No. _____

In The Supreme Court of the United States

PAULETTE H. FOSTER, KEARNEY MATTHEW FOSTER, WILLIAM AARON FOSTER, AND ANNETTE FOSTER ALFORD, AS THE PERSONAL REPRESENTATIVES OF MARLON KEARNEY FOSTER, FOR SUBSTITUTION IN THE PLACE AND STEAD OF THE MARLON KEARNEY FOSTER, DECEASED; AND SCOTT M. PERRILLOUX, IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR THE 21ST JUDICIAL DISTRICT OF LOUISIANA,

Petitioners,

v.

MICHAEL WEARRY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After Respondent's murder conviction was reversed because the prosecution had failed to disclose evidence bearing on the credibility of its witnesses, he sued the prosecutor and the detective under Section 1983 for allegedly coercing a witness to testify at trial to a fabricated story. The Fifth Circuit affirmed the denial of absolute immunity and allowed the claim to proceed. Three judges dissented from the denial of rehearing *en banc* based on *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) and *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003), both of which require a "functional approach" under which absolute immunity applies to conduct that is "intimately associated with the judicial phase of the criminal process" that includes "initiating a prosecution and in presenting the State's case." *Buckley*, 509 U.S. at 270 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)). The Fifth Circuit nevertheless deemed the conduct to be "investigative" and not subject to absolute immunity despite falling clearly within the function of preparing the State's evidence for use at trial.

The questions that are therefore presented for review in this petition are:

1. Whether preparing witnesses to bolster existing evidence intended for use at the criminal trial, after probable cause has been determined, is a function "intimately associated with the judicial phase of the criminal process" and "in presenting the State's case" such

QUESTIONS PRESENTED—Continued

that absolute immunity applies under *Imbler v. Pachtman*, 424 U.S. 409 (1976) and its progeny including *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

2. Does the absolute immunity that applies to prosecutors for conduct under the "functional approach" embraced in *Imbler v. Pachtman*, 424 U.S. 409 (1976) extend to law enforcement officers performing the same conduct while assisting in the prosecution of the criminal charge?

PARTIES TO THE PROCEEDINGS

Petitioner Scott M. Perrilloux is the District Attorney in the 21st Judicial District of Louisiana.

Marlon Kearney Foster, who died during the pendency of this lawsuit, was a detective with the Livingston Parish Sheriff's Office. Petitioners Paulette H. Foster, Kearney Matthew Foster, William Aaron Foster, and Annette Foster Alford have been substituted in as his personal representatives.

Respondent Michael Wearry filed this lawsuit under 42 U.S.C. § 1983.

STATEMENT OF RELATED CASES

In *Wearry v. Cain*, 577 U.S. 385 (2016), this Court reversed Wearry's murder conviction and death penalty sentence.

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OPINIONS AND JUDGMENTS BELOW

The United States District Court for the Middle District of Louisiana denied Petitioners' motions for judgment on the pleadings. *Wearry v. Perrilloux*, Case No. 18-594-SDD-SDJ, 2020 WL 3473955 (M.D. La. June 24, 2020). A panel of the United States Court of Appeals for the Fifth Circuit affirmed the denial, with one judge writing a separate "dubitante" opinion. *Wearry v. Foster*, 33 F.4th 260 (5th Cir. 2022). A divided Fifth Court then denied Petitions for Rehearing *en banc* with seven of sixteen judges voting for rehearing, three of whom joined a dissenting opinion. *Wearry v. Foster*, 52 F.4th 258 (5th Cir. 2022).

STATEMENT OF JURISDICTION

The Fifth Circuit had appellate jurisdiction from the district court's denial of absolute immunity that turned on an issue of law such that it was a final and appealable decision within the meaning of 28 U.S.C. § 1291. *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) ("the denial of a substantial claim of absolute immunity is an order appealable before final judgment"). The panel opinion was issued on May 3, 2022 from which Petitioners timely sought rehearing *en banc*, which was denied on October 27, 2022. (App. at 1-43; 65-80.) Petitioners timely applied for an extension of time to petition for certiorari, which Justice Alito granted through February 24, 2023. (Case No. 22A608). This petition is timely filed within that extended period

which, if granted, will vest the Court with jurisdiction to review the merits of the decision below. 28 U.S.C. § 1254(1); SUP. CT. R. 13(1), (3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Respondent seeks damages for alleged violations of the due process clause of the Fourteenth Amendment of the United States Constitution which provides in pertinent part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. Amend. XIV, § 1.

Title 42 U.S.C. § 1983 provides in pertinent part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

A. Introduction

The Fifth Circuit's denial of absolute immunity cries out for review by this Court as the alleged conduct was well with the quintessential prosecutorial

function of preparing witnesses and evidence for trial. As explained below, the "star witness" at Wearry's criminal trial was Sam Scott who testified that Wearry confessed to the murder and that he saw the victim being forcibly shoved into a car with Wearry. According to Wearry's complaint, Petitioners sought to fabricate evidence to corroborate portions of Scott's testimony out of a concern for his credibility. (ECF Doc. No. 1 at ¶¶ 18-25.) To that end, Wearry alleges that Petitioners coerced Jeffrey Ashton to testify to a completely invented story that he had seen Wearry discard Walber's cologne on the night of the murder, which Ashton then later recanted. (ECF Doc. No. 1 at ¶¶ 21-25.)

This Court reversed Wearry's murder conviction finding that the State had failed to disclose evidence that went to Scott's credibility as well as others who directly implicated Wearry in the crime. *Wearry*, 577 U.S. 385. Ashton's testimony was not the subject of that decision, and was noted as merely circumstantial evidence that might show Wearry to have been an accessory after the fact. *Id*. at 387-88. Nevertheless, following remand and prior to pleading guilty to manslaughter, Wearry filed this action claiming that Petitioners' alleged conduct in fabricating Ashton's testimony violated his substantive due process rights. (ECF Doc. No. 1.)

Departing sharply from precedent, the Fifth Circuit determined that absolute immunity does not apply given the egregiousness of the conduct that it deemed to be "investigative" rather than "advocative," even though it occurred after an indictment had been

returned and in preparation for the criminal trial. (App. at 11-15.) Under the "functional approach" required by the case law, however, the conduct fell within a function of preparing a witness for trial testimony for which absolute immunity has traditionally been applied regardless of the alleged egregiousness. Accordingly, review should be had by this Court to evaluate the Fifth Circuit's departure from precedent in denying absolute immunity on the clear record presented.

B. Facts and procedural history

1. Wearry's murder conviction is reversed for *Brady* violations.

The background facts that led to the allegations in Wearry's complaint in this case were summarized by this Court in its opinion overturning the death sentence. Wearry was charged with murdering Eric Walber on April 4, 1998. *Wearry*, 577 U.S. at 386. The case was cold for almost two years when an inmate named Sam Scott implicated Wearry as having confessed to the murder. *Id*. at 386-87. Scott changed his version of events several times, ultimately telling the jury that an acquaintance named Randy Hutchinson had shoved Walber into a car that Wearry and others were driving around. *Id*. at 387. Another individual named Eric Brown, who was incarcerated at the time of Wearry's trial, testified that he had seen Wearry on the night of the murder with someone who resembled Walber. *Id.* Brown denied receiving any prosecutorial favors and said he agreed to testify because he knew

Walber's sister. *Id*. Although no physical evidence linked Wearry to the crime, the prosecution presented testimony that Wearry was later seen driving Walber's vehicle and possessing his class ring and a bottle of his cologne. *Id.* at 387-88.

This Court reversed Wearry's conviction based on violations of *Brady v. Maryland*, 373 U.S. 83 (1963) based on a finding that the failure to disclose three items of information undermined confidence in the verdict. The undisclosed information included that: (1) Scott—the "star" witness—had told another inmate that he was lying about what he had seen; (2) Brown had discussed reduction of his sentence in exchange for testimony; and (3) Hutchinson, who allegedly shoved Walber into the car, had knee surgery nine days before the murder that would have made it physically impossible for him to have done so. *Wearry*, 577 U.S. at 389-91. This Court found reversal was mandated because "the only evidence directly tying him to that crime was Scott's dubious testimony, corroborated by the similarly suspect testimony of Brown." *Id*. at 393. In so ruling, this Court noted that additional evidence that Wearry possessed Walber's property after the crime did not implicate Wearry in the murder itself but at most to being "an accessory after the fact." *Id.*

2. Wearry sues under Section 1983 on different grounds.

After remand, Wearry pleaded guilty to manslaughter and was sentenced to 25 years in prison.

(App. at 27, n.1.) Before doing so, however, he filed this Section 1983 action claiming that Petitioners Perrilloux and Foster, the prosecutor and detective respectively, had coerced Jeffery Ashton (a minor) into fabricating a story that on the night of the murder he "watched Wearry throw Walber's cologne bottle into a ditch and get into Walber's car." (ECF Doc. No. 1 at ¶¶ 21-25.) Wearry alleged that Petitioners' "efforts to tie [him] to the murder were based almost exclusively on Scott's account, which contradicted several known facts of the crime." (*Id.* at ¶ 18.) He claimed that Petitioners grew "concerned that Scott's account would not be sufficient to secure a conviction and death sentence" and therefore "made an intentional and deliberate decision to fabricate a narrative that would corroborate Scott in order to procure Wearry's conviction and death sentence." (*Id.* at ¶¶ 19-20.) To that end, Wearry alleges that Petitioners engaged in tactics such as pulling Ashton out of school and falsifying a photo array lineup, indicating falsely that Ashton had identified Wearry when in fact he had not. (*Id.* at ¶¶ 21, 28, 30.) At another time, Ashton was allegedly taken to see the blood-stained car to frighten him. (*Id.* at ¶ 31.)

Wearry alleges that Ashton's fabricated testimony was presented at trial to support his conviction. (*Id.* at ¶¶ 37-39.) Although Wearry states that this Court reversed the conviction because of "the prosecution's failure to disclose material evidence" (*id.* at ¶ 46), he omits that Ashton's testimony was not the basis for the decision. Nevertheless, he alleges that after the remand a deputy sheriff named Ben Ballard—who is not a party

to this case—continued Ashton's coercion. (*Id.* at ¶¶ 50-54.) Wearry claims Petitioners' conduct came to light thereafter when Ashton signed an affidavit stating that he had not in fact seen Wearry that night, and so testified at an evidentiary hearing. (*Id.* at ¶¶ 57-62.)

Based on these allegations, Wearry contended in Count I that Petitioners' coerced fabrication of Ashton's testimony violated Wearry's substantive due process rights. (*Id.* at ¶¶ 66-82.) Anticipating Petitioners' absolute immunity defense, Wearry contended that falsification occurred "during an investigation" such that the immunity did not apply. (*Id.* at ¶ 77.) In Counts II and III, which were not part of the interlocutory appeal, Wearry contended, respectively, that Perrilloux was liable in his official capacity and that both defendants were liable under a state law claim of malicious prosecution. (*Id.* at ¶¶ 83-104.)

3. The lower courts' denials of absolute immunity.

Initially, Petitioner Perrilloux moved for immunity on the state law claim only, which was denied. (ECF Doc. No. 44.) Petitioner Foster then moved for absolute immunity on the due process claim in Count I which Petitioner Perrilloux joined. (ECF Doc. Nos. 49, 51.) Again, the district court denied absolute immunity, finding the activity was more in the nature of an investigation than preparing a witness for trial to which absolute immunity would apply. (App. at 44-64.)

The Fifth Circuit panel agreed. (App. at 1.) Phrasing the question as whether Petitioners had engaged in advocacy or investigatory activities, the Fifth Circuit drew a distinction "between the advocacy function or organizing, evaluating, and presenting evidence, and the separate investigative function of gathering or acquiring evidence." (App. at 10.) The Fifth Circuit thus affirmed, finding Petitioners were alleged to have engaged in the latter and ruling that Foster would not be entitled to absolute immunity in any event given his title of "detective." (*Id.* at 11, 23-24.)

In so deciding, the Fifth Circuit brushed aside the functional distinction drawn in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), as well as its own precedent in *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003), between conduct that occurs before and after a probable cause determination has been rendered, with absolute immunity applying to the latter. One judge, however, addressed that bright line distinction in a separate "dubitante" opinion, noting that in all the cases relied on by the court, "the alleged prosecutorial misconduct occurred before—and thus in the complete absence of—any indictment or determination of probable cause or wrongdoing by the plaintiff." (App. at 32.) Citing that precedent, the judge noted that absolute immunity had been upheld in those cases "because the prosecutor there allegedly engineered false witness testimony after indictment, and did so for the express purpose of using the testimony at trial." (App. at 32.)

Petitioners sought rehearing *en banc*, which seven out of sixteen judges voted in favor of granting. (App. at 66-67.) Three of those judges joined a dissenting opinion that spelled out the errors of the panel's determination:

> Wearry purports to draw additional support for its dichotomy between "gathering" evidence and "presenting evidence" from a series of Supreme Court and lower court cases in which absolute prosecutorial immunity was denied for activities in the former category. In each of these, however, the alleged misconduct occurred before any probable cause determination or indictment of the defendant. None involved post-indictment witness trial preparation.
>
> For these reasons, Wearry created an irreconcilable conflict with *Cousin* that this court should have addressed.
>
> Compounding the intra-circuit conflict is the conflict between Wearry and other circuits. *See*, *e.g.*, *Annappareddy v. Pascale*, 996 F.3d 120 (4th Cir. 2021) (citing *Cousin*, fabricating evidence while coaching a witness post-indictment is advocatory, and absolutely immune); *Fields v. Wharrie*, 740 F.3d 1107, 1115 (7th Cir. 2014) ("Once prosecution begins, bifurcating a prosecutor's role between investigation and prosecution is no longer feasible."); *Hill v. City of New York*, 45 F.3d 653, 662–63 (2d Cir. 1995) (if prosecutor's efforts that resulted in false testimony were undertaken for presentation

> before a grand jury, absolute immunity would apply).

(App. at 76-78.) Further, with respect to Petitioner Foster, the dissenting judges criticized the panel for categorically rejecting immunity for law enforcement officers as running afoul of the "functional" approach mandated by *Buckley*. (App. at 77, n.8) ("the majority opinion contradicts *Buckley*, which stated that '[w]hen the functions of prosecutors and detectives are the same . . . the immunity that protects them is also the same.'").

As explained below, certiorari review is warranted in two respects. First, the Fifth Circuit's functional analysis runs afoul of precedent set by this Court as well its own precedent and decisions from other circuit courts. Second, the functional analysis demands that absolute immunity applies equally to those performing the requisite functions as opposed to official's particular title. This petition should be granted to allow the Court to review these significant issues. Absent review by the Court, the decision below will have an eroding effect on this immunity that has traditionally been applied in this context of preparing evidence for criminal trials.

REASONS FOR GRANTING THE WRIT

A. The Fifth Circuit's Denial of Absolute Immunity Conflicts with this Court's Holding in *Buckley v. Fitzsimmons* and its Interpretations in the Circuit Courts of Appeals.

Certiorari review is warranted because the Fifth Circuit's decision runs counter to the holdings of this Court and the various Circuit Courts of Appeals holding as a matter of law that preparing evidence for trial is "intimately associated with the judicial phase of the criminal process" under the "functional approach" mandated by this Court's settled law.

1. Under the "functional approach," absolute immunity applies to conduct that is "intimately associated with the judicial phase of the criminal process," including preparing witnesses for trial after a probable cause determination has been made.

In *Buckley v. Fitzsimmons*, the prosecutor was alleged to have fabricated evidence during the preliminary investigation into whether probable cause existed to support an arrest. In considering whether absolute immunity applied, the Court reiterated that "some officials perform 'special functions' which, because of their similarity to functions that would have been immune when Congress enacted § 1983, deserve absolute immunity from damages liability." *Id*. at 269. Under that rubric, absolute immunity had been upheld

previously for a prosecutor's conduct that was "intimately associated with the judicial phase of the criminal process" that included "initiating a prosecution and in presenting the State's case." *Id*. at 270 (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976)). The alleged conduct at issue in *Imbler* was intentionally presenting false testimony at a murder trial and suppressing evidence favorable to the accused. 424 U.S. at 416. *Imbler* upheld absolute immunity for that conduct that was involved in the trial of the case. It did not, therefore, resolve the question presented by *Buckley*, i.e., whether out-of-court fabrication of evidence to support a finding of probable cause was a "function" that entitled the prosecutor to absolute immunity.

Nor was that question answered by *Burns v. Reed*, 500 U.S. 478 (1991), which concerned whether absolute immunity applied to a prosecutor's acts of: (1) advising police officers on the validity of evidence to support probable cause to an arrest; and (2) participating in a probable cause hearing. In support of the latter, the plaintiff alleged that the prosecutor "deliberately misled the [probable cause] Court into believing that the Plaintiff had confessed to the shooting of her children." *Id*. at 487-88. The *Burns* Court had little difficulty concluding that providing legal advice to the police on the existence of probable cause to arrest a suspect was not part of the judicial process for absolute immunity to apply. *Id*. at 493-96. Citing *Imbler*, however, the Court found that presenting evidence at a court hearing—even if the evidence was fabricated—was "intimately

associated with the judicial phase of the criminal process" for absolute immunity to apply. *Id*. at 492.

As *Buckley* summarized, *Burns'* holding is that absolute immunity applies to "prosecutors or other attorneys for eliciting false or defamatory testimony from witnesses or for making false or defamatory statements during, and related to, judicial proceedings." 509 U.S. at 270. The question presented in *Buckley* was therefore whether the alleged fabrication of evidence to support a finding of probable cause came within that scope.

Turning to that inquiry, the *Buckley* court contrasted "an out-of-court effort to control the presentation" of testimony which is entitled to absolute immunity with "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings," which would not be subject to absolute immunity. 509 U.S. at 272-73 (quoting *Imbler*, 424 U.S. at 430, n.32). Applying this distinction to the facts presented, the *Buckley* court found that the prosecutor's acts in determining whether probable cause exists falls in the "investigative" category for which absolute immunity would not be available.

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a

> prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Hampton v. Chicago*, 484 F.2d 602, 608 (CA7 1973) (internal quotation marks omitted), *cert. denied*, 415 U.S. 917, 94 S.Ct. 1414, 39 L.Ed.2d 471 (1974). Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he "has no greater claim to complete immunity than activities of police officers allegedly acting under his direction." 484 F.2d, at 608–609.

Id. at 273–74. Noting that there was neither probable cause to arrest the plaintiff nor judicial proceedings to initiate at the time of the prosecutor's conduct, the *Buckley* court concluded that absolute immunity did not apply: "A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274.

2. Wearry's allegation that Petitioners fabricated evidence to corroborate and support anticipated testimony of the star witness at trial falls squarely within the "advocacy" function to which absolute immunity applies.

In the case at bar, Petitioners allegedly fabricated evidence *after* Wearry had been indicted on the murder charge and during the preparation stage for trial. Notably, according to the allegations in the complaint,

Petitioners did so because they "were concerned that Scott's account would not be sufficient to secure a conviction and death sentence against Wearry" such that they "made an intentional and deliberate decision to fabricate a narrative that would corroborate Scott in order to procure Wearry's conviction and death sentence." (ECF Doc. No. 1 at ¶¶ 19-20.)

Far from developing evidence to support probable cause to charge Wearry with the crime, the alleged motivation was to buttress Scott's testimony at the upcoming murder trial. This conduct was plainly advocacy for the State for which absolute immunity would apply under *Buckley*'s clear holding. On this score, even the three dissenting justices in *Buckley* would have agreed as they argued for an *expansion* of absolute immunity to include pre-indictment conduct as well. 509 U.S. at 287–88 (Kennedy, J., dissenting). Thus, under both the majority and dissenting opinions in *Buckley*, absolute immunity should have been accorded for the alleged fabrication of evidence in the run-up to trial and after there had been a finding of probable cause.

Yet the Fifth Circuit justified its denial of absolute immunity by finding that "the allegations in Wearry's complaint make out a more extreme conspiracy to manufacture false evidence than the one presented in *Buckley*." (App. at 12.) As *Buckley* itself stated, however, "the *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." 509 U.S. at 271. It is therefore the *function*

that is being performed to which immunity applies and not the relative egregiousness of the conduct alleged.

The Fifth Circuit also justified its result by citing to *dicta* in a footnote in *Buckley* in which the majority characterized the dissent as agreeing that qualified immunity would apply to "police investigative work," even after there has been a determination of probable cause. (App. at 13-14.) (citing *Buckley*, 504 U.S. at 274, n.5). Apart from this statement being made in passing and not as part of the holding, the reference was to the dissent's argument that "police investigative work" before or after a determination of probable cause should not matter. 504 U.S. at 290. Instead, in the dissenters' view, absolute immunity should have been expanded because in either instance the officials "functioned as advocates, preparing for prosecution before investigators are alleged to have amassed probable cause and before an indictment was deemed appropriate." *Id.*

Indeed, as noted in both the "dubitante" opinion to the panel's decision and in the dissent from the denial of rehearing *en banc*, the Fifth Circuit had previously upheld absolute immunity in *Cousin v. Small*, in which the prosecutor allegedly instructed a witness to lie about the accused in exchange for a lenient sentence for the witness' armed robbery charge. (App. at 26-31; 72-78.) Absolute immunity was upheld because "[t]he interview was intended to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect, not to identify a suspect or establish probable cause." *Cousin*, 325 F.3d at 635. Likewise, the prosecutor in *Cousin* had

absolute immunity for allegedly hiding witnesses, as "a contrary rule would have the anomalous result of extending absolute immunity to the prosecutor who silences a witness through coercion or intimidation, but denying it to the prosecutor who achieves the same result through deceit." *Id*. at 637.

Although *Cousin*'s reasoning would seem to require absolute immunity for Petitioners, as the "dubitante" and dissenting opinions in both *Wearry* decisions made clear, the Fifth Circuit made the untenable distinction that the conduct in *Cousin* was during plea negotiations in the witness' prosecution in which his defense counsel was involved. (App. at 17-18.) This distinction from Wearry's allegations was made without consideration of the allegation that they were motivated to bolster Sam Scott's credibility at trial to improve the prospects of gaining a conviction at trial. Under the "functional approach," they were engaged in an advocacy role for which absolute immunity undeniably applies.

Viewed from another perspective, Wearry's allegation that Petitioners fabricated evidence to ensure a conviction is akin to an allegation that evidence favorable to the accused was suppressed in violation of *Brady v. Maryland*. In that context, it is well-settled that withholding favorable evidence is a function cloaked with absolute immunity from damages. Specifically, in *Imbler*, this Court upheld absolute immunity for the prosecutor's knowing presentation of false information and suppression of favorable evidence. As the Court there explained:

> A claim of using perjured testimony simply may be reframed and asserted as a claim of suppression of the evidence upon which the knowledge of perjury rested. That the two types of claims can thus be viewed is clear from our cases discussing the constitutional prohibitions against both practices.

424 U.S. at 431, n.34. Absolute immunity plainly applied to *Brady* violations as "[d]enying absolute immunity from suppression claims could thus eviscerate, in many situations, the absolute immunity from claims of using perjured testimony." *Id.; see also id.* ("we perceive no less an infringement of a defendant's rights by the knowing use of perjured testimony than by the deliberate withholding of exculpatory information.").

For this reason, Wearry did not (and could not) pursue a Section 1983 claim based on the suppression of evidence that this Court relied upon to reverse his murder conviction. Yet tellingly, Wearry cherry-picked Ashton's testimony—that did not implicate him in the murder itself as this Court found—to claim a violation of his due process rights. In principle, no distinction can be made between Wearry's allegation that Ashton's testimony was fabricated by Petitioners and his allegation that favorable information was suppressed.

In essence, Wearry's claim is that he was not provided with exculpatory information that would have undermined Ashton's testimony, and therefore the State's case, before a jury. Without Ashton having testified at trial, Wearry would not be able to assert a

violation of ***his*** right to due process. So viewed, the decision to fabricate evidence to present at trial after probable cause has been established cannot be distinguished from the failure to disclose exculpatory information to the accused. Both decisions involve the handling and evaluation of evidence in preparation for trial which is a core function for which absolute immunity applies.

Certiorari review is therefore warranted to examine *Buckley*'s application to the allegations in Wearry's complaint.

3. The Fifth Circuit's Opinion Conflicts with Decisions in the Circuit Courts of Appeals.

Until the decision in this case, there was a consensus in the circuit courts that developing witness testimony post-probable cause and indictment was an advocacy function for which absolute immunity applies.

The Eighth Circuit's decision in *Williams v. Hartje*, 827 F.2d 1203 (8th Cir. 1987) is particularly illustrative in showing that Petitioners' conduct falls squarely within absolute immunity under the functional approach. In pertinent part, the prosecutor in *Williams* was alleged to have coerced a witness "into giving false testimony by threatening him in the jailhouse the day before the inquest was held." *Id.* at 1209. As in this case, the plaintiffs contended that this conduct was not a prosecutorial function but instead

investigatory work (and egregious at that) for which absolute immunity should not attach. The Eighth Circuit reasoned through the application of the functional approach, including the potential overlap between "investigative" and "advocacy" work, and in so doing concluded that absolute immunity had to apply under established precedent:

> In drawing the line between absolutely immune activity and other activity, we think the important consideration is not whether the act was one which could be done only by a prosecutor as attorney, but rather whether the act was closely related to the prosecutor's role as advocate. It would make little sense to immunize the prosecutor's decision to prosecute while not immunizing the immediately preceding steps which lead to that decision. The act of calling witnesses has been held to be intimately associated with the judicial process, and therefore immune even when the prosecutor knows that the testimony of those witnesses will be false. *Hamilton v. Daley*, 777 F.2d 1207, 1212–13 (7th Cir. 1985). We agree with the Court of Appeals for the Third Circuit that while some of a prosecuting attorney's preliminary investigative work may be analogous to a police detective's investigation, and should therefore be only qualifiedly immune, *investigation to secure the information necessary to the prosecutor's decision to initiate criminal proceedings is within the quasi-judicial aspect of the prosecutor's job and therefore is absolutely immune from civil suit*

> *for damages*. *See Forsyth v. Kleindienst*, 599 F.2d 1203, 1215 (3d Cir. 1979), *cert. denied*, 453 U.S. 913, 101 S.Ct. 3147, 69 L.Ed.2d 997 (1981).

Id. at 1210 (emphasis added). By the exact same token, "investigation to secure information necessary to the prosecutor's decision to [proceed to trial] is within the quasi-judicial aspect of the prosecutor's job" such that absolute immunity applies.

To the same effect is *Annappareddy v. Pascale*, 996 F.3d 120 (4th Cir. 2021), where the prosecutor in a Medicaid fraud case was accused of fabricating an inventory analysis after indictments had been returned. This allegation is indistinguishable from Wearry's allegation that Petitioners fabricated Ashton's testimony. Yet the Fourth Circuit upheld absolute immunity reasoning as follows:

> [T]he specific allegation against Pascale is that she began to take a "more hands-on approach" in anticipation of *trial*, once she realized that the existing MEDIC inventory analysis was "not nearly as favorable [to] the government" as she had expected. This is not the hypothetical post-indictment "police investigative work" reserved by the Court in *Buckley*. Instead, it falls squarely on the trial-preparation side of the line.

Id. at 140 (internal citations omitted) (emphasis in original).

Likewise, in *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994), the prosecutor was accused of coercing a witness to commit perjury at trial—which is likewise identical to the allegations by Wearry. Even more on point, the Section 1983 complaint in *Dory* was based on an affidavit from the witness given years after the trial had taken place. Relying on *Buckley*, the Second Circuit found the prosecutor was entitled to immunity:

> [A]bsolute immunity protects a prosecutor from § 1983 liability for virtually all acts, regardless of motivation, associated with his function as an advocate. This would even include, for purposes of this case, allegedly conspiring to present false evidence at a criminal trial. The fact that such a conspiracy is certainly not something that is *properly* within the role of a prosecutor is immaterial, because "[t]he immunity attaches to his function, not to the manner in which he performed it."

Id. at 83 (quoting *Barrett v. United States*, 798 F.2d 565, 573 (2d Cir. 1986)) (emphasis in original). Other circuits have ruled similarly. *See Yarris v. County of Delaware*, 465 F.3d 129, 139 (3d Cir. 2006) (finding absolute immunity would protect prosecutor for fabricating evidence if the accused had been indicted such that the prosecutor was working as the State's advocate); *KRL v. Moore*, 384 F.3d 1105 (9th Cir. 2004) (upholding absolute immunity for prosecutorial functions directed to an upcoming trial); *Fullman v. Graddick*, 739 F.2d 553, 559 (11th Cir. 1984) (upholding absolute immunity for a claim that the prosecutor conspired "to create and proffer perjured testimony"); *Beckett v. Ford*, 384

F. App'x 435, 449–52 (6th Cir. 2010) ("The district court was correct: even if Anderson threatened, coerced, or enticed Williams into presenting false testimony, Anderson did so as part of his effort to prosecute Beckett for Cunningham's murder.").

Wearry thus marks a departure from circuit court opinions, including within the Fifth Circuit itself, that accord absolute immunity for conduct that falls within the prosecutorial function of preparing evidence for trial without regard to the egregiousness of the alleged conduct. Certiorari review is thus warranted to address this clear variance from other circuit court decisions.

B. Absolute Immunity Extends to Both Petitioners who are Alleged to have Engaged in the Same Conduct.

A secondary holding by the Fifth Circuit that warrants review by this Court is its disparate analysis of the immunities accorded to the detective for the same conduct engaged in by the prosecutor. In justifying a different standard, the Fifth Circuit relied on this Court's decision in *Malley v. Briggs*, 475 U.S. 335 (1986), that applied qualified immunity to a police officer in seeking an arrest warrant. 33 F.4th at 272. In denying absolute immunity in that context, this Court explained that "while a vital part of the administration of criminal justice, [the police officer] is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment."

475 U.S. at 342-43. The clear distinction here that the Fifth Circuit overlooked is that Petitioners are not alleged to have fabricated evidence to support probable cause but instead to develop Ashton's independent percipient testimony to bolster the State's star witness Sam Scott's testimony that placed Wearry with Walber on the night of the murder. Thus, *Malley* provides no support for denying absolute immunity to Petitioners.

More fundamentally, the Fifth Circuit did not mention, let alone apply, the "functional approach" to resolve the absolute immunity question as applied to Petitioner Foster. As *Buckley* made crystal clear, it is "the nature of the function performed, *not the identity of the actor who performed it*." *Buckley*, 509 U.S. at 269 (emphasis added); *see also Forrester v. White*, 484 U.S. 219, 227 (1988) ("[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.") (Emphasis in original). Focusing on Foster's title as a detective to deprive him of absolute immunity instead of addressing his function in preparing witnesses for trial was thus a cardinal error out of the starting gate. This flaw was identified by the judge who wrote in the "dubitante" opinion that "it may seem odd to apply prosecutorial immunity to anyone other than a prosecutor. But it's what governing precedents seem to contemplate." (App. at 31, n.2.) Likewise, the dissenters from the denial of rehearing *en banc* wrote that the panel opinion "flatly contradicts" cases that "lend strong support to Detective Foster's claim for functional immunity on the facts pled here." (App. at 77, n.8.)

In that regard, application of the functional approach has led courts to grant absolute immunity to police officers when they are serving a quasi-judicial function. *See*, *e.g.*, *Jones v. Cannon*, 174 F.3d 1271 (11th Cir. 1999) (applying absolute immunity to detective accused of suborning perjury because allowing "a § 1983 claim based on subornation of perjured testimony where the allegedly perjured testimony itself is cloaked in absolute immunity would be to permit through the back door what is prohibited through the front."); *Valdez v. City and County of Denver*, 878 F.2d 1285 (10th Cir. 1998) (applying absolute immunity to deputies who arrested plaintiff pursuant to a judicial contempt order); *Hurt v. Bennett*, 17 F.3d 1263 (10th Cir. 1994) (applying absolute immunity to a detective who allegedly conspired to commit perjury during preliminary hearing at trial); *Henry v. Farmer City State Bank*, 808 F.2d 1228 (7th Cir. 1986) (applying absolute immunity to sheriff who was executing a valid court order to enforce a judgment when we seized and sold plaintiff's property). Absolute immunity has likewise been applied outside the law enforcement context based on application of the functional approach. *See Spec's Farm Partners, Ltd. v. Nettles*, 972 F.3d 671 (5th Cir. 2020) (applying absolute immunity for commissioners for their handling of permits); *Meyers v. Contra Costa County Dep't of Soc. Servs.*, 812 F.2d 1154 (9th Cir. 1987) (applying absolute immunity for social workers for "functions connected with the initiation and pursuit of child dependency proceedings.").

Certiorari is therefore warranted to clarify the absolute immunity of non-prosecutors who are equally engaged in the judicial process regardless of their titles.

CONCLUSION

It has been well-established that after a finding of probable cause, preparing witnesses to testify at a criminal trial is a function cloaked with absolute immunity irrespective of the egregiousness of the conduct. Any deviation from that bright line would mean the immunity is no longer absolute. Yet the Fifth Circuit has now allowed parties to manipulate the "absolute" nature of the immunity by alleging that acts admittedly taken as an advocate of the State in preparation for trial were also in the nature of an investigation. As the record in this case amply shows, the absolute immunity analysis should not turn on whether Wearry alleged Petitioners' actions to secure Ashton's testimony to be investigative. Particularly when Wearry also alleges that the efforts were undertaken to bolster existing evidence intended for use at trial, the "functional approach" should have compelled the conclusion that the actions were undertaken as advocacy on behalf of the State. The decision thus erodes the scope of this common law immunity and left unreviewed will open the door for courts within other circuits to follow suit.

WHEREFORE, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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