No.

In the Supreme Court of the United States

JOHN C. BAER, PETITIONER,

v.

LARRY TRENT ROBERTS; CITY OF HARRISBURG; DAVID LAU.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, a divided Third Circuit panel, over a dissent by Judge Shwartz, deepened a widely-recognized and entrenched circuit conflict regarding the scope of absolute immunity for prosecutors. Respondent was convicted of homicide. His conviction was later vacated, and on retrial he was acquitted. He sued the original prosecutor, petitioner here, and alleged that, one month before the first trial, petitioner deliberately located a new witness and persuaded the witness to fabricate testimony for use at respondent's trial. The majority below, rejecting the tests used in other circuits, held that, by seeking out a new witness, petitioner stepped out of his prosecutorial role and into an "investigative" role, forfeiting his entitlement to absolute prosecutorial immunity. Judge Shwartz dissented, concluding, as numerous other circuits have, that "collecting evidence in preparation for trial" is "clearly the work of an advocate" and therefore subject to prosecutorial immunity.

In the 31 years since *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Circuits have fallen into an acknowledged, intractable conflict over how to distinguish when a prosecutor is acting in a "prosecutorial" capacity entitled to absolute immunity versus in an "investigative" capacity subject to qualified immunity.

The questions presented are:

1. Whether prosecutors are always absolutely immune from 42 U.S.C. § 1983 liability for (1) post-charge acts (2) taken to marshal evidence to present at trial, as four Circuits have held, or not, as two Circuits have held.

2. Whether the Court should clarify or, if necessary, recede from its dictum in footnote five of *Buckley*, that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards."

RELATED PROCEEDINGS

United States District Court (M.D. Pa.):

Roberts v. Lau, No. 1-21-cv-01140, 2021 WL 4819312 (M.D. Pa. July 11, 2022) (order denying motion to dismiss)

United States Court of Appeals (3d Cir.):

Roberts v. Lau, No. 22-2340, 90 F.4th 618 (3d Cir. 2024) (affirming denial of motion to dismiss)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 90 F.4th 618 (3d Cir. 2024). The opinion of the district court (Pet. App. 34a-46a) is unreported but available at 2022 WL 2677473. The order of the court of appeals denying rehearing *en banc* (Pet. App. 49a-50a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2024. Pet. App. 1a. The court of appeals denied a timely petition for rehearing *en banc* on February 5, 2024. Pet. App. 50a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, U.S. Const. amend. XIV § 1, and 42 U.S.C. § 1983, are reproduced in the petition appendix, Pet. App. 51a-53a.

STATEMENT OF THE CASE

This case presents an "irreconcilable conflict" among the federal courts of appeals over an important question central to "the scope of absolute prosecutorial immunity." *Wearry v. Foster*, 52 F.4th 258, 260, 263 (5th Cir. 2022) (Jones, J., joined by Smith and Duncan, JJ., dissenting from denial of rehearing en banc). The question is whether the protections of absolute prosecutorial immunity from civil liability under 42 U.S.C. § 1983 always extend to a prosecutor's post-charge acts taken to marshal evidence for trial.

Applying *Imbler v. Pachtman*, 424 U.S. 409 (1976), and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the First, Second, Fourth, and (sometimes) Fifth Circuits say yes. The D.C., Third, and (other times) Fifth Circuits say

no. In the decision below, the Third Circuit declined to apply the test other circuits have articulated, rejected the reasoning in Judge Shwartz's dissent, and held that a prosecutor collecting evidence for trial—against a defendant who has already been charged—can nonetheless lose the protections of absolute prosecutorial immunity if his actions are deemed sufficiently "investigative" by a judge or jury.

This case warrants the Court's review. It involves a recurrent and important question that affects the civil liability protections of every state and local prosecutor nationwide. The split is clear, acknowledged, and entrenched.[1] Courts and commentators have recognized the "mishmash" of divergent answers in the lower courts.

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[1] *Wearry*, 52 F.4th at 260, 263 (Jones, J., dissental) (noting "conflicts [among] significant sister circuit decisions"); *Espinosa v. City & County of San Francisco*, No. C 11-02282 JSW, 2011 WL 6056545, at *2 & n.4 (N.D. Cal. Dec. 6, 2011) ("out-of-circuit authority on this issue is in conflict"); *Vargas v. Maranda*, CV-F-08-1707, 2009 WL 1769849, at *5 (E.D. Cal. June 23, 2009) ("conflicting out-of-circuit authority"); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 56-57 (2005) (circuits "are divided"); Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 Fordham L. Rev. 509, 527 (2011) ("multiple conflicting decisions"); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 223 (2013) ("confusion"); Michael Avery, et al., *Police Misconduct: Law and Litigation* § 3:4 (noting conflict); Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 Touro L. Rev. 473, 477 (2008) ("lower courts struggle"); Megan M. Rose, Note, *Endurance of Prosecutorial Immunity—How the Federal Courts Vitiated* Buckley v. Fitzsimmons, 37 B.C. L. Rev. 1019, 1041-60 (1996) ("the Supreme Court has still provided no precise guidelines"); Michael L. Wells, *Absolute Official Immunity in Constitutional Litigation*, 57 Ga. L. Rev. 919, 933 & n.100 (2023) ("The lower federal courts regularly face the issue of what activities fall within absolute prosecutorial immunity.").

Wearry, 52 F.4th at 260, 263-64 (Jones, J., dissental). Without this Court's intervention, "these issues will recur, to the detriment of clear law, of honest prosecutors, and the public interest." *Id.* at 264.

The vastly different holdings as to when, post-probable cause, a prosecutor is entitled to absolute immunity stem from a confusing footnote in *Buckley*, 509 U.S. at 274 n.5. In footnote five of *Buckley*, the Court, in an apparent effort to leave the question open, wrote that "a determination of probable cause does not *guarantee* a prosecutor absolute immunity from liability for all actions taken afterwards," and that "[e]ven after that determination … a prosecutor *may* engage in 'police investigative work' that is entitled to only qualified immunity." 509 U.S. at 274 n.5 (emphasis added). That dictum, which this Court has never since applied, has created a conflict among—and even within—the courts of appeals. The scope and application of that footnote "remain unknowable decades later." *Edwards v. Vannoy*, 593 U.S. 255, 294 (2021) (Gorsuch, J., concurring).

At its most charitable, that dictum was meant to leave an exceptionally narrow opening for potential post-charge claims against prosecutors, not open the door to discovery in any case where the plaintiff alleges that the prosecutor "investigat[ed]" some issue post-charge. *Buckley*, 509 U.S. at 274. Yet *Buckley*'s esoteric footnote has spawned an enormous body of law in the lower courts seeking to isolate post-probable-cause "advocacy" from post-probable-cause "investigation"—and led numerous courts, like the court below, to conclude that core prosecutorial conduct (trial preparation) is somehow "investigative." The Court should take this case to correct the courts of appeals that have transformed the "wiggle room" provided for in footnote five into a chasm wide enough to swallow the rule. *Edwards*, 593 U.S. at 294 (Gorsuch, J., concurring). While footnote five "le[ft] a door

ajar and h[eld] out the possibility that someone, someday might walk through it," *id.* at 282 (Gorsuch, J., concurring), the Court should now "wisely close[the] door," *id.* at 281 (Thomas, J., concurring).

Both of the questions presented are vitally important. A functioning criminal justice system is the infrastructure of a "well-ordered society." *Young v. United States*, 315 U.S. 257, 259 (1942). Limiting prosecutorial immunity as the Third Circuit did below upends that order. It discourages prosecutors from confessing error and "open[s] the way for unlimited harassment and embarrassment of the most conscientious officials." *Imbler*, 424 U.S. at 423. Indeed, the rule articulated below permits plaintiffs to plead artfully around prosecutorial immunity, embroiling prosecutors in extensive civil litigation any time a charge does not result in a conviction. This Court should not "endorse a rule of absolute immunity that is so easily frustrated." *Rehberg v. Paulk*, 566 U.S. 356, 370 (2012); *see also id.* at 369 (discussing evasion of immunity through artful pleading). The Court should grant review and clarify the protections shielding prosecutors from meritless lawsuits.

1. This case, which the Third Circuit majority twice described as "a close call," Pet. App. 13a, 17a, and "a tough question with no clear answer," Pet. App. 10a, demonstrates how a single footnote of dictum in *Buckley* turned the prosecutorial immunity doctrine into a "mishmash," *Wearry*, 52 F.4th at 260, 263-64 (Jones, J., dissental).

a. The complaint, which the Third Circuit treated as true for purposes of its decision, alleges that defendant-respondent Detective David Lau harbored a decades-old "personal animus against [plaintiff-respondent Larry] Roberts" and orchestrated a scheme to convict Roberts of murder. Pet. App. 68a (Amend. Compl. ¶ 62(g)).

This case begins with a homicide. Duwan Stern was killed on December 21, 2005, at approximately 10:00pm. Pet. App. 57a (Amend. Compl. ¶ 13). Lau, the primary investigator on the case, arrived on the scene an hour after it happened. Pet. App. 61a (Amend. Compl. ¶ 44). Lau suspected Roberts was involved in the murder because Roberts had called Stern's cell phone three times after Stern's body was discovered. Pet. App. 61a (Amend. Compl. ¶ 45).

According to the complaint, this was not Lau's first interaction with Roberts. In 1994, Lau had arrested Roberts and allegedly assaulted Roberts in the course of that arrest. Pet. App. 61a (Amend. Compl. ¶¶ 40-41). The charges in that earlier case were ultimately dropped. Pet. App. 61a (Amend. Compl. ¶ 42). But Lau allegedly still had a grudge against Roberts. Pet. App. 68a (Amend. Compl. ¶ 62).

Recognizing Roberts's name on Stern's cellphone, Lau began looking for a connection between Roberts and Stern's murder. Pet. App. 62a (Amend. Compl. ¶¶ 47-48). The complaint alleges that Roberts did not match the description Lau had received from two witnesses, but Lau nonetheless included pictures of Roberts in a photo array he showed to every witness. Pet. App. 62a-63a (Amend. Compl. ¶¶ 41, 45, 48). The witnesses did not identify Roberts from the array. Pet. App. 63-64a (Amend. Compl. ¶¶ 42, 46, 47).

Even so, Lau took Roberts into custody. Pet. App. 65a (Amend. Compl. ¶ 52). Lau then asked an eyewitness, who had earlier failed to select Roberts from a photo array, to come identify him at the station. Pet. App. 66a (Amend. Compl. ¶ 56). According to the complaint, Lau did not follow any standard lineup procedures, but rather had the witness look at just Roberts, coercing her into identifying Roberts as the man

she saw on the night Stern was murdered. Pet. App. 66a-67a (Amend. Compl. ¶ 58).

The complaint alleges that Lau, obsessed with investigating Roberts, submitted an affidavit in support of probable cause to the court that was "riddled with fabrications and reckless omissions." Pet. App. 67a (Amend. Compl. ¶ 60). Lau allegedly lied to the court, saying that Roberts matched the descriptions provided by eyewitnesses. Pet. App. 67a-68a (Amend. Compl. ¶ 61). Lau also allegedly omitted that other suspects "had bragged about killing Mr. Stern," and that three eyewitnesses had failed to identify Roberts in the photo array. Pet. App. 68a (Amend. Compl. ¶ 62). According to the complaint, Lau also failed to disclose to the court that "he had a history of personal animus against Mr. Roberts." Pet. App. 68a (Amend. Compl. ¶ 62).

As trial approached, Lau learned that a witness he had arranged to testify as to Roberts's motive no longer intended to cooperate with law enforcement. Pet. App. 72a (Amend. Compl. ¶ 89). Lau allegedly began searching for a replacement. Pet. App. 72a (Amend. Compl. ¶ 90).

b. At this point, the complaint sets its sights on the prosecuting attorney, petitioner ADA Baer. *See, e.g.*, Pet. App. 72a (Amend. Compl. ¶ 90).

The complaint alleges that over a year and a half after Lau brought Roberts into custody, and just one month before trial, petitioner met with a potential trial witness, jailhouse informant Layton Potter, "who would testify as to a motive." Pet. App. 72a (Amend. Compl. ¶ 90). According to the complaint, petitioner "approached [Potter] and asked him if he 'wanted a piece' of the case against Mr. Roberts." Pet. App. 73a (Amend. Compl. ¶ 92). Potter allegedly "did, in fact want a piece of the case in order to gain favor related to charges that were pending against him." Pet. App. 73a (Amend. Compl.

¶ 93). "Accordingly, Mr. Potter crafted a false statement for [petitioner and Lau] which purported to establish motive for Mr. Roberts to kill Mr. Stern." Pet. App. 73a (Amend. Compl. ¶ 93). "Mr. Potter fabricated a story of conflict between Mr. Roberts and Mr. Stern out of whole cloth." Pet. App. 73a (Amend. Compl. ¶ 94).

At trial, petitioner called Potter as a witness. Pet. App. 73a-74a (Amend. Compl. ¶ 97). Petitioner explained to the jury that Potter's testimony would "help them understand how and why" Stern was murdered. Pet. App. 73a (Amend. Compl. ¶ 95). Potter told the jury that Stern and Roberts were "both in the drug business and had a dispute over unpaid drug debts." Pet. App. 73a (Amend. Compl. ¶ 94). On November 14, 2007, the jury convicted Roberts and he was sentenced to life in prison. Pet. App. 56a (Amend. Compl. ¶ 9).

Six years after the trial, Potter recanted and claimed that petitioner and Lau used him "to ensure a conviction." Pet. App. 74a (Amend. Compl. ¶ 99). Roberts's conviction was later vacated due to ineffective assistance of counsel. *Commonwealth v. Roberts*, No. 1148 MDA 2017, 2018 WL 4922783, at *9 (Pa. Super. Ct. Oct. 10, 2018). Petitioner, who had since left the DA's office to become a federal Assistant United States Attorney in the Middle District of Pennsylvania, took special leave to handle Roberts's re-prosecution.[2] A jury acquitted Roberts on September 17, 2019. Pet. App. 56a (Amend. Compl. ¶ 9).

2. After his acquittal on retrial, Roberts sued Lau, the City of Harrisburg, Pennsylvania, and petitioner for

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[2] Christine Vendel, *After Battling Murderers in Dauphin County for Years, Prosecutor Leaves for Federal Job*, PennLive (Dec. 20, 2018), https://perma.cc/AK47-4PA4; Matt Miller, *Man Acquitted of Harrisburg Murder After Spending 13 Years in Prison Sues Detective, Prosecutor*, PennLive (July 2, 2021), https://perma.cc/XE7L-DYX9.

violating his civil rights. Pet. App. 54a. Roberts brought five claims against Lau, alleging malicious prosecution, withholding of evidence, fabrication of evidence, and conspiring to fabricate evidence. Pet. App. 79a-87a (Amend. Compl. ¶¶ 113-50). Roberts brought one claim against the City under 42 U.S.C. § 1983, alleging the City failed to implement and maintain policies and trainings related to the creation of affidavits of probable cause. Pet. App. 84a-85a (Amend. Compl. ¶¶ 136-42).

Roberts also brought two claims against petitioner under § 1983, alleging that he "fabricated evidence" and "conspired to fabricate evidence." Pet. App. 81a-84a (Amend. Compl. ¶¶ 121-25, 131-35). Petitioner moved to dismiss the § 1983 claims against him on the basis of absolute prosecutorial immunity. Pet. App. 7a.

The district court noted that Roberts's "claims against [petitioner] stem from a single act," Pet. App. 39a—that petitioner "fabricated evidence" by allegedly instructing Potter to testify falsely at trial. Pet. App. 35a. The district court denied petitioner absolute immunity on the ground that petitioner "played 'the detective's role' to 'search[] for the clues and corroboration' necessary to convict [Roberts]." Pet. App. 40a (citation omitted).

3.a. A divided panel of the Third Circuit affirmed. Pet. App. 24a-25a. The majority stated that "[t]he sole issue on appeal" was "whether [petitioner] functioned as an advocate or an investigator" when he allegedly fabricated testimony one month before Roberts's original criminal trial and nearly two years after Roberts's indictment. Pet. App. 8a.

Following Third Circuit precedent, the majority articulated a two-step process for determining whether a prosecutor is entitled to absolute immunity: "First we ascertain just what conduct forms the basis for the plaintiff's cause of action. Then, we determine what

function (prosecutorial, administrative, investigative, or something else entirely) that act served." Pet. App. 11a (citations and quotation marks omitted).

Despite acknowledging that the issue was a "close call," the majority concluded that petitioner's post-charge interview with Potter, intended to generate evidence for trial, was "investigative" not "prosecutorial" and therefore petitioner could not claim absolute immunity. Pet. App. 13a.

Purporting to apply the dictum in footnote five of *Buckley*, the panel majority first held that petitioner could not claim prosecutorial immunity solely on the basis that the interview was post-charge. Pet. App. 13a. Quoting that footnote, the majority stated the "determination of probable cause [for an arrest] does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards," because "[e]ven after that determination, … a prosecutor may engage in 'police investigative work that is entitled to only qualified immunity.'" Pet. App. 13a (quoting *Buckley*, 509 U.S. at 274 n.5). Thus, the majority concluded that "the fact that a prosecutor sought to generate evidence post-charge cannot be enough to show that their conduct served a prosecutorial function." Pet. App. 14a.

Next, taking a step beyond *Buckley*'s dictum, the panel majority concluded that even when a post-charge witness interview is "designed to produce inculpatory evidence for trial" it *still* is not necessarily entitled to prosecutorial immunity. Pet. App. 13a-14a (citing *Buckley*, 509 U.S. at 277).

Emphasizing *Buckley*'s dictum disavowing bright-line rules, the majority determined that "[t]he timing of conduct as pre- or post-indictment and the presence or absence of a connection to a judicial proceeding" are merely "relevant considerations" and "not enough to establish that a prosecutor's post-charge effort to

fabricate evidence for trial served a quasi-judicial function." Pet. App. 16a-17a (quotation marks omitted). The majority thus rejected the premise that a prosecutor necessarily acts as an advocate when, after the defendant has been arrested and charged, the prosecutor marshals evidence for trial. According to the majority, those facts are not enough for prosecutorial immunity to attach. Pet. App. 16a-17a.

Instead, to determine whether petitioner's actions crossed the line from prosecutorial to investigative, the majority compared petitioner's alleged actions to the facts in two earlier Third Circuit cases addressing prosecutorial immunity, *Yarris v. County of Delaware*, 465 F.3d 129 (2006), and *Fogle v. Sokol*, 957 F.3d 148 (2020). In *Yarris*, the court held that prosecutors were entitled to absolute immunity for soliciting false testimony from a jailhouse informant because the prosecutors' "involvement with [the false] statements occurred *after* Yarris's prosecution for those crimes had begun." 465 F.3d at 139. In *Fogle*, by contrast, the court denied absolute immunity to prosecutors who "not only solicited false statements from jailhouse informants, but deliberately encouraged the State Troopers to do the same." *Fogle*, 957 F.3d at 163-64. The majority below concluded that *Fogle* was a "closer fit to [petitioner's] alleged conduct than *Yarris*" because, as in *Fogle*, petitioner worked with police officers to identify a jailhouse informant to testify falsely at trial. Pet. App. 22a.

The majority expressly declined to consider the more protective bright-line tests for prosecutorial immunity used in other circuits. Concluding that "*Fogle* resolves whether [petitioner] is entitled to absolute immunity on the face of the complaint," the majority refused to "address" the "out-of-circuit cases" in petitioner's brief, including *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003),

Annappareddy v. Pascale, 996 F.3d 120 (4th Cir. 2021), and *Kroemer v. Tantillo*, 758 F. App'x 84 (2d Cir. 2018). Pet. App. 22a n.10.[3]

b. Judge Shwartz dissented. She reasoned that because (1) Roberts had already been charged when petitioner "solicited the witness's statement," and (2) "this testimony was intended to be used for trial rather than for an investigative purpose," "[petitioner] was acting as an advocate rather than an investigator." Pet. App. 25a, 32a-33a.

Judge Shwartz noted that "[t]he alleged solicitation occurred over a year and a half after Roberts had been identified as a suspect and charged, and then only after the Detective identified the witness to [petitioner] one month before trial." Pet. App. 29a. Although "timing alone is [not] dispositive … under *Buckley*," Judge Shwartz explained, the fact that petitioner "was seeking someone 'who would testify as to a motive' for the murder … demonstrates that [petitioner] was 'evaluating evidence and interviewing witnesses as he prepare[d] for trial,' rather than just 'searching for … clues.'" Pet. App. 30a & 30a n.7 (quoting Amend. Compl. ¶ 84, *Buckley*, 509 U.S. at 273). Thus, Judge Shwartz reasoned, the combination of "the timing of [petitioner's alleged] conduct and its purpose show that [petitioner] acted as an advocate rather than an investigator when he met with [the witness]." Pet. App. 30a.

Judge Shwartz also disagreed with the majority's reliance on *Fogle*. She observed that *Fogle* "conflicts with

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[3] As explained, *infra*, in those circuits "a prosecutor accused of falsifying [evidence] is entitled to absolute immunity if he does so (1) after indictment or determination of probable cause, and (2) with the intent of presenting that [evidence] at trial." *Wearry v. Foster*, 33 F.4th 260, 274 (5th Cir. 2022) (Ho., J., *dubitante*) (summarizing *Cousin*).

our earlier cases [(*e.g.*, *Yarris*)] holding that collecting evidence in preparation for trial or grand jury proceedings is an advocacy function." Pet. App. 31a. In any event, she reasoned, *Yarris* was the closer fit. Pet. App. 32a.

Finally, Judge Shwartz reiterated "that [petitioner] solicited the witness's statement for the purpose of gathering testimony, and the temporal proximity to the trial shows this testimony was intended to be used for trial rather than for an investigative purpose." Pet. App. 32a-33a. Judge Shwartz thus concluded that by "preparing for trial and interview[ing] a witness" petitioner's actions were "clearly the work of an advocate." Pet. App. 31a.

The Third Circuit denied a timely petition for rehearing *en banc*. Pet. App. 50a. The district court stayed all district court proceedings against petitioner pending the disposition of this petition for certiorari. *See* Order Granting Motion to Stay, *Roberts v. Lau*, No. 21-cv-1140, ECF No. 88 (M.D. Pa. May 22, 2024).

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND INTRACTABLE CONFLICT OVER THE SCOPE OF ABSOLUTE PROSECUTORIAL IMMUNITY

The decision below deepened an "irreconcilable conflict" among the federal courts of appeals over whether prosecutors are always absolutely immune from civil liability for post-charge acts taken to marshal evidence for trial. *Wearry*, 52 F.4th at 263 (Jones, J., dissental). That conflict is widely-recognized by courts and commentators. *See supra* n.1.

The First, Second, Fourth, and (sometimes) Fifth Circuits say yes, prosecutors are always absolutely immune from civil liability for post-charge acts taken to marshal evidence for trial. The D.C., Third, and (other times) Fifth Circuits say no. As three Fifth Circuit judges

recently lamented: "Pity the district court judges and counsel" who are "left with [the] mishmash" of divergent answers to this important question. *Wearry*, 52 F.4th at 260, 264 (Jones, J., joined by Smith and Duncan, JJ., dissental). Without this Court's intervention, "these issues will recur, to the detriment of clear law, of honest prosecutors, and the public interest." *Id.* at 264.

A. Petitioner would have prevailed under the test that governs in the First, Second, Fourth, and (sometimes) Fifth Circuits. Under that test, a prosecutor is immune from post-charge acts taken to marshal evidence for trial. Instead, the Third Circuit held that "the fact that a prosecutor sought to generate evidence" for trial, "post-charge[,] cannot be enough to show that their conduct served a prosecutorial function." Pet. App. 14a. Thus, according to the Third Circuit majority below, petitioner was not entitled to the absolute immunity he would have received in other circuits.

1. The decision below is irreconcilable with the Fifth Circuit's decision in *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003) (per curiam), which the majority below expressly declined to "address" on the ground that *Cousin* is "out-of-circuit," Pet. App. 22a n.10. In *Cousin*, the prosecutor attempted to coerce Cousin's friend to testify falsely at Cousin's trial in exchange for favorable treatment in his own pending case. *Id.* at 629. Applying *Imbler* and *Buckley*, the Fifth Circuit concluded that the prosecutor was "acting as [an] advocate[]" because he met with the prospective witness "to tell him how he should testify in court and to rehearse his testimony with him." *Id.* at 632-34. The court explained that "[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," so the prosecutor "therefore [was] entitled to absolute immunity with respect to this

claim." *Id.* at 635. "In short," *Cousin* held, "a prosecutor accused of falsifying witness testimony is entitled to absolute immunity if he does so (1) after indictment or determination of probable cause, and (2) with the intent of presenting that testimony at trial." *Wearry v. Foster*, 33 F.4th 260, 274 (5th Cir. 2022) (Ho., J., *dubitante*) (summarizing *Cousin*).

In granting immunity in *Cousin*, the Fifth Circuit expressly rejected the D.C. Circuit's reasoning in *Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995), "that the collection of information for use in a prosecution is necessarily investigative rather than advocatory conduct." *Cousin*, 325 F.3d at 633 n.6 (summarizing *Moore*). The Fifth Circuit explained that *Moore* "is inconsistent with" Fifth Circuit precedent and "demonstrates a much narrower conception of the advocatory role than is justified by *Imbler*." *Id.*

b. The First Circuit applies the same test the Fifth Circuit applied in *Cousin*. In *Díaz-Colón v. Fuentes-Agostini*, 786 F.3d 144, 148 (1st Cir. 2015), for example, the First Circuit granted absolute immunity to a prosecutor alleged to have bribed a prospective witness to testify falsely at trial. Because the prosecutor's "involvement was limited to his actions as a prosecutor in connection with preparing the Commonwealth's evidence at trial," it was "immunized prosecutorial advocacy." *Id.* at 150-51. The court emphasized that "[p]reparing trial witnesses is at the core of what a prosecutor qua prosecutor does, and the trial itself is the quintessential judicial proceeding." *Id.* at 151.

c. The Second Circuit's rule is the same. In *Dory v. Ryan*, 25 F.3d 81, 82 (2d Cir. 1994), for example, the Second Circuit granted absolute immunity to a prosecutor alleged to have "entered into an extra-judicial conspiracy [with a prospective witness] to convict [the defendant] based on perjured testimony." Although the court in *Dory*

had previously denied absolute immunity, it reconsidered its decision after *Buckley*, and concluded "that absolute immunity protects a prosecutor from" liability for "allegedly conspiring to present false evidence at a criminal trial." *Id.* at 83.

A panel of the Second Circuit applied this rule more recently in *Kroemer*, 758 F. App'x 84, another decision the Third Circuit majority below declined to "address," Pet. App. 22a n.10. In *Kroemer*, the court granted absolute immunity to a prosecutor alleged to have "coach[ed] a witness." 758 F. App'x at 87. Judges Livingston, Sack, and Chin explained that "preparing a witness for trial during a pending criminal proceeding"—even coaching that witness to give false testimony—"falls squarely within the prosecutor's role as advocate and therefore remains protected by absolute immunity." *Id.*

d. Finally, the Fourth Circuit applied the same test to the alleged fabrication of evidence in *Annappareddy*, 996 F.3d 120, another case the majority below declined to "address," Pet. App. 22a n.10. After fraud charges against Annappareddy were dismissed, he sued the prosecutor for fabricating evidence, alleging that she had "worked with an internal auditor at the U.S. Attorney's Office to produce new [data] that would … falsely … inculpate Annappareddy in fraud." *Id.* at 129. In holding that the prosecutor was entitled to absolute immunity, the Fourth Circuit explained that "Annappareddy's complaint allege[d] wrongdoing on [the prosecutor's] part that occurred only after he had been identified as a suspect, after probable cause had been established, and after he had been twice indicted." *Id.* at 140. Applying *Buckley*, the court "readily conclude[d]" that this was "enough to establish that [the prosecutor's] alleged evidence fabrication was undertaken in her 'advocative' capacity, in preparation for the trial that was about to begin, and not as an 'investigator' seeking probable cause for an arrest

or indictment." *Id.* As in *Cousin*, the prosecutor's alleged fabrication of evidence occurred "after probable cause had been established" and "in anticipation of *trial*." *Id.*

In all of the cases above, the prosecutor was entitled to absolute immunity because the alleged fabrication of testimony or other evidence occurred "(1) after indictment or determination of probable cause, and (2) with the intent of presenting that [evidence] at trial." *Wearry*, 33 F.4th at 274 (Ho., J., *dubitante*) (summarizing *Cousin*). Under that standard, petitioner here would have been entitled to absolute immunity as well. As Judge Shwartz explained in her dissent below, petitioner "here was preparing for trial and interviewed a witness, who the Detective identified, for presentation to the jury. This is clearly the work of an advocate." Pet. App. 31a.

2. The test the Third Circuit majority applied below directly conflicts with decisions in the First, Second, Fourth, and Fifth Circuits. And the D.C. Circuit applies an even more extreme outlier rule than the Third Circuit.

a. The Third Circuit's standard comes from *Fogle*, 957 F.3d 148, and as the majority below explained, *Fogle* "dictate[d]" the outcome of this case. Pet. App. 13a. In *Fogle*, the Third Circuit denied immunity to prosecutors who, post-arrest, allegedly used "improper tactics to obtain [a] false and fabricated statement from [the defendant's brother]," and encouraged police officers to obtain additional "fabricate[d] statements from three jailhouse informants." *Fogle*, 957 F.3d at 163 (quotation marks omitted). Attempting to "parse the[] fine lines between advocacy and investigation," "dissecti[ng] … the prosecutor's actions," and rejecting "bright-line rules," the Third Circuit in *Fogle* concluded that the prosecutors were not entitled to immunity—even though their acts were post-arrest—because they were "investigating [their] theory of [the] case." *Id.* at 160, 163.

In her dissent from the decision below, Judge Shwartz noted that "*Fogle*'s reasoning … conflicts with … earlier [Third Circuit] cases holding that collecting evidence in preparation for trial or grand jury proceedings is an advocacy function." Pet. App. 31a. Aligning with the majority of circuits, Judge Shwartz concluded, *contra Fogle*, that a prosecutor "preparing for trial" who generates evidence "for presentation to the jury" "is clearly [doing] the work of an advocate." Pet. App. 31a.

b. The D.C. Circuit has taken an even more extreme position than the Third Circuit. In *Moore*, the D.C. Circuit held that, under *Imbler* and *Buckley*, coercing a witness to present false testimony *categorically* "relates to a typical police function, the collection of information to be used in a prosecution." 65 F.3d at 194. In an opinion the Fifth Circuit expressly rejected in *Cousin*, 325 F.3d at 633 n.6, the D.C. Circuit reversed a grant of absolute immunity to a prosecutor who allegedly "pressur[ed] witnesses into incriminating Moore," *Moore*, 65 F.3d at 192. The D.C. Circuit reasoned that "[i]ntimidating and coercing witnesses into changing their testimony is not advocatory" but "is rather a misuse of investigative techniques legitimately directed at exploring whether witness testimony is truthful and complete and whether the government has acquired all incriminating evidence." *Id.* at 194 (emphasis added). Thus, as one commentator put it, "[t]he D.C. Circuit took a categorical approach in holding that coercing witnesses to testify falsely is an investigative function that receives only qualified immunity." Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 101 (2005) (contrasting *Moore* with *Cousin*).

3. Adding to the division and confusion, the Fifth Circuit recently deepened "the conflict between … circuits" and "created an irreconcilable [intra-circuit]

conflict with *Cousin*." *Wearry*, 52 F.4th at 263 (Jones, J., dissental). In *Wearry*, 33 F.4th at 273, a divided panel of the Fifth Circuit denied absolute immunity to a prosecutor who allegedly coerced a potential witness into presenting a fabricated story at Wearry's trial. Purporting to apply *Imbler* and *Buckley*, the court rejected the prosecutor's immunity bid on the ground that he concocted "a wholly false narrative connecting Wearry to the scene of the crime" and orchestrated "the falsification of [the witness's] statements." *Id.* at 269 n.6. According to the Fifth Circuit panel, those facts "br[ought] Wearry's case within the facts of *Buckley*, which involved a conspiracy to manufacture witness testimony," even though "the prosecutors in *Buckley* lacked probable cause to indict Buckley at the time they fabricated the evidence, while … Wearry had already been charged." *Id.* at 268, 269 n.6.

Judge Ho filed a *dubitante* opinion, bemoaning the inability to "reconcile [the majority's decision] with *Cousin*." *Id.* at 273-74 (Ho., J., *dubitante*). He noted that "*Cousin* expressly states that, if a prosecutor allegedly conducts a witness interview with the '*intent to secure evidence* that would be used in the presentation of the state's case at the pending trial of an already identified suspect,' the prosecutor is '*entitled to absolute immunity* with respect to this claim.'" *Id.* at 274 (quoting *Cousin*, 325 F.3d at 635). Under *Cousin*, Judge Ho explained, "a prosecutor accused of falsifying witness testimony is entitled to absolute immunity if he does so (1) after indictment or determination of probable cause, and (2) with the intent of presenting that testimony at trial." *Id.* Judge Ho also noted that "a number of academic and legal commentators have construed *Cousin* the exact same way." *Id.* at 275 (collecting materials).

Dissenting from denial of rehearing en banc, Judges Jones, Smith, and Duncan observed that the majority

"opinion fatally conflicts with [the Fifth Circuit's] two-decade old opinion in *Cousin*," and "also conflicts with significant sister circuit decisions." *Wearry*, 52 F.4th at 263 (Jones, J., dissental). The dissental explained that "a prosecutor who fabricates evidence by coercing a witness to testify falsely at trial is acting in an 'advocacy' capacity (not in an 'investigative' role) and is entitled to absolute immunity when those activities occur post-indictment"—a conclusion that "flows directly from governing Supreme Court precedent." *Id.* at 261 (citing *Buckley*, 509 U.S. at 269). The dissental also noted that "[t]he Second Circuit's precedent generally aligns with *Cousin* and applies absolute immunity to the fabrication of testimony by the prosecutor." *Id.* at 262 n.5. Only "the D.C. Circuit's holding in *Moore*," *Wearry*, and the Third Circuit's test conflict with those courts. *Id.* at 262.[4]

4. District courts and commentators likewise have acknowledged and struggled with the split.

a. In *Espinosa v. City & County of San Francisco*, No. C 11-02282 JSW, 2011 WL 6056545, at *2, *5 (N.D. Cal. Dec. 6, 2011), for example, the district court denied prosecutorial immunity at the motion to dismiss stage, even though it "appear[ed] that the [underlying prosecution] was beyond the investigatory phase and that [the prosecutor] obtained the material witness warrants to secure [his] testimony for trial." The court explained that it could not "say as a matter of law that [t]his conduct [fell] entirely within [the prosecutor's] role as an advocate, rather than as an investigator or administrator." *Id.* at *5.

[4] Because *Cousin* and *Wearry* conflict, *Cousin* remains the binding precedent in the Fifth Circuit. *See Rios v. City of Del Rio*, 444 F.3d 417, 425 n. 8 (5th Cir. 2006) ("The rule in this circuit is that where two previous holdings or lines of precedent conflict the earlier opinion controls and is the binding precedent in this circuit (absent an intervening holding to the contrary by the Supreme Court or this court en banc).").

Comparing the Fifth Circuit's approach in *Cousin* with the Third Circuit's approach, the court observed that "out-of-circuit authority on this issue is in conflict." *Id.* at *2 & n.4; *see Vargas v. Maranda*, No. CV-F-08-1707 OWW/GSA, 2009 WL 1769849, at *5 (E.D. Cal. June 23, 2009) ("[T]here is conflicting out-of-circuit authority affording absolute prosecutorial immunity to a prosecutor securing a material witness warrant.").

b. Likewise, as one observer noted shortly after the Fifth Circuit diverged from the D.C. Circuit, "lower courts have reached conflicting decisions on post-probable cause immunity." Johns, *Reconsidering Absolute Prosecutorial Immunity*, *supra* at 101 (contrasting *Cousin* with *Moore*). Circuits "are divided on whether a prosecutor is entitled to absolute immunity when she fabricates evidence or coerces a witness to testify falsely and then uses that tainted evidence in a judicial proceeding." *Id.* at 56-57; *see id.* at 87-88 ("The Court's functional approach to prosecutorial immunity has created conflicts and confusion as the lower courts attempt to grapple with the difficulty of characterizing prosecutorial misconduct and determining which immunity applies."). That scholar emphasized the split again in 2011: "Under the current doctrine, drawing the line between conduct entitled to absolute immunity and conduct entitled to qualified immunity is a complicated question that has generated multiple conflicting decisions." Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 Fordham L. Rev. 509, 527 (2011).

Others have noted the consequences of the split, observing, for example, that the doctrine "has inevitably spawned confusion." John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 223 (2013); *see, e.g.*, Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent*

Developments, 24 Touro L. Rev. 473, 477 (2008) (noting that "lower courts struggle" to determine "what constitutes prosecutorial action versus what makes action administrative or investigative"); Megan M. Rose, Note, *Endurance of Prosecutorial Immunity—How the Federal Courts Vitiated* Buckley v. Fitzsimmons, 37 B.C. L. Rev. 1019, 1041 (1996) ("[T]he Supreme Court has still provided no precise guidelines for determining whether a prosecutorial act following the establishment of probable cause to arrest is administrative or investigatory, or whether it is advocatory."); *cf.* Michael Avery, et al., *Police Misconduct: Law and Litigation* § 3:4 ("[W]hile many decisions refer to the presence or absence of a probable cause as a dividing line between investigatory and prosecutorial (hence, immune) conduct, several courts have specifically rejected such a bright line rule and have found that prosecutors may engage in non-immune 'investigative' conduct even after a formal probable cause determination." (citing *Wearry*, 33 F.4th at 267-68 and *Fogle*, among others).

5. This "irreconcilable conflict" will not resolve itself. *Wearry*, 52 F.4th at 263 (Jones, J., dissental). Absent this Court's intervention, "these issues will recur, to the detriment of clear law, of honest prosecutors, and the public interest." *Id.* That outcome is unsustainable. The conflict is ripe and ready for this Court's review.

II. THE COURT SHOULD REVISIT FOOTNOTE FIVE OF *BUCKLEY V. FITZSIMMONS*

There is a simple way for the Court to resolve the circuit split discussed above: revisiting the footnote in *Buckley* that spawned the confusion. In footnote five of *Buckley*, the Court seemed to be attempting to exempt a narrow set of claims from absolute prosecutorial immunity in extraordinary—yet unidentified—cases in which a prosecutor steps into the role of an investigator even after a probable cause determination has been made.

See Buckley, 509 U.S. at 274 n.5. In all the years since *Buckley*, this Court has never applied the footnote, endorsed it, or denied prosecutorial immunity for post-charge conduct.

Nevertheless, footnote five has generated a profusion of misguided, inconsistent lower-court caselaw. The result is that post-charge prosecutorial immunity means one thing in some jurisdictions and something else in others. Instead of drawing a clear line between actions entitled to absolute immunity and those entitled to qualified immunity, footnote five muddies the waters. And as this case and the discussion above show, prosecutors are being denied immunity for core prosecutorial advocacy—cases in which the alleged misconduct did not remotely resemble police investigative work. The Court should either recede from *Buckley*'s dictum altogether or—at very least—clarify that the theoretical exception for "investigative" post-charge decisions by prosecutors is vanishingly narrow.

A. The prosecutors in *Buckley* were sued over conduct that occurred before the suspect was charged. The case did not present the question of whether absolute immunity insulates *post-charge* conduct because it did not involve post-charge conduct. This Court held only that prosecutors who fabricated false evidence during a *pre-charge* preliminary investigation and made false statements at a press conference were not absolutely immune. 509 U.S. at 275, 276-77. In so holding, the Court embraced a "functional approach" to determining whether absolute immunity applies to prosecutorial conduct that happens before probable cause is established. *Id.* at 269. Under that approach, absolute immunity attaches for "activities [that are] intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430.

Buckley's functional approach makes sense for pre-charge conduct because, before a defendant is identified and charged, a prosecutor can act in ways unconnected to a judicial proceeding. As *Buckley* noted, "[t]here 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." 509 U.S. at 273. A prosecutor's "role in evaluating evidence and interviewing witnesses" differs significantly from, say, "a prosecutor plan[ning] and execut[ing] a raid on a suspected weapons cache." *Id.* at 274. In *Burns v. Reed*, 500 U.S. 478 (1991), for example, this Court concluded that a prosecutor was absolutely immune for participating in a probable cause hearing that led to the issuance of a warrant because he was acting as an advocate in initiating criminal proceedings. *Id.* at 491-92. But the same prosecutor was not immune for providing police officers with legal advice during the investigatory phase of the case, because that action was too far divorced from the "judicial phase." *Id.* at 493. The Court noted that "[a]bsolute immunity is designed to free the *judicial process* from harassment and intimidation associated with litigation," so it attaches only to "actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Id.* at 494.

Despite *Buckley*'s limited holding about pre-charge immunity, however, the Court added, in dictum and in a footnote, that "a determination of probable cause does not guarantee a prosecutor absolute immunity for all actions taken afterwards." *Buckley,* 509 U.S. at 274 n.5. The Court stated that "[e]ven after [the probable cause] determination, … a prosecutor may engage in 'police

investigative work' that is entitled to only qualified immunity." *Id.*

That dictum has confused lower courts, leading to the "irreconcilable conflict" discussed above. *Wearry*, 52 F.4th at 263 (Jones, J., dissental). With no guidance from this Court, lower courts have been forced to draw their own lines in each case instead of following a uniform rule. *Whitlock v. Brueggemann*, 682 F.3d 567, 579 (7th Cir. 2012) (describing *Buckley*'s "murk[iness]").

There is no need for this confusion. The rationale underlying *Buckley*'s functional approach to pre-charge conduct falls apart when applied to post-charge conduct. Post-charge, a prosecutor's *only job* is to build a case that will establish a specific defendant's guilt beyond a reasonable doubt. To be sure, prosecutors often seek evidence beyond what was sufficient to establish probable cause at the charging stage. But they do so in preparation for trial. In other words, once the charging decision is made, *every* action a prosecutor takes in preparation for trial is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. There is no such thing as "investigative" post-charge prosecutorial action. "To hold otherwise [would] mean[] that every time a prosecutor prepares for trial and determines that an additional piece of evidence is needed to prove the crime beyond a reasonable doubt, he is acting in an investigative role." Pet. App. 30a (Shwartz, J., dissenting). This would contravene the longstanding "recogn[ition] that prosecutors engage in the work of an advocate outside the courtroom too," and would "essentially narrow[] the advocacy work protected by absolute immunity to actions in the courtroom." Pet. App. 30a-31a (Shwartz, J., dissenting).[5]

[5] Even the majority recognized this consequence of its rule, stating that a prosecutor maintains immunity for *identifying* a "hole in the

The 31 years of disarray in the lower courts since *Buckley* demonstrate that the functional approach is untenable for post-charge, trial-preparation activities. And "[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts." *Edwards*, 593 U.S. at 272. This Court should revisit footnote five to clarify that all post-charge prosecutorial actions are entitled to absolute immunity, or—at very least—that any exception is vanishingly narrow.

B. "[N]o *stare decisis* values would be served by continuing to indulge the fiction" that post-charge prosecutorial acts can be investigative, because "[n]o one can reasonably rely on a supposed exception" that this court has never actually applied or endorsed. *Id.* at 275. Indeed, revisiting or clarifying footnote five of *Buckley* would not alter this Court's precedent. It would "simply acknowledg[e] reality and stat[e] the obvious," *id.*: post-charge prosecutorial acts are entitled to absolute immunity.

While this Court has repeatedly clarified when absolute immunity applies *pre*-charge, *see, e.g.*, *Kalina v. Fletcher*, 522 U.S. 118, 130-31 (1997) (no absolute immunity for acting as a witness in support of a warrant application), and even weighed in on whether there is absolute immunity for "certain administrative activities," including "supervision or training or information-system management," *Van de Kamp v. Goldstein*, 555 U.S. 335, 343-44 (2009) (holding that there is absolute immunity when the "administrative obligation … is directly connected with the conduct of a trial"), it has never denied

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state's case ahead of trial," but loses that immunity for "attempt[ing] to fill that hole." Pet. App. 23a n.11.

prosecutorial immunity for a post-charge action, *see id.* at 343 (collecting post-*Imbler* absolute immunity decisions). In reconsidering or clarifying footnote five, therefore, the Court "need not and [will] not overrule any" of its own "post-[*Buckley*] cases" that held that a prosecutor is entitled to absolute immunity, because no such cases exist. *Edwards*, 593 U.S. at 274.

On the flip side, *Buckley*'s dictum continues to vex lower courts, to the detriment of both plaintiffs and prosecutors. By leaving the door slightly ajar, this Court has allowed "[a] large new 'haystack' of frivolous" suits against prosecutors. *Id.* at 287 (Gorsuch, J., concurring) (quoting *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring)). That "haystack … mak[es] it that much harder for courts to identify the meritorious 'needle,'" *id.* at 287-88 (Gorsuch, J., concurring)—the rare case in which a plaintiff has a claim against a prosecutor who *did* act in an investigative capacity. As the conflict among the lower courts shows, that "haystack just grew too large" and the current doctrine is "unsustainable." *Id.* at 288 (Gorsuch, J., concurring). The only way to "sort[] the hay from the needles," *id.* at 289 (Gorsuch, J., concurring), is for this Court to intervene and revisit footnote five.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT REVIEW

A. The questions presented are vastly important and are potentially implicated in every criminal prosecution in every state and territory. Local prosecutors across the country initiate millions of criminal proceedings each year. S. Gibson, et al., eds., *Trial Court Caseload Overview*, Court Statistics Project, https://tinyurl.com/2kjm5vy5. In 2022 alone, prosecutors in just 40 states initiated more than 12 million cases. Individual prosecutors are often responsible for hundreds of cases at a time. Adam M. Gershowitz & Laura R.

Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 N.W. L. Rev. 261, 268-70 (2011). Many defendants who are ultimately not convicted surely would relish the opportunity to seek damages from the prosecutors. Free to proceed unchecked, such actions would impede prosecutors from performing their sworn duty. *Imbler*, 424 U.S. at 423. Absolute immunity is the gate that prevents acquitted defendants from drowning prosecutors in vexatious retaliatory litigation. *Id.* at 425.

Common-law prosecutorial immunity stems from the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423. "The office of public prosecutor is one which must be administered with courage and independence"—a tall order "if the prosecutor is made subject to suit by those whom he accuses and fails to convict." *Id.* Curtailing prosecutorial immunity "would open the way for unlimited harassment and embarrassment of the most conscientious officials by those would profit thereby." *Id.* (quotation marks omitted). "The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of [the office of the public prosecutor.] The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter a[nd] fairer law enforcement." *Id.* at 424.

A functioning criminal justice system requires prosecutors who can make impartial decisions based on their experience, reasoned judgment, and assessment of the evidence. The Third Circuit's opinion, if allowed to stand, would chip away at those pillars. Prosecutors would

be forced to act with a cloud of potential litigation looming over each decision they make, from interviewing witnesses to discussing cases with investigating officers. In fact, the majority opinion below contemplates that prosecutors will face that threat on a day-to-day basis. According to the majority, "prosecutors who identify a hole in the state's case ahead of trial" forfeit their immunity if they "attempt to fill that hole by affirmatively searching for a new witness." Pet. App. 23a n.11. The consequences of that rule are astonishing. If the laboratory technician is unavailable to testify, opening a "hole" in the prosecution's case, the prosecutor may fill it with an alternate witness only by forfeiting prosecutorial immunity. If the prosecutor hires a forensics expert to testify, it is open season on the prosecutor if the defendant alleges that the prosecutor "sought out" the expert. The list could go on.

B. Prosecutorial immunity benefits wrongly convicted criminal defendants by giving prosecutors the breathing room to confess error, an essential element of a "well-ordered society." *See Young*, 315 U.S. at 259. "The public trust reposed in the law enforcement officers of the government requires that they be quick to confess error when, in their opinion, a miscarriage of justice may result from their remaining silent." *Id.* at 258. When a prosecutor is aware of evidence "which satisfies him the defendants are innocent of the crime of which they were convicted … it [is] manifestly his duty to confess error." *Parlton v. United States*, 75 F.2d 772, 773 (D.C. Cir. 1935). "The public interests and the principles of justice would be satisfied with nothing less." *Id.*; *see also, e.g.*, ABA Model Rules of Professional Conduct, Rule 3.8—*Special Responsibilities of a Prosecutor*.

If allowed to stand, the decision below would reduce the likelihood that prosecutors will own up to mistakes or misconduct. It is, regrettably, an inevitable consequence

of our criminal justice system that some innocent people will be convicted. There have been over 3,000 exonerations of innocent people convicted of crimes since 1989. *The National Registry of Exonerations*, University of Michigan Law School, https://tinyurl.com/4nmtx66w. Confession of error is crucial to many of these exonerations.[6] To encourage error-*correction*, prosecutors need the assurance that error-*confession* will not entail civil liability.

C. The Third Circuit's rule allows plaintiffs to simply plead around prosecutorial immunity by alleging that the prosecutor "investigated" post-probable cause. In fact, that is exactly what has happened in districts within the Third Circuit since the decision in this case.

Relying on the decision below, the Eastern District of Pennsylvania has already denied prosecutorial immunity for a post-charge, pre-trial witness interview, because it was "not clear" from the complaint that the prosecutor was acting as an "advocate" under the majority's reasoning. *Carson v. City of Philadelphia*, No. 23-2661, 2024 WL 2057398, at *5 (E.D. Pa. May 8, 2024). In *Carson*, the plaintiff alleged that, before his trial, the prosecutor had "offered [a potential witness] a reduced sentence on her probation violation if [she] testified." *Id.* at *4. That witness later recanted. *Id.* at *4. Relying on the decision below, the district court denied immunity because "there [we]re no factual allegations regarding the circumstances of the interview, e.g., whether [the prosecutor] 'went

[6] *See* Jon B. Gould & Richard A. Leo, *The Path to Exoneration*, 79 Alb. L. Rev. 325, 345 (2016) (prosecutors and their partners in law enforcement are "a guiding force" in 22% of exonerations); Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 Marq. L. Rev. 477, 483–84 (2009) (courts "almost always" credit confessions of error); *Young v. United States*, 315 U.S. 257, 258 (1942) (confession of error "is entitled to great weight").

looking for a new witness to provide false testimony,' or was interviewing a witness 'who ha[d] been located and identified by investigators.'" *Id.* (quoting Pet. App. 18a (alterations in original)). In other words, the prosecutor was not entitled to immunity—and thus subject to discovery—because the ambiguous allegations in the complaint meant that the prosecutor *might* have "investigated" under the Third Circuit's test.

As the fallout from the decision below underscores, "uncertain immunity is little better than no immunity at all." *Filarsky v. Delia*, 566 U.S. 377, 392 (2012). "One of the purposes of [immunity] is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.'" *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)). Subjecting prosecutors to discovery undermines the principle that absolute immunity is an "entitlement not to stand trial *or face the other burdens of litigation*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added); *see Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part). Because the Third Circuit flouted that principle, this Court must once again "decline to endorse a rule of absolute immunity that is so easily frustrated." *Rehberg*, 566 U.S. at 370.

D. This case is an excellent vehicle for the Court to clarify the scope of prosecutorial immunity. There are no disputed facts. The questions presented are pure legal issues that petitioner fully preserved below. Indeed, prosecutorial immunity is the sole issue on appeal. There is no dispute that this question was outcome-determinative and that no antecedent factual or legal issues would prevent the Court from resolving it.

The Third Circuit has muddied the waters on a question essential to the application of prosecutorial immunity. Without this Court's intervention, "these

issues will recur, to the detriment of clear law, of honest prosecutors, and the public interest." *Wearry*, 52 F.4th at 264 (Jones, J., dissental). The lack of clarity "could be cured, or at least minimized, by more clearly defining the boundaries of prosecutorial and investigative conduct." Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 Iowa L. Rev. 261, 344 (1995). This case presents the ideal opportunity for the Court to clarify those boundaries.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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