No. 23-1282

In the
Supreme Court of the United States

JOHN C. BAER,
Petitioner,
v.

LARRY TRENT ROBERTS; CITY OF HARRISBURG; DAVID LAU,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

AMICUS BRIEF OF THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF PETITIONER

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Interest of Amicus Curiae

The Attorney General of Pennsylvania is "the chief law enforcement officer of the Commonwealth." 71 Pa.C.S. § 732-206. In addition to prosecuting certain crimes the Office of the Attorney General provides assistance and support to local District Attorneys upon request. Such assistance may include representation of the Commonwealth in all stages of criminal proceedings. As such, the Attorney General supports the establishment of clear rules delineating the scope of absolute immunity for state prosecutors from civil actions in federal court.

In this case, the Third Circuit's ruling negatively impacts all Pennsylvania prosecutions. Under it, prosecutors who find gaps in the State's case during trial preparation may forfeit absolute immunity if they try to find more evidence. As a result, the only safe course is to do nothing.

The vague and overbroad rule in this Circuit hinders the State's ability to enforce its criminal laws and diminishes fairness and reliability in its system of justice. The issue raised in this case is of vital importance to Pennsylvania, and the Attorney General urges this Court to review the Third Circuit's decision.[1]

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[1] No person or entity other than the amicus paid in whole or in part for the preparation of this brief, or authored this brief, in whole or in part. Counsel of record received timely notice of the intent to file this brief pursuant to Rule 37.2.

Summary of Argument

Nuanced, fact-sensitive rules may be favored by appellate courts, but they are fatal to the doctrine of absolute immunity. The functional test developed by the Third Circuit is dysfunctional. Its operation cannot be predicted by real-world prosecutors preparing real criminal trials.

Congress' intent is that prosecutorial judgment should not be distorted by the threat of litigation for personal liability. A vague and overbroad test negates that intent. If a prosecutor can never be certain what conduct is protected, the result is paralysis. While the Circuits conflict, the standard applied in some of them proves that a clear and effective rule is possible. This Court's intervention is needed, and it should grant *certiorari*.

Argument

Lack of a clear and understandable rule effectively negates absolute immunity, to the detriment of the justice system.

Absolute prosecutorial immunity was the intent of Congress in 42 U.S.C. § 1983. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). The alternative—a system in which prosecutors operate under "the constant dread of retaliation"—would harm the justice system. *Id*. at 426-428 (citation omitted); *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) ("any lesser degree of immunity could impair the judicial process itself") (citation omitted).

But what Congress intended may be lost in execution. Certainly, because absolute immunity is not based on status, it needs a "functional" test. *Id*. at 430. But in Pennsylvania and in other States, no clear federal rule defines what functions are protected. That negates absolute immunity. "An uncertain immunity is little better than no immunity at all." *Filarsky v. Delia*, 566 U.S. 377, 392 (2012); *Buckley v. Fitzsimmons*, 509 U.S. 259, 283 (1993) (Kennedy, J., with White, J. and Souter, J., concurring) (warning against allowing plaintiffs to negate immunity with a "pleading mechanism"). To be effective absolute immunity must protect officials from the threat of litigation, not just liability. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) ("substantial costs" of qualified immunity such

as far-reaching discovery are "disruptive of effective government").

Here the Court of Appeals said the prosecutor lost absolute immunity because, shortly before trial, he "went looking for a new witness," and "seeking to generate evidence," the Court said, is "not an advocate's work." *Roberts v. Lau*, 90 F.4th 618, 625 (3d Cir. 2024). Under the Third Circuit's version of the function test, a prosecutor who finds a problem in the State's case forfeits absolute immunity if he finds a new witness. But what he should have done instead is unknown. May a prosecutor interview a witness if she was previously identified by the police, or is that an impermissible further investigation?[2] Is a prosecutor who asks the police to find a new witness and interview her effectively taking over and directing the police investigation? Or is doing nothing the only way to secure absolute immunity? If so, is that consistent with Congress' intent?

These are not hypothetical questions. In *Carson v. City of Philadelphia*, 2024 WL 2057398, *4 (E.D. Pa. May 8, 2024), the District Court, citing the Third Circuit's rule in this same case, refused to dismiss a complaint against a prosecutor who interviewed a witness prior to trial. The complaint did not say whether the prosecutor "went looking for a new

[2] The Court of Appeals acknowledged this as a possible scenario and deemed it "distinguishable." 90 F.4th at 628. But it identified no clear principle to explain the distinction, and failed to say whether the alternate scenario would secure or forfeit absolute immunity.

witness … or was interviewing a witness who had been located and identified by investigators." But the answers to those questions didn't matter. Apparently absolute immunity was lost either way.

The Court of Appeals' rule calls for "careful dissection of the prosecutor's actions" in search of the closest "fit" with its carefully-reasoned precedents. 90 F.4th at 627. Such a rule is unpredictable. It is impossible to imagine how a real-world prosecutor, struggling with trial preparation, could hope to take any action that might not violate such a standard. The only safe action is inaction.

A vague and overbroad rule negates absolute immunity, regardless of the ultimate outcome in any individual case. It becomes a one-way ratchet that works only against, never for, the State's interests.

The Third Circuit's unspoken message to prosecutors is this: put on whatever case the police gave you and let the chips fall where they may. But that is not the intent of Congress or the law stated by this Court. Prosecutors are expected to be a check on the police. *See Kyles v. Whitley*, 514 U.S. 419, 438 (1995) ("any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor … as the final arbiters of the government's obligation to ensure fair trials").

An inscrutable rule penalizes responsible prosecutors and incentivizes paralysis. It promotes precisely the kind of second-guessing and reluctance that absolute

immunity exists to prevent. That is unacceptable, especially when a clear and functional rule is within easy reach. *Compare Annappareddy v. Schuster*, 996 F.3d 120, 139-140 (4th Cir. 2021) (absolute immunity for actions taken "after a probable-cause determination has been made" and "in preparation for the trial that was about to begin"); *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) (prosecutors "enjoy immunity not just for the presentation of testimony but … for all actions relating to their advocacy"); *see also Wearry v. Foster*, 52 F.4th 258, 261 (5th Cir. 2022) (Jones, J. dissenting from denial of rehearing *en banc*) (preferring the clarity of a rule that absolute immunity applies to conduct designed "to secure evidence that would be used in the presentation of the state's case at trial, not to identify a suspect or establish probable cause") (brackets omitted).

One clear and appropriate test that may be understood and acted upon by real-world officials is needed. This Court should grant *certiorari*.

Conclusion

For these reasons, the Commonwealth respectfully requests that this Court grant the petition.

Respectfully submitted,

/s/

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