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

BRIEF IN OPPOSITION

PAUL W. HUGHES
Counsel of Record
ANDREW A. LYONS-BERG
CHARLES SEIDELL
CALEB H. YONG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Respondent Larry Trent Roberts

QUESTIONS PRESENTED

1. Whether a prosecutor who "embark[s] on a post-charge search for a new witness to plug a hole in the prosecution's case" (Pet. App. 9a) is engaged in an investigatory function, such that his extraction of false testimony from that witness is protected by only qualified, rather than absolute, immunity.

2. Whether the Court should depart from its longstanding "functional approach" to prosecutorial immunity (*Buckley* v. *Fitzsimmons*, 509 U.S. 259, 279 (1993)) and embrace a novel bright-line rule that would absolutely immunize from 42 U.S.C. § 1983 liability all actions prosecutors might take after probable cause has been determined.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Cases—continued

Other authorities

INTRODUCTION

Respondent Larry Trent Roberts was wrongfully convicted of murder and sentenced to life without parole. He served 13 years in a maximum-security prison before his conviction was vacated and he was granted a new trial in post-conviction proceedings. On retrial, he was acquitted on all charges.

Seeking to be made whole for the egregious violations of his civil rights that led to his wrongful conviction, respondent sued Assistant District Attorney John Baer, petitioner here, under 42 U.S.C. § 1983. His claims rested on allegations that, with the case against respondent falling apart for lack of evidence, petitioner affirmatively sought out a jailhouse informant to falsely testify against respondent and used that informant's entirely fabricated testimony to convict him at trial.

Petitioner asserted absolute prosecutorial immunity from these claims, but both the district court and the Third Circuit rejected his arguments. Applying this Court's longstanding and fact-specific "functional approach" to prosecutorial immunity (*Buckley* v. *Fitzsimmons*, 509 U.S. 259, 269 (1993)), the court of appeals framed "[t]he sole issue on appeal" as "whether [petitioner] functioned as an advocate or an investigator when he allegedly went looking for a new witness to fabricate a motive for [respondent] to kill" the victim. Pet. App. 8a. As the court concluded, "[t]he allegations that [petitioner] went looking for a new witness to provide false testimony describe an investigator's work seeking to generate evidence in support of a prosecution, not an advocate's work interviewing witnesses as he prepare[s] for trial." *Id.* at 13a.

Purporting to discern not only error by court of appeals, but also division and confusion among the circuits as to the scope of absolute immunity for a

prosecutor's fabrication of evidence, petitioner now seeks further review from this Court. He urges the Court not only to reverse the Third Circuit's fact-bound decision, but also to effectively abandon the functional approach in favor of a rigid rule focused exclusively on the timing of a prosecutor's misconduct.

But this Court's review is unwarranted, for three reasons:

First, petitioner's rhetoric aside, there is no circuit split regarding the governing legal standard. Indeed, the "irreconcilable conflict" he touts in the very first sentence of his statement of the case (Pet. 1) is misquoted from a dissenting opinion describing a supposed "*intra*-circuit conflict" between two Fifth Circuit cases. *Wearry* v. *Foster*, 52 F.4th 258, 263 (5th Cir. 2022) (Jones, J., dissental) (emphasis added).

Similarly, petitioner's description of the test supposedly applied by his preferred side of the purported circuit split is drawn from a non-binding *dubitante* opinion and was explicitly rejected by the actual panel opinion in the case on which he relies. Compare Pet. 11 n.3, 14, 16 (relying on Judge Ho's separate opinion in *Wearry* v. *Foster*, 33 F.4th 260 (5th Cir. 2022), as "summarizing *Cousin*," an earlier Fifth Circuit case, into a two-part doctrinal test), with *Wearry*, 33 F.4th at 271 (majority opinion) ("Respectfully, *Cousin* articulated no such test.").[1]

---

[1] A reader of the petition would also be forgiven for thinking that Justices Thomas and Gorsuch have authored opinions regarding the questions presented. See Pet. 3-4 (repeatedly quoting the Justices' concurring opinions in *Edwards* v. *Vannoy*, 593 U.S. 255, 294 (2021), in sentences about absolute prosecutorial immunity). They have not: *Edwards* is about the retroactivity of criminal procedure rulings; it has nothing to do with immunity. Despite petitioner's deeply misleading use of quotations,

In fact, the circuits are united in applying the fact-sensitive "'functional' approach" that is "deeply embedded in [this Court's] § 1983 jurisprudence." *Kalina* v. *Fletcher*, 522 U.S. 118, 135 (1997) (Scalia, J., concurring). Differences in how various courts have decided absolute immunity cases involving falsified testimony stem from the specific factual details of the prosecutor's interaction with the witness. Faced with different facts, courts applying a fact-sensitive standard have unsurprisingly arrived at different conclusions.

Second, the Third Circuit correctly applied the functional approach to conclude that petitioner engaged in investigative, not advocative, activity when he sought out and found a new witness who was willing to provide false testimony. And while petitioner plays up the panel dissent as early as the first sentence of his question presented, not even that dissent really agrees with petitioner's current framing of the legal arguments: "The primary difference between the dissent and majority is our views of the complaint." Pet. App. 27a n.3 (Shwartz, J., dissenting). That is, if there is any real dispute here, it is a fact-specific one about interpreting the allegations of respondent's complaint. This Court need not, and should not, engage in such fact-bound error correction.

Third, the Court should reject petitioner's invitation to abandon its longstanding functional approach in favor of a bright-line rule that would confer absolute immunity on all prosecutorial misconduct that occurs after criminal charges have issued. Petitioner's proposed rule amounts to a massive expansion of absolute prosecutorial immunity, contrary to this

---

Edwards did not so much as cite *Buckley*, much less address the "scope and application" of "footnote five." Pet. 3.

Court's repeated admonitions that qualified immunity is the rule, while absolute immunity is the exception. See, *e.g.*, *Burns* v. *Reed*, 500 U.S. 478, 487 (1991). Enlarging the scope of absolute immunity would deal an unwarranted blow to efforts to hold prosecutors to account, given the demonstrated ineffectiveness of alternative accountability mechanisms.

Indeed, far from expanding absolute prosecutorial immunity, the Court should abandon it. "Respected judges and scholars have said that absolute prosecutorial immunity is inconsistent with the text and original understanding of 42 U.S.C. § 1983." *Wearry*, 52 F.4th at 259 (Ho, J., concurring in denial of rehearing en banc). If it were to grant certiorari as to the questions presented, the Court would need to face the logically prior issue of whether absolute immunity is lawful in the first place—and if the Court does so, it should "conclud[e] that the entire doctrine of prosecutorial immunity is simply wrong as an original matter, as only the Supreme Court can do." *Wearry*, 33 F.4th at 279 (Ho, J., *dubitante*).

STATEMENT

A. Legal Background

1. The Court has consistently embraced a fact-sensitive functional approach to delineate the boundaries of a prosecutor's absolute immunity from suit under Section 1983. This functional test is "deeply embedded in [its] § 1983 jurisprudence." *Kalina* v. *Fletcher*, 522 U.S. 118, 135 (1997) (Scalia, J., concurring).

The Court first addressed prosecutors' entitlement to absolute immunity from Section 1983 liability in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). Although the text of 42 U.S.C. § 1983 "on its face admits of no immunities," the Court held that immunities "well grounded in history and reason" are understood not to

have been abrogated when the Reconstruction Congress enacted the statute. *Id*. at 417, 418 (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951)).

The Court began by reading the common law as providing prosecutors immunity from tort suits, in light of certain explicit policy concerns. *Imbler*, 424 U.S. at 422-424 (quoting *Pearson* v. *Reed*, 44 P.2d 592, 597 (1935)).[2] Concluding that these "considerations of public policy" apply with equal force in the Section 1983 context (*id*. at 424-425), the Court held that the statute confers on prosecutors the same absolute immunity (*id*. at 427). The Court declined, however, to hold that a prosecutor's activities come within the scope of this absolute immunity simply by virtue of the prosecutor's status. Rather, the Court focused on the "functional nature" of a prosecutor's activities, holding that those activities "intimately associated with the judicial phase of the criminal process," and hence performed "in the role of an * * * advocate," are absolutely immune. *Id.* at 430-431.

The Court has repeatedly reiterated that "the function test of *Imbler*" does not extend absolute immunity to the actions of a prosecutor "merely because they are performed by a prosecutor." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 273 (1993). In determining whether absolute immunity applies, it is "the nature of the function performed" that matters, "not the identity of the actor who performed it." *Kalina*, 522 U.S. at 127 (quoting *Forrester* v. *White*, 484 U.S. 219, 229 (1988)). Under this "functional approach to immunity" (*Burns*, 500 U.S. at 486), "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State," are covered by absolute

---

[2] But see *infra* pages 30-32.

immunity. *Buckley*, 509 U.S. at 273. But a prosecutor's activities that "do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings," such as actions that serve "investigatory functions," are entitled only to qualified immunity. *Ibid.* (citing *Burns*, 500 U.S. at 494-496); see also *Buckley*, 509 U.S. at 273 (distinguishing "the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial" from "the investigative functions normally performed by a detective or police officer").

2. Applying the functional test requires "careful attention to subtle details" of fact. *Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part). The absolute immunity analysis is therefore generally not amenable to bright-line rules.

For example, in determining whether a prosecutor's efforts to fabricate evidence fall within the scope of absolute immunity, the Court has indicated the need for a nuanced analysis. On the one hand, a prosecutor might be engaged in an "out-of-court 'effort to control the presentation of a witness' testimony'" through the "professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury." *Buckley*, 509 U.S. at 273. Such efforts to prepare evidence for presentation at trial are performed in the prosecutor's role as an advocate and are therefore entitled to absolute immunity.

On the other hand, instead of evaluating evidence and interviewing witnesses as he prepares for trial," a prosecutor might be "searching for * * * clues and corroboration" to support his theory of the case. *Buckley*, 509 U.S. at 273. In thus playing "the detective's role," the prosecutor would be performing paradigmatically "investigative functions normally performed by a

detective or police officer." *Ibid*. In those circumstances, a prosecutor participating in the fabrication of evidence is entitled only to the qualified immunity that protects detectives and police officers.

3. The timing of a prosecutor's actions bears on what role the prosecutor was playing and therefore on the prosecutor's entitlement to absolute immunity under the functional approach. Before a prosecutor has "probable cause to have anyone arrested," he "neither is, nor should consider himself to be, an advocate." *Buckley*, 509 U.S. at 274. Absolute immunity is therefore foreclosed for prosecutorial activities undertaken before probable cause is established. That a prosecutor's pre-charge actions are "entirely investigative in character" (*ibid*.) is the sole bright-line rule that governs the immunity inquiry.

The inverse, however, is not necessarily true. Where misconduct takes place after probable cause has been established, the timing is relevant—since a prosecutor's actions in that context may be more closely connected to the trial—but it is not dispositive. As the Court has recognized, "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards." *Buckley*, 509 U.S. at 274 n.5. To the contrary, "[e]ven after that determination, * * * a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Ibid.*; see also *id.* at 290 (Kennedy, J., concurring in part and dissenting in part) (agreeing that "even after there is probable cause to arrest a suspect or after a suspect is indicted, a prosecutor might act to further police investigative work, say by finding new leads.").

B. Factual Background

On December 21, 2005, Duwan Stern was shot and killed while sitting in his car in Harrisburg,

Pennsylvania. Pet. App. 57a (Amend. Compl. ¶¶ 13, 15). Hearing gunshots, two residents of the neighborhood, Jacquelyn Wright and Lisa Starr, ran to their windows to observe the scene. Pet. App. 62a, 63a (Amend. Compl. ¶¶ 39, 43). Wright later described to police the two individuals she had seen: "boys" in their early twenties, one light and thin, the other a taller, black man wearing a hood. Pet. App. 62a-63a (Amend. Compl. ¶ 39, 43). Starr also reported seeing two men at the scene, one of whom she described as a black man wearing a jacket with a hood who had his head in Stern's car. Pet. App. 63a (Amend. Compl. ¶ 44).

Thomas Mullen was one of the two individuals observed at the crime scene; he was in the area with an associate to buy drugs. Pet. App. 57a, 58a (Amend. Compl. ¶¶ 18, 22). Mullen subsequently admitted to the police that, after Stern had been shot, he pushed Stern's body out of the car and into the street, then attempted to rob him of drugs or money. Pet. App. 57a, 58a, 71a (Amend. Compl. ¶¶ 18, 26-27, 79). In a statement he gave the police hours after the shooting, Mullen claimed not to have seen the shooting itself; rather, he reported encountering an armed man at Stern's car immediately following the shooting. He described the armed man as being in his 20s, having a medium to dark complexion, wearing a dark hooded jacket, and weighing 160-175 pounds. Pet. App. 59a-60a (Amend. Compl. ¶¶ 33-35).

When Detective David Lau arrived at the crime scene about an hour after the shooting, he noticed that respondent had called Stern's phone three times that evening. Pet. App. 61a (Amend. Compl. ¶¶ 44-45). Lau recognized respondent's name and phone number because they had a rancorous personal history: Years earlier, Lau had struck respondent with his firearm while arresting him, and—to fabricate a defensive

justification for his use of violence—charged respondent with assault. Although these charges were later dismissed, this personal history led Lau to believe that respondent was capable of murder. Pet. App. 61a (Amend. Compl. ¶¶ 39-42).

Once Lau realized that respondent was an associate of Stern's, he began to obsessively focus his investigation on respondent even though he did not fit any of the suspect descriptions given by Wright, Starr, or Mullen. He was much heavier—287 pounds—than the 160-175 pound armed man reportedly seen by Mullen. And he was significantly older—35 years old—than the "boys" in their 20s reported by the witnesses. Pet. App. 62a, 67a-68a (Amend. Compl. ¶¶ 48, 61). Lau included a photo of Respondent in a photo array that he showed to each of the witnesses—but none of them identified respondent. Indeed, Wright selected someone else's photo from the photo array. Pet. App. 61a, 63a (Amend. Compl. ¶¶ 37, 41-42, 45-46).

Despite having discovered evidence exculpating respondent, Lau later brought respondent into the police station for questioning under the pretext that he was investigating other, unrelated crimes. Pet. App. 64a-65a (Amend. Compl. ¶¶ 49, 52). While respondent was in custody at the police station, Lau persuaded him to participate in a deliberately flawed identification procedure where he was viewed "one on one" by Wright. Pet. App. 65a, 66a (Amend. Compl. ¶¶ 54, 58). Influenced by the defective procedure that Lau orchestrated to target respondent, Wright identified respondent as the unknown black man she had seen near Stern's car in the aftermath of his shooting. Pet. App. 67a (Amend. Compl. ¶ 59).

Lau leveraged this unreliable identification to draft and submit an affidavit of probable cause. Pet. App. 64a, 67a (Amend. Compl. ¶¶ 48, 60). The

affidavit also omitted important exculpatory information, including that two other men had been heard bragging about having killed Stern, and that when Wright was previously shown a photo of respondent in a photo array, she did not identify him. Pet. App. 68a (Amend. Compl. ¶¶ 62-63). Respondent was arrested based on this flawed probable cause affidavit. Pet. App. 70a (Amend. Compl. ¶ 73).

Once he had succeeded in having respondent arrested, Lau proceeded to build a case against him by fabricating evidence. First, Lau induced Mullen to falsely identify respondent as the armed man he had encountered at Stern's car immediately after the shooting. Pet. App. 71a-72a (Amend. Compl. ¶¶ 77, 82-84.) To manufacture a motive for respondent's killing of Stern, Lau devised a fabricated narrative where respondent and Stern were locked in conflict regarding the sale of a car. Lau then attempted to coerce Tyrone Gibson, an associate of respondent's, to give perjured testimony parroting this false narrative. But Gibson refused to cooperate with this scheme. Pet. App. 72a (Amend. Compl. ¶¶ 87-89).

With the car-dispute theory off the table, Lau teamed up with petitioner Baer to manufacture a different motive for Respondent to have killed Stern. Together, detective and prosecutor began "affirmatively seeking" a jailhouse informant who would be willing to testify falsely as to a motive. Pet. App. 72a (Amend. Compl. ¶¶ 89-90). That search ultimately yielded a willing witness in the person of jailhouse informant Layton Potter. Pet. App. 72a-73a (Amend. Compl. ¶ 91).

Petitioner "approached" Potter and asked him if he "wanted a piece" of the case against respondent in exchange for favorable treatment in the charges that were pending against him. Pet. App. 73a (Amend.

Compl. ¶ 92). Potter obliged, crafting a completely false statement claiming that respondent and Stern were embroiled in a dispute over unpaid drug debts. Pet. App. 73a (Amend. Compl. ¶¶ 93-94). Petitioner solicited evidence from Potter despite knowing that he was a crack cocaine addict being held in custody on pending charges, and who had previously been convicted of making false police reports. Pet. App. 73a (Amend. Compl. ¶ 96).

At respondent's trial, petitioner used Potter's testimony describing a conflict between Stern and respondent—a conflict that in reality had been entirely conjured up—as a key piece of evidence to secure respondent's conviction, telling the jury that Potter would "help them understand how and why" Stern was killed. Pet. App. 73a (Amend. Compl. ¶ 95). As the result of petitioner and Lau's egregious misconduct, respondent was wrongfully convicted of first-degree murder and sentenced to life imprisonment. *Commonwealth* v. *Roberts*, 2018 WL 4922783, at *2 (Pa. Super. Ct. Oct. 10, 2018).

After respondent spent 13 years in prison for a crime he did not commit, his conviction was vacated in state post-conviction proceedings. Pet. App. 56a (Amend. Compl. ¶ 9). The post-conviction court granted relief upon finding that respondent's trial counsel was ineffective for failing to present crucial evidence supporting his alibi defense. *Roberts*, 2018 WL 4922783, at *9.

In fact, cell-tower records demonstrated that, at all relevant times on the evening in question, respondent was far away from the area where Mr. Stern was killed. See Pet. App. 75a-79a (Amend. Compl. ¶¶ 107-111). Upon retrial, respondent was acquitted of all charges. Pet. App. 56a (Amend. Compl. ¶ 9).

C. Proceedings Below

1. After his exoneration, respondent sued petitioner, Lau, and the City of Harrisburg, Pennsylvania for violating his civil rights. Against petitioner specifically, respondent brought two claims under 42 U.S.C. § 1983 for fabricating evidence and conspiring with Lau to fabricate evidence, in violation of his Fourteenth Amendment rights. Pet. App. 81a-82a, 83a-84a (Amend. Compl. ¶¶ 123-125, 131-135). Both claims arose from petitioner's alleged actions to knowingly "s[eek] out, influenc[e], entic[e], and coerc[e]" a false statement from Potter inculpating Respondent. Pet. App. 81a-82a, 83a-84a (Amend. Compl. ¶¶ 123, 133).

Petitioner moved to dismiss, asserting absolute prosecutorial immunity. Pet. App. 37a. The district court applied the "functional test" established under Supreme Court and Third Circuit precedent to determine if petitioner was entitled to absolute immunity. Pet. App. 39a. The court recognized that this functional approach—with its focus on whether the prosecutor was "function[ing] as the state's advocate" when performing the actions alleged to have violated the plaintiff's civil rights—"reject[s] bright-line rules" and makes the "applicability of absolute immunity turn[] on the specific facts in the case." Pet. App. 38a-39a.

Emphasizing the allegations that petitioner "took steps to seek out, influence, and coerce" Potter to supply a statement that could be used to prove respondent had a motive to kill Stern, the court saw petitioner as "'play[ing] the detective's role to search[] for the clues and corroboration' necessary to convict." Pet. App. 40a. Because petitioner's alleged misconduct thus served an investigative function, the court held that he was not entitled to absolute immunity and denied his motion to dismiss.

2. The Third Circuit affirmed. Recognizing that the scope of absolute prosecutorial immunity is defined by this Court's longstanding functional approach, the panel majority understood the "sole issue on appeal" to be "whether Baer functioned as an advocate or an investigator" when he engaged in the conduct at issue. Pet. App. 8a.

Determining whether a prosecutor's conduct was undertaken in the prosecutor's role as an advocate or in an investigative capacity is, the court explained, a "fact-intensive inquiry that generally cannot be reduced to bright-line rules." Pet. App. 16a. In particular, following this Court's teaching in *Buckley* that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards" (509 U.S. at 274 n.5), the court emphasized that the "timing of conduct as pre- or post-indictment" is a "relevant"—but by no means dispositive—consideration. Pet. App. 16a-17a.

In line with the functional approach, the court of appeals began its analysis by "carefully pars[ing] the allegations" of the complaint (Pet. App. 20a n.8) to determine "just what conduct forms the basis for" petitioner's claims (Pet. App. 11a). The court focused on the allegations that, upon "join[ing] Detective Lau's investigation," petitioner "began affirmatively seeking a jailhouse snitch who would testify as to a motive," and that petitioner "approached Mr. Potter and asked him if he 'wanted a piece' of the case against [respondent]." Pet. App. 12a.

The court thus read the complaint to allege that petitioner "went looking—with Lau—for a new witness, whom [petitioner] approached and persuaded to provide false testimony." Pet. App. 10a n.3. Because petitioner's alleged misconduct involved "embark[ing] on a post-charge search for a new witness to plug a

hole in the prosecution's case" (Pet. App. 9a), his actions were "an investigator's work 'seeking to generate evidence in support of a prosecution,' not an advocate's work 'interviewing witnesses as he prepare[s] for trial'" (Pet. App. 13a).

Judge Shwartz dissented—but agreed with the majority on the governing legal standard. Indeed, like the majority, Judge Shwartz acknowledged that the inquiry into the precise function of a prosecutor's action is "fact-specific" and not amenable to "bright-line rules" or "categorical reasoning." Pet. App. 26a.

Given this agreement on the applicability of the fact-sensitive functional approach, the "primary difference" that divided the majority from the dissent concerned their "view[s] of the complaint." Pet. App. 27a n.3. Where the panel majority understood the complaint to allege that petitioner went searching for a new witness in collaboration with Lau, Judge Shwartz read the allegations to mean that Lau had initially "identified [Potter] as a potential witness" before petitioner interviewed him. Pet. App. 27a n.3. It was based on this different factual understanding that Judge Shwartz characterized petitioner's actions in eliciting fabricated evidence from Potter as an effort to "prepar[e] for trial" by "interview[ing] a witness, whom [Lau] identified, for presentation to the jury." Pet. App. 31a.

REASONS FOR DENYING THE PETITION

The Court's review is not warranted. Contrary to petitioner's telling, this case does not present any entrenched circuit split: Courts applying a fact-sensitive standard to different facts understandably reach different outcomes; that is a feature, not a bug. Faced with a unique set of facts, the Third Circuit below reached a common-sense conclusion that is consistent with this Court's guidance and the law of other

circuits. And the Court certainly should not abandon its longstanding functional approach to prosecutorial immunity as petitioner advocates—if anything, absolute prosecutorial immunity itself is what should be abandoned.

A. The courts of appeals agree on a fact-sensitive functional approach to immunity.

Petitioner purports to detect a "clear, acknowledged, and entrenched" circuit split over whether to adopt a bright-line rule that "prosecutors are *always* absolutely immune from civil liability for post-charge acts taken to marshal evidence for trial," or to apply a more fact-intensive immunity inquiry. Pet. 2, 12 (emphasis added). But his contention that the courts of appeals are locked in an "irreconcilable conflict" over the appropriate test for immunity in this context (*e.g.*, *id.* at 1) misstates the law.[3]

1. As an initial matter, the courts of appeals uniformly apply this Court's longstanding "functional approach" to prosecutorial immunity. *Buckley*, 509 U.S. at 269. And there is widespread recognition among the circuits that distinguishing between investigatory and advocatory activities is a fact-intensive inquiry

---

[3] Indeed, the "irreconcilable conflict" language petitioner quotes repeatedly (*see* Pet. 1, 12, 21, 24), is actually a description of an "*intra-circuit* conflict" between two Fifth Circuit cases, not of a conflict between circuits. *Wearry* v. *Foster*, 52 F.4th 258, 263 (5th Cir. 2022) (Jones, J., dissenting from denial of a petition for rehearing en banc) (emphasis added); see *id.* ("For these reasons, *Wearry* [v. *Foster*, 33 F.4th 260 (5th Cir. 2022)] created an irreconcilable conflict with *Cousin* [v. *Small*, 325 F.3d 627 (5th Cir. 2003)] that this court should have addressed."). And while that opinion also briefly asserted an inter-circuit conflict, as we explain below, the divergent outcomes in those cases are primarily the result of applying a fact-intensive standard to different fact patterns, not a disagreement about the law.

not amenable to resolution with rigid, bright-line rules. See, *e.g.*, *Diaz-Colon* v. *Fuentes-Agostini*, 786 F.3d 144, 150 (1st Cir. 2015) ("'[T]he Supreme Court has resisted any attempt to draw a bright-line between' advocacy and investigation.") (quoting *Genzler* v. *Longanbach*, 410 F.3d 630, 637 (9th Cir. 2005)); *Odd* v. *Malone*, 538 F.3d 202, 210 (3d Cir. 2008) ("[O]ur prosecutorial immunity analysis focuses on the unique facts of each case and requires careful dissection of the prosecutor's actions."); *Prince* v. *Hicks*, 198 F.3d 607, 612 (6th Cir. 1999) ("[T]he absolute immunity question * * * turns on the specific circumstances of the case.").

In line with this recognition that the functional approach requires "careful attention to subtle details" of fact (*Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part)), the courts of appeals are united in rejecting any bright-line rule that would automatically confer immunity on prosecutorial misconduct taking place after criminal charges have issued. See, *e.g.*, *Filler* v. *Kellett*, 859 F.3d 148, 154 (1st Cir. 2017) ("[T]he fact that a prosecutor engaged in certain activities after a prosecution had already commenced is not necessarily dispositive of the question whether absolute immunity attaches."); *Barbera* v. *Smith*, 836 F.2d 96, 100 (2d Cir. 1987) ("We do not intend to establish a bright line commencement-of-proceedings test."); *Odd*, 538 F.3d at 210 ("We have rejected bright-line rules that would treat the timing of the prosecutor's action (e.g. pre- or postindictment) * * * as dispositive."); *Annappareddy* v. *Pascale*, 996 F.3d 120, 140 (4th Cir. 2021) (acknowledging that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards") (quoting *Buckley*, 509 U.S. at 274 n.5); *Singleton* v. *Cannizzaro*, 956 F.3d 773, 783

(5th Cir. 2020) ("The Supreme Court has never held that the timing of a prosecutor's actions controls whether the prosecutor has absolute immunity."); *Watkins* v. *Healy*, 986 F.3d 648, 664 (6th Cir. 2021) ("[W]e once again reject any bright-line rules that would suggest that a prosecutor automatically passes from the realm of investigation to the world of advocacy as soon as * * * probable cause arises."); *Genzler*, 410 F.3d at 641 ("We do not view the filing of the complaint as an event after which, by definition, all actions by the prosecutor and his staff are protected by absolute immunity.").

2. Contrary to petitioner's assertion (cf. Pet. 13-16), the First, Second, Fourth, and Fifth Circuits do *not* follow any bright-line rule that immunity automatically attaches to the fabrication of evidence once probable cause has been determined or criminal charges have issued. Rather, these circuits carefully engage with the specific facts of each case to discern the function prosecutors were performing—investigatory or advocatory—when they allegedly participated in misconduct.

Petitioner leads with the **Fifth Circuit**—but tellingly, his characterization of the test that court follows comes not from any authoritative statement of law, but from a non-binding, single-judge *dubitante* opinion. See Pet. 14 (quoting Judge Ho's separate opinion in *Wearry* v. *Foster*, 33 F.4th 260, 274 (5th Cir. 2022)) for the proposition that, under a prior Fifth Circuit decision—*Cousin* v. *Small*, 325 F.3d 617 (5th Cir. 2003)—"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.").

Critically, though, the panel majority in that case *explicitly rejected* Judge Ho's understanding of Fifth Circuit law: "Respectfully, *Cousin* articulated no such test." *Wearry*, 33 F.4th at 271; see also *ibid.* ("While both of the above elements existed in that case, the panel never held that they alone were sufficient to grant absolute immunity."). And "[i]ndeed, it would have been strange for *Cousin* to have created the framework that [Judge Ho, and thus petitioner] says it did," because "neither of the two conditions he identifies—the existence of probable cause or the intent to use fabricated evidence at trial—is sufficient alone or in combination to entitle a prosecutor to absolute immunity." *Ibid.*

Thus, the rule in the Fifth Circuit is entirely consistent with the court of appeals' decision here: "[E]vidence gathering and creation is investigatory in nature, while evidence presentation and organization is advocatory," regardless of when it occurs—and the "creat[ion of] fictitious testimony" from whole cloth falls on the investigatory side of the line. *Wearry*, 33 F.4th at 271.[4] For that reason, the Court held squarely that "the existence of probable cause is *not* a bright-line rule." *Id.* at 268 (emphasis added). Far from conflicting with the decision below, Fifth Circuit precedent strongly endorses it.

The Court should therefore deny certiorari—just as it did last year in *Wearry*. See *Foster* v. *Wearry*, No. 22-857 (U.S.) (petition denied May 15, 2023).

---

[4] As the *Wearry* court explained, what made the *Cousin* prosecutor's actions advocatory was that "the elicitation of false testimony occurred during two meetings that were admitted to be express rehearsals for trial," after "the witness's own attorney" had already directed him to make the false statements. *Wearry*, 33 F.4th at 269-270; see *Cousin*, 325 F.3d at 634.

Similarly, the **First Circuit** did not, in deciding *Diaz-Colon* v. *Fuentes-Agostini*, 786 F.3d 144 (1st Cir. 2015), apply a bright-line rule that a prosecutor's fabrication of evidence is covered by absolute immunity if it occurs post-charge. Cf. Pet. 14. The plaintiffs there alleged that a prosecutor unduly influenced a witness "*during* one of the trials in which she testified falsely for the prosecution." 786 F.3d at 147 (emphasis added). The prosecutor's alleged misconduct thus occurred not only after indictment, but in the midst of the criminal trial—"the quintessential judicial proceeding." *Id.* at 151. In no way did the court attach significance to the post-indictment timing of the prosecutor's alleged actions, let alone treat it as dispositive.

Instead, as noted above, the First Circuit has also made expressly clear that "the fact that a prosecutor engaged in certain activities after a prosecution had already commenced *is not necessarily dispositive* of the question whether absolute immunity attaches." *Filler*, 859 F.3d at 154 (emphasis added). Again, there is no bright-line rule.

The **Second Circuit** likewise applies this Court's functional inquiry without resort to bright-line timing rules. In *Dory* v. *Ryan*, 25 F.3d 81, 83 (2d Cir. 1994), on which petitioner wrongly relies (Pet. 14-15), the court did not even mention the timing of the prosecutor's alleged efforts to coerce a witness to perjure himself. Rather, the Second Circuit simply applied this Court's instruction that "the professional evaluation of the evidence *assembled by the police* and appropriate preparation for its presentation at trial" are advocative functions. *Ibid.* (quoting *Buckley*, 509 U.S. at 27) (emphasis added).

Because the misconduct by the prosecutor occurred only while he was "prepar[ing] [someone] to testify as

his witness" (*Dory* v. *Ryan*, 999 F.2d 679, 683 (2d Cir. 1993) (prior opinion in same case, quoting affidavit)), it involved "efforts to 'control the presentation of [a] witness' testimony'" at trial, rather than "acts of investigation." (*Dory*, 25 F.3d at 83). The result in *Dory* hinged on "the nature of the function" of the prosecutor's actions, not on those actions' timing. *Ibid*.[5]

The **Fourth Circuit** has also declined to adopt any rigid rule that a prosecutor's post-charge actions to fabricate evidence are necessarily covered by absolute immunity. Cf. Pet. 15. To the contrary, *Annappareddy* v. *Pascale*, 996 F.3d 120 (4th Cir. 2021), acknowledged that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterward," and simply held "*in the context of this case*" that the prosecutor's "alleged evidence fabrication was undertaken in her 'advocative' capacity, in preparation for the trial that was about to begin." *Id.* at 140 (quoting *Buckley*, 509 U.S. at 274 n.5) (emphasis added). Thus, while the timing of events was a "key factor," it was not a dispositive one. *Id.* at 139.[6]

---

[5] *Kroemer* v. *Tantillo*, 758 F. App'x 84 (2d Cir. 2018), is similar. Cf. Pet. 15. There, the prosecutor was accused of "fabricat[ing] evidence" while "preparing a witness for trial." *Id.* That is entirely consistent with the Third Circuit's opinion here, which acknowledged that "interviewing witnesses as he prepare[s] for trial" is "an advocate's work"—but "seeking to *generate* evidence in support of a prosecution" is not. Pet. App. 13a (emphasis added). Petitioner is alleged to have done the latter. See *infra* pages 24-25.

[6] Petitioner appears to think it telling that the court of appeals "declined to 'address'" *Annapareddy* and his other preferred cases. Pet. 15; see also *id.* at 13. But there is nothing sinister, or even unusual, about the court's decision to forgo analysis of "nonbinding authority" when its own prior "precedential opinion * * *

3. Besides purporting to detect an entrenched conflict between circuits that apply a bright-line temporal rule and those that do not (in fact, there are no such circuits), petitioner also finds confusion among the lower courts, with a "'mishmash' of divergent answers" in prosecutorial immunity cases. Pet. 2 (quoting *Wearry*, 52 F.4th at 260, 263-264 (Jones, J., dissental)). But the emergence of divergent results in prosecutorial immunity cases is not a symptom of pathological confusion, but an expected outcome when courts must apply a fact-sensitive legal standard. Because discerning the function served by a prosecutor's actions in each case involves "careful attention to subtle details" of the prosecutorial misconduct at issue (*Buckley*, 509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part)), courts have reached diverse results in cases that initially appear to present similar facts but that—on closer inspection—are differentiated by critical factual nuances.

As with any legal standard that requires courts to consider and weigh the significance of multiple details of fact, applying the functional approach "is not always easy." *Diaz-Colon*, 786 F.3d at 150. Inevitably, there will be "close call[s]." Pet. App. 13a; see also *Imbler*, 424 U.S. at 431 n.33 ("Drawing a proper line between [a prosecutor's different] functions may present difficult questions."). These difficulties and complexities are inherent in the task of applying any fact-specific standard; they do not warrant the Court's intervention.

4. Finally, petitioner's presentation of his purported circuit split reveals that his complaint is not really with the legal test the Third Circuit applied—

---

resolves whether [petitioner] is entitled to absolute immunity on the face of the complaint." Pet. App. 22a n.10.

the court applied the same fact-specific, functional standard used by this Court and every other circuit. Petitioner's real quarrel is with the court's evaluation of the specific allegations against him.

As petitioner (and the panel dissent) tell it, petitioner "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. 16 (quoting Pet. App. 31a (Shwartz, J., dissenting)); *see also id.* (asserting that petitioner therefore "would have been entitled to absolute immunity" under other circuits' law). But the panel majority *agreed* with the legal principle that "interviewing witnesses as he prepare[s] for trial" is "an advocate's work" (Pet. App. 13a), placing it in accord with petitioner's proffered authorities.[7]

As the court explained, however, "it was Baer's alleged *search for a new witness* that served an investigative function, *not* Baer's decision to speak with the witness and present his false testimony at trial." Pet. App. 18a (emphases added); see also *id.* at 22a ("Baer played the detective's role to search for clues and corroboration when he went looking for a new jailhouse informant, found Potter, approached Potter, and knowingly influenced, enticed, and coerced Potter to provide false testimony.").[8] And none of petitioner's cases provide support for the proposition that "looking

---

[7] Thus, to the extent "the D.C. Circuit has taken [the] even more extreme position" that "coercing a witness to present false testimony *categorically* relates to a typical police function" (Pet. 17), any disagreement between that court and the other circuits is simply not presented by this case.

[8] As noted, the majority rejected as a factual matter the dissent's suggestion that the detective, rather than petitioner, had identified the new witness. Pet. App. 9a n.3; see pages 13-14, *supra*.

for a *new* witness to provide false testimony" is an advocatory function, rather than "an investigator's work," as the Third Circuit held. Pet. App. 13a.

In the end, petitioner simply disagrees with the Third Circuit majority's reading of the complaint's allegations, preferring instead the dissent's factual interpretation. See Pet. 16 (quoting Pet. App. 31a (Shwartz, J., dissenting). With that disagreement brought to the fore, the petition is merely a request for fact-bound error correction. Not only is that undeserving of review, but no error is to be found.

B. The court of appeals correctly denied absolute immunity.

The Third Circuit's decision is also correct on the merits. The majority faithfully applied the Court's prescribed functional approach to determine that, in seeking out a new witness to supply fabricated motive evidence, petitioner was not acting as an advocate but was instead engaged in investigative work.

1. The court of appeals correctly applied the functional approach.

The Court's longstanding precedents teach that the scope of absolute prosecutorial immunity depends on "the nature of the function performed, not the identity of the actor who performed it" (*Kalina*, 522 U.S. at 127 (quoting *Forrester*, 484 U.S. at 229)), with absolute immunity "protect[ing] the prosecutor's role as an advocate" (*id*. at 127) but not a prosecutor's actions serving "investigatory functions" (*Buckley*, 509 U.S. at 273). In line with this functional approach, the panel majority trained its focus on the "sole issue" of whether petitioner "functioned as an advocate or an investigator" when he engaged in the alleged misconduct. Pet. App. 8a.

a. The majority properly sought, first, to determine "just what conduct" was at issue. Pet. App. 11a. Based on its parsing of the complaint, the majority understood respondent to have alleged that petitioner "went looking—with [Detective] Lau—for a new witness" to supply false testimony as to respondent's motive (Pet. App. 10a n.3), and that petitioner "identified and tracked down" this new witness (Pet. App. 9a).

This reading of the allegations is amply supported. The complaint alleges that, "[i]n order to fabricate evidence of motive," petitioner "began *affirmatively seeking* a jailhouse snitch who would testify as to a motive." Pet. App. 72a (Amend. Compl. ¶ 90) (emphasis added). When this investigation led "to Layton Potter, a known jailhouse snitch," petitioner, "approached [Potter] and asked him if he 'wanted a piece' of the case against [respondent]," encouraging him to falsely testify. Pet. App. 72a (Amend. Compl. ¶¶ 91-92).

b. In seeking to discern what function this specific alleged misconduct served, the majority placed critical weight on the fact that petitioner actively searched for a witness that the police had not previously identified. As the majority emphasized, petitioner was alleged not merely to have "sp[oken] with the witness and present[ed] his false testimony at trial," but to have conducted a "search for a new witness." Pet. App. 18a n.7. This affirmative investigative conduct was a key factor that made petitioner's alleged misconduct "distinguishable" from the similar yet crucially different situation "where a prosecutor might interview and meet a * * * witness who has been located and identified by investigators." Pet. App. 18a.

Petitioner's alleged actions in "embark[ing] on a post-charge search for a new witness" and "[going] looking for a new witness to provide false testimony" (Pet. App. 9a)—as opposed to simply speaking with an

already-identified witness to rehearse testimony for trial—were aptly characterized by the majority as "an investigator's work 'seeking to *generate* evidence in support of a prosecution,'" rather than "an advocate's work 'interviewing witnesses as he prepare[s] for trial'" (Pet. App. 13a).

The majority's conclusion aligns with, and indeed was compelled by, Third Circuit precedent. When the Third Circuit was previously presented with "nearly identical" allegations of a prosecutor's efforts to fabricate evidence it denied absolute immunity. Pet. App. 17a; *see Fogle* v. *Sokol*, 957 F.3d 148, 154 (3d Cir. 2020). In *Fogle*, as here, the plaintiff alleged that after the prosecutors' case "began to unravel," they "[w]ork[ed] collaboratively with" law enforcement to "recruit[]" and "pursu[e]" jailhouse informants to provide fabricated evidence. 957 F.3d at 154. Because the prosecutors were "seeking to *generate* evidence in support of a prosecution," the *Fogle* court concluded that they were "functioning not as advocates, but as investigators." Pet. App. 31a (emphasis added).

c. That distinction between the essentially investigative function of generating new evidence and the advocative function of organizing and preparing existing evidence for trial is amply supported by this Court's doctrine.[9] The Court has discerned "a

[9] It is also consistent with precedents from other circuits. See *Wearry*, 33 F.4th at 271 ("[E]vidence gathering and creation is investigatory in nature, while evidence presentation and organization is advocatory."); *Genzler*, 410 F.3d at 639 ("A prosecutor gathering evidence is more likely to be performing a quasi-judicial advocacy function when the prosecutor is 'organiz[ing], evaluati[ng], and marshaling [that] evidence' in preparation for a pending trial, in contrast to the police-like activity of '*acquiring* evidence which might be used in a prosecution.'") (quoting *Barbera*, 836 F.2d at 100).

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." *Buckley*, 509 U.S. at 273.

While the Court's discussion in *Buckley* references the probable cause determination as a potentially relevant factor, it also makes clear that "[e]ven after that determination * * * a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Buckley*, 509 U.S. at 274 n.5. And the Court cited Justice Kennedy's partial concurrence with approval on this point (*ibid.*), which lists "finding new leads" as an example of the investigative functions a prosecutor might engage in "even after there is probable cause." *Id.* at 290 (Kennedy, J., concurring in part and dissenting part).

"[F]inding new leads" is exactly what petitioner is alleged to have engaged in here: He "embarked on a post-charge search for a new witness to plug a hole in the prosecution's case." Pet. App. 9a. The court of appeals correctly characterized that conduct as investigative, and therefore entitled to only qualified immunity.

2. The dissent below resulted from a factual disagreement.

As noted above, although Judge Shwartz dissented from the Third Circuit panel's decision, her dispute was not with the legal standard that the majority applied. Cf. Pet. 1 (asserting that the court of appeals "deepened a widely-recognized and entrenched circuit conflict" "over a dissent by Judge Shwartz"). Instead, as she herself recognized, "[t]he primary difference

between the dissent and majority is our views of the complaint." Pet. App. 27a n.3.

Where the majority read the complaint to allege that petitioner actively sought out and identified Potter as a witness willing to fabricate testimony, the dissent read the complaint to allege that it was "the Detective" who "conducted a search" and "identified [Potter] as a potential witness." Pet. App. 27a n.3. While the dissenting opinion also pointed to other factors, the allegation—as Judge Shwartz understood the complaint—that "the Detective identified the witness to the ADA" was the key factor that prompted her to reach a different conclusion than the majority. Pet. App. 29a.

Again, the dispute in this case ultimately comes down to a *factual* disagreement about how best to understand what petitioner is alleged to have done. That fact-specific controversy does not merit this Court's review.

C. The Court should not impose a novel bright-line rule that would unjustifiably expand prosecutors' absolute immunity.

1. The petition urges the Court to abandon the functional approach it has long prescribed, at least in the post-charge context. In its place, petitioner would have the Court adopt a bright-line rule that "all post-charge prosecutorial actions are entitled to absolute immunity," perhaps with some unspecified but "vanishingly narrow" range of exceptions. Pet. 25.

The Court should not overthrow five decades of precedent affirming and reaffirming the functional approach to massively enlarge the scope of absolute immunity enjoyed by prosecutors. Because the Court endorses the "presumption" that "qualified rather than absolute immunity is sufficient" to protect the

discretion of executive officials in the exercise of their duties (*Burns*, 500 U.S. at 486-487), "qualified immunity represents the norm" for such officials (*Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982)). In line with this presumption, the Court has been "quite sparing" in recognizing absolute immunity," "refus[ing] to extend it any 'further than its justification would warrant.'" *Burns*, 500 U.S. at 487 (first quoting *Forrester*, 484 U.S. at 224, then quoting *Harlow*, 457 U.S. at 811).

Enlarging the scope of absolute immunity as petitioner proposes is certainly not justified. To do so would give prosecutors free rein to engage in misconduct after criminal charges have issued, safe in the knowledge that all of their post-charge actions are absolutely immunized against civil liability under Section 1983.

2. Further stripping away the potential to use civil liability to hold prosecutors to account for misconduct is especially unjustified given growing awareness that alternative accountability mechanisms, such as professional discipline and criminal sanctions, are ineffective at deterring misconduct.

When the Court first recognized absolute prosecutorial immunity from Section 1983 liability, it reasoned that prosecutors would not be completely shielded from accountability for serious misconduct, given the availability of other checks. The Court mentioned two such alternative mechanisms in particular. First, the Court pointed out that prosecutors remain within the reach of the criminal law. Even if immune from *civil* liability, prosecutors "could be punished *criminally* for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of § 1983." *Imbler*, 424 U.S. at 429 (emphasis added).

But although federal prosecutors can in theory bring criminal proceedings against their state or federal colleagues who willfully violate a defendant's constitutional rights under 18 U.S.C. § 242, scholars have shown that such criminal actions are "almost never brought," and the imposition of other criminal charges is likewise "rare." See Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 Cardozo L. Rev. 2089, 2094 (2010). Indeed, one study found that since the criminal provision codified at 18 U.S.C. § 242 was adopted in 1866, there has only been *one* conviction of a prosecutor under the statute. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 71 (2005).

The second accountability mechanism *Imbler* suggested could keep a prosecutor in check was "professional discipline by an association of his peers." 424 U.S. at 429. Again, however, scholars have found that the "practical reality is that few prosecutors are ever disciplined" by state bar associations. This paucity of professional discipline for professional misconduct is unsurprising, given that many state bars lack the resources to actively monitor and punish prosecutorial misconduct, relying instead on complaints. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 Fordham L. Rev. 851, 898-899 (1995). As a result, few cases of prosecutorial misconduct reach the attention of state bars. In those rare cases where state bars become aware of misconduct by prosecutors, they are often reluctant to impose sanctions. Barkow, *Organizational Guidelines*, at 2095-2096.[10]

---

[10] *Amicus* the Association of Prosecuting Attorneys implausibly suggests that a bright-line rule expanding absolute immunity is necessary to allow prosecutors to admit to past misconduct. The

Because of the inefficacy in practice of alternative mechanisms to hold prosecutors accountable, Section 1983 liability remains a vital tool to deter prosecutorial misconduct. The Court should not strip this tool away by accepting petitioner's invitation to adopt a novel bright-line rule absolutely immunizing all post-charge prosecutorial conduct.

3. Finally, the Court should not expand absolute prosecutorial immunity as petitioner requests because the doctrine is legally wrong to begin with. In other words, should the Court grant certiorari in this case to tinker with the details of absolute prosecutorial immunity, it must first address the logically prior question whether such immunity is lawful in the first place—and the answer is no.

Although the lawfulness of qualified immunity has received more judicial and scholarly attention (see, *e.g.*, *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1862-1864 (2020) (Thomas, J., dissenting from denial of cert.); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45 (2018)), absolute prosecutorial immunity shares the same fatal flaw: "[T]he presumed legislative intent not to eliminate traditional immunities is [the] only [potentially legitimate]

---

theory, as it goes, is that because conviction review units are typically housed in prosecutors' offices, a staff attorney will be "reluctant" to zealously investigate prosecutorial misconduct if that could "expose her boss, colleagues, or friends to civil liability." Ass'n of Prosecuting Att'ys Br. 15-16. The Association offers no support for this novel suggestion, which presupposes that public servant attorneys will be peer pressured to violate their professional and ethical obligations. Nor is there any reason to think that any impediment to post-conviction review would outweigh the reduced deterrent effect exerted by Section 1983 if liability for prosecutors' post-charge conduct were entirely eliminated.

justification for limiting the categorical language" of Section 1983 (*Burns*, 500 U.S. at 498 (Scalia, J., concurring in the judgment in part and dissenting in part)), yet "[t]here was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted." *Kalina*, 522 U.S. at 132 (Scalia, J., concurring).

Thus, "the doctrine of prosecutorial immunity appears to be mistaken as an original matter." *Wearry*, 33 F.4th at 273 (Ho, J., *dubitante*); see also *id.* at 279-280 (discussing the much narrower scope of historical common-law immunities potentially applicable to prosecutors); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1367 (2021) ("The best reading of the case law and treatises suggest that the common law in 1871 would have extended absolute immunity to the discretionary acts of high ranking executive officers but *not* government prosecutors.") (emphasis added).

What is more, even if—counterfactually—the historical common law would have recognized something approximating absolute prosecutorial immunity, recent scholarship suggests that Congress actually *did* intend to abrogate common-law immunities when it enacted what is now Section 1983. See *Rogers* v. *Jarrett*, 63 F.4th 971, 979-981 (5th Cir. 2023) (Willett, J., concurring) ("[T]he Supreme Court's original justification for [Section 1983] immunity—that Congress wouldn't have abrogated common-law immunities absent explicit language—is faulty because the 1871 Civil Rights Act *expressly included such language*.") (discussing Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023)). For this reason, too, the "principled way" forward is "by concluding that the entire doctrine of prosecutorial immunity is simply wrong as an original matter,

as only the Supreme Court can do." *Wearry*, 33 F.4th at 273 (Ho, J., *dubitante*).

Prosecutorial immunity's shaky historical foundations supply yet more reason why the Court should not grant review to expand the immunized conduct. And if it does grant certiorari, the Court should overturn the doctrine in whole.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

PAUL W. HUGHES
Counsel of Record
ANDREW A. LYONS-BERG
CHARLES SEIDELL
CALEB H. YONG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Respondent
Larry Trent Roberts