No. 23-1282

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

REPLY BRIEF FOR THE PETITIONER

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The questions presented are profoundly significant to the daily work of prosecutors across the nation. The ruling below exacerbates a recognized split regarding the scope of absolute prosecutorial immunity for post-charge actions, directly impacting every state and local prosecutor in the United States. Pennsylvania highlights the urgency of review warning the decision below "hinders the State's ability to enforce its criminal laws and undermines fairness and reliability in its justice system." Pa. Amicus 1. The Association of Prosecuting Attorneys echoes these concerns. The rule announced below "erodes prosecutorial independence" and "deepens an entrenched circuit split, cementing a chaotic and unworkable immunity regime." APA Amicus 4-5.

Respondent's arguments against review are meritless. The circuit split in this case is important and widely-recognized (*contra* Opp. 15-20). The ruling below is far from "correct[]" (*contra* Opp. 23). And confusion reigns in the lower courts over the boundary between post-charge "investigation" and "advocacy," underscoring

the need to revisit the fifth footnote in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) (*contra* Opp. 3). Finally, whether prosecutorial immunity stands on footing firm or weak, that is a question for another case; it is no basis to decline to resolve a clear and consequential split over the doctrine's correct application (*contra* Opp. 30-32). The Court should grant certiorari.

ARGUMENT

I. THIS COURT'S REVIEW OF THE QUESTIONS PRESENTED IS IMPERATIVE

A. There is a Recognized, Entrenched Split Over the First Question Presented

The error below that prompted Judge Shwartz's vigorous dissent was the majority's holding that any time a prosecutor "identif[ies] a hole in the state's case ahead of trial" and "attempt[s] to fill that hole by affirmatively searching for a new witness—[the prosecutor] will lose the protection of absolute immunity." Pet. App. 23a n.11. As Judge Shwartz explained, that holding means "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 … essentially narrow[ing] the advocacy work protected by absolute immunity to actions in the courtroom even though the law clearly recognizes that prosecutors engage in the work of an advocate outside the courtroom too." Pet. App. 30a-31a.[1]

1.a. The majority's holding is both incorrect and deepens a recognized circuit conflict over whether

[1] Judge Shwartz's view that a prosecutor should be able to "determine[] that an additional piece of evidence is needed to prove the crime beyond a reasonable doubt," without forfeiting immunity, shows that Judge Shwartz's dispute with the majority was more than a dispute over how to read the complaint (*contra* Opp. 26-27).

absolute immunity attaches for all (1) post-charge acts (2) taken to marshal evidence to present at trial.

Judges Jones, Smith, and Duncan identified this conflict just two years ago in their dissental in *Wearry v. Foster*, 52 F.4th 258, 260-64 (5th Cir. 2022) (Jones, J., dissental). Like the decision below, *Wearry* denied absolute prosecutorial immunity in a case that involved "a search for false witness testimony for use as evidence" after the defendant had already been charged. *Wearry v. Foster*, 33 F.4th 260, 267-68 (5th Cir. 2022). As Judge Jones explained, the *Wearry* panel "dramatically recharacterize[d], and thus confuse[d], the scope of absolute prosecutorial immunity in the Fifth Circuit," issuing an opinion that "fatally conflict[ed] with [the Fifth Circuit's] two-decade old opinion in *Cousin v. Small*, 325 F.3d 627 (5th Cir. 2003)," and "conflict[ed] with significant sister circuit decisions." *Wearry*, 52 F.4th at 260. At the core of the conflict is the principle that "post-indictment witness trial preparation" is an integral part of a prosecutor's advocacy function. *Id.* at 263. As Judge Jones explained:

> Compounding the intra-circuit conflict [with *Cousin*] is the conflict between *Wearry* and other circuits. *See, e.g.*, *Annappareddy v. Pascale*, 996 F.3d 120 (4th Cir. 2021) (citing *Cousin*, fabricating evidence while coaching a witness post-indictment is advocatory, and absolutely immune); *Fields v. Wharrie*, 740 F.3d 1107, 1115 (7th Cir. 2014) ("Once prosecution begins, bifurcating a prosecutor's role between investigation and prosecution is no longer feasible"); *Hill v. City of New York*, 45 F.3d 653, 662-63 (2d Cir. 1995) (if prosecutor's efforts that resulted in false testimony were undertaken for presentation before a grand jury, absolute immunity would apply).

Wearry, 52 F.4th at 262-63. Judge Ho "agree[d] with much of the dissent" and thus "would've granted prosecutorial immunity[.]" *Id.* at 259 (Ho, J., concurral).

Judge Shwartz, in dissent below, also recognized that the majority opinion opened a split, citing *Annappareddy*, 996 F.3d at 140, as supporting her position. As Judge Shwartz explained, *Annappareddy*, in direct conflict with the rule announced below, held that a prosecutor's fabrication of evidence was not "post-indictment police investigative work," but rather was undertaken in an "advocative" capacity to prepare for trial because: "(1) the conduct occurred only after the plaintiff had been identified as a suspect, after probable cause had been established, and after he had been twice indicted" and "(2) the complaint alleged that the prosecutor began to take a more hands-on approach in anticipation of trial, once she realized that the existing evidence was not nearly as favorable to the government as she had expected." Pet. App. 29a n.5 (cleaned up).

b. The cases in the split—spanning six circuits—speak for themselves. In the First, Second, Fourth, and (sometimes) Fifth circuits, a prosecutor's post-charge acts to marshal evidence for trial are entitled to immunity whether or not the prosecutor "affirmatively search[ed] for" the allegedly fabricated evidence. Pet. App. 23a n.11; *see Cousin*, 325 F.3d at 635 (granting immunity because the allegedly fabricated testimony "would be used in the presentation of the state's case at the pending trial of an already identified suspect"); *Annappareddy*, 996 F.3d at 139-40 (granting immunity based on "the timing" and because the prosecutor's alleged fabrication of evidence occurred "in preparation for [a] trial"); *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) (granting immunity for "allegedly conspiring to present false evidence at a criminal trial"); *Díaz-Colón v. Fuentes-Agostini*, 786 F.3d 144, 150-51 (1st Cir. 2015) (granting immunity because

suspect had already been charged and the prosecutor's actions were "in connection with preparing the Commonwealth's evidence at trial").

In the Third, D.C., and (other times) Fifth circuits, however, post-charge acts in preparation for trial are not necessarily immune. *See Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995) (denying prosecutorial immunity for post-charge conduct because coercing a witness to present false testimony categorically "relates to a typical police function, the collection of information to be used in a prosecution"); *Wearry*, 33 F.4th at 268-69 (denying prosecutorial immunity to a prosecutor who, post-charge, allegedly coerced a potential witness into presenting a fabricated story at defendant's trial); Pet. App. 23a (denying prosecutorial immunity because a prosecutor, post-charge, allegedly sought out new witness to secure testimony for trial).

c. Respondent argues "there is no circuit split regarding the governing legal standard," and "the courts of appeals uniformly apply this Court's longstanding 'functional approach' to prosecutorial immunity." Opp. 2, 15. Respondent is incorrect. The circuits disagree about a purely legal question essential to the correct application of prosecutorial immunity: what it means for a prosecutor to engage in "investigation" post-charge. The First, Second, Fourth, and (sometimes) Fifth circuits treat it as dispositive that once charges have attached, a prosecutor's efforts to gather additional evidence for use at trial constitute *advocacy* not investigation. The Third, D.C. and (other times) Fifth circuits do not.

Respondent argues the First, Second, Fourth, and (sometimes) Fifth circuits have not announced "bright-line rules." Opp. 16-19. But they have. As Judge Ho explained in his *Wearry dubitante* opinion, and as Judges Jones, Duncan, and Smith agreed in their dissental, the Fifth Circuit in *Cousin*, like three other circuits, held that

"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." 33 F.4th at 274 (Ho, J., *dubitante*); *see also* 52 F.4th at 261-63 (Jones, J., dissental) (similar).

To be sure, every circuit leaves open the possibility that some post-charge acts by a prosecutor can be investigative because *Buckley* footnote five requires that. *See Buckley*, 509 U.S. at 274 n.5; *see Wearry*, 33 F.4th at 274 (Ho, J., *dubitante*). But in three circuits (and sometimes the Fifth) the universe of post-charge acts by prosecutors that forfeit immunity is narrow, limited to acts that are unrelated to the preparation of evidence for trial. *Wearry*, 33 F.4th at 274 (Ho, J., *dubitante*). "For example, a prosecutor might interview an insignificant witness with no intention of ever using that interview for trial, and that interview might not be subject to prosecutorial immunity, even if it takes place after indictment." *Id.* But outside of that narrow compass, virtually all post-charge acts by prosecutors are immune.

The bottom line is that prosecutors in three circuits know that they can plug a "hole in [their] case" by locating new evidence for trial without risking protracted litigation and bankrupting liability. Pet. App. 9a. But in the Third and D.C. Circuits, the opposite is true. And in the Fifth Circuit, it depends on the panel.

2. Contrary to respondent's claim, the lower courts have been mired in confusion over the distinction between post-charge investigation and advocacy ever since *Buckley*. That confusion is not something petitioner just conjured up; legal commentators have repeatedly acknowledged the widespread uncertainty surrounding the scope of prosecutorial immunity in the lower courts. Pet. 2 n.1 (collecting sources). Indeed, they have gone further, and explained at length how the consequences of

allowing this confusion to persist are severe and far-reaching. *Id.* The time to resolve this growing problem is now, before it continues to undermine the integrity and consistency of prosecutorial conduct nationwide.

Respondent argues that there is no confusion (just as there "is no circuit split"). "[D]ivergent 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." Opp. 21. That is false. Commentators do not write articles about uncertainty and confusion when the law is clear. Courts do not fracture sharply when the law is clear. Yet they have repeatedly over this issue. Consider *Wearry* where seven judges voted in favor of rehearing (Judges Richman, Jones, Smith, Southwick, Duncan, Oldham, and Wilson), 52 F.4th at 259, and three publicly dissented, decrying the "confus[ion]" in the law, *id.* at 260 (Jones, J., dissental). Or look at this case, where the majority denied immunity while Judge Shwartz, the only former prosecutor on the panel, stated that petitioner's conduct was "*clearly* the work of an advocate" and the majority's rule "essentially narrows the advocacy work protected by absolute immunity to actions in the courtroom." Pet. App. 30a-31a (emphasis added). Cases like this one—cases that should be "clear[]"—are hard because there is manifest confusion about what this Court meant when it held prosecutors could still engage in "investigative" acts *after* charges have been brought, despite the entire purpose of investigation being to bring charges. *See Buckley*, 509 U.S. at 273-74.

4. Respondent's other argument against review—that the decision below is "correct[]" (Opp. 23-27)—is immaterial at this juncture. The time to determine the correctness of the decision below is on plenary review, not at the certiorari stage. In any event, respondent is flat wrong. Prosecutors build their preliminary case using

evidence provided by police but then bolster that evidence to ensure they can prove guilt beyond a reasonable doubt. *See* APA Amicus 5, 8; Pa. Amicus 4. The distinction respondent claims this Court has drawn for purposes of prosecutorial immunity—between a prosecutor who interviews a witness identified by police, and a prosecutor who interviews a witness identified (for example) by another witness—has no basis in doctrine or common sense. The availability of prosecutorial immunity cannot possibly turn on such artificial distinctions as whether the prosecutor merely "interviewed" or instead "went out and found" a witness to testify at trial. What matters is how the evidence is to be used—if it is for use at trial, the act is advocacy; if it is for use to make a charging decision, the act is investigative. That is the line *Buckley* drew. *Buckley*, 509 U.S. at 273-74.

5. The consequences of the decision below are difficult to overstate. As Pennsylvania explains, the test announced below is "fatal to the doctrine of absolute immunity" because "[i]ts operation cannot be predicted by real-world prosecutors preparing real criminal trials." Pa. Amicus 2. "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." *Id.* at 5. The majority's rule "penalizes responsible prosecutors and incentivizes paralysis. It promotes precisely the kind of second-guessing and reluctance that absolute immunity exists to prevent." *Id.* at 5-6. As APA adds, "[t]he Third Circuit's decision ignores the prosecutor's role as a minister of justice, and the criminal justice system is worse for it." APA Amicus 4.

The rule announced below—that "looking for" evidence to fill a "hole" in the prosecution's case forfeits immunity, Pet. App. 8a-9a—eliminates prosecutorial immunity for many acts that fall within the heartland of the prosecutor's function. It means interviewing a witness

identified by another witness during trial preparation forfeits immunity. Subpoenaing bank records to verify a witness's story forfeits immunity. Calling a witness's employers to verify her credibility forfeits immunity. Interviewing a cellmate who spent time in pretrial custody with the defendant forfeits immunity. Taking a voluntary confession from a co-conspirator forfeits immunity. *See also* Pa. Amicus 4 (listing additional hypotheticals). It sounds outlandish, but it is the rule announced below and endorsed by respondent. *See, e.g.*, Opp. 25 ("seeking to generate evidence in support of a prosecution" is "an investigator's work"). It is a "rule [that] penalizes responsible prosecutors and incentivizes paralysis." Pa. Amicus 5.

B. This Court's Review of the Second Question Presented Would Provide Crucial Guidance

The second question presented asks the Court to 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" because "a prosecutor may engage in 'police investigative work' that is only entitled to qualified immunity." *Buckley*, 509 U.S. at 274 n.5. Respondent's brief only underscores the need to revisit footnote five.[2]

1. Footnote five has been misconstrued and confused from the start. From that footnote alone, lower courts have denied immunity for acts at the very core of prosecutorial advocacy. Here, petitioner did what any prosecutor would do: he looked for evidence to fill a hole

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[2] The doctrinal parallels between this case and *Edwards v. Vannoy*, 593 U.S. 255 (2021), are striking. As Justices Gorsuch and Thomas recognized in that case, this Court has a special obligation to recede from misleading dictum. *See Edwards*, 593 U.S. at 294 (Gorsuch, J., concurring); *id.* at 281-82 (Thomas, J., concurring).

in his case at trial. If a prosecutor can be held personally liable for that, it is hard to envision a case where a prosecutor will not be exposed to liability.

2. Respondent is wrong that receding from footnote five would "overthrow five decades of precedent." Opp. 28. This Court has *never* applied footnote five to post-charge conduct in the years since that decision and has never once found that a prosecutor engaged in post-charge "investigation." Receding from footnote five would preserve the functional approach in the pre-charge context where it actually makes sense; it would simply recognize that a prosecutor, by definition, cannot engage in "investigative" functions once charges have already been brought.

3. Respondent is also wrong that receding from footnote five would "strip[] away the potential to use civil liability to hold prosecutors to account for misconduct," Opp. 28, or "expand absolute prosecutorial immunity," Opp. 30. Those arguments incorrectly assume that prosecutors *can* engage in "investigative" acts post-charge. But *Buckley* was wrong to suggest that. *Buckley* said a door is open that is in fact deadbolt shut: there simply are no post-charge acts that a prosecutor can take that are "investigative" because investigation, by definition, is undertaken to bring charges. Petitioner's request that the Court revisit footnote five is not a request to "expand" prosecutorial immunity, but merely to ensure that lower courts apply it correctly.

II. RESPONDENT'S VEHICLE ARGUMENT IS MERITLESS

This case is an ideal vehicle for resolving the questions presented. Pet. 31. There are no disputed facts. Whether petitioner's acts constituted investigation or advocacy—a purely legal question—was dispositive below. Respondent does not contest this.

Respondent's lone vehicle argument fails. The Court would not "have to" address whether absolute immunity "is lawful" to settle a conflict over its correct application (Opp. 30). The Court frequently grants review of important questions while assuming, without deciding, antecedent questions.[3] The appropriate sequence would be for this Court to grant the questions presented and, if it finds that the Third Circuit majority erred in its application of prosecutorial immunity, clarify the test, vacate the decision, and remand so the Third Circuit can apply the correct test. If the Third Circuit holds on remand that prosecutorial immunity bars this suit, respondent can file a petition for certiorari asking the Court to overrule its 100 years of precedent recognizing the doctrine. *See Van de Kamp v. Goldstein*, 555 U.S. 335, 341-42 (2009) (tracing history).

[3] For example, in *Lucia v. SEC*, the government argued in its certiorari- and merits-stage briefing that, to determine whether administrative law judges were "Officers of the United States," the Court would have to address whether the removal restrictions on ALJs were constitutional. The Court declined to address that question. *See* 585 U.S. 237, 244 n.1 (2018).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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