No.

IN THE

Supreme Court of the United States

LISA PRICE, Personal Representative of the Estate of Nickie Miller,

Petitioner,

v.

MONTGOMERY COUNTY, KENTUCKY, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Nickie Miller was wrongly incarcerated for two years for a murder he did not commit. The charges were based on a coerced confession from a woman who later wrote multiple letters admitting that her confession was false. The trial court ordered these exculpatory letters turned over to Miller's defense team. But the lead prosecutor, Respondent Keith Craycraft, instead instructed the woman to destroy them. The charges were eventually dropped before trial. Miller then sued Respondent for damages under 42 U.S.C. § 1983. In a split decision, the Sixth Circuit held that Respondent was entitled to dismissal on absolute immunity grounds.

The questions presented, each of which is the subject of a circuit conflict, are:

1. Is absolute immunity unavailable under § 1983 where a prosecutor knowingly destroys exculpatory evidence?

2. Is absolute immunity unavailable under § 1983 where a prosecutor defies a court order that compels specific action, leaving no room for the exercise of discretion?

RELATED PROCEEDINGS

Price v. Montgomery County, Kentucky, et al., No. 21-6076 (6th Cir. judgment entered July 5, 2023)

Miller v. Montgomery County, et al., No. 5:18-cv-00619-DCR-EBA (E.D. Ky. judgment entered Nov. 5, 2021)

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INTRODUCTION

This Court has strictly cabined the absolute immunity defense for prosecutorial wrongdoing. Prosecutors are entitled to absolute immunity only when they perform functions that require advocative "discretion." *Kalina v. Fletcher*, 522 U.S. 118, 125 (1997). The defense is unavailable for administrative or ministerial functions that entail no such discretion. Absolute immunity is thus "quite sparing." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). Courts may impose its extreme costs—denying any remedy to victims of egregious misconduct—only where necessary to insulate the exercise of advocative discretion from the threat of civil liability. Those boundaries have become even more essential as the doctrine's shaky textual and historical foundations have come under renewed scrutiny. *See Kalina*, 522 U.S. at 132 (Scalia, J., concurring, joined by Thomas, J.) ("There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted."); Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1367 (2021) ("the common law of 1871 had not recognized any such immunity").

The Sixth Circuit exceeded those boundaries in this case, deepening two circuit splits along the way. The prosecutorial misconduct at issue had nothing to do with advocative discretion. Kentucky officials wrongfully charged Nickie Miller for a murder he did not commit. The charges were premised on a false, coerced confession that the witness recanted in letters exchanged with her husband from jail. Upon learning of the letters, the trial court classified them as exculpatory evidence and mandated their disclosure to the

defense. That order left the lead prosecutor, Respondent Keith Craycraft, with a ministerial task: ensure the letters were turned over. Instead, he directed that they be destroyed.

The Sixth Circuit nonetheless granted Craycraft absolute immunity by improperly expanding the doctrine—and splitting from other courts of appeals—in two different ways. First, the Sixth Circuit extended absolute immunity to a prosecutor's decision to intentionally destroy evidence. But deciding to dispose of evidence, unlike the assessment of the government's *Brady* obligations during discovery, is not a function that requires advocative discretion. It is an administrative task within the prosecutor's office. That is why the Third Circuit denies absolute immunity for the knowing destruction of evidence. The Sixth Circuit—echoing the Fourth and Seventh Circuits—held otherwise only by expressly rejecting the Third Circuit's rule and mistakenly conflating the destruction of evidence with *Brady* analysis.

Second, the Sixth Circuit majority—over Judge Nalbandian's comprehensive objections—extended absolute immunity to a prosecutor's defiance of a court order that compels specific action and leaves no room for discretion. By definition, however, responding to that type of order is not a function requiring advocative discretion. It is a ministerial task demanding no legal judgment. That is why the Third and Tenth Circuits deny absolute immunity for violating such orders, including those that compel the production of specific evidence. The Sixth Circuit, following the Eighth and Eleventh Circuits, held otherwise only by abandoning advocative discretion as the

touchstone for absolute immunity analysis. The Sixth Circuit instead granted absolute immunity solely because "matters related to a court order in a criminal case are naturally part of the prosecutorial process." Pet. App. 15a. That expansive framework flies in the face of this Court's carefully cabined precedent.

The absolute immunity issues that this case presents are important and recurring, and this case is an excellent vehicle for resolving them. The Court should grant certiorari to resolve these two circuit splits and restore critical boundaries on the absolute immunity defense.

OPINIONS AND ORDERS BELOW

The Sixth Circuit's opinion (Pet. App. 1a-47a) is reported at 72 F.4th 711. The district court's decision granting Respondent's motion to dismiss on absolute immunity grounds (Pet. App. 90a-97a) is unpublished but reported at 2019 WL 499744. The decision of the Sixth Circuit denying Price's petition for rehearing en banc is unpublished but reproduced at Pet. App. 98a-99a.

JURISDICTION

The Sixth Circuit issued its decision on July 5, 2023, and denied a timely petition for rehearing en banc on August 15, 2023. Pet. App. 1a-47a, 98a-99a. On November 6, 2023, this Court granted a 30-day extension of time to file a petition for certiorari, to and including December 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1983 of Title 42 of the U.S. Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

STATEMENT OF THE CASE

Absolute Immunity Is Limited To Prosecutorial Functions That Need Advocative Discretion

Absolute prosecutorial immunity imposes uniquely high costs on "the genuinely wronged defendant," denying "civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). This Court has accepted those costs as necessary "evils," but only in narrow circumstances. *See id.* at 428 (citation omitted). Absolute immunity shields prosecutorial "functions" that need "wide discretion in the conduct of the trial and the presentation of evidence." *Id.* at 426, 430. This Court has found it necessary to insulate those functions from civil liability to ensure that prosecutors are undeterred in "exercising the independence of judgment required by [the] public

trust." *Id.* at 423. Where the prosecutor's functions do not require such judgment, however, the "rationale" for absolute immunity does not apply. *Kalina*, 522 U.S. at 125. The "presumption" is that qualified—rather than absolute—immunity suffices "to protect government officials in the exercise of their duties." *Burns v. Reed*, 500 U.S. 478, 486-87 (1991).

The touchstone of absolute immunity is advocative discretion. The defense is not automatically available based merely on the "identity of the actor" or the fact that the conduct "occurred during criminal proceedings." *Buckley*, 509 U.S. at 269-71. Rather, courts must ask whether the prosecutor acted "as an advocate," *id.* at 273, by performing a function that "necessarily require[s] legal knowledge and … related discretion," *Van de Kamp v. Goldstein*, 555 U.S. 335, 344 (2009). If not, absolute immunity is unavailable.

The defense therefore does not extend to performing "administrative duties" or "investigatory functions" that do not demand advocative discretion. *Buckley*, 509 U.S. at 273. For example, this Court has declined to extend absolute immunity to a prosecutor's false factual statements in an arrest warrant application because the function of "[t]estifying about facts" did not entail "the exercise of the judgment of the advocate." *Kalina*, 522 U.S. at 130. This Court reached that conclusion even though other functions related to the same arrest warrant application "involved the exercise of professional judgment" and triggered absolute immunity, including the "determination that the evidence was sufficiently strong to justify a probable-cause finding." *Id.*

Respondent Craycraft, Defying A Court Order, Directs That Exculpatory Evidence Be Destroyed

This case is about prosecutorial misconduct far removed from advocative discretion. It began when Kentucky officials wrongfully charged Nickie Miller for a murder he did not commit. The charges stemmed from a homicide investigation that had gone "cold for nearly four years." Pet. App. 4a. After all that time, a prison inmate the police had previously interviewed reached out with an entirely different story than the one she had related earlier. *Id.* It involved a convoluted conspiracy implicating Miller, two women, and a man named Cody Hall. *Id.* The police knew the story clashed not merely with the inmate's prior statements, but also with DNA evidence "found at the scene." *Id.* Nonetheless, with no other leads, the police interviewed the two women the inmate had named. *Id.* They in turn implicated Hall's wife, Natasha Martin. *Id.*

Police knew the women's story was false. *Id.* Yet they interrogated Martin anyway. And they used a range of improperly coercive tactics, including falsely telling Martin her DNA was found at the crime scene, implying that her children could be taken away if she did not implicate anyone else, and assuring her she would "walk" if she named the perpetrators. Pet. App. 4a-6a; R.1, PageID# 13-19.[1]

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[1] Citations to the district court record are in the form of "R.__, PageID#__," where R. indicates the district court docket number and PageID# indicates the page number.

Martin succumbed to the coercion. In exchange for a "diversionary deal" involving "no jail time," she made a false statement implicating herself, Miller, and Hall in the murder. Pet. App. 6a; R.1, PageID# 18. But within 24 hours, she started recanting. "[K]nowing [her] in-station confession was false," Martin first tried to withdraw her confession the "next morning." Pet. App. 7a. The police refused to "believe her ... despite knowing that some of the information she originally provided was incorrect," and prosecutors filed charges against Miller and Hall. *Id.* Soon after, Martin again recanted her confession in jailhouse letters to Hall, explaining that her false statements had been "obtained through 'coercive interrogation techniques, threats, and undisclosed promises of consideration.'" *Id.* (quoting R.1, PageID# 24). Hall responded that he and Miller "were both innocent." *Id.*

On a motion from defense counsel, the Kentucky trial court ordered Kentucky officials to turn the letters over. The order was unequivocal. It stated that the court found the specific letters at issue "exculpatory in nature and necessary to the defense of Defendant Nicki Miller." Pet. App. 43a-44a (quoting R.118-70, PageID# 3496). The order then compelled Kentucky officials to "immediately go to" Martin to secure the letters and turn them over. Pet. App. 44a. The court issued the order "*ex parte*." *Id.* (quoting R.1, PageID# 25). The only Kentucky officials privy to the order were "the prosecution team," led by Craycraft. *Id.*

But Craycraft did not turn over Martin's letters. Instead, he spoke with Martin on his personal cell

phone and "successful[ly] pressur[ed]" her to destroy the letters. Pet. App. 7a, 12a; R.1, PageID# 25-28. This was a ploy to salvage the case against Miller by "removing the most critical and probative evidence remaining in the case." R.1, PageID# 27. And it kept the prosecution going—and Miller incarcerated while awaiting trial—for a total of two years. Eventually, however, the prosecution dropped all charges against Miller. Pet. App. 8a.

The District Court Grants Craycraft Absolute Immunity

Having endured two years of wrongful prosecution and incarceration, Miller sued several Kentucky officials and a county for damages under 42 U.S.C. § 1983. As relevant here, Miller alleged that the prosecutor, Craycraft, had violated his constitutional rights by knowingly directing the destruction of exculpatory materials in defiance of a court order specifically compelling their disclosure. Pet. App. 8a; R.1, PageID #25-29.

Craycraft moved to dismiss Miller's § 1983 claims on grounds of absolute prosecutorial immunity. Pet. App. 97a. The district court granted the motion. *Id.* Miller appealed to the Sixth Circuit, but he died after filing the appeal. Pet. App. 8a. Miller's daughter, Petitioner Lisa Price, substituted for him as the plaintiff, representing his estate. *Id.*

A Divided Sixth Circuit Panel Affirms, Deepening Two Circuit Splits

A divided panel of the Sixth Circuit affirmed the dismissal of Petitioner's claims on absolute immunity grounds. Pet. App. 1a-47a. In doing so, the majority extended the absolute immunity defense beyond two distinct boundaries that several other circuits enforce. Judge Nalbandian, writing separately, raised extensive concerns on both fronts.

First, the majority extended absolute immunity to a prosecutor's knowing destruction of evidence. As the "starting point" for its analysis, the majority noted that absolute immunity has long insulated a different prosecutorial function from civil suit: a prosecutor's assessment of what evidence must be produced during discovery under *Brady v. Maryland*, 373 U.S. 83 (1963). Pet. App. 13a (citing *Imbler*, 424 U.S. at 431 n.34). From there, the majority reasoned that absolute immunity applies with equal force to the function of deciding whether to destroy evidence. In the majority's view, prosecutors destroy evidence in their "'advocative' capacity." *Id.* (quoting *Annappareddy v. Pascale*, 996 F.3d 120, 142 (4th Cir. 2021)).

The majority acknowledged that the Third Circuit has reached the opposite conclusion and explicitly disagreed with that holding. Pet. App. 14a (discussing *Yarris v. Cnty. of Delaware*, 465 F.3d 129, 137 (3d Cir. 2006)).

Although Judge Nalbandian concurred on this point, he cautioned that the absolute immunity doctrine is "unmoored from the text of § 1983" and that

extending the defense to encompass the knowing destruction of exculpatory evidence is "incongruous with what ought to be our instincts about fairness and justice." Pet. App. 39a n.6. In light of those concerns, Judge Nalbandian urged this Court to "take a fresh look at this issue" with its "renewed focus on the common-law foundations of legal doctrine." Pet. App. 39a-40a n.6.

Second, the Sixth Circuit majority extended absolute immunity to a prosecutor's knowing defiance of a court order that compels specific action and leaves no room for prosecutorial discretion. The majority could not dispute that was exactly what happened here: The Kentucky trial court specified that Martin's letters were "exculpatory" and unequivocally directed that they be produced. *Supra* 7. Nonetheless, the majority concluded that absolute immunity shielded Craycraft's refusal to abide by the order merely because the order issued during an ongoing criminal case. "By definition," the majority stated, "matters related to a court order in a criminal case are naturally part of the prosecutorial process" and thus subject to absolute immunity. Pet. App. 15a.

Judge Nalbandian disagreed. He explained that the majority's rationale clashed with this Court's absolute immunity precedents and the law of other circuits. Judge Nalbandian underscored that the absolute immunity defense hinges on the presence of advocative discretion: "where a prosecutor has no discretion to act in his role as an advocate, he can't get absolute immunity." Pet. App. 42a. That means the defense is unavailable where a prosecutor defies a court order that "stripped" away "all discretion," like

the Kentucky trial court's order in this case to "turn over specific pieces of evidence." Pet. App. 46a. Such orders leave no "judgment call for the prosecutor to make," so "violating the order was not within his discretion as an advocate." Pet. App. 45a-46a. Judge Nalbandian expressly pointed to decisions from the First and Third Circuits tracking that boundary on absolute immunity. Pet. App. 41a-43a (citing *Odd v. Malone*, 538 F.3d 202, 214 (3d Cir. 2008), and *Reid v. New Hampshire*, 56 F.3d 332, 337 (1st Cir. 1995)).

Judge Nalbandian concurred in the result only because he separately concluded that Craycraft would be entitled to qualified immunity. Pet. App. 46a-47a. Craycraft had not raised that defense, and the district court and panel majority decisions did not address it.

The Sixth Circuit denied rehearing en banc without comment. Pet. App. 98a-99a.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Deepened Two Splits Regarding The Scope Of Absolute Immunity.

By extending absolute immunity to Craycraft's egregious misconduct, the Sixth Circuit deepened splits on two distinct questions about the defense's limits: whether it shields a prosecutor's knowing destruction of evidence, and whether it covers a prosecutor's defiance of a court order that compels specific action and leaves no room for the exercise of discretion. Either split alone would warrant this Court's review. The fact that this case implicates both splits makes it a particularly good candidate for certiorari,

providing the opportunity for this Court to clarify two vital boundaries on the absolute immunity doctrine.

A. The circuits are split 3-1 on whether absolute immunity extends to a prosecutor's knowing destruction of evidence.

As the Sixth Circuit expressly acknowledged, the circuits disagree about whether prosecutors are entitled to absolute immunity where they knowingly destroyed evidence. Pet. App. 13a. The courts agree that a different function—deciding what evidence must be produced in discovery under *Brady*—falls within the scope of absolute immunity. *See Imbler*, 424 U.S. at 431 & n.34. But the circuits are at odds about whether the knowing destruction of evidence warrants the same treatment.

The Third Circuit says no. *Yarris* drew a sharp line between assessing *Brady* obligations and deciding whether to dispose of evidence. It deemed *Brady* analysis to be "an act of advocacy" involving "protectible prosecutorial discretion" and thus subject to absolute immunity. 465 F.3d at 136-37 (citation omitted). But the Third Circuit explained that deciding to *destroy* evidence "is not such an act" because it does not reflect advocacy in any relevant sense and so implicates "no additional protectible prosecutorial discretion." *Id.* (citation omitted). The Third Circuit has reaffirmed its rule in recent years, emphasizing that "the knowing destruction of exculpatory evidence … is not part of the prosecutorial function and therefore not entitled to absolute immunity." *Munchinski v. Solomon*, 747 F. App'x 52, 57 (3d Cir. 2018); *see also*

Odd, 538 F.3d at 211 ("[P]rosecutors never enjoy absolute immunity for deliberately destroying exculpatory evidence.").

The Sixth Circuit in this case joined the Fourth and Seventh Circuits in rejecting the Third Circuit's "dichotomy." Pet. App. 14a. These circuits recognize no distinction, for absolute immunity purposes, between the function of assessing *Brady* obligations and that of deciding to destroy evidence. As the Sixth Circuit saw things, "[i]n both instances, the 'decision is made in an advocative capacity.'" Pet. App. 13a (quoting *Annappareddy*, 996 F.3d at 142). That is because, in the Sixth Circuit's view, *any* decision about "what to do with ... evidence" automatically "goes to the heart of the advocate's role" in "presenting the State's case," and so "cannot be characterized as merely administrative or ... merely investigative." Pet. App. 14a (quoting *Ybarra v. Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 679 (9th Cir. 1984)).

The Fourth Circuit ruled similarly in *Annappareddy*. That decision too rejected the Third Circuit's rule as drawing a "distinction" between assessing *Brady* obligations and deciding to destroy evidence that was not "workable." 996 F.3d at 142 n.13. The Fourth Circuit instead depicted those distinct functions as "two sides of the same coin." *Id.* at 142. On that basis, *Annappareddy* extended absolute immunity to a prosecutor's knowing destruction of evidence, overruling the district court's holding that such destruction was by its nature "administrative" and thus not entitled to absolute immunity. *Id.* at 141-42.

The Seventh Circuit applies the same rule as the Fourth and Sixth Circuits. *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978), extended absolute immunity to claims that prosecutors "destroyed and falsified a line-up report and police tapes of incoming telephone calls." *Id.* at 432. The court offered no rationale for that expansion of absolute immunity beyond a citation to *Imbler*. *See id.* (citing *Imbler*, 424 U.S. at 427). *Heidelberg* preceded the Third Circuit's decision in *Yarris*, which expressly rejected the Seventh Circuit's rule. *See Yarris*, 465 F.3d at 136 (citing *Heidelberg*, 577 F.2d at 432).

Altogether, therefore, the split on this issue is explicit and entrenched, with decisions on each side directly acknowledging and rejecting the other side's view.

B. The circuits are split 3-2 on whether absolute immunity extends to a prosecutor's defiance of a court order that leaves no room for discretion.

As Judge Nalbandian emphasized below, the circuits separately disagree on a further issue: whether absolute immunity extends to a prosecutor's defiance of a court order that compels specific action and leaves no room for the exercise of discretion. Cases on both sides of that split disagree more specifically about whether absolute immunity shields a prosecutor's violation of an order to disclose specified evidence.

1. The Third and Tenth Circuits both hold that absolute immunity does not shield a prosecutor's defiance of specific court orders because such

misconduct does not implicate advocative discretion. The Third Circuit drew that boundary 15 years ago in *Odd*. At the prosecutor's request, the state trial court there had ordered a person detained as a material witness in criminal proceedings that were ongoing before another judge. 538 F.3d at 205. To ensure the incarceration lasted only as long as necessary, the trial court issued an order with "explicit instructions" that the prosecutor report any continuance in the related criminal proceedings so that the court could release the witness from custody. *Id.* at 205, 213-14. The prosecutor flouted that order and stayed silent when the related proceedings were continued, preventing the witness's release for nearly two months. *Id.* at 206.

The Third Circuit denied absolute immunity for that misconduct because the court's "explicit order" had imposed only an "administrative" "obligation." *Id.* at 213. The prosecutor's sole function under the order was "to advise" the court of "facts," a ministerial task that left no room for the sort of discretionary "advocacy" that might trigger absolute immunity. *Id.* That ruling reflected a fundamental boundary on the absolute immunity defense. As the Third Circuit put it, "[w]e can imagine few circumstances under which we would consider the act of disobeying a court order or directive to be advocative, and we are loath to grant a prosecutor absolute immunity for such disobedience." *Id.* at 214.

Applying that rule, the Third Circuit subsequently denied absolute immunity in a situation even closer to the facts here: where a prosecutor defied a court order requiring disclosure of particular evidence. The prosecutor in *Munchinski v. Solomon* had

been ordered to produce "the 'complete and entire' Pennsylvania State Police investigation file" in connection with a challenge to a criminal conviction. 618 F. App'x 150, 153 (3d Cir. 2015). He failed to comply. *Id.* The Third Circuit declined to extend absolute immunity for that misconduct because, as in *Odd*, the court order left no room for the prosecutor "to exercise any discretion." *Id.* at 155. The prosecutor did not, for example, need to "make judgments" about the scope of his *Brady* obligations. *Id.* at 156 (citing *Reid*, 56 F.3d at 336-38). The order identified the specific evidence to be disclosed, leaving the prosecutor with only the ministerial function of delivering the material as instructed.

The Tenth Circuit enforces this same boundary on absolute immunity. *Gagan v. Norton*, 35 F.3d 1473 (10th Cir. 1994), likewise involved a court order for the production of specific evidence in connection with a challenge to a criminal conviction. The order compelled a court reporter to prepare and disclose transcripts documenting relevant judicial proceedings. *Id.* at 1474-75. The prosecutor in the case intervened and ordered the court reporter "not to prepare the transcripts." *Id.* at 1475. The Tenth Circuit denied absolute immunity for that misconduct. It reiterated that "the determinative factor" in applying absolute immunity "is 'advocacy.'" *Id.* (citation omitted). Echoing the Third Circuit's ruling in *Munchinski*, the Tenth Circuit emphasized that "contravening the authority of the judicial branch" by defying the clear command of a court does not "constitute the kind of advocacy" protected by the absolute immunity defense. *Id.* at 1476. The Tenth Circuit has since reaffirmed that rule, denying absolute immunity where a prosecutor

defied a court order barring use of a search warrant to collect particular evidence. *Auguste v. Alderden*, 231 F. App'x 832, 835 (10th Cir. 2007).

While the First Circuit has not expressly joined the Third and Tenth Circuits on this issue, its jurisprudence tracks the same boundary on absolute immunity. In *Reid*, the trial court issued orders granting defense motions for the production of "any 'exculpatory' evidence which could assist [the defendant] in the preparation and presentation of his defense." 56 F.3d at 337. The defendant later sued the prosecutors for failing to disclose exculpatory evidence, arguing that the prosecutors had violated the court orders by failing to meet their *Brady* obligations. *Id.* at 335-36. The First Circuit dismissed the suit on absolute immunity grounds. *Id.* at 336-37. But it did so only because the court orders at issue, unlike those in *Munchinski* and *Gagan*, had *preserved* "prosecutorial discretion." *Id.* at 337. The orders simply reiterated the *Brady* standard, leaving prosecutors with the advocative task of "determin[ing] what evidence in their possession was 'exculpatory' and subject to disclosure." *Id.* That judgment-laden exercise was far more involved than the "ministerial function" of handing over materials identified by the court. *Id. Reid*'s careful distinction suggests, as *Munchinski* and *Gagan* held, that the prosecutors would not have received absolute immunity had the order stripped away their discretion by specifying precisely what evidence to produce.

2. The Sixth Circuit majority in this case deviated from the above-cited circuits, aligning instead with

the more expansive view of absolute immunity held by the Eighth and Eleventh Circuits.

The Sixth Circuit majority did not dispute that the trial court's order in this case stripped away any advocative discretion and left only the ministerial duty to turn over the exculpatory letters. But the majority abandoned advocative discretion as the touchstone of its absolute immunity analysis. It focused instead on timing. In the majority's view, what mattered was that the order issued during an ongoing criminal case. "By definition," the majority stated, "matters related to a court order in a criminal case are naturally part of the prosecutorial process" and subject to absolute immunity, regardless of the order's content. Pet. App. 15a. The majority thus paid no heed to the distinction between orders that eliminate advocative discretion (as in *Munchinski* and *Gagan*) and those that preserve it (as in *Reid*).

The Eleventh Circuit has expanded absolute immunity in the same way. The state trial court in *Hart v. Hodges*, 587 F.3d 1288 (11th Cir. 2009), issued an order that expressly directed the state prosecutor not to imprison the defendant after his release from federal custody. *Id.* at 1292. The prosecutor declined to comply, and the defendant was instead "detained ... in shackles" and incarcerated immediately upon his release from federal prison. *Id.* at 1292-93. The Eleventh Circuit held that absolute immunity shielded the prosecutor's misconduct merely because the order at issue related to "the state trial court's sentence." *Id.* at 1297-98. *Hart* rejected as not "persuasive" decisions from other circuits—including *Odd* and *Gagan*—that declined to extend absolute immunity to

"prosecutors' disobedience of judicial orders" that stripped away all advocative discretion. *Id.* at 1298 n.11.

The Sixth Circuit majority purported to draw further support from the Eighth Circuit's decision in *Webster v. Gibson*, 913 F.2d 510 (8th Cir. 1990). It read that decision as having "established a rule that prosecutors maintain absolute immunity in directly violating court orders presented to and directed at them." Pet. App. 16a. Although *Webster* did not in fact go that far, its holding nevertheless further conflicts with the Third and Tenth Circuits. The state trial court in *Webster* ordered a state prosecutor to release a detainee in the event an information was not "filed immediately"—a purely ministerial task. 913 F.2d at 512. The prosecutor nonetheless declined to release the detainee for two months even though no information was filed. *Id.* The Eighth Circuit granted absolute immunity for that noncompliance—a ruling the Third and Tenth Circuits would not endorse. But the Eighth Circuit appeared to rely on a mischaracterization of the court order and its relationship to the prosecutor's advocative discretion. *Webster* improperly framed the order as a command "to file an information" (a discretionary decision) rather than a command to release a detainee from custody (a ministerial task) in the event no information was filed. *Id.* at 514. That misunderstanding shaped the Eighth Circuit's conclusion that the prosecutor's noncompliance was sufficiently "related to initiating a prosecution and presenting the state's case" to trigger absolute immunity. *Id.* at 513-14.

In short, the split on this second issue is also explicit, with decisions on each side directly acknowledging and rejecting the other side's views.

3. The Sixth Circuit majority unpersuasively downplayed its disagreement with the circuits on the other side of the split.

The majority first suggested that the Third and Tenth Circuits' contrary decisions are distinguishable because they lacked "an active prosecution at the time of the prosecutor's misdeed." Pet. App. 17a. That is both factually wrong and irrelevant to those courts' legal reasoning. *Odd*, for example, denied absolute immunity where the prosecutor defied an order demanding updates on an *ongoing prosecution*, which were relevant to decisions about the *ongoing detention* of a material witness. 538 F.3d at 215. No surprise, then, that *Odd*'s rationale for denying absolute immunity did not hinge on the absence of ongoing proceedings. The Third Circuit broadly held that there were "few circumstances"—whether within or outside of an active prosecution—"under which we would consider the act of disobeying a court order or directive to be advocative." *Id.* at 214. The Sixth Circuit's ruling here squarely contradicts that ruling. Similarly, the Tenth Circuit's decision in *Gagan* involved an ongoing habeas proceeding, 35 F.3d at 1475, which the Sixth Circuit itself has held is equivalent to an active criminal prosecution for absolute immunity purposes, *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003).

The Sixth Circuit majority also asserted that the order in this case was not "directed to" the

prosecution, while the orders on the other side of the split were. Pet. App. 16a. Both parts of that proposition are wrong. To begin with, the order in this case, properly understood, *was* directed to the prosecution. As Judge Nalbandian explained, "a plain reading of the complaint and the court order shows that Craycraft was presented with and made subject to the court order." Pet. App. 44a. And those well-pleaded allegations must be accepted as true at this stage. The Sixth Circuit majority's legal reasoning was correspondingly broad: It extended absolute immunity to *all* "matters related to a court order in a criminal case," without regard to how particularly they are addressed to the prosecutor. Pet. App. 15a. Under that rule, as Judge Nalbandian noted, "the difference between a court order directed to the state generally or a specific prosecutor creates a distinction without a difference." Pet. App. 43a n.10.

The majority also mischaracterized the other side of the split as hinging on how directly courts addressed their orders to the prosecution. But *Gagan* denied absolute immunity where the prosecutors had defied a court order technically directed to "a court reporter," not the prosecutor. 35 F.3d at 1476; *supra* 16. And no decision from the Third Circuit has drawn any distinction in this context based on how specifically a court order is addressed to the prosecution. The Sixth Circuit's decision is simply at odds with the decisions of these other circuits.

II. The Sixth Circuit Is Wrong.

Certiorari is further warranted because the Sixth Circuit joined the wrong side of both splits, extending

absolute immunity far beyond the "quite sparing" defense this Court has permitted. *Buckley*, 509 U.S. at 269 (citation omitted). Destroying evidence to thwart an explicit court order compelling its disclosure has no relation to a prosecutor's advocative "discretion in the conduct of the trial and the presentation of evidence." *Imbler*, 424 U.S. at 426. And shielding that form of misconduct from civil liability does nothing to promote "the independence of judgment required by [the] public trust." *Id.* at 423. By nonetheless applying absolute immunity in these circumstances, the Sixth Circuit distorted the doctrine in a way that undermines, rather than preserves, "the functioning of the criminal justice system." *Id.* at 426.

A. Absolute immunity does not extend to a prosecutor's knowing destruction of evidence.

This Court has made clear that the availability of absolute immunity hinges on the prosecutorial "function" at issue. *Buckley*, 509 U.S. at 269. Where that function demands "legal knowledge" and "related discretion," *Van de Kamp*, 555 U.S. at 344, absolute immunity may apply—even if the prosecutor "deliberate[ly]" performs the function incorrectly, *Imbler*, 424 U.S. at 431 n.34. But the defense is unavailable where the underlying prosecutorial function does not require "the exercise of the judgment of the advocate." *Kalina*, 522 U.S. at 130.

Courts must be exacting when parsing that distinction. As *Kalina* demonstrates, advocative and non-advocative functions often occur at the same stage of a criminal case—indeed, even regarding the

same written document. *Id.* But that proximity of functions is no excuse to equate them. Courts must pick out the non-advocative functions and limit absolute immunity accordingly, just as *Kalina* carefully distinguished the non-advocative function of "[t]estifying about facts" in an arrest warrant application from the advocative function of performing the application's "probable-cause" analysis. *Id.*

The Third Circuit followed that careful functional approach when distinguishing *Brady* analysis from decisions regarding the disposal of evidence. *Yarris*, 465 F.3d at 137. There is of course proximity between those functions; both relate to evidence and both may be undertaken at a time when trial proceedings are ongoing. But they have entirely different connections to the prosecutor's advocative discretion. As a mandatory step that prosecutors are "duty bound" to perform during discovery, *Brady* analysis is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 424, 430. And assessing whether evidence qualifies as exculpatory in the constitutional sense requires "legal knowledge" and "related discretion." *Van de Kamp*, 555 U.S. at 344. The Third Circuit thus acknowledged that the function of applying *Brady* is "an act of advocacy" that involves "protectible prosecutorial discretion" and triggers absolute immunity. *Yarris*, 465 F.3d at 137 (citation omitted).

None of that applies to the distinct function of deciding whether to destroy evidence. It is not a mandatory step of discovery or any other "judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Nor does it require "the exercise of the judgment of the advocate." *Kalina*, 522 U.S. at 130. Destroying evidence

is instead an "administrative" task within the prosecutor's office. *Buckley*, 509 U.S. at 273. And a prosecutor who decides to destroy evidence "is in no different position" than other officials, like police, who may do the same. *Id.* at 278. The Third Circuit correctly drew that distinction, explaining that evidentiary disposal is not "an act" of "advocacy" because it implicates "no additional protectible prosecutorial discretion." *Yarris*, 465 F.3d at 136-37 (citation omitted). The Third Circuit soundly declined to extend absolute immunity on that basis.

The Sixth Circuit in this case held otherwise only by abandoning the careful functional parsing this Court requires. It collapsed the distinction between *Brady* analysis and evidentiary disposal, treating them as "two sides of the same coin" because both functions relate to "what to do with ... evidence." Pet. App. 13a-14a (quoting *Annappareddy*, 996 F.3d at 142). From there, the Sixth Circuit asserted that the two functions were comparably essential to "the advocate's role" in "presenting the State's case." Pet. App. 14a (quoting *Ybarra*, 723 F.2d at 679). The idea, as the Fourth Circuit put it, is that a prosecutor's *Brady* assessment of evidence may in some sense be "accompanied by" a subsequent decision on whether to destroy the evidence—and that the two functions must therefore be indistinguishable for absolute immunity purposes. *Annappareddy*, 996 F.3d at 142.

That analysis was far too expansive. The functions in *Kalina* all accompanied the same arrest warrant application. *Supra* 5, 22-23. But that did not make them equivalent for absolute immunity purposes; some aspects of the application required

advocative discretion while others did not. 522 U.S. at 129-30. So too here. Assessing evidence through the lens of *Brady* is advocative. Separately deciding whether evidence should be destroyed is not. Nor are absolute immunity's goals served by allowing the defense for destruction of evidence: Destroying evidence is not "essential to the proper functioning of the criminal justice system," nor is it a task that requires "vigorous and fearless performance" by a prosecutor. *See Imbler*, 424 U.S. at 427-28.

The Sixth Circuit majority changed nothing by noting that Craycraft eliminated the letters by "advising Martin" to destroy them. Pet. App. 12a. He was still performing the same non-advocative function of evidence destruction, even when he instructed Martin. Craycraft plainly was not performing the distinct function of "[p]reparation of witnesses for trial." *Id.* (quoting *Spurlock*, 330 F.3d at 797). He did not contact Martin about her "testimony" or any other aspect of her prospective performance at trial. Pet. App. 13a (citing *Spurlock*, 330 F.3d at 798). To the extent the Sixth Circuit meant to suggest that *any* prosecutorial "[c]ommunication" with a "key witness" automatically triggers absolute immunity, the court again failed to consider the precise aspect and function of the prosecutor's conduct. This Court's precedent demands more.

B. Absolute immunity does not extend to a prosecutor's defiance of a court order that leaves no room for discretion.

This Court's functional approach also points to the proper resolution of the second split. When a court order compels specific action and leaves no room for discretion, the prosecutor's sole remaining function under the order is ministerial: Carry out the court's instructions. With no advocative discretion in play, absolute immunity provides no safe haven if the prosecutor chooses to defy the court's command.

The Third and Tenth Circuits have demonstrated how that functional approach should work. Both emphasize that the defense applies only to a prosecutor's "advocacy" functions. *Odd*, 538 F.3d at 213; *Gagan*, 35 F.3d at 1475. And both circuits recognize that advocacy plays no role where a prosecutor faces a court order that compels specific action and leaves no room for the prosecutor to "exercise any discretion." *Munchinski*, 618 F. App'x at 155; *see Gagan*, 35 F.3d at 1476. That includes a court order directing production of specific evidence. *Munchinski*, 618 F. App'x at 155; *Gagan*, 35 F.3d at 1476. Because prosecutors have no "discretion" in their "conduct" under such orders, there is no "independence of judgment" to be protected and so no "reason[] for absolute immunity" to apply. *Imbler*, 424 U.S. at 422-23, 426, 430.

Judge Nalbandian correctly applied the same functional approach. He explained that "courts give prosecutors absolute immunity to protect the 'wide discretion' they have in carrying out a case." Pet. App. 42a (quoting *Imbler*, 424 U.S. at 426). That bedrock

principle has a simple corollary: "[W]here a prosecutor has no discretion to act in his role as an advocate, he can't get absolute immunity." *Id.* That is the case where a court issues a "directive" requiring the prosecutor to perform specific action, like turning over particular evidence. Pet. App. 41a. Judge Nalbandian thus agreed with the Third and Tenth Circuits: "disobeying" such a court order is a type of "disobedience" that absolute immunity does not shield. *Id.* (quoting *Odd*, 538 F.3d at 214).

The Sixth Circuit majority held otherwise only by impermissibly abandoning any focus on advocative discretion. It did not dispute that the trial court's order stripped away all discretion and left only the ministerial duty to turn over Miller's letters. The majority simply ignored all of that. Instead, it treated timing as dispositive. The trial court had, of course, issued its order during Miller's criminal case. The Sixth Circuit majority effectively deemed that conclusive. "By definition," it held, "matters related to a court order in a criminal case are naturally part of the prosecutorial process." Pet. App. 15a. That alone meant that Craycraft's defiance of the order was "not conduct so outside the prosecutorial role that it loses its cloak of absolute immunity." *Id.*

The majority's reasoning fundamentally misapprehends what this Court requires. The critical inquiry for absolute immunity is whether the prosecutorial *function* at issue involves the exercise of an advocate's "discretion," *Imbler*, 424 U.S. at 426, or merely "administrative duties," *Buckley*, 509 U.S. at 273. The "identity of the actor" is not dispositive. *Buckley*, 509 U.S. at 269. Neither is the fact that the

conduct "occurred during criminal proceedings." *Id.* at 271. Again, *Kalina* distinguished among functions performed contemporaneously in connection with a single arrest warrant application. 522 U.S. at 127. The Sixth Circuit's conclusory assessment of how "naturally" court orders fit into "the prosecutorial process," Pet. App. 15a, is unmoored from those limits on absolute immunity.

Notably, the majority's legal rule has nothing to do with how specifically an order is directed to a prosecutor. It held that "matters related to a court order in a criminal case," *without restriction*, "are naturally part of the prosecutorial process" such that prosecutors should receive absolute immunity for defying them. Pet. App. 15a. The majority was simply wrong to suggest there was any uncertainty about how that rule applies to a prosecutor who "violate[s] a court order directed to him" with some untold degree of additional specificity. Pet. App. 16a. And in any event, the specificity with which a court order names a prosecutor is not a sound way to determine the scope of absolute immunity. What matters is the nature of the prosecutor's conduct in defying that order and whether it is intimately intertwined with advocative discretion.

The Sixth Circuit's erroneous extension of absolute immunity to shield prosecutorial defiance of court orders undercuts the doctrine in several ways. For one, it imposes absolute immunity's "evils" without its benefits. *Imbler*, 424 U.S. at 428 (citation omitted). The Sixth Circuit's holding denies any possibility of relief to victims of egregious prosecutorial misconduct like Miller. But the misconduct at issue has

nothing to do with the prosecutor's pertinent "discretion in the conduct of the trial and the presentation of evidence." *Id.* at 426. Prosecutors always must obey court orders, although they may elect to appeal them. There is no "independence of judgment" to protect, and no risk that the prospect of civil liability could somehow lead prosecutors to overcorrect in a way that hinders "the functioning of the criminal justice system." *Id.* at 422-23, 426. Indeed, it is the Sixth Circuit's rule that hinders justice by removing a powerful incentive for prosecutors to obey judicial commands. All of that confirms the Sixth Circuit's approach to absolute immunity has gone seriously astray.

III. The Questions Presented Are Important And Recurring.

The splits described above are widening, demonstrating that the questions presented in this petition increasingly divide and confuse the courts of appeals. Absent much-needed clarity, plaintiffs and defendants will continue to have these questions decided by the vagaries of geography instead of uniform national rules.

The questions presented are also important ones in their own right. The cost of extending absolute immunity, as this Court has recognized, is "leav[ing] the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Imbler*, 424 U.S. at 427. This case illustrates how severe those deprivations can be: Innocent people like Nickie Miller may endure years of incarceration, both before and after trial, for crimes they did not commit. It is for precisely this

reason that the Court has been "'quite sparing' in [its] recognition of absolute immunity" and has "refused to extend it any 'further than its justification would warrant.'" *Burns*, 500 U.S. at 487 (citations omitted).

Prosecutorial misconduct is, unfortunately, far from rare. As one exhaustive study by the National Registry of Exonerations found, prosecutors committed misconduct in *30%* of all known exonerations in the United States from 1989 through February 2019. *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, National Registry of Exonerations, Sept. 1, 2020, page iv. During that period alone, the National Registry identified 2,663 exonerations, and that number only includes those individuals who were "convicted of a crime" and then "officially and completely cleared based on new evidence of innocence." *Id.*, page iii. So it does not even cover cases like this where an individual was wrongfully detained without a conviction, or cases where a conviction was overturned without official confirmation of innocence.

The sort of misconduct at issue here—knowing destruction of exculpatory evidence in defiance of a court order—is particularly grievous. It often denies wrongfully convicted individuals any chance of exoneration because there is no evidence left to uncover. *See, e.g.*, Emma Zack, *Why Holding Prosecutors Accountable Is So Difficult*, Innocence Project (Apr. 23, 2020), https://innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult/ (Innocence Project litigator noting in interview that in a number of cases, "credible leads to suppressed evidence can't be pursued because the original files are destroyed" as a

result of intentional misconduct by prosecutors). Destroying exculpatory evidence thus prevents "the judicial process," including collateral proceedings premised on belatedly unearthed evidence, from serving "as a check on prosecutorial actions." *Burns*, 500 U.S. at 492.

Civil liability under § 1983 is a crucial protection against such prosecutorial impropriety. Decades ago, *Imbler* suggested that even where absolute immunity precluded § 1983 suits, "the public" would not be "powerless to deter misconduct or to punish that which occurs" because prosecutorial misconduct could trigger "professional discipline." 424 U.S. at 428-29. But that discipline in practice rarely materializes. The National Registry's report found that disciplinary actions were "especially" uncommon for prosecutors, even as compared to other officials who committed misconduct in cases of wrongful convictions. *Convicting the Innocent*, *supra*, page iv.

Correcting the Sixth Circuit's improper extension of absolute immunity is also particularly vital in light of the doctrine's doubtful historical foundations. Several Justices of this Court have questioned the provenance of *any* absolute immunity defense to § 1983 claims. *See, e.g.*, *Kalina*, 522 U.S. at 132 (Scalia, J., concurring, joined by Thomas, J.) ("There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted."); Keller, *supra*, 73 Stan. L. Rev. at 1367 ("While absolute immunity was frequently extended to government prosecutors throughout the rest of the twentieth century, the common law of 1871 had not recognized any such immunity."). Judge Nalbandian reiterated those doubts,

noting that the absolute "immunity analysis itself is unmoored from the text of § 1983" and is "incongruous with what ought to be our instincts about fairness and justice." Pet. App. 39a n.6.

Absolute immunity's shaky textual and historical foundations may well warrant its wholesale elimination. At the very least, those problems reinforce the importance of a "quite sparing" approach to the doctrine. *Buckley*, 509 U.S. at 269 (citation omitted). The Sixth Circuit's decision in this case expands absolute immunity, pushing far beyond the scope of this Court's precedents or "1871 common-law immunities." Pet. App. 41a n.7. Certiorari is warranted to restore longstanding and essential limits on the absolute immunity defense.

IV. This Case Presents An Ideal Vehicle To Address The Questions Presented.

This case presents an excellent vehicle for addressing both questions presented. The disputed limits on absolute immunity were cleanly presented and outcome-determinative. The complaint alleged that Craycraft, after receiving the court's *ex parte* order requiring production of the letters, instructed Martin to destroy them. *Supra* 7. The parties then briefed Craycraft's absolute immunity defense and the district court dismissed Petitioner's claims against him on that ground. *Supra* 8. The Sixth Circuit expressly affirmed on the same basis. *Supra* 9-10. The scope of absolute immunity is thus squarely teed up for this Court's review, with no relevant disputes of fact between the parties.

Although Judge Nalbandian briefly mentioned qualified immunity in his concurring opinion, that distinct defense has no bearing on this case and should not discourage this Court's review. The Court has repeatedly granted certiorari to assess the boundaries of absolute immunity in cases where qualified immunity might have been available on remand. *See, e.g.*, *Kalina*, 522 U.S. at 122 (granting certiorari and limiting absolute immunity defense even though "whether qualified immunity would apply was a question of fact"); *Burns*, 500 U.S. at 494-95 (holding that only qualified immunity was available for prosecutor's legal advice to police); *Burns v. Reed*, 44 F.3d 524, 529 (7th Cir. 1995) (affirming grant of qualified immunity to prosecutor on remand from this Court). For good reason: Prosecutors can always assert a qualified immunity defense as an alternative to absolute immunity. *See Buckley*, 509 U.S. at 268. In any event, Craycraft has forfeited the defense here. Qualified immunity "must be pleaded by a defendant official." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). But Craycraft failed to raise it before the district court or the Sixth Circuit. *See* R.17-1, PageID# 135-142; Craycraft CA6 Brief, Dkt. 39. A *forfeited* qualified immunity defense certainly offers no reason for this Court to delay review.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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December 13, 2023