No. 23-649

In the Supreme Court of the United States

LISA PRICE, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF NICKIE MILLER,
Petitioner,

v.

MONTGOMERY COUNTY, KENTUCKY, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION OF KEITH CRAYCRAFT

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February 15, 2024

QUESTIONS PRESENTED

This case presents two questions. First, does a prosecutor have absolute immunity from a claim alleging that he advised a witness to destroy exculpatory evidence?

Second, does a prosecutor have absolute immunity from a claim alleging that he advised a witness to act in a way that frustrates a court order to a third party?

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INTRODUCTION

Lisa Price alleges that Keith Craycraft, while prosecuting a case against her father, advised a witness to destroy exculpatory evidence. And she alleges that Craycraft did so despite a court order that prison officials turn over that evidence to the defense. Now, Craycraft did no such thing, as his sworn deposition makes clear. But of course, when weighing absolute immunity at the motion-to-dismiss stage, a complaint's allegations are viewed as true. And it is those allegations that matter—not Price's current spin on them.

In her petition, Price reframes the complaint's allegations to bolster her chances of this Court granting review. She characterizes the questions presented as whether absolute immunity extends to the destruction of exculpatory evidence and the defiance of a court order compelling specific action. But neither maps onto what the complaint alleges. Obscuring those allegations lets Price do two things. First, it lets her argue that both questions raise a circuit split. And second, it allows her to present the lower court's holdings as conflicting with her view of the cases extending absolute immunity only to acts of "advocative discretion."

As to the first argument, neither circuit split is cleanly presented here. The Sixth Circuit's holdings based on what the complaint alleges do not conflict with a decision of another circuit—not directly anyway. And as to Price's second argument, the caselaw does not grant absolute immunity only to acts of advocative discretion. That is not the dividing line. Yet even if it were, the allegations here do not cross it. Price still cannot overcome absolute immunity. Advising a witness about what to do with material evidence

for an ongoing prosecution that is the subject of a court order is just the sort of act that is done as an advocate and that requires discretion.

STATEMENT OF THE CASE

1. Before jumping into the background of this case, consider that of absolute immunity. The Court has long held that 42 U.S.C. § 1983 does not grant a blanket right to sue state officials. *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012). For nearly 75 years, the Court has interpreted the statute to retain common-law immunities. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). And that "interpretation has been reaffirmed by the Court time and again and is now an entrenched feature of [its] § 1983 jurisprudence." *Rehberg*, 566 U.S. at 361. Indeed, even some who have questioned parts of that interpretation "would not abandon it" because of stare decisis. *Burns v. Reed*, 500 U.S. 478, 505 (1991) (Scalia, J., concurring in part).

One of the immunities the Court has long recognized is absolute immunity for prosecutors. *See Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Like with other immunities, the Court takes a functional approach to whether it applies. *Rehberg*, 566 U.S. at 363. On a general level, that means comparing the specific act alleged to the common law (considering both analogous acts at common law and the interests behind the common law's grant of immunity). *Id.* at 363–66.

On a more granular level, that means considering whether a prosecutor's acts are "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. In other words, if a prosecutor does something in the role of an advocate, then he gets absolute immunity. But if he acts as an administrator

or investigator in a way not closely connected to the judicial phase, then he doesn't.

The cases repeatedly draw that line. For example, in *Imbler*, absolute immunity applied to a prosecutor offering false testimony and suppressing exculpatory evidence. *Id.* at 416. Likewise, in *Burns*, it applied to a prosecutor's "appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing." 500 U.S. at 492. But such immunity did not apply to giving legal advice to the police during an investigation. *Id.* at 496. That was not done in the role of an advocate.

The other cases hold similarly. Absolute immunity does not apply to investigating and fabricating evidence before having probable cause. *Buckley v. Fitzsimmons*, 509 U.S. 259, 274–75 (1993). Nor does it apply to giving statements to the press about a prosecution because that is not part of an advocate's role. *Id.* at 278. And for the same reason, absolute immunity does not apply to a prosecutor certifying that facts given in support of probable cause are true. *Kalina v. Fletcher*, 522 U.S. 118, 130–31 (1997). "Testifying about facts is the function of the witness, not of the lawyer." *Id.* at 130.

But absolute immunity does apply to failing to train or supervise prosecutors and failing to establish an information system with impeachment material about informants. *Van de Kamp v. Goldstein*, 555 U.S. 335, 339 (2009). Even though those acts are administrative, they are still closely connected to trial and involve legal knowledge and discretion. *Id.* at 344.

So the line is clear. Acts done in the role of an advocate get absolute immunity. Acts done in a different role typically do not.

2. Now turn to this case. In November 2018, Price's father, Nickie Miller, filed a complaint under § 1983 against Kentucky state officials related to a murder prosecution that was eventually dropped. Pet. App. 8a. One of the state officials he sued was Craycraft, the prosecutor in the case.

Miller's claim against Craycraft had to do with alleged conduct by a potential codefendant and key witness against Miller, Natasha Martin. *Id.* at 5a–7a. Martin had confessed to participating in the murder and had told officers that Miller was the murderer. Yet while in custody, Martin allegedly wrote jailhouse letters saying that her statement was false and her confession coerced. *Id.* at 7a. She also allegedly received letters from another inmate and potential codefendant, which were exculpatory for Miller. *Id.*

During discovery in the ongoing prosecution against Miller, his defense team tried to obtain those letters by a court order to the jail officials. But that effort did not succeed. The complaint alleges that the defense never got the letters because Martin destroyed them based on advice from Craycraft. *Id.*

Let's step back and unpack that. The complaint specifically alleges the following. First, the trial court issued a sealed order requiring "any and all personnel of the Montgomery County Detention Center" on being presented with the order to "immediately go to Natasha Martin and retrieve from her all correspondence, letters and emails written to her" or by her to another inmate. Compl. 25, ECF No. 1. The order directed the

jail personnel to produce those materials to Miller's defense team. *Id.*

Second, because the order was sealed, limited people knew about it. But Craycraft was one of them. *Id.*

Third, someone from Miller's defense team went to the jail to execute the order. But he found out that Martin had been released from custody. *Id.* at 25–26.

Fourth, after Martin found out about the court order, she "sought advice" from Craycraft "on what should be done with the letters and correspondence at issue." *Id.* at 26.

Fifth, even though Craycraft knew the correspondence was exculpatory, he allegedly "participated in [its] tampering and destruction" by "encouraging" Martin to destroy the evidence. *Id.* And Craycraft allegedly "did so despite the court order" and despite knowing that Miller had requested that such correspondence be maintained. *Id.* at 26–27.

Sixth, Craycraft allegedly "was well aware that he was removing the most critical and probative evidence remaining in the case" that revealed Miller was innocent and Martin's statements were false. *Id.* at 27.

And seventh, according to the complaint that evidence was "successfully destroyed through the actions of" Craycraft and Martin. *Id.* at 28. That's it though. That is everything relevant that the complaint alleges about Craycraft's role in the destruction of the evidence.

3. Craycraft then moved to dismiss the complaint based on absolute immunity. And the district court granted that motion. Pet. App. 90a. But because of the other defendants, the case did not go on appeal yet.

Instead, discovery continued. As part of that discovery, Craycraft sat for a sworn deposition. During it, he was directly asked whether he advised Martin "to get rid of the letters in her possession." Dep. 97, ECF No. 113-1. And his response was unequivocal: "Absolutely not." *Id.* All Craycraft told Martin when she asked what to do about "an order or something for her stuff," was what any good lawyer would: "to call her attorney." *Id.* at 77. And "that was it." *Id.*; *see also id.* at 79–80, 88.

After discovery, the other defendants filed summary-judgment motions based on qualified immunity. And the district court granted those motions. Miller then appealed. While the appeal was pending, however, he passed away. Pet. App. 8a. So Price continued as his estate's representative.

4. On appeal, the Sixth Circuit affirmed. It held that Craycraft is absolutely immune from the claim alleged in the complaint. *Id.* at 17a. The court considered that claim in two ways. First, it considered "Craycraft advising Martin to destroy evidence, advice she acted upon." *Id.* at 12a. The court reasoned that Martin was a key witness in an ongoing prosecution and that Craycraft was addressing matters with her related to that prosecution. *Id.* So the communication was "plainly within the prosecutorial role." *Id.*

That Martin acted on Craycraft's advice to "destroy exculpatory evidence" changed nothing. *Id.* at 13a. Just like withholding exculpatory evidence, destroying such evidence is a decision made in the capacity of an advocate. *Id.* That meant "Craycraft's role in the destruction of evidence thus did not exceed the scope of his immunity as a prosecutor." *Id.* at 13a–14a. On this point, the Sixth Circuit was not persuaded by the

Third Circuit's distinction between withholding and destroying exculpatory evidence. *Id.* at 14a–15a.

Second, the panel considered "Craycraft's purported thwarting of a court order." *Id.* at 15a. It reasoned that too was within the prosecutorial role. The order "was naturally part of the prosecutorial process," given that it governed procedures related to the prosecution, was sought by Miller to defend himself in the prosecution, and allegedly concerned highly relevant evidence to his defense. *Id.* The court found support in a decision from the Eighth Circuit but was quick to note that its holding was not so broad. *Id.* at 15a–16a. While the Eighth Circuit grants absolute immunity to prosecutors for violating court orders directed to them, the Sixth Circuit left that question for another case. *Id.* at 16a.

It did so because the complaint did not allege that Craycraft violated an order directed to him. Rather, the complaint alleged only that he "advis[ed] a witness to act in unethical ways," which frustrated a court order directed to a third party. *Id.* at 16a–17a.

The court also distinguished several decisions from other circuits about prosecutors violating court orders. It explained that those decisions did not involve active prosecutions, while this one did. *Id.* at 17a.

5. Judge Nalbandian saw things a bit differently. He parsed the allegations in the complaint as raising three separate acts: advising a witness, destroying exculpatory evidence, and violating a court order. *Id.* at 36a. For the first two, he agreed with the majority. Still, he suggested in a footnote that this Court "may want to take a fresh look" at the exculpatory-evidence issue. *Id.* at 39a n.6. He did so seemingly because of

two things. First, Judge Nalbandian reasoned that destroying exculpatory evidence "seems incongruous with what ought to be our instincts about fairness and justice." *Id.* Even though such considerations "raise the specter of unmoored judicial decision making," he did not view them as necessarily off limits in this context. *Id.* And second, Judge Nalbandian concluded that members of this Court have suggested a "renewed focus on the common-law foundations" of absolute immunity. *Id.*

For the third act he considered based on the complaint's allegations, however, Judge Nalbandian disagreed with the majority. He reasoned that the court order here "eliminated nearly all" of Craycraft's discretion. *Id.* at 41a. So he was not "acting within his discretion as an advocate when he violated" it. *Id.* And that meant Craycraft should not receive absolute immunity. *Id.* at 45a. Yet Judge Nalbandian concurred in the result on the court-order issue, reasoning that qualified immunity would apply. *Id.* at 46a–47a.

And that brings us to this petition.

ARGUMENT

Price makes four arguments for why the Court should grant review. The first two are the big ones. She thinks that this case raises two circuit splits and that the Sixth Circuit is on the wrong side of both. The second two arguments are ancillary. Price thinks that the questions presented are important and recurring and that this case is a good vehicle to address them.

But Price is wrong across the board. Given the allegations in the complaint (and the holdings based on them), no circuit split is cleanly presented here. The Sixth Circuit's decision got it right, correctly applying

this Court's cases. That means Price's main arguments for review come up short. And her subsidiary ones fare no better. Nothing tips the scales in favor of granting review. Plus, this case is a poor vehicle to resolve the questions presented.

I. No circuit split is cleanly presented here.

Price's lead argument is that this case implicates two circuit splits. It doesn't, not directly anyway. To be sure, there is some disagreement among the circuits about the scope of absolute immunity. But that disagreement is not directly presented here—on either question presented.

1. Start with Price's argument that the decision below deepened the split about whether absolute immunity applies to the knowing destruction of exculpatory evidence. Pet. 12–14. She says that the Sixth Circuit joined the Fourth and Seventh Circuits in their disagreement with the Third Circuit.

True, the circuits disagree on this issue. The Third Circuit disagrees with the Fourth and Seventh Circuits. And the decision below aligns closer with the latter two. But at bottom, the Sixth Circuit answered a different legal question than those other cases, based on the complaint's allegations. That difference could well be material, making the split not cleanly presented here. Besides, even if the split were well presented, the Third Circuit—almost by its own admission—diverges from this Court's cases. One circuit in clear conflict with this Court is little reason to grant review.

Take a closer look. Price points to the Third Circuit's decision in *Yarris v. County of Delaware*, 465 F.3d 129 (3d Cir. 2006). There, the court considered

whether prosecutors were absolutely immune for deliberately destroying exculpatory evidence. *Id.* at 136. It held that doing so "is not related to a prosecutor's prosecutorial function." *Id.* As the court saw it, that's because the decision happens after a prosecutor decides not to produce the evidence. *Id.* at 136–37. So the decision to destroy involves no prosecutorial discretion. But later, the Third Circuit glossed its holding as based on the act's level of egregiousness. *See Odd v. Malone*, 538 F.3d 202, 211 (3d Cir. 2008). As the Third Circuit made clear, deliberately destroying exculpatory evidence "fall[s] wholly outside the prosecutorial role no matter when or where" committed, "presumably by virtue of [the act's] egregiousness." *Id.*

Price is right that *Yarris* conflicts with the Fourth Circuit's decision in *Annappareddy v. Pascale*, 996 F.3d 120 (4th Cir. 2021). There, the Fourth Circuit held that the act of a prosecutor and other defendants "purposefully shredd[ing] three boxes of evidence" because of their exculpatory nature was entitled to absolute immunity. *Id.* at 141–42. And *Yarris* also conflicts with the Seventh Circuit's decision in *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978). There, the Seventh Circuit held that prosecutors were absolutely immune from the claim that they destroyed certain evidence. *Id.* at 432.

2. But Price is wrong that *Yarris* conflicts with the decision below. There is no direct conflict. Recall the complaint's allegations. It alleges that, after Martin called Craycraft for "advice," he "participated" in the destruction of exculpatory evidence by "encouraging" Martin to destroy the letters. Compl. 26, ECF No. 1. Based on those allegations, the Sixth Circuit held that

Craycraft was entitled to absolute immunity. It expressly focused on the facts that Martin was a key witness, that she sought advice from him, and that the two were discussing matters related to an ongoing prosecution. Pet. App. 12a. That is markedly different from the other decisions that consider a prosecutor personally destroying exculpatory evidence unrelated to advising a key witness in the prosecution to do so.

To be sure, the Sixth Circuit considered the Third, Fourth, and Seventh Circuits' views. *Id.* at 13a–14a. It found support in the latter two and was unpersuaded by *Yarris*. But its holding based on the complaint's allegations does not necessarily conflict with *Yarris*'s. There is a plain distinction between the two. And perhaps that distinction between a prosecutor advising a witness to destroy evidence and himself personally doing so without giving such advice is dispositive. Or perhaps not. The point is just that there is a material difference between this case and the other cases Price identifies.

In other words, the Court could resolve the question presented in this case—whether absolute immunity applies to advising a witness to destroy exculpatory evidence—without resolving the circuit split on a prosecutor himself destroying such evidence. So the split is not cleanly presented here.

But even if it were, that split weighs little in favor of a grant. The Third Circuit's views diverge starkly from this Court's, and that limits the value of the Court stepping in here. Remember, the typical line for whether absolute immunity applies is if a prosecutor does something in the role of an advocate. And destroying exculpatory evidence falls easily within it.

More on that later. For now, just consider the Third Circuit's own gloss of its holding: deliberately destroying exculpatory evidence does not get absolute immunity because of how egregious it is. *Odd*, 538 F.3d at 211. That is a far cry from this Court's functional approach. That approach does not consider how bad an act is. What matters is if something is done in the role of an advocate. Indeed, offering false testimony and suppressing exculpatory evidence are both plenty egregious. But both get absolute immunity. *Imbler*, 424 U.S. at 416, 430. In short, the Third Circuit's view strays from this Court's cases. True, the Court could fix that with a grant. But correcting one circuit in clear conflict with the caselaw hardly seems worth it here.

3. On to Price's second split. She says that the circuits disagree on whether absolute immunity applies to a prosecutor's defiance of a court order eliminating all discretion. Pet. 14–21. Here again, the circuits do seem to disagree some. But just like with the first question, that disagreement is not cleanly presented here.

In fact, even less so than the first. All the cases Price identifies save one involve a prosecutor violating a court order directed to him. Yet the complaint here alleges only that Craycraft advised a witness to act in a way that frustrated a court order to a third party. At most, that means the decision below could diverge from one case Price raises. But even that case is materially distinguishable. Again, take a closer look.

On one side, Price puts the Third and Tenth Circuits (and says that the First Circuit implicitly agrees). For the Third Circuit, she identifies two cases: *Odd* and *Munchinski v. Solomon*, 618 F. App'x 150 (3d Cir. 2015). But the latter is an unpublished decision

with no precedential force. *See Wallace v. Mahanoy*, 2 F.4th 133, 144 n.16 (3d Cir. 2021). So consider *Odd*.

There, the allegations were that a prosecutor got a bench warrant to ensure a witness would testify. *Odd*, 538 F.3d at 205. The judge issuing the bench warrant ordered the prosecutor to notify him of any delay or continuance in the prosecution. *Id.* But the prosecutor failed to do so. *Id.* at 206. The Third Circuit held that absolute immunity did not apply because the prosecutor's obligation to notify the judge was administrative due to the order. *Id.* at 213. In support, the court noted that it could "imagine few circumstances under which [it] would consider the act of disobeying a court order or directive to be advocative." *Id.* at 214.

For the Tenth Circuit, Price points to *Gagan v. Norton*, 35 F.3d 1473 (10th Cir. 1994). There, in a habeas proceeding, a court ordered a court reporter to prepare certain transcripts. *Id.* at 1474–75. But despite the court order, the prosecutor directed the court reporter not to prepare them. *Id.* at 1475. The Tenth Circuit held that absolute immunity did not apply. It explained that the prosecutor's contravening the court's authority "in regard to the defense of a civil action" did not "constitute the kind of advocacy related to the initiation and prosecution of criminal proceedings" for which absolute immunity applies. *Id.* at 1476.

And for the First Circuit, Price suggests that *Reid v. New Hampshire*, 56 F.3d 332 (1st Cir. 1995), implicitly agrees. She does not, however, include it in her count of the split. For good reason: the court in *Reid* held that absolute immunity applied because discovery orders did not do away with a prosecutor's discretion. *Id.* at 337. But the Court never answered

whether such immunity would have applied to an order eliminating all discretion. So *Reid* cannot help bolster Price's alleged split.

On the other side, Price puts the Eighth and Eleventh Circuits and would include the Sixth Circuit now too. In *Webster v. Gibson*, the Eighth Circuit considered whether a prosecutor violated a court order to file "an information" immediately or release a detained individual. 913 F.2d 510, 512 (8th Cir. 1990). The prosecutor waited 56 days before filing the information, while keeping the individual detained. *Id.* The Eighth Circuit held that the prosecutor's disregarding of the court order did "not place him outside the scope of his prosecutorial duties," so absolute immunity applied. *Id.* at 514.

And in *Hart v. Hodges*, the Eleventh Circuit considered whether absolute immunity applied to a prosecutor disobeying a court order that a defendant was not to serve any time in state prison once released from federal prison. 587 F.3d 1288, 1292, 1296 (11th Cir. 2009). The Eleventh Circuit said yes. It reasoned that the alternative would not comply with the functional analysis and purpose behind absolute immunity. *Id.* at 1298.

4. To be sure, the Third and Tenth Circuits on the one hand and the Eighth and Eleventh Circuits on the other seem to disagree in some respects. But that disagreement again is not directly presented here. Price is wrong to slot the decision below as right in line with those of the Eighth and Eleventh Circuits.

That's because the Sixth Circuit did not address whether a prosecutor has immunity for violating a

court order directed to him that eliminated all his discretion. Remember what the complaint alleges: that the trial court issued an order requiring "any and all personnel of the Montgomery County Detention Center" on being presented with the order to "immediately go to" Martin and retrieve certain letters. Compl. 25, ECF No. 1. It was an order directed to jail personnel—not to Craycraft. The order did not affect his discretion one way or another. He was not required to do anything under it nor play any role in executing it. Instead, it was the defense team that brought the order to the jail personnel who were then to produce the materials. *Id.*

All Craycraft is alleged to have done is advise Martin to act in a way that frustrated that order to the jail personnel. *Id.* at 26–28. Yet that is materially different from the court-order violations discussed above. In all but one of those cases the order was directed to the prosecutor. In *Odd*, the prosecutor was ordered to notify the judge of a delay. 538 F.3d at 205, 213. In *Webster*, the prosecutor was ordered to file an information or release a detainee. 913 F.2d at 512. And in *Hart*, the prosecutor, at least by necessary implication, was ordered not to detain a defendant in state prison after his release from federal prison. 587 F.3d at 1292, 1296. (For what it's worth, the same goes for *Reid*, 56 F.3d at 337, and *Munchinski*, 618 F. App'x at 155.)

That means each of those decisions is materially different from that below. It is an altogether different question whether a prosecutor has absolute immunity for violating a court order eliminating his discretion from whether he has immunity for advising a witness to act in a way that frustrates a court order directed to a third party.

And the Sixth Circuit recognized as much. It expressly left for another day whether a prosecutor has absolute immunity for violating a court order directed to him. Pet. App. 16a. So the decision below does not take sides on the disagreement Price puts forward.

That leaves just *Gagan*—the only case in which an order was not directed to the prosecutor. At most, the decision below could present a one-to-one split with the Tenth Circuit. But it doesn't even do that. Remember, in *Gagan* the court order was to a court reporter that the prosecutor directed the reporter not to follow. 35 F.3d at 1475. So as here, the order was to a third party that the prosecutor then allegedly helped to frustrate. Still, *Gagan* is materially different from the decision below.

For one thing, the Tenth Circuit keyed to the fact that the order was in a habeas proceeding. *Id.* at 1476. So the prosecutor's act did not "constitute the kind of advocacy related to the initiation and prosecution of criminal proceedings" for which absolute immunity applies. *Id.* That is different from here, where there was an ongoing prosecution. And for another, directing a court reporter not to provide hearing transcripts is not analogous to advising a witness about handling evidence in an ongoing prosecution. The latter falls directly in the heart of an advocate's role.

Put differently, just as with the first question presented, the Court could decide this one and not resolve any circuit split. It could answer the second question and not abrogate *Gagan* or any other case. That means no split about disobeying a court order is cleanly presented here.

5. Price pushes back. First, she says that the order below was directed to the prosecution. Pet. 21. But notice the sleight of hand. Just like throughout her petition, Price does not rely on the order's language alleged in the complaint. Rather, she just puts forward Judge Nalbandian's views. *Id.* Those views, however, are hard to square with the complaint's allegations. As alleged, the order directed jail personnel to do something—not the State, not Craycraft. Compl. 25, ECF No. 1. And based on those allegations, Craycraft could not have violated the order. All he could do is what the majority said: "advis[e] a witness to act in unethical ways," which frustrated the order directed to a third party. Pet. App. 16a–17a.

Second, Price says that the Sixth Circuit's reasoning was broad, extending "absolute immunity to *all* 'matters related to a court order in a criminal case.'" Pet. 21 (citing Pet. App. 15a). But the Sixth Circuit relied on more than that statement for its holding. Pet. App. 15a–16a. And the court expressly left open the question of a prosecutor "violat[ing] a court order directed to him." *Id.* at 16a. It was clear that its holding went only to Craycraft allegedly advising a witness to act in a way that frustrated a court order to a third party. *Id.* That holding does not take sides in the circuit split Price identifies.

Third, Price points out that *Gagan* considered a court order to a third party. Pet. 21. And she disagrees with the Sixth Circuit's distinguishing that case as involving a civil proceeding, arguing that the Sixth Circuit views habeas proceedings like active prosecutions. Pet. 20. Even so, there are big differences between directing a court reporter to violate a court or-

der and advising a witness to frustrate an order directed to a third party. And Price cannot get around that the Tenth Circuit thought it material in *Gagan* that there was no ongoing prosecution, only a habeas civil proceeding. 35 F.3d at 1476. Even if the Sixth Circuit might not credit that distinction in all circumstances, it mattered to the Tenth Circuit. And so that fact further distinguishes *Gagan* from the decision below.

At bottom, no circuit split is cleanly presented here. Price's lead argument does not support this Court reviewing the case.

II. The decision below tracks this Court's cases.

The same goes for Price's second argument. She argues that the Court should grant review because of how the Sixth Circuit resolved both questions presented. Pet. 21–29. On this, Price hangs her hat on her position that absolute immunity applies only to acts of advocative discretion. But the Court's cases do not draw that line. Acting in the role of an advocate is the typical line. Besides, even if a prosecutor must act as an advocate and with discretion, what the complaint alleges Craycraft did easily qualifies.

1. Go back to the caselaw. Time and again, the Court has explained that acts "intimately associated with the judicial phase of the criminal process" get absolute immunity. *Imbler*, 424 U.S. at 430. Usually, whether an act falls in that category is determined by whether a prosecutor is acting in the role of an advocate or in some other role like an administrator or investigator. *Burns*, 500 U.S. at 492, 496; *Buckley*, 509 U.S. at 274–75; *Kalina*, 522 U.S. at 130–31. But at times, even if an act is done in a different role than an

advocate, it can still get absolute immunity. For example, an administrative act can qualify if it is closely connected to trial and involves legal knowledge and discretion. *Van de Kamp*, 555 U.S. at 344. But the Court has never held that absolute immunity applies only if an act is both done as an advocate and involves the exercise of discretion. Indeed, the phrase "advocative discretion" appears nowhere in the cases.

Still, Price puts that forward as the test. She latches onto the point about administrative acts in *Van de Kamp* and cherry-picks phrases out of the other cases. *See* Pet. 22. As she tells it, a prosecutor can only act as an advocate when he is exercising discretion. Now, no doubt, if a prosecutor is exercising discretion related to an ongoing prosecution, then he is acting as an advocate. But he can also act as one without exercising discretion.

For example, in *Burns* the Court held that absolute immunity applied both to a prosecutor's "appearance in court in support of an application for a search warrant *and* the presentation of evidence at that hearing." 500 U.S. at 492 (emphasis added). Of course, appearing at a hearing involves little (if any) discretion. The prosecutor just has to show up. But he still acts as an advocate when he does so.

And *Van de Kamp* does not change that. The Court there focused in part on discretion and legal knowledge because the alleged acts were done in the role of an administrator, not an advocate. *Van de Kamp*, 555 U.S. at 344. It merely explained that if an administrative act is closely connected to a criminal trial and involves legal knowledge and discretion, then absolute immunity applies. That does not, however,

mean that acts done in an advocate's role must involve legal knowledge and discretion.

In short, Price's argument that the Sixth Circuit got it wrong because the acts at issue did not involve advocative discretion has a faulty premise. To receive absolute immunity, the acts just needed to be done in the role of an advocate.

2. And they were. The Sixth Circuit got that exactly right. Advising a witness in an ongoing prosecution to destroy exculpatory evidence is done in the role of an advocate. *See* Pet. App. 12a–15a. How could it not be when withholding exculpatory evidence is done in that role? *See Imbler*, 424 U.S. at 416, 430.

To be sure, the Third Circuit tries to distinguish the two acts, saying that withholding involves discretion but destroying does not. *Yarris*, 465 F.3d at 136–37. But that distinction makes no sense. Whether to destroy evidence involves the same type of determinations as whether to produce it. For example, is the evidence material? Is it exculpatory? Is there a legal duty to maintain it? A prosecutor is not done making such determinations after deciding not to produce the evidence. In fact, it could be the case that the prosecution never had the evidence to turn over at first—exactly what's alleged here.

Plus, all that does not account for the complaint alleging that the evidence was destroyed because Craycraft advised a witness. Giving advice in an ongoing prosecution to a witness related to evidence is a common task for a prosecutor. In sum, the alleged act here was done in the role of an advocate. The Sixth Circuit got it right: absolute immunity applies.

Besides, that holds even under Price's theory of absolute immunity requiring an act to be done as an advocate and with discretion. Price tries to argue otherwise by characterizing the act only as a prosecutor destroying exculpatory evidence. And she argues that destroying evidence is an administrative task done within the prosecutor's office. Pet. 23–24. Two points there.

First, the complaint does not allege that Craycraft himself destroyed the evidence. It alleges that he advised a witness to do so. Giving advice to a witness both involves discretion and is done in the role of an advocate. Consider it this way. What if Craycraft were alleged to have told Martin to hold onto the evidence because it was material and potentially exculpatory? No doubt, that involves "advocative discretion." It is giving legal advice to a witness in an ongoing prosecution about preserving exculpatory evidence. Giving the opposite advice is no different. It still involves discretion and still is done as an advocate.

Second, the characterization of destroying evidence as a pure administrative task makes no sense here. There is no allegation that the evidence was destroyed as part of routine document-retention processes. The allegation is that Craycraft "was well aware that he was removing the most critical and probative evidence remaining in the case." Compl. 27, ECF No. 1. He allegedly singled out this evidence. That is not done as an administrator.

On top of that, even assuming that destroying evidence could be an administrative task, such an act is just like those in *Van de Kamp*. Destroying evidence related to an ongoing prosecution is closely connected to trial and involves legal knowledge and discretion.

Van de Kamp, 555 U.S. at 344. Doing so requires determining whether the evidence is material or exculpatory, whether there is a duty to maintain, and so on. The Sixth Circuit got the first question presented right, no matter whether Price's framing of the law is correct.

3. And it got the second question right too. The Sixth Circuit correctly held that absolute immunity applies to advising a witness to act in a way that frustrates a court order to a third party. Pet. App. 15a–17a. The same above analysis holds. The complaint alleges only that a prosecutor in an ongoing prosecution advised a witness on what to do with evidence subject to a court order to a third party. Giving such advice is done as an advocate. And the act requires discretion, if that matters.

Again, consider if the allegations were the opposite: that Craycraft advised Martin to hold onto the evidence because of the court order. That's giving legal advice to a witness in an ongoing prosecution to ensure that an order in that prosecution is effective. Doing so falls squarely in the role of an advocate and requires the exercise of discretion. And if advising a witness like that gets absolute immunity, then advising a witness the other way does too. This question is straightforward whether Price's advocative-discretion theory applies or not.

All in all, Price's view of the merits is no reason to grant review here. The Sixth Circuit followed this Court's cases and correctly held that absolute immunity applies.

III. No other reason justifies review.

After her main arguments, Price offers some secondary ones. She says that the questions presented are important and recurring. Pet. 29–32. More specifically, she argues that prosecutorial misconduct is "far from rare," that the alleged conduct here is particularly egregious, and that absolute immunity has shaky historical foundations. *Id.* But none of her arguments justify granting certiorari.

Start with her claim that prosecutorial misconduct keeps happening. There of course are bad actors out there. But that general point cannot justify review here, not given the specific allegations in the complaint. Put differently, the questions presented—properly framed—are not recurring. Price offers no other example of a prosecutor allegedly advising a witness to destroy exculpatory evidence and frustrate a court order directed to a third party. Indeed, as shown above, she cannot even find a circuit decision with a similar fact pattern. So if the Court grants review and answers the questions presented by the complaint's allegations, its resolution could have little legal effect on other cases of alleged prosecutorial misconduct.

Similarly, the egregiousness of the alleged conduct here adds little support for a grant. That is almost always true of absolute-immunity cases. And the whole point of absolute immunity is to prevent suits against a prosecutor from interfering with the time and judgment needed to do his job. *See Rehberg*, 566 U.S. at 365–66. That covers all alleged acts done in close connection to the judicial process—without regard to how bad the allegations are.

And that leaves just the point about absolute immunity's historical foundations. For that, Price echoes Judge Nalbandian's suggestion that the Court "take a fresh look" at the doctrine. Pet. App. 39a n.6. Yet the suggestion overlooks that the Court has held that § 1983 did not eliminate common-law immunities for almost 75 years and absolute immunity in particular for almost 50. *See Rehberg*, 566 U.S. at 361. It fails to appreciate that the Court has reaffirmed the doctrine time and again. *Id.* And it ignores that stare decisis should well apply to the doctrine. *See Burns*, 500 U.S. at 505 (Scalia, J., concurring in part). That is all the more so because the question is one of statutory interpretation. *See, e.g.*, *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015).

Plus, Judge Nalbandian's mention of what "seems incongruous with what ought to be our instincts about fairness and justice," Pet. App. 39a n.6, goes against this Court's frequent reminder. Whether absolute immunity applies is not "a freewheeling policy choice." *Rehber*g, 566 U.S. at 363 (citation omitted). Absolute immunity applies based on a comparison to the common law, including the considerations underlying its grant of immunity. *Id.* at 363–66; *Kalina*, 522 U.S. at 123–24. That does not consider notions of fairness and justice, which Judge Nalbandian correctly noted "raise the specter of unmoored judicial decision making." Pet. App. 39a. n.6.

IV. This case is a poor vehicle.

Finally, consider Price's vehicle argument. Pet. 32–33. Of course, this argument alone cannot justify the Court granting review. It matters only if Price's other arguments hit the mark. And they don't. Even still,

this case is a poor vehicle to address the questions presented.

For starters, if we're talking about the questions presented as Price frames them, *see* Pet. i, neither is cleanly presented here. This case does not directly raise whether absolute immunity applies to a prosecutor destroying exculpatory evidence or violating a court order. So if the Court wants to consider those questions, it should wait for a case that better presents them.

But the case is also a poor vehicle to resolve the questions actually presented—for two reasons. First, at a minimum qualified immunity will apply. Judge Nalbandian easily concluded that. Pet. App. 46a–47a. True, the parties did not address that at the Sixth Circuit because only absolute immunity was at issue on appeal. But that just means if the Court grants review and holds absolute immunity inapplicable, the case will end up back in district court. There, Craycraft will be able to raise qualified immunity, at the very least in a motion for summary judgment. And the doctrine is going to apply. Sure, the Court could still grant review to resolve the absolute-immunity question. But it makes less sense to do so when it will ultimately make little difference in the case.

Second, this case is a poor vehicle because Craycraft did not do what the complaint alleges. Recall, there is sworn deposition testimony in the record showing just that. Craycraft could not have been clearer in his answer when asked whether he had advised Martin to destroy evidence: "Absolutely not." Dep. 97, ECF No. 113-1. He told Martin "to call her attorney," and "that was it." *Id.* at 77.

Of course, in deciding whether absolute immunity applies, we assume that the complaint's allegations are true. *Kalina*, 522 U.S. at 122. So if the Court decides to review this case, the deposition testimony will not technically be in play. But that doesn't mean in considering whether to grant certiorari the Court should ignore the real-world ramifications of doing so.

Granting certiorari here would only further tarnish Craycraft's reputation as a prosecutor. He will be memorialized in the U.S. Reports, with the notoriety only this Court's cases get, as the prosecutor who purportedly advised a witness to destroy exculpatory evidence and to frustrate a court order. Yet taken at his sworn word, Craycraft did no such thing. And the reputational harm from such allegations is no small matter, especially given that many readers will fail to appreciate that the Court is bound by Price's allegations.

No doubt, even if the Court grants, Craycraft will continue to do his job with the "courage and independence" required of his office. *Imbler*, 424 U.S. at 423 (citation omitted). He will do so despite the further damage to his reputation as a prosecutor. But he shouldn't have to.

* * *

In the end, Price offers nothing that justifies a grant of certiorari. The circuit splits she identifies are not cleanly presented here. The decision below does not directly raise whether a prosecutor has absolute immunity for destroying exculpatory evidence or violating a court order directed to him. All it raises is whether a prosecutor has such immunity for advising a witness to destroy evidence and to act in a way that

frustrates a court order to a third party. And the decision below got the answers right. Absolute immunity applies.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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