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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent Craycraft's brief in opposition only confirms that certiorari is warranted. He concedes that the circuits are split on each of the questions presented in the petition: whether absolute immunity extends to prosecutors' knowing destruction of exculpatory evidence or their defiance of court orders that compel nondiscretionary action. The Court should take this opportunity to clarify the dimensions of the doctrine and ensure absolute immunity does not exceed its "quite sparing" bounds. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (citation omitted).

Respondent gets nowhere trying to place this case outside the splits. He emphasizes that the particular *way* he destroyed exculpatory evidence—by conscripting a witness's assistance—does not precisely match the facts from other circuits' cases. Respondent also stresses that the court's order was not directed to him in exactly the same way as in certain other cases. But those minor factual variations make no difference. The Sixth Circuit extended absolute immunity by applying two broad legal rulings: destroying exculpatory evidence and defying court orders are prosecutorial functions that warrant absolute immunity. Those rulings squarely clash with other circuits and place this case at the heart of both splits.

Respondent fares no better in recharacterizing the prosecutorial functions at issue. He insists this case is not about destroying evidence or defying court orders, but instead about the function of "advising a witness" in preparation for trial. BIO 20-22. The Court should reject that sleight of hand. There was no

trial preparation here—just a prosecutor pressuring a witness to help carry out his own misconduct.

Respondent also does nothing to diminish the importance of the questions presented. He cannot contest that absolute prosecutorial immunity rests on increasingly dubious historical foundations. Recent scholarship has confirmed Justice Scalia's view that such immunity did not exist at the time of § 1983's enactment, while also revealing that—contrary to this Court's longstanding assumption—Congress expressly abrogated common-law immunities when it passed the law. Those revelations may well demand reconsideration of the doctrine in its entirety. But at minimum, they underscore the urgency of carefully enforcing existing boundaries on the defense—boundaries the Sixth Circuit far exceeded here.

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

Destruction of evidence. As the petition detailed (at 13), the Sixth Circuit expressly acknowledged, and deepened, the destruction-of-evidence split. The decision below explained that the Fourth and Seventh Circuits have extended absolute immunity to a prosecutor's destruction of exculpatory evidence by analogizing such conduct to *Brady* analysis. Pet. App. 13a-14a (citing *Annappareddy v. Pascale*, 996 F.3d 120, 142 (4th Cir. 2021), and *Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978)). The Sixth Circuit also noted that the Third Circuit has denied absolute immunity for destruction of evidence by instead drawing a "dichotomy" between that act and *Brady* analysis. Pet. App. 14a (citing *Yarris v. Cnty.*

of Delaware, 465 F.3d 129, 136-37 (3d Cir. 2006)). Respondent concedes that "the circuits disagree on this issue." BIO 9. And the Sixth Circuit joined the fray here, granting absolute immunity to Respondent by adopting the Fourth and Seventh Circuits' rule and rejecting the Third Circuit's competing approach as "pay[ing] little heed" to the purportedly advocative nature of any decision related to evidence. Pet. App. 14a.

Respondent is thus mistaken that the Sixth Circuit "answered a different legal question than those other cases." BIO 9. It explicitly answered the same question, concluded that *Yarris* got it wrong, and granted absolute immunity on that basis. That "holding" plainly *does* "conflict with *Yarris*'s," BIO 11, and places the Sixth Circuit squarely within what is now a 3-1 split.

In arguing otherwise, Respondent attempts to differentiate the cases in the split based on the precise *way* the prosecutor destroyed evidence. Respondent emphasizes that he enlisted a witness's cooperation in destroying the exculpatory letters, while the prosecutor in *Yarris* "personally" destroyed evidence. *Id.* But that distinction is irrelevant. No circuit varies its approach to absolute immunity based on the exact manner of a prosecutor's evidentiary destruction. The Sixth Circuit certainly did not reject or distinguish *Yarris* on that basis. All of these courts have instead assessed whether the prosecutorial *function* of destroying evidence (in whatever manner) entails advocative discretion. That is the "functional approach" to absolute immunity that this Court's precedents require. *Burns v. Reed*, 500 U.S. 478, 486 (1991). The

function of destroying evidence is the same whether the prosecutor does it personally or directs another to do it. Respondent slices things too finely by parsing the details of how prosecutors performed that function. Those details are not "material," BIO 11, under this Court's absolute immunity standard or the reasoning of any circuit in the split.

Respondent also suggests that his destruction of evidence could be reclassified as the act of "advising a witness." *Id.* That improperly manipulates this Court's functional approach. Advising a witness in preparation for her "intended testimony" is a discretionary function. *Cf. Rehberg v. Paulk*, 566 U.S. 356, 369-70 (2012). But enlisting a witness to carry out what the prosecutor is forbidden from doing is not. Prosecutors cannot launder impermissible acts of evidentiary destruction by pressuring witnesses to perform the deed. That would erroneously elevate the "identity of the actor" over the substance of the function. *See Buckley*, 509 U.S. at 269 (citation omitted).

Defiance of a nondiscretionary court order. As with the first split, the courts of appeals have acknowledged the second split the petition identified: whether absolute immunity is available where a prosecutor defies a court order that compels specific action and leaves no room for the exercise of discretion. Pet. 14-19; *see, e.g.*, *Hart v. Hodges*, 587 F.3d 1288, 1298 n.11 (11th Cir. 2009) (granting absolute immunity in those circumstances and explicitly rejecting contrary decisions from the Third and Tenth Circuits).

Once more, Respondent concedes that the circuits "disagree," BIO 12, and argues only that the Sixth

Circuit majority's decision somehow falls outside the split. This time, the purported point of distinction is that the court order here was not explicitly "directed to" Respondent. BIO 15-16. The petition explained why that is factually wrong: As Judge Nalbandian observed, "a plain reading of the complaint and the court order shows that Craycraft was presented with and made subject to the court order." Pet. 21 (quoting Pet. App. 44a). The court delivered the *ex parte* order to Craycraft as the legal representative for Kentucky, including the jailhouse personnel who were to help retrieve the exculpatory letters. Pet. App. 44a (citing R.1, PageID# 25). Those allegations must be accepted as true at this stage, and Respondent cannot evade them with an unduly cramped reading of the complaint.

Even on its own terms, Respondent's argument does not remove the Sixth Circuit from the split. As the petition explained (at 21), the majority's *reasoning* on this issue drew no distinction based on the specificity with which an order addresses a prosecutor. The majority concluded that absolute immunity extends to *all* "matters related to a court order in a criminal case" merely because such orders are "naturally part of the prosecutorial process." Pet. App. 15a. Under that sweeping ruling, 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. Respondent emphasizes that the majority did not technically have occasion to extend absolute immunity where a prosecutor defies a nondiscretionary order explicitly "directed to him." BIO 16. But the majority's

broad legal rule leaves no doubt that immunity would also apply in those circumstances.

On top of that, the circuit split remains robust even focusing on decisions where the order at issue was not explicitly directed to the prosecutor. The Tenth Circuit denied absolute immunity where a prosecutor impeded an order directed to a court reporter. *Gagan v. Norton*, 35 F.3d 1473, 1476 (10th Cir. 1994). And the Eleventh Circuit denied absolute immunity where a prosecutor frustrated an order that did not name him and was addressed more directly to jailhouse personnel. *Hart*, 587 F.3d at 1297-98. That order decreed that a detainer against the plaintiff (signed by the state prison commissioner) be removed and that the plaintiff not serve any time in state prison after his release from federal prison. Dkt. 15-2 at 41-42, *Hart v. Hodges*, No. 1:05-cv-00030 (M.D. Ga. July 21, 2005). Even accepting Respondent's narrowing lens, therefore, the split remains at least 2-1, with the Sixth Circuit having joined the Eleventh Circuit in opposing the Tenth Circuit.

Respondent's efforts to diminish that count fall flat. He contends that *Gagan* is meaningfully different from this case because it took place at the habeas stage. BIO 16. That changes nothing. Both the Sixth and Tenth Circuits grant absolute immunity to "prosecutors during post-conviction proceedings," including habeas cases, as long as they act "as an advocate." *Ellibee v. Fox*, 244 F. App'x 839, 844-45 (10th Cir. 2007) (quoting *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003)). So the question both here and in *Gagan* was whether defying a nondiscretionary court order was an advocative act. The circuits simply

disagree on that fundamental point. Respondent also insists that although the order in *Hart* did not name the prosecutor, he was obligated not to frustrate it "by necessary implication." BIO 15. But the same implication is necessary here. Respondent does not even try to explain how the *Hart* order impliedly demanded prosecutorial non-interference but the trial court's order in this case did not. And the impracticality of drawing such hair-splitting distinctions shows why the courts of appeals have not, in fact, varied their approaches to absolute immunity based on the exact specificity with which a nondiscretionary order names a prosecutor.

Finally, Respondent retreads his argument that the real function at issue here is "advising a witness." *Id.* It is equally facile in this context. Conscripting a witness to aid in defying a clear judicial command bears no resemblance to the sort of trial preparation function that might entail advocative discretion and trigger absolute immunity. *Supra* 4.

II. The Sixth Circuit Is Wrong.

The Sixth Circuit improperly extended absolute immunity by abandoning advocative discretion as the touchstone for its analysis. Pet. 21-29. Respondent doubles down on the error. He defends the Sixth Circuit's decision principally by reading this Court's precedent to grant absolute immunity any time a prosecutor "is acting as an advocate," regardless of whether the prosecutor is "exercising discretion." BIO 19. But this Court plainly has not said that. It has accepted the "evils" of absolute immunity only where necessary to ensure the prospect of liability does not

deter prosecutors in "exercising the independence of judgment required by [the] public trust." *Imbler v. Pachtman*, 424 U.S. 409, 423, 428 (1976). That is the whole point of the functional approach—to limit absolute immunity to those prosecutorial "functions" that entail "wide discretion in the conduct of the trial and the presentation of evidence." *Id.* at 426, 430.

Respondent fares no better in arguing that the prosecutorial functions at issue here entail discretion. Regarding the first question presented, Respondent intermingles the functions of *Brady* analysis and evidentiary disposal, framing them as indistinguishable for absolute immunity purposes. BIO 21-22. As the petition explained, this Court's functional approach is more nuanced than that. *Kalina* demonstrates that even where discretionary and non-discretionary functions occur in close proximity (there, in different portions of the same arrest warrant application), courts must disentangle them when applying absolute immunity. Pet. 22-23. The same is true here. The functions of *Brady* analysis and evidentiary destruction may occur in proximity, but only *Brady* analysis entails the advocative discretion that absolute immunity protects. Pet. 23-24. That functional analysis does not change merely because Respondent hoped to gain a "critical" tactical advantage through his particular act of evidentiary destruction. BIO 21. Absolute immunity hinges on the nature of the underlying prosecutorial function, not the defendant's specific intent. *See Imbler*, 424 U.S. at 425-26, 430.

Respondent also reiterates the faulty premise that both acts boil down to "advising a witness," which purportedly involves advocative discretion. BIO 20-

22. Again, that is wrong. The functions here were destroying evidence and defying a nondiscretionary court order; Respondent simply conscripted a witness to help carry them out.

Finally, as to the second question presented, Respondent urges that if *complying* with a nondiscretionary order warrants absolute immunity, *defying* one "does too." BIO 22. That is a non sequitur. It is true that prosecutors cannot face civil liability for complying with judicial mandates. But that is not because the function is discretionary and triggers *prosecutorial* immunity. Instead, "officials acting pursuant to a court order have a *quasi judicial* absolute immunity from damages for actions taken to execute that order." *Rose v. Flairty*, 772 F.3d 552, 554 (8th Cir. 2014) (citation omitted) (emphasis added). Just as judges may not be sued for issuing nondiscretionary orders, prosecutors may not be sued for heeding them. That is so precisely because prosecutors exercise no "independence of judgment," *Imbler*, 424 U.S. at 423, in complying. By the same token, prosecutors do not perform a function that entails discretion, and are not entitled to absolute immunity, when they defy such orders.

III. Respondent Cannot Minimize The Importance Of The Questions Presented, Especially In Light Of The Atextual And Ahistorical Nature Of Absolute Immunity.

Respondent also fails in challenging the importance of the questions presented. He cannot dispute that prosecutorial misconduct remains a widespread problem. Pet. 30. Nor can Respondent

contest that misconduct like his, which destroys exculpatory evidence, is particularly difficult to detect or remedy through "the judicial process." Pet. 30-31 (quoting *Burns*, 500 U.S. at 492).

Respondent's lead answer is to rehash the immaterial factual distinctions between this case and those in other circuits, then urge that certiorari "could have little legal effect" because every last detail of this precise fact pattern may not recur frequently. BIO 23. As explained, that is wrong. The legal rules that the Sixth Circuit applied sweep far more broadly than this particular fact pattern. They extend absolute immunity to *all* prosecutorial efforts to destroy exculpatory evidence and *all* prosecutorial defiance of nondiscretionary court orders. *Supra* 3-6. A decision from this Court would resolve whether those doctrinal extensions are unsound. That is an issue of urgent importance not just for Petitioner, but for any defendant who counts on properly calibrated civil liability to curb prosecutorial "evils" in their proceedings, *Imbler*, 424 U.S. at 428, and to vindicate the compensatory and deterrent purposes of § 1983, *Owen v. City of Independence*, 445 U.S. 622, 651 (1980).

As the petition explained (at 31-32), policing improper expansions of absolute immunity is particularly vital because the defense rests on such shaky historical foundations. Recent scholarship has confirmed Justice Scalia's understanding that there was "no such thing as absolute prosecutorial immunity when § 1983 was enacted." *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring); *see* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1367 (2021).

Scholarship has also demonstrated that this Court's earlier decisions were mistaken in assuming Congress never expressed that it "wished to abolish" common-law immunities under § 1983. *Buckley*, 509 U.S. at 268 (citation omitted). Congress *did*, in fact, expressly abrogate common-law immunities under the statute; that clause was simply (and inexplicably) omitted by the Reviser of Federal Statutes when it created the first compilation of federal law in 1874. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 201, 207-08, 234-41, 244 (2023). Judge Nalbandian soundly raised these developments when urging the Court to revisit absolute immunity entirely. Pet. App. 27a-29a nn.1-2, 39a-40a n.6.

Respondent misses the point by invoking stare decisis. BIO 24. For one, the Court has yet to grapple with these "game-changing" discoveries. *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023) (Willett, J., concurring). Stare decisis should not shield absolute immunity from fresh scrutiny in light of new historical understandings. In any event, the petition does not ask this Court to alter its precedent. Petitioner instead asks the Court to carefully enforce the "quite sparing" limits of that precedent, *Buckley*, 509 U.S. at 269 (citation omitted), by reversing the Sixth Circuit's improper expansions.

IV. This Case Is An Ideal Vehicle.

Aside from recycling his mistaken arguments that this case somehow falls outside the identified splits, BIO 25, Respondent urges two vehicle concerns. Neither poses any obstacle to certiorari.

First, Respondent asserts that if this Court corrects the Sixth Circuit's erroneous expansion of absolute immunity, he will establish his entitlement to qualified immunity on remand. *Id.* But the petition explained why that possibility carries no weight here, and Respondent offers no answer. The prospect of qualified immunity is a feature of *any* absolute immunity case. Pet. 33. It has not stopped this Court from weighing in before and should not do so here. *Id.* (noting the Court granted certiorari in *Kalina* and *Burns* notwithstanding unresolved qualified immunity disputes). And Respondent concedes that he has not yet raised qualified immunity, BIO 25, even though it is his burden to plead, Pet. 33.

Second, Respondent suggests this case is a poor vehicle because he has not admitted wrongdoing. BIO 25. If that were a vehicle problem, the Court would never hear a case about prosecutorial misconduct. As even Respondent concedes, this Court must accept the complaint's allegations as true at this stage. BIO 26. Whether Craycraft told the truth when he later denied the allegations is a question for the jury much farther down the line—not for this Court in deciding the scope of absolute immunity at the pleading stage. Certainly, this Court should not stay its hand to avoid "tarnish[ing] Craycraft's reputation as a prosecutor." *Id.* That reputation should rise or fall on the strength of Petitioner's showing of misconduct. It should not be artificially buoyed by an erroneous extension of absolute immunity that denies Petitioner any chance at "redress." *Imbler*, 424 U.S. at 427.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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March 4, 2024