**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF LOUISIANA**

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| RENATA SINGLETON,<br>MARC MITCHELL,<br>LAZONIA BAHAM,<br>JANE DOE,<br>TIFFANY LACROIX,<br>FAYONA BAILEY,<br>JOHN ROE, and<br>SILENCE IS VIOLENCE;<br><br>*Plaintiffs*,<br><br>v.<br><br>LEON CANNIZZARO, in his official capacity as District Attorney of Orleans Parish and in his individual capacity;<br><br>GRAYMOND MARTIN,<br>DAVID PIPES,<br>IAIN DOVER,<br>JASON NAPOLI,<br>ARTHUR MITCHELL,<br>TIFFANY TUCKER,<br>MICHAEL TRUMMEL,<br>MATTHEW HAMILTON,<br>INGA PETROVICH,<br>LAURA RODRIGUE,<br>SARAH DAWKINS, and<br>JOHN DOE,<br>in their individual capacities;<br><br>*Defendants*. | **Civil Action No. 17-10721**<br><br>Section H<br>Judge Jane Triche Milazzo<br><br>Division 1<br>Magistrate Judge Janis van Meerveld |

**BRIEF OF *AMICI CURIAE* FORMER PROSECUTORS, FORMER PUBLIC DEFENDERS, AND LEGAL ACADEMICS**
**IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT**

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# BRIEF OF AMICI CURIAE

This brief is filed on behalf of the New York University ("NYU") School of Law's Center on Administration of Criminal Law and Center on Race, Inequality, and the Law,[1] the Cato Institute, Dean Ronald Weich, Professor Angela J. Davis, Professor Brandon L. Garrett, Professor Karen McDonald Henning, and Professor Jennifer E. Laurin as *amici curiae* in support of Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second Amended Complaint.

## I. INTEREST OF *AMICI CURIAE*

*Amici Curiae* are leading thinkers and researchers on the criminal justice system, including former federal prosecutors, former public defenders, and legal academics, who share an interest in ensuring that absolute prosecutorial immunity is properly limited. They are interested in this case because its outcome will affect the incentives of prosecutors to comply with the law and the Constitution, and because they believe that the interpretation of 42 U.S.C. § 1983 should reflect the purpose and history of the statute's enactment.

**The Center on the Administration of Criminal Law**, based at the NYU School of Law, is dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. The Executive Director of the Center is a former state and federal prosecutor with the United States Attorney's Office for the District of New Jersey and the Office of the Attorney General for the State of New York.

Also based at the NYU School of Law, **the Center on Race, Inequality, and the Law** works to highlight and dismantle structures and institutions that have been infected by racial bias and plagued by inequality. The Center fulfills its mission through public education, research, advocacy, and litigation. The Executive Director of the Center previously served as a Federal

[1] No part of this brief purports to represent the views of New York University School of Law, or New York University.

Defender in the Southern District of New York, a Senior Counsel at the NAACP Legal Defense and Educational Fund, and a staff attorney at the Bronx Defenders.

**The Cato Institute** is a nonpartisan public policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement and prosecutors.

**Ronald Weich**, Dean and Professor of Law at the University of Baltimore School of Law, previously served as an Assistant District Attorney in Manhattan and a former United States Assistant Attorney General.

**Angela J. Davis**, Professor of Law at American University Washington College of Law, previously served as director of the Public Defender Service for the District of Columbia.

**Brandon L. Garrett** is the Justice Thurgood Marshall Distinguished Professor of Law and White Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law, where his work—which includes criminal procedure, civil rights, and constitutional law—has been widely cited by courts, including the U.S. Supreme Court and lower federal courts.

**Karen McDonald Henning**, Associate Professor of Law at the University of Detroit Mercy Law School, has written in the area of prosecutorial immunity under Section 1983.

**Jennifer E. Laurin** is the Wright C. Morrow Professor of Law at the University of Texas School of Law, and is co-author of a leading treatise on civil rights litigation against police and prosecutors.

## II. INTRODUCTION

At issue before the Court is whether the narrowly circumscribed absolute prosecutorial immunity to Section 1983 actions should be extended to certain non-prosecutorial investigative and administrative practices by the Orleans Parish District Attorney's Office (the "Office"). Plaintiffs allege that the Office issued fake subpoenas that threatened jail time and fines in order to coerce crime victims and witnesses to give statements to the Office, and sought detention, jail, and other sanctions against those crime victims and witnesses who did not comply with the fake subpoenas, or who did not supply testimony consistent with the Office's wishes. The Office claims absolute prosecutorial immunity for these unlawful practices.

Absolute prosecutorial immunity is not found in the text or history of Section 1983. Congress enacted Section 1983 during Reconstruction to protect the constitutional rights of individuals—in particular African Americans—who were being targeted by State actors, including prosecutors. More than 100 years after its enactment, and despite the clear text and history of Section 1983, the Supreme Court granted absolute immunity to a narrow set of prosecutorial conduct on the basis of questionable analysis of public policy and immunities historically available at common law. *See Imbler v. Pachtman*, 424 U.S. 409, 420 (1976). In so doing, however, the *Imbler* Court expressly limited absolute immunity for prosecutors to conduct that is "intimately associated with the judicial phase of the criminal process." *Id*. at 430. The Supreme Court has never extended absolute immunity to apply to the investigatory or administrative conduct at issue here. Moreover, the rationales cited in the Court's decision in *Imbler*, which focused on concerns about criminal defendants, are entirely absent in the instant context—where Plaintiffs are victims of and witnesses to crime, as opposed to criminal suspects or defendants. This Court should thus decline to extend *Imbler*'s absolute immunity here.

In fact, expanding *Imbler*'s narrow grant of absolute prosecutorial immunity to the egregious investigative and administrative conduct alleged in this case would subvert the purpose and underlying policy of Section 1983. It would make it easier for prosecutors to target communities of color—in direct contravention of the historical purpose of Section 1983. It would provide perverse incentives to prosecutors, who already face minimal checks on their power and minimal consequences for abusing it. It is also unnecessary: prosecutors already have existing protections afforded by qualified immunity and other litigation defenses. For all of these reasons, *amici curiae* urge the Court to reject Defendants' efforts to expand absolute immunity to excuse the harrowing allegations in this case.

## III. THE HISTORICAL DEVELOPMENT OF SECTION 1983 DEMONSTRATES THAT ABSOLUTE PROSECUTORIAL IMMUNITY IS ONLY APPLICABLE IN NARROW CIRCUMSTANCES NOT PRESENT IN THIS CASE

### *A. Section 1983 was enacted to provide a remedy to parties—in particular African Americans—deprived of their constitutional rights by a State official's abuse of position.*

Congress enacted Section 1983 specifically to provide a civil remedy under circumstances like those at issue here—where State officials have abused their State power—to the kind of plaintiff bringing suit here—African Americans targeted by those State officials. In drafting Section 1983, the Reconstruction Congress sought to secure hard-won civil rights in the post-Civil War era. Enacted as part of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act,[2] Section 1983 was intended to combat racial terrorism in the Reconstruction South. "The specific historical catalyst for the Civil Rights Act of 1871 was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens

[2] David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev. 497, 497 n.2 (1992)

their civil and political rights." *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Section 1983 was intended to provide a remedy specifically against such abuses of power being carried out "under color of" state law and custom. 42 U.S.C. § 1983.

### 1. Section 1983 was aimed at State officials, including prosecutors, targeting African Americans and Union loyalists.

In enacting Section 1983, the Reconstruction Congress sought to check the abuse of power by State officials. Section 1983 is directed squarely at the "'misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974) (quoting *Monroe v. Pape*, 365 U.S. 167, 184 (1961)). Thus, Congress created a federal damages remedy "to interpose the federal courts between the States and the people . . . to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)); *cf. Owen* v. *City of Independence*, 445 U.S. 622, 651-52 (1980) (noting that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees"). As the statutory language makes clear, the purpose of Section 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe*, 365 U.S. at 172.

The Reconstruction Congress specifically intended Section 1983 to curb misconduct by prosecutors against African Americans and Union loyalists. While Section 1983's sweeping language created a cause of action against "every person" who under color of state law deprives another of "any rights, privileges, or immunities secured by the Constitution," Congress was keenly aware of the problem of wrongful prosecutions. In the post-Civil War period, abuse of prosecutorial power was a "crisis that provoked vigorous debate and decisive legislative action."

David Achtenberg, *With Malice Toward Some: United States v. Kirby, Malicious Prosecution, and the Fourteenth Amendment*, 26 Rutgers L.J. 273, 342 (1995). This decisive action was meant to halt the post-war Confederate practice of initiating thousands of civil and criminal proceedings against Union loyalists, including African American soldiers and newly freed slaves. *Id*. at 298-302, 337-41 (noting the "national problem posed by vexatious prosecution of Union supporters," which included African Americans, the issuance of "baseless indictments," and the need for "protection from malicious" prosecution).

**2. Section 1983 did not provide for absolute prosecutorial immunity.**

The Reconstruction Congress did not afford prosecutors absolute immunity, because such a doctrine would have been anathema to the very purpose of Section 1983. *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983*, 86 Nw. U. L. Rev. at 539-47 (noting that "protection of individual rights" was the "hierarchically superior purpose" of enacting Section 1983, and that the "radical" law was meant to reach the outermost constitutional bounds); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 485 (1982) (noting the 1871 Act was the most penetrating legislation Congress could enact, minimizing "[t]raditional immunities" to "deal with the problem in the South"). On its face, the statute provides no such immunity. And, given the sweeping language of the statute, "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms." *Scheuer*, 416 U.S. at 243. To "extend absolute immunity to any group of state officials is to negate Pro tanto the very remedy which it appears Congress sought to create." *Imbler*, 424 U.S. at 434 (White, J., concurring in the judgment).

Moreover, even had Congress intended to incorporate *sub silentio* common-law immunities that existed at the time into Section 1983, it would not have incorporated the thennovel idea of absolute prosecutorial immunity. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 114 (2005) (noting that a legislator in 1871 "would have found the well-established tort of malicious prosecution, which had been upheld in an action against a public prosecutor" and "would have found no immunity defense to insulate the prosecutor from liability . . . for there was not a single decision affording prosecutors any kind of immunity defense from liability for malicious prosecution"). In fact, numerous courts continued to allow public prosecutors to be sued for malicious prosecution well after 1871. *See Arnold v. Hubble*, 38 S.W. 1041 (1897); *Skeffington v. Eylward*, 97 Minn. 244, 248 (1906); *Leong Yau v. Carden*, 23 Haw. 362, 368-69 (1916); *Dean v. Kochendorfer*, 237 N.Y. 384 (1924). Upon conducting a searching historical analysis in a case decided after *Imbler*, Justice Scalia summarized it succinctly: "There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted." *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring).

### *B.* **Imbler** ***granted absolute prosecutorial immunity to certain types of Section 1983 actions as a narrow protection, given the availability of other sanctions against prosecutorial misconduct.***

Addressing the issue of prosecutorial immunity under Section 1983 for the first time, the Supreme Court in 1976 granted absolute immunity from suit under Section 1983 to prosecutors within a narrowly drawn set of circumstances. *See Imbler*, 424 U.S. 409.

Although *Imbler* recognized that, on its face, Section 1983 "admits of no immunities," *id*. at 417, the Court determined that absolute prosecutorial immunity existed in the common law, and that "considerations of public policy" "countenance absolute immunity under § 1983." *Id*. at 424 & n.21 (tracing the common law justification without serious historical inquiry and relying only on cases applying immunity some fifty years *after* Section 1983 was enacted).[3] These public policy considerations include the possibility that a threat of civil lawsuits could constrain a prosecutor's decision-making and that qualified immunity may not sufficiently shield honest prosecutors from the threats of liability. *Id*. at 424-27.

Although the *Imbler* Court held that there were circumstances under which prosecutors were entitled to absolute immunity, the Court narrowly circumscribed such immunity, shielding only the prosecutor's judgment "in deciding which suits to bring and in conducting them *in court*." *Id*. at 424 (emphasis added). The Court explicitly declined to consider whether immunity should apply "for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer," *id*. at 430-31, the roles in which Defendants were acting in the instant case.

In addition to concerns about the impact of lawsuits on a prosecutor's decisions in the charging and in-court prosecution of crimes, the *Imbler* Court in reaching its conclusion "emphasize[d] that the immunity of prosecutors from liability in suits under § 1983 does not leave the public powerless to deter misconduct or to punish that which occurs" because there were alternative ways to deter prosecutorial misconduct at trial. *Id*. at 428-29. Specifically, the Court assumed that prosecutors would face criminal liability for "willful acts," and "professional discipline" for less egregious acts. *Id*. at 429. Indeed, part of the Court's willingness to extend

[3] Several commentators have argued that *Imbler* was wrongly decided because it is not grounded in an immunity that existed at the time Section 1983 was enacted and because its policy considerations rest on empirically unsupported assumptions. *See, e.g.*, Amicus Br. of Const. Accountability Ctr., *Van De Kamp v. Goldstein*, 2008 WL 4181889, at *10-17 (2008) (No. 07-854) (noting that "the error of *Imbler* is manifest"); Bennett Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, Harvard Civ. Rights-Civ. Liberties L. Rev., *available at*: http://harvardcrcl.org/wp-content/uploads/2010/08/Gershman_Publish.pdf (hereafter "Gershman, *Bad Faith*") (referring to *Imbler*'s "revisionist history and dubious policy"). Whether or not these well-taken criticisms are ultimately correct, they at least counsel against further expanding the prosecutorial immunity recognized in *Imbler*.

absolute immunity was its assumption that misconduct such as using perjured testimony or withholding exculpatory information would "warrant[] criminal prosecution as well as disbarment." *Id.* at 431 n.34. As demonstrated below, the Court's assumptions proved wrong in practice, and thus do not support the expansion of absolute immunity to the context presented in this case.

### *C. Since* **Imbler***, absolute prosecutorial immunity has been narrowly applied to court-supervised prosecution, not pre-litigation investigative or administrative conduct.*

Since *Imbler* was decided, the Court has drawn a sharp line between situations in which absolute immunity applies—the decision to prosecute and the presentation of the government's case—and situations in which it does not—when prosecutors are carrying out investigative, administrative, or other functions. No court has extended absolute immunity to such administrative or investigative conduct, and any official seeking to invoke a more expansive immunity bears an extremely heavy burden—a burden which Defendants here have not even attempted to carry. *See Butz v. Economou*, 438 U.S. 478, 506 (1978) ("Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law" and thus officials "bear the burden" of proving otherwise); *see also United States v. Lee*, 106 U.S. 196, 220 (1882) ("No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.").

In *Imbler*, the Court held that "*in initiating a prosecution and in presenting the State's case*, [a] prosecutor is immune from a civil suit for damages under § 1983." *Imbler*, 424 U.S. at 431 (emphasis added). In subsequent cases, the Court has repeatedly confirmed that absolute prosecutorial immunity is the exception, not the rule, and that its scope should be "quite sparing." *Burns v. Reed*, 500 U.S. 478, 487 (1991) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988)). Therefore, although "[a]lmost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute," the Supreme Court has "never indicated that absolute immunity is that expansive." *Burns*, 500 U.S. at 495. This is because it is the "'judicial process itself,'" not "any special 'esteem for those who perform [prosecutorial] functions,'" that provides the basis for absolute prosecutorial immunity. *Kalina*, 522 U.S. at 127 (quoting *Malley v.Briggs*, 475 U.S. 335, 342 (1986)).

Thus, since *Imbler*, the Supreme Court has recognized that prosecutors perform different functions, that the level of immunity that applies is determined by the role the prosecutor is playing, and that absolute prosecutorial immunity is only applied to prosecutorial actions that are closely associated with the judicial process itself. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269-70 (1993) (like the police, prosecutors are only entitled to qualified immunity when they are acting as criminal investigators); *Burns*, 500 U.S. at 492 (prosecutors are only entitled to qualified immunity for *providing advice to police* that contributes to a misleading arrest warrant application intended to bring a suspect before the court for criminal proceedings, but are entitled to absolute immunity for *presenting evidence in court* in support of a search warrant application where a judge serves as a check on prosecutorial power); *Kalina*, 522 U.S. at 129-31 (prosecutors are only entitled to qualified immunity for acting like a complainant in personally attesting to the truth of facts necessary to obtain an arrest warrant that is intended to initiate criminal proceedings); *see also, e.g., Loupe v. O'Bannon*, 824 F.3d 534 (5th Cir. 2016) (district attorney was not absolutely immune for ordering sheriff's deputy to make a warrantless arrest of a witness allegedly without probable cause in retaliation for her refusal to testify against boyfriend).

## IV. THIS COURT SHOULD NOT EXPAND ABSOLUTE IMMUNITY BEYOND ITS NARROW SCOPE BECAUSE DOING SO WOULD SUBVERT THE HISTORY, PURPOSE AND POLICY OF SECTION 1983

Where, as here, the facts of a particular case are far removed from the original policy justifications for absolute immunity, there is no reason to extend what was always intended to be a narrow doctrine. Indeed, the Supreme Court has regularly rejected policy arguments where prosecutors have sought absolute immunity for non-prosecutorial functions. *See, e.g.*, *Kalina*, 522 U.S. at 131 (noting that the Court was "not persuaded" by prosecutors' concern about "chilling effect" when granting only qualified immunity to prosecutor attesting to facts to obtain an arrest warrant to initiate criminal proceedings); *Burns*, 500 U.S. at 494 (noting there is not a "generalized concern with interference with an official's duties, but rather is a concern with interference with the conduct closely related to the judicial process" in refusing to extend absolute immunity to a prosecutor's provision of advice to police on a warrant application). Plaintiffs here are not even criminal defendants, but rather crime victims and witnesses who faced the deprivation of their constitutional rights without a trial. "Where the reason for the rule extending absolute immunity to prosecutors disappears, it would truly be 'monstrous to deny recovery.'" *Imbler*, 424 U.S. at 445 (White, J., concurring in the judgment) (citation omitted).

Further, expanding absolute immunity to cover the type of misconduct at issue here would subvert the history and purpose of Section 1983 while exacerbating other policy concerns. Contrary to the Supreme Court's assumptions in *Imbler*, prosecutors rarely face criminal liability or professional sanctions, even for egregious misconduct. Courts, therefore, should be exceedingly reluctant to strip victims of the civil remedy given them by Congress. Nor is the expansion of absolute immunity at all necessary, given that qualified immunity already "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns*, 500 U.S. at 495 (quoting *Malley*, 475 U.S. at 341).

### *A. The public policy rationales behind* **Imbler** *do not apply to this case.*

In its "public policy" analysis in *Imbler*, the Court relied on the notions that (1) the threat of suit could constrain a prosecutor's decision-making and undermine her performance; (2) qualified immunity may be insufficient and even honest prosecutors may face "substantial danger of liability"; and (3) immunity would protect criminal defendants' ability to receive a fair hearing on appeal or on post-trial motion because a judge would not be concerned that a post-trial decision in favor of the accused might result in prosecutorial liability, 424 U.S. at 424-27, and, relatedly, "[t]he possibility of personal liability also could dampen the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation," *id.* at 427 n.25.

These policy justifications for affording absolute prosecutorial immunity, however, simply are not present in the context of acts that violate the constitutional rights of crime victims and witnesses, against whom no criminal case is pending. Refusing to extend absolute prosecutorial immunity in this case would not implicate any of the concerns identified in *Imbler*. It would not deter a prosecutor's decision to charge specific criminal defendants because this case involves abuse by prosecutors directed at crime victims and not criminal defendants. It would not require an honest prosecutor to face substantial danger of liability because this case involves egregious allegations of clear, repeated, and willful constitutional violations. And it would not undermine the willingness of a judge to grant relief to a criminal defendant or of a prosecutor to bring mitigating evidence to the court's attention because, again, the prosecutors here directed their misconduct at crime victims or witnesses and not criminal defendants. Moreover, the reasoning that prosecutors should be immune from liability for existing constitutional violations because they might otherwise commit additional constitutional or ethical violations (namely discovery violations) is questionable at best and dangerous at worst.

The only "chilling effect" that would be caused by a refusal to extend absolute immunity in this context would be perfectly justified: prosecutors *should* be forced to account for their actions when they step outside of their traditional advocacy roles in carefully controlled court proceedings, engage in unfettered and abusive quasi-police investigatory acts, and direct those acts at crime victims who lack the same protections and recourse available to criminal defendants. Any other result would create perverse incentives for prosecutors to feel *more* free to abuse crime victims and witnesses.

Nor does the historical common-law immunity on which *Imbler* relied apply to Plaintiffs' Section 1983 claims in this case. As the Supreme Court held in *Burns v. Reed*, "[a]bsent a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in *Imbler*, [the Supreme Court] ha[s] not been inclined to extend absolute immunity from liability under § 1983." 500 U.S. at 493 (citing *Malley*, 475 U.S. at 342). Here, Plaintiffs' Section 1983 claims turn not on the decision to prosecute them for crimes, but rather on numerous actions taken by Defendants in deceiving, coercing and punishing them as victims and witnesses to crimes. There is thus no justification for extending absolute prosecutorial immunity here.

### ***B. The types of safeguards that the Supreme Court has found sufficient to justify affording absolute prosecutorial immunity are glaringly absent here.***

The existence of non-litigation safeguards against constitutional violations is another crucial consideration in the Supreme Court's absolute-immunity jurisprudence. Underlying the

Court's decision in *Imbler* was the recognition that prosecutorial misconduct of the type implicated by *Imbler's* suit was subject to correction by means other than Section 1983 lawsuits. *Imbler*, 424 U.S. at 427 (noting that "[v]arious post-trial procedures are available to determine *whether an accused has received a fair trial*," including "the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies") (emphasis added). As the *Imbler* Court acknowledged, "[t]hese checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights *of persons accused of crime*." *Id.*, 424 U.S. at 429 (emphasis added).

Here, however, these checks are inapplicable. Unlike persons accused of crime, victims and witnesses cannot rely on acquittal, post-trial relief, or the threat of evidentiary sanctions in their favor to deter prosecutorial misconduct. A person who is not a criminal defendant has no trial at all. Indeed, the crux of Plaintiffs' claim is that local prosecutors engaged in misconduct—from fabricating subpoenas "without any judicial approval or oversight" to coercing interrogations "by prosecutors outside of court" (SAC at 2 (Preliminary Statement))—precisely to *avoid judicial processes* that might normally safeguard against abuses and might warrant broader protections in different circumstances. *See Lacey v. Maricopa Cty.*, 693 F.3d 896, 913-14 (9th Cir. 2012) ("we can find no justification for extending absolute immunity to the acts of a prosecutor designed to avoid the 'judicial phase,'" where special prosecutor was "alleged to have acted ultra vires when he issued the subpoenas without ever obtaining grand jury or court approval" and therefore "forfeited the protections the law offers to those who work within the process").

The Supreme Court has concluded that the absence of safeguards other than the specter of civil liability counsels against the extension of absolute immunity. *See Cleavinger v. Saxner*, 474 U.S. 193, 202, 204-06 (1985) (refusing to extend absolute immunity to members of a prison's discipline committee due to absence of "safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct"); *cf. Butz*, 438 U.S. at 513-16 (extending absolute immunity to federal administrative law judges because agency proceedings provide "many of the same safeguards as are available in the judicial process," such as adversary proceedings, a trier of fact insulated from political pressure, the right to present evidence, and the right to agency or judicial review). Given the absence of non-Section 1983 safeguards available to crime victims and witnesses, absolute prosecutorial immunity should not be expanded to bar Plaintiffs' Section 1983 action in this case either. It is the only remedy Plaintiffs have.

### *C. Expanding absolute immunity, when prosecutors almost never face criminal or professional sanctions for misconduct as is, would only incentivize even worse behavior.*

*Imbler*'s application of absolute immunity assumed that prosecutors would be subject to criminal liability and professional sanctions, such that immunity would "not leave the public powerless to deter misconduct or to punish that which occurs." *Imbler*, 424 U.S. at 428-29. In reality, prosecutors are rarely sanctioned at all, even for egregious misconduct. *See, e.g.*, *United States v. Olsen*, 737 F.3d 625, 630-31 (9th Cir. 2013) (Kozinski, J., dissenting from denial of rehearing en banc) (noting that for prosecutors "[p]rofessional discipline is rare," and "[c]riminal liability [even] for causing an innocent man to lose decades of his life behind bars is practically unheard of" despite the "epidemic" of prosecutorial misconduct). To expand the circumstances in which absolute immunity applies would simply carve out an even greater swath of unsanctioned misconduct and would create more perverse incentives for prosecutors.

*First*, *Imbler*'s assumption that immunized prosecutors will still face criminal penalties has not proven to be true. *See generally* Gershman, *Bad Faith* at 32 (citing data that "criminal sanctions against a prosecutor are hardly ever enforced, in California or anywhere else in the United States"); Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of* Connick v. Thompson, at 17, *available at*: https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf ("Laws providing criminal sanctions for intentional prosecutorial misconduct do exist in a number of states, but in reality, prosecutions are rarely sanctioned under such statutes, even in the most egregious cases.").

Particularly where prosecutors themselves are the gatekeepers of criminal sanctions, it is hardly surprising that they are reluctant to police their own colleagues:

> [I]n most instances there is an inherent conflict of interest because the prosecutor's office is responsible for initiating criminal proceedings against one of its own. The individuals charged with investigating and indicting the prosecutor are usually current or former coworkers of the offending prosecutor. Such a proceeding also generates negative publicity and scrutiny for the office, which is a huge disincentive, especially when one considers that most district attorneys are elected to office.

Innocence Project at 17. Accordingly, in 1999, the Chicago Tribune found that out of 381 nationwide reversals in homicide cases for using false evidence or "conceal[ing] evidence suggesting innocence," only "one [prosecutor] was fired, but [he] appealed and was [later] reinstated with back pay"; "another received an in-house suspension of 30 days"; a "third prosecutor's law license was suspended for 59 days, but for other misconduct in the case"; and none were disbarred or received any public sanction. *See* Maurice Possley & Ken Armstrong, *The Verdict: Dishonor*, Chicago Tribune, January 11, 1999, at C1; and Maurice Possley & Ken Armstrong, *The Flip Side of a Fair Trial*, Chicago Tribune, January 11, 1999, at C1. Most recently, New York State prosecutors opposed a bill to create a prosecutorial oversight board that would police misconduct in the profession. *See* WNYC, *How We Judge Prosecutors*, February 18, 2018, *available at*: https://www.wnyc.org/story/how-we-judge-prosecutors/. The prospect of self-policing is particularly remote in cases like this one, where the alleged abuses were perpetrated by *multiple* prosecutors and were apparently permitted by the District Attorney himself. *See* SAC ¶ 13.

*Second*, *Imbler*'s assumption that professional discipline would serve as an additional bulwark against abuse has not been borne out. "Although state bar associations, grievance committees, and the Justice Department's Office of Professional Responsibility have regulatory authority over prosecutors and have the power to discipline prosecutors for violations of rules of professional ethics, virtually every commentator has criticized the absence of professional discipline of prosecutors, even in cases of obvious and easily provable violations and even in cases in which a court issued a stinging rebuke of the prosecutor." Gershman, *Bad Faith* at 34. "In most jurisdictions, trial and appellate judges are not required to report prosecutorial misconduct and error. Yet, even in jurisdictions where there is a requirement to report, judges are failing to do so." Innocence Project, at 14.

Even assuming that professional discipline were routinely attempted, there is ample evidence that ethics complaints and bar referrals are not effective deterrents, particularly in Louisiana. *See, e.g.*, The Open File, *LA: Weak Enforcement of Prosecutorial Ethics Just Got Weaker in the Nation's Hotbed of Misconduct*, Oct. 24, 2017 (hereafter "*LA: Weak Enforcement*") (noting that "Louisiana has a uniquely sordid history when it comes to prosecutorial misconduct"), *available at:* http://www.prosecutorialaccountability.com/2017/10/24/la-weak-enforcement-of-prosecutorial-ethics-just-got-weaker-in-the-nations-hotbed-of-misconduct/; Radley Balko, *New Orleans's* *persistent prosecutor problem*, Washington Post, October 27, 2015 (detailing pattern and practice of prosecutorial misconduct and noting that, although "defense attorneys in Louisiana filed a series of ethics complaints with the Office of Disciplinary Counsel, . . . [i]t took more than two years for them to even get notice of receipt for those complaints" and no action had been taken many months later), *available at*: https://www.washingtonpost.com/news/the-watch/wp/2015/10/27/new-orleanss-persistent-prosecutor-problem/?utm_term=.bae1d338cf24. For example, the Louisiana Supreme Court recently made ethics complaints against abusive prosecutors more difficult to prove by imposing a new materiality requirement in cases alleging that prosecutors failed their ethical duties to disclose exculpatory evidence. *LA: Weak Enforcement*. Nor are courts a perfect check: "many judges are reluctant to challenge prosecutors specifically or to instigate professional disciplinary proceedings." *Id.* (describing criminal courts in Louisiana as "a place well-known to be safe for the state's prosecutors—even the unethical ones").

The result has been a yawning disparity between provable instances of prosecutorial misconduct and actual discipline for such misconduct. As the National Association of Criminal Defense Lawyers has explained elsewhere:

> Prosecutorial misconduct remains a substantial cause of wrongful convictions, yet the offending attorneys are virtually never disciplined.
> . . .
> The New York State Bar Association Task Force on Wrongful Convictions ("Task Force") recently found that prosecutorial misconduct was a substantial cause of wrongful convictions in the state, but that prosecutors rarely were disciplined, either by their own offices or by state disciplinary authorities. The Task Force studied 53 cases of wrongful convictions that were overturned by "exoneration," and conducted hearings at which practitioners from both sides, and exonerated individuals themselves, testified. It concluded that 31 of those wrongful convictions were attributable to "governmental practices." Yet, it reported, "research has not revealed any public disciplinary steps against prosecutors."
> . . .

> In California, the Commission on the Fair Administration of Justice ("Justice Commission"), made similar findings. The Justice Commission analyzed 2,131 California cases where claims of prosecutorial misconduct had been raised. While courts had found prosecutorial misconduct in 444 of these cases, the Justice Commission focused on 54 cases that resulted in the reversal of the conviction and which, pursuant to California Law, should have been reported to the state bar association for disciplinary investigation. The Commission could not find a single instance where any such referral was made. The Commission concluded that "our reliance upon the State Bar as the primary disciplinary authority is seriously hampered by underreporting." Moreover, the Justice Commission cited no specific examples of internal discipline in those cases, or any others.

Brief of the National Association of Criminal Defense Lawyers *et al*., *Pottawattamie Cty., Iowa v. McGhee*, 2009 WL 3022905, at *24-26 (2009) (No. 08-1065) (citations omitted).

Absent a real threat of criminal sanctions, external discipline, or internal recriminations—as well as the lack of trial-based remedies for non-criminal defendants like Plaintiffs here—there are very few existing deterrents for prosecutors who abuse crime victims and witnesses. This Court should be wary of expanding absolutely immunity in any way that might further embolden prosecutorial abuses. Indeed, in this regulatory vacuum, it falls on trial courts "to take a much more aggressive stand against prosecutorial abuses in an effort to make prosecutors accountable for their misconduct." Gershman, *Bad Faith* at 35. Expanding the doctrine of absolute immunity in clear cases of abuse, as sought by the Defendants here, would remove one of the few remaining lines of defense against misconduct by prosecutors.

### *D. Expanding absolute immunity to this case would undermine Section 1983's purpose of protecting African Americans.*

The conduct alleged in this case appears to disproportionately target victims and witnesses of color. This Court should be especially vigilant about prosecutorial misconduct aimed at communities of color, which were intended beneficiaries of Section 1983's protections and which are particularly vulnerable to abuse. *See supra* Section III.A. "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."

*Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *see also Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986) ("Discrimination within the judicial system is most pernicious because it is 'a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.'") (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)) .

Extending absolute immunity in these circumstances would not only subvert the intent of Section 1983's purpose of protecting African Americans, and by extension people of color, from official abuse, but it would also exacerbate a longstanding mistrust of the criminal justice system within communities of color by wholly and unjustifiably shielding systemic abuses from legal redress. And to the extent the District Attorney's Office justified its conduct by arguing that victims and witnesses would not cooperate with their investigations without coercion, immunizing abusive conduct against people of color will have the *opposite* effect of restoring that trust—it will only hasten its evisceration. *See McCleskey v. Kemp*, 481 U.S. 279, 346 (1987) (quoting *Rose*, 443 U.S. at 555-56) (noting that disparate treatment by the criminal justice system "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process").

### ***E. Expanding absolute immunity to this case is not necessary given existing protections afforded by qualified immunity and other litigation defenses.***

"[A]bsolute immunity is an extreme remedy, and it is justified only where 'any lesser degree of immunity could impair the judicial process itself.'" *Lacey v. Maricopa Cty.*, 693 F.3d 896, 912 (9th Cir. 2012) (*quoting Kalina*, 522 U.S. at 127). There is no need for a sledgehammer when a scalpel will do: for better or worse, qualified immunity already "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns*, 500 U.S. at 494-95 (quoting *Malley*, 475 U.S. at 341).

Nor is qualified immunity a weak alternative: statistics show that qualified immunity is almost always a winning argument for government officials. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 82-83 (Feb. 2018). Therefore, prosecutors who act in good faith or face frivolous lawsuits can still avail themselves of the robust protections of qualified immunity. As the Supreme Court said in *Buckley v. Fitzsimmons*:

> Even if policy considerations allowed [courts] to carve out new absolute immunities to liability for constitutional wrongs under § 1983, we see little reason to suppose that qualified immunity would provide adequate protection to prosecutors in their provision of legal advice to the police, yet would fail to provide sufficient protection in the present context.

509 U.S. at 278 (internal citation omitted).

Prosecutors also retain the benefit of other protections, including: heightened federal pleading requirements for plaintiffs, *see, e.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); the reality that their positions as government officials are more likely to be credited by juries than plaintiffs and witnesses who are challenging prosecutors; the ability of prosecutors to avoid scrutiny by offering sweetheart pleas, dropping charges, or dismissing cases entirely if misconduct is uncovered before trial; and the fact that, in the unlikely event the prosecutor is found liable for misconduct, the county or state that employed him would almost certainly indemnify him for his damages. *See Board of Cty. Comm'rs v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting). Further, prosecutors are more familiar with the tools of litigation than most, and there is no reason to believe that this group will be unable to defend themselves against frivolous charges or cowed by the prospect of doing so.[4]

[4] To be clear, *amici* do not take a position on whether or how qualified immunity should be applied under the circumstances of this case.

## V. CONCLUSION

For the reasons stated above, this Court should refuse to extend the doctrine of absolute immunity to this case, and deny that basis for Defendants' Motion to Dismiss the Second Amended Complaint.

Respectfully submitted this 11th day of April, 2018,

By:
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 11th day of April, 2018, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system, and that service will be provided through the CM/ECF system, as well as by U.S. Mail for any non-CM/ECF participant.

___/s/ Trevor P. Stutz__________
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