No. 08-1065

In the Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

CURTIS W. MCGHEE JR.
AND TERRY J. HARRINGTON,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Center on the Administration of Criminal Law ("the Center"), based at New York University 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. Although prosecutorial discretion is a central feature of criminal enforcement at all levels of government, there is a dearth of scholarly attention to how prosecutors actually exercise their discretion, how they should exercise their discretion, and what mechanisms could be employed to improve prosecutorial decisionmaking. The Center's litigation program, which consists of filing briefs in support of both the government and defendants, aims to bring its empirical research and experience with criminal justice and prosecution practices to bear in important criminal justice cases in state and federal courts. The Center focuses on cases in which the exercise of prosecutorial discretion raises significant substantive legal issues. The Executive Director of the Center was a federal prosecutor for 12 years and worked in the United States Attorney's Office for the Southern District of New York, the United States Attorney's Office for the District of

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[1] The parties have consented to the filing of this amicus brief and their consent letters have been filed with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Columbia, and the United States Department of Justice in Washington, D.C.

The Center files this *amicus* brief in support of Respondents' brief to highlight its concern about the potential harms of expanding absolute immunity to cloak pre-indictment, investigative conduct by prosecutors. The Center has an interest in advancing qualified, not absolute, immunity as the better and more workable standard to apply to such conduct, including the conduct alleged in the instant case. To adopt the rule Petitioners propose would subject prosecutors to a higher level of protection than that provided to police officers and other law enforcement officials performing essentially identical functions, create perverse incentives for unethical prosecutors to exercise their discretion to charge suspects as a means of immunizing misconduct they committed at the pre-indictment stage, and skew prosecutors' incentives in choosing between horizontal prosecution models that segregate investigative and adjudicative functions and vertical prosecution models that do not.

SUMMARY OF ARGUMENT

Absolute immunity for public officials acting in their official capacities is the exception, not the rule. This Court has consistently held that absolute immunity is a shield to be used sparingly. For prosecutors, this shield protects only the exercise of prosecutorial discretion to pursue charges against a suspect and subsequent advocacy to prove those charges beyond a reasonable doubt. Absolute immunity is not available to prosecutors, just as it is

not available to police officers and other law enforcement officials, for conduct that is investigative in nature and that occurs prior to the charging of a suspect. Instead, prosecutors are entitled to qualified immunity for such conduct. This is the clear holding of *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). Petitioners would have this Court undermine *Buckley*'s core holding by extending the reach of absolute immunity to cloak retroactively a prosecutor's investigative conduct where the conduct produced evidence the prosecutor subsequently chose to introduce to a grand jury or at trial. Such an expansion of the limited doctrine of absolute immunity is unwarranted under this Court's precedent and unjustifiable as a matter of policy and common sense.

This Court has been clear that prosecutors functioning as investigators prior to the bringing of charges receive qualified immunity, the same protection that traditional investigators such as police officers receive in such circumstances. Petitioners attempt to resurrect a proposition firmly rejected in *Buckley* – namely, that prosecutors functioning as investigators nevertheless may enjoy absolute immunity if their pre-indictment investigative conduct results in evidence that is later used in the grand jury or at trial. Such a rule cannot be reconciled with the language or reasoning of *Buckley* – which puts the character of the conduct at the heart of the analysis, not the identity of the investigator – and would afford prosecutors more protection than police officers and other law enforcement officials for exactly the same conduct.

Nor are Petitioners and their *amici* correct in their assertion that absolute immunity is necessary to ensure that prosecutors are not deterred from doing their jobs. Qualified immunity is a better and more workable standard that provides substantial and sufficiently appropriate protections for prosecutors from liability for their actions during the investigative stage. Indeed, several states have long provided only qualified immunity to prosecutors and other government officials performing discretionary acts in good faith and within the scope of their authority with no apparent impairment of their ability to exercise their duties. Qualified immunity will not deter prosecutors acting in good faith to gather facts and assess evidence prior to deciding whether there is sufficient probable cause to bring charges against a suspect. As this Court noted in *Buckley*, the prosecutor's appropriate pre-indictment role is far more akin to a neutral fact-finder than it is to an advocate, and there is scant justification for expanding absolute immunity to prosecutors whose conduct at that stage grossly deviates from the standards we expect of them. Qualified immunity would deter only the most egregious and willful acts of prosecutorial misconduct that constitute clear violations of law, professional standards, and moral principles during the investigative stage, the very point that prosecutors are expected to be at their most objective and truth-seeking. Qualified immunity accords with *Buckley* and balances, more effectively than alternatives such as professional disciplinary proceedings, the public interest in fair investigations and trials with its complementary interest in zealous prosecution of criminal conduct.

To expand the reach of absolute immunity would have a detrimental effect on prosecutorial incentives in making charging decisions. Under the rule proposed by Petitioners, a prosecutor who decides to bring charges against a suspect will retroactively receive absolute immunity for even purely investigative conduct at the pre-indictment stage so long as it is in some way connected to evidence later used at trial. Accordingly, regardless of the strength of the evidence, an unethical prosecutor has a strong incentive to bring charges against a suspect, and perhaps falsify even more evidence to increase the chances of securing a conviction, to shield herself from civil liability for her misconduct at the investigative stage. Absolute immunity would strengthen the hand of unethical prosecutors, do nothing to encourage ethical ones, and would remove a key tool in uncovering prosecutorial misconduct through civil discovery and lawsuits. A criminal justice system with such incentives would corrupt the proper exercise of prosecutorial discretion.

Finally, extending absolute immunity as suggested by Petitioners would push prosecutor's offices to employ a vertical prosecution model in which the same prosecutor investigates and makes decisions about charging and advocacy at trial. Application of absolute immunity would cause prosecutors to discount any potential benefits of a horizontal prosecution model – one where the investigative and adjudicative functions are segregated between two different sets of prosecutors. Prosecutors should be left to choose the structural design of their offices to best accomplish their

primary mission of law enforcement without the skewing effect of the applicable immunity standard.

ARGUMENT

I. Prosecutors Should Have Qualified, Not Absolute, Immunity for All Investigative Stage Conduct, Including the Procurement of False Testimony from a Witness

Absolute immunity exists to enable prosecutors to exercise independent judgment on charging decisions and to advocate vigorously to prove their cases in the courtroom. Although this Court has ruled that prosecutors are entitled to absolute immunity while engaged in conduct that is "intimately associated with the judicial phase" of a criminal proceeding, *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), absolute immunity is the exception, not the rule, and 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)). The primary purpose of absolute immunity is not to advance "the interest in protecting the prosecutor from harassing litigation that would divert his time and attention from his official duties," but rather to advance "the interest in enabling him to exercise independent judgment when 'deciding which suits to bring and in conducting them in court.'" *Kalina v. Fletcher*, 522 U.S. 118, 125 (1997) (quoting *Imbler*, 424 U.S. at 424).

This Court has cautioned that absolute immunity is justified only when there is great risk

that prosecutors will be deterred from the effective performance of their appropriate role as advocates. There is no such risk for prosecutors acting as investigators, not advocates, at the pre-indictment stage, nor would the application of a lesser degree of immunity prior to the filing of formal charges significantly impair the judicial process as Petitioners and their supporting *amici* suggest. The case law in this area reflects a careful balancing of the need to preserve a sphere of uninhibited discretion for prosecutors when acting as advocates against the need to provide fair and meaningful redress for the victims of egregious constitutional violations. *See Buckley*, 509 U.S. at 269.

To preserve this balance, prosecutors gathering evidence in connection with a criminal investigation prior to the commencement of formal charges should be afforded qualified, not absolute, immunity, regardless of whether that evidence is later used in some way in the grand jury or at trial. Extending the impenetrable shield of absolute immunity to prosecutors performing an investigative function would protect, and possibly encourage, flagrant and unchecked abuses of investigative techniques, many of which could amount to violations of a suspect's constitutional rights, without providing ethical prosecutors any substantial additional protections beyond the quite robust ones already provided by the qualified immunity standard.

Petitioners assert that qualified immunity is inadequate because it will open the floodgates to vexatious litigation, with the effect of deterring

prosecutors from conducting effective investigations. *But see Burns*, 500 U.S. at 494 (there is little danger of "harassment and intimidation" stemming from "vexatious litigation" over legal advice given by prosecutors to investigating officers). As this Court has noted, however, qualified immunity offers quite substantial protections to public officials acting in their official capacities, and the hurdles for filing a suit aimed at defeating an official's qualified immunity defense are high, and the hurdles for succeeding even higher. A plaintiff seeking to overcome a defense of qualified immunity must show that a government official acted so as to violate a clearly established statutory or constitutional right that a reasonable person in the official's position would have known to exist. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity thus "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 v. Briggs*, 475 U.S. 335, 341 (1986) (internal quotation marks omitted)). This is especially true in light of the strict pleading requirements of *Ashcroft v. Iqbal*, which further reinforce the protections of qualified immunity and require courts to focus on the substantive plausibility of allegations of misconduct at the pleadings stage, rather than the mere possibility that the allegations might be true. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009). Not only is overcoming a defense of qualified immunity daunting, but § 1983 plaintiffs must also independently demonstrate all of the elements of a constitutional violation and legal causation of injury. *See City of Canton Ohio v. Harris*, 489 U.S. 378, 389-

91 (1989); *West v. Atkins*, 487 U.S. 42, 48-50 (1988); *Martinez v. State of Cal.*, 444 U.S. 277 (1980).

The overwhelming majority of prosecutors are ethical public servants motivated by a desire to do justice. Their activities will be guided by the law, the facts, and their own moral compass, which will protect their conduct regardless of what immunity standard is applied at different stages in a criminal investigation and prosecution. The immunity standard can affect the behavior of unethical prosecutors, however, by exposing them to civil liability for serious misconduct committed at the investigative stage. Application of the qualified immunity standard to a prosecutor's investigative conduct during the pre-charging, fact-gathering phase of an investigation – the same protection afforded police officers and other law enforcement officials performing identical investigative tasks – will protect ethical prosecutors and deter only the most egregious misconduct. Qualified immunity at the pre-indictment stage will enhance, not undermine, the ethical prosecutor's ability to be a zealous advocate once formal charges have been initiated and deter only that conduct which would fundamentally compromise a suspect's right to a fair trial.

A. Police Officers are Entitled to Qualified, Not Absolute, Immunity and the Same Standard Should Apply to Prosecutors Performing an Investigative Function

Qualified immunity has long been a workable standard at the investigative stage for police officers

and other law enforcement officials and does not pose a significant burden on the effective performance of their duties. There is no reason to expect that qualified immunity would present any more of a hindrance to prosecutors acting in an investigative capacity. Indeed, it is settled law that prosecutors performing an investigative function before the filing of charges are entitled only to qualified immunity. *See Buckley*, 509 U.S. at 259; *Kalina*, 522 U.S. at 118. Using the "functional approach" refined in *Burns*, the Court explained that it is the nature of the function performed, not the identity of the person performing it, that should be considered in determining whether absolute or qualified immunity should apply. *Buckley*, 509 U.S. at 269. If the prosecutor's activities are not advocatory in nature – i.e., not "*intimately* associated with the judicial phase of the criminal process," *Imbler* at 430 (emphasis added) – then absolute immunity does not shield the prosecutor from potential civil liability for misconduct.

Procuring false testimony through the coercion of witnesses during the pre-indictment fact-gathering stage of a criminal investigation is not in any sense advocatory and should not be shielded by absolute immunity. *See Moore v. Valder*, 65 F.3d 189 (D.C. Cir. 1996) (prosecutor was not entitled to absolute immunity for alleged misconduct of intimidating and coercing witnesses, functions related to typical police functions). Rather, such conduct is an abuse of investigative techniques directed at ensuring that the government has acquired incriminating evidence, without regard for its truthfulness. The procurement of evidence prior

to the filing of formal charges is a classic police function, i.e., the collection of information to be used by a prosecutor in determining whether to commence a criminal prosecution. *See Barbera v. Smith*, 836 F.2d 96, 100 (2d Cir. 1987) (holding that acquiring evidence that may be used in a prosecution, as opposed to the organization, evaluation and marshalling of such evidence, is by nature a police activity and is not entitled to absolute immunity). When a prosecutor sets out to gather facts and evidence prior to bringing charges against a suspect, she is serving not as an advocate trying to win her case but as an investigator trying to understand whether a crime occurred and who did it.

Whether it is a police officer or a prosecutor who procures evidence prior to the filing of formal charges, the same standard of immunity should apply to each. *See Buckley*, 509 U.S. at 276. It does not change the analysis that prosecutors may use the evidence they themselves procured in deciding whether to bring charges or how to try a case against a defendant. Even though "[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," this Court has "never indicated that absolute immunity is that expansive." *Burns*, 500 U.S. at 495. Instead, the Court in *Buckley* explained that where a prosecutor "performs the investigative functions normally performed by a detective or police officer," it is neither "appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." *Buckley*, 509 U.S. at 283-84 (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th

Cir. 1973) (internal quotation marks omitted)). Nor can a prosecutor "shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial," otherwise, every prosecutor might try to insulate herself from liability for constitutional wrongs by ensuring that the case goes to trial. *Buckley*, 509 U.S. at 276.

The underlying rationale for the equal treatment of police officers and prosecutors who perform investigative functions is straightforward and concerns the divergent purposes of investigative activity and trial advocacy. A prosecutor is performing a qualitatively different function in the criminal justice system than her traditional role as courtroom advocate when she investigates a crime before the filing of charges. The investigative role requires a disinterested mode of fact-gathering and weighing of evidence; the role of trial advocate involves persuading a jury by presenting the assembled facts in the strongest light possible within the legal and ethical confines of an adversarial proceeding. As this Court noted in *Buckley*:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand.

509 U.S. at 273 (quoting *Hampton*, 484 F. 2d at 608, cert. denied, 415 U.S. 917 (1974)).

The prosecutor's trial role, her role as advocate and persuader, merits the protection of absolute immunity precisely because it is so different from the performance of traditional investigative functions. *See Burns,* 500 U.S. at 478; *Forrester v. White,* 484 U.S. at 224. Trial advocacy requires the prosecutor to use independent judgment in presenting a strong case to a jury. The prosecutor's role in the post-indictment stage is to persuade neutral arbiters that the defendant is guilty of the crimes alleged. A prosecutor fearing potential civil liability for her trial advocacy may tread too cautiously in the courtroom, thereby skewing the delicate balance of the adversarial proceedings that are grounded in zealous representation of both parties. Traditional investigative activities, by contrast, are intended to be different in kind from advocacy. The essential purpose of a criminal investigation at the pre-indictment stage is to discover the facts so that the prosecutor may make an informed decision about whether to pursue charges. There is scant room for advocacy at the fact-gathering stage, and investigators, whether they happen to be prosecutors or police officers, are expected to proceed with a measure of objectivity that one does not expect or encourage during an adversarial trial proceeding. *See Buckley*, 509 U.S. at 274 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.") (footnote omitted). In short, the investigation is the time to gather the

facts, the charging determination is the time for a clear-eyed assessment of those facts, and the trial is the time to convince the jury that the facts support the charges beyond a reasonable doubt.

In a critical sense, then, the reliability of the investigation serves as the foundation for the integrity of subsequent charging decisions and the adversarial proceedings before the grand jury and at trial. Qualified immunity at the pre-indictment stage is crucial to preserving this integrity by helping ensure that prosecutors understand their proper roles at different stages in a criminal investigation and prosecution. If they choose to take on investigative functions, prosecutors should serve as objective fact-finders, not as advocates. It is only after they (or the police officers and other law enforcement officials working with them) have properly discharged these investigative functions that they receive the benefit of absolute immunity for how they subsequently use the facts and evidence in bringing charges and proving their case.

When the functions of prosecutors and police officers are the same, the immunity that protects them should also be the same. As this Court has made clear, it is an unworkable standard to afford prosecutors a higher degree of immunity simply because there is a possibility that evidence gathered during an investigation may later be used at trial. *See Buckley*, 509 at 276. Prosecutors who act as investigators prior to filing formal charges are not serving in an advocacy role and should not have absolute immunity from liability for their actions in such circumstances. *Id.* at 259. In sum, there is no

reason to believe that prosecutorial discretion would be threatened by encouraging prosecutors to understand, and act in accordance with, their proper role at the investigative stage.

B. Qualified Immunity Provides Robust Protection to Prosecutors

Qualified immunity has been characterized by this Court as providing "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Contrary to Petitioners' and their *amici's* arguments, absolute immunity is not required to prevent frivolous litigation, nor to protect the judicial process. Absolute immunity is unnecessary to protect the ethical prosecutor at the investigative stage because the difficulty of establishing a cause of action and defeating a defense of qualified immunity will protect all but the most incompetent or willful wrongdoers. *See* Margaret Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 55 (2005).

Significantly, certain tactics deemed essential to law enforcement are not undermined by use of the qualified immunity standard. *See, e.g.*, *Cruz v. Kauai County*, 279 F.3d 1064, 1069 (9th Cir. 2002) (prosecutor who signed affidavit to secure arrest warrant without investigating truthfulness of allegations made by third party was entitled to qualified immunity); *Manetta v. Macomb County Enforcement Team*, 141 F.3d 270, 274-75 (6th Cir. 1998) (prosecutor entitled to qualified immunity for advising police to conduct an arrest in absence of

probable cause, because prosecutor could have reasonably believed that Plaintiffs' conduct constituted extortion under Michigan law, while in actuality Plaintiffs were engaged in legal activity). Defeating the qualified immunity defense is usually an insurmountable challenge. Specifically, under a qualified immunity regime, the victim of misconduct can maintain an action only by proving that the prosecutor violated clearly established statutory or constitutional law that a reasonable person in the prosecutor's position would have been aware of. *See Harlow*, 457 U.S. at 818. For example, this Court recently reaffirmed the robust protections of qualified immunity in holding that public school officials were protected from liability for conducting unconstitutional strip searches of students because established law did not clearly show that such searches violated the Fourth Amendment. *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009). At the same time, qualified immunity – unlike absolute immunity – does not shield clearly outrageous conduct. *See e.g.*, *Hope v. Pelzer*, 536 U.S. 730 (2002) (officials not entitled to qualified immunity where they handcuffed inmate to hitching post on two occasions, one of which lasted for seven hours without water or bathroom breaks, because they were on notice that their conduct violated established law); *Doe v. Phillips*, 81 F.3d 1204, 1211-1212 (2d Cir. 1996) (prosecutor not entitled to qualified immunity for claims that he violated Plaintiff's First Amendment rights when he demanded that Plaintiff swear to her innocence on a bible in a church as a condition of dropping charges that she had sexually abused her son); *Orange v. Burge,* 2008 WL 4443280 *10 (N.D. Ill. 2008)

(prosecutor not entitled to qualified immunity where he was personally involved in coercive interrogation and then coached the suspect to deliver a false confession in exchange for bringing an end to the violent interrogation).

Moreover, the qualified immunity defense has been strengthened in the years since *Imbler* to provide a complete defense at the earliest stages of litigation for all but the most inexcusable misconduct. This Court has replaced the common-law subjective standard of good faith with an objective standard which allows liability only where an official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Burns*, 500 U.S. at 494 n.8 (quoting *Harlow*, 457 U.S. at 818). This change was designed to avoid extensive disruption of government functions and resolve many insubstantial claims on summary judgment. *Id.*; *see also Malley*, 475 U.S. at 341, and *Anderson v. Creighton*, 483 U.S. 635, 645 (1987)). Additionally, in *Imbler*'s wake, when a government official raises the qualified immunity defense, discovery on other issues is stayed until the immunity issue is resolved by a motion to dismiss or a motion for summary judgment. *See Harlow,* 457 U.S. at 818. Should a trial court reject a qualified immunity defense, government officials are afforded the right to an immediate interlocutory appeal. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-530 (1985); *see also Anderson*, 483 U.S. at 646 n.6.

State practice provides further evidence that qualified immunity affords prosecutors sufficient

protection to perform their functions effectively and independently. A number of jurisdictions provide only qualified immunity for state and local officials who acted without malice and were performing discretionary acts within the scope of their duties. *See e.g.*, *Shellburne, Inc. v. Roberts*, 238 A.2d 331 (Del. 1967); *Medeiros v. Kondo*, 522 P.2d 1269 (Haw. 1974); *Towse v. State*, 647 P.2d 696 (Haw. 1982); *Bone v. Andrus*, 527 P.2d 783 (Idaho 1974); *Robinson v. Board of County Commissioners*, 278 A.2d 71 (Md. 1971); *Sustin v. Fee*, 431 N.E.2d 992 (Ohio 1982); *Utah State University v. Sustro & Co.*, 646 P.2d 715 (Utah 1982). For example, Vermont's doctrine of official immunity recognizes two degrees of immunity – absolute immunity shields judges, legislators, and the state's highest executive officers in cases where the conduct was performed within their respective authorities; qualified immunity, on the other hand, protects lower-level officers, employees, and agents so long as they 1) reasonably believed they were acting within the scope of their authority; 2) acted in good faith; and 3) were performing discretionary acts. *See Levinsky v. Diamond*, 559 A.2d 1073 (Vt. 1989) (applying qualified immunity standard to state assistant attorneys general for discretionary acts including subpoenaing records, filing charges, pursuing a federal warrant, and making statement at a bail hearing); *see also Ross v. Consumers Power Consumers Power Co.*, 363 N.W. 2d 641 (Mich. 1984) (applying only qualified immunity to lower level officials, including prosecutors, for all discretionary acts performed within the scope of duties and in good faith). The longstanding immunity doctrines in these states demonstrate that qualified immunity is

a perfectly workable standard, and there is no indication that the application of this standard unduly limits prosecutors in the performance of their duties.

C. Qualified Immunity is the More Workable Standard in the Absence of Meaningful Alternative Deterrents to Prosecutorial Misconduct

One of the key premises of *Imbler* was that sanctions such as professional discipline and criminal punishment would provide a meaningful alternative deterrent to unconstitutional action by prosecutors, and that their constitutional violations are more likely to be detected and corrected than those committed by other government officials. *See Imbler*, 424 U.S. at 426; *Cf. Mitchell*, 472 U.S. at 522-23 ("officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed...and the judicial process is largely self-correcting"). However, empirical studies of these alternative safeguards – including appellate review of claims of misconduct, judicial reporting of acts of misconduct, state bar disciplinary actions, statewide codes of professional conduct, as well as internal systems of accountability within prosecutor's offices – suggest that such alternatives do little to deter misconduct or provide meaningful remedies, largely because they are rarely invoked. *See* Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L. J. 1509, 1514 (2009).

Recent studies show that prosecutors are rarely disciplined or criminally prosecuted for their misconduct, and that their victims are generally denied any civil remedy because of prosecutorial immunities. This is so not because disciplinary proceedings usually result in the exoneration of the accused prosecutors, but because disciplinary proceedings are rarely instituted against prosecutors in the first place. In 2003, the Center for Public Integrity conducted a comprehensive study of prosecutorial misconduct which examined 11,452 cases since 1970 in which appellate courts reviewed charges of prosecutorial misconduct. *See* Johns, 2005 B.Y.U. L. REV. at 60 (citing to Center for Public Integrity, Harmful Error: Investigating America's Local Prosecutors 45-47, app. at 109-09 (2003); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 278 (2007). In the overwhelming majority of cases, the alleged misconduct was either not addressed or ruled to be harmless error. *Id.* Prosecutorial misconduct by state and local prosecutors resulted in the dismissal of charges, reversal of convictions or reduction in sentences in over 2000 cases, and of these, prosecutors were disciplined in only forty-four cases and were never criminally prosecuted. *Id.* Another study found that between 1886 and 2000, on average less than one disciplinary proceeding was brought against prosecutors per year nationally. *See* Johns, 2005 B.Y.U. L. REV. at 70-71. It is even extremely rare that an appellate court will name in its published opinion a prosecutor who the court has determined committed misconduct. *See* Adam M. Gershowitz,

Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct, 42 U.C. DAVIS L. REV. 1059, 1062 (2009). Perhaps most disturbing is the possibility that the vast majority of the most egregious and extreme misconduct evades any form of review and correction.

Nor is there evidence that discipline from state bar associations has been effective in deterring prosecutors from engaging in misconduct. Studies recently completed by the California Commission on the Fair Administration of Justice (CCFAJ) concluded that there were 443 reported decisions between 1998 and 2008 in which courts cited prosecutors for misconduct. *See* CCFAJ, *Reports and Recommendations*, *available at* http://www.ccfaj.org/reports.html (last visited September 15, 2009). In 53 of these cases, convictions were reversed and California judges were required, by law, to refer the prosecutors to the State Bar for discipline. *Id.* Yet, despite this requirement, judges did not refer a single case for discipline. *Id.* The CCFAJ report further shows that upon review of all of the prosecutorial misconduct cases, some of the offending prosecutors had been cited by the courts for engaging in the same misconduct more than once without any subsequent bar disciplinary action. *Id.*

The safeguard of potential civil liability for misconduct at the investigative stage, subject to the defense of qualified immunity, is vital to ensure the integrity of the criminal justice system. Alternatives to potential civil liability simply do not provide a meaningful enough deterrent to abuse of prosecutorial power. Extending absolute immunity

to the investigative conduct at issue in the instant case would eliminate a limited but essential civil remedy for victims of intentional and serious misconduct by prosecutors. Qualified immunity at the investigative stage offers robust protection and would protect prosecutors against all but the most egregious acts, those which merit a remedy to preserve justice and provide some measure of recourse.

II. Conferring Absolute Immunity for Investigative Acts Would Create the Wrong Incentives for Prosecutors Regarding Charging Decisions and Skew Prosecutors' Incentives Regarding Structuring Their Offices

A. Extending Absolute Immunity Would Create Improper Incentives for Prosecutors Deciding Whether to Charge an Individual With a Crime

The rule proposed by Petitioners and their *amici* would have a perverse and damaging effect on prosecutorial incentives in making charging decisions. Prosecutorial discretion to decide whether to pursue charges against an individual is a critical element of our criminal justice system. It affords the prosecutor an opportunity to use her considered and independent judgment to weigh the evidence and assess the likelihood of conviction prior to engaging the full powers of the State to pursue an individual for an alleged crime.

A prosecutor who has investigated a crime will often have principal responsibility for making

the decision regarding whether to charge an individual. If the prosecutor does not charge the individual, her investigative conduct would be subject to qualified immunity as provided in *Buckley*. Under the rule advocated by Petitioners in this case, however, the prosecutor who *does* charge the individual will receive the shield of absolute immunity not just for all trial-related conduct going forward, but also *retroactively* for all investigative-stage conduct related to trial.[2] Thus, if the prosecutor is concerned a violation of a suspect's statutory or constitutional rights may have occurred during the course of the investigation, a sure way to insulate herself from civil liability would be to charge the suspect with a crime. On the theory proposed by Petitioners and their *amici*, the mere decision to charge will extend absolute immunity both forward and backward in time to give a prosecutor complete protection from civil liability. In fact, the more egregious the misconduct by the prosecutor, the stronger her incentive may be to bring charges to avoid liability. Our notions of justice would be stood on their head, as unethical prosecutors would have a deeply personal incentive to bring charges in the weakest cases where they

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[2] The prosecutor's incentives would obviously be different if the Court holds that there can be no violation of individual rights without a trial taking place. In that case, the decision to charge an individual would not present any advantage from the standpoint of immunity because a decision not to charge would cut off any possibility of liability in that no violation of rights has taken place. For reasons set forth at length in the Brief for Respondents, such a position should be rejected. Resp. Br. at 24-27.

may have falsified evidence to "prove" a suspect's guilt at trial. The standard sought by Petitioners and their *amici* would do little other than distort the ethical exercise of prosecutorial discretion upon which much of our criminal justice system rests.

Prosecutorial discretion is an inherent part of the Executive Power. Although prosecutors are required to have probable cause to bring charges against an individual, and are barred by the Equal Protection Clause from targeting individuals for prosecution for reasons of race or religion, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the fact that prosecutorial discretion is an intrinsically Executive calculation makes its exercise largely unreviewable by courts. *See, e.g.*, *United States v. Armstrong,* 517 U.S. 456, 464 (1996) (citing cases); *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 807 (1987); *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing cases). Because there is relatively little independent oversight of a prosecutor's decision to charge an individual with a crime—one of the most consequential decisions a government official can ever make—it is imperative that the immunity doctrines that apply to prosecutorial conduct not reward an unethical prosecutor with retrospective immunity for making the decision to bring charges. The temptation in a close case to charge an individual, or one that is not close but depends on falsified evidence to establish the suspect's guilt, and thereby obtain absolute immunity for conduct that has already taken place, would likely prove irresistible to unethical prosecutors.

B. Applying Absolute Immunity in this Case Would Skew Prosecutors' Incentives Regarding the Allocation of Prosecutorial Functions Within Their Offices

The constitutional standard for immunity should not skew prosecutors' incentives regarding their choice between horizontal (those where investigative and adjudicative responsibilities are performed by separate teams of prosecutors) and vertical (those where such responsibilities reside in one actor) prosecution models. The expansion of absolute immunity disfavors the horizontal model and creates strong incentives for jurisdictions to adopt a vertical model. While we do not take a position on the relative merits of each model, we do observe that some experts, including the American Bar Association, believe that a horizontal structure offers significant benefits absent from a purely vertical one. *See* ABA Criminal Justice Section: Standards On Prosecutorial Investigations, Standard 1.2(e) (2008) (hereinafter, "ABA Standards") (Standard 1.2(e) cites the general principle that "[g]enerally, the prosecutor engaged in an investigation should not be the sole decision-maker regarding the decision to prosecute matters arising out of that investigation."); *see also* Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000).

Proponents of the horizontal model argue that the combination of law enforcement and adjudicative functions vests prosecutors with a significant amount of largely unchecked power. Barkow, 61 STAN. L. REV. at 876. Armed with the unfettered discretion to charge defendants using a growing body of criminal laws that carry a wide range of potential sentences and penalties, and exercising significant leverage over defendants to obtain pleas and cooperation, prosecutors are empowered in many instances to judge their own cause for all intents and purposes. *Id.* at 882-83; *see also* Uviller, 68 FORDHAM L. REV. at 1699. Prosecutors who investigate a case, proponents of the horizontal model contend, are intimately tied to the procurement of the evidence and thus may be less suited than a prosecutor not involved in the investigation to determine whether the evidence gathered is sufficient to prove a suspect's guilt beyond a reasonable doubt. *See* ABA Standards; *id* at 883. Similarly, prosecutors who switch gears from investigator to trial advocate in the same case may not be well disposed to make adjudicative decisions without imposing their own self-interest. *See* Uviller, 68 FORDHAM L. REV. at 1716. There is the risk that improper factors and personal biases will motivate decision-making. *See Armstrong,* 517 U.S. at 476 (Stevens, J., dissenting) ("[T]he possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 Harv. L. Rev. 1521, 1523-37 (1981).

Extending absolute immunity to pre-indictment investigative conduct that is connected to evidence later introduced at trial would encourage prosecutor's offices to adopt a vertical model of prosecution. Under this standard, a prosecutor who gathered evidence during the investigative stage would have a strong incentive to remain the principal decision-maker in evaluating whether to bring charges and what evidence to use against a defendant, and thereby retroactively receive absolute immunity for her conduct in procuring evidence that she herself decides to use in the grand jury or at trial. To be sure, there are important benefits to vertical prosecution, including efficiency and consolidation of knowledge in one person for the purpose of subsequent disclosure decisions. But the choice between vertical and horizontal models should not be skewed by the immunity standard that applies to investigatory conduct.

Application of qualified immunity to investigative conduct and an absolute immunity to advocatory conduct, by contrast, frees prosecutors to make decisions about the structure of their offices based on what best accomplishes their mission of law enforcement and the fair administration of criminal justice, and recognizes the different purposes of and different roles played by prosecutors at each stage of a criminal investigation and prosecution. This Court should take note of the consequences of extending the reach of absolute immunity for the incentives of prosecutor's offices to choose one model of prosecution over another.

CONCLUSION

Qualified immunity is the appropriate standard by which to evaluate the potential liability of prosecutors for their performance of investigative functions prior to the bringing of formal charges against a suspect. Petitioners' and their *amici's* proposal to expand absolute immunity to shield prosecutors' investigative conduct from scrutiny finds no support in the text of § 1983, this Court's precedent, or the public policy concerns that animate immunity doctrines for public officials. We urge this Court to affirm the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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