No. 19-30197

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

RENATA SINGLETON; MARC MITCHELL; LAZONIA BAHAM; TIFFANY LACROIX; FAYONA BAILEY; SILENCE IS VIOLENCE; JANE DOE; JOHN ROE,

*Plaintiffs-Appellees,*

v.

LEON A. CANNIZZARO, JR., in his official capacity as District Attorney of Orleans Parish and in his individual capacity; DAVID PIPES; IAIN DOVER; JASON NAPOLI; ARTHUR MITCHELL; TIFFANY TUCKER; MICHAEL TRUMMEL; INGA PETROVICH; LAURA RODRIGUE; MATTHEW HAMILTON; GRAYMOND MARTIN; SARAH DAWKINS,

*Defendants-Appellants.*

On Appeal from the United States District Court for the Eastern District of Louisiana, No. 2:17-cv-10721, The Honorable Jane Triche Milazzo

# BRIEF OF *AMICI CURIAE* THE DKT LIBERTY PROJECT, THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW, THE CENTER ON RACE, INEQUALITY, AND THE LAW, THE CATO INSTITUTE, FORMER PROSECUTORS, FORMER PUBLIC DEFENDERS, AND LEGAL ACADEMICS IN SUPPORT OF PLAINTIFFS-APPELLEES

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## SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel of record provides this statement of those with an interest in this *amicus* brief.

***Amici Curiae*:**

DKT Liberty Project

The Center on the Administration of Criminal Law

The Center on Race, Inequality, and the Law

The Cato Institute

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are leading thinkers and researchers on the criminal justice system and include former federal prosecutors, former public defenders, legal academics, and non-profit organizations that collectively share an interest in ensuring that absolute prosecutorial immunity is properly limited consistent with the history and purpose of 42 U.S.C. § 1983. *Amici* are interested in this case because the outcome will affect the incentives prosecutors have to comply with the law and the Constitution.[2]

**The DKT Liberty Project** was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is committed to defending privacy, guarding against government overreach, and protecting every American's right and responsibility to function as an autonomous and independent individual. The Liberty Project espouses vigilance of government overreach of all kinds, but especially prosecutorial overreach. The Liberty Project has filed several briefs as *amicus curiae* with state and federal courts and with the United States Supreme Court on issues involving constitutional rights and civil liberties.

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[1] *Amici* hereby certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and no person other than *amici* and their counsel contributed money intended to fund the preparation or submission of this brief. Counsel of record for Plaintiffs-Appellees have consented to the filing of this brief, and counsel of record for Defendants-Appellants do not oppose the filing of this brief.

[2] Academic affiliations are listed for identification purposes only.

**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.

**The Center on Race, Inequality, and the Law**, also based at the NYU School of 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 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.

**Cynthia Alkon**, is a Professor of Law and the Director of the Criminal Law, Justice & Policy Program at Texas A&M University School of Law.

**Lara Bazelon**, is an Associate Professor of Law and the Director of the Criminal & Juvenile Justice Clinic and the Racial Justice Clinic at the University of San Francisco School of Law.

**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 L. Neil Williams, Jr. Professor of Law at Duke Law School, 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.

**Carissa Byrne Hessick**, is the Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law and Associate Dean for Faculty Development at the University of North Carolina School of Law.

**Shon Hopwood**, Associate Professor of Law at Georgetown University Law Center.

**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.

**Pamela Metzger**, is the Director of the Deason Criminal Justice Reform Center and Professor of Law at Southern Methodist University Dedman School of Law, and previously served as the Director of Tulane Law School's Criminal Defense Clinic, where she handled hundreds of criminal cases in New Orleans, the Eastern District of Louisiana, and the Fifth Circuit since Hurricane Katrina. Professor Metzger also previously served as a Federal Public Defender in the Southern and Eastern Districts of New York.

**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.

**Ellen Yaroshefsky**, is the Howard Lichtenstein Professor of Legal Ethics and Director of the Monroe Freedman Institute for the Study of Legal Ethics at the Maurice A. Deane School of Law at Hofstra University.

## SUMMARY OF ARGUMENT

The allegations of prosecutorial misconduct in this case are profoundly disturbing. Plaintiffs—who are both victims of and witnesses to crimes occurring in Orleans Parish—allege that they were harassed and threatened with fines and jail

when they refused to talk with prosecutors. Plaintiffs further allege that in an attempt to force them to talk, Defendants served them with fraudulent subpoenas marked with the official seal of the Orleans Parish District Attorney's Office. But, in reality, those "subpoenas" were not obtained through any judicial process. They were nothing more than sham documents. On the basis of those fraudulent subpoenas, Defendants obtained arrest warrants, sought extensive fines, and frequently jailed those crime victims and witnesses who refused to talk them—often for days on end. The district court correctly held that Defendants are not shielded by absolute immunity from facing these disturbing allegations.

That conclusion is fully in accord with the history and purpose of Section 1983. In 1871, Congress enacted through Section 1983 a broad civil damages action through which individuals could seek to hold liable any person who, under color of state law, deprives another of his constitutional and statutory rights. 42 U.S.C. § 1983. Despite Section 1983's broad and categorical language, the Supreme Court has held that Congress did not intend to abrogate existing common law immunities that were well-established in 1871. However, to properly "discern Congress' likely intent in enacting" Section 1983, courts must look closely to "common law and other history for guidance," and must avoid making "a freewheeling policy choice" to immunize conduct Congress intended to reach. *Burns v. Reed*, 500 U.S. 478, 493 (1991) (internal quotation marks and citation omitted).

Congress specifically intended Section 1983 to reach misconduct by prosecutors. Indeed, Congress was well aware of the spate of baseless prosecutions and the abusive use of prosecutorial power in the post-Civil War era to target African Americans and Union loyalists. And in 1871, no generalized "absolute prosecutorial immunity" existed. As a historical matter, both private attorneys who assisted a complaining witness in prosecuting a criminal action and the few public prosecutors who did exist in 1871 could be held liable in an action for malicious prosecution. The immunity doctrines available in 1871, at most, conferred absolute immunity only as derivative of existing judicial and defamation immunities—and thus shielded prosecutors absolutely only when they acted in a capacity to adjudicate parties' rights or made statements in court.

Accordingly, prosecutorial immunity is a narrow doctrine which, as the Supreme Court has held, only shields prosecutors absolutely from liability for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). When a prosecutor acts wholly outside of the judicial process or in an investigative role, absolute immunity does not attach. These are precisely the circumstances presented in this case. Here, Plaintiffs allege that Defendants used sham "subpoenas"—created and issued entirely outside the careful judicial process Louisiana has codified for seeking such subpoenas—in order to coerce crime victims and witnesses to speak with

prosecutors. As the district court correctly held, absolute immunity does not cover this conduct.

Expanding immunity to cover the conduct alleged here would subvert Section 1983's purpose by shielding prosecutors who violate individuals' constitutional rights from any legal accountability. Because prosecutors rarely face accountability for misconduct, extending absolute immunity when supported neither by history nor by precedent would only further insulate egregious bad acts from liability—to the detriment of the rule of law. To appropriately adhere to Congress' intent and Section 1983's purposes, this Court should affirm the ruling of the district court so that Plaintiffs can attempt to hold Defendants accountable for the egregious acts alleged here.

## ARGUMENT

### I. The History And Purpose Of Section 1983 Demonstrate That Absolute Immunity Is Available To Prosecutors Only In Narrow Circumstances.

When it enacted Section 1983, Congress was specifically aware of the post-Civil War history of prosecutorial abuses. At that time, common law also limited absolute immunity only to narrow circumstances closely associated with the judicial process when prosecutors were acting in an adjudicative capacity. Consistent with both precedent and history, this Court must continue to confine absolute immunity to such circumstances.

### A. Section 1983 Was Enacted To Remedy The Deprivation Of Constitutional Rights—Including Through Prosecution.

Congress enacted Section 1983 to provide a civil remedy to individuals who have been deprived of their constitutional rights in precisely the circumstances the Plaintiffs in this case allege here: where state officials have abused state power. The Reconstruction Congress drafted and enacted Section 1983 as part of the Civil Rights Act of 1871, and in an effort to secure hard-won civil rights in the post-Civil War era. The "specific historical catalyst" for that Act "was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). Accordingly, Section 1983 was intended to combat racial terrorism in the Reconstruction South and was 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)). Section 1983's federal damages remedy was intended to "interpose the federal courts between the States and the people" and was specifically intended to protect individuals from "unconstitutional action under the color of state law" regardless of whether that unconstitutional action was "executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)).

Congress was keenly aware of the scourge of wrongful prosecutions in the post-Civil War era. The Reconstruction Congress specifically intended the Fourteenth Amendment, and thus by extension, Section 1983, to curb misconduct committed *through the use of prosecutions* against African Americans and Union loyalists. 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). In enacting Section 1983, Congress sought to protect individuals from malicious prosecution and halt the "national problem" posed by the post-war Confederate practice of initiating "vexatious prosecution of Union supporters"—including African American soldiers and newly freed slaves—through the issuance of "baseless indictments." *Id.* at 337, 340.

### B. Common Law Supports At Most A Narrow Absolute Immunity For Prosecutors, As The Supreme Court Has Recognized.

In light of this history, it is no surprise that Section 1983 is written broadly to reach "[e]very person" who, under the color of law, deprives an individual of his constitutional rights. 42 U.S.C. § 1983. Although the statute "on its face admits of no immunities," *Imbler*, 424 U.S. at 417-18, the Supreme Court has held that Congress "intended the statute to be construed in . . . light of common-law principles that were well settled at the time of its enactment" in 1871, *Kalina v. Fletcher*, 522

U.S. 118, 123 (1997). The Court must look to "the common law and other history for guidance because" the Court's role "is not to make a freewheeling policy choice, but rather to discern Congress' likely intent in enacting" Section 1983. *Burns*, 500 U.S. at 493 (internal quotation marks omitted). Courts "do not have a license to establish immunities" based on "what [courts] judge to be sound public policy." *Id.* (quotation marks omitted).

In 1871, the office of public prosecutor that exists today was nascent or non-existent in most jurisdictions. However, prosecutions were frequently handled by private attorneys retained by a victim's family and friends. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 109-10; *Kalina*, 522 U.S. at 132 (Scalia, J., concurring). And at common law, such attorneys were not absolutely immune from tort liability when sued, typically for the tort of malicious prosecution. Instead, a plaintiff in a malicious prosecution action could sue both the complainant who brought the prosecution, *and his attorney* for an alleged attempt to enforce criminal law maliciously and without probable cause. *See* Johns, *supra*, at 111-12 & n.440 (collecting cases); *see also, e.g.*, *Staley v. Turner*, 21 Mo. App. 244, 251 (1886) (explaining that a lawyer who engages in malicious prosecution "prostitutes the privileges which the state has conferred upon him of appearing in its courts as an officer of those courts and a minister of justice"). In addition, the few pre-1871 cases that exist involving public prosecutors suggest that

public prosecutors, too, could be held liable for the tort of malicious prosecution. *See* Johns, *supra* at 113 (citing *Parker v. Huntington*, 68 Mass. (2 Gray) 124, 126-28 (1854)).

Absolute immunity, by contrast, was only available in a narrow set of circumstances. The only existing common-law immunities potentially applicable to some prosecutorial functions were judicial, quasi-judicial, and defamation immunity. *See* Johns, *supra*, at 118; *see also Burns*, 500 U.S. at 500-01 (Scalia, J., concurring in part and dissenting in part) (describing same). To the limited extent that prosecutors could be said to have acted in a capacity to which traditional *judicial* or *defamation* immunity could be applied, absolute immunity would have been available. *See, Burns*, 500 U.S. at 500 (Scalia, J., concurring). Judicial immunity extended beyond judges to both "public officials" and "private citizens," like jurors and arbitrators; but the "touchstone for its applicability was performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Id.* Defamation immunity protected statements "made in the course of a court proceeding," such as statements made by "lawyers in presenting evidence," from suits for defamation. *Id.* at 501. Both of these immunities applied only to protect efforts before courts to adjudicate parties' rights—and therefore were primarily extended in order to protect the *judicial process* from interference by private lawsuits. *Id.* at 494 ("Absolute immunity is designed to free the *judicial*

*process* from the harassment and intimidation associated with litigation" and that concern justifies immunity "only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.").

Beyond those limited circumstances, in 1871 there existed no general immunity afforded to prosecutors or those acting in a prosecutorial function. Indeed, even years after Section 1983 was enacted, contemporaneous tort treatises remained silent concerning any general immunity available specifically to prosecutors. *See, e.g.*, Martin L. Newell, *Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process*, Ch. X § 4, Ch. XII § 1 (1892); Thomas M. Cooley, *Treatise on the Law of Torts* 375-402 (1880).

Instead, common law in 1871 made available at most quasi-judicial immunity—a form of qualified immunity—for most prosecutorial functions. *See, e.g.*, Johns, *supra* at 119-20; *Burns*, 500 U.S. at 500 (Scalia J., concurring in part and dissenting in part) ("[P]rosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial."). This qualified form of immunity extended to "official acts involving policy discretion but not consisting of adjudication." *Burns*, 500 U.S. at 500 (Scalia, J., concurring in part and dissenting in part). Importantly, that qualified immunity could be defeated by a showing of malice—as was required to bring a claim for malicious prosecution under common law. *See, e.g.*, William L. Prosser, *Handbook on the Law of Torts* § 25, at 151-52

(1941) ("Certain acts which call for much individual judgment, such as those of a prosecuting attorney in connection with an indictment . . . are called 'discretionary,' or 'quasi-judicial,' and are therefore privileged *so long as they are done honestly and in good faith*." (emphasis added)).

In light of this history, the Supreme Court has appropriately held that absolute immunity is only available for prosecutors for conduct that is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Prosecutors' activities are "not absolutely immune merely because they are performed by a prosecutor." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). In *Burns*, for example, the Court distinguished between a prosecutor's appearance before and statements to *a court* in a probable cause hearing, and the prosecutor's role in aiding the investigation of the crime by providing legal advice to detectives about the legality of conducting an interview under hypnosis. 500 U.S. at 489-96. The Court held that only the former conduct warranted absolute immunity. *Id.* at 492, 496.

Understanding the historical common law basis for absolute immunity and the proper confines of that doctrine is critical to adhering to Congress' intent in providing a damages remedy in Section 1983. Because a court's role is to look to "common law and other history for guidance," *id.* at 493, lower courts therefore should be particularly cautious when asked to extend absolute immunity to

prosecutors beyond both existing doctrine and absolute immunity's historical foundations. Moreover, immunity is an affirmative defense. "[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Id.* at 486. Close questions therefore must be resolved against the defendants. *See Buckley*, 509 U.S. at 281 (Scalia, J., concurring) (expressing concern over extension of the doctrine, but explaining that because the defendant official "bears the burden of showing that the conduct for which he seeks immunity would have been privileged at common law in 1871," if "application of the principle is unclear, the defendant simply loses").[3]

### C. Absolute Immunity Does Not Apply To The Pre-Litigation Investigative Conduct Plaintiffs Allege Here.

Here, the question is not close. There is no basis to find that Defendants' issuance and use of fake subpoenas—entirely outside of the judicial process—is encompassed within the limited absolute immunity that was available to prosecutors at common law.

*First*, the conduct alleged was entirely outside of the judicial process. Plaintiffs allege that Defendants served sham "subpoenas" in an effort to induce the

[3] The Supreme Court recently acknowledged that some of the case law it relied on when establishing prosecutorial immunity significantly post-dated 1871. *See Kalina*, 522 U.S. at 124 n.11 ("The cases that the Court cited were decided after 1871 and granted a broader immunity to public prosecutors than had been available in malicious prosecution actions against private persons who brought prosecutions at early common law.").

witnesses to crimes or crime victims to talk to them. In producing and serving those "subpoenas," Defendants in no way attempted to comply with the carefully circumscribed process under Louisiana law for obtaining actual subpoenas. *See* La. Code Crim. P. art 66. This attempt *to circumvent* entirely the legal process cannot plausibly be recast as conduct "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Instead, Defendants attempted to supersede judicial authority, and their conduct therefore is "conduct outside the judicial process." *Loupe v. O'Bannon*, 824 F.3d 534, 540 (5th Cir. 2016) (denying absolute immunity to prosecutor who ordered warrantless arrest). Prosecutors who "avoid the scrutiny of the court" thereby "forfeit[] the protections the law offers to those who work within the process." *Lacey v. Maricopa Cty.*, 693 F.3d 896, 914 (9th Cir. 2012). The district court was correct to describe this conduct as the "usurpation of the power of another branch of government." ROA.1521. As the district court correctly observed, to find that "such *ultra vires* conduct is 'intimately associated with the judicial phase of the criminal process' would give no meaning to the 'judicial phase' element of the standard." *Id*. (quoting *Loupe*, 824 F.3d at 540).

*Second*, the conduct alleged relates to investigation, which is protected by at most qualified immunity. *See, e.g.*, *Simon v. City of N.Y.*, 727 F.3d 167, 172-74 (2d Cir. 2013). Courts have consistently distinguished between an advocate's role in

preparing for trial and "the detective's role in searching for the clues and corroboration" that might support a charge. *Buckley*, 509 U.S. at 273. Thus, "[i]nvestigation, arrest, and detention have historically and by precedent been regarded as the work of police, not prosecutors, and they do not become prosecutorial functions merely because a prosecutor has chosen to participate." *Simon*, 727 F.3d at 172 (internal quotation marks omitted). Even when a prosecutor acts in an investigative role prior to a probable cause determination, a prosecutor may still "engage in 'police investigative work' that is entitled to only qualified immunity" after such a determination is made. *Buckley*, 509 U.S. at 274 n.5. Accordingly, other courts have held that the execution of a material witness warrant, for example, is an investigative function not protected by absolute immunity—particularly where a warrant attempted to avoid a court-ordered process. *See Simon*, 727 F.3d at 174 (a material arrest warrant "does not authorize a person's arrest and prolonged detention for purposes of investigative interrogation by the police or a prosecutor" and that an individual "might eventually have been called to testify in a judicial proceeding does not make her detention a prosecutorial function"). Where, as here, a prosecutor participates in attempting to *assemble* evidence—rather than evaluate it for presentation to the court—her actions are investigative and unprotected by absolute immunity. *See, e.g.*, *Hoog-Watson v. Guadalupe Cty.*, 591 F.3d 431, 439 (5th Cir. 2009) (reversing grant of absolute immunity). Here,

Defendants' conduct was both outside the judicial process entirely and investigative in nature.[4]

*Third,* holding Defendants accountable for the conduct alleged here would not interfere with the prosecutorial function. In *Imbler*, the Court raised a concern that the threat of lawsuits could constrain prosecutors' decision-making or discretion, and that qualified immunity might be insufficient to protect even an honest prosecutor from the danger of liability. 424 U.S. at 426. These policy concerns are wholly absent where, like here, the claim is that prosecutors violated the rights of crime victims and witnesses, against whom no case is pending. Denying absolute immunity here would not deter a prosecutor's decision to charge specific defendants. Instead, the only chilling effect would be a justified and indeed welcome one.

[4] To the extent Defendants might attempt to cast their conduct as *judicial* (which it is not) because they created, issued, and served subpoenas and thus acted akin to a judge, that argument, too, would be unavailing. Absolute immunity only attaches when judicial duties "are imposed upon a public officer," *Burns*, 500 U.S. at 493 (quotation marks omitted), and Louisiana law clearly empowers only *judges* to issue subpoenas, *see* La. Code Crim. P. art 66. Thus, a prosecutor attempting to serve such a subpoena acts without authority to do. At common law, a judge who acted without jurisdiction or authority would not be cloaked with immunity even if the conduct could be described as a judicial act, generally. *See, e.g.*, *Cooley*, *supra*, at 416-17 ("A judge is not such at all times and for all purposes: when he acts he must be clothed with jurisdiction; and acting without this, he is but the individual falsely assuming an authority he does not possess."); *Stump v. Sparkman*, 435 U.S. 349, 357 n.7 (1978) (explaining that "if a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action").

Prosecutors should be held accountable for their actions when they step outside their advocacy role, engage in abusive and unlawful investigatory acts (under the guise of a fabricated subpoena), and direct that conduct at crime victims who lack the protections available to criminal defendants.

The district court appropriately denied absolute prosecutorial immunity for the alleged conduct, and this Court should affirm that determination.

## II. Further Judicial Expansion Of Absolute Immunity Would Subvert Section 1983's Purpose.

Congress enacted Section 1983 in order to broadly remedy the misuse of power, and was particularly motivated to protect the rights of African Americans—like each of the individual Plaintiffs here—and reach abusive prosecutions. Indeed, prosecutors wield immense power in our criminal justice system, and there can be "little doubt that prosecutors are the most powerful and influential actors in the American criminal justice system." Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 Lewis & Clark L. Rev. 573, 579 (2017). Prosecutorial misconduct, particularly when shielded from accountability, undermines the fairness of the criminal justice system. Because the conduct alleged here does not fall within the absolute immunity recognized at common law, this Court should not extend that immunity. "Where the reasons 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) (internal quotation marks omitted).

### A. The Alternative Safeguards The Supreme Court Referenced To Justify Absolute Immunity Are Absent Here.

In *Imbler*, the Court considered it significant that there existed safeguards other than a Section 1983 damages action to police constitutional violations, deter prosecutorial misconduct, and protect the rights of criminal defendants. 424 U.S. at 427-29. But those checks are inapplicable here.

Crime victims and witnesses cannot rely on acquittal, post-trial relief, or the threat of evidentiary sanctions to protect their rights. *Id.* at 427. Because they are not directly connected to the prosecution, the judicial process does not provide any opportunity for the court to consider and remedy violations of crime victims' and witnesses' rights. Indeed, the crux of Plaintiffs' allegations is that Defendants engaged in the misconduct here precisely to avoid the judicial process that might typically safeguard abuses against compulsory testimony.

When other safeguards are unavailable, the Supreme Court has declined to extend immunity. *See Cleavinger v. Saxner*, 474 U.S. 193, 202, 204-06 (1985) (declining to extend absolute immunity to members of a prison disciplinary committee because of the absence of "safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct"). Here, a Section 1983 action is the only remedy Plaintiffs have.

### B. Prosecutors Rarely Face Accountability For Misconduct, And Extending Absolute Immunity Would Insulate Egregious Bad Acts From Liability.

The Court also hypothesized in *Imbler* that extending absolute immunity would "not leave the public powerless to deter misconduct or to punish that which occurs" because, the Court assumed, prosecutors would be subject to criminal liability and professional sanctions. 424 U.S. at 428-29. In reality, however, the subsequent four decades have demonstrated that prosecutors are rarely held accountable—even for egregious misconduct. Put bluntly, "there are currently no effective deterrents for prosecutorial misconduct." Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 Cardozo L. Rev. 2089, 2093 (2010). Extending absolute immunity where no historical basis exists to do so would only exacerbate this alarming accountability gap.

Because prosecutors are the gatekeepers to the imposition of criminal and many types of professional or disciplinary sanctions, it is no surprise that prosecutors are reluctant to police their own colleagues. *See* Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of* Connick v. Thompson 17 (Mar. 2016).[5] For example, a 1999 Chicago Tribune investigation found that, of 381 nationwide homicide cases in which convictions were reversed because of the use

[5] https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf.

of false evidence or the concealment of evidence suggesting innocence, only one prosecutor was fired (but he was reinstated with back pay); a second prosecutor was suspended for 30 days; and a third prosecutor's law license was suspended for 59 days (but due to other misconduct). Importantly, *none* of the prosecutors were disbarred or received any public sanction. *See* Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, Chicago Trib., Jan. 11, 1999[6]; Maurice Possley & Ken Armstrong, *Part 2: The Flip Side of a Fair Trial*, Chicago Trib., Jan. 11, 1999.[7] On the facts of this case, where Plaintiffs allege that the abuses were perpetrated by multiple prosecutors and permitted by the District Attorney himself, the prospect of self-policing is particularly remote.

Professional discipline also has rarely been imposed on prosecutors. Where internal discipline systems in prosecutors' offices do exist, they "offer very little transparency," and the evidence that has been gathered to date "suggests they function poorly and fail to hold prosecutors to account." Sarma, *supra* at 593. Commentators have repeatedly criticized the absence of professional discipline—even in cases of obvious and easily provable violations, and even where courts have issued a stinging rebuke of the prosecutor. *See, e.g.*, Bennett L. Gershman, *Bad*

[6] https://www.chicagotribune.com/investigations/chi-020103trial1-story.html.

[7] https://www.chicagotribune.com/investigations/chi-020103trial2-story.html.

*Faith Exception to Prosecutorial Immunity for* Brady *Violations*, Amicus, Harv. Civ. Rights-Civ. Liberties L. Rev., at 34 (Aug. 10, 2010).[8] A recent study by the Innocence Project found that, of 660 cases involving prosecutorial misconduct, in only a *single* case was a prosecutor disciplined. *See* Innocence Project, *supra*, at 12. And an earlier study of misconduct over eleven years in California found that only six attorneys were disciplined in 707 cases of appellate-court-determined misconduct during that period. *See* Kathleen M. Ridolfi & Maurice Possley, N. Cal. Innocence Project, Santa Clara Univ. Sch. of Law, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009* 3 (Oct. 2010).

Even on the rare occasions that a complaint or bar referral is made, there is ample evidence that ethics complaints and 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 (noting that "Louisiana has a uniquely sordid history when it comes to prosecutorial misconduct")[9]; Radley Balko, *New Orleans's Persistent Prosecutor Problem*, Wash. Post, Oct. 27, 2015 (detailing pattern and practice of prosecutorial misconduct and noting that, although "defense attorneys in Louisiana filed a series

[8] https://harvardcrcl.org/wp-content/uploads/sites/10/2010/08/Gershman_Publish.pdf.

[9] http://www.prosecutorialaccountability.com/2017/10/24/la-weak-enforcement-of-prosecutorial-ethics-just-got-weaker-in-the-nations-hotbed-of-misconduct/.

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 that no action had been taken many months later).[10] Indeed, the Louisiana Supreme Court recently made it more difficult to prove ethical complaints against abusive prosecutors by imposing a materiality requirement in cases alleging that prosecutors failed to disclose exculpatory evidence. The Open File, *supra*. Courts themselves are also an imperfect check on prosecutors, because "many judges are reluctant to challenge prosecutors specifically or to instigate professional disciplinary proceedings." *Id.* (describing Louisiana courts as "a place well-known to be safe for the state's prosecutors—even the unethical ones").

Nor is policing misconduct through review of individual criminal cases—although not available here, given that Plaintiffs are not criminal defendants—a realistic possibility. When reviewing individual convictions, courts focus only on whether the conduct had a prejudicial effect on the defendant's specific prosecution. Reversals are uncommon; therefore the unlikelihood of a conviction being overturned provides no deterrent effect. Sarma, *supra*, at 584-85; *see also* Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 Wash. & Lee L. Rev. 1533, 1540 (2010)

[10] https://www.washingtonpost.com/news/the-watch/wp/2015/10/27/new-orleanss-persistent-prosecutor-problem/?utm_term=.8f64a4a8b1e2.

(discussing studies finding dramatically low levels of reversal specifically in *Brady* cases).

Finally, efforts to hold prosecutors' offices accountable as an institution and spur top-down reforms are also nascent, and largely have not been employed to date. It is important to emphasize—as the failure to supervise claim that the district court found properly pled here demonstrates, *see* ROA.1526—that a focus only on individual prosecutors and individual cases "ignores the possibility that the office is blameworthy in failing to train, supervise, and establish internal processes and systems to prevent unintentional error." Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 Notre Dame L. Rev. 51, 59 (2016). Although a few courts are exceptions and have attempted to impose some modest sanctions on prosecutors' offices, themselves, there has not been a widespread effort to hold those institutions accountable. *See, e.g.*, *Comm. for Pub. Counsel Servs. v. Attorney General*, 108 N.E.3d 966, 989 n.13 (Mass. 2018); *Martinez v. City of Chicago*, No. 09 C 5938, 2014 WL 6613421, at *5-7 (N.D. Ill. Nov. 20, 2014), *aff'd*, 823 F.3d 1050 (7th Cir. 2016).

Because these other mechanisms fail to hold prosecutors accountable, applying absolute prosecutorial immunity means that egregious instances of misconduct will be shielded from any accountability at all. As just one example, consider Jabbar Collins—who was falsely imprisoned for fifteen years for a 1994

Brooklyn, New York murder as the result of prosecutorial misconduct. After an anonymous tip, three eyewitnesses identified Collins as the perpetrator during a police line-up and, on the strength of those witnesses' testimony, Collins was convicted of second-degree murder, and sentenced to 34 years to life. *Collins v. City of N.Y.*, 923 F. Supp. 2d 462, 468 (E.D.N.Y. 2013). It later became clear, however, that police and prosecutors had coerced all three witnesses to testify against Collins, and withheld significant exculpatory evidence from Mr. Collins' defense attorney. *Id.* One witness was threatened with revocation of work release, while another witness, who had violated parole, was told he could avoid re-incarceration if he testified against Collins. *Id.* at 467; *see also* Stephanie Denzel, *Jabbar Collins*, The National Registry of Exonerations (Sept. 3, 2014).[11] During federal habeas proceedings, the District Attorney's office even expressly admitted that it had failed to disclose a secret recantation by one of those witnesses (its chief witness)—a recantation that the prosecutor, in a sworn affidavit, had previously categorically denied ever occurred. *Collins*, 923 F. Supp. 2d at 467.

Despite this glaring misconduct, absolute prosecutorial immunity was applied to shield the prosecutor from any liability. And Judge Frederic Block, the federal judge overseeing Collins's federal civil suit, has specifically expressed regret that

[11] http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3115.

prosecutorial immunity forced him to dismiss the case against the prosecutor and district attorney. Judge Block has written that "I do lose sleep . . . over the Collins case and the rash of wrongful convictions that are continuing to be uncovered to this date in Brooklyn," but that his decision had "quoted the binding circuit court precedent I was duty-bound to follow." Frederic Block, *Let's Put an End to Prosecutorial Immunity*, The Marshall Project, Mar. 13, 2018.[12]

If anything, prosecutors otherwise inclined to engage in misconduct are only incentivized to continue. Such conduct can help secure convictions and thereby increase a prosecutor's conviction rate—often a key to promotion.

These failures mean that Section 1983 actions are frequently the only means to hold bad actors accountable. It therefore falls on courts "to take a much more aggressive stand against prosecutorial abuses in an effort to make prosecutors accountable for their misconduct." Gershman, *supra*, at 35. But if absolute immunity is extended beyond its common law application, even the most egregious misconduct will continue to be shielded from any meaningful liability. This Court should decline to expand such immunity, and instead ensure that prosecutors are held accountable for misconduct.

[12] https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity.

### C. Given The Existing Protection Qualified Immunity And Other Defenses Afford, Extending Absolute Immunity Is Unnecessary.

Because absolute immunity "is an extreme remedy," its use is "justified only where 'any lesser degree of immunity could impair the judicial process itself.'" *Lacey*, 693 F.3d at 912 (quoting *Kalina*, 522 U.S. at 127). Qualified immunity—for better or worse—already provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Burns*, 500 U.S. at 494-95 (quotation marks omitted).

Indeed, qualified immunity is not a weak safeguard. Studies show that qualified immunity reliably protects government officials. *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 82-83 (2018). As a result, prosecutors who act in good faith will still be able to avail themselves of qualified immunity's robust protections. And, where it has found insufficient historical support for extending absolute immunity, the Supreme Court itself has noted that qualified immunity will in any event provide sufficient protection to honest prosecutors. *Buckley*, 509 U.S. at 278. Under current Supreme Court caselaw, qualified immunity is "more protective of officials than it was at the time that *Imbler* was decided." *Burns*, 500 U.S. at 494.

Prosecutors also retain the benefit of other procedural safeguards. Federal pleading requirements for plaintiffs are stringent safeguards against frivolous lawsuits. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In reality, prosecutors,

as government officials, are more likely to be credited by juries than plaintiffs and witnesses who are challenging prosecutors. Prosecutors may be able to escape scrutiny of their actions by offering sweetheart pleas, dropping charges, or dismissing cases entirely if misconduct is uncovered before trial. And, 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 Bd. of Cty. Comm'rs v. Brown*, 520 U.S. 397, 436 (1997) (Breyer, J., dissenting).

These safeguards are adequate to protect prosecutors, particularly where, as here, there is no basis in the common law or the Supreme Court's case law to extend absolute immunity.

* * *

## CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court affirm the district court's determination.

Dated: July 3, 2019

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I certify that this document complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this document contains 6,332 words, and that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

/s/ Jessica Ring Amunson

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## CERTIFICATE OF SERVICE

I certify that, on July 3, 2019, a true and correct copy of the foregoing was filed via the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

/s/ Jessica Ring Amunson

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