No. 20-30406

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MICHAEL WEARRY,

Plaintiff-Appellee,

v.

MARLON KEARNEY FOSTER, in his Individual Capacity; SCOTT M. PERRILLOUX, in his Individual Capacity and in his Official Capacity as District Attorney for the 21st Judicial District of Louisiana,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Louisiana
Case No. 3:18-cv-00594-SDD-SDJ

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: November 13, 2020

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns allegations of serious misconduct by a Louisiana prosecutor and police officer—and the question whether there is even the possibility of judicial redress for that alleged misconduct. Appellee Michael Wearry alleges that Appellants—Scott Perrilloux, a prosecutor, and Marlon Foster, a police officer—conspired to fabricate a narrative implicating Wearry in a murder by pulling a 10-year-old child out of school, intimidating him, providing him with a false story, and coaching him on that story six separate times. ROA. 20-30406.261. That false tes-

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Appellant Marlon K. Foster and Appellee Michael Wearry consent to the filing of this brief. Appellant Scott M. Perrilloux does not consent.

timony, Wearry alleges, was "concocted wholesale by that detective and prosecutor," and "the child's compliance" was "ensured with scare tactics like taking him to view the murder victim's bloody car." ROA. 20-30406.511-12. Wearry alleges that "[t]his fabrication caused [him] to be convicted of first degree murder, sentenced to death, and incarcerated on Death Row." ROA. 20-30406.13.

Wearry sued, alleging that Perrilloux and Foster took these actions in violation of both federal and state law. In response, Perrilloux and Foster argued, among other things, that the doctrine of absolute prosecutorial immunity shields them from suit for their alleged misconduct. The district court disagreed, and this Court should affirm. Although the Supreme Court and this Court have held that prosecutors are shielded by absolute immunity for certain misconduct, no case from either the Supreme Court or this Court requires the application of that doctrine on the facts of this case. And indeed, because the doctrine of absolute immunity is not supported by the text or history of either the Constitution or Section 1983, the federal statute that permits individuals to bring damages actions against state and local officials who violate their constitutional rights, this Court should not apply that doctrine any more broadly than precedent requires.

Rules of absolute immunity are in tension with our constitutional tradition. At the time of the Founding, *ultra vires* acts by public officials were remedied through civil damages suits. *See* Akhil Reed Amar, The Bill of Rights 70 (1998). Indeed,

when the Framers drafted the Bill of Rights, they included the Seventh Amendment, in part, to ensure that persons whose Fourth, Fifth, and Sixth Amendment rights were violated by law enforcement would have the right to bring their claim before a jury.

Supreme Court precedent confirms the necessity of civil suits against public officers. As that Court has explained, to hold that citizens do not have a remedy against government misconduct would "sanction[] a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." *United States v. Lee*, 106 U.S. 196, 221 (1882).

Absolute immunity rules are also at odds with the history and purpose of Section 1983. As the Supreme Court has explained, that provision is squarely directed 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)), and it was designed so "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms," *id.* Given this, the Court has held that it will recognize absolute immunity only when the official would have been "accorded immunity from tort actions at common law when [Section 1983] was enacted in 1871," *and* when "§ 1983's history or purposes

[do not] counsel against recognizing the same immunity in § 1983 actions." *Tower v. Glover*, 467 U.S. 914, 920 (1984).

Applying that test, there is no justification for recognizing absolute immunity for the conduct of prosecutors. As Justice Scalia noted, there was not, as a general matter, "absolute prosecutorial immunity when § 1983 was enacted"; prosecutors could be sued for malicious prosecution if they "acted maliciously and without probable cause, and the prosecution ultimately terminated in the defendant's favor." *Kalina v. Fletcher*, 522 U.S. 118, 132-33 (1997) (Scalia, J., concurring). Rather, the only *absolute* immunity for prosecutors in 1871 existed in the context of "slander and libel actions," where "both witnesses and attorneys" enjoyed immunity based on "statements made in the course of a judicial proceeding and relevant to the matter being tried." *Id.* at 133. Outside this narrow category of immunity, many courts permitted suits against prosecutors both before and after Section 1983 was passed. *See infra* at 14-15.

Even if an analogous immunity did exist in 1871, Section 1983's purposes would counsel against recognizing absolute prosecutorial immunity. For the 42nd Congress, protecting individual rights was "a hierarchically superior purpose—a goal that government had a duty to achieve as completely as possible before other goals could be considered." David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev.

497, 539 (1992). As one of Section 1983's drafters explained, "the largest latitude consistent with the words employed" should be "given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (Rep. Shellabarger). Notably, its authors were specifically concerned about the problem of wrongful prosecutions, given the history of Confederate states initiating prosecutions against African Americans and Union loyalists for baseless offenses. In short, neither the text nor the history of the Constitution or Section 1983 justifies absolute immunity from suit for prosecutors.

Despite all this, the Supreme Court has held that prosecutors can be absolutely immune for "activities [that are] intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Importantly, this immunity is limited to that situation. "[A]bsolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." *Van de Kamp v. Goldstein*, 555 U.S. 335, 342 (2009). As the Supreme Court has noted, "[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial" and "investigative functions normally performed by a detective or police officer." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

Perrilloux and Foster's misconduct here was fundamentally investigatory: rather than simply preparing a witness for trial, they allegedly *fabricated* evidence by feeding a false story to a witness. This case is therefore similar to *Buckley*, in which the Supreme Court held that prosecutors were not entitled to absolute immunity when they allegedly conspired to manufacture false evidence. *Id.* at 272. And the fact that Perrilloux eventually introduced this fabricated testimony at trial makes no difference. "A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because . . . that work may be retrospectively described as 'preparation' for a possible trial." *Id.* at 276. Perrilloux and Foster's coercion of a minor to provide false testimony months before trial is investigative conduct through and through. Thus, under current precedent, their conduct should not be shielded from review. And because absolute prosecutorial immunity is at odds with the text and history of both the Constitution and Section 1983, there is no basis for extending the scope of that immunity. This Court should affirm the judgment of the district court.

ARGUMENT

I. ABSOLUTE PROSECUTORIAL IMMUNITY IS NOT SUPPORTED BY THE TEXT OR HISTORY OF THE CONSTITUTION OR SECTION 1983.

1. The principle that constitutional rights are enforceable through civil suits against wrongdoing officers is a vital part of our constitutional tradition. Indeed,

rules of absolute immunity represent a stark departure from two bedrock principles reflected in our Constitution—first, that "'where there is a legal right, there is also a legal remedy,'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 W. Blackstone, Commentaries 23 (1783)), and, second, that "[n]o man in this country is so high that he is above the law," *Lee*, 106 U.S. at 261.

Notably, at the time of the Founding, *ultra vires* acts by public officials were remedied through civil damages suits. *See, e.g.*, *Wilkes v. Wood*, 98 Eng. Rep. 439 (C.P. 1763) (successful suit under English common law of trespass for an unlawful search and seizure); William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602–1791*, at 538 (2009) (describing "[m]assive coverage of the Wilkes affair by the colonial press"). If the allegedly trespassing official was found liable, he could be "made to pay compensatory and (in egregious cases) punitive damages (though he might well in turn be indemnified by the government)." Amar, Bill of Rights, *supra*, at 70. And in the first steps toward independence, the Founders made sure to retain official liability: the First Continental Congress rebuffed parliamentary attempts to immunize from private damages suits government officials accused of wrongdoing. Declaration and Resolves of the First Continental Congress (1774), *reprinted in* Documents of American History 84 (H. Commager 9th ed., 1973).

These civil suits were favored not only because they comported with the Framers' view of the nature of rights and their sense of corrective justice, but also because they advanced constitutional values of popular sovereignty and public accountability. Representing the power and voice of the people in "both civil and criminal proceedings, the jury played a leading role in protecting ordinary individuals against governmental overreaching." Amar, Bill of Rights, *supra*, at 84; *see* I Alexis de Tocqueville, Democracy in America 283 (Knopf 1945) ("The jury system as it is understood in America [is] as direct and as extreme a consequence of the sovereignty of the people as universal suffrage.").

The text and structure of the Constitution and the Bill of Rights reflect this understanding. One of the principal purposes of the Bill of Rights was to place limits on the new federal government's power to search, arrest, and prosecute. The Fourth, Fifth, and Sixth Amendments together aim to prevent abuse of law enforcement power from the moment of investigation to adjudication. Complementing these guarantees, the Seventh Amendment assures that persons wronged by the law enforcement apparatus will have the right to bring their claim before a civil jury of their peers to redress unconstitutional conduct. *See* Akhil Reed Amar, The Constitution and Criminal Procedure 162 (1997) ("[T]he preferred vehicle for litigating the Fourth Amendment was a tort suit brought by a citizen and tried before a Seventh Amendment jury of fellow citizens."). Consistent with this constitutional

understanding, during the nineteenth century, "there seems to have been absolute uniformity in holding officers liable for injuries resulting from the enforcement of unconstitutional acts." Max P. Rapacz, *Protection of Officers Who Act Under Unconstitutional Statutes*, 11 Minn. L. Rev. 585, 585 (1927); *see* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1486-87 (1987); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804).

Reflecting this constitutional design, the Supreme Court's cases underscore the critical role civil actions against government officials play in enforcing our constitutional rights. In *Lee*, for example, the Court rejected the defendant officers' argument that they were entitled to absolute immunity, recognizing that constitutional first principles demanded a civil remedy for violations of fundamental rights because "[c]ourts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government." 106 U.S. at 220-21. As the Court explained, if "the courts cannot give remedy when the citizen has been deprived of his property by force, . . . without any process of law, and without any compensation, ... it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights." *Id.* The Court specifically considered—and rejected—the argument that immunity was important to prevent "the possible

interference of judicial action with the exercise of powers of the government essential to some of its most important operations." *Id.* at 221. According to the Court, those "[supposed] evils . . . [are] small indeed compared to" the harm threatened to the rule of law by a grant of immunity, and such concerns are "much diminished" when considering that in "nearly a century under the present constitution," suits against officers had been "well established," resulting in "no injury . . . to th[e] government." *Id.*

2. Not only are absolute-immunity rules at odds with constitutional tradition, they are also at odds with the history and purposes of Section 1983. Congress enacted Section 1983 as part of the Civil Rights Act of 1871, Pub. L. No. 42-22, 17 Stat. 13, thereby creating a federal damages remedy that would "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 (1879)). Written in sweeping terms, Section 1983 creates a cause of action against "[e]very person" who under color of state law deprives another of "any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Importantly, as Justice Thomas has pointed out, the text of Section 1983 "ma[kes] no mention of defenses or immunities." *Ziglar v.*

Abbasi, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment).

Section 1983's text 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*, 416 U.S. at 243 (1974) (quoting *Monroe*, 365 U.S. at 184). Thus, "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms." *Id.*; *see Imbler*, 424 U.S. at 434 (White, J., concurring) (To "extend absolute immunity to any [class] of state officials is to negate pro tanto the very remedy which it appears Congress sought to create.").

Notably, when the 42nd Congress was debating Section 1983, opponents objected that imposing liability on government officials for violating constitutional guarantees would result in their being "dragged to the bar of a distant and unfriendly court, and . . . placed in the pillory of vexatious, expensive, and protracted litigation, and heavy damages." Cong. Globe, 42d Cong., 1st Sess. 365 (1871). Supporters responded that Section 1983 simply "seeks to denounce[] . . . an unconstitutional act; and . . . endeavors to enforce the penalty imposed upon that by the proper intervention of the judiciary," thereby ensuring that states and their officers "obey the will of the whole people expressed in the Constitution." *Id.* at 691; *see id.* at 482

("[W]hat legislation could be more appropriate than to give a person injured by another under color of such unconstitutional state laws a remedy by civil action?").

3. In light of this long-standing practice of enforcing constitutional rights in civil damages actions, as well as Section 1983's specific provision of a damages remedy to hold accountable state officers who violate constitutional guarantees, the Supreme Court has explained that absolute immunities should be limited to immunities so well established in the common law and so central to the functioning of government that the members of the 42nd Congress must have been aware of them and could not have meant to abrogate them by implication. *See Burns v. Reed*, 500 U.S. 478, 487 (1991) ("We have been quite sparing in our recognition of absolute immunity . . . and have refused to extend it any further than its justification would warrant." (internal quotation marks and citations omitted)); *Malley v. Briggs*, 475 U.S. 335, 340 (1986) ("[S]tate officers who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." (internal quotation marks omitted)).

For that reason, the Supreme Court has enunciated a strict two-part test to determine if absolute immunity can limit the reach of Section 1983. The "initial inquiry is whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts." *Id.* at 339-40. Second, even if "an official was accorded immunity from tort actions at common law when the

Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Glover*, 467 U.S. at 920. Thus, while the Court "look[s] to the common law for guidance, [it does] not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form." *Malley*, 475 U.S. at 340; *see Burns*, 500 U.S. at 497 (Scalia, J., concurring in the judgment in part and dissenting in part) (an 1871 common law pedigree is a "necessary" condition for absolute immunity but not a "sufficient" one).

Applying that standard, the Court has held, for instance, that legislators are absolutely immune from § 1983 suits. *Tenney v. Brandhove*, 341 U.S. 367, 372-76 (1951). After describing a common-law tradition of legislative immunity dating back to 1689, *see id.* at 372-76 (noting that the Bill of Rights in England and the American Constitution both afforded legislators immunity), the Court explained that it could not "believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language" of Section 1983. *Id.* at 376.

Similarly, the Court has held that judges are immune from suit under Section 1983 for actions taken in the course of their judicial duties because judicial immunity is deeply entrenched in our legal system and goes back to English common law. *See Pierson v. Ray*, 386 U.S. 547, 553-54 (1967). Because judicial immunity was

fundamental to the legal system, *see Yates v. Lansing*, 5 Johns. 282, 290-95 (N.Y. Sup. Ct. 1810) (tracing the common-law history of judicial immunity), and was firmly established in American law by 1871, *see Bradley v. Fisher*, 80 U.S. 335 (1871), the Court concluded that the 42nd Congress surely would have known of this rule and, had it wished to abolish the rule, "would have specifically so provided." *Pierson*, 386 U.S. at 555.

4. Applying the Supreme Court's test, there is no justification in either the common law of 1871 or in Section 1983's purpose for providing absolute immunity to prosecutors who violate citizens' constitutional rights. Regarding the common law, "[t]here was . . . no such thing as absolute prosecutorial immunity when § 1983 was enacted." *Kalina*, 522 U.S. at 132 (Scalia, J., concurring). In fact, "there generally was no such thing as the modern public prosecutor." *Id.* And for "*private* prosecutors, who once commonly performed the 'function' now delegated to public officials," they could "be sued for the tort of malicious prosecution" if they "acted maliciously and without probable cause, and the prosecution ultimately terminated in the defendant's favor." *Id.* at 132-33.

Indeed, nineteenth-century courts allowed malicious prosecution suits to proceed against prosecutors. *See, e.g.*, *Warfield v. Campbell*, 35 Ala. 349, 350 (1859); *Burnap v. Marsh*, 13 Ill. 535, 538 (1852) (exempting prosecuting attorneys from liability would "authoriz[e] those who are the most capable of mischief to

commit the grossest wrong"); *Wood v. Weir*, 44 Ky. 544, 547 (1845) (because attorneys have great power with courts, "for good or evil[,] . . . holding them to a strict accountability, will have the effect to exalt and dignify the profession, by purging it of ignorant, meretricious and reckless members"). Notably, in *Parker v. Huntington*, the court indicated that a plaintiff could maintain a malicious prosecution action against a district attorney who had elicited and used false testimony in a criminal prosecution. 68 Mass. 124, 125 (1854).

Significantly, "the first case extending *any* form of prosecutorial immunity was decided some 25 years after the enactment of § 1983." *Burns*, 500 U.S. at 499 (Scalia, J., concurring in the judgment in part and dissenting in part). And a treatise on malicious prosecution published two decades after Section 1983's enactment gave no indication that prosecutors (whether public or private) were immune from such suits and stated that "quasi-judicial officers"—those situated "midway between the judicial and ministerial ones," and whose duties entailed "looking into the facts and acting upon them"—were liable if they acted "dishonestly or maliciously." *See* Martin Newell, Malicious Prosecution 166 (1892). Courts continued to allow public prosecutors to be sued for that tort well after 1871. *See, e.g.*, *Arnold v. Hubble*, 38 S.W. 1041 (1897); *Skeffington v. Eylward*, 97 Minn. 244, 248 (1906); *Leong Yau v. Carden*, 23 Haw. 362, 368 (1916).

At the time that Section 1983 was passed, *absolute* immunity for prosecutors had been recognized only in the narrow context of "slander and libel actions" based on "statements made in the course of a judicial proceeding and relevant to the matter being tried," an immunity that protected "both witnesses and attorneys." *Kalina*, 522 U.S. at 133 (Scalia, J., concurring). Otherwise, "government servants" performing "official acts involving policy discretion but not consisting of adjudication" were at most entitled to a qualified "[q]uasi-judicial immunity" that could be "defeated by a showing of malice." *Burns*, 500 U.S. at 500 (Scalia, J., concurring in the judgment in part and dissenting in part). In short, nothing like absolute prosecutorial immunity was accepted in the common law at the time that Section 1983 was passed.

Even if some analogous immunity did exist at the time Section 1983 was passed, Section 1983's purposes still would not justify absolute prosecutorial immunity from suit. *See Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (immunities must be "*both* 'well established at common law' and 'compatible with the purposes of the Civil Rights Act'" (emphasis added) (quoting *Owen v. City of Independence*, 445 U.S. 622, 638 (1980))). The legislative history of the Act makes clear the importance Congress ascribed to providing a remedy for violations of federal rights. *See* Achtenberg, *Immunity Under 42 U.S.C. § 1983*, *supra*, at 539 ("For the 42nd Congress . . . protection of individual rights was more than one desirable goal among

many. It was a hierarchically superior purpose—a goal that government had a duty to achieve as completely as possible before other goals could be considered."). Thus, Representative Dawes, a member of the select committee that drafted the bill, explained, "If you can show me that there is in the arsenal of the Constitution any weapon of defense that the American citizen can take with him to face any unlawful attempt to trench upon the rights secured to him by it, I will use it," Cong. Globe, 42d Cong., 1st Sess. 476 (1871). And Senator Edmunds, the manager of the bill in the Senate, stated he was willing to enact "every measure of constitutional legislation which will have a tendency to preserve life and liberty and uphold order." *Id.* at 691. These expressions of single-mindedness were not mere rhetoric: the civil action codified as Section 1983 was one avowedly "mild" component, *id.* at 482, of an act in which other provisions "gave the President the unprecedented authority to use federal troops to protect individual rights when the states failed or were unable to do so, [and] . . . authorized the President to suspend the writ of habeas corpus to insure the prosecution of conspirators who violated individual rights." Achtenberg, *Immunity Under 42 U.S.C. § 1983*, *supra*, at 547.

The drafters of Section 1983 meant the new statutory remedy to be implemented in accordance with its broad terms. Representative Shellabarger, the author and manager of the bill in the House, explained that "[t]his act is remedial, and in aid of the preservation of human liberty and human rights," and that "[a]ll

statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871); *see id.* ("As has been again and again decided by your own Supreme Court of the United States, . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.").

Not only did Congress intend Section 1983 to be construed in accord with its broad terms, but its authors were specifically concerned about the problem of wrongful prosecutions. Abuse of prosecutorial power was no mere abstraction for the legislators who enacted Section 1983, but rather a protracted "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). As members of the 42nd Congress were keenly aware, Confederate sympathizers in Kentucky, Virginia, Texas, and other states were able to take over the machinery of state and local government after the Civil War, initiating thousands of civil suits and criminal prosecutions against African Americans and Union loyalists for "offenses" such as violating the slave code, capturing Confederate soldiers during the war, and acting "disloyal[ly]" by challenging in court the Virginia law prohibiting African

Americans from testifying. *Id.* at 299, 340-41 & n.496; *see* Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., at xvii (1866) (reporting that "prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere as soon as the United States troops are removed"). In short, it is antithetical to the purposes of Section 1983 to recognize an absolute prosecutorial immunity from suit.

II. EVEN ASSUMING THE EXISTENCE OF SOME ABSOLUTE PROSECUTORIAL IMMUNITY, NEITHER SUPREME COURT NOR FIFTH CIRCUIT PRECEDENT REQUIRES IMMUNITY HERE.

Although the text, history, and purposes of the Constitution and Section 1983 do not justify recognizing any absolute prosecutorial immunity, the Supreme Court has nonetheless held that prosecutors are absolutely immune for "activities [that are] intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Importantly, however, the Court has also indicated that "absolute immunity may not apply when a prosecutor is not acting as 'an officer of the court,' but is instead engaged in other tasks, say, investigative or administrative tasks." *Van de Kamp*, 555 U.S. at 342; *Imbler*, 424 U.S. at 430 (favorably noting lower court decisions holding that "a prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's"); *Wooten v. Roach*, 964 F.3d 395, 407 (5th Cir. 2020) (quoting *Cousin v. Small*, 325 F.3d 627, 632-33 (5th Cir.

2003)) (no absolute immunity when prosecutors are "functioning as the equivalent of a detective rather than as an advocate preparing for trial").[2]

Because of the tenuous legal foundation for the absolute immunity doctrine, its application should be carefully confined to circumstances that clearly fall within this precedent. Appellants' alleged misconduct here—pulling a minor out of school and coaching him to offer false testimony months before trial—is not "intimately associated with the judicial phase of the criminal process," and is instead quintessentially investigative. Wearry alleges that prosecutor Perrilloux and officer Foster "pull[ed] a [10]-year-old boy out of school on at least six occasions to intimidate him into offering false testimony at a murder trial—false testimony concocted wholesale by that detective and prosecutor and carefully rehearsed, the child's compliance ensured with scare tactics like taking him to view the murder victim's bloody car." ROA. 20-30406.511-12. As the district court correctly explained, these "allegations arise out of [Appellants'] fabrication of evidence

[2] Appellants also argue that they are entitled to absolute immunity from Wearry's claim of malicious prosecution under Louisiana law, but this claim of absolute immunity should be analyzed in the same way as their claim of immunity from suit under Section 1983. *See Knapper v. Connick*, 681 So.2d 944, 949 (La. 1996) (Louisiana "harmonize[s] [its] state immunity rules with federal immunity principles"); *id.* at 950 (absolute immunity applies where "the activities complained of fall within the scope of the prosecutor's role as an advocate for the state and are intimately associated with the conduct of the judicial phase of the criminal process").

during the *investigation* into the . . . murder [at issue] and, as such, are not subject to the defense of absolute prosecutorial immunity." ROA. 20-30406.272.

The act of *fabricating* evidence is far different from "choosing . . . witnesses, preparing those witnesses for trial, and performing the state's trial duties," acts which this Court has held fall "under the protection of absolute immunity," *Mowbray v. Cameron Cty.*, 274 F.3d 269, 277 (5th Cir. 2001). After all, "[t]here is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial" and "investigative functions normally performed by a detective or police officer." *Buckley*, 509 U.S. at 273. Thus, in *Buckley*, the Supreme Court held that prosecutors were not entitled to absolute immunity when they allegedly "conspired to manufacture false evidence that would link [a plaintiffs'] boot with [a] bootprint the murderer left on the front door" by "shopp[ing] for experts until they found one who would provide the opinion they sought." *Id.* at 272. Likewise, Perrilloux and Foster's alleged manufacturing of evidence by coercing a minor to give false testimony was not about preparing a witness for trial; it was about fabricating evidence out of whole cloth—an investigative act.

Notably, the fact that this allegedly fabricated evidence was introduced at trial months later makes no difference. As the Supreme Court explained in *Buckley*, "[a] prosecutor may not shield his investigative work with the aegis of absolute immunity merely because . . . that work may be retrospectively described as 'preparation' for

a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial." *Id.* at 276; *see Fields v. Wharrie*, 740 F.3d 1107, 1114 (7th Cir. 2014) ("A prosecutor cannot retroactively immunize himself from conduct by perfecting his wrong-doing through introducing the fabricated evidence at trial and arguing that the tort was not completed until a time at which he had acquired absolute immunity.").

Perrilloux argues that this case is different because the alleged misconduct in this case occurred after Wearry was "implicated in the murder in question, arrested, and indicted," Perrilloux Br. 4, and the conduct in *Buckley* occurred before the plaintiff had been arrested or indicted, *Buckley*, 509 U.S. at 275. But the Court in *Buckley* cautioned that the notion that absolute immunity applies simply because "the injuries suffered by [a] petitioner occurred during criminal proceedings . . . is contrary to the [Court's] approach." *Id.* at 271. Rather, the question "is whether the prosecutors have . . . establish[ed] that they were functioning as 'advocates.'" *Id.* at 274. In that case, the plaintiff argued that the prosecutors "conspired to manufacture false evidence," *id.* at 272, and the Court concluded that for this alleged misconduct, the prosecutors functioned as investigating detectives and were not entitled to absolute immunity, *id.* at 276. The same is true here.

Appellants rely primarily on *Cousin v. Small*, in which this Court held that absolute immunity shielded prosecutors who allegedly coerced and intimidated a

friend of the plaintiff, Cousin, into giving false trial testimony that would implicate Cousin in a murder. 325 F.3d at 632; *see* Perrilloux Br. 6-8; Foster Br. 7-8. But *Cousin* does not apply here for at least two reasons. First, that case dealt with the quintessentially prosecutorial function of negotiating with defense counsel to determine a criminal sentence. Specifically, Cousin alleged that as part of such a negotiation, the prosecutors coerced his friend to lie. *See id.* at 634 (the prosecutor and the witness's defense counsel allegedly "told [the witness] to lie about Cousin to avoid a lengthy sentence for armed robbery"). Here, however, although Wearry did allege that the minor whom Perilloux and Foster coerced to lie was "vulnerable to intimidation by authorities" because he was "subject to juvenile court proceedings at the time," ROA. 20-30406.261, there is no allegation that Perrilloux himself was engaged in a negotiation over the minor's sentence. And of course, Foster could not possibly be engaged in a sentence negotiation because he is a police officer, not a prosecutor.

Second, unlike the prosecutors in *Cousin*—who provided false answers to questions that would be asked of a witness through the witness's counsel, 325 F.3d at 634—Perrilloux and Foster used *law enforcement* powers to fabricate false testimony. Specifically, they allegedly pulled the minor witness out of school, detained him, and coerced him into providing a false story, including fabricating the results of a photo array identification and taking the minor to see a blood-stained car

to intimidate him. ROA. 20-30406.261-62, 511-12. Perrilloux and Foster therefore acted far more like police officers than advocates when they fabricated evidence. *See* Appellee's Br. 41 ("*Cousin* does not extend absolute immunity to a prosecutor's and law enforcement officer's joint effort to *create* evidence through a false witness narrative." (emphasis added)).

More broadly, in *Cousin*, this Court made clear that even though "many, perhaps most," interviews conducted after indictment are "advocatory rather than investigative," not all of them are. 325 F.3d at 633; *see id.* ("after probable cause has been established, it is *more likely* that the prosecutor acts as an advocate" (emphasis added)); *id.* ("the existence of probable cause with respect to a particular suspect is *a significant factor* to be used in evaluating the advocatory nature of prosecutorial conduct" (emphasis added)). Thus, *some* interviews conducted after indictment can be investigative, and the fabrication of witness testimony at issue here should plainly fall within that category and outside the scope of conduct shielded by absolute prosecutorial immunity.[3]

[3] There is also no reason to extend *Cousin* to this materially distinct situation, given that *Cousin* is in substantial tension with the Supreme Court's decision in *Buckley*, as well as decisions from other courts of appeals that have held that absolute prosecutorial immunity does not extend to coercing a witness to give false testimony. *See, e.g.*, *Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995) ("Intimidating and coercing witnesses into changing their testimony is not advocatory. It is rather a misuse of investigative techniques legitimately directed at exploring whether witness testimony is truthful and complete and whether the government has acquired

Affirming the district court would also accord with this Court's recent decision in *Singleton v. Cannizzaro*, 956 F.3d 773 (5th Cir. 2020). There, the Court held that prosecutors who "used fraudulent subpoenas to pressure crime victims and witnesses to meet with them outside of court" were not shielded by absolute immunity. *Id.* at 781. The Court noted that "Defendants allegedly used the subpoenas to gather information from crime victims and witnesses outside of court." *Id.* at 782. Indeed, the Court contrasted the facts of that case with those in *Imbler*, noting that "Defendants were not attempting to control witness testimony during a break in judicial proceedings." *Id.* at 783. For that reason, the Court determined that "Defendants' use of the fake subpoenas in an attempt to obtain information from crime victims and witnesses outside the judicial context falls into the category of investigative conduct for which prosecutors are not immune." *Id.* at 783-84. The same is true here: Perrilloux and Foster's conduct occurred outside of court and months before Wearry's trial, and it was therefore quintessentially investigative conduct for which they are not immune.[4]

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all incriminating evidence."); *Barbera v. Smith*, 836 F.2d 96, 100 (2d Cir. 1987) (contrasting "*acquiring* evidence which might be used in a prosecution" with "the *organization, evaluation, and marshalling* of this evidence into a form that will enable the prosecutor to try a case or to seek a warrant, indictment, or order").

[4] Notably, the *Singleton* Court distinguished *Cousin* on the ground that, in *Cousin*, "the defendant prosecutor told a witness to falsely implicate a suspect and practiced with him on how to testify at trial *while the trial was pending*." *Singleton*, 956 F.3d at 782 n.5 (emphasis added) (citing *Cousin*, 325 F.3d at 634-35).

Finally, the justifications this Court has given for absolute prosecutorial immunity do not support extending such immunity to prosecutors who falsify witness testimony months before a trial. The Court has explained that "immunity is necessitated by the concern that [prosecutors] in the judicial process required by law to make important decisions regarding the initiation, conduct, and merit of controversies which often excite 'the deepest feelings' of the parties would be intimidated in the exercise of their discretion by the fear of retaliatory lawsuits." *Marrero v. City of Hialeah*, 625 F.2d 499, 507 (5th Cir. 1980) (quoting *Butz v. Economou*, 438 U.S. 478, 509 (1978)). However, "when a prosecutor acts outside his quasi-judicial role, . . . subjecting him to liability for such decisions will not interfere to the same degree with the effective functioning of the criminal judicial system." *Id.* at 508. As such, "'when a prosecutor makes an investigative decision' comparable to that of a police officer . . . the prosecutor is not entitled to absolute immunity." *Singleton*, 956 F.3d at 781 (quoting *Marrero*, 625 F.2d at 508). This case falls squarely in the second bucket. A prosecutor and police officer coordinating to pull a minor out of school, intimidate him, and feed him a fabricated story is hardly the sort of "important decision[] regarding the initiation, conduct, and merit of controversies," *Marrero*, 625 F.2d at 507, for which this Court has shielded prosecutors from suit. Rather, falsifying evidence is quintessentially investigative, not quasi-judicial, and is comparable to the conduct of a police officer—indeed, it

was partly done by a police officer. There is no basis for shielding such misconduct from judicial review.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's ruling.

Respectfully submitted,

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Dated: November 13, 2020

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on November 13, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 13th day of November, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,494 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

Executed this 13th day of November, 2020.

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