No. 10-788

In the Supreme Court of the United States

CHARLES A. REHBERG,
Petitioner,
v.
JAMES P. PAULK, KENNETH B. HODGES, III, AND KELLY R. BURKE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a government official who acts as a "complaining witness" by providing false grand jury testimony leading to the initiation of a prosecution against an innocent citizen is entitled to absolute immunity—rather than qualified immunity—in a damages action under Section 1983 arising from the unjustified prosecution.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) issued on rehearing is reported at 611 F.3d 828. The panel's initial, withdrawn opinion (Pet. App. 45a-80a) is reported at 598 F.3d 1268. The opinion of the District Court for the Middle District of Georgia (Pet. App. 81a-108a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2010, upon consideration of petitioner's petition for rehearing. On October 6, 2010, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including December 13, 2010. The petition for a writ of certiorari was filed on December 13, 2010, and was granted on March 21, 2011. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATEMENT

In actions for damages under 42 U.S.C. § 1983, qualified immunity is the "norm." *Malley* v. *Briggs*, 475 U.S. 335, 340 (1986) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982)). This Court has "been 'quite sparing' in recognizing absolute immunity for state actors." *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester* v. *White*, 484 U.S. 219, 224 (1988)). And the threshold showing required for absolute immunity is that the official claiming immunity "can point to a common-law counterpart to the privilege he asserts." *Malley*, 475 U.S. at 339-340.

The Court held in *Malley* that a police officer was entitled to qualified immunity, but not absolute immunity, for causing an arrest warrant to issue by submitting a sworn affidavit that failed to establish probable cause. *Id.* at 343. The Court reasoned that officers who initiate prosecution in this manner function as complaining witnesses, who—unlike other witnesses—"were not absolutely immune at common law." *Id.* at 340. In *Kalina* v. *Fletcher*, 522 U.S. 118 (1997), the Court rejected a prosecutor's claim of absolute immunity for making false statements of fact in an affidavit supporting an application for an arrest warrant, reiterating that complaining witnesses "were subject to suit at common law." *Id.* at 127.

Here, respondent Paulk, an investigating officer, made false statements in his grand jury testimony that instigated the return of three grand jury indictments and petitioner's arrest on criminal charges. As in *Malley* and *Kalina*, Paulk's actions as a complaining witness are entitled to qualified immunity, but not absolute immunity.

The Court's decision in *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), which extended to Section 1983 actions the common-law rule of absolute immunity for a witness's *trial testimony* (*id.* at 345-346), and which expressly distinguished the situation of complaining witnesses (*id.* at 328 n.5), does not justify a different result. There simply is no basis for permitting the assertion of absolute immunity when the prosecution is initiated by false information provided through oral testimony, but limiting a defendant to qualified immunity when a criminal prosecution is initiated by false statements in an affidavit. Neither the common law nor common sense justifies such inconsistent results.

A. Factual Background

This case arises from the testimony of respondent James Paulk before a state grand jury in Georgia that falsely and maliciously implicated petitioner Charles Rehberg in multiple crimes.[1]

Petitioner is a certified public accountant and certified forensic accountant who, along with a surgeon at the Phoebe Putney Hospital in Albany, Georgia, discovered evidence of the hospital's unethical billing and accounting practices. See generally J.A. 2-42 (Compl., *Rehberg* v. *Paulk*, No. 1:07-tc-05000 (M.D. Ga. 2007)). In order to raise public awareness of these practices, petitioner sent anonymous faxes publicizing the hospital's activities and financial management to members of the community, the hospital, and his Congressman. J.A. 6, 11, 30 (¶¶ 17, 31, 123). Those faxes prompted hospital management to have the Dougherty County District Attorney launch an illegal investigation of the anonymous faxes as a "favor" to the hospital. J.A. 10-12 (¶¶ 29, 33, 35).[2]

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[1] Because this case was decided on a motion to dismiss, this Court "must * * * accept all factual allegations in the complaint as true." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

[2] The District Attorney of Dougherty County was Kenneth B. Hodges, III. After unfavorable press coverage of the District Attorney's conflicts of interest in relation to the hospital, Hodges formally recused himself from the case, and Kelly R. Burke was appointed as a special prosecutor in his stead. J.A. 17-18 (¶ 54); see, *e.g.*, Andy Miller, *D.A. Aided Civil Action*, Atlanta J.-Const., May 9, 2005, at 1A ("Legal experts say the actions * * * are unusual and possibly inappropriate for a district attorney's office."). Both Hodges and Burke were named defendants below and are nominal respondents before this

Respondent Paulk was the Chief Investigator in the District Attorney's office, and led the retaliatory investigation against petitioner. J.A. 2-3, 12-15 (¶¶ 3, 34-45). Although his investigation would turn up no evidence establishing probable cause to indict petitioner (J.A. 6, 7 (¶¶ 17, 19)), respondent would nonetheless testify falsely to the contrary in front of three grand juries. Respondent's false testimony as a complaining witness (J.A. 20, 28, 29 (¶¶ 63, 112, 114, 117)), offered with full knowledge that "there was not probable cause to indict [petitioner]" (Pet. App. 11a) and in a malicious attempt to indict petitioner (J.A. 25-30 (¶¶ 96-120)), resulted in three indictments against petitioner. Petitioner was arrested and detained as a result of these indictments. Pet. App. 6a.

All of the indictments would be later dismissed as legally insufficient (J.A. 10-11 (¶ 29); Pet. App. 5a-6a), but not before inflicting significant harm on petitioner's reputation, finances, and health (J.A. 10-11 (¶ 29)).

1. The First Indictment

On December 14, 2005, petitioner was indicted on charges of aggravated assault, burglary, and harassing telephone calls. J.A. 4-5 (¶ 10). According to the indictment, petitioner allegedly: (1) burglarized the home of Dr. James Hotz (a doctor at the hospital), entering with the intent to commit assault; (2) assaulted Dr. Hotz by "suggesting that the accused had a weapon"; and (3) committed six counts of engaging in harassing telephone calls (by sending ano-

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Court, but petitioner has not sought this Court's review of his claims against Hodges and Burke.

nymous faxes to various members of the community including petitioner's Congressman). *Ibid.*

Respondent was the sole witness to testify before the grand jury; he was listed on the bill as the "complainant" against the petitioner. J.A. 6, 28-29 (¶¶ 16, 112, 114, 117); see also Pet. App. 48a (noting that the respondent was "the sole complaining witness against [petitioner]"). Respondent's testimony, however, was entirely false. There was never any probable cause to indict petitioner. J.A. 7 (¶ 19). Indeed, there was not even a police report of an assault or burglary. J.A. 5 (¶ 13). Respondent has since admitted that before testifying he "never interviewed any witness [n]or gathered any evidence indicating that [petitioner] committed any aggravated assault or burglary." J.A. 6 (¶ 17). One of the alleged recipients of the anonymous faxes did not own a fax machine and petitioner's Congressman disclaimed any assertion that petitioner harassed him. *Ibid.* On February 2, 2006, the first indictment was nol-prossed by the special prosecutor (J.A. 7-8 (¶ 21)), appointed after the District Attorney recused himself from the case (see page 3, note 2 *supra*).

2. The Second Indictment

After the first indictment was nol-prossed, respondent Paulk appeared before a second grand jury in another effort to indict petitioner. J.A. 8 (¶ 22). On February 16, 2006, the grand jury indicted petitioner on a charge of simple assault for "commit[ting] an act which placed James A. Hotz * * * in reasonable apprehension of immediately receiving a violent injury" (*ibid.*), and five counts of engaging in harassing telephone calls. *Ibid.*

However, for a second time, respondent Paulk's testimony was false. There was no evidence that petitioner *ever visited* Dr. Hotz's home, let alone evidence suggesting that petitioner assaulted Dr. Hotz or was a party to an assault against Dr. Hotz. *Ibid.* Indeed, there was no evidence that an assault even occurred against Dr. Hotz, who, as mentioned, never filed a police report. J.A. 8-9 (¶ 23). Further, many of the so-called "victims" of harassing faxes did not actually see themselves as victims. *Ibid.* Once again, the indictment was dismissed. J.A. 9-10 (¶¶ 24, 27).

3. The Third Indictment

On March 1, 2006—while the second indictment remained pending—respondent Paulk, acting with malice, and without probable cause (J.A. 26 (¶ 99)), and Burke appeared before a *third* grand jury and secured another indictment against petitioner, this time for "simple assault" and "harassing telephone calls." J.A. 9 (¶ 25). But, again, on May 1, 2006, after a motion from petitioner's counsel, the trial court dismissed all charges against petitioner. J.A. 9-10 (¶ 26).

B. Proceedings Below

Following the dismissal of the indictments, petitioner filed a complaint in the United States District Court for the Middle District of Georgia against respondent alleging, in addition to various state law claims, three violations of Section 1983. Pet. App. 6a-7a. Petitioner accused respondent of malicious prosecution in violation of the Fourth and Fourteenth Amendments,[3] retaliatory investigation and prosecu-

[3] The Eleventh Circuit recognizes a valid § 1983 claim for malicious prosecutions in violation of the Fourth Amendment.

tion in violation of petitioner's First Amendment free speech rights, and conspiracy to violate petitioner's rights under the First, Fourth, and Fourteenth Amendments. Pet. App. 6a-7a.

Respondent Paulk moved to dismiss the claims pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing, among other grounds, that he was entitled to absolute immunity for his testimony before the grand jury. Paulk and Dougherty County Mem. in Support of Mot. to Dismiss, *Rehberg* v. *Paulk*, No. 1:07-CV-22(WLS) (M.D. Ga. Apr. 10, 2007).

The district court identified Paulk as a complaining witness before the grand jury (Pet. App. 83a), and denied his motion to dismiss on the ground that—apart from his grand jury testimony—Paulk's other non-testimonial acts as a complaining witness were sufficient to defeat his claim of absolute immunity (Pet. App. 98a-100a).[4]

Respondent Paulk appealed, contending in part that he was entitled to absolute immunity under this Court's decision in *Briscoe*, 460 U.S. 325, which recognized absolute immunity from Section 1983 liability for false trial testimony by a law enforcement officer. Petitioner countered that respondent was not entitled to absolute immunity, in line with this Court's decision in *Malley*, 475 U.S. 335, which denied absolute immunity for a law enforcement officer who acted as a "complaining witness" in submitting a

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See, *e.g.*, *Whiting* v. *Traylor*, 85 F.3d 581, 584-586 (11th Cir. 1996).

[4] The district court rejected respondent Paulk's qualified immunity claim because his alleged conduct violated petitioner's clearly established constitutional right. Pet. App. 101a-102a.

complaint and supporting affidavit that failed to establish probable cause.

Although acknowledging that Paulk was a "complaining witness" against petitioner (Pet. App. 4a), the court of appeals reversed the district court's denial of Paulk's absolute immunity claim (Pet. App. 12a (citing *Briscoe*, 460 U.S. at 326)). The court distinguished *Malley* on the ground that the criminal complaint at issue in that case did not implicate the secrecy concerns associated with the grand jury. Pet. App. 14a n.9. Even though it explicitly recognized that "[t]wo circuits [have] carved out a complaining-witness exception" for false grand jury testimony (Pet. App. 14a n.9), the court of appeals dismissed petitioner's Section 1983 malicious prosecution claim (Pet. App. 61a).[5]

SUMMARY OF ARGUMENT

The threshold requirement for absolute immunity is "a common-law counterpart to the privilege [the government official] asserts." *Malley*, 475 U.S. at 339-340. There is no such common-law analog here. To the contrary, this Court has recognized three times that "complaining witnesses were not absolutely immune at common law." *Id.* at 340; see also *Kalina*, 522 U.S. at 127 & n.14; *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992). The fact that respondent Paulk acted as a complaining witness by testifying before grand juries, rather than by submitting written affi-

[5] Separately, the court of appeals affirmed denial of respondent's motion to dismiss petitioner's retaliatory prosecution claim. Pet. App. 34a. It also ruled that petitioner's conspiracy claim was barred by the intracorporate conspiracy doctrine. Pet. App. 43a-44a. These additional aspects of the court of appeals decision are not before this Court.

davits, is irrelevant. At common law, both forms of evidence could and did give rise to liability in malicious prosecution.

The absence of immunity at common law is dispositive of the absolute immunity claim here. The Court has stated that it "do[es] not have a license to establish immunities from § 1983 actions in the interests of what [the Court] judge[s] to be sound public policy." *Tower* v. *Glover*, 467 U.S. 914, 922-923 (1984). But even if those considerations were relevant, they too weigh strongly against absolute immunity.

To begin with, the function performed by a complaining witness whose grand jury testimony triggers the issuance of an indictment is precisely the same as the function performed by one whose affidavit results in the issuance of an arrest warrant. In both situations, the complaining witness has initiated a criminal prosecution, subjecting the target of his or her efforts to a loss of liberty and other injuries.

This Court squarely held in *Malley* and *Kalina* that absolute immunity is not available to government officials who submit false affidavits that result in the issuance of arrest warrants. There simply is no basis for distinguishing between the two types of evidence, according absolute immunity to evidence provided orally but only qualified immunity to evidence provided in writing.

Moreover, the States differ significantly in the extent to which they require grand jury indictments to initiate criminal prosecutions. Basing the availability of absolute immunity on the procedural mechanism used to begin a criminal action would mean that Section 1983's protection against unconstitu-

tional criminal prosecutions would turn on the particular State's procedural rules. A person victimized by malicious falsehoods could bring a claim in a State in which written affidavits were sufficient to instigate a prosecution, but absolute immunity would bar a claim from an identically situated person in a State in which an indictment was required. That distinction is entirely arbitrary.

Finally, there is no reason to believe that a rule of qualified immunity will open the door to abusive litigation. The qualified immunity principle already is applied by seven courts of appeals with respect to complaining witnesses' oral testimony, and—under this Court's decisions in *Malley* and *Kalina*—it applies nationwide with respect to affidavits and other written submissions that trigger criminal actions. Yet there is no evidence of a flood of unjustified claims. "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

ARGUMENT

A COMPLAINING WITNESS IS NOT ENTITLED TO ABSOLUTE IMMUNITY FROM A SECTION 1983 WRONGFUL PROSECUTION CLAIM ARISING FROM HIS MALICIOUSLY FALSE GRAND JURY TESTIMONY.

Qualified immunity "'represents the norm'" for government officials sued under Section 1983 for acts performed in the course of their duties. *Buckley*, 509 U.S. at 273 (quoting *Malley*, 475 U.S. at 340). "'[T]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.'" *Id.* at 278 (quoting

Burns v. *Reed*, 500 U.S. 478, 486-487 (1991)); see also *Harlow*, 457 U.S. at 807 ("For executive officers in general, * * * qualified immunity represents the norm.").

This Court has for that reason been "'quite sparing in recognizing absolute immunity for state actors.'" *Buckley*, 509 U.S. at 269 (quoting *Forrester*, 484 U.S. at 224). The burden is on the official to show entitlement to more than qualified immunity. *Butz* v. *Economou*, 438 U.S. 478, 506 (1978).

The courts below did not dispute that, based on the allegations of the complaint, respondent Paulk qualifies as a "complaining witness." See Pet. App. 4a, 13a, 83a.[6] The question in this case is whether Paulk is entitled to absolute immunity because the facts that led to the initiation of the prosecutions were provided in oral testimony rather than through affidavit.

Each of the factors considered by the Court weighs strongly against absolute immunity. *First*, there was no absolute immunity for complaining witnesses at common law in 1871, when Section 1983 was enacted, even when the witness supplied information through oral testimony. *Second*, the Court has specifically rejected claims of absolute immunity with respect to the particular government function—serving as a complaining witness—on which the Section 1983 claim here is based. *Third*, the relevant public policy considerations all point sharply against distinguishing between absolute and qualified im-

[6] As this Court has explained, a complaining witness is a person who provides the facts that "set the wheels of government in motion by instigating a legal action." *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992).

munity for complaining witnesses based upon whether they provided information through oral testimony to a grand jury as opposed to written affidavit to a judge or magistrate.

A. Complaining Witnesses Were Not Entitled To Common-Law Immunity In 1871.

The threshold inquiry in determining the scope of a government official's immunity in actions under Section 1983 is whether the official claiming immunity "can point to a common-law counterpart to the privilege he asserts." *Malley*, 475 U.S. at 339-340 (citing *Tower*, 467 U.S. at 914). "One important assumption underlying the Court's [Section 1983] decisions * * * is that members of the 42d Congress were familiar with common-law principles, * * * and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *Briscoe*, 460 U.S. at 330 (internal quotation marks omitted); see also *Buckley*, 509 U.S. at 281 (Scalia, J., concurring) ("[T]he Court reaffirms that 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" and "if application of the principle is unclear, the defendant simply loses").

Thus, in each of the contexts in which the Court has upheld a claim of absolute immunity from Section 1983 liability, it has rested that decision on the existence of a parallel immunity at common law. *Briscoe*, 460 U.S. at 330-334 (individuals who testify at trial); *Pierson* v. *Ray*, 386 U.S. 547, 553-554 (1967) (judges); *Tenney* v. *Brandhove*, 341 U.S. 367, 372-375 (1951) (legislators); see also *Imbler* v. *Pachtman*, 424 U.S. 409, 421-424 (1976) (prosecutor when function-

ing as an advocate, relying on post-1871 common-law developments).

And where the Court has not found such a common-law analog, it has rejected absolute immunity. *Wood* v. *Strickland*, 420 U.S. 308, 318 (1975) (school board members); *Pierson*, 386 U.S. at 555 (police officers).

This essential prerequisite for absolute immunity is not present here.

In *Malley*, this Court declined to grant absolute immunity to a law enforcement officer who submitted a criminal complaint and supporting affidavit that failed to establish probable cause. The Court determined that "complaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." 475 U.S. at 340-41; see also *Kalina*, 522 U.S. at 127 & n.14 (stating that "complaining witnesses * * * were subject to suit at common law" (citing *Malley*, 475 U.S. at 340)); *Wyatt*, 504 U.S. at 164-165 (same).[7]

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[7] Justice Scalia, in his concurring opinion in *Kalina* for himself and Justice Thomas, pointed out that liability for malicious prosecution at common law extended not just to persons who "provided factual testimony" that triggered a prosecution but also to anyone who "had a role in initiating or procuring the prosecution whether or not he ever provided factual testimony." 522 U.S. at 135. The common-law immunity for witnesses "was * * * an immunity only against slander and libel actions"; a witness's false statements could be used as "evidence of malice or initiation in the malicious prosecution suit" but were not actionable independently in defamation. *Id.* at 133 (emphasis omitted). They thus agreed that a person whose false

Although *Malley* involved a complaining witness who provided information by submitting an affidavit, the common law drew no distinction between complaining witnesses who provided information in writing and those whose information came via oral testimony. Nor did the common law draw a distinction based upon whether the oral information was furnished to a magistrate or to a grand jury.

The basic principle of common-law liability for malicious prosecution was framed in general terms: "[t]he gist of the action is the criminal prosecution, instituted with malice and without probable cause, resulting in damage to the plaintiff, by depriving him of his liberty, injuring his reputation or putting him to expense." *Shaul* v. *Brown*, 28 Iowa 37, 42 (1869). Indeed, appellate court opinions ruling on suits for malicious prosecution often simply noted that the defendant had "caused" the plaintiff to be arrested or prosecuted without specifying the means by which the defendant had presented the information that led to that result. See, *e.g.*, *Tefft* v. *Windsor*, 17 Mich. 486, 491 (1869) (affirming judgment against defendants who "caus[ed] [plaintiff] to be arrested on a criminal charge").[8]

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statements triggered a prosecution were subject to liability at common law for the injury caused by the unjustified prosecution—the very injury that is the basis for the claim in this case.

[8] See also *Spain* v. *Howe*, 25 Wis. 625 (1870) (affirming judgment in malicious prosecution suit against defendant who "caused [plaintiffs] to be arrested on a civil warrant from a justice of the peace"); *Hill* v. *Palm*, 38 Mo. 13, 19 (1866) (affirming judgment against defendant who had "wilfully, maliciously, and without probable cause, caused the respondent to be prosecuted for the offence of larceny"); *William M. Ross & Co.* v. *Innis*, 35 Ill. 487, 506, 511 (1864) (affirming judgment for

There is no doubt, moreover, that a complaining witness who testified in person was treated identically to one who submitted an affidavit. For example, individuals were subject to suit for prosecutions instituted via oath or information before a magistrate. See, *e.g.*, *Kimball* v. *Bates*, 50 Me. 308, 309 (1862) (reversing judgment for a "defendant [who] made oath before the magistrate" and remanding for new trial).[9]

Courts also entertained malicious prosecution suits against those who provided oral testimony to grand juries. See, *e.g.*, *Casperson* v. *Sproule*, 39 Mo. 39, 43-44 (1866) (remanding for trial an action for malicious prosecution against a defendant who "appeared voluntarily before the grand jury and tried 'to have [plaintiff] indicted for embezzlement' * * * [upon which] 'the grand jury refused to indict * * *.'"); *Stewart* v. *Thompson*, 51 Pa. 158, 160 (1865) (affirming judgment against defendant who "procured a bill of indictment * * * to be presented to the grand jury, upon which bill he was the only witness sworn"); *Kidder* v. *Parkhurst*, 85 Mass. 393, 393-394

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plaintiff on third successful trial of the issue noting only that defendants had "caused the plaintiff to be arrested" and had "sought [plaintiff's] ruin through an infamous charge which they knew was unfounded. Such is retributive justice! The judgment is affirmed."); *Glascock* v. *Bridges*, 15 La. Ann. 672 (La. 1860) (noting only that the defendant had "caused the plaintiff to be arrested").

[9] See also *Thomas* v. *Norris*, 64 N.C. 780, 783-784 (1870) (affirming judgment against defendant for malicious prosecution instituted by swearing out a warrant that was "read over to the defendant" and presented to a magistrate); *Callahan* v. *Caffarata*, 39 Mo. 136 (1866) (affirming judgment in malicious prosecution suit against defendant who caused arrest by providing information to city police captain).

(1862) (reviewing malicious prosecution suit "alleging that the defendants had maliciously caused the female plaintiff, Mary Kidder, to be indicted and prosecuted for perjury" but concluding that malicious prosecution claim was without merit because despite acquittal there was in fact probable cause for the defendants' claim of plaintiff's perjury); *Robertson* v. *Spring*, 16 La. Ann. 252 (La. 1861) (reversing judgment for plaintiff in a malicious prosecution suit, in part because "[the complainant] *did not* appear, as a witness, before the Grand Jury, who found the true bill" (emphasis added)).

The Court's discussion in *Briscoe* of the common law immunity for witnesses' trial testimony does not undermine this conclusion. The Court specifically noted that the question presented in that case was "'[w]hether a police officer who commits perjury *during a state court criminal trial* should be granted absolute immunity from civil liability'" under Section 1983. 460 U.S. at 328 n.5 (emphasis added). And the Court explicitly declined to address the availability of absolute immunity for witnesses at any sort of pretrial proceedings. *Ibid.*

Moreover, the dissent in *Briscoe* relied on the availability at common law of malicious prosecution actions against a witness whose false testimony resulted in an unjustified arrest—"courts routinely permitted plaintiffs to bring actions alleging that the defendant had made a false and malicious accusation of a felony to a magistrate or other judicial officer." *Id.* at 351 (Marshall, J., dissenting). The Court responded that "[t]he availability of a common-law action for false accusations of crime is inapposite because petitioners present only the question of § 1983 liability for false testimony during a state court crim-

inal trial." *Id.* at 331 n.9 (internal citation omitted).[10] Thus, the *Briscoe* Court itself made clear that its analysis did not apply to complaining witnesses.

Because the absence of common-law immunity recognized by the Court in *Malley* applied equally to all complaining witnesses, including those who provided information through oral testimony—and nothing in *Briscoe* supports a different conclusion regarding the state of the common law—the predicate for a grant of absolute immunity is lacking here (just as it was also lacking in *Malley*). "Since [Section 1983] on its face does not provide for *any* immunities, [the Court] would be going too far to read into it an absolute immunity for conduct which was only accorded qualified immunity in 1871." *Malley*, 475 U.S. at 342. Complaining witnesses are therefore entitled only to the qualified immunity generally available to government officials.

B. This Court Has Twice Held That The Function Performed By A Complaining Witness Warrants Qualified Immunity.

The absence of a common-law privilege is dispositive of the claim of absolute immunity here.

But even if the Court were to conclude, contrary to our submission, that there could be a common-law basis for absolute immunity, the Court "do[es] not

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[10] For these reasons, the *Briscoe* Court's use of the terms "judicial proceeding" and "judicial process" (see, *e.g.*, 460 U.S. at 334, 335) must be understood as referring to criminal trials. See *id.* at 335 ("The common law's protection for judges and prosecutors formed part of a 'cluster of immunities protecting the various participants in judge-supervised trials,' which stemmed 'from the characteristics of the judicial process.'" (quoting *Butz*, 438 U.S. at 512)).

assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form." *Malley*, 475 U.S. at 340. Rather it considers "whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Ibid*.

One line of inquiry in the Court's decisions is whether the function performed by the government official is one that requires absolute immunity. The Court's precedents with respect to complaining witnesses make clear that only qualified immunity is appropriate with respect to that function.

First, there is no useful parallel to be drawn between complaining witnesses who provide information through testimony before a grand jury and the grant of absolute immunity afforded to prosecutors. Indeed, the Court specifically rejected such a rationale in *Kalina*, holding that a prosecutor who acts as a complaining witness is *not* entitled to absolute immunity. 522 U.S. at 131.

The deputy prosecuting attorney in *Kalina* "commenced a criminal proceeding against respondent by filing * * * documents" including a probable cause certification—"an affidavit or sworn testimony establishing the grounds for issuing the [arrest] warrant." *Id.* at 121 (citation omitted). The plaintiff based his Section 1983 claim on the false statements of fact in that sworn statement.

This Court stated that a prosecutor's absolute immunity rests on "the importance to the judicial process of protecting the prosecutor when serving as an advocate in judicial proceedings." *Id.* at 125; see also *id*. at 131 ("[T]he prosecutor is fully protected by

absolute immunity when performing the traditional functions of an advocate.").

The Court concluded that the act of the prosecutor in "personally attesting to the truth of the averments in the certification" did not fall within the role of advocate. *Id*. at 129. "Testifying about facts is the function of the witness, not of the lawyer. * * * [T]he evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required 'Oath or affirmation' is a lawyer, the only function that she performs in giving sworn testimony is that of a witness." *Id*. at 130-131.[11] For that reason, the Court concluded, absolute prosecutorial immunity did not apply. *Id.* at 131.

Similarly, the Court in *Malley* rejected the defendant police officer's argument that he was entitled to absolute immunity because the function he was performing—supplying facts through an affidavit in order to obtain an arrest warrant—was similar to that of a prosecutor. 475 U.S. at 342. The Court declared that an officer's application for a warrant "is further removed from the judicial phase of criminal proceedings than the act of a prosecutor in seeking an indictment." *Id.* at 342-343.

The Court also observed that absolute immunity is accorded to a prosecutor for the act of seeking an

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[11] See also *Kalina*, 522 U.S. at 129-130 ("Although the law required that [certification of probable cause] to be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification. In doing so, petitioner performed an act that any competent witness might have performed.").

indictment because that is "but the first step in the process of seeking a conviction. Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work * * *. Thus, we shield the prosecutor seeking an indictment because any lesser immunity could impair the performance of a central actor in the judicial process." *Id.* at 343.

Kalina and *Malley* make clear that a prosecutor's absolute immunity is tied to his or her role as a lawyer and advocate—rather than an investigator or fact witness—in criminal proceedings.[12] There accordingly can be no basis for extending prosecutors' absolute immunity to a complaining witness—something that *Kalina* squarely rejects.

Second, absolute immunity for complaining witnesses cannot be justified by analogy to the function performed by a witness who testifies at a criminal trial.

As we have discussed (see page 16 *supra*), the Court in *Briscoe* explicitly limited its decision to trial testimony and *excluded* complaining witnesses.

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[12] See also *Buckley*, 509 U.S. 259 (granting only qualified immunity to a prosecutor engaged in an investigatory function and in making false statements in the public announcement of an indictment); *Burns*, 500 U.S. at 495-496 (denying absolute immunity for performing functions other than those intimately associated with the judicial process—like giving legal advice to the police); *cf. Van de Kamp* v. *Goldstein*, 129 S. Ct. 855 (2009) (granting absolute prosecutorial immunity in a § 1983 suit against a prosecutor for failure to disclose impeachment material); *Burns*, 500 U.S. at 487 (granting absolute immunity for participating as a prosecutor and advocate in a probable cause hearing).

There accordingly is no basis for extending *Briscoe* to the context that the Court specifically excluded.

Moreover, the Court's rationale in *Briscoe* was closely tied to the nature of the proceedings: "A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions on direct examination and cross-examination, and may be prosecuted subsequently for perjury." *Id.* at 342. Grand jury testimony, of course, does not include the critical check of cross-examination. Nor is the defendant able to put on his own evidence to challenge the veracity of a witness's testimony.

Briscoe's inapplicability to complaining witnesses is confirmed by the Court's subsequent decisions in *Kalina* and *Malley*. *Kalina*'s determination that the prosecutor was not entitled to absolute immunity because "the only function that she performs in giving sworn testimony is that of a witness" (522 U.S. at 131) would make no sense if every individual acting as a witness were entitled to absolute immunity. See also *Malley*, 475 U.S. at 342-45 (finding only qualified immunity appropriate for officer's written testimony in support of warrant). The only possible conclusion is that *Briscoe* does not extend so broadly and, in particular, does not encompass complaining witnesses.

Indeed, that distinction comports fully with the Court's "functional" analysis, because complaining witnesses perform a function very different from witnesses at trial. A complaining witness does not simply supply facts for the consideration of a judge or jury; rather, he or she provides the facts that "set the wheels of government in motion by instigating a legal action." *Wyatt*, 504 U.S. at 164-165. As the

Second Circuit observed in denying absolute immunity for false testimony by a police officer before a grand jury, there is a "subtle but crucial" common-law distinction between witnesses "whose role was limited to providing testimony" and those, like the officer testifying before the grand jury, "who played a role in initiating a prosecution—complaining witnesses." *White* v. *Frank*, 855 F.2d 956, 958-959 (2d Cir. 1988).

The common law concluded that that very different function warranted a different immunity rule—replacing the absolute immunity afforded witnesses in the defamation context with a rule of qualified immunity that permitted liability for malicious prosecution upon a showing of malice and a lack of probable cause. See Eugene Scalia, Comment, *Police Witness Immunity Under § 1983*, 56 U. Chi. L. Rev. 1433, 1446 (1989) (at common law, "the relation between witness immunity and malicious prosecution represented a delicate balancing of individual and social interests"). Qualified—rather than absolute—immunity is also appropriate in actions under Section 1983.

C. The Relevant Policy Considerations Preclude Absolute Immunity For Complaining Witnesses That Testify Before A Grand Jury.

Where there is no common-law tradition of absolute immunity for a particular official function, this Court's inquiry is at its end—considerations of public policy alone cannot justify recognition of a Section 1983 immunity. See *Tower*, 467 U.S. at 922-923 ("We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."). In any event, there is no sound

policy basis for granting absolute immunity to complaining witnesses who testify before a grand jury.

1. Distinguishing Between Prosecutions Initiated By Grand Jury Indictment And Prosecutions Initiated By Warrant Or Information Produces Absurd And Arbitrary Results.

Distinguishing for purposes of Section 1983 immunity between prosecutions initiated by grand jury indictment and those initiated by arrest warrant or information simply makes no sense. Although these charging instruments vary in their procedural details, they have the same effect: initiating a criminal proceeding. It therefore would be entirely arbitrary for the nature of the immunity provided to a complaining witness to depend on whether the complaining witness gave oral testimony before a grand jury or submitted a written affidavit in court.

The States differ significantly in the degree to which they require grand jury indictments to initiate a criminal prosecution.[13] Twenty-two States require a grand jury indictment for certain serious crimes, but allow prosecution by information for other offenses.[14] Twenty-six States permit the use of either

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[13] In *Hurtado* v. *California*, 110 U.S. 516 (1884), this Court declined to incorporate the Fifth Amendment Grand Jury Clause against the States, leaving individual States to decide whether and when to require a grand jury indictment to initiate a prosecution.

[14] Eighteen States follow the federal system in requiring grand jury indictment for crimes meeting the traditional definition of felonies: Alabama, Alaska, Delaware, Georgia, Kentucky, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Wayne R.

indictment or information for all crimes.[15] Two States have effectively abolished the indicting grand jury by repealing the statutory provisions providing for their empanelment, and now use grand juries only for investigatory purposes.[16] Thus, in all but those two States, prosecutors have their choice of charging instrument—indictment or information—when prosecuting at least some class of crimes.

For that reason, distinguishing between prosecutions initiated by grand jury and those initiated by information would lead to grants of immunity to some complaining witnesses, but not to others, based solely on whether the prosecutor proceeded by indictment or not. Where the effect of the complaining witness's actions is the same—initiating a prosecution—there is no basis for providing absolute immunity in some cases and qualified immunity in others, based solely on the procedural method used to initiate the prosecution.

2. The Policy Justifications Recognized In Malley *And* Kalina *Apply Equally To Grand Jury Testimony.*

This Court recognized in *Malley* that official abuse of the judicial process harms innocent citizens,

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LaFave et al., 4 Crim. Proc. § 15.1(d) (3d ed. 2010). Four States require grand jury indictment only for the most serious crimes, usually those carrying a penalty of death or life in prison: Florida, Louisiana, Minnesota, and Rhode Island. *Id.* § 15.1(e).

[15] Those States are: Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. *Id.* § 15.1(g).

[16] These States are Connecticut and Pennsylvania. See *id.* § 15.1(g), n.346.

wastes judicial resources, and undermines the legitimacy of the criminal justice system. 475 U.S. at 343-344 ("Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or * * * benefit the guilty."). These concerns apply with no less force to prosecutions initiated by grand jury indictment than to prosecutions initiated by any other means.

Indeed, "the [Section 1983] remedy is benefiting the victim of police misconduct one would think most deserving of a remedy—the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason." *Id.* at 344. And, it may cause a public official—in that case a police officer—to reflect before making a complaint: "such reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature." *Id.* at 343.

Victims of malicious prosecutions initiated through false grand jury testimony are no less deserving of a remedy than victims of arrests based on false affidavits. And the public interest in deterring such behavior is no less vital. Limiting a complaining witness to qualified immunity when the witness provides oral testimony rather than a written complaint serves as an appropriate check against illegitimate manipulation of the charging process.

Moreover, the policy justification relied upon to support absolute immunity in *Briscoe* is wholly inapplicable here. The *Briscoe* Court wrote that "the truth-finding process is better served if the witness's testimony is submitted to 'the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence

in the case to determine where the truth lies.'" 460 U.S. at 333-334 (quoting *Imbler*, 424 U.S. at 440 (White, J., concurring in the judgment)).

That policy rationale relies on the transparency and adversarial nature of a criminal trial. But grand juries have neither of these features. Prosecutors generally have no obligation to present exculpatory evidence to the grand jury, grand jurors may consider evidence that would be inadmissible at trial, and defendants ordinarily have no right to testify, cross-examine witnesses, or introduce evidence, or even to be present for any part of the grand jury proceedings. See Gregory T. Fouts, *Reading the Jurors Their Rights: The Continuing Question of Grand Jury Independence*, 79 Ind. L.J. 323, 328 (2004). Without civil liability for complaining witnesses, therefore, the distorting effects of false testimony before the grand jury could well go unchecked.

Finally, there is no reason to believe that a rule of qualified immunity will lead to abusive litigation. The Court observed in *Malley* that "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." 475 U.S. at 341. Indeed, the qualified immunity standard has been applied to claims against complaining witnesses who testify falsely before grand juries in seven judicial circuits—the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia[17]—and there is no

[17] See, *e.g.*, *Vakilian* v. *Shaw*, 335 F.3d 509, 516 (6th Cir. 2003); *Kulas* v. *Flores*, 255 F.3d 780, 783 n.1 (9th Cir. 2001); *Curtis* v. *Bembenek*, 48 F.3d 281, 285 n.5 (7th Cir. 1995); *Enlow* v. *Tishomingo County, Miss.*, 962 F.2d 501, 511 & n.29 (5th Cir. 1992); *Anthony* v. *Baker*, 955 F.2d 1395, 1399-1401 (10th Cir. 1992); *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415,

evidence that the qualified immunity standard has been unable to provide a means of quickly disposing of unjustified claims. Similarly, there is no evidence that this Court's decisions in *Malley* and *Kalina* have opened the floodgates for claims against complaining witnesses acting through written testimony.

The relevant policy considerations therefore provide no basis for creating a new rule of absolute immunity. To the contrary, they strongly favor application of the well-settled rule of qualified immunity to complaining witnesses who testify orally as well as to those who provide evidence in writing.

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419 (D.C. Cir. 1991); *White*, 855 F.2d at 961; see also *Harris* v. *Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997) (extending the complaining witness exception to *trial* testimony).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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