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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The immunity question in this case begins and ends with the common-law principle that applied at the time Section 1983 was enacted—complaining witnesses could be held liable in damages on the basis of their grand jury testimony. Neither respondent nor his *amici* cite a single case applying a contrary rule. Rather, the nineteenth-century cases cited by the Solicitor General confirm that complaining witnesses could be subject to liability for grand jury testimony.

No doubt recognizing the absence of any support for their position under the historical test consistently applied by this Court, respondent and his supporters focus their attention elsewhere.

First, they attack the concept of a "complaining witness," contending that it is vague and does not apply to modern prosecutions in which law enforcement officers provide the facts that trigger criminal prosecutions. But this Court has twice labeled as "complaining witnesses" law enforcement officials who allegedly furnished false information leading to the arrest of innocent citizens. See *Malley* v. *Briggs*, 475 U.S. 335 (1986) (no absolute immunity for "complaining witness" police officer); *Kalina* v. *Fletcher*, 522 U.S. 118 (1997) (no absolute immunity for "complaining witness" prosecutor). And the concept, which is deeply rooted in history, continues to be applied at common law today. Only by overruling *Malley* and *Kalina*, and ignoring contemporary common law, could the Court decline to apply a complaining witness rule to public law enforcement officers like respondent in this case.

Second, respondent and his *amici* urge the Court to adopt a new absolute immunity standard unrelated to historical common-law principles. Treating this Court's opinion in *Briscoe* as the equivalent of a statute conferring immunity, they combine an out-of-context snippet from that opinion with policy arguments that this Court rejected in *Malley* and *Kalina* to create a novel "judicial proceedings" standard.

The Court should reject this invitation to engage in judicial law-making. The historical test controls. Moreover, respondent's "judicial proceedings" test makes no sense and, if anything, points toward the conclusion that grand jury proceedings are *not* judicial proceedings.

Finally, neither respondent nor the government has an answer to our argument that absolute immunity for maliciously false grand jury testimony would create a bizarre anomaly. It would immunize law enforcement officers for lying to a grand jury even though they could be held liable for falsely presenting the very same facts directly to a judge by sworn affidavit. The Court should reject that unjustifiable result and hold that a complaining witness's grand jury testimony, like a complaining witness's written submission to a judge, is protected by qualified immunity.

A. At Common Law, Complaining Witnesses Were Subject To Liability For Their Grand Jury Testimony.

The threshold and dispositive issue in this case is whether respondent would have been absolutely immune for his grand jury testimony under the common law in 1871. Pet. Br. 12-17; *Malley* v. *Briggs*, 475 U.S. 335, 339-340 (1986) ("Our initial inquiry is

whether an official claiming immunity under § 1983 can point to a common-law counterpart to the privilege he asserts."); see also *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 281 (1993) (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").

American courts in the 1860s and 1870s routinely entertained malicious prosecution suits against complaining witnesses who testified falsely before grand juries. Pet. Br. 15-16 (citing cases); see also *Anderson* v. *Callaway*, 7 Del. 324, 325-326 (Del. Super. Ct. 1861) (malicious prosecution upheld where defendant "was the only name endorsed on the indictment as a witness" against the plaintiff); *Moulton* v. *Beecher*, 1 Abb. N. Cas. 193, 194 (N.Y. Gen. Term. 1876) (malicious prosecution action upheld involving complaint alleging in part that "defendant did * * * voluntarily go before the grand jury * * * for the purpose of procuring an indictment against plaintiff"), aff'd, 53 How. Pr. 86 (N.Y. Gen. Term. 1877). These holdings are consistent with Blackstone's observation that a person was liable for "preferring malicious indictments," and that "an action on the case for a malicious prosecution may be *founded upon an indictment* whereon no acquittal can be had, as if it be rejected by the grand jury [or] insufficiently drawn." 3 William Blackstone, *Commentaries* *126-127 (emphasis added).

We have not located a single case in which a nineteenth-century court held that liability could not be premised in whole or in part on maliciously false

grand jury testimony. Respondent and his *amici* do no better.[1]

This history alone is fatal to respondent's claim for absolute immunity. Although respondent and his *amici* work mightily to explain away this fundamental historical fact, their efforts are unavailing.

1. Respondent contends that the "complaining witness" role is an historical artifact from the days of "private prosecutions" and not applicable to witnesses who are publicly employed law enforcement officers. Resp. Br. 11-12, 23-27; see Brief for the Int'l Mun. Lawyers Ass'n *et al.*, at 17-20.

But this argument ignores the Court's instruction that "[i]n determining whether particular actions of government officials fit within a common-law tradition of absolute immunity," the Court looks to "the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269 (1993) (internal quotation marks omitted). Indeed, both *Malley* and *Kalina* applied the complaining witness rule to public law enforcement officials who allegedly furnished maliciously false information leading to the arrest of innocent citizens.

In any event, respondent's history is wrong. Public prosecutors were active throughout the United States by 1871, with complaining witnesses functioning solely as "witnesses" rather than "prosecutors."[2]

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[1] Indeed, the cases that the government introduces actually support the opposite proposition. See pages 8-9, *infra*.

[2] Respondent attempts to exploit scholarly debate over precisely when public prosecutors came to predominate over private prosecution in American criminal law. Some scholars have asserted that American colonists abandoned the English common-

As early as 1820, most states had developed a local public prosecutor, often known as a county attorney or district attorney. See Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Legal Hist. 43, 43 (1995). By 1871, the constitutions of more than three-quarters of the states provided for local public prosecutors,[3] and local public prosecution was

law practice of private prosecution and that public prosecutors had become so "deeply engrained" during the colonial era that "public prosecution was firmly established as the American system by * * * 1789" (when the Judiciary Act created "United States district attorneys to prosecute federal crimes"). Jack M. Kress, *Progress and Prosecution*, 423 Annals Am. Acad. Pol. & Soc. Sci. 99, 103 (1976). Others point to the second half of the nineteenth century as the period when public prosecutors took over most criminal prosecutions. See Yue Ma, *Exploring the Origins of Public Prosecution*, 18 Int'l Crim. Just. Rev. 190 (2008). Whichever view is correct about when public prosecutions became predominant, there is no doubt that public prosecutors were widespread by 1871, with complaining witnesses that assisted the public prosecutors liable for damages in malicious prosecution actions.

[3] In 1871, twenty-eight of the then-thirty-seven States provided for local public attorneys in their constitutions. Twenty-three state constitutions provided for their direct election. See Ala. Const. of 1867, Art. VI, § 17; Cal. Const. of 1849, Art. VI, § 7 (1862); Ill. Const. of 1870, Art. VI, § 22; Ind. Const. of 1851, Art. VII, § 11 (amended in 1952); Iowa Const. of 1857, Art. V, § 13; Ky. Const. of 1850, Art. VI, § 1; La. Const. of 1868, Art. 92; Md. Const. of 1867, Art. V, § 7; Mass. Const. of 1780, Art. of Amend. XIX (1855); Mich. Const. of 1850, Art. X, § 3; Minn. Const. of 1857, Sched., § 15; Miss. Const. of 1868, Art. VI, § 25; Nev. Const. of 1864, Art. IV, § 32; N.Y. Const. of 1846, Art. X, § 1; N.C. Const. of 1868, Art. IV, § 29; Or. Const. of 1857, Art. VII, § 17; S.C. Const. of 1868, Art. IV, § 29; Tenn. Const. of 1870, Art. VI, § 5; Tex. Const. of 1868, Art. V, § 12; Vt. Const., Amend. XVI (1850); Va. Const. of 1870, Art. VII, § 1; W. Va. Const. of 1863, Art. VII, § 5; Wisc. Const. of 1848, Art. VI, § 4. Five more States provided in their constitutions for local public attorneys.

common everywhere but in Rhode Island and Delaware, which utilized the same statewide attorneys general that they retain today.[4] Public prosecutors in every state commonly prosecuted cases on behalf of citizens, with complaining witnesses serving the same function as today: providing factual information to public prosecutors and/or grand juries making charging decisions.

See Ark. Const. of 1868, Art. XV, § 6; Fla. Const. of 1868, Art. VII, § 19; Ga. Const. of 1868, Art. V, § 4.1; Me. Const. of 1820, Art. IX, § 2; N.J. Const. of 1844, Art. VII, § 2.4. These constitutional provisions can be found in Benjamin Perley Poore, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (1878).

[4] Of the nine states that did not constitutionalize local public prosecutors in 1871, seven had local public prosecutors. See 1867 Neb. Laws 854 (law providing for the "election of District Attorneys and defining their duties"); *State* v. *Main*, 31 Conn. 572, 573 (1863) (state's attorney); *Rice* v. *State*, 3 Kan. 141, 156 (1865) (district attorney); *State ex rel. Watson* v. *Farris*, 45 Mo. 183, 189 (1869) (circuit attorney); *Town of Troy* v. *Cheshire R.R. Co.*, 23 N.H. 83, 94 (1851) (public prosecutor); *Ohio R.R. Co.* v. *State*, 10 Ohio 360, 361 (1841) (prosecuting attorney); *In re Election Cases*, 65 Pa. 20, 20 (1870) (district attorney). Only Rhode Island and Delaware—the smallest of the United States—had public prosecutions, then and now, organized under an Attorney General, rather than local public prosecutors. See *State* v. *Ward*, 5 Del. 496, 496 (Del. Gen. Sess. 1854) (trial conducted by an attorney who "aided the Attorney General"); *State* v. *Pawtuxet Tpk. Co.*, 8 R.I. 521, 522 (1867) (prosecution conducted by attorney "for the Attorney General"). For modern data, see U.S. Dep't of Justice Bureau of Justice Statistics, *Prosecutors in State Courts, 2001*, at 11 (2002), *available at* http://www.bjs.gov/content/pub/pdf/psc01.pdf (reporting that only in Rhode Island, Delaware, and Alaska, which was not a state in 1871, is the Attorney General the chief prosecutor handling felony cases).

Critically, even after public prosecutors assumed control of the charging process, complaining witnesses could be sued for malicious prosecution when their statements set the wheels of government action in motion. See *Bacon* v. *Towne*, 58 Mass. 217, 235 (1849) (considering malicious prosecution claim against complaining witness in context of prosecution conducted by "public prosecutor"); *Stanton* v. *Hart*, 27 Mich. 539, 542 (1873) (finding that complaining witness could be liable for malicious prosecution and noting that "under our system all prosecutions are put under official control, and a principal reason for this was the abuses of private prosecutions, which are very apt to be set on foot for private purposes rather than for the public good"); *State* v. *Dillon*, 38 Tenn. 389, 391 (1858) (minor could be held liable for malicious prosecution and quoting 1801 statute providing that "[n]o State's Attorney shall prefer a bill of indictment to any grand jury in this State, without a prosecutor marked thereon."). There simply is no historical support for respondent's claim that complaining witness liability was confined to the era of private prosecutions.

2. The government seeks to deflect the force of the 1871 common-law rule by claiming, "[i]n most malicious prosecution actions, a plaintiff will be able to point to some act aside from courtroom testimony that allegedly 'procured' the arrest warrant," so that there may be no need to premise liability on a complaining witness's grand jury testimony. U.S. Br. 26. This argument is irrelevant.

The fact that a malicious prosecution action could sometimes be premised on acts outside the grand jury does not change the fact that the common law of 1871 permitted reliance on grand jury testi-

mony to support—in whole or in part—a malicious prosecution action. That historical truth precludes absolute immunity under Section 1983.

A case invoked by the government—*Dennis* v. *Ryan*, 65 N.Y. 385 (1875)[5]—proves the point by holding that a complaining witness's appearance to testify falsely before a grand jury was evidence that supported a malicious prosecution claim: "In all that pertained to the criminal prosecution of the plaintiff, the defendant was as much the complainant and prosecutor as if he had, unbidden by legal process, *appeared before the grand jury and made the complaint upon which the indictment was found*." *Id.* at 387 (emphasis added). Like the cases cited above, the complaining witness was held liable even though public prosecutors in New York controlled all prosecutions:

> [T]he district attorney, confiding in the truth of his statement, and, as in duty bound, caused him to be subpœnaed to appear before the grand jury and testify as to the matter of which he had complained; he appeared, testified, and the indictment followed. That he was the complainant was not questioned on the trial, nor is it raised by the appellant here.

Ibid.

As the government recognizes, other nineteenth-century cases "'permitt[ed] a plaintiff to recover in an action for malicious prosecution based *in part* upon the defendant's appearance before the grand jury.'" U.S. Br. 26 (quoting *White* v. *Frank*, 855 F.2d 956, 960 (2d Cir. 1988), and citing *Dennis*, *supra*, and

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[5] The government mistakenly dates this case to 1865.

Fitzjohn v. *Mackinder*, 142 Eng. Rep. 199 (Exch. Chamber 1861)). That concession eliminates any doubt about the historical basis for imposing liability based on a complaining witness's grand jury testimony.

In short, it is undisputed that the common law of 1871 did not preclude the imposition of liability on a complaining witness based on his or her grand jury testimony. That rule was not confined to private prosecutions, but also applied to public prosecutions. And the rule did not distinguish between claims premised entirely on grand jury testimony and claims based in part on activity occurring outside the grand jury. That common-law rule precludes adoption of a rule of absolute immunity for respondent's grand jury testimony.

B. The Court Should Not Replace Its Historical Common-Law Test With A New "Judicial Proceedings" Standard.

Unable to find support in the relevant history, respondent and the government devote much of their briefs to a new "judicial proceedings" immunity standard for Section 1983 actions. Resp. Br. 16-17; U.S. Br. 7-15. This novel standard cannot be squared with this Court's requirement that immunity be determined by reference to historical common-law equivalents, not present-day "judicial" or "non-judicial" labels. In any event, any sensible "judicial proceedings" test would not encompass grand jury investigative proceedings that do not involve the presence or activity of any judge.[6]

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[6] Respondent recognizes that a judge plays no part in the grand jury's proceedings. See Resp. Br. 10.

1. Section 1983 "on its face admits of no immunities * * *." *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). Each time this Court has found a Section 1983 defendant protected by absolute immunity, it has done so because there was a corresponding immunity "existing at common law." *Briscoe*, 460 U.S. at 334. Eschewing any law-making role, the Court has required a Section 1983 defendant seeking immunity to "point to a common-law counterpart to the privilege he asserts." *Malley*, 475 U.S. at 339-340.

Although the government (U.S. Br. 9) derives its novel "judicial proceedings" test from *Imbler*, it is telling that *Imbler*'s holding that prosecutors have absolute immunity was premised on the Court's lengthy review of the common law and its conclusion that prosecutors were historically immune for their advocacy role at common law. *Imbler*, 424 U.S. at 421-424. Only at the end of its opinion did the Court in *Imbler* state that a specific prosecutor's "activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.* at 430. A footnote to this sentence made clear that the Court's focus was on the prosecutor's role as "advocate," *id.* at 430 n.32, and the Court immediately cautioned that "[w]e have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator *or investigative officer* rather than that of advocate." *Id.* at 430-431 (emphasis added); see also *Kalina,* 522 U.S. at 129-130 (prosecutor not entitled to absolute immunity when acting as fact witness).

The Court in *Imbler* thus hewed to the standards at common law and quite clearly did not invent a

new "judicial proceedings" test to govern the scope of immunity under Section 1983.[7]

2. The government also errs in relying on *Briscoe* v. *LaHue*, 460 U.S. 325 (1983). First, like *Malley* and *Kalina*, *Briscoe* makes clear that the common law is the touchstone for determining the level of immunity. See *id.* at 330-331 (noting that "Congress likely intended these common-law principles to obtain" (quoting *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981)). And following this common-law approach, *Briscoe* concluded that the immunity of trial witnesses from "subsequent damages liability for their testimony in judicial proceedings was well established in English common law." *Id. Briscoe* took care to note that it was not ruling on the scope of immunity for "pretrial proceedings such as probable cause hearings." See *id.* at 328 n.5.

Briscoe also did not address grand jury proceedings. But, as we have previously explained (see page 10, *supra*), *Briscoe*'s common-law approach compels the conclusion that a complaining witness is not entitled to absolute immunity for his or her grand jury testimony.

3. The government does not define the term "judicial proceeding"—even though that is the centerpiece of its new standard for immunity determina-

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[7] The *Kalina* Court observed that *Imbler* relied on "policy considerations," noting that they were policies "underlying the firmly established common-law rules providing absolute immunity for judges and jurors." 522 U.S. at 124 n.11. Here, the "firmly-established common-law rules" permitted the imposition of liability on complaining witnesses—there is no need to rely on analogies to determine how persons in respondent's position would have been treated at common law.

tions under Section 1983. Common sense suggests that a "judicial proceeding" must at a minimum include the physical presence of a judge. But a judge is not present during grand jury proceedings.

By contrast, the false affidavits at issue in *Malley* and *Kalina* were submitted under oath directly to a judge.[8] Yet—given the Court's holdings in those cases—that judge-supervised process could not qualify as a "judicial proceeding." The government's mixed-up definition of a "judicial proceeding" thus includes proceedings where no judge is to be found (an investigative grand jury hearing) yet excludes proceedings where a judge is present, receives sworn evidence, and issues arrest warrants (*Malley* and *Kalina*). The government's standard simply makes no sense.

The government cites but one case to support its claim that an investigative grand jury hearing is a judicial proceeding. U.S. Br. 12-13 (citing *United States* v. *Mandujano*, 425 U.S. 564, 575-576 (1976) (noting that "federal statutes conferring immunity on witnesses in federal judicial proceedings, including grand jury investigations, are so familiar that they have become part of our constitutional fabric" (internal quotation marks omitted))). The Court's decision in *Mandujano* concerned *Miranda* rights for grand

[8] After the prosecutor submitted her certification regarding Kalina's actions, "the trial court found probable cause and ordered that an arrest warrant be issued." *Kalina*, 522 U.S. at 121. Similarly, in *Malley*, "[t]he judge signed warrants for the arrest of respondents and 20 other individuals charged by petitioner as a result of information gathered through the wiretap." *Malley* 475 U.S. at 338.

jury witnesses. It had nothing to do with Section 1983 or principles of immunity.

Moreover, for Sixth Amendment purposes, this Court has repeatedly held that "judicial proceedings" begin only *after* a grand jury returns an indictment, not while the grand jury is still investigating and hearing testimony of witnesses. See, *e.g.*, *Fellers* v. *United States*, 540 U.S. 519, 523 (2004) ("The Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated * * * whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" (quoting *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977) (internal quotation marks omitted))).[9]

In short, the Court should reject the government's novel "judicial proceedings" test and adhere to its common-law approach for determining the scope of immunity under Section 1983. Even if this test were to govern, moreover, grand jury investigative hearings could not qualify as judicial proceedings.[10]

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[9] Adding to confusion about the meaning of a "judicial proceeding" is the fact that the term has a very different meaning when it is used in the Constitution's Full Faith and Credit Clause and a related federal statute—in that context it refers to a final judgment of a court. See U.S. Const. Art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."); 28 U.S.C. § 1738; *Kremer* v. *Chem. Const. Corp.*, 456 U.S. 461, 466 & n.6 (1982).

[10] The Municipal Lawyers' *amicus* brief tries to distract the Court with questions on which it did not grant certiorari and that were not raised in any court below. First, acknowledging that petitioner has pleaded a Fourth Amendment claim that is based on conduct constituting malicious prosecution under the common law, it argues that "a claim for malicious prosecution

C. The Court Should Reject The Policy Arguments Advanced By Respondent And The Government.

Respondent and his *amici* attempt to bolster their "judicial proceedings" test with various policy arguments. As the Court has previously observed, however, "We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy." See *Tower* v. *Glover*, 467 U.S. 914, 922-923 (1984).

1. *Standard for Identifying Grand Jury "Complaining Witnesses."* The government complains that we "do[] not explain why, on [our] theory, liability would not attach to the testimony of *any* grand jury witness, whether a 'complaining witness' or not." U.S. Br. 21. But the common law distinguished between complaining witnesses and other witnesses, and that same distinction applies in Section 1983 actions.

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stands outside the Fourth Amendment." Brief for the Int'l Mun. Lawyers Ass'n *et al.* at 25-26. But, as the government notes, the courts of appeals have reached different conclusions regarding this argument and the question is not presented here. U.S. Br. 30-31. The Municipal Lawyers also raise a causation argument, contending that "an investigator cannot be held liable for the course of a criminal prosecution because a prosecutor's independent litigating decision is a break in the chain of causation." Brief for the Int'l Mun. Lawyers Ass'n *et al.* at 21. This causation argument turns on factual issues (including an exception that the Municipal Lawyers acknowledge for cases in which an investigator misleads a prosecutor). In addition, the argument, if accepted, could call into question the decisions in *Malley* and *Kalina*, because the judges' decisions to issue a warrant could similarly be characterized as a break in the causal chain. Again, this argument was not raised below, is not properly before the Court, and—even on these *amici*'s view—turns on case-specific factual issues.

Liability in the nineteenth century did not turn on a defendant's *status*; rather, it turned upon the *elements* of the malicious prosecution tort that were needed to establish a suit at common law. See, *e.g.*, *Kalina*, 522 U.S. at 134 (Scalia, J., concurring) (noting that the common law "did not recognize two kinds of witness; it recognized two different torts," including a malicious prosecution tort).

To sustain a malicious prosecution claim, a plaintiff was required to prove three distinct elements: (1) that "the alleged prosecution had come to a legal conclusion in the plaintiff's favor"; (2) that the defendant did not have probable cause "in *setting the criminal law in motion*"; and (3) that the defendant "acted from malicious motives." *Hamilton* v. *Smith*, 39 Mich. 222, 225-226 (1878) (emphasis added). Proof that the defendant's conduct "set[] the law in motion" was thus a settled *element* of the offense of malicious prosecution.[11] That element served to distinguish complaining witnesses from other witnesses. And that common-law distinction extends to claims under Section 1983.

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[11] See Francis Taylor Piggott, *Principles of the Law of Torts* 275 (1885) ("To entitle a plaintiff to a verdict in an action for malicious prosecution it is essential for him to prove * * * absence of reasonable and probable cause in *setting the law in motion* * * *.") (emphasis added); *Clark* v. *Carroll*, 59 Md. 180, 183 (1883) ("This suit is for injury done maliciously * * * by *setting in motion*, without probable cause, the ordinary legal proceedings whereby indictment was found against the plaintiff * * *.") (emphasis added); *Closson* v. *Staples*, 42 Vt. 209, 216 (1869) ("[I]f a party falsely and maliciously and without probable cause *put the law in motion*, that is properly a subject of * * * the well-known actions for malicious prosecutions." (emphasis added) (internal quotation marks omitted)).

2. *Uncertainty About Identifying Who Is A Complaining Witness.* The government next asserts that our "rule would also put courts in the difficult position of determining, on a case-by-case basis, whether a particular grand jury witness's testimony is sufficient to render him or her a 'complaining witness.'" U.S. Br. 22; see also Resp. Br. 38-41.

But this argument is not limited to claims resting on grand jury testimony—it would logically extend to identifying the witness whose conduct "set the wheels of government in motion" in any pre-charge context. Elsewhere in its brief, however, the government asserts that complaining witness liability may properly be found on *non*-grand-jury conduct. U.S. Br. 26 (asserting that "a non-testimonial act that induces a prosecutor to 'set the wheels of government in motion,' *Wyatt*, 504 U.S. at 164, is not entitled to absolute immunity"). The government does not explain how to reconcile these inconsistent contentions.

In any event, courts have had very little difficulty determining who is and is not a complaining witness. Complaining witnesses have for more than two centuries been subject to liability for malicious prosecution actions in state courts. Further, the vast majority of post-*Malley* cases have not been confounded by this question.[12]

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[12] See, *e.g.*, *Baker* v. *McNeil*, 711 F. Supp. 2d 1313 (N.D. Fla. 2010) (proceeding directly to consider whether the complaining witness was credible); *Alcantara* v. *City of New York*, 646 F. Supp. 2d 449, 458 (S.D.N.Y. 2009) ("The evidence is clear that despite the plaintiff's argument to the contrary, the defendants were not complaining witnesses against the plaintiff for purposes of bringing charges against him."); *Brown* v. *City of One-*

The instant case demonstrates why the issue frequently is not difficult to resolve. Respondent was the single witness in the grand jury sessions that resulted in two of the three indictments, and his investigations were crucial to instigating the criminal proceedings against Rehberg. The court of appeals took as given that "Paulk was the sole complaining witness against Rehberg before the grand jury." Pet. App. 4a. The district court similarly had assumed Paulk's complaining witness status. Pet. App. 83a. Indeed, respondent's "complaining witness" status has never been seriously at issue in this case.

3. *Complaining Witnesses at Trial.* The government also complains that we "do[] not explain why, if [we are] correct, a 'complaining witness' could not be sued for false statements made at trial, as well as before the grand jury." U.S. Br. 21. But this complaint misunderstands the role of a complaining witness, who "set[s] the wheels of government in motion by instigating a legal action." *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992). Once the trial has commenced, the wheels of government are already turning—there

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onta, N.Y., 160 F.R.D. 18 (N.D.N.Y. 1995) (bypassing the identification of the complaining witness and moving to whether the complaining witness's identity must be disclosed). Very few district court cases from the 25-year dataset have found it necessary to adjudicate whether an individual is a complaining witness. In these cases, the examination is brief, especially in comparison to other legal issues discussed in the decision. See, *e.g.*, *Kerns* v. *Bd. of Comm'rs of Bernalillo Cnty.*, 707 F. Supp. 2d 1190 (D.N.M. 2010); *Mata* v. *Anderson*, 760 F. Supp. 2d 1068 (D.N.M. 2009); *Toler* v. *Paulson*, 551 F. Supp. 2d 1039 (E.D. Cal. 2008); *Finwall* v. *City of Chicago*, 490 F. Supp. 2d 918 (N.D. Ill. 2007); *Franklin* v. *Terr*, 294 F. Supp. 2d 1145 (N.D. Cal. 2003); *Cipolla* v. *County of Rensselaer*, 129 F. Supp. 2d 436 (N.D.N.Y. 2001); *Cignetti* v. *Healy*, 89 F. Supp. 2d 106 (D. Mass. 2000); *Cervantes* v. *Jones*, 23 F. Supp. 2d 885 (N.D. Ill. 1998).

simply could be no basis for complaining witness liability grounded in trial testimony.

4. *Effect on Witness Candor and Cooperation Incentives.* Respondent complains that allowing liability for a complaining witness's grand jury testimony would encourage witnesses to engage in self-censorship and otherwise burden law enforcement officers with litigation. Resp. Br. 34-37. But a complaining witness, unlike the witness in *Briscoe*, is no ordinary trial fact witness; because of his role in initiating a prosecution, an added layer of caution is, in fact, desirable. As this Court noted in *Malley*, liability may motivate a complaining witness to "reflect * * * upon whether he has a reasonable basis for believing that his affidavit establishes probable cause * * * * [S]uch reflection is desirable, because it reduces the likelihood that the [request] will be premature." *Malley,* 475 U.S. at 343. False testimony before a grand jury is "at best a waste of judicial resources [and at worst], lead[s] to premature arrests, which may injure the innocent or * * * benefit the guilty." *Id*. at 343-344.

Moreover, complaining witnesses are still protected by qualified immunity, which broadly shields all but "the plainly incompetent or those who knowingly violate the law." *Id*. at 341.

Respondent contends that prosecutors' ethical duty to seek justice is a sufficient check against false grand jury testimony by a complaining witness. Resp. Br. 11. This argument is contradicted by the facts of the instant case. Nor is there plausible merit to the government's claim in passing (U.S. Br. 16) that grand jurors themselves will serve as meaningful checks on a witness who is bent on testifying falsely. Grand jurors have no more ability than the

judges issuing the arrest warrants in *Malley* and *Kalina* to independently assess the veracity of a complaining witness.

5. *Effect on Grand Jury Secrecy*. Respondent and the government assert that allowing claims against complaining witnesses for their false grand jury testimony will jeopardize grand jury secrecy. Resp. Br. 41; U.S. Br. 13-14. But these concerns are overstated or altogether meritless.

To begin with, there is no reason to believe an intrusion on grand jury secrecy will be inevitable. Evidence can be obtained through a deposition of the defendant, which does not in any way violate the secrecy principle.

In seven judicial circuits, complaining witnesses have only qualified immunity rather than absolute immunity for their grand jury testimony. Pet. Br. 26.[13] No court has suggested that the resulting inquiry is invasive or intractable, nor have depositions of grand jurors been required to determine who they believed the complaining witness was.

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[13] Respondent claims that eight circuits support absolute immunity for grand jury testimony based on *Briscoe*; notably, all eight opinions respondent cites preceded this Court's decision in *Kalina*. See Resp. Br. 18. Four of those circuits now recognize that complaining witnesses receive only qualified immunity for their grand jury testimony. See *Vakilian* v. *Shaw*, 335 F.3d 509, 516 (6th Cir. 2003); *Kulas* v. *Flores*, 255 F.3d 780, 783 n.1 (9th Cir. 2001); *Cervantes* v. *Jones*, 188 F.3d 805, 809 (7th Cir. 1999); *Edmond* v. *U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 419 (D.C. Cir. 1991). The salient distinction in the malicious prosecution context is not between trial and pretrial but between complaining and non-complaining witnesses.

At most, a malicious prosecution claim might require a breach of grand jury secrecy only to obtain a transcript of the testimony of the complaining witness. There is no merit to respondent's claim (Resp. Br. 41) that testimony from grand jurors themselves would be required. The malicious falsity and its materiality to the grand jury's function can be shown by evidence extrinsic to the grand jury's deliberation process.

Exceptions to the grand-jury secrecy rule have long been recognized under state and federal law. *E.g.*, Fed. R. Crim. P. 6(e)(3)(E) ("The court may authorize disclosure—at a time, in a manner, and subject to any other conditions that it directs—of a grand-jury matter * * * preliminarily to or in connection with a judicial proceeding."). This Court has explained that disclosure of grand jury materials is appropriate "where the need for it outweighs the public interest in secrecy" and "the burden of demonstrating this balance rests upon the private party seeking disclosure." *Douglas Oil Co. of Cal.* v. *Petrol Stops Nw.*, 441 U.S. 211, 223 (1979). "It is * * * clear that as the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification." *Ibid.*[14] "[A] court called upon to determine whether grand jury transcripts should be released necessarily is infused with substantial discretion."

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[14] A claim typically will arise—as in the instant case—only after a criminal proceeding has been terminated in a criminal defendant's favor. See *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994). Any inquiry at that time into matters that occurred before the grand jury poses no risk to an ongoing grand jury investigation for which secrecy is needed.

Ibid.; see also *Law* v. *United States*, 488 A.2d 914, 916 (D.C. 1985) (holding that a trial court has "substantial discretion" but should "conduct an *in camera* inspection of the requested grand jury materials" when deciding whether to grant the materials for a malicious prosecution suit).

In short, none of respondent's policy objections comes close to justifying rejection of the common-law rule subjecting complaining witnesses to liability based on their testimony before a grand jury.

CONCLUSION

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

Respectfully submitted.

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