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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 08-1065, Pottawattamie County v. McGhee.

Mr. Sanders.

ORAL ARGUMENT OF STEPHEN SANDERS

ON BEHALF OF THE PETITIONERS

MR. SANDERS: Mr. Chief Justice, and may it please the Court:

If a prosecutor's absolute immunity in judicial proceedings means anything, it means that a prosecutor may not be sued because a trial has ended in a conviction. Yet that is exactly what happened in this case.

Lower courts may not fashion exceptions to the immunity this -- this Court provided in Imbler by purporting to relocate a due process injury from the trial to an earlier investigation.

JUSTICE KENNEDY: Your -- your case here is a polite way of telling us we wasted our time in Buckley v. Fitzsimmons.

MR. SANDERS: Your Honor --

JUSTICE KENNEDY: I mean, we were just spinning our wheels in that case?

1           MR. SANDERS: Your Honor, I don't believe so  
2 at all. I think that this case presents exactly the  
3 question that Buckley reserved, and that is whether the  
4 fabrication of evidence by a prosecutor in and of  
5 itself, without regard to its use in some way, states a  
6 constitutional cause of action.

7           In this case, the use at trial, obviously,  
8 was absolutely immunized under Imbler and many of this  
9 other -- this Court's other precedents. Despite  
10 Respondent's best efforts to argue that there was some  
11 sort of due process violation caused by the fabrication  
12 itself, without regard to its use in some way, there  
13 simply is no support for that.

14           JUSTICE GINSBURG: Does that mean that, even  
15 if we were dealing with police officers who did what the  
16 prosecutors were alleged to have done at the  
17 investigation stage -- no prosecutor, only police  
18 investigators -- the fact that a trial and a conviction  
19 had occurred would mean that the police officers were  
20 not liable, either?

21           MR. SANDERS: Your Honor, the fact that a  
22 trial and conviction had occurred could mean that the  
23 police officers were liable because of the due process  
24 violation at the trial, but in footnote 5 of Buckley,  
25 this Court was very clear and insisted that there is no

1 disjunction between observing that a prosecutor, like a  
2 police officer, has only qualified immunity during the  
3 investigation while, at the same time, insisting that  
4 that does not affect the fact that the prosecutor has  
5 absolute --

6 JUSTICE KENNEDY: Take -- take two cases.  
7 One is Justice Ginsburg's case, a police officer  
8 fabricates the evidence, dupes the prosecuting attorney,  
9 or -- or doesn't fully disclose. Case 2, a prosecutor  
10 does the same thing and gives it to a fellow prosecutor.

11 Same -- should the analysis be precisely the  
12 same?

13 MR. SANDERS: Your Honor, it should be the  
14 same if the prosecutor in the second case that you  
15 hypothesize had nothing to do with the later  
16 prosecution -- in other words, if we could view that  
17 prosecutor simply as an ordinary citizen, simply as a  
18 complaining witness, as analogous to a police officer.  
19 So there's no argument in this case that simply, by  
20 virtue of being a prosecutor, a prosecutor has absolute  
21 immunity.

22 The courts below wrongfully abrogated trial  
23 immunity because trial is the only place where the  
24 injury of conviction and subsequent incarceration could  
25 have taken place. Without reference to that specific

1 injury, there is simply no other injury. The --

2 JUSTICE GINSBURG: I'm not sure that I fully  
3 grasp your answer to my first question and to Justice  
4 Kennedy's, that is, yes or no, if everything that  
5 happened was alleged to have happened, but it was done  
6 by a police officer or a different prosecutor,  
7 nonetheless, the trial went on, the fabricated evidence  
8 was introduced without any participation by the actual  
9 prosecutor in that fabrication, does a conviction --  
10 do -- does the -- do the police officers or the  
11 prosecutor that was not involved in trial get absolute --  
12 are they -- are they no longer liable, not because they  
13 have absolute immunity, but because the trial and  
14 conviction at which the evidence was used overtakes what  
15 liability they might have had, absent the trial?

16 Is that your position?

17 MR. SANDERS: Your Honor, our position is --  
18 I believe I would agree with you. Our position is there  
19 is no liability for the initial fabrication. As the  
20 United States explains in its brief, for a police  
21 officer to be held liable in those circumstances, it  
22 would need to be under some sort of malicious  
23 prosecution theory that would depend on the actual  
24 conviction and the use of the evidence at trial.

25 But the use of the evidence at trial is the

1 injury itself, and that is exclusively a prosecutorial  
2 act. Only a prosecutor could use --

3 JUSTICE SCALIA: No, you're not answering the  
4 question clearly. Are both the prosecutor, in Justice  
5 Ginsburg's hypothetical, and the policeman liable?  
6 Can't you answer that? Yes or no.

7 MR. SANDERS: Yes. This Court --

8 JUSTICE SCALIA: Good. That's what I  
9 thought your answer was.

10 MR. SANDERS: The police officer --  
11 Likely -- this Court has never -- never addressed the  
12 issue. The police officer would likely be liable  
13 because the police officer would have no immunity for  
14 the use of the evidence at trial.

15 JUSTICE SCALIA: Well, she's more concerned  
16 about the prosecutor, and the prosecutor, also, would be  
17 treated just like a police officer.

18 MR. SANDERS: If the prosecutor performed no  
19 prosecutorial function, that's correct.

20 JUSTICE SCALIA: In the case?

21 MR. SANDERS: That's correct, Your Honor.

22 CHIEF JUSTICE ROBERTS: But only if the --  
23 only if the evidence is presented at trial?

24 MR. SANDERS: But only if the evidence is  
25 presented at trial, because that's the only way the

1 evidence can provide injury and so the --

2 JUSTICE KENNEDY: And so the law is  
3 the more deeply you're involved in the wrong, the more  
4 likely you are to be immune? That's a strange  
5 proposition.

6 MR. SANDERS: Your Honor, I think it's not  
7 the more deeply you're involved; it's whether you are  
8 in the unique position of a prosecutor to cause injury  
9 by use of the evidence at trial. That is exclusively a  
10 prosecutorial function.

11 The function test of -- of Buckley goes to  
12 what function someone is performing, but only the  
13 prosecutor can ever perform the function of actually  
14 using the evidence.

15 JUSTICE GINSBURG: But it's strange to say  
16 you could have a prosecutor who wasn't involved in the  
17 trial, would have liability, but as long as the  
18 prosecutor, in effect, turns the investigatory stage  
19 material over to himself, rather than to another  
20 prosecutor, then there's absolute immunity.

21 MR. SANDERS: Your Honor, I -- that is  
22 correct, but I think the Court, more than 80 years ago,  
23 when it summarily affirmed *Yaselli v. Goff* from the  
24 Second Circuit, spoke to this question.

25 In that case, the Court said -- affirmed the

1 Second Circuit in its view that, if a prosecutor  
2 cannot -- if a prosecutor has absolute immunity for  
3 acting maliciously at trial, that immunity cannot be  
4 circumvented --

5 JUSTICE GINSBURG: No, but the -- the  
6 question is not at trial, nothing about trial. It's the  
7 pretrial conduct.

8 MR. SANDERS: The -- the odd thing about --  
9 if we are taking out reference to the trial itself, then  
10 there simply can be no claim. Respondents urge a new  
11 freestanding right, separate and apart from the due  
12 process trial right, yet at the same time --

13 JUSTICE GINSBURG: But you've said that  
14 there -- that there would be liability, as long as it  
15 wasn't the same person involved in the investigation and  
16 the trial. Even though there had been a trial, you  
17 say -- you answered Justice Scalia, that those people  
18 separated from the trial would be liable, even though  
19 there was a trial, and it's at issue.

20 MR. SANDERS: Your Honor, looking to the  
21 common law, the rationale for that would be a form of  
22 malicious prosecution, but as you observed in your  
23 concurrence in Albright, asserting malicious prosecution  
24 against a prosecutor would be anomalous because it's the  
25 prosecutor who is exclusively responsible for causing

1 the kind of injury.

2 If a police officer or a nonprosecuting  
3 prosecutor simply fabricates the evidence, as Chief  
4 Judge Easterbrook of the Seventh Circuit said, there can  
5 be no cause of action.

6 It is the exclusive function of a prosecutor  
7 in a case who uses the evidence who can cause the  
8 injury, and although --

9 JUSTICE SOTOMAYOR: But that makes no sense  
10 because, if you go down that road, then what you're  
11 saying is that neither the -- neither a police officer  
12 or a different prosecutor who fabricated evidence could  
13 be liable either, because the only person who causes  
14 the deprivation is the prosecutor who uses the false  
15 evidence at trial.

16 MR. SANDERS: Your Honor, this Court has not  
17 spoken to that question, but as you stated, that would  
18 be the rationale of the Restatement actually. The  
19 Restatement says, if there is no deception of the  
20 prosecutor, then it is the prosecutor's willful and free  
21 will use of the evidence at trial.

22 JUSTICE SOTOMAYOR: Now, the Second Circuit  
23 in its decision, Judge Newman, looked at it and said  
24 there are two causes to the injury here. One is the  
25 fabrication. Joint tortfeasors. There are two people

1 who can cause any injury and the prosecutor who actually  
2 puts the evidence in at trial. That's how you hold  
3 police officers and different prosecutors liable because  
4 they are assisting in the violation that is occurring.

5 MR. SANDERS: Uh-hmm.

6 JUSTICE SOTOMAYOR: Why doesn't that theory  
7 fit the same prosecutor who commits two different acts?

8 MR. SANDERS: Your Honor, I think --

9 JUSTICE SOTOMAYOR: One commits the direct  
10 violation, and the other act, the investigatory act,  
11 contributes to it, leads to it as a joint activity with  
12 it.

13 MR. SANDERS: Your Honor, I believe the  
14 analysis is not that it -- because it leads to the  
15 injury itself. The tort of wrongful conviction based on  
16 use of false evidence at trial has only one element  
17 under this Court's precedents in Pyle and Mooney and  
18 Hysler and Rochin. That element is the prosecutor's use  
19 of the evidence at trial. But simply because that act  
20 is absolutely immune is not to say that someone else  
21 who's responsible for --

22 JUSTICE SOTOMAYOR: You're -- you're  
23 confusing -- the constitutional injury is the deprivation  
24 of liberty.

25 MR. SANDER: The deprivation --

1 JUSTICE SOTOMAYOR: That's the injury.

2 MR. SANDERS: That's correct.

3 JUSTICE SOTOMAYOR: What causes that injury  
4 is not an element of the crime. It is -- the question  
5 is: Have you proven the violation? Have you proven the  
6 injury?

7 MR. SANDERS: Well, it's --

8 JUSTICE SOTOMAYOR: So why does the use --

9 MR. SANDERS: Because that --

10 JUSTICE SOTOMAYOR: -- defined in scope of  
11 the injury?

12 MR. SANDERS: Because that is the way a  
13 prosecutor would be held liable. The cause of action  
14 against a prosecutor, even though he would be absolutely  
15 immune, would be the prosecutor's knowing or even  
16 unknowing use of the false evidence at trial. But in  
17 this case, Respondents ask for a freestanding due  
18 process right that would somehow at the same time  
19 protect the interest against wrongful conviction at  
20 trial. That simply can't be. This Court's decision --

21 JUSTICE GINSBURG: What -- what about the  
22 view that Judge Fairchild expressed very simply. He said  
23 if this fabrication had not occurred, there never would  
24 have been any trial.

25 MR. SANDERS: Your Honor, as we discussed in

1 our opening brief in this case, I think that Judge  
2 Fairchild's reasoning is classic malicious prosecution  
3 reasoning. That is, that it's the false evidence that  
4 impelled the prosecution. But again, this Court has  
5 been absolutely clear that a malicious prosecution  
6 theory cannot be asserted against a prosecutor because a  
7 prosecutor can initiate willfully and maliciously a  
8 wrongful prosecution based on good evidence, bad  
9 evidence, or no evidence at all.

10           It's simply untenable to say -- and this  
11 Court's decision last term in Van de Kamp made clear  
12 that where the injury comes at trial, where that is the  
13 interest protected against, that you can somehow  
14 abrogate immunity and continue with a case based on that  
15 kind of claim based on a claim of an earlier due process  
16 right --

17           JUSTICE GINSBURG: Was there no injury in  
18 the period before? Let's leave out the trial for a  
19 moment. There was a deprivation of liberty during the  
20 investigatory stage.

21           MR. SANDERS: Your Honor, I think any  
22 earlier deprivation of liberty would be covered by the  
23 Fourth Amendment. The Fourth Amendment is not  
24 implicated in the question presented here. It has not  
25 been briefed. Surely, there would be an interest against

1 wrongful seizure or, since this -- these arrests were  
2 pursuant to legal process, against a form of malicious  
3 prosecution. But again, that would be a Fourth  
4 Amendment theory, and it could not be asserted if it is  
5 malicious prosecution against a prosecutor.

6 JUSTICE STEVENS: Would you clear up one  
7 thing for me I really don't quite understand? You do  
8 agree that if the police officers did this, there would  
9 be liability?

10 MR. SANDERS: Your Honor, this Court has not  
11 addressed that issue. That is the view of some of the  
12 circuits and the Restatement.

13 JUSTICE STEVENS: Are you assuming that to  
14 be correct or are you disputing that?

15 MR. SANDERS: We're assuming that to be  
16 correct, but if I may --

17 JUSTICE STEVENS: But if that's true, why  
18 doesn't the trial immunize the police officers because  
19 they didn't cause the trial? Well, they were in the  
20 background in the same sense that these prosecutors are.  
21 But why would the police officers be liable?

22 MR. SANDERS: A police officer would never  
23 get immunity at trial because --

24 JUSTICE STEVENS: Not to get immunity, but  
25 why is he liable? Why is he liable? Because the injury

1 was caused by the trial, if I understand your theory.

2 MR. SANDERS: The theory of the common law  
3 on malicious prosecution would be that the police  
4 officer is liable because his fabrication of evidence  
5 impelled the proceeding, caused the proceeding to begin.

6 JUSTICE STEVENS: Yes, but it was not a  
7 malicious prosecution. The prosecution -- the  
8 prosecutors acted in good faith all the way through, so  
9 there is no malicious prosecution. So what is the basis  
10 for liability against the police officer?

11 MR. SANDERS: The basis for liability  
12 precisely against the police officer would be the  
13 violation of the due process right to a fair trial,  
14 Wrongful conviction on the basis of the introduction --

15 JUSTICE STEVENS: Well, why doesn't your  
16 theory apply to the facts of this case also?

17 MR. SANDERS: This theory wouldn't apply to  
18 the facts of this case because in this case the  
19 prosecutors made the decision independently to initiate  
20 the prosecution. It's undisputed that they did that in  
21 their capacity as prosecutors. The -- they -- the police  
22 officer's act could not cause injury but for the  
23 immunized act of a prosecutor beginning the prosecution  
24 and conducting the trial.

25 JUSTICE STEVENS: Well, this -- this

1 investigation by the prosecutor could not have caused  
2 injury but for the immunized act of going forward with  
3 the trial.

4 MR. SANDERS: But, Your Honor, I think --

5 JUSTICE STEVENS: What's the difference?

6 MR. SANDERS: I think that that reasoning  
7 would be contrary to what this Court affirmed in Yaselli  
8 and what this Court has said -- and which the Court has  
9 repeatedly cited favorably, and that is -- and it would  
10 also run up against the concerns that Justice Kennedy  
11 indicated in his concurrence in Buckley, which this --  
12 the majority in Buckley also disputed and said there is  
13 no disjunction between qualified immunity for a  
14 prosecutor during an investigation but absolute immunity  
15 for the act of setting the prosecution in motion.

16 The Court was absolutely clear in footnote 5  
17 of Buckley that there was no disjunction, and as this  
18 Court has indicated in Malley v. Briggs and other cases,  
19 anything other than absolute immunity for a prosecutor  
20 would impair the -- would impair the performance of a  
21 central actor in the judicial process.

22 And with the Court's permission, I'll reserve  
23 the balance of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Katyal.

1 ORAL ARGUMENT OF NEAL K. KATYAL  
2 ON BEHALF OF THE UNITED STATES,  
3 AS AMICUS CURIAE,  
4 SUPPORTING THE PETITIONERS

5 MR. KATYAL: Thank you, Mr. Chief Justice  
6 and may it please the Court:

7 This Court's decision in Buckley v.  
8 Fitzsimmons explicitly reserved the question presented  
9 today, which is whether a cause of action exists against  
10 prosecutors alleged to have fabricated evidence.  
11 Respondents' answer to that question asks this Court to  
12 announce for first time ever that there is a freestanding  
13 due process right not to be framed. That theory would  
14 untether due process from the right to a fair trial,  
15 which is the process a defendant is due before being  
16 deprived of liberty.

17 JUSTICE BREYER: Why do we need that theory?  
18 I mean, why not just say what Newman said and the others  
19 said? There is no freestanding right.

20 MR. KATYAL: Well --

21 JUSTICE BREYER: There is just a  
22 right not to convict a person with made-up evidence, and  
23 of course a prosecutor, insofar as he's involved in the  
24 prosecutorial stage, is absolutely immune. But if he's  
25 involved in the investigatorial stage of that event,

1 well, then he's not immune absolutely. That's a policy  
2 decision. That has nothing to do with freestanding  
3 rights.

4 MR. KATYAL: Respondents' primary submission  
5 before this Court is not that argument. They don't rest  
6 their theory --

7 JUSTICE BREYER: All right. Then I'm making  
8 that argument.

9 (Laughter.)

10 MR. KATYAL: Right. Right. And with respect  
11 to that I think we have several -- several responses.  
12 The first is that this Court has rejected that kind of  
13 mere foreseeability analysis in the context of section  
14 1983, and due process --

15 JUSTICE BREYER: Mere foreseeability. You  
16 can fill in those boundaries, Toffler, not Toffler, as  
17 you wish. But the basic theory isn't a problem because,  
18 after all, we're just drawing a line somewhere within  
19 the stage of an ongoing tort on the basis of policy, and  
20 Buckley suggests such a line.

21 Now, I don't see a conceptual problem there,  
22 is my problem. Maybe there are practical problems, but I  
23 don't see a conceptual one.

24 MR. KATYAL: I think there are practical and  
25 conceptual problems, which is why Buckley reserved

1 precisely this question in footnote 5, and here's the  
2 basic policy or conceptual concern: Our point is that  
3 if a section 1983 defendant is absolutely immune for the  
4 constitutional wrong, then you can't read back in time;  
5 a plaintiff can't look back in time and isolate some  
6 other acts as to which they are nonimmune and thereby --

7 JUSTICE BREYER: I interrupt you right  
8 there. I would say they are not absolutely immune for  
9 the whole constitutional offense. That's the line I'm  
10 trying to draw.

11 MR. KATYAL: And, Justice Breyer, I'm saying  
12 to do that requires you to read the due process  
13 violation as occurring sometime before the trial, and  
14 -- and then we're back to the freestanding rationale and  
15 the opening up of the due process clause to something  
16 this Court has never, ever accepted.

17 JUSTICE BREYER: So I -- I agree with you on  
18 that. I agree with you. I won't do it. I'll take it  
19 as one tort. Began before the investigation stage, ends  
20 with conviction. One tort. Now, within that tort, we  
21 draw a line, and we draw a line based on policy purposes  
22 as to when the prosecutor is absolutely or qualifiedly  
23 immune, and where that line comes is Buckley,  
24 approximately.

25 MR. KATYAL: Yes.

1 JUSTICE BREYER: Okay? Now, I don't see a  
2 conceptual problem with that, and I'm having a hard time  
3 finding a practical problem.

4 MR. KATYAL: The conceptual problem is that  
5 this Court has been explicit that section 1983 is not  
6 the font of tort law. Rather, you need to isolate a  
7 constitutional violation. Here, the constitutional  
8 violation is the due process clause. That violation  
9 begins, as this Court's decisions in Napue and Pyle say,  
10 when the fabricated evidence is introduced at trial in  
11 order to secure a conviction.

12 JUSTICE SCALIA: And how do you get the  
13 policeman who has fabricated the evidence?

14 MR. KATYAL: Because the policeman  
15 essentially induces the prosecution at an earlier point  
16 in time and acts through the innocent agent, the  
17 prosecutor. That introduction of evidence at trial is  
18 not something as to which the policeman has any sort of  
19 absolute immunity. And so in Justice Breyer's example  
20 of a prosecutor introducing evidence, that is something  
21 as to which the prosecutor is absolutely immune. That  
22 is where the constitutional violation begins.

23 JUSTICE KENNEDY: What if a prosecutor knows  
24 that it's fabricated evidence? The police officer  
25 fabricates the evidence and says: Mr. Prosecutor, he's

1 a very bad man; I fabricated the evidence. The  
2 prosecutor introduces it. What result there?

3 See, your footnote 6 presumes that the  
4 prosecutor doesn't know.

5 MR. KATYAL: Right.

6 JUSTICE KENNEDY: Suppose he knows?

7 MR. KATYAL: And if the prosecutor does  
8 know, we don't think that there is a Fifth Amendment due  
9 process violation.

10 JUSTICE KENNEDY: Against the policeman?

11 MR. KATYAL: Against -- against the  
12 policeman in that circumstance, because the --

13 JUSTICE KENNEDY: Again, the more aggravated  
14 the tort, the greater the immunity.

15 MR. KATYAL: And I agree that that seems a  
16 little odd, but --

17 JUSTICE KENNEDY: You're basically saying  
18 that you cannot aid and abet someone who is immune, and  
19 that's just not the law.

20 MR. KATYAL: No, what I'm saying and what  
21 this Court's decisions have said is that absolute  
22 immunity doesn't exist to protect bad apples. It  
23 reflects a larger interest in protecting judicial  
24 information coming into the judicial process. And if  
25 prosecutors have to worry at trial that every act they

1 undertake will somehow open up the door to liability,  
2 then they will flinch in the performance of their duties  
3 and not introduce that evidence. And that is the  
4 distinction between the police officer, who is liable,  
5 and the prosecutor, who is -- who is absolutely immune.

6 JUSTICE SOTOMAYOR: A prosecutor is not  
7 going to flinch when he suspects evidence is perjured or  
8 fabricated? Do you really want to send a message to  
9 police officers that they should not merely flinch but  
10 stop if they have reason to believe that evidence is  
11 fabricated?

12 MR. KATYAL: Justice Sotomayor, we  
13 absolutely want to send that message. The worry is that  
14 allegations of wrongdoing, as this Court has recognized  
15 in Imbler and Van de Kamp, can -- can supersede that.  
16 And just to give you --

17 JUSTICE SOTOMAYOR: Am I right in that none  
18 of the -- neither of the two prosecutors in this case  
19 were sanctioned in any way for their conduct in this  
20 case?

21 MR. KATYAL: I believe that is correct, and  
22 I also believe that no ethics complaints were ever  
23 brought. That is, rather the Respondents went into  
24 Federal court seeking money damages instead of ethics  
25 violations and the like.

1 JUSTICE SOTOMAYOR: But you have no reason  
2 to dispute the numerous studies we were provided that  
3 show that, as a matter of routine, prosecutors are not  
4 sanctioned for improper prosecutorial conduct in the  
5 investigatory stage, are you?

6 MR. KATYAL: Well, I do think that there is  
7 a debate in the briefs before this Court, including the  
8 brief by 12,400 or so prosecutors that takes the reverse  
9 view. But be that as it may, I think that's a question  
10 for the legislature.

11 This Court has said repeatedly that those  
12 ethics and disciplinary violations are -- are a  
13 successful deterrent, and there's others as well that  
14 this Court has pointed to that may be available,  
15 including counsel liability.

16 JUSTICE KENNEDY: Well, you can't have it  
17 both ways and say this is a policy we should take into  
18 account, and then when Justice Sotomayor asks you a  
19 question, say: Oh, well, that's for the legislature.

20 MR. KATYAL: Well --

21 JUSTICE KENNEDY: I mean, you're -- it seems  
22 to me you're trying to have it both ways.

23 MR. KATYAL: Well, with respect to a cause  
24 of action and whether the principles of absolute  
25 immunity apply to this, I think this Court has already

1 recognized several times that the overriding interest is  
2 protecting the judicial process and not letting  
3 information be chilled and not come in.

4           And to give you a couple of data points,  
5 there were 14.4 million arrests in the year 2006 and 1.1,  
6 approximately, million felony convictions. Respondents'  
7 theory would allow prosecutors in any of those  
8 circumstances to be sued for an alleged fabrication of  
9 evidence, and that's something that could be -- that's  
10 something that's not that hard to envision, since  
11 criminal evidence, unlike civil evidence, is messy. It  
12 often involves cooperation agreements, leniency  
13 agreements, and the like, and for that reason it's very  
14 natural -- and this Court has recognized that in *Imbler*  
15 -- for the defendant in a criminal case to say: Well,  
16 I'm going to blame the prosecutor; they fabricated  
17 evidence, they made this story up; and -- and then seek  
18 civil liability.

19           And what this Court has said repeatedly is  
20 that the societal interest suffers. And that is why  
21 it's not about, Justice Kennedy, protecting the bad  
22 apple and someone who exacerbates the harm by carrying  
23 the fabricated evidence through trial. Rather, what  
24 this Court's absolute immunity decisions consistently  
25 reflect is the principle that when someone is

1 introducing evidence at trial, you don't want to chill  
2 them in the performance of their duties in any way  
3 through the rubric of civil liability.

4 JUSTICE STEVENS: I don't understand why at  
5 the time of introducing the evidence, the policy  
6 concerns that you describe arise, because we were  
7 criticizing what he did before he introduced the  
8 evidence.

9 MR. KATYAL: When -- when the evidence is  
10 introduced and it's the prosecutor himself who developed  
11 that evidence, maybe through flipping a witness or  
12 something like that, that --

13 JUSTICE STEVENS: Right, and he would know  
14 whether or not it was fabricated.

15 MR. KATYAL: Well, he would know whether or  
16 not it's fabricated, but the question is whether he  
17 would know that he could insulate himself from an  
18 allegation of wrongdoing. And Respondents' theory,  
19 which allows the due process clause to be some sort of  
20 freestanding right, would permit those suits even at  
21 the earliest stages of an investigation and permit  
22 strike suits even before the criminal process is  
23 under way.

24 And that, I think, is a fundamental point,  
25 which is this Court -- no court -- has ever really

1 accepted the notion that prosecutors can be liable, that  
2 there is a cause of action for --

3 JUSTICE STEVENS: But haven't we said that  
4 during the investigating stage their conduct is subject  
5 to different rules than during the trial?

6 MR. KATYAL: For purposes of absolute  
7 immunity, and we agree with that. So, for example,  
8 Justice Stevens, in your Fourth Amendment decision in  
9 1975 on the Seventh Circuit, we agree there is liability  
10 when a prosecutor is, for example, conducting a raid or  
11 something like that. There the constitutional violation  
12 is complete before the trial, and whatever the  
13 prosecutor does at trial --

14 JUSTICE STEVENS: I just can't see the -- I  
15 don't understand the reasoning why the time  
16 in which the violation is completed, namely after the  
17 trial, goes to the question of whether there is  
18 liability for pretrial conduct.

19 MR. KATYAL: Well, we think there is no  
20 liability for pretrial conduct, and so long as you agree  
21 with me that the due process clause violation begins  
22 only at the trial --

23 JUSTICE STEVENS: It was completed at the  
24 trial, but it began when the -- the phony investigation  
25 started.

1 MR. KATYAL: The -- the text of the due  
2 process clause says that the deprivation of life,  
3 liberty, property with --

4 JUSTICE STEVENS: I understand.

5 MR. KATYAL: -- under due process of law.  
6 And due process under this Court's decisions is what  
7 happens at trial, not before.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
9 Katyal.

10 Mr. Clement.

11 ORAL ARGUMENT OF PAUL D. CLEMENT

12 ON BEHALF OF THE RESPONDENTS

13 MR. CLEMENT: Mr. Chief Justice, and may it  
14 please the Court:

15 As I listen to Petitioners, I hear two  
16 arguments to why there ought to be liability for the  
17 prosecutor -- rather, for the police officer and not the  
18 prosecutor, and both of those are arguments this Court  
19 has already heard and rejected.

20 On the immunity issue, the argument  
21 Petitioners make seems to distill to the proposition  
22 that as long as you're suing a prosecutor for injuries  
23 inflicted at trial, the prosecutor ought to have  
24 absolute immunity.

25 Now, that's not a crazy theory of immunity.

1 It's exactly the theory of immunity that the Seventh  
2 Circuit adopted in the Buckley decision and this Court  
3 reversed, unanimously as to the press conference and by  
4 a majority opinion with respect to pretrial  
5 investigatory conduct involving fabrication. If that  
6 sounds familiar, it should. That's the conduct that's  
7 at issue here.

8 So the absolute immunity issue in this case  
9 was decided in Buckley. Now --

10 JUSTICE ALITO: When the issue, when the --  
11 the claim is based on the evaluation of the truthfulness  
12 of a witness who eventually testifies at trial, where's  
13 the line to be drawn between the investigative stage and  
14 the prosecutorial stage?

15 MR. CLEMENT: Well, I think, Justice Alito,  
16 the place to draw the line is the place this Court drew  
17 the line in Buckley, which is probable cause. And  
18 before probable cause, when prosecutors are engaging in  
19 investigatory functions, I don't think we want them  
20 shaping the witness for trial. I think we want them  
21 trying to figure out who actually committed this crime  
22 and who would we have probable cause to perhaps initiate  
23 process against.

24 JUSTICE ALITO: So what concerns me about  
25 your argument is the -- is a real fear that it will

1 eviscerate Imbler. Now, maybe you can convince me that  
2 it will not have that effect, but as the Solicitor  
3 General argued at the end of his argument, a very -- in  
4 the typical criminal case, the witnesses are not  
5 John Q. Public with -- who have never engaged in any  
6 wrongful activity.

7           A typical witness is -- well, let's take the  
8 case of the prosecution of a -- a white -- of the CEO of  
9 a huge corporation for insider trading or some other  
10 white-collar violation. And the chief witness against  
11 this person is, let's say, the CFO of this company, who  
12 when initially questioned by law enforcement officials  
13 and investigatory officials, made -- made statements  
14 denying any participation in any wrongdoing, but  
15 eventually changed his story and testifies against the  
16 CEO at trial in exchange for consideration in -- in a  
17 plea deal.

18           Now, your argument, in a case like that --  
19 or you could change the facts, make it an organized  
20 crime case, make it a prosecution of a drug kingpin  
21 who's -- the witness against him is a lower-ranking  
22 person in the organization who has a criminal record,  
23 maybe has previously committed perjury, has made numerous  
24 false statements, is subject to impeachment. In all of  
25 those cases a claim could be brought against the

1 prosecutor.

2 MR. CLEMENT: Well, Justice Alito, let me  
3 try to answer it this way, which is you mentioned both  
4 organized crime cases and insider trading cases. Well,  
5 I think if there's any circuit in which those kind of  
6 claims are going to be brought, it's probably the Second  
7 Circuit. The Second Circuit has lived with this rule  
8 since the year 2000 and the Zahrey decision that's  
9 already been mentioned. There has not been a floodgate  
10 opening. There's not been a torrent of these claims.  
11 There's been a trickle. They remain very hard to  
12 allege, and the allegations here --

13 JUSTICE ALITO: Well, I mean, that might be  
14 true as an empirical matter, but I don't understand why  
15 it would be hard to allege.

16 MR. CLEMENT: I --

17 JUSTICE ALITO: What would you have to  
18 allege to get by Iqbal or to get by summary judgment?  
19 You allege that the testimony at trial was false and  
20 that the prosecutor knew that it was false. And in  
21 support of that, you have prior inconsistent statements  
22 by the witness, and you may have the evidence that was  
23 introduced by the defense at trial that is inconsistent  
24 with that. You have a triable issue.

25 MR. CLEMENT: I don't --

1 JUSTICE ALITO: You certainly get by  
2 12(b)(6).

3 MR. CLEMENT: As I hear your hypothetical, I  
4 don't think so, because the thing that's missing is the  
5 allegation that the prosecutors fabricated that  
6 evidence. This isn't a case about coaching a witness.

7 CHIEF JUSTICE ROBERTS: Well, but what if --  
8 what if there's an acquittal? Then you have at least a  
9 jury not believing the evidence, and that also is strong  
10 support for at least supporting an allegation. He  
11 fabricated it; nobody believed it when it was presented  
12 at trial.

13 MR. CLEMENT: Well, two things, Your Honor.  
14 One is obviously without the fabrication allegations  
15 that take place during the investigatory stage, you  
16 would be protected by Imbler.

17 Now, in the acquittal situations, this Court  
18 doesn't have a case directly on point. But if I read  
19 the Hartman decision, for example, Hartman v. Moore,  
20 and apply it to this context, I assume that in the  
21 context of an acquittal if you tried to bring a claim  
22 like this, this Court would interpret through the common  
23 law the -- a malicious prosecution type element that you  
24 would have to satisfy, which --

25 JUSTICE ALITO: Why is it difficult to

1 allege fabrication? The -- the allegation is that at  
2 point A this witness denied that the defendant did  
3 anything wrong, and then at point B the defendant told  
4 an entirely different story after having received from  
5 the government a plea deal that promises no prosecution  
6 and entry into the witness protection program or  
7 something like that. That certainly is sufficient  
8 evidence to -- of fabrication, is it not?

9 MR. CLEMENT: Well, Justice Alito, let me  
10 say this. First of all, you are going to have to  
11 pinpoint those kind of allegations pre-probable cause,  
12 which is not going to be the case in a lot of cases.

13 Second of all, I mean, this Court --

14 JUSTICE SCALIA: I don't know what you mean  
15 by that.

16 MR. CLEMENT: In -- in the typical case,  
17 if -- if the witness perhaps in the first instance comes  
18 up with one testimony and later comes up in -- with a  
19 different story later, the question for purposes of  
20 absolute immunity is going to be, did all of the conduct  
21 that you're alleging, the fabrication, did all of it  
22 take place before probable cause attached? And in a lot  
23 of cases prosecutors don't even get involved until after  
24 probable cause, until after there have been arrests,  
25 something like that. And in those cases --

1 JUSTICE ALITO: That's an entirely false  
2 picture of the way any sophisticated prosecution is  
3 handled today, completely false. You want -- the  
4 prosecutor may not know whether there's probable cause  
5 until the prosecutor interviews the witness.

6 MR. CLEMENT: And, again -- but this --

7 JUSTICE ALITO: And so then you have to go  
8 back and determine whether there was -- if there wasn't  
9 probable cause before the interview, then there is  
10 liability. But if there was probable cause before the  
11 interview, then there isn't liability.

12 MR. CLEMENT: I think if I understand your  
13 hypothetical, the question would actually be whether  
14 there was probable cause before the re-interview,  
15 because if at the point that --

16 JUSTICE ALITO: Before the re-interview,  
17 because the prosecutor doesn't want to take the case to  
18 the grand jury before looking this witness in the eye  
19 and seeing whether this -- this guy who's got a lot of  
20 impeachment baggage is -- is a -- is a credible witness.

21 MR. CLEMENT: Well, two things, Justice  
22 Alito. First of all, if you have all -- if you had the  
23 interview and the re-interview before probable cause and  
24 you have the allegations that it was done for the avowed  
25 purpose of depriving the person of their liberty, then

1 you would, I think, apply Iqbal, and you would ask under  
2 all the circumstances of that case whether it's a  
3 plausible allegation.

4           And this Court is obviously in a better  
5 position than I am to say how it would apply Iqbal in  
6 those kind of cases. But what I can tell you is that  
7 for nearly a decade the Second Circuit has had this  
8 rule. Now, the Second Circuit is the circuit that  
9 brought you Iqbal. So for that same decade, they did not  
10 have the rule of Iqbal, and yet they didn't have a  
11 torrent of these claims.

12           So, I think going forward, if you recognize  
13 these claims --

14           CHIEF JUSTICE ROBERTS: How -- how do you --  
15 I mean, we hear that type of argument every time,  
16 because there's usually a circuit conflict here, and  
17 you look at one circuit and say the world hasn't fallen.  
18 But you have no idea how many of these claims are  
19 asserted and dismissed at an early stage or -- or  
20 whatever.

21           You're saying, what, that there haven't been  
22 many Second Circuit opinions on this question?

23           MR. CLEMENT: I think if you look at  
24 reported -- both unpublished and published Second Circuit  
25 decisions at the district court level and the court of

1 appeals level, you will find very few cases that even  
2 cite Zahrey. I think it's something like -- maybe 17 I  
3 think is what we found.

4 CHIEF JUSTICE ROBERTS: Do you think  
5 we'll -- do you think there will be more if we agree  
6 with your theory?

7 MR. CLEMENT: In the Second Circuit? I  
8 don't think so. I think it will be the same number in  
9 the Second Circuit.

10 Now, in the Seventh Circuit that has lived  
11 with the Buckley remand rule, I suppose there will now  
12 be a couple of dozen cases there. But I do think it's  
13 revealing that the circuit that has certainly the kind  
14 of cases that Justice Alito was dealing with, has not  
15 had a flood of these cases. As far as I'm aware, the  
16 U.S. attorney's offices in that circuit have not had to  
17 rework the way they do business in those circuits, and I  
18 do think that these are claims that are going to be  
19 difficult to allege.

20 CHIEF JUSTICE ROBERTS: Well, but it's also  
21 you don't really know, right? In other words, we're  
22 concerned about the chilling effect on the prosecutors.  
23 We don't know what the impact of the Second Circuit's  
24 decision has been on the prosecutors.

25 MR. CLEMENT: Well, Your Honor, we don't

1 know for sure. We don't know either way, because either  
2 way this Court is going to adopt a clear rule. What I  
3 can say is at least I'm pointing to empirical evidence  
4 in a circuit that has lived with this rule for a decade.  
5 That seems to me a better empirical basis to go on than  
6 absolutely nothing.

7 But let me give you another example, which  
8 is this Court, a couple of years ago, decided a decision  
9 called Hartman v. Moore. Hartman v. Moore sort of  
10 recognized that there was a tort called, I think,  
11 retaliatory inducement to prosecute.

12 Now, in footnote 8, this Court recognized  
13 that actually you could sue a prosecutor for retaliatory  
14 inducement to prosecute if you focused on the  
15 investigatory activities. That's exactly the same basic  
16 theory we have here, which is you focus on the  
17 investigatory activities of a prosecutor and say that  
18 there is a valid 1983 claim.

19 Now, again, to my knowledge there have not  
20 been a flood of Hartman claims brought against  
21 prosecutors. I think there --

22 CHIEF JUSTICE ROBERTS: What -- what is the  
23 basis for the 1983 claim without the submission at  
24 trial?

25 MR. CLEMENT: Without the submission at

1 trial -- I mean, it would depend, I suppose, on the  
2 circumstances. You could have, certainly, a Fourth  
3 Amendment variant --

4 CHIEF JUSTICE ROBERTS: Well, you know I'm  
5 not talking about the Fourth Amendment violation, which  
6 is complete whether there's a trial or not.

7 MR. CLEMENT: Well -- and then maybe I just  
8 need a concrete hypothetical. Let's say -- let's say --  
9 let me -- let me provide one. Suppose that there was  
10 this -- the prosecutor put on this fabricated evidence  
11 at trial, and then the -- the whole case sort of  
12 unraveled because the system actually worked the way  
13 it's supposed to. On cross-examination the witness  
14 cracked, and it became clear that there was this  
15 conspiracy to use perjured evidence.

16 Now, at that point -- I mean, I suppose the  
17 government's theory would be because you never deprived  
18 the person of their liberty, the knowing use by the  
19 prosecutor of perjured testimony at trial does not  
20 violate the Due Process Clause.

21 But I hope that's not the rule. I mean, I  
22 hope that in a Mooney case, if you bring the -- make a  
23 Mooney violation against somebody who is actually  
24 guilty, so you knowingly use perjured testimony against  
25 somebody that's -- that's guilty, so if you did a

1 harmless error analysis, you would say, well, the use of  
2 the perjured testimony really didn't deprive the person  
3 of their liberty because they were otherwise --

4 JUSTICE KENNEDY: What's -- what's  
5 your best authority for the proposition that there's  
6 liability in the case the Chief Justice put? What's  
7 your best case?

8 MR. CLEMENT: I -- I -- I'm not sure I have  
9 a best case for that, Justice Kennedy. I mean, let  
10 me -- let me give you what I think is a very good case  
11 that illustrates a similar principle, but I -- I will --  
12 I will be candid that I think this is an extrapolation  
13 from Mooney, but a very sort of clear extrapolation from  
14 Mooney.

15 My best case in some ways I think is Malley,  
16 because their proposition seems to be that -- this is  
17 the other argument you have heard and rejected -- is  
18 that if there's an absolutely immune act in the causal  
19 chain, then that somehow means that there is no  
20 violation.

21 Think about who was sued in Malley. It  
22 was the police officers. What did the police officers  
23 do? They procured an invalid arrest warrant. Now, did  
24 their actions, independent of the absolute immune act of  
25 the magistrate, injure the plaintiffs? No. Without the

1 magistrate issuing the warrant, there was no arrest,  
2 there's no search, there's no injury to the plaintiffs.

3 So we allow in our system somebody to bring  
4 a constitutional tort claim, even though there's an  
5 absolutely immune act in the causal chain.

6 The lower court in Malley actually accepted  
7 exactly this argument, that if you have any absolutely  
8 immune act in the causal chain, that breaks it off. This  
9 Court rejected it and was frankly fairly dismissive,  
10 dismissed it in a footnote, footnote 7 of the opinion.

11 JUSTICE KENNEDY: You will have to refresh  
12 my memory. Wasn't that a Fourth Amendment violation,  
13 ultimately?

14 MR. CLEMENT: It was a Fourth Amendment  
15 violation.

16 JUSTICE KENNEDY: So that -- so that's  
17 not --

18 MR. CLEMENT: No, I think it illustrates the  
19 principle, which is you don't have to have a completed  
20 constitutional violation in your 1983 action. I mean,  
21 Malley illustrates that principle, but so does the text  
22 of -- of section 1983, frankly. Section 1983 doesn't  
23 force you to have a completed constitutional violation.  
24 It provides liability if you subject someone to a  
25 constitutional violation or cause them to be subjected

1 to a constitutional violation.

2 JUSTICE SCALIA: The difference here is that  
3 the -- the absolutely immune act which follows the --  
4 the unlawful act is -- is an absolutely immune act by  
5 the very actor who performed the earlier act that --  
6 that you say induces liability. And so the argument is,  
7 what's the use of giving him liability later on if -- if  
8 you can simply drag him into litigation by -- by  
9 alleging that he at an earlier stage committed a  
10 violation?

11 MR. CLEMENT: Well, the --

12 JUSTICE SCALIA: That's the difference. I  
13 mean, to me that's the -- the crux of this, that it is  
14 the same actor who has absolute liability whom you're  
15 trying to get on the basis of -- of earlier action.

16 MR. CLEMENT: Well, Justice --

17 JUSTICE STEVENS: Of course, that's the  
18 reason the rule seems perverse.

19 MR. CLEMENT: What's that?

20 JUSTICE STEVENS: That's the very reason the  
21 rule they're arguing for seems perverse.

22 MR. CLEMENT: Well, I would ask -- I would  
23 ask both of you to go back and read two things, and I  
24 would particularly like Justice Scalia to go back and  
25 read your separate opinion in Burns. Because in Burns

1 you confronted just this issue. You conceptualized what  
2 happens at the warrant stage as a variant of malicious  
3 prosecution, and you said: Now, could a prosecutor, sort  
4 of as kind of a complaining witness in that context,  
5 procure a warrant that they were subsequently involved  
6 in? And you said: I don't see any reason why not. I  
7 think you got it right there.

8 The other thing I would ask you to look at  
9 is footnote 8 of the Hartman v. Moore decision, because  
10 there you were dealing with a retaliatory prosecution  
11 claim. Now, the Court's opinion was very careful to  
12 say, you know, it's really not a retaliation -- a  
13 retaliatory prosecution claim; what it is, is a  
14 retaliatory inducement to prosecute case.

15 CHIEF JUSTICE ROBERTS: If you cannot rely  
16 on anything that goes on at the trial to establish the  
17 due process violation, what do you rely on to establish  
18 the violation?

19 MR. CLEMENT: Well, Mr. Chief Justice --

20 CHIEF JUSTICE ROBERTS: I guess the question  
21 is where is it complete, or do you say it doesn't have  
22 to be a complete violation?

23 MR. CLEMENT: Well, I guess what I would do,  
24 Mr. Chief Justice, is try to take issue with your  
25 premise, which is that we can't advert to the absolute

1 immune act at all. Of course we can. I mean, this  
2 isn't --

3 CHIEF JUSTICE ROBERTS: Well, let's say that  
4 you -- let's say that you can't because we read Imbler  
5 as conferring absolute immunity on what goes on at the  
6 trial. And if you can't advert to that, you don't have  
7 a constitutional violation, right?

8 MR. CLEMENT: Well, I would still say we do,  
9 but please let me try to take one more crack at the  
10 premise, which is Imbler is not a use immunity case, and  
11 this Court has rejected the proposition that just  
12 because you're absolutely immune for an act, there's no  
13 evidentiary use of that in going after conduct that was  
14 earlier in the causal chain.

15 This Court specifically confronted that in a  
16 case called Dennis v. Sparks that was with, you know,  
17 the granddaddy of them all, judicial immunity, and said  
18 even the judge's actions could be proved up as part of a  
19 tort action. So there is no use immunity for --

20 CHIEF JUSTICE ROBERTS: Against -- against  
21 the judge?

22 MR. CLEMENT: It wasn't against the judge,  
23 but I -- but with all due respect, I don't think that  
24 matters. And I also think --

25 CHIEF JUSTICE ROBERTS: Well, that's the

1 distinction here in this case, isn't it?

2 MR. CLEMENT: Well, but -- but it's a  
3 distinction without a difference. It's a distinction  
4 this Court confronted in -- in Hartman in footnote 8.  
5 It's a distinction Justice Scalia confronted. And also  
6 -- I mean, the consequences of accepting their view is to  
7 really turn all of your absolute immunity cases into a  
8 fool's errand.

9 I mean, think about Kalina. I mean, the  
10 supporting affidavit wasn't the thing that inflicted  
11 injury. Now, the thing that inflicted injury were the  
12 two documents that the supporting affidavit supported,  
13 the warrant and the information. Now, it would have  
14 made no sense for this Court to say, well, there is only  
15 qualified immunity for the supporting affidavit, so  
16 let's send this back to the lower court, if you couldn't  
17 even get into evidence the fact that there was an  
18 information or a warrant.

19 So too in the Malley case, of course you  
20 can use -- now it's a different -- it's a different  
21 person. In Kalina, it's the same person.

22 Or take a look at Burns, for example. In  
23 Burns, the prosecutor's advice to the police officer --  
24 that's not what injured the plaintiff in that case. It  
25 was the warrant that was eventually procured.

1 CHIEF JUSTICE ROBERTS: In terms of the  
2 chilling impact on the prosecutor, what difference does  
3 it make whether it's at trial or pretrial for use at  
4 trial?

5 MR. CLEMENT: Well, I think it makes all the  
6 difference in the world in the sense that if -- if they  
7 know that everything that they do at trial is going to be  
8 protected, those functions, which is the basis of this  
9 Court's functional approach to absolute immunity, are  
10 going to be protected. Now, if they're going to be --

11 JUSTICE SCALIA: But it won't be protected.  
12 They won't have that assurance, because when they --  
13 when they produce evidence at trial, oh, yes, I guess  
14 the production at trial will be protected, but you're --  
15 you're telling us that they can go back and say, ah, but  
16 you got that evidence in a bad manner, and therefore we  
17 can sue you, not for introducing it at trial, but for  
18 fabricating it before trial.

19 I -- I don't see that there is much of a  
20 difference as far as the deterrent effect upon the  
21 prosecutor is concerned.

22 MR. CLEMENT: Well, I think there is going  
23 to be an effect on the deterrent effect on the  
24 prosecutor pretrial, which is they will be procured. I  
25 mean, think about the contrary incentive you're --

1 you're creating. Suppose you're a prosecutor. You've  
2 participated in the misconduct before trial. You now  
3 have the decision to make: Okay, I was -- I was  
4 complicit in the fabrication of this perjured evidence;  
5 should I put it on into evidence? Well, let's see. If  
6 I don't put it on into evidence and I come clean now,  
7 I'm actually liable for the arrest and all the pretrial  
8 detention. If I actually introduce it into evidence  
9 now, I'm scot-free --

10 JUSTICE BREYER: But there's a different  
11 tendency, which I would say this is a slight fluke, what  
12 you're describing. I'm more worried about what Justice  
13 Alito brought up, that, other things being equal, I  
14 think it's probably a good thing to get prosecutors  
15 involved in the questioning process. That -- that has a  
16 kind of check on the police.

17 And the concern I'd have is that the -- this  
18 will discourage the prosecutors from becoming involved  
19 in the witness -- witness questioning process, at least  
20 not before the police are well on the way. And that is  
21 a very negative incentive, I would think.

22 So what is your most pro-prosecutorial rule  
23 that you could live with that will in fact minimize the  
24 risk of that kind of disincentive? Now, are you just  
25 going to say, well, Buckley?

1 MR. CLEMENT: Well --

2 JUSTICE BREYER: Or is there something -- I  
3 mean, I can see Buckley with the -- with the, you know,  
4 probable cause. It turns on and off as you're talking to  
5 the witness. First what he says, you have the probable  
6 cause; then you don't; then you do; then you don't. I  
7 mean, I -- I'm not -- I just want you to give your best  
8 thought to this problem and tell me what is the most  
9 safe rule that will allow you to win your case?

10 MR. CLEMENT: Well, Justice Breyer, I mean,  
11 I would say that there's no reason for this Court to  
12 disturb the line it drew in Buckley. Now, I could,  
13 because of this case --

14 JUSTICE BREYER: We have amicus briefs here  
15 that give us a lot of reason. They say -- they say it's  
16 very discouraging to, you know, AUSAs or DAs going in  
17 and talking to the witnesses with the police.

18 MR. CLEMENT: Well --

19 JUSTICE BREYER: And they say they do it in  
20 Chicago, I think. In other places, they do it a lot.

21 MR. CLEMENT: Well, I mean, another thing  
22 presumably, Justice Breyer, you want to encourage is  
23 having the police officers come to the prosecutors and  
24 get legal advice about what they're doing. And this  
25 Court squarely confronted that question in Burns and

1 said the advice-giving function, which is a function  
2 only a prosecutor, only a lawyer anyways, can perform --

3 JUSTICE KENNEDY: Well, could you answer  
4 Justice Breyer's question, which I -- I think raises a  
5 -- a critical point in terms of Justice Alito's examples  
6 of talking to the witness. Why isn't that at some  
7 point -- I think in Buckley, the judicial phase. Why  
8 is this the judicial phase?

9 MR. CLEMENT: Well, Justice Kennedy, let me  
10 respond to that. Let me say why I don't think I can  
11 really improve on the probable cause line. I mean, in  
12 this case, the police officers and the prosecutors were  
13 involved in this from the get-go, but --

14 JUSTICE KENNEDY: No, probable cause  
15 doesn't work because you have -- you have probable cause  
16 once you fabricate the evidence.

17 MR. CLEMENT: Well, I think for purposes --

18 JUSTICE KENNEDY: That's circular.

19 MR. CLEMENT: No, I don't think so. I think  
20 for purposes of evaluating when there's probable  
21 cause, you have to eliminate the fabricated evidence,  
22 and so I think that you evaluate probable cause.

23 But here's why I think it's the right line,  
24 because think about the prosecutor's special function.  
25 If you don't have probable cause to arrest any individual

1 for a crime, then the function the police officers ought  
2 to be performing is one of a truth-seeking function, and  
3 that is a classic police investigatory function.

4 Now, the moment they have probable cause,  
5 I'm willing to listen to the argument that at that point  
6 they shift roles, and at that point they're not looking  
7 at the evidence the way the police officer is, just to  
8 find out who "dun" it, but they're looking at it to say,  
9 well, I have a job to do, I have to put a case on, and,  
10 you know, this person says what they say, and, you know,  
11 there's some problems with that and the jury's not going  
12 to believe that, so let me talk to him some more.

13 That's why I think the probable cause line  
14 is not only administrable, but it makes sense in this  
15 context.

16 JUSTICE KENNEDY: Suppose the prosecutor  
17 isn't sure there's probable cause and he calls -- calls  
18 in the accountant, the CFO, and really doesn't begin to  
19 believe his story, so he starts probing and finally he  
20 gets the CFO to change his story with the plea -- plea  
21 bargain. Would that be part of the judicial process?  
22 Or is that still clearly investigatory?

23 MR. CLEMENT: I think at the point -- if the  
24 interview begins and he doesn't think he has probable  
25 cause, I think that that --

1 JUSTICE KENNEDY: Well, he's trying to find  
2 out. That's way it works --

3 MR. CLEMENT: Of course, he is trying to find  
4 out. But he's -- but he's not trying to find out if  
5 there's probable cause necessarily to identify a  
6 particular suspect. What he's trying to do, is there  
7 probable cause to arrest anyone? And that's exactly the  
8 question a police officer asks every single day.

9 JUSTICE BREYER: Well, also, you're making  
10 me more worried because I think, if 85 percent of all  
11 the defendants -- or 90 percent plead guilty, it might  
12 be a highly desirable thing to get prosecutors involved  
13 in the truth-discovering process, I mean, so that they  
14 don't just see themselves as the job of -- well, we're  
15 going to take somebody, put them in jail.

16 I mean, maybe -- maybe that's a reason for  
17 pushing it back a little bit, this -- this line.

18 MR. CLEMENT: Well -- you know, I'm not sure  
19 what the logical place to push it back any further is,  
20 and I think -- you know, just to --

21 JUSTICE BREYER: Where have you got it now?  
22 You've got it as when there is probable cause for  
23 believing that someone has committed a crime?

24 MR. CLEMENT: Yes.

25 JUSTICE BREYER: Someone? So it needn't be

1 --

2 MR. CLEMENT: Someone.

3 JUSTICE BREYER: -- the particular person  
4 they eventually indict?

5 MR. CLEMENT: That's right.

6 JUSTICE BREYER: Uh-huh.

7 MR. CLEMENT: And let me say this, Justice  
8 Breyer, I mean, I know you don't want me to talk about  
9 Burns, but I'd like to, just for a second, because I  
10 think it's a very similar policy concern.

11 As a policy matter, sure, we want  
12 prosecutors to get -- give advice to police officers,  
13 but qualified immunity is not insignificant protection,  
14 and think about that, I mean, the incentives you're  
15 creating for the same anomaly that the Court recognized  
16 in Buckley. The incentive would really --

17 CHIEF JUSTICE ROBERTS: Well, we thought it  
18 was -- I'm sorry. Why don't you finish your answer?

19 MR. CLEMENT: I just wanted to say that the  
20 incentive would really be perverse. Under Burns, if the  
21 police -- if the police officer comes to the prosecutor  
22 and says, you know, we want to fabricate evidence to  
23 frame these people; can we do it? And the prosecutor  
24 says, yes, you can do that, go ahead -- there's qualified  
25 immunity.

1           Now, if the prosecutor says, go ahead and  
2 let me help, there would somehow be absolute immunity.  
3 I mean, that is really an anomalous result, and it's  
4 the anomaly that caused this Court in Buckley to draw  
5 the line at probable cause.

6           CHIEF JUSTICE ROBERTS: I was going to  
7 suggest in response to your point that -- you know,  
8 qualified immunity is really significant. Of course, it  
9 is, but we've recognized, in a number of contexts, in  
10 the judicial area, for example, that it's -- it's not  
11 enough. We have also recognized that in the  
12 prosecutorial area.

13           And trying to draw the line where  
14 you do -- I think this was one of the points Justice  
15 Alito was making -- is that sometimes you're  
16 investigating and preparing your case at the same time.  
17 You don't just sit back and say, I'm -- I'm  
18 just going to look and see what I can find. You have  
19 particular areas. The prosecution requires you to show  
20 four things. So you are looking at those four things.  
21 You are preparing your case, and you're investigating.

22           MR. CLEMENT: And, again, the Court  
23 addressed exactly this Court in the -- exactly that  
24 issue in the Buckley decision and said, sure -- you  
25 know, from -- with the benefit of hindsight, you can

1 sort of retrospectively look and make anything in the  
2 investigatory stage part of -- and part and parcel of  
3 the prosecution.

4           And I don't think that was something that  
5 this Court saw as a reason not to draw a clean line  
6 that's consistent with the functional approach. It's  
7 consistent, not just with Buckley, but with Burns and  
8 with Kalina and with a whole host of this Court's  
9 decisions.

10           JUSTICE ALITO: In -- in answer to Justice  
11 Breyer's question, would -- would it be a -- would it be  
12 practical and conceptually correct to draw the line at  
13 the stage at which the prosecutor is interviewing  
14 witnesses to evaluate credibility?

15           So, at that stage, the prosecutorial  
16 function has begun and absolute immunity would kick in.

17           MR. CLEMENT: Well, if I could add, I mean,  
18 I suppose I might be --

19           JUSTICE ALITO: Not on whether there is  
20 probable cause because probable cause is -- is  
21 evanescent. It comes, and it goes. It is -- it is --  
22 it is inextricably intertwined with what the prosecutor  
23 is doing in questioning the witness.

24           MR. CLEMENT: And let me say this: If I  
25 could add a couple of words, I think we could probably

1 live with that line, which is, if the prosecutor is  
2 interviewing those witnesses with an eye towards  
3 credibility for use at trial, I mean, that's a line  
4 that, I think, would be, I think, probably pretty  
5 consistent with probable cause, but something that we  
6 could live with, but --

7 JUSTICE ALITO: But with a line toward  
8 investigating credibility for use at a trial, which  
9 is -- which is, at that point, foreordained, but, if the  
10 evaluation is being done for the purpose of determining  
11 whether there should be a trial, then, no. That's your  
12 answer?

13 MR. CLEMENT: Well, I mean, I worry that  
14 words are being put in my mouth. I would say that, if  
15 the prosecutor is interviewing the witness for the  
16 purpose of judging their credibility at trial, then  
17 that's something for which you may be able to sort of  
18 tweak the line on Buckley and say that's covered.

19 I actually think it won't make any  
20 difference because I think that should only be happening  
21 after probable cause. If I could --

22 CHIEF JUSTICE ROBERTS: Well, your approach,  
23 then, encourages prosecutors to be trigger happy.  
24 They're prosecuting right now because they know, then,  
25 that everything else, they have absolute immunity, so --

1 you know, shoot first and ask questions later.

2 MR. CLEMENT: Well, shoot first -- you mean  
3 go to an impartial magistrate and try to get somebody  
4 arrested or --

5 CHIEF JUSTICE ROBERTS: No, just begin the  
6 formulation. I'm -- I'm starting to prosecute this  
7 person, rather than saying, let's look, let's  
8 investigate, let's interview, and then decide who we're  
9 going to prosecute.

10 MR. CLEMENT: Well, I suppose --

11 CHIEF JUSTICE ROBERTS: In Justice Alito's  
12 hypothetical, you've got a CFO, you can -- you know,  
13 you've probably got probable cause to go after him as  
14 well, but you want to begin interviewing him, to see if  
15 he's going to flip in your case against the CEO.

16 MR. CLEMENT: Well, if you have probable  
17 cause, then I think you're on the other side of the  
18 Buckley line, and that's an objective determination, and  
19 I think --

20 CHIEF JUSTICE ROBERTS: So you've got --  
21 you've got to make that decision early in the process,  
22 rather than later.

23 MR. CLEMENT: Well, I think it's -- I'm not  
24 sure it's a decision you have to make. I think it's  
25 actually something that would be evaluated objectively

1 after the fact, and I think the way that this Court  
2 should approach this case is neither of the parties  
3 before you have asked this Court to overturn Buckley.

4 I wouldn't do it under those circumstances,  
5 but, of course, it's worth adding that, if you were  
6 going to overturn Buckley, then the place to probably  
7 start would be to go back to first principles, and if  
8 you're going to go back to first principles, then what  
9 you're going to find is that there was no common law  
10 support at all for absolute immunity.

11 And I wouldn't think that this Court was  
12 particularly interested in coming up with implied  
13 immunities that aren't in the statute and had no basis  
14 at the common law, and that's why I think some of the  
15 Justices that have looked at this as an original matter  
16 have tended to be quite reluctant in recognizing  
17 absolute immunity because it lacks support in the text  
18 and it lacks support at the common law.

19 So we're -- we're happy with the lines that  
20 this Court has already drawn. But if the Court's going  
21 to go back to first principles, well, let's go back to  
22 first principles and look at -- the at the statute  
23 Congress passed in 1871.

24 That statute did not provide any immunities,  
25 and I do think, as we say in the brief, this is a case

1 where it's important not to lose the forest for the  
2 trees because this is a statute was passed -- passed in  
3 1871. This is one of the great civil rights statutes.

4           Is it really plausible to think that the  
5 Congress that passed this statute didn't want to provide  
6 a remedy in the circumstances before the Court today? I  
7 think it's clear from this Court's cases -- there may  
8 not be a case that lines up all the dots exactly, but I  
9 think it's clear from this Court's cases that the  
10 police officer that engages in this misconduct has  
11 committed a grave, grave constitutional violation and  
12 ought to be liable.

13           I think the prosecutor who engages in the  
14 pretrial misconduct and then doesn't participate in the  
15 trial is just as liable as that police officer, and I  
16 can't think of a single reason why the only reason a  
17 prosecutor would get absolute immunity is, if they not  
18 only participated in the pretrial misconduct, but  
19 completed the scheme by committing further misconduct at  
20 trial.

21           For all those reasons, we think the Court  
22 should affirm. Thank you.

23           CHIEF JUSTICE ROBERTS: Thank you,  
24 Mr. Clement.

25           Mr. Sanders, you have 5 -- 5 minutes

1 remaining.

2 REBUTTAL ARGUMENT OF STEPHEN SANDERS

3 ON BEHALF OF THE PETITIONERS

4 MR. SANDERS: Thank you, Mr. Chief Justice.

5 We have four main points.

6 Beginning with the Second Circuit's decision  
7 in Zahrey and subsequent cases in the Second Circuit  
8 have significantly cut back on the meaning of Zahrey.  
9 The Wray decision, which we discuss in our reply  
10 brief, the Gonzalez decision, which we discuss in our  
11 opening brief, have not allowed for this kind of  
12 continuous liability for a prosecutor.

13 They have made very clear, particularly the  
14 Gonzalez decision, that when it is a prosecutor's  
15 actions before a judge advocating on behalf of the  
16 State that are responsible for a deprivation of  
17 liberty, in that situation, absolute immunity applies.

18 I think it's important to understand the  
19 consequences of affirming --

20 JUSTICE SCALIA: What -- what does that  
21 prove? What does that prove? I don't understand why  
22 you bring that up -- because it shows that the fact that  
23 there aren't many cases, only 17 in the -- in the Second  
24 Circuit? It doesn't mean anything because the Second  
25 Circuit is not applying as liberal a rule as your

1 opponent suggests.

2 Is that --

3 MR. SANDERS: No, Your Honor. I think it's  
4 to -- I think it's to say that the Zahrey decision has  
5 not had the kind of impact and has not been applied in  
6 the way that Respondents are asking for it to be applied.

7 JUSTICE SCALIA: Yes, but hat's -- that's  
8 just what I said, and, therefore -- and had it been  
9 applied that way, there would have been more than 17  
10 cases in  
11 the Second Circuit.

12 MR. SANDERS: I'm not sure I understand the  
13 question.

14 JUSTICE SCALIA: I'm not --

15 MR. SANDERS: Okay. The -- I think it's  
16 important to understand the consequences of affirming the  
17 courts below, either on the basis of the Zahrey theory or  
18 on the freestanding due process theory offered by  
19 Respondents.

20 It would work a radical change in the law of  
21 immunity because it would mean that far more wrongful  
22 conviction claims against prosecutors would go forward  
23 under only qualified immunity.

24 That is the inevitable consequence of  
25 affirming the courts below in this case. These cases

1 are not difficult, as Justice Alito said, to plead,  
2 particularly because, in most of these sorts of cases,  
3 most of the discovery will have been done during the  
4 postconviction review process.

5           And so there will be plenty of -- plenty of  
6 grounds for a plaintiff to allege a plausible violation  
7 during the investigative process and survive a motion to  
8 dismiss or survive summary judgment, even if,  
9 ultimately, that comes to nothing. The consequence would  
10 be to hold prosecutors to inconsistent standards of  
11 liability, qualified immunity or absolute immunity,  
12 based simply on the allegations in a complaint,  
13 something this Court has specifically said is -- is not  
14 appropriate and should not be done.

15           JUSTICE GINSBURG: I want, before you're  
16 finished, to get a clear picture of your view of the  
17 dimensions of the claim, because you rely heavily on the  
18 trial part. Everything proceeds as it was alleged to  
19 have proceeded in this case, except that just before the  
20 trial begins, Harris comes forward and said it was all a  
21 pack of lies, and so there is no trial.

22           MR. SANDERS: Uh-huh.

23           JUSTICE GINSBURG: Is anyone in this picture  
24 liable? The defendants have been incarcerated for some  
25 time, but when it blows up, they're let out. No trial,

1 but everything else, the same.

2 MR. SANDERS: Your Honor, I believe there  
3 would be no due process liability. There might be two  
4 independent grounds for liability under some Fourth  
5 Amendment malicious prosecution theory, which is not at  
6 issue in this case, and possibly under State law  
7 remedies. As Justice Kennedy and Justice Thomas  
8 indicated in their concurrence in *Albright*, we do not go  
9 to the Federal Constitution's Due Process Clause unless  
10 we're sure that the plaintiffs have exhausted their  
11 possible remedies under State law. In this case, Iowa  
12 State law provides a cause of action for malicious  
13 prosecution.

14 JUSTICE GINSBURG: You said -- I think your  
15 position is that due process begins when trial is  
16 under way, and before that, due process doesn't enter the  
17 picture.

18 MR. SANDERS: Your Honor, I believe that  
19 this Court's decisions make clear that due process  
20 applies to the judicial process; that is, the filing of  
21 charges and the later conduct of the prosecuting --

22 JUSTICE STEVENS: Yes, but what about the  
23 pretrial detention? Isn't that a deprivation of  
24 liberty?

25 MR. SANDERS: Your Honor, it would be, but

1 that would be Fourth Amendment territory.

2 JUSTICE STEVENS: Why would it be Fourth  
3 Amendment? Why isn't it Fourteenth Amendment right on  
4 the nose? They're deprived of liberty without due  
5 process of law.

6 MR. SANDERS: Your Honor, this Court --  
7 seven justices in this Court's decision in Albright  
8 agreed that there was no due process cause of action for  
9 the wrongful institution of criminal proceedings, that  
10 in that case there may be some sort of Fourth Amendment  
11 claim. There may be some sort of State law claim under  
12 Parratt v. Taylor, but I have not --

13 JUSTICE STEVENS: But that case talked about  
14 the institution of prosecution, not the deprivation of  
15 liberty during pretrial detention, which is a different  
16 matter.

17 MR. SANDERS: Your Honor, I believe the  
18 Court's Fourth Amendment jurisprudence would still  
19 indicate that that is a concern of the Fourth Amendment,  
20 not the Due Process Clause, and that pursuant to Paul v.  
21 Davis and Parratt v. Taylor, there may indeed be some  
22 sort of State law cause of action for defamation or loss  
23 of status, but that there is no support for a Federal  
24 due process claim.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Counsel.

2 MR. SANDERS: Thank you.

3 CHIEF JUSTICE ROBERTS: The case is  
4 submitted.

5 (Whereupon, at 11:04 a.m., the case in the  
6 above-entitled matter was submitted.)

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