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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 POTTAWATTAMIE COUNTY, :

4 IOWA, ET AL., :

5 Petitioners :

6 v. : No. 08-1065

7 CURTIS W. MCGHEE, JR., ET AL. :

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9 Washington, D.C.

10 Wednesday, November 4, 2009

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:02 a.m.

15 APPEARANCES:

16 STEPHEN SANDERS, ESQ., Chicago, Ill.; on behalf of the
17 Petitioners.

18 NEAL K. KATYAL, ESQ., Deputy Solicitor General,
19 Department of Justice, Washington, D.C.; on behalf of
20 the United States, as amicus curiae, supporting the
21 Petitioners.

22 PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
23 the Respondents.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We will 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?

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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

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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 two cases. One is
7 Justice Ginsburg's case, a police officer fabricates the
8 evidence, dupes the prosecuting attorney, or -- or
9 doesn't fully disclose. Case two, a prosecutor does the
10 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

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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 does the -- do the police officers or the prosecutors
11 that was not involved in the trial get absolute -- are
12 they -- are they no more liable, not because they have
13 absolute immunity, but because the trial and conviction
14 at which the evidence was used overtakes what liability
15 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

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1 injury itself, and that is exclusively a prosecutorial
2 act, only a prosecutor could --

3 JUSTICE SCALIA: 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: Yes. 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.

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

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1 evidence can provide injury and so --

2 JUSTICE KENNEDY: So the -- 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 are 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 can 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, that is correct,
22 but I think the Court, more than 80 years ago, when it
23 summarily affirmed *Yaselli v. Goff* from the Second
24 Circuit, spoke to this question.

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

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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 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

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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

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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 confusing -- the
23 constitutional injury is the deprivation of liberty.
24 That's the injury.

25 MR. SANDERS: That's correct.

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1 JUSTICE SOTOMAYOR: What causes that injury
2 is not an element of the crime. It is -- the question
3 is have you proven the violation, have you proven the
4 injury.

5 MR. SANDERS: Well --

6 JUSTICE SOTOMAYOR: So why does the use
7 define the scope of the injury?

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

17 JUSTICE GINSBURG: What about the view that
18 Judge Fairchild expressed very simply. He said if this
19 fabrication had not occurred, there never would have
20 been any trial.

21 MR. SANDERS: Your Honor, as we discussed in
22 our opening brief in this case, I think that Judge
23 Fairchild's reasoning is classic malicious prosecution
24 reasoning. That is, that it's the false evidence that
25 impelled the prosecution. But again, this Court has

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1 been absolutely clear that a malicious prosecution
2 theory cannot be asserted against a prosecutor because a
3 prosecutor can initiate willfully and maliciously a
4 wrongful prosecution based on good evidence, bad
5 evidence, or no evidence at all.

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

13 JUSTICE GINSBURG: Was there no injury in
14 the period before? Let's leave out the trial for a
15 moment. There was a deprivation of liberty during the
16 investigatory stage.

17 MR. SANDERS: Your Honor, I think any
18 earlier deprivation of liberty would be covered by the
19 Fourth Amendment. The Fourth Amendment is not
20 implicated in the question presented here. It has not
21 been briefed. Surely there would be an interest against
22 wrongful seizure or, since this -- these arrests were
23 pursuant to legal process, against a form of malicious
24 prosecution. But again, that would be a Fourth
25 Amendment theory and it could not be asserted if it is

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1 malicious prosecution against a prosecutor.

2 JUSTICE STEVENS: Would you clear up one
3 thing for me I really don't quite understand. You do
4 agree that if the police officers did this there would
5 be liability?

6 MR. SANDERS: Your Honor, this Court has not
7 addressed that issue. That is the view of some of the
8 circuits and the Restatement.

9 JUSTICE STEVENS: Are you assuming that to
10 be correct or are you disputing that?

11 MR. SANDERS: We're assuming that to be
12 correct, but if I --

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

18 MR. SANDERS: A police officer would never
19 get immunity at trial because --

20 JUSTICE STEVENS: Not to get immunity, but
21 why is he liable? Why is he liable? Because the injury
22 was caused by the trial, if I understand your theory.

23 MR. SANDERS: The theory of the common law
24 on malicious prosecution would be that the police
25 officer is liable because his fabrication of evidence

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1 impelled the proceeding, caused the proceeding .

2 JUSTICE STEVENS: But it was not a malicious
3 prosecution. The prosecution -- the prosecutors acted
4 in good faith all the way through, so there is no
5 malicious prosecution. So what is the basis for
6 liability against the police officers?

7 MR. SANDERS: The basis for liability
8 precisely against the police officer would be the
9 violation of the due process right to a fair trial,
10 Wrongful conviction on the basis of the introduction --

11 JUSTICE STEVENS: Why doesn't the theory
12 apply to the facts of this case also?

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

21 JUSTICE STEVENS: This investigation by the
22 prosecutor could not have caused injury but for the
23 immunized act of going forward with the trial.

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

25 JUSTICE STEVENS: What's the difference?

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

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

17 With the Court's permission, I'll reserve
18 the balance of my time.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Katyal.

21 ORAL ARGUMENT OF NEAL K. KATYAL

22 ON BEHALF OF THE UNITED STATES,

23 AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONERS

25 MR. KATYAL: Thank you, Mr. Chief Justice

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1 and may it please the Court:

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

12 JUSTICE BREYER: Why do we need that theory?
13 I mean, why not just say what Newman said and the others
14 said? There is no free-standing right. There is just a
15 right not to convict a person with made-up evidence, and
16 of course a prosecutor insofar as he's involved in the
17 prosecutorial stage is absolutely immune. But if he's
18 involved in the investigatorial stage of that event,
19 well, then he's not immune absolutely. That's a policy
20 decision. That has nothing to do with free-standing
21 rights.

22 MR. KATYAL: Respondents' primary submission
23 before this Court is not that argument. They don't rest
24 --

25 JUSTICE BREYER: All right. Then I'm making

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1 that argument.

2 MR. KATYAL: Right, and with respect to that
3 I think we have several, several responses. The first
4 is that this Court has rejected that kind of mere
5 foreseeability analysis in the context of section 1983.

6 JUSTICE BREYER: Mere foreseeability. You
7 can fill in those boundaries, Toffler, not Toffler, as
8 you wish. But the basic theory isn't a problem because,
9 after all, we're just drawing a line somewhere within
10 the stage of an ongoing tort on the basis of policy, and
11 Buckley suggests such a line. I don't see a conceptual
12 problem there, is my problem. Maybe there are practical
13 problems, but I don't see a conceptual one.

14 MR. KATYAL: I think there are practical and
15 conceptual problems, which is why Buckley reserved
16 precisely this question in footnote 5, and here's the
17 basic policy or conceptual concern. Our point is that
18 if a section 1983 defendant is absolutely immune for the
19 constitutional wrong, then you can't read back in time;
20 a plaintiff can't look back in time and isolate some
21 other acts as to which they are nonimmune and thereby --

22 JUSTICE BREYER: I interrupt you right
23 there. I would say they are not absolutely immune for
24 the whole constitutional offense. That's the line I'm
25 trying to draw.

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1 MR. KATYAL: And, Justice Breyer, I'm saying
2 to do that requires you to read the due process
3 violation as occurring sometime before the trial, and
4 then we're back to the free-standing rationale and the
5 opening up of the due process clause to something this
6 Court has never, ever accepted.

7 JUSTICE BREYER: So I agree with you on
8 that. I agree with you. I won't do it. I'll take it
9 as one tort. Began before the investigation stage, ends
10 with conviction. One tort. Now, within that tort we
11 draw a line and we draw a line based on policy purposes
12 as to when the prosecutor is absolutely or qualifiedly
13 immune, and where that line comes is Buckley,
14 approximately. Okay?

15 Now, I don't see a conceptual problem with
16 that and I'm having a hard time finding a practical
17 problem.

18 MR. KATYAL: The conceptual problem is that
19 this Court has been explicit that section 1983 is not
20 the font of tort law. Rather, you need to isolate a
21 constitutional violation. Here, the constitutional
22 violation is the due process clause. That violation
23 begins, as this Court's decisions in Napue and Pyle say,
24 when the fabricated evidence is introduced at trial in
25 order to secure a conviction.

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1 JUSTICE SCALIA: And how do you get the
2 policeman who has fabricated the evidence?

3 MR. KATYAL: Because the policeman
4 essentially induces the prosecution at an earlier point
5 of time and acts through the innocent agent, the
6 prosecutor, that introduction of evidence at trial is
7 not something as to which the policeman has any sort of
8 absolute immunity. And so in Justice Breyer's example
9 of a prosecutor introducing evidence, that is something
10 as to which the prosecutor is absolutely immune. That
11 is where the constitutional violation begins.

12 JUSTICE KENNEDY: What if a prosecutor knows
13 that it's fabricated evidence? The police officer
14 fabricates the evidence and says: Mr. Prosecutor, it's
15 a very bad man; I fabricated the evidence. The
16 prosecutor introduces it. What result there?

17 See, your footnote 6 presumes that the
18 prosecutor doesn't know.

19 MR. KATYAL: Right.

20 JUSTICE KENNEDY: Suppose he knows?

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

24 JUSTICE KENNEDY: Against the policeman?

25 MR. KATYAL: Against -- against the

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1 policeman in that circumstance, because the --

2 JUSTICE KENNEDY: Again, the more aggravated
3 the tort, the greater the immunity.

4 MR. KATYAL: And I agree that that seems a
5 little odd --

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

9 MR. KATYAL: No, what I'm saying and what
10 this Court's decisions have said is that absolute
11 immunity doesn't exist to protect bad apples. It
12 reflects a larger interest in protecting judicial
13 information coming into the judicial process. And if
14 prosecutors have to worry at trial that every act they
15 undertake will somehow open up the door to liability,
16 then they will flinch in the performance of their duties
17 and not introduce that evidence. And that is the
18 distinction between the police officer, who is liable,
19 and the prosecutor, who is -- who is absolutely immune.

20 JUSTICE SOTOMAYOR: A prosecutor is not
21 going to flinch when he suspects evidence is perjured or
22 fabricated? Do you really want to send a message to
23 police officers that they should not merely flinch but
24 stop if they have reason to believe that evidence is
25 fabricated?

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1 MR. KATYAL: Justice Sotomayor, we
2 absolutely want to send that message. The worry is that
3 allegations of wrongdoing, as this Court has recognized
4 in Imbler and Van de Kamp, can -- can supersede that.
5 And just to give you --

6 JUSTICE SOTOMAYOR: Am I right that none of
7 the -- neither of the two prosecutors in this case were
8 sanctioned in any way for their conduct?

9 MR. KATYAL: I believe that is correct, and
10 I also believe that no ethics complaints were ever
11 brought. That is, rather the Respondents went into
12 Federal court seeking money damages instead of ethics
13 violations and the like.

14 JUSTICE SOTOMAYOR: But you have no reason
15 to dispute the numerous studies we were provided that
16 show that as a matter of routine prosecutors are not
17 sanctioned for improper prosecutorial conduct in the
18 investigatory stage, are you?

19 MR. KATYAL: Well, I do think that there is
20 a debate in the briefs before this Court, including the
21 brief by 12,400 or so prosecutors that takes the reverse
22 view. But be that as it may, I think that is a question
23 for the legislature.

24 This Court has said repeatedly that those
25 ethics and disciplinary violations are -- are a

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1 successful deterrent, and there is others as well that
2 this Court has pointed to that may be available,
3 including counsel's liability.

4 JUSTICE KENNEDY: Well, you can't have it
5 both ways and say this is a policy we should take into
6 account and then when Justice Sotomayor asks you a
7 question, say: Oh, well, that's for the legislature. I
8 mean, you're -- it seems to me you're trying to have it
9 both ways.

10 MR. KATYAL: Well, with respect to a cause
11 of action and whether the principles of absolute
12 immunity apply to this, I think this Court has already
13 recognized several times that the overriding interest is
14 protecting the judicial process and not letting
15 information be chilled and not come in.

16 To give you a couple of data points, there
17 were 14.4 million arrests in the year 2006 and 1.1,
18 approximately, million felony convictions. Respondents'
19 theory would allow prosecutors in any of those
20 circumstances to be sued for an alleged fabrication of
21 evidence, and that's something that could be -- that's
22 something that's not that hard to envision, since
23 criminal evidence, unlike civil evidence, is messy. It
24 often involves cooperation agreements, leniency
25 agreements and the like, and for that reason it's very

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1 natural, and this Court has recognized that in Imbler,
2 for the defendant in a criminal case to say: Well, I'm
3 going to blame the prosecutor; they fabricated evidence,
4 they made this story up; and -- and then seek civil
5 liability.

6 And what this Court has said repeatedly is
7 that the societal interest suffers. And that is why
8 it's not about, Justice Kennedy, protecting the bad
9 apple and someone who exacerbates the harm by carrying
10 the fabricated evidence through trial. Rather, what
11 this Court's absolute immunity decisions consistently
12 reflect is the principle that when someone is
13 introducing evidence at trial, you don't want to chill
14 them in the performance of their duties in any way
15 through the rubric of civil liability.

16 JUSTICE STEVENS: I don't understand why at
17 the time of introducing the evidence, the policy
18 concerns that you've described arise, because we were
19 criticizing what he did before he introduced the
20 evidence.

21 MR. KATYAL: When -- when the evidence is
22 introduced and it's the prosecutor himself who developed
23 that evidence, maybe through flipping a witness or
24 something like that, that --

25 JUSTICE STEVENS: Right, and he would know

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1 whether or not it was fabricated.

2 MR. KATYAL: Well, he would know whether or
3 not it's fabricated, but the question is whether he
4 would know that he could insulate himself from an
5 allegation of wrongdoing. And Respondents' theory,
6 which allows the due process clause to be some sort of
7 free-standing right, would permit those suits even at
8 the earliest stages of an investigation and permit
9 strike suits even before the criminal process is
10 underway.

11 And that, I think, is a fundamental point,
12 which is this Court, no court has, ever really accepted
13 the notion that prosecutors can be liable, that there is
14 a cause of action for --

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

18 MR. KATYAL: For purposes of absolute
19 immunity, and we agree with that. So, for example,
20 Justice Stevens, in your Fourth Amendment decision in
21 1975 on the Seventh Circuit, we agree there is liability
22 when a prosecutor is, for example, conducting a raid or
23 something like that. There the constitutional violation
24 is complete before the trial, and whatever the
25 prosecutor does at trial --

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1 JUSTICE STEVENS: I just don't see the -- I
2 don't to see if I can understand the reason why the time
3 in which the violation is completed, namely after the
4 trial, goes to the question of whether there is
5 liability for pretrial conduct.

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

10 JUSTICE STEVENS: It was completed at the
11 trial, but it began when the -- the phony investigation
12 started.

13 MR. KATYAL: The -- the text of the due
14 process clause says the deprivation of life, liberty,
15 property with -- under due process of law, and due
16 process under this Court's decisions is what happens at
17 trial, not before.

18 CHIEF JUSTICE ROBERTS: Thank you, Mr.
19 Katyal.

20 Mr. Clement.

21 ORAL ARGUMENT OF PAUL D. CLEMENT

22 ON BEHALF OF THE RESPONDENTS

23 MR. CLEMENT: Mr. Chief Justice, and may it
24 please the Court:

25 As I listen to Petitioners, I hear two

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1 arguments to why there ought to be liability for the
2 prosecutor -- rather, for the police officer and not the
3 prosecutor, and both of those are arguments this Court
4 has already heard and rejected.

5 On the immunity issue, the argument
6 Petitioners make seems to distill to the proposition
7 that as long as you're suing a prosecutor for injuries
8 inflicted at trial, the prosecutor ought to have
9 absolute immunity.

10 Now, that's not a crazy theory of immunity.
11 It's exactly the theory of immunity that the Seventh
12 Circuit adopted in the Buckley decision and this Court
13 reversed, unanimously as to the press conference and by
14 a majority opinion with respect to pretrial
15 investigatory conduct involving fabrication. If that
16 sounds familiar, it should. That's the conduct that's
17 at issue here.

18 So the absolute immunity issue in this case
19 was decided in Buckley. Now --

20 JUSTICE ALITO: When the issue, when the --
21 the claim is based on the evaluation of the truthfulness
22 of a witness who eventually testifies at trial, where's
23 the line to be drawn between the investigative stage and
24 the prosecutorial stage?

25 MR. CLEMENT: Well, I think, Justice Alito,

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1 the place to draw the line is the place this Court drew
2 the line in Buckley, which is probable cause. And
3 before probable cause, when prosecutors are engaging in
4 investigatory functions, I don't think we want them
5 shaping the witness for trial. I think we want them
6 trying to figure out who actually committed this crime
7 and who would we have probable cause to perhaps initiate
8 process against.

9 JUSTICE ALITO: What concerns me about your
10 argument is the -- is a real fear that it will
11 eviscerate Imbler. Now, maybe you can convince me that
12 it will not have that effect, but as the Solicitor
13 General argued at the end of his argument, a very -- in
14 the typical criminal case, the witnesses are not
15 John Q. Public with -- who have never engaged in any
16 wrongful activity.

17 A typical witness is -- well, let's take the
18 case of the prosecution of a -- a white -- of the CEO of
19 a huge corporation for insider trading or some other
20 white-collar violation. And the chief witness against
21 this person is, let's say, the CFO of this company, who
22 when initially questioned by law enforcement officials
23 and investigatory officials, made -- made statements
24 denying any participation in any wrongdoing, but
25 eventually changed his story and testifies against the

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1 CEO at trial in exchange for consideration in a plea
2 deal.

3 Now, your argument, in a case like that --
4 or you could change the facts, make it an organized
5 crime case, make it a prosecution of a drug kingpin
6 who's testifying -- the witness against him is a
7 lower-ranking person in the organization who has a
8 criminal record, maybe has previously committed perjury,
9 has made numerous false statements, is subject to
10 impeachment. In all of those cases a claim could be
11 brought against the prosecutor.

12 MR. CLEMENT: Well, Justice Alito, let me
13 try to answer it this way, which is you mentioned both
14 organized crime cases and insider trading cases. Well,
15 I think if there is any circuit in which those kind of
16 claims are going to be brought it's probably the Second
17 Circuit. The Second Circuit has lived with this rule
18 since the year 2000 and the Zahrey decision that's
19 already been mentioned. There has not been a floodgate
20 opening, there's not been a torrent of these claims.
21 There's been a trickle. They remain very hard to
22 allege, and the allegations here --

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

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1 MR. CLEMENT: What would you --

2 JUSTICE ALITO: What would you have to
3 allege to get by Iqbal or to get by summary judgment?
4 You allege that the testimony at trial was false and
5 that the prosecutor knew that it was false. And in
6 support of that you have prior inconsistent statements
7 by the witness, and you may have the evidence that was
8 introduced by the defense at trial that is inconsistent
9 with that. You have a triable issue.

10 MR. CLEMENT: I don't --

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

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

17 CHIEF JUSTICE ROBERTS: Well, but what --
18 what if there's an acquittal? Then you have at least a
19 jury not believing the evidence, and that also is strong
20 support for at least supporting an allegation. He
21 fabricated it; nobody believed it when it was presented
22 at trial.

23 MR. CLEMENT: Well, two things, Your Honor.
24 One is obviously without the fabrication allegations
25 that take place during the investigatory stage, you

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1 would be protected by Imbler.

2 Now, in the acquittal situations, this Court
3 doesn't have a case directly on point. But if I read
4 the Hartman decision, for example, Hartman v. Moore,
5 and apply it to this context, I assume that in the
6 context of an acquittal if you tried to bring a claim
7 like this, this Court would interpret through the common
8 law the -- a malicious prosecution type element that you
9 would have to satisfy.

10 JUSTICE ALITO: Why is it difficult to
11 allege fabrication? The -- the allegation is that at
12 point A this witness denied that the defendant did
13 anything wrong, and then at point B the defendant told
14 an entirely different story after having received from
15 the government a plea deal that promises no prosecution
16 and entry into the witness protection program or
17 something like that. That certainly is sufficient
18 evidence to -- of fabrication, is it not?

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

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

24 JUSTICE SCALIA: I don't know what you mean
25 by that.

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1 MR. CLEMENT: In -- in the typical case,
2 if -- if the witness perhaps in the first instance comes
3 up with one testimony and later comes up in -- with a
4 different story later, the question for purposes of
5 absolute immunity is going to be, did all of the conduct
6 that you're alleging, the fabrication, did all of it
7 take place before probable cause attached? And in a lot
8 of cases prosecutors don't even get involved until after
9 probable cause, until after there have been arrests,
10 something like that. And in those cases --

11 JUSTICE ALITO: That's an entirely false
12 picture of the way any sophisticated prosecution is
13 handled today, completely false. You want -- the
14 prosecutor may not know whether there's probable cause
15 until the prosecutor interviews the witness.

16 MR. CLEMENT: And, again --

17 JUSTICE ALITO: And so then you have to go
18 back and determine whether there was -- if there wasn't
19 probable cause before the interview, then there is
20 liability. But if there was probable cause before the
21 interview, then there isn't liability.

22 MR. CLEMENT: I think if I understand your
23 hypothetical, the question would actually be whether
24 there was probable cause before the re-interview,
25 because if at the point --

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

6 MR. CLEMENT: Well, two things, Justice
7 Alito. First of all, if you have all -- if you had the
8 interview and the re-interview before probable cause and
9 you have the allegations that it was done for the avowed
10 purpose of depriving the person of their liberty, then
11 you would, I think, apply Iqbal, and you would ask under
12 all the circumstances of that case whether it's a
13 plausible allegation.

14 And this Court is obviously in a better
15 position than I am to say how it would apply Iqbal in
16 those kind of cases. But what I can tell you is that
17 for nearly a decade the Second Circuit has had this
18 rule. Now, the Second Circuit is the circuit that
19 brought you Iqbal. So for that same decade they did not
20 have the rule of Iqbal, and yet they didn't have a
21 torrent of these claims.

22 So, I think going forward, if you recognize
23 these claims --

24 CHIEF JUSTICE ROBERTS: How -- how do you --
25 I mean, we hear that type of argument every time,

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1 because there is usually a circuit conflict here, and
2 you look at one circuit and say the world hasn't fallen.
3 But you have no idea how many of these claims are
4 asserted and dismissed at an early stage or -- or
5 whatever.

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

8 MR. CLEMENT: I think if you look at
9 reported, both unpublished and published Second Circuit
10 decisions at the district court level and the court of
11 appeals level, you would find very few cases that even
12 cite Zahrey. I think it's something like maybe 17 I
13 think is what we found.

14 CHIEF JUSTICE ROBERTS: Do you think there
15 will be -- do you think there will be more if we agree
16 with your theory?

17 MR. CLEMENT: In the Second Circuit? I
18 don't think so. I think it will be the same number in
19 the Second Circuit.

20 Now, in the Seventh Circuit that has lived
21 with the Buckley remand rule, I suppose there will now
22 be a couple of dozen cases there. But I do think it's
23 revealing that the circuit that has certainly the kind
24 of cases that Justice Alito was dealing with, has not
25 had a flood of these cases. As far as I'm aware, the

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1 U.S. attorney's offices in that circuit have not had to
2 rework the way they do business in those circuits, and I
3 do think that these are claims that are going to be
4 difficult to allege.

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

10 MR. CLEMENT: Well, Your Honor, we don't
11 know for sure. We don't know either way, because either
12 way this Court is going to adopt a clear rule. What I
13 can say is at least I'm pointing to empirical evidence
14 in a circuit that has lived with this rule for a decade.
15 That seems to me a better empirical basis to go on than
16 absolutely nothing.

17 But let me give you another example, which
18 is this Court a couple of years ago decided a decision
19 called *Hartman v. Moore*. *Hartman v. Moore* sort of
20 recognized that there was a tort called, I think,
21 retaliatory inducement to prosecute.

22 Now, in footnote 8 this Court recognized
23 that actually you could sue a prosecutor for retaliatory
24 inducement to prosecute if you focused on the
25 investigatory activities. That's exactly the same basic

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1 theory we have here, which is you focus on the
2 investigatory activities of a prosecutor and say that
3 there is a valid 1983 claim.

4 Now, again, to my knowledge there have not
5 been a flood of Hartman claims brought against
6 prosecutors. I think --

7 CHIEF JUSTICE ROBERTS: What -- what is the
8 basis for the 1983 claim without the submission at
9 trial?

10 MR. CLEMENT: Without the submission at
11 trial -- I mean, it would depend, I suppose, on the
12 circumstances. You could have, certainly, a Fourth
13 Amendment --

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

17 MR. CLEMENT: Well -- and then maybe I just
18 need a concrete hypothetical. Let's say -- let's say --
19 let me -- let me provide one. Suppose that there was
20 this -- the prosecutor put on this fabricated evidence
21 at trial, and then the -- the whole case sort of
22 unraveled because the system actually worked the way
23 it's supposed to. On cross-examination the witness
24 cracked and it became clear that there was this
25 conspiracy to use perjured evidence.

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1 Now, at that point -- I mean, I suppose the
2 government's theory would be because you never deprived
3 the person of their liberty, the knowing use by the
4 prosecutor of perjured testimony at trial does not
5 violate the due process clause.

6 But I hope that's not the rule. I mean, I
7 hope that in a Mooney case, if you bring the -- make a
8 Mooney violation against somebody who is actually
9 guilty, so you knowingly use perjured testimony against
10 somebody that's -- that's guilty, so if you did a
11 harmless error analysis, you would say, well, the use of
12 the perjured testimony really didn't deprive the person
13 of their liberty because they were otherwise --

14 JUSTICE KENNEDY: What's -- what's -- what's
15 your best authority for the proposition that there's
16 liability in the case the Chief Justice put? What's
17 your best case?

18 MR. CLEMENT: I -- I -- I'm not sure I have
19 a best case for that, Justice Kennedy. I mean, let
20 me -- let me give you what I think is a very good case
21 that illustrates a similar principle, but I -- I will --
22 I will be candid that I think this is an extrapolation
23 from Mooney, but a very sort of clear extrapolation from
24 Mooney.

25 My best case in some ways I think is Malley,

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1 because their proposition seems to be that -- this is
2 the other argument you have heard and rejected -- is
3 that if there's an absolutely immune act in the causal
4 chain, then that somehow means that there is no
5 violation.

6 Think about who was sued in the Malley. It
7 was the police officers. What did the police officers
8 do? They procured an invalid arrest warrant. Now, did
9 their actions independent of the absolute immune act of
10 the magistrate injure the plaintiffs? No. Without the
11 magistrate issuing the warrant, there was no arrest,
12 there's no search, there's no injury to the plaintiffs.

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

16 The lower court in Malley actually accepted
17 exactly this argument, that if you have any absolutely
18 immune act in the causal chain that breaks it off. This
19 Court rejected it and was frankly fairly dismissive,
20 dismissed it in the footnote, footnote 7 of the opinion.

21 JUSTICE KENNEDY: You will have to refresh
22 my memory. Wasn't that a Fourth Amendment violation
23 ultimately?

24 MR. CLEMENT: It was a Fourth Amendment
25 violation.

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1 JUSTICE KENNEDY: So that -- so that's
2 not --

3 MR. CLEMENT: No, I think it illustrates the
4 principle, which is you don't have to have a completed
5 constitutional violation in your 1983 action. I mean,
6 Malley illustrates that principle, but so does the text
7 of -- of section 1983, frankly. Section 1983 doesn't
8 force you to have a completed constitutional violation.
9 It provides liability if you subject someone to a
10 constitutional violation or cause them to be subjected
11 to a constitutional violation.

12 JUSTICE SCALIA: The difference here is that
13 the -- the absolutely immune act which follows the --
14 the unlawful act is -- is an absolutely immune act by
15 the very actor who performed the earlier act that --
16 that you say induces liability. And so the argument is,
17 what's the use of giving him liability later on if -- if
18 you can simply drag him into litigation by -- by
19 alleging that he at an earlier stage committed a
20 violation?

21 MR. CLEMENT: Well, the --

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

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1 MR. CLEMENT: Well --

2 JUSTICE STEVENS: That's the reason the rule
3 seems perverse.

4 MR. CLEMENT: What's that?

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

7 MR. CLEMENT: Well, I would ask -- I would
8 ask both of you to go back and read two things, and I
9 would particularly like Justice Scalia to go back and
10 read your separate opinion in Burns. Because in Burns
11 you confronted just this issue. You conceptualized what
12 happens at the warrant stage as a variant of malicious
13 prosecution and you said: Now, could a prosecutor, sort
14 of as kind of a complaining witness in that context,
15 procure a warrant that they were subsequently involved
16 in? And you said: I don't see any reason why not. I
17 think you got it right there.

18 The other thing I would ask you to look at
19 is footnote 8 of the Hartman v. Moore decision, because
20 there you were dealing with a retaliatory prosecution
21 claim. Now, the Court's opinion was very careful to
22 say, you know, it's really not a retaliation -- a
23 retaliatory prosecution claim; what it is is a
24 retaliatory inducement to prosecute case.

25 CHIEF JUSTICE ROBERTS: If you cannot rely

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1 on anything that goes on at the trial to establish the
2 due process violation, what do you rely on to establish
3 the violation?

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

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

8 MR. CLEMENT: Well, I guess what I would do,
9 Mr. Chief Justice, is try to take issue with your
10 premise, which is that we can't advert to the absolute
11 immune act at all. Of course we can. I mean, this
12 isn't --

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

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

25 This Court specifically confronted that in a

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1 case called Dennis v. Sparks that was with, you know,
2 the granddaddy of them all, judicial immunity, and said
3 even the judge's actions could be proved up as part of a
4 tort action. So there is no use immunity for --

5 CHIEF JUSTICE ROBERTS: Against -- against
6 the judge?

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

10 CHIEF JUSTICE ROBERTS: Well, that's the
11 distinction here in this case, isn't it?

12 MR. CLEMENT: Well, but -- but it's a
13 distinction without a difference. It's a distinction
14 this Court confronted in -- in Hartman in footnote 8.
15 It's a distinction Justice Scalia confronted. And also,
16 the consequences of accepting their view is to really
17 turn all of your absolute immunity cases into a fool's
18 errand.

19 I mean, think about Kalina. I mean, the
20 supporting affidavit wasn't the thing that inflicted
21 injury. Now, the thing that inflicted injury were the
22 two documents that the supporting affidavit supported,
23 the warrant and the information. Now, it would have
24 made no sense for this Court to say, well, there is only
25 qualified immunity for the supporting affidavit, so

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1 let's send this back to the lower court, if you couldn't
2 even get into evidence the fact that there was an
3 information or a warrant.

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

7 Or take a look at Burns, for example. In
8 Burns the prosecutor's advice to the police officer,
9 that's not what injured the plaintiff in that case. It
10 was the warrant that was eventually procured.

11 CHIEF JUSTICE ROBERTS: In terms of the
12 chilling impact on the prosecutor, what difference does
13 it make whether it's at trial or pretrial for use at
14 trial?

15 MR. CLEMENT: Well, I think it makes all the
16 difference in the world in the sense that if -- if they
17 know that everything they do at trial is going to be
18 protected, those functions, which is the basis of this
19 Court's functional approach to absolute immunity, are
20 going to be protected. Now, if they're going to be --

21 JUSTICE SCALIA: But it won't be protected.
22 They won't have that assurance, because when they --
23 when they produce evidence at trial, oh, yeah, I guess
24 the production at trial will be protected, but you're --
25 you're telling us that they can go back and say, ah, but

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1 you got that evidence in a bad manner, and therefore we
2 can sue you, not for introducing it at trial, but for
3 fabricating it before trial.

4 I -- I don't see that there is much of a
5 difference as far as the deterrent effect upon the
6 prosecutor is concerned.

7 MR. CLEMENT: Well, I think there is going
8 to be an effect on the deterrent effect on the
9 prosecutor pretrial, which is they will be procured. I
10 mean, think about the contrary incentive you're --
11 you're creating. Suppose you're a prosecutor. You've
12 participated in the misconduct before trial. You now
13 have the decision to make: Okay, I was -- I was
14 complicit in the fabrication of this perjured evidence;
15 should I put it on into evidence? Well, let's see. If
16 I don't put it on into evidence and I come clean now,
17 I'm actually liable for the arrest and all the pretrial
18 detention. If I actually introduce it into evidence
19 now, I'm scot-free.

20 JUSTICE BREYER: There's a different
21 tendency, which I would say this is a slight fluke, what
22 you're describing. I'm more worried about what Justice
23 Alito brought up, that, other things being equal, I
24 think it's probably a good thing to get prosecutors
25 involved in the questioning process. That -- that has a

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1 kind of check on the police.

2 And the concern I'd have is that the --this
3 will discourage the prosecutors from becoming involved
4 in the witness -- witness questioning process, at least
5 not before the police are well on the way. And that is
6 a very negative incentive, I would think.

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

11 MR. CLEMENT: Well --

12 JUSTICE BREYER: Or is there something -- I
13 mean, I can see Buckley with the, you know, probable
14 cause. It turns on and off as you're talking to the
15 witness. First what he says, you have the probable
16 cause; then you don't; then you do; then you don't. I
17 mean, I -- I'm not -- I just want you to give your best
18 thought to this problem and tell me what is the most
19 safe rule that will allow you to win your case?

20 MR. CLEMENT: Well, Justice Breyer, I mean,
21 I would say that there is no reason for this Court to
22 disturb the line it drew in Buckley. Now I could,
23 because of this case --

24 JUSTICE BREYER: We have amicus briefs here
25 that give us a lot of reason. They say -- they say it's

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1 very discouraging to, you know, AUSAs or DAs going in
2 and talking to the witnesses with the police.

3 MR. CLEMENT: Well --

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

6 MR. CLEMENT: Well, I mean, another thing
7 presumably, Justice Breyer, you want to encourage is
8 having the police officers come to the prosecutors and
9 get legal advice about what they're doing. And this
10 Court squarely confronted that question in Burns and
11 said the advice-giving function, which is a function
12 only a prosecutor, only a lawyer anyways, can perform --

13 JUSTICE KENNEDY: Well, could you answer
14 Justice Breyer's question, which I -- I think raises a
15 -- a critical point in terms of Justice Alito's examples
16 of talking to the witness. Why isn't that at some
17 point -- I think in Buckley, the "judicial phase." Why
18 is this the judicial phase?

19 MR. CLEMENT: Well, Justice Kennedy, let me
20 respond. Let me say why I don't think I can really
21 improve on the probable cause line. I mean, in this
22 case, the police officers and the prosecutors were
23 involved in this from the get-go.

24 JUSTICE KENNEDY: No, but probable cause
25 doesn't work because you have -- you have probable cause

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1 once you fabricate the evidence.

2 MR. CLEMENT: Well, I think --

3 JUSTICE KENNEDY: That's circular.

4 MR. CLEMENT: No, I don't think so. I think
5 for the purposes of evaluating when there's probable
6 cause, you have to eliminate the fabricated evidence,
7 and so I think that you evaluate probable cause, but
8 here's why I think it's the right line, Because think
9 about the prosecutor's special function.

10 If you don't have probable cause to arrest
11 any individual for a crime, then the function the police
12 officers ought to be performing is one of a
13 truth-seeking function and that is a classic police
14 investigatory function.

15 Now, the moment they have probable cause,
16 I'm willing to listen to the argument that at that point
17 they shift roles, and at that point they're not looking
18 at the evidence the way the police officer is, just to
19 find out whodunit; but they're looking at it to say,
20 well I have a job to do, I have to put a case on, and,
21 you know, this person says what they say, and, you know,
22 there's some problems with that and the jury's not going
23 to believe that, so let me talk to him some more.

24 That's why I think the probable cause line
25 is not only administrable, but it makes sense in this

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1 context.

2 JUSTICE KENNEDY: Suppose the prosecutor
3 isn't sure there's probable cause and he calls -- calls
4 in the accountant, the CFO, and really doesn't begin to
5 believe his story, so he starts probing and finally he
6 gets the CFO to change his story with the plea -- plea
7 bargain. Would that be part of the judicial process?
8 Or is that still clearly investigatory?

9 MR. CLEMENT: I think at the point -- if the
10 interview begins and he doesn't think he has probable
11 cause, I think that that --

12 JUSTICE KENNEDY: Well, he's trying to find
13 out. That's what --

14 MR. CLEMENT: Of course he is trying to find
15 out. But he's -- but he's not trying to find out if
16 there's probable cause necessarily to identify a
17 particular suspect. What he's trying to do, is there
18 probable cause to arrest anyone? And that's exactly the
19 question a police officer asks every single day.

20 JUSTICE BREYER: Well, also, you're making
21 me more worried because I think, if 85 percent of all
22 the defendants -- or 90 percent plead guilty, it might
23 be a highly desirable thing to get prosecutors involved
24 in the truth-discovering process, I mean, so that they
25 don't just see themselves as the job of -- well, we're

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1 going to take somebody, put them in jail.

2 Maybe -- maybe that's a reason for pushing
3 it back a little bit, this -- this line.

4 MR. CLEMENT: Well -- you know, I'm not sure
5 what the logical place to push it back any further is,
6 and I think -- you know --

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

10 MR. CLEMENT: Yes.

11 JUSTICE BREYER: Someone? So it's
12 someone -- needn't be the particular person they
13 eventually indict?

14 MR. CLEMENT: That's right.

15 JUSTICE BREYER: Uh-huh.

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

20 As a policy matter, sure, we want
21 prosecutors to get -- to give advice to police officers,
22 but qualified immunity is not insignificant protection,
23 and think about that, I mean, the incentives you're
24 creating for the same anomaly that the Court recognized
25 in Buckley. The incentive would really --

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

3 MR. CLEMENT: I just wanted to say the
4 incentive would really be perverse. Under Burns, if the
5 police -- if the police officer comes to the prosecutor
6 and says -- you know, we want to fabricate evidence to
7 frame it, can we do it? And the prosecutor says, yes,
8 you can do that, go ahead; there's qualified immunity.

9 Now, if the prosecutor says, go ahead and
10 let me help, there would somehow be absolute immunity.
11 I mean, that is really an anomalous result, that it's
12 the n anomaly that caused this Court in Buckley to draw
13 the line at probable cause.

14 CHIEF JUSTICE ROBERTS: I was going to
15 suggest in response to your point that -- you know,
16 qualified immunity is really significant. Of course, it
17 is, but we've recognized, in a number of contexts, in
18 the judicial area, for example, that it's -- it's not
19 enough.

20 We have also recognized that in the
21 prosecutorial area, and trying to draw the line where
22 you do -- I think this was one of the points Justice
23 Alito was making, is that, sometimes, you're
24 investigating and preparing your case at the same time.

25 You don't just sit back and say, I'm -- I'm

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1 just going to look and see what I can find. You have
2 particular areas. The prosecution requires you to show
3 four things, So you are looking at those four things.
4 You are preparing your case, and you're investigating.

5 MR. CLEMENT: And, again, the Court
6 addressed exactly this Court in the -- exactly that
7 issue in the Buckley decision and said, sure -- you
8 know, from -- with the benefit of hindsight, you can
9 sort of retrospectively look and make anything in the
10 investigatory stage part of -- and part and parcel of
11 the prosecution.

12 And I don't think that was something that
13 this Court saw as a reason not to draw a clean line
14 that's consistent with the functional approach. It's
15 consistent, not just with Buckley, but with Burns and
16 with Kalina and with a whole host of this Court's
17 decisions.

18 JUSTICE ALITO: In -- in answer to Justice
19 Breyer's question, would -- would it be a -- would it be
20 practical and conceptually correct to draw the line at
21 the stage at which the prosecutor is interviewing
22 witnesses to evaluate credibility?

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

25 MR. CLEMENT: Well, if I could add, I mean,

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1 I suppose I might be able --

2 JUSTICE ALITO: Not on whether there is
3 probable cause because probable cause is -- is
4 evanescent. It comes, and it goes. It is -- it is --
5 it is inextricably intertwined with what the prosecutor
6 is doing in questioning the witness.

7 MR. CLEMENT: And let me say this: If I
8 could add a couple of words, I think we could probably
9 live with that line, which is, if the prosecutor is
10 interviewing those witnesses with an eye towards
11 credibility for use at trial, I mean, that's a line
12 that, I think, would be, I think, probably pretty
13 consistent with probable cause, but something that we
14 could live with, but --

15 JUSTICE ALITO: But with a line toward
16 investigating credibility for use at a trial, which
17 is -- which is, at that point, foreordained, but, if the
18 evaluation is being done for the purpose of determining
19 whether there should be a trial, then, no. That's your
20 answer?

21 MR. CLEMENT: Well, I mean, I worry that
22 words are being put in my mouth. I would say that, if
23 the prosecutor is interviewing the witness for the
24 purpose of judging their credibility at trial, then
25 that's something for which you may be able to sort of

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1 tweak the line on Buckley and say that's covered.

2 I actually think it won't make any
3 difference because I think that should only be happening
4 after probable cause. If I could --

5 CHIEF JUSTICE ROBERTS: Well, your approach,
6 then, encourages prosecutors to be trigger happy.
7 They're prosecuting right now because they know, then,
8 that everything else, they have absolute immunity, so --
9 you know, shoot first and ask questions later.

10 MR. CLEMENT: Well, shoot first -- you mean
11 go to an impartial magistrate and try to get somebody
12 arrested or --

13 CHIEF JUSTICE ROBERTS: No, just begin the
14 formulation. I'm -- I'm starting to prosecute this
15 person, rather than saying, let's look, let's
16 investigate, let's interview, and then decide who we're
17 going to prosecute.

18 MR. CLEMENT: Well, I suppose --

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

24 MR. CLEMENT: Well, if you have probable
25 cause, then I think you're on the other side of the

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1 Buckley line, and that's an objective determination, and
2 I think --

3 CHIEF JUSTICE ROBERTS: So you've got --
4 you've got to make that decision early in the process,
5 rather than later.

6 MR. CLEMENT: Well, I think it's -- I'm not
7 sure it's a decision you have to make. I think it's
8 actually something that would be evaluated objectively
9 after the fact, and I think the way that this Court
10 should approach this case is neither of the parties
11 before you have asked this Court to overturn Buckley.

12 I wouldn't do it under those circumstances,
13 but, of course, it's worth adding that, if you were
14 going to overturn Buckley, then the place to probably
15 start would be to go back to first principles, and if
16 you're going to go back to first principles, then what
17 you're going to find is that there was no common law
18 support at all for absolute immunity.

19 And I wouldn't think that this Court was
20 particularly interested in coming up with implied
21 immunities that aren't in the statute and had no basis
22 at the common law, and that's why I think some of the
23 Justices that have looked at this as an original matter
24 have tended to be quite reluctant in recognizing
25 absolute immunity because it lacks support in the text

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1 and it lacks support at the common law.

2 So we're -- we're happy with the lines that
3 this Court has already drawn. But if the Court's going
4 to go back to first principles, well, let's go back to
5 first principles and look at -- the at the statute
6 Congress passed in 1871.

7 That statute did not provide any immunities,
8 and I do think, as we say in the brief, this is a case
9 where it's important not to lose the forest for the
10 trees because this is a statute was passed -- passed in
11 1871. This is one of the great civil rights statutes.

12 Is it really plausible to think that the
13 Congress that passed this statute didn't want to provide
14 a remedy in the circumstances before the Court today? I
15 think it's clear, from this Court's cases -- there may
16 not be a case that lines up all the dots exactly, but I
17 think it's clear, from this Court's cases, that the
18 police officer that engages in this misconduct has
19 committed a grave, grave constitutional violation and
20 ought to be liable.

21 I think the prosecutor who engages in the
22 pretrial misconduct and then doesn't participate in the
23 trial is just as liable as that police officer, and I
24 can't think of a single reason why the only reason a
25 prosecutor would get absolute immunity is, if they not

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1 only participated in the pretrial misconduct, but
2 completed the scheme by committing further misconduct at
3 trial.

4 For all those reasons, we think the Court
5 should affirm. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 Mr. Clement.

8 Mr. Sanders, you have five -- five minutes
9 remaining.

10 REBUTTAL ARGUMENT OF STEPHEN SANDERS

11 ON BEHALF OF THE PETITIONERS

12 MR. SANDERS: Thank you, Mr. Chief Justice.
13 We have four main points.

14 Beginning with the Second Circuit's decision
15 in Zahrey and subsequent cases in the Second Circuit,
16 have significantly cut back on the meaning of Zahrey.
17 The Wray decision, which we discussed in our reply
18 brief, the Gonzalez decision, which we discussed in our
19 opening brief, have not allowed for this kind of
20 continuous liability for a prosecutor.

21 They have made very clear, particularly the
22 Gonzalez decision, that when it is a prosecutor's
23 actions before a judge advocating on behalf of the
24 State, that are responsible for a deprivation of
25 liberty, in that situation, absolute immunity applies.

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1 I think it's important to understand the
2 consequences --

3 JUSTICE SCALIA: What -- what does that
4 prove? What does that prove? I don't understand why
5 you bring that up because it shows that the fact that
6 there aren't many cases, only 17 in the -- in the Second
7 Circuit, it doesn't mean anything because the Second
8 Circuit is not applying as liberal a rule as your
9 opponent suggests.

10 Is that --

11 MR. SANDERS: No, Your Honor. I think it's
12 to -- I think it's to say that the Zahrey decision has
13 not had the kind of impact and has not been applied in a
14 way that respondents are asking for it to be applied.

15 JUSTICE SCALIA: Yes. That's -- that's just
16 what I said, and, therefore -- and had it been applied
17 that way, there would have been more than 17 cases in
18 the Second Circuit.

19 MR. SANDERS: I'm not sure I understand the
20 question.

21 JUSTICE SCALIA: Okay.

22 MR. SANDERS: The -- I think it's important
23 to understand the consequences of affirming the courts
24 below, either on the basis of the Zahrey theory or on
25 the freestanding due process theory offered by

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1 respondents.

2 It would work a radical change in the law of
3 immunity because it would mean that far more wrongful
4 conviction claims against prosecutors would go forward
5 under only qualified immunity.

6 That is the inevitable consequence of
7 affirming the courts below in this case. These cases
8 are not difficult, as Justice Alito said, to plead,
9 particularly because, in most of these sorts of cases,
10 most of the discovery will have been done during the
11 post-conviction review process.

12 And so there will be plenty of -- plenty of
13 grounds for a plaintiff to allege a plausible violation
14 during the investigative process and survive a motion to
15 dismiss or survive summary judgment, even if,
16 ultimately, that comes to nothing, the consequence would
17 be to hold prosecutors to inconsistent standards of
18 liability, qualified immunity or absolute immunity,
19 based simply on the allegations in a complaint,
20 something this Court has specifically said is -- is not
21 appropriate and should not be --

22 JUSTICE GINSBURG: I want, before you're
23 finished, to get a clear picture of your view of the
24 dimensions of the claim because you rely heavily on the
25 trial part. Everything proceeds as it was alleged to

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1 have proceeded in this case, except that just before the
2 trial begins, Harris comes forward and said it was all a
3 pack of lies, and so there is no trial.

4 MR. SANDERS: Uh-huh.

5 JUSTICE GINSBURG: Is anyone in this picture
6 liable? The defendants have been incarcerated for some
7 time, but when it blows up, they're let out. No trial,
8 but everything else, the same.

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

21 JUSTICE GINSBURG: You said -- I think your
22 position is that due process begins when trial is
23 underway, and before that due process doesn't enter the
24 picture?

25 MR. SANDERS: Your Honor, I believe that

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1 this Court's decisions make clear that due process
2 applies to the judicial process; that is, the filing of
3 charges and the later conduct of the prosecuting --

4 JUSTICE STEVENS: Yes, but what about the
5 pretrial detention? Isn't that a deprivation of
6 liberty?

7 MR. SANDERS: Your Honor, it would be, but
8 that would be Fourth Amendment territory.

9 JUSTICE STEVENS: Why would it be Fourth
10 Amendment? Why isn't it Fourteenth Amendment right on
11 the nose? They're deprived of liberty without due
12 process of law.

13 MR. SANDERS: Your Honor, this Court --
14 seven justices in this Court's decision in Albright
15 agreed that there was no due process cause of action for
16 the wrongful institution of criminal proceedings, that
17 in that case there may be some sort of Fourth Amendment
18 claim. There may be some sort of State law claim under
19 Parrot v. Taylor, but I have not --

20 JUSTICE STEVENS: But that case talked about
21 the institution of prosecution, not the deprivation of
22 liberty during pretrial detention, which is a different
23 matter.

24 MR. SANDERS: Your Honor, I believe the
25 Court's Fourth Amendment jurisprudence would still

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1 indicate that that is a concern of the Fourth Amendment,
2 not the Due Process Clause, and that pursuant to Paul v.
3 Davis and Parrot v. Taylor, there may indeed be some
4 sort of State law cause of action for defamation or loss
5 of status, but that there is no support for a Federal
6 due process claim.

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
8 Counsel. The case is submitted.

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

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