No. 10-788

In the Supreme Court of the United States

CHARLES A. REHBERG, PETITIONER

v.

JAMES P. PAULK, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

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QUESTION PRESENTED

Whether a government official may be held liable in a civil damages action for testimony before a grand jury.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the circumstances in which federal officers can be liable in civil actions for violations of constitutional rights. Although this case involves a claim against state officials under 42 U.S.C. 1983, this Court has invoked its Section 1983 jurisprudence in cases involving the implied cause of action against federal officers for the deprivation of constitutional rights, recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See, *e.g.*, *Antoine* v. *Byers & Anderson, Inc.*, 508 U.S. 429, 433 n.5 (1993).

STATEMENT

1. In 2003 and 2004, petitioner sent a series of anonymous faxes criticizing the management of a hospital in Albany, Georgia. In response, and allegedly as a favor to the hospital's politically connected management, respondents Kenneth Hodges (the Dougherty County, Georgia, District Attorney) and James Paulk (his chief investigator) launched a criminal investigation of petitioner. Hodges eventually recused himself and appointed a special prosecutor, respondent Kelly Burke (an Assistant District Attorney), but Hodges allegedly remained involved in the investigation. Pet. App. 3a-4a.

In December 2005, a grand jury in Dougherty County indicted petitioner for aggravated assault, burglary, and six counts of harassing phone calls. Pet. App. 4a. The indictment alleged that petitioner had assaulted Dr. James Hotz (a hospital physician) "after unlawfully entering Dr. Hotz's home." *Ibid.* Paulk was the only witness who testified before the grand jury. Paulk later admitted that he "never interviewed any witnesses or gathered evidence indicating [petitioner] committed an aggravated assault or burglary." *Id.* at 4a-5a. In fact, Dr. Hotz had not even reported an assault or a burglary. *Id.* at 5a. Moreover, the charges of "'harassing' phone calls to Dr. Hotz all were related to the faxes Rehberg had already sent criticizing the hospital." *Ibid.* Petitioner challenged the sufficiency of the indictment, and the special prosecutor dismissed it. *Ibid.*

In February 2006, the grand jury indicted petitioner again, charging him with assault and five counts of "harassing phone calls." Pet. App. 5a. This time both Paulk and Dr. Hotz testified. Once again petitioner challenged the sufficiency of the indictment, and it was eventually dismissed. *Ibid.*

Petitioner was indicted for a third time in March 2006, just two weeks after the second indictment was returned (and months before that indictment was dismissed). The charges were simple assault and harassing telephone calls. Petitioner was arrested and briefly detained following the return of the second and third indictments. Pet. App. 6a. The court ultimately dismissed the third indictment. *Ibid.*

2. Petitioner sued Paulk, Hodges, Burke, and Dougherty County under 42 U.S.C. 1983, alleging malicious prosecution (Paulk and Hodges); retaliatory prosecution (Paulk and Hodges); fabrication of evidence, calling a witness to give false testimony, and giving false statements to the media (Burke); and conspiracy to violate Rehberg's First, Fourth, and Fourteenth Amendment rights (Paulk, Burke, and Hodges). He also asserted state-law claims and claims against Dougherty County. Pet. App. 6a-7a. The district court dismissed the county from the suit but denied motions to dismiss filed by the individual defendants. *Id.* at 81a-108a.

3. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-44a. As relevant here, the court held that Paulk and Hodges were entitled to absolute immunity from petitioner's malicious-prosecution claim insofar as the claim rested on Paulk's perjured grand jury testimony. *Id.* at 12a-14a. The court relied on *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), in which this Court held that a police officer was entitled to absolute immunity from a civil damages action arising out of his allegedly false trial testimony, as well as circuit precedent applying *Briscoe*'s rule of absolute immunity to grand jury testimony. Pet. App. 12a. The court acknowledged petitioner's allegation that Paulk "was the sole 'complaining witness' before the grand jury," but

declined to "carv[e] out an exception to absolute immunity for grand jury testimony, even if false and even if [the detective] were construed to be a complaining witness." *Id.* at 13a (quoting *Jones* v. *Cannon*, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999). The court explained that "allowing civil suits for false grand jury testimony would result in depositions, emasculate the confidential nature of grand jury testimony, and eviscerate the traditional absolute immunity for witness testimony in judicial proceedings." *Ibid.*

In light of Paulk's testimonial immunity, the court of appeals held that both Hodges and Paulk were absolutely immune from liability for their alleged pre-indictment conspiracy to fabricate Paulk's false testimony. Pet. App. 15a-18a. The court explained that to allow liability to be based on conspiracy allegations "would be to permit through the back door what is prohibited through the front." *Id.* at 16a (quoting *Jones,* 174 F.3d at 1289).

The court of appeals also ordered the dismissal of petitioner's other claims, except for petitioner's retaliatory-prosecution claim against Paulk. Pet. App. 44a; *id.* at 34a.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that a government official who testifies as a witness in ongoing judicial proceedings, including before a grand jury, is entitled to absolute immunity from civil damages actions based on his testimony. An official is not, however, absolutely immune for other acts that cause criminal proceedings to be initiated.

A. This Court has interpreted 42 U.S.C. 1983 "in harmony with general principles of tort immunities and

defenses," including the common-law immunity of certain government officials from civil damages actions arising out of their official conduct. *Imbler* v. *Pachtman*, 424 U.S. 409, 418 (1976). The Court has adopted a functional approach under which absolute immunity protects public officials from liability for tasks "intimately associated with the judicial phase of the criminal process." *Id.* at 430. Following that functional approach in *Briscoe* v. *LaHue*, 460 U.S. 325 (1983), the Court held that official witnesses at a criminal trial are absolutely immune from civil damages actions based on their testimony.

B. Although the Court in *Briscoe* had no occasion to consider the immunity of grand jury witnesses, the considerations underlying its rule of absolute witness immunity are fully applicable in the grand jury context. Just as at trial, a grand jury witness who fears future litigation might be "reluctant to come forward to testify" or "might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence." *Briscoe*, 460 U.S. at 333. A rule that extends absolute immunity to grand jury witnesses is, moreover, consistent with other applications of the Court's functional analysis, under which immunity attaches to many participants in pretrial judicial proceedings, including prosecutors and the grand jurors themselves.

C. Petitioner urges this Court to create an exception to the rule of absolute witness immunity for those grand jury witnesses who might be called "complaining witnesses." Petitioner borrows the term from *Malley* v. *Briggs*, 475 U.S. 335 (1986), in which the Court held that an officer who procures proceedings against a defendant

by submitting an affidavit in support of a request for an arrest warrant is not absolutely immune from a civil damages action. But the Court in *Malley* used the term "complaining witness" to describe a person "who procured the issuance of an arrest warrant by submitting a complaint," not a person who gave testimony in judicial proceedings. *Id.* at 340. Under *Malley*, a person who initiates or procures a prosecution may be liable in a common-law action for malicious prosecution, or in a Section 1983 action for a constitutional claim analogous to malicious prosecution, whether or not he is a "witness" before the grand jury or at trial. But *Malley* does not suggest that liability may be based on testimony given in ongoing judicial proceedings, including before a grand jury. The result in *Malley* reflects a functional distinction between accusations offered during an ongoing judicial proceeding, which are subject to absolute immunity, and accusations made to initiate such a proceeding, which are not.

Petitioner's proposed "complaining witness" exception could well extend beyond the subset of witnesses who might be considered "complaining witnesses," or even beyond those who testify in grand jury proceedings. And even if it could be limited to the grand jury context, a "complaining witness" exception would embroil courts in unavoidably imprecise calculations about whether a particular witness's testimony could be said to have been the primary, or at least a sufficient, cause of the grand jury's decision to return the indictment. By contrast, a rule of absolute immunity for grand jury witness testimony eliminates any need for courts to probe the decisionmaking processes of the grand jury, as well as the risk that witnesses will shade their testimony for fear of monetary liability.

D. Although this Court has not strictly adhered to the common law of official immunities, application of the Court's functional analysis in this context yields results similar to those that would have obtained at common law. At common law, witnesses enjoyed absolute immunity from defamation actions, but there was no immunity from malicious-prosecution actions. In nearly all of the cases in which the common law would have permitted a malicious-prosecution action, the plaintiff will be able to identify some non-testimonial act of initiation or procurement that can serve as a basis for liability.

E. Under a proper application of this Court's immunity analysis, a defendant has no absolute immunity for procuring or inducing a malicious prosecution, so long as the alleged means of procurement or inducement was not testimony in a judicial proceeding. Because the court of appeals did not apply that test, this Court should remand to permit that court to determine, in the first instance, whether petitioner's complaint adequately states a claim.

ARGUMENT

GRAND JURY WITNESSES ARE ABSOLUTELY IMMUNE FROM CIVIL DAMAGES ACTIONS BASED ON THEIR TESTIMONY

A. Public Officials Are Entitled To Absolute Immunity From Civil Damages Actions When Performing Functions Intimately Associated With The Judicial Process

1. Section 1983 of Title 42, United States Code, creates a private cause of action against "[e]very person" who, under color of state law, deprives another "of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. Even though the statute "on its face admits of no immunities," this Court

has held that Section 1983 must "be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler* v. *Pachtman*, 424 U.S. 409, 417-418 (1976). The Court has accordingly "concluded that immunities 'well grounded in history and reason'" were not "abrogated 'by covert inclusion in the general language' of [Section] 1983," *id.* at 418 (quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 376 (1951)).

In determining whether a government official is protected by absolute immunity or qualified immunity in a Section 1983 action, the Court conducts "a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler*, 424 U.S. at 421. The Court employs a "functional" approach that "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 269 (1993) (quoting *Forrester* v. *White*, 484 U.S. 219, 229 (1988)).

2. Under the Court's functional approach, officials who would have received absolute immunity at common law, such as judges and legislators, continue to receive absolute immunity from Section 1983 actions arising from performance of their duties. *Pierson* v. *Ray*, 386 U.S. 547, 554-555 (1967) (judges entitled to absolute immunity for acts within their jurisdiction); *Tenney*, 341 U.S. at 372-375 (legislators entitled to absolute immunity for their legislative activities). In addition, the Court has recognized "that some officials perform 'special functions' which, because of their similarity to functions that would have been immune when Congress enacted [Section] 1983, deserve absolute protection from damages liability." *Buckley*, 509 U.S. at 268-269 (quot-

ing *Butz* v. *Economou*, 438 U.S. 478, 508 (1978)); see *Kalina* v. *Fletcher*, 522 U.S. 118, 131-133 (1997) (Scalia, J., concurring) (discussing differences between Court's functional approach and common-law immunity rules). In particular, the Court has concluded that absolute immunity shields public officials who perform tasks "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430.

This Court has consistently accorded absolute immunity to persons performing such functions, even in the absence of a precise "parallel immunity at common law." Pet. Br. 12. For example, grand jurors, who perform a "quasi-judicial" function, are entitled to absolute immunity, *Imbler*, 424 U.S. at 423 n.20, even though quasi-judicial officers received only a qualified immunity at common law, see *Burns* v. *Reed*, 500 U.S. 478, 500 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part). The same is true of hearing examiners and administrative law judges, who had no precise common-law analogues. *Butz*, 438 U.S. at 513. Likewise, prosecutors are protected by absolute immunity whenever they are performing "the traditional functions of an advocate," *Kalina*, 522 U.S. at 131, including initiating a prosecution, *Imbler*, 424 U.S. at 431; presenting the government's case, *ibid.*; participating in a probable-cause hearing, *Burns*, 500 U.S. at 487; or managing a trial-related information system, *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855, 864 (2009). That is so even though the "common-law tradition of prosecutorial immunity * * * developed much later than 1871," when Section 1983 was enacted. *Burns*, 500 U.S. at 505 (Scalia, J., concurring in the judgment in part and dissenting in part); see *Kalina*, 522 U.S. at 124 n.11 (noting that the Court's prosecutorial-immunity jurisprudence

has been drawn both from post-1871 cases and, "perhaps more importantly, from the policy considerations underlying the firmly established common-law rules providing absolute immunity for judges and jurors"). Finally, and of particular relevance here, trial witnesses are entitled to absolute immunity from all civil damages actions based on their testimony, even though the common-law immunity of witnesses applied only in defamation actions. *Briscoe* v. *LaHue*, 460 U.S. 325, 332 (1983); see *id.* at 350-351 (Marshall, J., dissenting); pp. 24-26, *infra*.

On the other hand, when officials perform functions "further removed from the judicial phase of criminal proceedings," they are entitled only to qualified immunity. *Malley*, 475 U.S. at 342. Thus, judges lack absolute immunity from suits based on actions that are not taken in their judicial capacity, such as decisions to demote or fire an employee. *Forrester*, 484 U.S. at 229-230. Prosecutors, too, enjoy only qualified immunity for investigative and administrative acts, such as attesting to affidavits in support of arrest warrants, *Kalina*, 522 U.S. at 130-131; developing evidence during a police investigation, *Buckley*, 509 U.S. at 272-276; making statements at a press conference, *id.* at 276-278; or giving legal advice to police officers, *Burns*, 500 U.S. at 489-490.

3. This Court has "interpreted § 1983 to give absolute immunity to functions 'intimately associated with the judicial phase of the criminal process,' not from an exaggerated esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." *Malley* v. *Briggs*, 475 U.S. 335, 342 (1986) (citation and emphasis omitted). The Court has recognized that, in the absence of immu-

nity, the threat of "harassment by unfounded litigation" could cause judges and prosecutors to "shade [their] decisions instead of exercising the independence of judgment required by [their] public trust." *Imbler*, 424 U.S. at 423.

Similarly, in extending absolute immunity to a police officer accused of giving false trial testimony in *Briscoe*, the Court explained that a contrary rule might make witnesses "reluctant to come forward to testify" or "distort[]" their testimony for "fear of subsequent liability." *Briscoe*, 460 U.S. at 333; see *ibid.* ("A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective, and undistorted evidence."). Furthermore, "[s]ubjecting government officials, such as police officers, to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties," particularly since "[p]olice officers testify in scores of cases every year, and defendants often will transform resentment at being convicted into allegations of perjury by the State's official witnesses." *Id.* at 343. Although the Court recognized that "absolute witness immunity bars another possible path to recovery" for criminal defendants injured by a police officer's perjury, "the alternative of limiting the official's immunity would disserve the broader public interest." *Id.* at 345.

B. Under This Court's Functional Analysis, Grand Jury Witnesses Enjoy Absolute Immunity From Civil Damages Actions Based On Their Testimony

The Court in *Briscoe* had no occasion to consider whether the absolute immunity that attaches to trial testimony similarly attaches to testimony in pretrial proceedings. 460 U.S. at 329 n.5. In the wake of *Briscoe*, however, nearly every court of appeals to consider the question has "afforded absolute immunity to witnesses * * * for their allegedly perjurious testimony at various types of pretrial proceedings," including grand jury proceedings. *Curtis* v. *Bembenek*, 48 F.3d 281, 284 (7th Cir. 1995); accord, *e.g.*, *Lyles* v. *Sparks*, 79 F.3d 372, 378 (4th Cir. 1996); *Strength* v. *Hubert*, 854 F.2d 421, 423-425 (11th Cir. 1988); *Williams* v. *Hepting*, 844 F.2d 138, 142 (3d Cir. 1988); *Little* v. *City of Seattle*, 863 F.2d 681, 684 (9th Cir. 1988); *Macko* v. *Byron*, 760 F.2d 95, 97 (6th Cir. 1985); *San Filippo* v. *U.S. Trust Co. of N.Y., Inc.*, 737 F.2d 246, 254 (2d Cir. 1984); *Briggs* v. *Goodwin*, 712 F.2d 1444, 1448-1449 (D.C. Cir. 1983). But see *Keko* v. *Hingle*, 318 F.3d 639, 643 & n.6 (5th Cir. 2003) (recognizing a contrary rule for probable-cause hearings, while leaving open the possibility that immunity might attach in grand jury proceedings). That conclusion is consistent with the functional analysis applied in this Court's absolute-immunity cases.

1. The functional considerations underlying immunity for trial witnesses apply with equal force in the context of grand juries. "The grand jury has always occupied a high place as an instrument of justice in our system of criminal law—so much so that it is enshrined in the Constitution." *United States* v. *Sells Eng'g, Inc.*, 463 U.S. 418, 423 (1983). This Court has described grand jury proceedings as "judicial proceedings," *Uni-*

ted States v. *Mandujano*, 425 U.S. 564, 575-576 (1976), and it has held that grand jurors perform a "quasi-judicial" function by exercising "discretionary judgment on the basis of evidence presented to them." *Imbler*, 424 U.S. at 423 n.20.

In order to carry out their constitutionally assigned functions, grand juries have "a right to every man's evidence." *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972) (quoting *United States* v. *Bryan*, 339 U.S. 323, 331 (1950)); accord *United States* v. *Dionisio*, 410 U.S. 1, 9-10 (1973) (noting "the historically grounded obligation of every person to appear and give his evidence before the grand jury"); see *Branzburg*, 408 U.S. at 687 (grand juries enjoy "constitutional prerogatives * * * rooted in long centuries of Anglo-American history") (quoting *Hannah* v. *Larche*, 363 U.S. 420, 489-490 (1960) (Frankfurter, J., concurring in the judgment). Just as at a trial, the prospect of litigation might make potential witnesses reluctant to appear before a grand jury. See *Briscoe*, 460 U.S. at 333. And just as at a trial, "[a] witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps to pay damages, might be inclined" to shade his testimony in a manner that would "deprive the finder of fact of candid, objective, and undistorted evidence." *Ibid.*

Premising liability on grand jury testimony would also undermine the "long-established policy that maintains the secrecy of * * * grand jury proceedings." *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 681 (1958); see Fed. R. Crim. P. 6(e). This Court has "recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings," *Douglas Oil Co.* v. *Petrol Stops N.W.*, 441 U.S. 211, 218 (1979), and that "[t]he grand jury as a pub-

lic institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow," *Procter & Gamble*, 356 U.S. at 682. If statements by grand jury witnesses could provide a basis for civil liability, the litigation arising from such statements would inevitably compromise grand jury secrecy.

2. A rule that extends absolute immunity to grand jury witnesses is consistent with other applications of this Court's functional analysis, under which immunity attaches to many participants in pretrial judicial proceedings. For example, prosecutors are absolutely immune for initiating prosecutions, *Imbler*, 424 U.S. at 431, participating in probable-cause hearings, *Burns*, 500 U.S. at 492, and appearing before grand juries, *id.* at 490 n.6 (noting "widespread agreement among the Courts of Appeals"). Likewise, grand jurors themselves receive absolute immunity. *Cleavinger* v. *Saxner*, 474 U.S. 193, 200 (1985); *Imbler*, 424 U.S. at 423 n.20. Those rules make sense as part of a functional immunity analysis that is designed to safeguard a judicial process that begins long before trial. They also indicate that petitioner is incorrect to suggest that "the *Briscoe* Court's use of the terms 'judicial proceeding' and 'judicial process' must be understood as referring to criminal trials" and not pretrial proceedings. Pet. Br. 17 n.10 (quoting 460 U.S. at 334-335) (citation omitted).

This Court has, in fact, recognized that the functional considerations underlying *Briscoe* are implicated in pretrial proceedings. In *Burns*, the Court considered whether a prosecutor should receive absolute immunity for participation in a search-warrant hearing. 500 U.S. at 481. It described that issue as "similar to" the question in *Briscoe*, and it noted that the common-law immu-

nity recognized in that case "extended to 'any hearing before a tribunal which perform[ed] a judicial function.'" *Id.* at 490 (quoting William Prosser, *Law of Torts* § 94, at 826-827 (1941), and citing Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 487-488 (1909) (Veeder)). The Court cited its decision in *Yaselli* v. *Goff*, 275 U.S. 503 (1927) (per curiam), which summarily affirmed "a decision by the * * * Second Circuit in which that court had held that the common-law immunity extended to a prosecutor's conduct before a grand jury," *Burns*, 500 U.S. at 490; see *Yaselli* v. *Goff*, 12 F.2d 396, 401-402 (2d Cir. 1926) (prosecutor absolutely immune from a malicious-prosecution claim based on his participation in grand jury proceedings); see also Veeder, 9 Colum. L. Rev. at 488 n.78 (common-law testimonial immunity extended to "communications to a grand jury," whose proceedings "are unquestionably judicial in character").

3. Petitioner contends (Br. 24-26) that perjury before a grand jury is both harmful to those wrongly accused and subversive of the truth-seeking function of the judicial process. That is certainly true, but it is also true of perjury at trial, for which a witness is nevertheless entitled to absolute immunity. As the Court made clear in *Briscoe*, absolute immunity does not leave the public powerless to remedy such misconduct. A grand jury witness who gives false testimony remains liable to criminal prosecution for perjury. See, *e.g.*, 18 U.S.C. 1621; Ga. Code Ann. § 16-10-70 (2007). Moreover, "official witnesses may be punished criminally for willful deprivations of constitutional rights." *Briscoe*, 460 U.S. at 345 n.32 (citing 18 U.S.C. 242).

Emphasizing that grand jury proceedings are *ex parte*, petitioner also asserts (Br. 26) that, absent the

prospect of civil liability for at least some set of grand jury witnesses, "the distorting effects of false testimony before the grand jury could well go unchecked." Petitioner is correct (Br. 21) that grand jury proceedings do not afford defendants an opportunity to cross-examine witnesses or to put on their own evidence. But it is the role of the grand jurors themselves to act "as a primary security to the innocent against hasty, malicious and oppressive persecution." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962); accord *Branzburg*, 408 U.S. at 687 n.23. Moreover, proceedings before a grand jury are only the first stage in a judicial process that includes an adversarial trial. Cf. *Imbler*, 424 U.S. at 427 (noting, as one rationale for absolute prosecutorial immunity, the availability of "post-trial procedures * * * to determine whether an accused has received a fair trial").

It is true that, in some cases, absolute immunity might leave a defendant without effective redress against a grand jury witness who has given false testimony under oath. But immunity rules must take account of the interests of the judicial system as a whole. See *Briscoe*, 460 U.S. at 345. In the context of suits alleging that officials offered false trial testimony, "it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Ibid.* (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), cert. denied, 339 U.S. 949 (1950)). In that context, "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Id.* at 332-333 (quoting *Calkins* v. *Sumner*, 13 Wis. 193, 197 (1860)). That reasoning is equally applicable in

this context. A rule designed to ensnare only the dishonest grand jury witness will necessarily create uncertainty for every witness who testifies, thereby undermining the truth-seeking function of the grand jury.

C. Grand Jury Witnesses Enjoy Absolute Immunity For Their Testimony Even If They Can Also Be Described As "Complaining Witnesses"

Relying on this Court's decision in *Malley*, petitioner argues that, even if grand jury witnesses are ordinarily entitled to absolute immunity, a "complaining witness" is not. That argument, which rests on a misreading of *Malley*, cannot be squared with this Court's functional analysis and would produce intractable problems of administration.

1. In *Malley*, this Court held that a defendant police officer was not entitled to absolute immunity for presenting a judge with a criminal complaint and supporting affidavit in order to secure an arrest warrant. 475 U.S. at 339-345. In so holding, the Court rejected the officer's argument that he was entitled to absolute immunity because "his function in seeking an arrest warrant was similar to that of a complaining witness." *Id.* at 340. "The difficulty with this submission," the Court explained, "is that complaining witnesses were not absolutely immune at common law." *Ibid.* Rather, "the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause." *Id.* at 340-341. The Court similarly rejected the officer's other arguments for absolute immunity, concluding that, "[i]n the case of the officer applying for a warrant, * * * the

judicial process will on the whole benefit from a rule of qualified rather than absolute immunity." *Id.* at 343.

The Court in *Malley* created no exception to the rule of absolute witness immunity recognized in *Briscoe*. By using the term "complaining witness," *Malley* did not suggest that any witness who testified against a defendant could be sued by that person in a civil damages action based on his testimony. The Court instead used the term to describe a person "who procured the issuance of an arrest warrant by submitting a complaint." 475 U.S. at 340; see *Wyatt* v. *Cole*, 504 U.S. 158, 164-165 (1992) (a complaining witness "set[s] the wheels of government in motion by instigating a legal action"); see also *Van de Kamp*, 129 S. Ct. 861 (noting the absence of immunity "when a prosecutor acts as a complaining witness in support of a warrant application"); *Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part) (complaining witness was "the private party bringing the suit"). In other words, the "complaining witness" described by the Court in *Malley* was not a witness at all, in the sense of a person who provides testimony in a judicial proceeding. The use of the word "'witness' in 'complaining witness' is misleading," therefore, because at common law, "a 'complaining witness' could be sued for malicious prosecution whether or not he ever provided factual testimony, so long as he had a role in initiating or procuring the prosecution." *Kalina*, 522 U.S. at 135 (Scalia, J., concurring) (citation omitted); see Restatement (Second) of Torts § 653 cmt. c (1977) (Restatement) (describing "complaining witness[]" as a synonym for "private prosecutor," "complainant," or "accuser," with all of the terms meaning "a private person who initiates criminal proceedings").

Under *Malley*, a person who "procure[s]" the issuance of an indictment or otherwise "set[s]" the wheels of a prosecution in motion may be liable for malicious prosecution. 475 U.S. at 340; see Restatement § 653 (explaining that a person may be liable for malicious prosecution when he "initiates or procures the institution of criminal proceedings against another"); see also *Kalina*, 522 U.S. at 129, 130-131 (applying the rule of *Malley* to prosecutor's act of personally attesting to the truth of the facts set forth in a certification submitted as part of an application for an arrest warrant). That the person happens later to be a witness would not shield him from liability for any actionable harms associated with his earlier acts of procurement. But nothing in *Malley* or any of this Court's cases applying it suggests that witnesses may be held liable for words spoken on the stand.

2. Petitioner contends (Br. 23) that the logic of *Malley* nevertheless extends at least to those grand jury witnesses who can be described as "complaining witnesses"—*i.e.*, those witnesses who testify to "facts that 'set the wheels of government in motion.'" Pet. Br. 11 n.6 (quoting *Wyatt*, 504 U.S. at 164-165)). In his view, there is no reason to draw a distinction between an officer who procures proceedings against a defendant by submitting an affidavit in support of a request for an arrest warrant and an officer "whose grand jury testimony triggers the issuance of an indictment." *Id.* at 9.

This Court has, however, recognized a functional distinction between accusations offered during an ongoing judicial proceeding and accusations made in order to initiate such a proceeding. In *Malley*, the Court noted that the act of swearing out an affidavit in support of a request for an arrest warrant, "while a vital part of the administration of criminal justice," is "further removed

from the judicial phase of criminal proceedings" than are acts subject to immunity, such as a trial witness's testimony or a prosecutor's attempt to obtain an indictment. 475 U.S. at 342-343. The functional immunity of a testifying witnesses therefore does not attach to any person who unilaterally decides to make an accusation in the hopes of instigating a proceeding. *Ibid.*; see *Kalina*, 522 U.S. at 129-130. But where, as here, a prosecutor has decided to convene a grand jury—an act that is shielded by absolute immunity, *Malley*, 475 U.S. at 343—any testimony offered by the witness in the course of the ensuing grand jury proceeding is subject to the rule of absolute witness immunity recognized in *Briscoe*. See pp. 12-15, *supra*.

While it is true, as petitioner observes (Br. 23-24), that some States employ grand juries and others do not, it does not follow that application of the functional test for immunity will lead to arbitrary results. The test simply takes account of the reality that different functional considerations are present in the different regimes. Whereas "every consideration of public policy requires that [witnesses] should be as fearless in testifying as judge and jury are independent in weighing their testimony," the same considerations do not attach to "a voluntary affidavit made when no cause is pending." Veeder, 9 Colum. L. Rev. at 476, 477 n.41; see *Maloney* v. *Bartley*, 170 Eng. Rep. 1357, 1357-1358 (1812) (testimony or affidavits submitted "in the course of a judicial proceeding" were immunized from liability, whereas "voluntary and extrajudicial" affidavits were not). In both *Malley* and *Kalina*, it was the official himself who "set the wheels of government in motion by instigating a legal action." *Wyatt*, 504 U.S. at 164-165; see *Malley*, 475 U.S. at 337-338. When grand jury proceedings have

already begun, however, all persons summoned before the grand jury must be able to testify freely without fear of subsequent civil liability. An officer should not be put to the choice of subjecting himself to potentially harassing litigation or contempt.

3. In advocating a rule that would abrogate absolute witness immunity for the grand jury testimony of a "complaining witness," petitioner draws two distinctions that lack any basis in precedent or logic.

First, petitioner does not explain why, on his theory, liability would not attach to the testimony of *any* grand jury witness, whether a "complaining witness" or not. His arguments (Br. 25-26) based on the nonadversarial nature of grand jury proceedings are equally applicable to all grand jury witnesses. But as explained above, see p. 12, *supra*, there has long been general agreement that grand jury witnesses ordinarily enjoy absolute immunity from damages actions based on their testimony, and petitioner does not appear to take issue with that proposition.

Second, petitioner does not explain why, if he is correct, a "complaining witness" could not be sued for false statements made at trial, as well as before the grand jury. Indeed, petitioner cites, with apparent approval, a Ninth Circuit decision that has held just that. See Br. 27 n.17 (citing *Harris* v. *Roderick*, 126 F.3d 1189, 1199 (9th Cir. 1997), cert. denied, 522 U.S. 1115 (1998)); see also *Cervantes* v. *Jones*, 188 F.3d 805, 809 (7th Cir. 1999 (stating that the "complaining witness" exception extends to "trial and pretrial testimony"), overruled on other grounds, *Newsome* v. *McCabe*, 256 F.3d 747, 751 (7th Cir. 2001). A plaintiff could presumably allege that such a witness had "take[n] an active part in continuing or procuring the continuation of criminal proceedings"

and was therefore "subject to the same liability for malicious prosecution as if he had then initiated the proceedings." Restatement § 655. Indeed, in his petition, petitioner suggested that "the complaining witness exception * * * should not exclude grand jury *or other judicial testimony*." Pet. 24 (emphasis added). As petitioner now appears to recognize (Br. 16), however, that sweeping contention is contrary to *Briscoe*, which forbids civil suits based on the trial testimony of any witness. 460 U.S. at 326.

4. Petitioner's rule would also put courts in the difficult position of determining, on a case-by-case basis, whether a particular grand jury witness's testimony is sufficient to render him or her a "complaining witness." Although the inquiry may appear simple enough where, as here, the defendant was the only witness before the grand jury, see Pet. App. 83a, other cases will not be as straightforward. See, *e.g.*, *Keko*, 318 F.3d at 643 ("He may be a complaining witness; in any event, this case presents a question of fact as to the degree of his participation in the prosecution that, on this record, cannot be resolved on summary judgment."); *Anthony* v. *Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992) (remanding a case in which a grand jury witness asserted absolute immunity in order to determine whether the witness had been a "complaining witness"). To determine whether any particular witness "provide[d] the facts that 'set the wheels of government in motion by instigating a legal action,'" Pet. Br. 11 n.6 (citation omitted), would require unavoidably imprecise calculations about whether a particular witness's testimony was the primary—or perhaps even a sufficient—motivation for the grand jury to return an indictment. It would be difficult enough for courts to make that determination after the fact, but it

would often be impossible for a witness to determine, before testifying, whether he might ultimately be found to be a complaining witness. The resulting uncertainty would give every potential witness an incentive to engage in the kind of self-censorship that the Court in *Briscoe* sought to avoid.

5. Although a witness's testimony in the course of a judicial proceeding may supply "*evidence* of malice or initiation in [a] malicious prosecution suit," *Kalina*, 522 U.S. at 133 (Scalia, J., concurring), the Court's functional approach to witness immunity means that grand jury testimony cannot itself form the basis for civil damages liability. Nor, as most courts of appeals have correctly held, can an alleged conspiracy to present false grand jury testimony. See *Jones* v. *Cannon*, 174 F.3d 1271, 1288 (11th Cir. 1999) (collecting cases). A person may not be liable "for conspiring to commit an act that he may perform with impunity." *House* v. *Belford*, 956 F.2d 711, 720 (7th Cir. 1992).

Under the Court's functional approach, a plaintiff in petitioner's position must be able to point to some non-testimonial act of procurement in order to proceed. In fact, some of the cases on which petitioner relies involved just such non-testimonial acts. See Pet. Br. 26 n.17; *Anthony*, 955 F.2d at 1396 ("Anthony's malicious prosecution complaint challenges Baker's motivation and conduct in nearly all phases of the investigation and resulting criminal prosecution."). *Enlow* v. *Tishomingo County*, 962 F.2d 501, 511-512 (5th Cir. 1992) (noting "disputed factual issues * * * regarding the events that transpired prior to the grand jury testimony"). In a suit based on such an act, the inquiry will be whether the defendant "induc[ed]" the prosecutor to initiate the proceedings. Restatement § 653 cmt. d. Unlike the in-

quiry contemplated by petitioner, that inquiry will not require a court to probe the decisionmaking processes of the grand jury, nor will it run the risk of inducing grand jury witnesses to shade their testimony.

D. A Rule Of Absolute Immunity For Grand Jury Testimony Is Consistent With The Common Law

As explained above, this Court's functional analysis provides for immunity even in the absence of a precise common-law analogue. But see Pet. Br. 9 (asserting that "[t]he absence of immunity at common law is dispositive"). Indeed, "no analytical approach based upon 'functional analysis' can faithfully replicate the common law." *Kalina*, 522 U.S. at 135 (Scalia, J., concurring). Nevertheless, a proper application of the functional test closely approximates the results that would have obtained at common law.

1. Although *Malley* correctly described "the generally accepted" common-law rule that "one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause," 475 U.S. at 340-341, its statement that "complaining witnesses were not absolutely immune at common law," *id.* at 340, suggests a distinction between "witnesses" and "complaining witnesses" that "has little foundation in the common law of 1871." *Kalina*, 522 U.S. at 134 (Scalia, J., concurring). The common law in fact "did not recognize two kinds of witnesses; it recognized two different torts." *Ibid.* There was no special exception for "complaining witnesses"; instead, there was absolute immunity from defamation actions based on testimony, but there was no such immunity from malicious-prosecution actions.

At common law, no witness—including a grand jury witness—could be sued for defamation based on testimony given in a judicial proceeding. Thus, in *Rex* v. *Skinner*, 98 Eng. Rep. 529, 530 (K.B. 1772), Lord Mansfield declared that a judge could not be sued for comments made in a grand jury proceeding because "neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office." See *Lake* v. *King*, 85 Eng. Rep. 137, 139 (K.B. 1667).

Early American courts likewise recognized that grand jury testimony could not be a basis for civil liability in defamation actions. In *Kidder* v. *Parkhurst*, 85 Mass. 393 (1862), for example, the Supreme Judicial Court of Massachusetts held that accusations made by a witness to a grand jury "appear[ed] to have been made in the regular course of justice" and therefore were not actionable as libel. *Id.* at 396. Likewise, in *Hastings* v. *Lusk*, 22 Wend. 410 (1839), New York's highest court held that a defendant was immune from a suit alleging that he slandered the plaintiff when testifying before a magistrate, because "complaints made to grand juries and magistrates" may not form the basis of a defamation action, even if "express malice as well as the absolute falsity of the charge can be established by proof." *Id.* at 417; see *Schultz* v. *Strauss*, 106 N.W. 1066, 1067 (Wis. 1906) (common-law witness-immunity rule applied to grand jury proceedings, which "are unquestionably judicial in character"); *Sands* v. *Robison*, 20 Miss. (12 S. & M.) 704, 712 (1849) (reversing slander verdict against a justice of the peace who had testified in a grand jury proceeding because "[t]he occasion * * * on which the words were spoken furnishes a *prima facie* excuse for their having been spoken"); Veeder, 9 Colum. L. Rev at 487-488 & n.78 ("The rule [of immunity] ap-

plies to and includes every publication which constitutes a step in, or arises out of, a judicial proceeding," including "communications to a grand jury.").

Conversely, in a malicious-prosecution action, even someone who testified as a witness could be sued if the person had engaged in acts that "procured" an indictment without probable cause. See, *e.g.*, *Fitzjohn* v. *Mackinder*, 142 Eng. Rep. 199 (Exch. Chamber 1861); *Dennis* v. *Ryan*, 65 N.Y. 385 (1865). The key question in those cases was whether the defendant had "set the wheels of government in motion by instigating a legal action." *Wyatt*, 504 U.S. at 164-165; see *Malley*, 460 U.S. at 340-341.

2. Although the Court's functional analysis is not tort-based, in nearly every case involving grand jury testimony the result will be much the same as it would have been under common law. In most malicious-prosecution actions, a plaintiff will be able to point to some act aside from courtroom testimony that allegedly "procured" the arrest warrant. And a non-testimonial act that induces a prosecutor to "set the wheels of government in motion," *Wyatt*, 504 U.S. at 164, is not entitled to absolute immunity.

Thus, the outcome would be the same under the functional analysis as it was in common-law cases such as *Fitzjohn* and *Dennis*, which "permitt[ed] a plaintiff to recover in an action for malicious prosecution based *in part* upon the defendant's appearance before the grand jury." *White* v. *Frank*, 855 F.2d 956, 960 (2d Cir. 1988) (emphasis added). In both of those cases, the defendant in the malicious-prosecution action did much more than merely testify in a judicial proceeding. In *Fitzjohn*, the defendant in the malicious-prosecution suit had falsified a document, charged the plaintiff with perjury, and been

assigned to prosecute the case. 142 Eng. Rep. at 199-200. The court specifically rejected the suggestion that the effect of its decision was to make a malicious-prosecution action "maintainable in respect of the evidence given by the defendant before the grand jury," explaining that the action was instead based on non-testimonial acts of procurement: "A prosecutor might give no evidence at all, and every witness called speak the whole truth, and nothing but the truth, and yet the prosecution be malicious." *Id.* at 206 (opinion of Bramwell, B.); accord *id.* at 210 (opinion of Cockburn, C.J.) ("[T]his is neither in form nor substance an action in respect of the perjury committed by the defendant."). Likewise, in *Dennis*, the defendant had gone to the prosecutor and alleged that the plaintiff had altered a financial instrument. 65 N.Y. at 387 (emphasizing that the defendant "appeared before [the district attorney] and related his made-up and malicious story"). Thus, non-testimonial acts were a basis for liability in both cases, and absolute immunity would not have applied.

Petitioner asserts (Br. 15) that common-law "[c]ourts also entertained malicious prosecution suits against those who provided oral testimony to grand juries." But none of the cases he cites involved a claim based only on such testimony. In *Casperson* v. *Sproule*, 39 Mo. 39, 41-42 (1866), for example, the defendant "had falsely, maliciously, and without any reasonable and probable cause, charged plaintiff with the crime of embezzlement, and caused him to be arrested and taken before the recorder of St. Louis" long before he ever appeared in the grand jury. Similarly, in *Stewart* v. *Thompson*, 51 Pa. 158, 160 (1865), the defendant had presented the mayor of Pittsburgh with an information requesting "that a warrant may issue, and that the aforesaid defendants * * *

may be arrested and held to answer this charge of misdemeanor" before he brought the case to, and testified before, a grand jury. And in *Kidder*, the defendants had done more than testify: they had drawn up a criminal complaint alleging perjury, signed it, and presented it to other individuals who then joined in their allegations. 85 Mass. at 393. Those non-testimonial acts would have constituted initiation or procurement of a prosecution. Finally, petitioner cites (Br. 15) *Robertson* v. *Spring*, 16 La. Ann. 252 (1861), but in that case the court reversed a malicious-prosecution verdict on the ground that the defendant had not taken "any active part to bring about" the prosecution, *id.* at 252.

3. Under the functional analysis, a grand jury witness would be absolutely immune from malicious-prosecution liability only if his judicial testimony were the sole act alleged to have wrongfully "procured" an indictment. It is not clear that the common law would have permitted liability in those circumstances either. See, *e.g.*, *Perkins* v. *Mitchell*, 31 Barb. 461, 468 (N.Y. Gen. Term 1860) ("It is unquestionable that a person who institutes a groundless proceeding * * * is liable to an action for the injury he occasions," but "the action must be for the malicious complaint, indictment or action, *and not for the words*" (emphasis added)). But even if the common law did permit plaintiffs to proceed against witnesses for their words alone, a rule that distinguishes between testimony in the course of ongoing judicial proceedings and other, non-testimonial acts would represent only a modest divergence from the common-law rule—a divergence required by this Court's functional approach to witness immunity and by the paramount interest in protecting the grand jury process.

E. This Court Should Remand The Case So That The Lower Courts May Consider Whether Petitioner Has Stated A Malicious-Prosecution Claim Based On Conduct Other Than Paulk's Grand Jury Testimony

1. Under a proper application of this Court's immunity analysis, Paulk has qualified, rather than absolute, immunity for procuring or inducing a malicious prosecution, so long as the alleged means of procurement or inducement were acts other than grand jury testimony. Because the courts below did not analyze the issue in these terms, their opinions leave room for doubt as to whether petitioner has stated a claim based on non-testimonial acts.

The opinion of the court of appeals could be read to suggest that petitioner's malicious-prosecution claim is based entirely on Paulk's testimony before the grand jury. See, *e.g.*, Pet. App. 17a ("[T]he only evidence [petitioner] alleges was fabricated is Paulk's false grand jury testimony, for which Paulk receives absolute immunity."). Petitioner, however, contended otherwise in his appellate brief. See Pet. C.A. Br. 18-23; *id.* at 18 ("Even if Paulk is entitled to absolute immunity with regard to his grand jury testimony, * * * [e]very count asserted against Paulk is based on more misconduct than simply his fraudulent grand jury testimony."). Portions of petitioner's complaint suggest that petitioner alleged other, non-testimonial acts that might provide a basis for liability. See, *e.g.*, J.A. 28 (alleging that Paulk "actively instigated or encouraged the prosecution" of petitioner); J.A. 29 (alleging that Hodges and Paulk "set a series of acts in motion which they knew or reasonably should have known would cause violations of [petitioner's] constitutional rights"); see also Pet. App. 31a, 33a (holding that

"very detailed" allegations supporting petitioner's retaliatory investigation claim sufficiently alleged that a "'non-prosecuting official' * * * successfully induced the prosecutor to bring charges that would not otherwise have been brought").

There is no need for this Court to decide at this time whether the allegations in the complaint are sufficient for liability. Instead, the Court should remand to permit the court of appeals to address that issue in the first instance. See *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009).

2. Although petitioner's suit raises questions about whether a malicious-prosecution suit may be maintained under Section 1983 at all, as well as questions about what the elements of that cause of action would be, the Court should not address those issues in this case.

This Court has "never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983," including the antecedent question whether "such a claim is cognizable" at all. *Wallace* v. *Kato*, 549 U.S. 384, 390 n.2 (2007). In *Albright* v. *Oliver*, 510 U.S. 266 (1994), the Court rejected the proposition that there is a substantive due process right "to be free from criminal prosecution except upon probable cause." *Id.* at 268 (plurality opinion). The courts of appeals have since divided over whether malicious-prosecution claims are nevertheless actionable under Section 1983 as Fourth Amendment claims. See, *e.g.*, *Lambert* v. *Williams*, 223 F.3d 257, 261 (4th Cir. 2000), cert. denied, 531 U.S. 1130 (2001). In particular, some courts have "indicated that the common law elements of malicious prosecution may establish a Fourth Amendment violation with respect to defendants acting under color of state law." *Ibid.* Others have held that "[c]ommon law malicious prosecution

is not itself redressable under § 1983," *id*. at 260, and that such claims are "properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort," *id.* at 261. Those courts include the court below, which requires a plaintiff to "prove a violation of his Fourth Amendment right to be free from unreasonable seizures in addition to the elements of the common law tort of malicious prosecution." *Wood* v. *Kesler*, 323 F.3d 872, 881 (11th Cir.) (emphasis omitted), cert. denied, 540 U.S. 879 (2003).

Whether the Eleventh Circuit has adopted the correct approach is a matter that was not raised below, was not addressed in the parties' briefing at the petition stage, and was not discussed in petitioner's opening brief. This Court should continue to reserve judgment on the issue until it has been squarely presented and fully briefed.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings consistent with the position set forth in this brief.

Respectfully submitted.

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