No. 10-788

In The Supreme Court of the United States

CHARLES A. REHBERG,

Petitioner,

v.

JAMES P. PAULK, KENNETH B. HODGES, III, and KELLY R. BURKE,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENT JAMES P. PAULK

THEODORE FREEMAN
SUN S. CHOY
JACOB E. DALY
FREEMAN MATHIS & GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339
(770) 818-0000

JOHN C. JONES
Counsel of Record
248 Roswell Street
Marietta, GA 30060
(770) 427-8066
jcjones1234@bellsouth.net

Counsel for Respondent James P. Paulk

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a government official is entitled to absolute immunity for testimony presented to a grand jury.

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OPINIONS AND JUDGMENTS BELOW

On March 31, 2009, the United States District Court for the Middle District of Georgia entered an order denying Paulk's motion to dismiss. The district court's opinion is not reported, but it is reproduced in the appendix to Rehberg's petition for writ of certiorari. (Pet. App. at 81a-108a.) On March 11, 2010, the United States Court of Appeals for the Eleventh Circuit issued its opinion affirming in part and reversing in part the district court's order. *Rehberg v. Paulk*, 598 F.3d 1268 (11th Cir. 2010). On July 16, 2010, the Eleventh Circuit granted Rehberg's petition for rehearing insofar as it sought panel rehearing, vacated its March 11, 2010 opinion, and issued a substitute opinion. *Rehberg v. Paulk*, 611 F.3d 828 (11th Cir. 2010). It is the Eleventh Circuit's July 16, 2010 opinion from which Rehberg appeals.

STATEMENT OF JURISDICTION

The Eleventh Circuit had appellate jurisdiction over Paulk's initial appeal because the district court's March 31, 2009 order was a final decision within the meaning of 28 U.S.C. § 1291 and the collateral order doctrine. *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982); *see also Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

On December 13, 2010, Rehberg filed his petition for writ of certiorari pursuant to an extension of time granted by Justice Thomas. On February 1, 2011,

Paulk filed his response to Rehberg's petition pursuant to an extension of time granted by the Clerk. Rehberg filed his reply in support of his petition on February 16, 2011. On March 21, 2011, the Court granted Rehberg's petition. *Rehberg v. Paulk*, 131 S. Ct. 1678 (2011).

Paulk agrees that the Court has jurisdiction to consider this appeal under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rehberg seeks damages from Paulk pursuant to 42 U.S.C. § 1983 based on alleged violations of Rehberg's rights under the Fourth and Fourteenth Amendments to the United States Constitution.[1]

The Fourth Amendment provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[1] Rehberg also alleges that Paulk violated his rights under the First Amendment, but that claim is not involved in this appeal.

The Fourteenth Amendment provides, in pertinent part, as follows:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. CONST. amend. XIV, § 1.

Section 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Because the issue in this case was decided by the courts below in the context of a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6), the allegations in Rehberg's complaint establish the relevant facts for purposes of this appeal. Not all of the allegations must be accepted as true; well-pleaded factual allegations are assumed to be true, but legal conclusions are not. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 129 S. Ct. at 1950; *see also Twombly*, 550 U.S. at 556-57.

Viewed under this standard,[2] Rehberg's complaint shows the following facts relevant to the question presented: Between September 2003 and March 2004, Rehberg sent anonymous faxes to various people criticizing and parodying the management and activities of Phoebe Putney Memorial Hospital in Albany, Georgia. (J.A. at 11.) Ken Hodges, the district attorney for the circuit that includes Albany, agreed to investigate the anonymous faxes as a favor to the hospital, and so he had his chief investigator, James Paulk, prepare and send several subpoenas to BellSouth, Alltel, and Sprint for records relating to certain telephone numbers. (J.A. at 12-13.) Paulk also prepared and sent a subpoena to Exact Advertising, an internet service provider, for e-mail messages sent from and received by Rehberg's personal computer. (J.A. at 12-13.) Paulk prepared and sent these subpoenas in late 2003 and early 2004. (J.A. at 12-13.)

Following unfavorable media reports, Hodges formally recused himself from the investigation but remained involved privately. (J.A. at 17-18.) In his

[2] Rehberg's complaint is rife with legal conclusions and other conclusory, non-factual allegations.

place, Kelly Burke was appointed as a special prosecutor. (J.A. at 17-18, 32.) On December 14, 2005, a grand jury indicted Rehberg for aggravated assault, burglary, and making harassing telephone calls (i.e., the anonymous faxes). (J.A. at 4-5.) The complaint does not identify any specific testimony that was presented to the grand jury, but Paulk was the only witness who testified. (J.A. at 6.) The aggravated assault and burglary charges related to an allegation that Rehberg had unlawfully entered the home of Dr. James Hotz with the intent to commit aggravated assault. (J.A. at 4-5.) In fact, Rehberg had never been to Hotz's home, and Hotz never reported any assault or burglary to the police. (J.A. at 5.) Rehberg's attorney challenged the sufficiency of the indictment, and Burke dismissed it on February 6, 2006. (J.A. at 7-8.)

On February 16, 2006, the grand jury again indicted Rehberg, this time for simple assault (again with respect to Hotz) and making harassing telephone calls (i.e., the anonymous faxes). (J.A. at 8.) This time, both Paulk and Hotz testified before the grand jury. (J.A. at 8.) Rehberg's attorney again challenged the sufficiency of the indictment, and during a hearing on April 10, 2006, Burke told the judge that he would dismiss the indictment. (J.A. at 9.) Burke did not do so, and so the judge dismissed the indictment on July 7, 2006. (J.A. at 9.)

Meanwhile, Paulk testified before the grand jury for a third time on March 1, 2006, and the grand jury again indicted Rehberg for simple assault (presumably with respect to Hotz; the complaint is not clear)

and making harassing telephone calls (i.e., the anonymous faxes). (J.A. at 9.) The judge dismissed this indictment on May 1, 2006. (J.A. at 9-10.)

The complaint does not specify exactly what Paulk's testimony to the grand jury consisted of. All the complaint says is that Paulk's testimony was false. (J.A. at 29.) Rehberg unduly emphasizes the fact that Paulk testified before the grand jury about matters of which he had no personal knowledge and that Paulk did not personally investigate or interview any witnesses. (J.A. at 6, 7, 15, 20, 21, 26-27, 35, 36.) Of course, there is no federal constitutional prohibition on testifying before a grand jury on the basis of hearsay or other evidence that would be inadmissible at trial. *United States v. Calandra*, 414 U.S. 338, 347-52 (1974) (holding that a grand jury may consider evidence obtained in violation of the Fourth Amendment); *Costello v. United States*, 350 U.S. 359, 363-64 (1956) (holding that a grand jury may consider hearsay). Georgia law also allows a grand jury to consider evidence that would be inadmissible at trial. *Ward v. State*, 706 S.E.2d 430, 434 (Ga. 2011) (holding that "a plea in abatement on the ground that [the indictment] was found on insufficient evidence, or illegal evidence, or no evidence, will not be sustained, because it comes under the rule that no inquiry into the sufficiency or legality of the evidence is indulged"). Thus, Paulk did nothing wrong by testifying on the basis of information provided by others. In

that regard, it is important to recognize what the complaint does not allege:

> In contrast, there is no allegation of any physical or expert evidence that Hodges or Paulk fabricated or planted. There is no allegation of a pre-indictment document such as a false affidavit or false certification. Rather, Hodges and Paulk are accused of fabricating together only the testimony Paulk later gave to the grand jury. No evidence existed until Paulk actually testified to the grand jury. Stated differently, the only evidence Rehberg alleges was fabricated is Paulk's false grand jury testimony, for which Paulk receives absolute immunity.

Rehberg, 611 F.3d at 841-42.[3] It is also important to recognize that Hodges and Burke directed Paulk to

[3] This is precisely why there is no need for the Court to remand the case for the lower courts to consider whether Paulk's non-testimonial conduct can support Rehberg's claim for malicious prosecution, as the Solicitor General urges in his amicus curiae brief. With respect to instigating the prosecution, Rehberg does not allege that Paulk did anything other than testify falsely before the grand jury, and so there is no non-testimonial conduct upon which Rehberg's claim for malicious prosecution could be based. Paulk's involvement with the subpoenas for Rehberg's telephone records and e-mail messages was not part of any "prosecution," as that term is defined by Georgia law. *See* GA. CODE ANN. § 16-1-3(14). Moreover, Rehberg waived this argument by not including it in his initial brief. Regardless, whether the Court remands the case is immaterial since the case must return to the district court in any event for further proceedings relating to the claims that were not dismissed as a result of the district court's or the Eleventh Circuit's rulings.

testify before the grand jury and told him what to say. (J.A. at 28, 32.)

On January 23, 2007, Rehberg filed his complaint in the United States District Court for the Middle District of Georgia. Counts I-IV allege state-law claims against Paulk for negligence, negligence per se, and invasion of privacy, (J.A. at 19-24), and Count V alleges that Dougherty County is vicariously liable for Paulk's torts under the doctrine of respondeat superior. (J.A. at 24-25.) Counts VI and VII allege claims under Section 1983 against Paulk and Hodges for malicious prosecution and retaliatory investigation and prosecution. (J.A. at 25-31.) Count VIII alleges that Burke violated Rehberg's constitutional rights by participating in the presentation of false testimony to the grand jury and by making statements to the media that damaged Rehberg's reputation. (J.A. at 32-34.) Count IX alleges that Dougherty County and Hodges, in his official capacity, are liable under Section 1983 for maintaining a policy, custom, or practice of having investigators testify before grand juries without adequate training, supervision, notice, preparation, or knowledge. (J.A. at 34-37.) Finally, Count X alleges that Paulk, Hodges, and Burke are liable for conspiring to violate Rehberg's constitutional rights. (J.A. at 37-38.)

Paulk and Dougherty County filed a motion to dismiss, and Hodges and Burke filed a separate motion to dismiss. While the motions were pending, Rehberg withdrew Count V. (Pet. App. at 107a.) On March 31, 2009, the district court entered an order

dismissing Count IX but denying the motions in all other respects. (Pet. App. at 81a-108a.)

Paulk, Hodges, and Burke filed an interlocutory appeal in which they challenged the district court's denial of absolute and qualified immunity on Counts VI, VII, VIII, and X. Paulk did not appeal the district court's rulings on Counts I-IV, and Rehberg did not appeal the district court's dismissal of Count IX. Thus, only the district court's rulings on Counts VI, VII, VIII, and X were at issue in the Eleventh Circuit. *Rehberg*, 611 F.3d at 836-37 & nn.3-4. The Eleventh Circuit reversed on Counts VI, VIII, and X, and it reversed in part and affirmed in part on Count VII. Thus, the only surviving claim after the Eleventh Circuit's decision was Count VII, but only insofar as it alleged retaliatory prosecution against Paulk. *Id.* at 855.

The only issue upon which Rehberg sought certiorari in this Court was whether the Eleventh Circuit correctly ruled that Paulk is entitled to absolute immunity for Count VI insofar as his testimony before the grand jury is concerned. Rehberg has not challenged any other aspect of the Eleventh Circuit's decision.

SUMMARY OF THE ARGUMENT

Paulk is entitled to absolute immunity for his allegedly false testimony before the grand jury. The guiding principle is that government officials performing functions that are intimately associated with

the judicial phase of the criminal process are entitled to absolute immunity. Historically, witnesses who testified in judicial proceedings were accorded absolute immunity for their testimony, and the Court has applied this rule to confer absolute immunity for their testimony at trial. Trials are the most obvious example of a judicial proceeding, and they are intimately associated with the judicial phase of the criminal process.

Grand jury proceedings are also judicial proceedings, and so the historical basis for absolute witness immunity applies equally to grand jury testimony. Despite this matter of historical fact, Rehberg contends that Paulk is not entitled to absolute immunity because he testified before the grand jury as a "complaining witness." Although the Court has held, in a factually distinguishable case, that complaining witnesses are not entitled to absolute immunity, that case does not control the outcome here because it did not involve testimonial immunity and because the common-law concept of a complaining witness does not apply to government officials in today's system of public prosecution. In fact, most federal circuit courts have extended absolute witness immunity for trial testimony to testimony given at grand jury proceedings and other pretrial proceedings.

To be sure, grand jury proceedings are not the same as trials, but they are first cousins. In each, witnesses are subpoenaed to testify under oath and are subject to prosecution for perjury if they testify falsely. There is no presiding judge and no defense

attorney to cross-examine the prosecution's witnesses, but prosecutors owe an ethical duty to seek justice separate from their ethical duty to seek convictions. Moreover, the grand jury itself acts as a check on the prosecutor, and the grand jurors may "cross-examine" the prosecution's witnesses, request additional witnesses or evidence, or refuse to indict if they believe the evidence is insufficient. In contrast, a proceeding for an arrest warrant application, which is the context in which the case regarding complaining witnesses arose, are a far cry from this. Given the similarities between grand jury proceedings and trials, there is little room to doubt that grand jury proceedings are intimately associated with the judicial phase of the criminal process. As such, government officials who testify in grand jury proceedings should have absolute immunity for their testimony.

Even if the Court adheres to the common-law concept of a complaining witness, a government official like Paulk does not fall into this category because he is not a private person or a victim of the alleged crime. As an investigator for a public prosecutor, Paulk could not initiate the prosecution of Rehberg as that term was used in 1871. At that time, the victim of a crime prosecuted the perpetrator at his own expense. Nor can Paulk initiate a prosecution today, as only the public prosecutor is authorized to do so under Georgia law.

Although investigators hired by and accountable to public prosecutors did not exist in 1871, that does not mean they are not entitled to absolute immunity

now. There are several examples of the Court conferring immunity under Section 1983 where none existed in the 1871 common law. For example, public prosecutors were largely unknown in 1871, but the Court has nevertheless held that they are entitled to absolute immunity, at least for their prosecutorial functions. Absolute immunity for judges today is not the same as the immunity which was accorded them before 1871. The Court has also extended the scope of qualified immunity for executive officials from the law as it existed in 1871. Finally, the Court has conferred absolute immunity on hearing examiners, administrative law judges, and regional legislators, even though those officials did not exist in 1871.

From a policy standpoint as well, Paulk should have absolute immunity for his grand jury testimony. As with trial witnesses, conferring absolute immunity on grand jury witnesses would protect against self-censorship. Witnesses who know that they could be sued for testifying before a grand jury might refuse to testify or might shade their testimony in the hope of avoiding damages liability. They might refuse to testify about anything save those facts of which they have personal knowledge, thereby greatly expanding the proceedings through a parade of witnesses before the grand jury. Either would be harmful to the judicial process. Subjecting government officials to potential damages liability for their grand jury testimony could also impair their ability to perform their jobs effectively by distracting them from their official duties. While absolute immunity for grand jury

testimony allows for the possibility of unjust indictments, the Court has determined that this possibility is preferable to impairing the integrity of the judicial process.

In addition to these policy considerations, making a witness's immunity contingent on whether he is characterized as a "complaining witness" is fraught with practical difficulties. It would be an almost-impossible task for courts to determine the character of a witness without full-blown discovery and perhaps even a trial, but this would defeat the purpose of immunity and the policy of secrecy in grand jury proceedings. But all of this is not necessary since there are sufficient protections in place to deter false testimony in grand jury proceedings. Civil damages liability is not the answer. Government officials who give false testimony before a grand jury are subject to prosecution for perjury, just like witnesses who give false testimony at trial. They are also subject to federal criminal prosecution for violating the criminal defendant's constitutional rights.

For all of these reasons, the Court should affirm the Eleventh Circuit and hold that Paulk is entitled to absolute immunity for his testimony before the grand jury.

ARGUMENT

The issue for the Court to decide is whether Paulk has absolute immunity for the allegedly false

testimony he gave to the grand jury. Taking into account the historical context, precedent, logic, and policy considerations, the Court should conclude that Paulk has absolute immunity from civil liability for Rehberg's Section 1983 claim for malicious prosecution (Count VI).[4] Accordingly, the Court should affirm the judgment of the Eleventh Circuit.

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[4] The antecedent question is whether a constitutional claim for malicious prosecution is cognizable. This issue was not raised in or decided by the lower courts because it was not necessary to do so in light of the binding Eleventh Circuit precedent on the question presented, and Paulk recognizes that the Court did not grant certiorari on this issue. However, it is worth noting that it is not at all clear that such a claim exists. In *Albright v. Oliver*, 510 U.S. 266 (1994), a majority of the Court found no protection from malicious prosecution in the Fourteenth Amendment but did not decide whether such a claim would be cognizable under the Fourth Amendment. *Id.* at 275; *id.* at 281-86 (Kennedy and Thomas, JJ., concurring in the judgment); *id.* at 286-91 (Souter, J., concurring in the judgment). More recently, in *Wallace v. Kato*, 549 U.S. 384 (2007), the Court observed that it had "never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983," and it did not do so in that case. *Id.* at 390 n.2. Rehberg asserts in a footnote that the Eleventh Circuit recognizes a Fourth Amendment claim for malicious prosecution, but this is a bit of a mischaracterization. In fact, what the Eleventh Circuit has recognized is that "a federal 'right' to be free from malicious prosecution is actually a description of the right to be free from an unlawful seizure which is part of a prosecution." *Whiting v. Traylor*, 85 F.3d 581, 584 n.4 (11th Cir. 1996). As the Eleventh Circuit implied in *Whiting*, there is no constitutional claim for malicious prosecution as such. Instead, what matters is whether a plaintiff alleges the violation of a specific constitutional right, such as the right to be free from unreasonable seizure. The Fifth Circuit has analyzed this issue, including a survey of how the circuit courts have

(Continued on following page)

I. HISTORY, PRECEDENT, AND LOGIC SHOW THAT GOVERNMENT OFFICIALS SHOULD HAVE ABSOLUTE IMMUNITY FOR THEIR GRAND JURY TESTIMONY

Although Section 1983, on its face, does not suggest the existence of any immunities, the Court has consistently recognized that "Congress did not intend § 1983 to abrogate immunities well grounded in history and reason." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (internal quotation marks omitted).

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struggled with this issue, and has concluded that "no such freestanding constitutional right to be free from malicious prosecution exists." *Castellano v. Fragozo*, 352 F.3d 939, 945 (5th Cir. 2003) (en banc); *see also* 1 SHELDON NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3.63 (4th ed. 1997 & Supp. 2010) ("Thus, strictly speaking, it is incorrect to talk about a § 1983 malicious prosecution . . . action premised solely on state tort law elements."); 1 MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION § 3.18[A], at 3-596.5 (4th ed. 2003 & Supp. 2011) ("Thus, the mere fact that official conduct gives rise to a claim for relief under common-law malicious prosecution principles does not necessarily mean that the conduct is also actionable under § 1983."); Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHI.-KENT L. REV. 127, 139 (2010) ("Even more problematic, it is far from clear that malicious prosecution is an actionable constitutional tort.") [hereinafter Rosenthal, *Second Thoughts*]. Thus, while some circuit courts have been inexact in explaining the contours of a claim like Count VI in Rehberg's complaint, to the extent they recognize such a claim based only on its common-law elements, they are incorrect. If this claim exists, it must exist as a specific constitutional claim. In the context of this case, if Rehberg alleges that he was unconstitutionally arrested because of Paulk's testimony before the grand jury, then he would be alleging a Fourth Amendment claim for unreasonable seizure.

"If parties seeking immunity were shielded from tort liability when Congress enacted the Civil Rights Act of 1871 . . . we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992).

In determining whether a particular government official's conduct is entitled to absolute or qualified immunity, the Court employs a functional approach, "which looks to the nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269 (internal quotation marks omitted). Government officials performing functions that are "intimately associated with the judicial phase of the criminal process" are entitled to absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). Absolute immunity is conferred for such functions, "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). As explained by Judge Learned Hand, "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." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

Under this methodology, Paulk is entitled to absolute immunity for his allegedly false testimony

before the grand jury because the common law of 1871 provided absolute immunity for testimony which was provided in judicial proceedings. It is beyond question that grand jury proceedings are judicial proceedings and, as such, are intimately associated with the judicial phase of the criminal process. *Burns v. Reed*, 500 U.S. 478, 490 (1991) (noting that grand juries perform a judicial function); *United States v. Mandujano*, 425 U.S. 564, 576 (1976) (noting that grand jury investigations are a type of judicial proceeding); *Cobbledick v. United States*, 309 U.S. 323, 327 (1940) (noting that the grand jury is a part of the judicial process and that a grand jury proceeding is a judicial inquiry); Van Vechten Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 COLUM. L. REV. 463, 488 n.78 (1909) ("The proceedings of a grand jury are unquestionably judicial in character."). Georgia law also characterizes grand jury proceedings as judicial proceedings. *Decatur County v. Bainbridge Post Searchlight, Inc.*, 632 S.E.2d 113, 117 (Ga. 2006) (Melton, J., dissenting); *Darnell v. State*, 11 S.E.2d 692, 694 (Ga. Ct. App. 1940).

In *Briscoe v. LaHue*, 460 U.S. 325 (1983), the Court considered whether a police officer who gives perjured testimony at a criminal trial is entitled to absolute immunity for a subsequent damages claim under Section 1983. Noting that "the common law provided absolute immunity from subsequent damages liability for all persons – governmental or otherwise – who were integral parts of the judicial process," *id.* at 335, the Court held that absolute

witness immunity would continue to apply in claims under Section 1983, especially since there was no evidence showing that Congress intended to abrogate this immunity when it enacted Section 1983. *Id.* at 334-41. As the Court explained, witnesses perform a different function at trial than judges and prosecutors, but their "participation in bringing the litigation to a just – *or possibly unjust* – conclusion is equally indispensable." *Id.* at 345-46 (emphasis added).[5]

Although the Court's decision in *Briscoe* was limited to whether a witness is entitled to absolute immunity for testimony offered at trial, *id.* at 328 n.5, its reasoning suggests that the same immunity would apply to testimony offered at pretrial proceedings, including grand jury proceedings. The Court's assessment of the 1871 common law was that it absolutely immunized witnesses for testifying in "judicial proceedings," and as explained above, grand jury proceedings are judicial proceedings. Following *Briscoe*, most federal circuit courts extended its rationale to confer absolute immunity on witnesses who testify at grand jury proceedings and other pretrial proceedings. *See, e.g.*, *Lyles v. Sparks*, 79 F.3d 372, 378 (4th Cir. 1996); *Kyricopoulos v. Town of Orleans*, 967 F.2d 14, 16 (1st Cir. 1992);[6] *Grant v.*

[5] The Court also found several policy reasons to support absolute witness immunity. Those policies are discussed below in Part II of Paulk's argument.

[6] Justice Breyer was on the panel of the First Circuit that decided *Kyricopoulos*.

Hollenbach, 870 F.2d 1135, 1139 (6th Cir. 1989); *Strength v. Hubert*, 854 F.2d 421, 423-25 (11th Cir. 1988) (per curiam); *Williams v. Hepting*, 844 F.2d 138, 140-43 (3d Cir. 1988); *Holt v. Castaneda*, 832 F.2d 123, 124-27 (9th Cir. 1987); *Kincaid v. Eberle*, 712 F.2d 1023, 1023-24 (7th Cir. 1983) (per curiam); *Briggs v. Goodwin*, 712 F.2d 1444, 1448-49 (D.C. Cir. 1983);[7] *see also* 1A SCHWARTZ, SECTION 1983 LITIGATION § 9.07[C][2], at 9-178 to -179 ("The lower courts, however, have tended to give *Briscoe* an expansive interpretation. The great weight of lower court authority, applying the functional approach, holds that absolute witness immunity applies to testimony given at the grand jury and at adversarial pretrial criminal proceedings.").

Rehberg contends that *Briscoe* is inapplicable and that this case is instead controlled by *Malley*. In *Malley*, the plaintiffs alleged that they were unconstitutionally arrested pursuant to an affidavit that failed to establish probable cause. The police officer who submitted the affidavit to the judge sought absolute immunity, but the Court rejected this claim because "complaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be

[7] Justice Ginsburg was on the panel of the District of Columbia Circuit that decided *Briggs*.

held liable if the complaint was made maliciously and without probable cause." *Id.* at 340-41.

Contrary to Rehberg's argument, *Malley* does not control the outcome of this case. First, and most obviously, *Malley* did not involve an assertion of testimonial immunity as Paulk has asserted here. While it is true that the police officer in *Malley* argued that he was entitled to absolute immunity, it was not on the basis of the testimonial immunity recognized in *Briscoe*. Thus, the Court did not decide anything about the scope of testimonial immunity. In fact, the Court in *Malley* did not even discuss the rule of testimonial immunity under *Briscoe*.[8]

Second, from a functional standpoint, Paulk's testimony to the grand jury is much more analogous to the trial testimony in *Briscoe* than it is to the affidavit testimony in *Malley*. The Court recognized this in *Malley* when it rejected the police officer's attempt to analogize his conduct to a prosecutor's conduct for which absolute immunity is available under *Imbler*. The Court observed that the act of applying 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 the act of a prosecutor in seeking an indictment." *Id.* at 342-43.

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[8] *Malley*'s only reference to *Briscoe* is a citation for the proposition that the purpose of absolute immunity is not to protect wrongdoers but rather to protect the judicial process. *Malley*, 475 U.S. at 342. Any number of other cases could have been cited in support of that proposition. *See, e.g.*, *Imbler*, 424 U.S. at 424-28.

Paulk's testimony before the grand jury was the first step in the district attorney's prosecution of Rehberg, GA. CODE ANN. § 16-1-3(14) (providing that a prosecution commences with the return of the indictment), and as such, it was "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, and deserving of absolute immunity.

Although there are obvious differences between grand jury proceedings and trials, the similarities are much greater. Witnesses in each are subject to compulsory process, must testify under oath, must answer questions asked by the prosecutor, and are subject to prosecution for perjury. It is true, of course, that a grand jury witness is not subject to adversarial cross-examination, but this difference is ameliorated by the prosecutor's ethical obligation "to seek justice, not merely to convict." ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, PROSECUTION FUNCTION STANDARD 3-1.2(c) (3d. ed. 1993). "Although the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public. Thus, the prosecutor has sometimes been described as a 'minister of justice' or as occupying a quasi-judicial position." *Id.* cmt. Georgia's Rules of Professional Conduct impose a similar ethical duty on prosecutors: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations

to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." GA. RULES OF PROF'L CONDUCT R. 3.8 cmt. 1. Thus, the absence of adversarial cross-examination in grand jury proceedings is not nearly as significant as it is in an ex parte hearing for an arrest warrant.

Further, Georgia law permits grand jurors to ask questions of the witnesses, in effect cross-examining them. GA. CODE ANN. § 15-12-67(a) (authorizing the foreperson to examine witnesses); *Davis v. State*, 33 S.E.2d 728, 729 (Ga. Ct. App. 1945) (suggesting that all grand jurors may examine witnesses). And there is nothing to prevent the grand jurors from requesting that the prosecutor present additional witnesses or evidence or from refusing to indict if the prosecutor's evidence is insufficient. Indeed, a grand jury is not an arm of the prosecutor that merely rubber stamps what the prosecutor wants. Rather, "[t]he grand jury . . . acts as a vital check against the wrongful exercise of power by the State and its prosecutors." *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) (internal quotation marks omitted). That being said, unlike an ex parte hearing for an arrest warrant, a grand jury proceeding and a criminal trial are both part of the "prosecution," which Georgia law defines as "all legal proceedings by which a person's liability for a crime is determined, commencing with the return of the indictment or the filing of the accusation, and including the final disposition of the case upon appeal." GA. CODE ANN. § 16-1-3(14). In Georgia, only the state –

through the district attorney – may conduct grand jury proceedings and further prosecute crimes. GA. CODE ANN. § 15-18-6(2) and (4).[9] In contrast, submitting an affidavit in support of an arrest warrant may be done by anyone, including private persons, and may be done on an ex parte basis without a hearing before a judge. GA. CODE ANN. § 17-4-40.

Finally, Paulk was not a complaining witness when he testified before the grand jury, and he certainly has not characterized himself as one like the police officer in *Malley* did. 475 U.S. at 340.[10] Historically, the complaining witness was the victim of the alleged crime, and the tort of malicious prosecution applied only to "[a] *private* person who initiate[d] or procure[d] the institution of criminal proceedings against another." RESTATEMENT (SECOND) OF TORTS

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[9] There are some exceptions to this. For example, the Georgia Attorney General may prosecute certain crimes. GA. CODE ANN. § 45-15-10. Also, some counties in Georgia have a solicitor general who is responsible for prosecuting misdemeanor offenses. GA. CODE ANN. § 15-18-66. The point is that only government officials are authorized to prosecute crimes in Georgia; private prosecution by the victim or his family or friends is no longer permitted. GA. UNIF. SUPER. CT. R. 42.1.

[10] Because the police officer in *Malley* contended that he was a complaining witness, the Court did not decide whether a government official can be properly characterized as a complaining witness. Instead, it simply accepted the police officer's characterization of himself as a complaining witness and rejected his argument that complaining witnesses had absolute immunity from common-law claims for malicious prosecution in 1871. *Malley*, 475 U.S. at 340-41.

§ 653 & cmt. c (1977) (emphasis added); *see also* John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 318 (1973) ("In modern American practice, where the public prosecutor has developed a monopoly over the instigation and conduct of criminal litigation, this citizen figure [i.e., the "aggrieved citizen" or victim] lives on as the complaining witness."). Because this tort applied only to private persons, "[i]t ha[d] no application to public officials charged with the enforcement of criminal law in the performance of their public duty." RESTATEMENT (SECOND) OF TORTS § 653 cmt. e.

The Court has recognized that the terms "complaining witness" and "accuser" are synonymous. *Sacher v. United States*, 343 U.S. 1, 11 (1952). More recently, Justice Scalia observed that a complaining witness is also known as a "private prosecutor[ ]" and "the private party bringing the suit." *Kalina v. Fletcher*, 522 U.S. 118, 133 (1997) (Scalia, J., concurring); *Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part); *see also* RESTATEMENT (SECOND) OF TORTS § 653 cmt. c ("Throughout this Chapter the term 'private prosecutor' is used to describe a private person who initiates criminal proceedings. Other terms such as 'prosecuting witness,' 'complaining witness,' 'complainant' or 'accuser' are in common use.").

Based on the history of public prosecution in England and pre-1871 America, it is not surprising that a complaining witness in 1871 was a private person who was the victim of a crime. Before 1871,

the prevailing method of prosecuting crime was via private prosecution, whereby the victim or his family or friends would hire an attorney to prosecute the accused, or else the victim would do it himself. Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 673-81 (2010) [hereinafter O'Neill, *Private Vengeance*]; Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 421-23 (2009); John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 ARK. L. REV. 511, 515-21 (1994); *see also Kalina*, 522 U.S. at 132 (Scalia, J., concurring) (noting that "there generally was no such thing as the modern public prosecutor" in 1871). Although most states had developed some form of public prosecutor by 1820, "privately funded prosecutors constituted a significant element of the state criminal justice system throughout the nineteenth century." Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 43, 43 (1995); *see also* O'Neill, *Private Vengeance*, at 674 ("Until the late nineteenth century, however, private prosecutions dominated the legal landscape.").

Under this system of private prosecution, the complaining witness – i.e., the victim (or his family or friends) – was the person who initiated and pursued the prosecution of the accused. It stands to reason, therefore, that the complaining witness – not a public prosecutor – was the defendant in a common-law tort action for malicious prosecution. Indeed, all of the

19th-century cases upon which Rehberg relies for establishing the state of the common law in 1871 were brought against private persons.[11] Because today's system of public prosecution, including the use of investigators to assist those prosecutors, was largely unknown in 1871, Congress could not have intended to abrogate an immunity for a government official that did not exist, not because the common law had rejected it, but because the underlying claim itself did not exist. Thus, there is no "relevant official" whose immunity in 1871 can be used to determine whether a 21st-century employee of a public prosecutor is entitled to absolute immunity for testifying falsely to a grand jury. *Imbler*, 424 U.S. at 421 (noting that immunity decisions are "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it").

Although the absence of a historical comparator has on one occasion led the Court to deny immunity

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[11] This system of private prosecution embodies the concept of a victim "pressing charges." Under this system, a victim would "press charges" by initiating a prosecution against the alleged perpetrator. If the victim declined to "press charges," there would be no prosecution. Today, however, the concept of "pressing charges" is obsolete, at least in those jurisdictions where private prosecution is not permitted, because victims cannot dictate whether a public prosecutor will prosecute. *See Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) (holding that a citizen lacks standing to challenge a prosecutor's decision because he "lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

for a government official, *Tower v. Glover*, 467 U.S. 914, 921 (1984) (holding that public defenders are not entitled to immunity because "there was . . . no such office or position in existence" in 1871, which obviously meant that there was no common-law immunity for them in 1871), the Court has "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). Indeed, the Court has on many occasions conferred immunity under Section 1983 where none existed in the 1871 common law.

For example, public prosecutors have absolute immunity from liability under Section 1983, at least insofar as they act as an advocate, even though the first case to recognize common-law immunity for public prosecutors was not decided until 25 years after Congress enacted Section 1983. *Imbler*, 424 U.S. at 421; *see also Burns*, 500 U.S. at 499 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that "the first case extending *any* form of prosecutorial immunity was decided some 25 years after the enactment of § 1983"); *Smith v. Wade*, 461 U.S. 30, 34 n.2 (1983) ("Indeed, in *Imbler* we recognized a common-law immunity that first came into existence 25 years after § 1983 was enacted."). Despite the lack of 19th-century common-law support for its decision, the Court relied on 20th-century cases and policy considerations to justify its recognition of prosecutorial immunity. *Imbler*, 424 U.S. at 422-28.

Another example is judicial immunity. Although the Court has declared that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction," *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967), its assessment of the historical evidence has been questioned. Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 758-60 (1987) [hereinafter Matasar, *Personal Immunities*]. Aside from the question of whether judicial immunity is well grounded in history, the Court has greatly expanded the scope of that immunity from its common-law origins.

In 1868, the Court held that judges "are not liable to a civil action for any judicial act done within their jurisdiction," but that judges may be liable for acts done maliciously or corruptly in excess of their jurisdiction. *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 535-36 (1868). Three years later, the Court retreated from the rule announced in *Randall* and held that judges are immune unless they act with "the clear absence of all jurisdiction." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1871). But just eight years after deciding *Bradley*, the Court held that a judge was not immune for excluding black citizens from jury duty because he had acted "outside of his authority." *Ex parte Virginia*, 100 U.S. (10 Otto) 339, 348 (1879). No mention of *Bradley* was made. Currently, the Court adheres to the view expressed in *Bradley* that a judge "will be subject to liability only

when he has acted in the 'clear absence of all jurisdiction.'" *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (quoting *Bradley*, 80 U.S. (13 Wall.) at 351).

In *Stump*, the Court acknowledged its earlier holding in *Randall* but dismissed the precedential value of that case because it had decided in *Bradley* that the rule announced in *Randall* was not correct. *Id.* at 355 n.5. The point here is not to criticize the Court's rule regarding judicial immunity or to argue that the rule should be based on *Randall* or *Bradley*. Rather, the point is that the Court had expressed its view of the common-law immunity accorded to judges in *Randall*, which was before Congress enacted Section 1983, but then relied on *Bradley*, which was decided *after* Congress enacted Section 1983, as its common-law support for the absolute immunity to which judges are entitled in lawsuits brought under Section 1983. Because "[a]cts in 'excess' of jurisdiction encompass a wide variety of things that are not in 'clear absence of jurisdiction,'" judicial immunity under the *Stump*/*Bradley* rule is greatly expanded from what it was under the *Randall* rule. Matasar, *Personal Immunities*, at 759.

The Court's qualified immunity jurisprudence also represents a departure from its prescribed methodology for resolving immunity questions. At common law, executive officials had good-faith immunity for "action taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances." *Wood v. Strickland*, 420 U.S. 308, 321 (1975). The Court held that this qualified

immunity consists of both objective and subjective components. *Id.* at 321-22. Because the subjective component proved to be incompatible with the goal of not allowing insubstantial claims to proceed to trial, the Court quickly determined that "an adjustment of the 'good faith' standard" was necessary. *Harlow v. Fitzgerald*, 457 U.S. 800, 814-16 (1982). The adjusted standard for qualified immunity eliminated the subjective component entirely: "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. As the Court later recognized, its decision in *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson*, 483 U.S. at 645; *see also Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (noting that "our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume"); *Burns*, 500 U.S. at 498 n.1 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that *Harlow* and *Anderson* "extended qualified immunity beyond its scope at common law").

The Court has also conferred absolute immunity on certain officials performing functions that did not exist before 1871. In *Butz v. Economou*, 438 U.S. 478,

508-14 (1978), the Court held that hearing examiners and administrative law judges are entitled to absolute immunity. And in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402-06 (1979), the Court held that regional legislators are entitled to absolute immunity. As all of these cases show, the absence of a parallel immunity recognized by the common law in 1871 does not preclude the Court from conferring absolute immunity under appropriate circumstances. This case presents such an appropriate circumstance.

Paulk's position is that this case is controlled by *Briscoe* and that the Court need only do what most of the circuit courts already have done – hold that absolute immunity applies to all government officials who testify at any judicial proceeding, including grand jury proceedings. *Malley* is not inconsistent with this rule because it involved a police officer who presented an affidavit in a non-judicial proceeding, which was not "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430.

If the Court finds that *Briscoe* does not answer the question presented in Paulk's favor, this case is one in which the Court should find that the government official is entitled to absolute immunity despite the absence of a precise common-law analog. In addition to the policy considerations supporting absolute immunity for government officials who testify in grand jury proceedings, which are discussed in Part

II below, it would be anomalous for a prosecutor to have absolute immunity for directing his investigator to offer testimony at a grand jury proceeding that he (the prosecutor) knows to be false, while according the investigator only qualified immunity for offering the testimony. This is especially true here, where the testifying witness is the prosecutor's subordinate employee. Under this scenario, "the star player is exonerated, but the supporting actor is not." *Albright*, 510 U.S. at 279 (Ginsburg, J., concurring). Here, the star players are Hodges and Burke, the district attorney and the specially appointed district attorney, and Paulk is the supporting actor, the investigator hired by and accountable to the district attorney. "It makes little sense to hold that a Government agent is liable for [giving false testimony before a grand jury], but that an official of higher rank who actually orders such [testimony] is immune simply because of his greater authority." *Butz*, 438 U.S. at 505-06. Yet this is exactly what Rehberg is asking the Court to do.

II. POLICY CONSIDERATIONS SUPPORT CONFERRING ABSOLUTE IMMUNITY ON GOVERNMENT OFFICIALS FOR THEIR GRAND JURY TESTIMONY

Although the historical analysis above is sufficient for the Court to rule in Paulk's favor, there are also compelling policy reasons for the Court to hold that absolute immunity applies to all government officials who testify at any judicial proceeding, including grand jury proceedings.

As Justice O'Connor once observed, examining the common law as it existed in 1871 to determine what Congress intended when it enacted Section 1983 "makes sense when there was a generally prevailing rule of common law, for then it is reasonable to assume that congressmen were familiar with that rule and imagined that it would cover the cause of action that they were creating." *Smith*, 461 U.S. at 93 (O'Connor, J., dissenting). But "[o]nce it is established that the common law of 1871 provides us with no real guidance on th[e] question, [the Court] should turn to the policies underlying § 1983 to determine which rule best accords with those policies." *Id.*; *cf. Virginia v. Moore*, 553 U.S. 164, 171 (2008) ("In determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve. . . . When history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness. . . .").

Here, a finding of absolute immunity for Paulk would be consistent with the historical analysis above, but it is true that the common law as it existed in 1871 did not confer absolute immunity on investigators employed by public prosecutors for their grand jury testimony. As explained above, the reason for this is simple: The system of public prosecution, including the use of investigators hired by and accountable to the prosecutor, that is so common today

was largely unknown in 1871. Thus, as Justice O'Connor recognized in *Smith*, and as the Court has done on several occasions when resolving questions of immunity applicable to Section 1983 claims, the Court should turn to the policy considerations that bear on whether absolute immunity should apply to grand jury testimony.

The starting point, once again, is *Briscoe*. There, the Court recognized several policy considerations that warranted absolute immunity for trial testimony. First, the Court was concerned about self-censorhip by witnesses. 460 U.S. at 333. If a witness faced the possibility of damages liability for his trial testimony, he might be reluctant to come forward and testify in the first place, and even if he did testify, his fear of subsequent liability might cause him to distort his testimony. *Id.* As the Court explained, "[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." *Id.*

Second, the Court worried that subjecting government officials to damages liability for their trial testimony would impair their ability to perform their jobs effectively. *Id.* at 343. Because government officials testify in numerous trials every year, the Court was concerned that "defendants often will transform resentment at being convicted into allegations of

perjury by the state's official witnesses." *Id.* Without absolute immunity, government officials would have to devote substantial time and resources to defending themselves when their attention would be better directed at performing their official functions. *Id.* at 343-44. Although some claims would be dismissed before trial, the time and resources required would still be "considerable." *Id.* at 343. Many claims, however, would not be susceptible to pretrial adjudication because they would require a factual determination as to whether the government official testified falsely, and "a case that goes to trial always imposes significant emotional and other costs on every party litigant." *Id.* at 343 n.29, 344.

Finally, the Court noted that an unfortunate by-product of a legal system operated by and involving humans is the possibility of unjust convictions based on false trial testimony. *Id.* at 345. While nobody wants criminal defendants to be unjustly convicted, "the alternative of limiting the official's immunity would disserve the broader public interest." *Id.* The Court's Section 1983 immunity jurisprudence reflects the value judgment that "'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.'" *Id.* (quoting *Gregoire*, 177 F.2d at 581). Obviously, this is no consolation for the unjustly convicted person, but when conferring absolute immunity on various government officials the Court has looked beyond the

specific individual interests involved to the broader societal interests in the integrity of the judicial process. As the Court observed in *Malley*, the goal of absolute immunity is not to protect government officials who abuse the authority of their office but rather to protect the integrity of the judicial process. 475 U.S. at 342.

All of the policy considerations recognized in *Briscoe* weigh heavily in favor of conferring absolute immunity for grand jury testimony, irrespective of whether the witness is a complaining witness. First, the danger of self-censorhip by grand jury witnesses is no less than it is by trial witnesses, and the importance of candid, objective, and undistorted testimony is no less in a grand jury proceeding than it is in a trial. Second, just as criminal defendants will transform their resentment at being convicted into allegations of perjury by a trial witness, so too will people who are disgruntled at being indicted. There is no reason to believe that grand jury witnesses will be sued less frequently than trial witnesses if they are not entitled to absolute immunity for their testimony. As with the Court's concern in *Briscoe* about the energy and attention of police officers being "diverted from the pressing duty of enforcing the criminal law," 460 U.S. at 344 (internal quotation marks omitted), the energy and attention of investigators employed by public prosecutors would also be diverted from their equally important role in investigating and assisting in the prosecution of crime. Finally, the purpose of absolute immunity for grand jury testimony is the

same as it is for trial testimony. It is necessary, not because public policy ought to protect people who lie to a grand jury, but rather because public policy accepts the risk of some wrongful indictments in exchange for protecting the integrity of the judicial process.

These policy considerations are equally applicable to both complaining witnesses and other witnesses. As a result, there is no reason to distinguish – for purposes of immunity – between grand jury testimony and trial testimony, or between complaining witnesses and other witnesses. Indeed, *Briscoe* applies broadly to all trial witnesses and makes no distinction between the testimony of complaining witnesses and the testimony of other witnesses, and Rehberg does not argue that a complaining witness who testifies at trial should not have absolute immunity. Presumably, a witness who testifies at trial cannot be a complaining witness because the prosecution has already been initiated and is nearing its conclusion. This means that a witness who offers identical testimony in a grand jury proceeding and at trial would have qualified immunity for the former but absolute immunity for the latter. This defies common sense because there is no logical reason to immunize testimony in one judicial proceeding but not the other, especially since "false testimony before the grand jury is less harmful than false testimony at trial; the grand jury can indict, but cannot convict." *Kincaid*, 712 F.2d at 1024 (explaining that this is why

"the argument for absolute immunity is stronger in the grand jury setting than in the trial setting").

In addition, there are numerous problems with having an exception to absolute testimonial immunity for complaining witnesses, assuming that a government official like Paulk can even be a complaining witness. Most importantly, how is a trial court to determine whether a witness is a complaining witness? As several circuit courts have held, this determination requires a factual inquiry into the witness's role in initiating the prosecution, which may not be susceptible of resolution on summary judgment. *See, e.g.*, *Enlow v. Tishomingo County*, 962 F.2d 501, 511-12 (5th Cir. 1992); *Anthony v. Baker*, 955 F.2d 1395, 1399 (10th Cir. 1992); *White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988). In *Briscoe*, the Court recognized this in the context of the significant burdens that litigation involving witness testimony could impose on the judicial system and law-enforcement resources:

> Moreover, lawsuits alleging perjury on the stand in violation of the defendant's due process rights often raise material questions of fact, inappropriate for disposition at the summary judgment stage. The plaintiff's complaint puts in issue the falsity and materiality of the allegedly perjured statements, and the defendant witness's knowledge and state of mind at the time he testified. Sometimes collateral estoppel principles will permit dismissal at the pretrial stage. But if the truth of the allegedly perjured statement was not necessarily decided in the previous

> criminal verdict, if there is newly-discovered evidence of falsity, or if the defendant concedes that the testimony was inaccurate, the central issue will be the defendant's state of mind. Summary judgment is usually not feasible under these circumstances. If summary judgment is denied, the case must proceed to trial and must traverse much of the same ground as the original criminal trial.

460 U.S. at 343 n.29 (citation omitted).

If the issue cannot be determined before trial, the overarching purpose of immunity – to allow government officials to avoid the burdens and expenses associated with discovery and trial – will be defeated. In the context of qualified immunity for executive officials, the Court recognized in *Harlow* that too many cases were proceeding to trial because of the then-existing subjective element of the defense, and so it altered the defense to better uphold this purpose. 457 U.S. at 815-17. The Court explained, "Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." *Id.* at 817.

Like the judicial inquiry required to determine subjective motivation for qualified immunity, the judicial inquiry required to determine whether a witness is a complaining witness is equally burdensome. The issue may be relatively easy where there is only one witness who testifies before the grand jury, but

not so when there are multiple witnesses. The question is whether a witness sufficiently initiated the prosecution, and this itself is a subjective determination. If five witnesses testify, is only the first witness the complaining witness? If the grand jury would not have returned an indictment based only on the first witness's testimony, but would have returned an indictment based on the first and second witnesses' combined testimony, are only the first and second witnesses the complaining witnesses? If a scheduling conflict prevents the witnesses from testifying in the order intended by the prosecutor such that the first and second witnesses testify fourth and fifth, are they still the complaining witnesses? The first and second witnesses could be the complaining witnesses if they actually testified first and second but not if they testified fourth and fifth because the testimony of the witnesses who actually testified first and second was sufficient for the grand jury to return an indictment. Does it matter if a witness testified pursuant to a subpoena?[12] The end result is that a witness could be a complaining witness under some circumstances but not under others, even though his testimony would

[12] "Absent a claim of the privilege, the duty to give testimony [before a grand jury] remains absolute." *Mandujano*, 425 U.S. at 575. Thus, a complaining witness could be faced with the choice of subjecting himself to contempt of court or potential civil damages liability. This is not a fanciful hypothetical. The Court itself has recognized that "honest witnesses might erroneously be subjected to liability because they would have difficulty proving the truth of their statements." *Briscoe*, 460 U.S. at 333 n.13.

have been identical under either set of circumstances. Whether a witness is entitled to absolute immunity should not depend on such vagaries.

Under Rehberg's theory, complaining witnesses are those witnesses whose testimony is sufficient to result in an indictment. But it is extremely difficult, if not impossible, to say how much is "sufficient." What is enough for one grand juror may not be enough for another. Thus, determining whether a witness is the complaining witness will not only require a factual inquiry into the witness's role in initiating the prosecution, but it will also require discovery relating to the grand jury proceeding. All of the grand jurors will have to be deposed to determine which combination of testimony was sufficient for them to vote to indict, and the prosecutor and other witnesses who testified before the grand jury also may have to be deposed. *Jones v. Cannon*, 174 F.3d 1271, 1287 n.10 (11th Cir. 1999). Such discovery would impair the secrecy of the grand jury proceeding, which is considered essential to the proper functioning of the grand jury. *Douglas Oil Co. of Cal. v. Petrol Stops N.W.*, 441 U.S. 211, 218-23 (1979); *see also* FED. R. CRIM. P. 6(e); GA. CODE ANN. § 15-12-67. As the Eleventh Circuit recognized below, this concern is not implicated in the scenarios at issue in *Malley* and *Kalina*. *Rehberg*, 611 F.3d at 840 n.8. In the end, discovery on this issue would eviscerate both the reason for secrecy in grand jury proceedings and the reason for immunity. *Jones*, 174 F.3d at 1287 n.10.

Having absolute immunity for grand jury testimony is not a license for witnesses – complaining or otherwise – to lie with impunity to the grand jury. Witnesses testifying before both federal and Georgia grand juries may be prosecuted for perjury. Federal law provides that a person found guilty of perjury before a grand jury shall be fined and/or imprisoned for up to five years. 18 U.S.C. § 1623(a). Georgia law is even more punitive, providing that the penalty for perjury shall be a fine of up to $1,000 and/or imprisonment for at least one, but not more than, ten years. GA. CODE ANN. § 16-10-70(b).[13] If the witness's false

[13] The scope of the federal and Georgia statutes on perjury also support the application of absolute witness immunity to grand jury testimony. Federal law includes a statute that covers perjury generally. 18 U.S.C. § 1621. It also includes a statute that covers perjury "in any proceeding before or ancillary to any court or grand jury of the United States." 18 U.S.C. § 1623(a). Similarly, Georgia has a statute that covers false swearing generally. GA. CODE ANN. § 16-10-71. It also has a statute that covers perjury in the specific context of "judicial proceedings." GA. CODE ANN. § 16-10-70(a). The fact that federal and Georgia law treat perjury in court and perjury in grand jury proceedings differently from perjury in other contexts indicates that the same immunity that applies to witnesses who testify in trials should apply to witnesses who testify in grand jury proceedings. Moreover, Georgia law imposes stiffer penalties for perjury in judicial proceedings, which include grand jury proceedings, than for perjury in other contexts. *Compare* GA. CODE ANN. § 16-10-70(b) (penalties for perjury in judicial proceedings), *with* GA. CODE ANN. § 16-10-71(b) (penalties for false swearing in all other contexts). Because Georgia law treats perjury at trial the same as perjury at a grand jury proceeding from the standpoint of punishment, it is logical for the immunities that apply to trial testimony and grand jury testimony to be the same.

testimony caused another person to be imprisoned, Georgia law requires the convicted witness to be imprisoned for an amount of time not to exceed the sentence received by the wrongfully convicted person. *Id.* And if the witness's false testimony caused another person to be executed, Georgia law requires the perjuror to be imprisoned for life. *Id.* In addition to being prosecuted for perjury, a government official who willfully deprives a person of his federal constitutional or statutory rights may be punished criminally under federal law. 18 U.S.C. § 242. Thus, the deterrent effect of being prosecuted for perjury or for civil rights violations is significant and cannot be discounted.

Deterrence of false testimony is, of course, the goal. Society does not want a system where government officials testify falsely in judicial proceedings and then take their chances in Section 1983 cases. Instead, we want a system where government officials testify truthfully without fear of being sued for civil damages by disgruntled criminal defendants. Unfortunately, government officials are human and sometimes come up short of this aspiration. The question, then, is how to deter them from testifying falsely and to encourage them to take greater care in ensuring that their testimony is accurate in the face of the reality that they may be called upon to testify to facts provided to them by others. The answer is not to subject them to civil damages liability. *Jones*, 174 F.3d at 1287 n.10 ("The remedy for false grand jury testimony is criminal prosecution for perjury and not

expanded civil liability and damages."). Indeed, Professor Lawrence Rosenthal argues that the threat of civil damages liability is unlikely to alter prosecutorial behavior because the political and professional incentives for prosecutors to prosecute crime aggressively far outweigh the political incentives to minimize civil damages liability, especially since government officials are likely to be indemnified by their employers. Rosenthal, *Second Thoughts*, at 152-61. As Professor Rosenthal explains,

> Given their political and professional incentives, we cannot expect prosecutors to be attentive to potential civil liability; for that reason, it may be best to leave deterrence of prosecutorial misconduct to the professional embarrassment associated with exonerations, and the potential for professional discipline in the most serious cases. As for investigators, the threat of liability in the most egregious cases may create some additional political incentive to devote scarce public resources to monitoring and discipline, and when it comes to egregious abuses, it is unlikely that the deterrent effect of liability will be offset by the political advantage of pursuing abusive techniques of which the public is likely to approve. Short of these outliers, however, it is extremely doubtful that the threat of civil liability is likely to reduce the incidence of wrongful conviction.

Id. at 160-61 (footnotes omitted).

Subjecting a complaining witness to civil damages liability in a common-law action for malicious prosecution made sense under the pre-1871 system of private prosecution because allowing a victim to prosecute the accused created an incentive for vindictiveness in the victim. For the same reason today, it makes sense for a private person who instigates a prosecution not to have immunity. But it makes no sense to deprive a government official who neither instigates the prosecution (in the sense that the victim does) nor initiates the prosecution (in the sense that the public prosecutor does) of absolute immunity for testifying before a grand jury. This is especially so in light of the facts that (1) the prospect of civil damages liability does not deter government officials from testifying falsely, and (2) there are other constitutional, legal, political, professional, and personal deterrents and safeguards in place to diminish the incentive for giving false testimony.

Once again, it bears emphasizing that the common-law concept of the complaining witness does not apply to government officials because the system of public prosecution that is so prevalent today was largely unknown before 1871. Under the former system of private prosecution, government officials did not initiate prosecutions. Although certain government officials today do initiate prosecutions, investigators like Paulk do not. When Paulk testified to the grand jury about Rehberg, he was merely presenting evidence; the complaining witnesses were Hotz, Phoebe Putney Memorial Hospital, and/or whoever received and

complained about the allegedly harassing faxes sent by Rehberg.[14] Moreover, Paulk was not legally authorized to initiate the prosecution of Rehberg under Georgia law. Only the district attorney was authorized to do that.

In the end, the policy considerations outlined above demonstrate that absolute immunity should apply to all grand jury testimony. Under Rehberg's proposed approach, every case would require a factual determination as to (1) whether a witness is a complaining witness, thereby forcing an untold number of government officials to endure the burdens and expenses of litigation; and (2) whether the witness testified falsely. Such a formulation would render the purposes of immunity (even qualified immunity) meaningless. The inability to make this determination without discovery (or a possible trial) indicates that this is an issue that calls for the clarity and predictability of a bright-line rule. Thus, the Court should hold that absolute immunity applies to all government officials who testify at any judicial proceeding, including grand jury proceedings. Under this rule,

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[14] As noted above, federal law and Georgia law allow grand juries to consider hearsay and other evidence that would be inadmissible at trial. Because it is permissible to present hearsay and otherwise inadmissible evidence to a grand jury, the prosecutor's presentation about Rehberg to the grand jury was streamlined by having Paulk testify in summary fashion on the basis of information provided by others. Under Rehberg's theory, Paulk became the complaining witness simply because the prosecutor attempted to be efficient.

Paulk is entitled to dismissal of Rehberg's claim for malicious prosecution.

CONCLUSION

For the foregoing reasons, the Court should hold that all government officials who testify at any judicial proceeding, including grand jury proceedings, are entitled to absolute immunity. Under this rule, Paulk has absolute immunity from civil liability under Section 1983 for any claims arising out of his testimony to the grand jury. Accordingly, the Court should affirm the judgment of the Eleventh Circuit.

Respectfully submitted,

JOHN C. JONES
Counsel of Record
248 Roswell Street
Marietta, GA 30060
(770) 427-8066
jcjones1234@bellsouth.net

THEODORE FREEMAN
SUN S. CHOY
JACOB E. DALY
FREEMAN MATHIS &
GARY, LLP
100 Galleria Parkway
Suite 1600
Atlanta, GA 30339
(770) 818-0000

Counsel for Respondent
James P. Paulk