

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: POTTAWATTAMIE COUNTY, IOWA, ET AL.,
Petitioners, v. CURTIS W. MCGHEE, JR., ET AL.
CASE NO: No. 08-1065
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1 P R O C E E D I N G S

2 (10:02 a.m.)

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

6 Mr. Sanders.

7 ORAL ARGUMENT OF STEPHEN SANDERS

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

23 MR. SANDERS: Your Honor --

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

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

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

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

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

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

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

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

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

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

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

16 Is that your position?

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

25 But the use of the evidence at trial is the

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

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

7 MR. SANDERS: Yes. This Court --

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

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

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

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

20 JUSTICE SCALIA: In the case?

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

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

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

1 evidence can provide injury and so the --

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

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

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

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

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

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

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

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

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

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

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

1 the kind of injury.

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

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

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

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

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

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

5 MR. SANDERS: Uh-hmm.

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

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

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

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

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

25 MR. SANDER: The deprivation --

1 JUSTICE SOTOMAYOR: That's the injury.

2 MR. SANDERS: That's correct.

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

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

8 JUSTICE SOTOMAYOR: So why does the use --

9 MR. SANDERS: Because that --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE STEVENS: He doesn't get immunity,
25 but why is he liable? Why is he liable? Because the

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

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

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

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

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

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

1 JUSTICE STEVENS: Well, this -
2 -- this
3 investigation by the prosecutor could not have caused
4 injury but for the immunized act of going forward with
5 the trial.

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

7 JUSTICE STEVENS: What's the difference?

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Katyal.

2 ORAL ARGUMENT OF NEAL K. KATYAL

3 ON BEHALF OF THE UNITED STATES,

4 AS AMICUS CURIAE,

5 SUPPORTING THE PETITIONERS

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

7 and may it please the Court:

8 This Court's decision in Buckley v.

9 Fitzsimmons explicitly reserved the question presented

10 today, which is whether a cause of action exists against

11 prosecutors alleged to have fabricated evidence.

12 Respondents' answer to that question asks this Court to

13 announce for first time ever that there is a freestanding

14 due process right not to be framed. That theory would

15 untether due process from the right to a fair trial,

16 which is the process a defendant is due before being

17 deprived of liberty.

18 JUSTICE BREYER: Why do we need that theory?

19 I mean, why not just say what Newman said and the others

20 said? There is no freestanding right.

21 MR. KATYAL: Well --

22 JUSTICE BREYER: There is just a

23 right not to convict a person with made-up evidence, and

24 of course a prosecutor, insofar as he's involved in the

25 prosecutorial stage, is absolutely immune. But if he's

1 involved in the investigatorial stage of that event,
2 well, then he's not immune absolutely. That's a policy
3 decision. That has nothing to do with freestanding
4 rights.

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

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

10 (Laughter.)

11 MR. KATYAL: Right. Right. And with respect
12 to that I think we have several -- several responses.
13 The first is that this Court has rejected that kind of
14 mere foreseeability analysis in the context of section
15 1983, and due process --

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

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

25 MR. KATYAL: I think there are practical and

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

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

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

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

1 MR. KATYAL: Yes.

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

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

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

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

24 JUSTICE KENNEDY: What if a prosecutor knows
25 that it's fabricated evidence? The police officer

1 fabricates the evidence and says: Mr. Prosecutor, he's
2 a very bad man; I fabricated the evidence. The
3 prosecutor introduces it. What result there?

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

6 MR. KATYAL: Right.

7 JUSTICE KENNEDY: Suppose he knows?

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

11 JUSTICE KENNEDY: Against the policeman?

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

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

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

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

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

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

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

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

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

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

1 violations and the like.

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

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

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

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

21 MR. KATYAL: Well --

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

24 MR. KATYAL: Well, with respect to a cause
25 of action and whether the principles of absolute

1 immunity apply to this, I think this Court has already
2 recognized several times that the overriding interest is
3 protecting the judicial process and not letting
4 information be chilled and not come in.

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

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

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

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

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

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

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

25 And that, I think, is a fundamental point,

1 which is this Court -- no court -- has ever really
2 accepted the notion that prosecutors can be liable, that
3 there is a cause of action for --

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

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

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

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

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

1 started.

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

5 JUSTICE STEVENS: I understand.

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

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

11 Mr. Clement.

12 ORAL ARGUMENT OF PAUL D. CLEMENT

13 ON BEHALF OF THE RESPONDENTS

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

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

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

1 Now, that's not a crazy theory of immunity.
2 It's exactly the theory of immunity that the Seventh
3 Circuit adopted in the Buckley decision and this Court
4 reversed, unanimously as to the press conference and by
5 a majority opinion with respect to pretrial
6 investigatory conduct involving fabrication. If that
7 sounds familiar, it should. That's the conduct that's
8 at issue here.

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

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

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

25 JUSTICE ALITO: So what concerns me about

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

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

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

1 In all of those cases a claim could be brought against
2 the prosecutor.

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

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

17 MR. CLEMENT: I --

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

1 MR. CLEMENT: I don't --

2 JUSTICE ALITO: You certainly get by
3 12(b)(6).

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

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

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

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

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

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

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

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

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

1 something like that. And in those cases --

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

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

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

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

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

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

1 purpose of depriving the person of their liberty, then
2 you would, I think, apply Iqbal, and you would ask under
3 all the circumstances of that case whether it's a
4 plausible allegation.

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

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

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

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

24 MR. CLEMENT: I think if you look at
25 reported -- both unpublished and published Second Circuit

1 decisions at the district court level and the court of
2 appeals level, you will find very few cases that even
3 cite Zahrey. I think it's something like -- maybe 17 I
4 think is what we found.

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

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

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

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

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

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

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

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

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

1 MR. CLEMENT: Without the submission at
2 trial -- I mean, it would depend, I suppose, on the
3 circumstances. You could have, certainly, a Fourth
4 Amendment variant --

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

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

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

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

1 somebody that's -- that's guilty, so if you did a
2 harmless error analysis, you would say, well, the use of
3 the perjured testimony really didn't deprive the person
4 of their liberty because they were otherwise --

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

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

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

22 Think about who was sued in Malley. It
23 was the police officers. What did the police officers
24 do? They procured an invalid arrest warrant. Now, did
25 their actions, independent of the absolute immune act of

1 the magistrate, injure the plaintiffs? No. Without the
2 magistrate issuing the warrant, there was no arrest,
3 there's no search, there's no injury to the plaintiffs.

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

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

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

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

17 JUSTICE KENNEDY: So that -- so that's
18 not important --

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

1 constitutional violation or cause them to be subjected
2 to a constitutional violation.

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

12 MR. CLEMENT: Well, the --

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

17 MR. CLEMENT: Well, Justice --

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

20 MR. CLEMENT: What's that?

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

23 MR. CLEMENT: Well, I would ask -- I would
24 ask both of you to go back and read two things, and I
25 would particularly like Justice Scalia to go back and

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

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

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

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

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

24 MR. CLEMENT: Well, I guess what I would do,
25 Mr. Chief Justice, is try to take issue with your

1 premise, which is that we can't advert to the absolute
2 immune act at all. Of course we can. I mean, this
3 isn't --

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

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

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

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

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

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

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

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

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

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

1 was the warrant that was eventually procured.

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

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

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

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

23 MR. CLEMENT: Well, I think there is going
24 to be an effect on the deterrent effect on the
25 prosecutor pretrial, which is they will be procured. I

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

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

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

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

1 going to say, well, Buckley?

2 MR. CLEMENT: Well --

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

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

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

19 MR. CLEMENT: Well --

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

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

1 Court squarely confronted that question in Burns and
2 said the advice-giving function, which is a function
3 only a prosecutor, only a lawyer anyways, can perform --

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

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

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

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

19 JUSTICE KENNEDY: That's circular.

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

24 But here's why I think it's the right line,
25 because think about the prosecutor's special function.

1 If you don't have probable cause to arrest any individual
2 for a crime, then the function the police officers ought
3 to be performing is one of a truth-seeking function, and
4 that is a classic police investigatory function.

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

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

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

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

1 cause, I think that that --

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

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

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

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

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

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

25 MR. CLEMENT: Yes.

1 JUSTICE BREYER: Someone? So it needn't be
2 --

3 MR. CLEMENT: Someone.

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

6 MR. CLEMENT: That's right.

7 JUSTICE BREYER: Uh-huh.

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

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

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

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

1 immunity.

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

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

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

23 MR. CLEMENT: And, again, the Court
24 addressed exactly this Court in the -- exactly that
25 issue in the Buckley decision and said, sure -- you

1 know, from -- with the benefit of hindsight, you can
2 sort of retrospectively look and make anything in the
3 investigatory stage part of -- and part and parcel of
4 the prosecution.

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

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

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

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

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

25 MR. CLEMENT: And let me say this: Because

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Well, your approach,
24 then, encourages prosecutors to be trigger happy.
25 They're prosecuting right now because they know, then,

1 that everything else, they have absolute immunity, so --
2 you know, shoot first and ask questions later.

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

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

11 MR. CLEMENT: Well, I suppose --

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

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

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

24 MR. CLEMENT: Well, I think it's -- I'm not
25 sure it's a decision you have to make. I think it's

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

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

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

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

25 That statute did not provide any immunities,

1 and I do think, as we say in the brief, this is a case
2 where it's important not to lose the forest for the
3 trees because this is a statute was passed -- passed in
4 1871. This is one of the great civil rights statutes.

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

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

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

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

1 Mr. Sanders, you have 5 -- 5 minutes
2 remaining.

3 REBUTTAL ARGUMENT OF STEPHEN SANDERS

4 ON BEHALF OF THE PETITIONERS

5 MR. SANDERS: Thank you, Mr. Chief Justice.
6 We have four main points.

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

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

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

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

1 Circuit is not applying as liberal a rule as your
2 opponent suggests.

3 Is that --

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

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

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

14 JUSTICE SCALIA: Never mind --

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

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

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

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

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

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

22 MR. SANDERS: Uh-huh.

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

1 but everything else, the same.

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

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

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

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

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

1 that would be Fourth Amendment territory.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Counsel.

2 MR. SANDERS: Thank you.

3 CHIEF JUSTICE ROBERTS: The case is
4 submitted.

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

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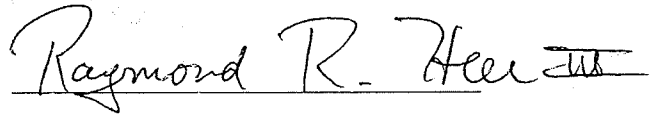
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of; POTTAWATTAMIE COUNTY, IOWA, ET AL., Petitioners, v. CURTIS W. MCGHEE, JR., ET AL.; and that these attached pages constitute the original transcript of the proceedings for the records of the Court.

Handwritten signature of Raymond R. Heer in cursive script, written over a horizontal line.

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