No. 23-1282

IN THE

Supreme Court of the United States

JOHN C. BAER,

Petitioner,

v.

LARRY TRENT ROBERTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF PROSECUTING ATTORNEYS IN SUPPORT OF PETITIONER

ALEXANDER C. DALE
Counsel of Record
CHRISTOPHER S. EDWARDS
WARD AND SMITH, P.A.
127 Racine Drive,
University Corporate Center
P.O. Box 7068
Wilmington, NC 28406-7068
910-794-4800
acd@wardandsmith.com

Counsel for Amicus Curiae

331103

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST.....1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE PETITION 6

I. The decision below erodes absolute immunity and diminishes prosecutorial independence.....6

II. The circuit split that petitioner identifies is real, and it creates a patchwork of civil liability for prosecutors across the country. 10

III. Without broad immunity, conviction review units' important work will suffer. 13

CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

Bailey v. Commonwealth,
237 S.W. 415 (Ky. 1922) 3

Buckley v. Fitzsimmons,
509 U.S. 259 (1993) 2, 7, 10, 11

Cousin v. Small,
325 F.3d 627 (5th Cir. 2003) 11

Diaz-Colon v. Fuentes-Agostini,
786 F.3d 144 (1st Cir. 2015). 11

Imbler v. Pachtman,
424 U.S. 409 (1976) 2, 7

In re Peasley,
90 P.3d 764 (Ariz. 2004) 3

Van de Kamp v. Goldstein,
555 U.S. 335 (2009) 2, 6

Wearry v. Foster,
52 F.4th 258 (5th Cir. 2022)..... 12

Yarris v. Cnty. of Delaware,
465 F.3d 123 (3d Cir. 2006)..... 12

Statutes

42 U.S.C. § 1983..... 7

Other Authorities

Am. Bar Ass'n, Criminal Justice Standards for the Police Function, (2020). 9

Am. Bar Ass'n, Criminal Justice Standards for the Prosecution Function (2017) 9

Cyrus R. Vance, Jr., *The Conscience & Culture of a Prosecutor*,
50 Am. Crim. L. Rev. 629 (2013)..... 14

Elizabeth Webster, *The Prosecutor as a Final Safeguard against False Convictions: How Prosecutors Assist with Exoneration*,
110 J. of Crim. L & Criminology 245 (2020)..... 13

Inger H. Chandler, *Conviction Integrity Review Units*,
31 Sum. Crim. Just. 14 (2016) 14

John A. Horowitz, *Prosecutorial Discretion & the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*,
65 Fordham L. Rev. 2571 (1997)..... 5

John Hollway, Quattrone Ctr. for the Fair Admin. of Just., *Conviction Review Units: A Nat'l Perspective* (2016), ... 13, 15

Mike Ware, *Dallas Cnty. Conviction Integrity Unit & the Importance of Getting it Right the First Time*,
56 N.Y.L. Sch. L. Rev. 1033 (2012) 14

Model Rules of Pro. Conduct (Am. Bar Ass'n) 3, 5

Nat'l Registry of Exonerations, Registry of Exonerations (2024)..... 14

Nat'l Study of Prosecutor Elections, *The Prosecutors & Politics Project* (Feb. 2020)..... 5

Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve & Protect Each Other: How Police–Prosecutor Codependence Enables Police Misconduct*,
100 Bos. U. L. Rev. 895 (2020). 8

U.S. Dep't of Just., *Just. Manual* (2018)..... 8

STATEMENT OF INTEREST[1]

The Association of Prosecuting Attorneys (APA) is a national, nonprofit organization created by prosecutors from across the country to strengthen their efforts in ensuring safer communities and improving their performance in the criminal justice system.

The APA provides resources, including training and technical assistance, to develop proactive and innovative prosecutorial practices. It acts as a global forum for the exchange of ideas, allowing prosecutors to collaborate with each other and with other criminal justice partners. The APA also serves as an advocate for prosecutors on emerging issues related to the administration of justice, including by submitting briefs as *amicus curiae* in appropriate cases.

The APA's board of directors includes current prosecutors from states throughout the nation. The APA has eighteen attorneys on staff with over 400 years of collective criminal justice experience.

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than amici or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties received notice of the APA's intent to file an amicus brief at least 10 days before the deadline to file the brief and consented to its filing.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Absolute prosecutorial immunity creates prosecutorial independence. *See Van de Kamp v. Goldstein*, 555 U.S. 335, 341–42 (2009). Independent prosecutors make our criminal justice system work.

For more than 100 years, courts have recognized the importance of absolute prosecutorial immunity. "[H]arassment by unfounded [civil] litigation" makes prosecutors—and our criminal justice system—less effective. *Id.* An unfounded suit will distract a prosecutor "from h[er] public duty," and even the threat of such a suit might lead a prosecutor to "shade h[er] decisions" rather than exercise the independent judgment that the public trust demands. *Id.* Exposing a prosecutor to civil liability for her decisions may thus cause her to put her own interests over the interests of the community that she serves. *See id.* And when prosecutors are distracted by the fear of unfounded litigation, those communities suffer.

Whether a prosecutor should enjoy absolute immunity from civil liability turns on the nature of her conduct. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). If the prosecutor was acting as an advocate, then she is immune from all civil suits. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). But when the prosecutor was acting as an investigator, she receives only qualified immunity, a lesser form of immunity that depends on the constitutional right at issue. *Buckley*, 509 U.S. at 275–76. Even the most diligent prosecutor must make split-second decisions, some of which may, with the benefit of hindsight, turn out to be wrong. Recognizing that most prosecutors are committed, diligent, and ethical, the Court has protected pros-

ecutors from civil liability when they perform their core responsibilities.

The Court should take this case to clarify the scope of absolute prosecutorial immunity and reverse the Third Circuit's decision. Petitioner was the assistant district attorney assigned to prosecute respondent's criminal case. Pet. App. 6–7. After respondent was indicted, petitioner worked with a detective to identify a potential witness, Layton Potter, who would testify about respondent's motive. Pet. App. 72–73. After identifying Mr. Potter, petitioner interviewed Mr. Potter and asked him "if he 'wanted a piece' of the case against" respondent. Pet. App. 73. As a result of petitioner's request, Mr. Potter gave petitioner a false statement, which respondent contends petitioner should have known to be false. Pet. App. 73. While respondent alleges that petitioner was performing an investigation, petitioner's conduct—interviewing Mr. Potter, evaluating his testimony, and obtaining a statement—is a core prosecutorial function that deserves absolute immunity.

Advocacy may look different for prosecutors than for other lawyers. Rather than zealously advocate for a specific client or outcome, prosecutors advocate for the greater good. The American Bar Association's Model Rules of Professional Conduct describe the prosecutor as a "minister of justice," *see* Model Rules of Pro. Conduct r. 3.8 cmt. 1 (Am. Bar Ass'n), someone who seeks a just outcome whether or not it results in a conviction, *e.g.*, *In re Peasley*, 90 P.3d 764, 772 (Ariz. 2004) ("[A prosecutor's interest] is not that it shall win a case, but that justice shall be done."); *Bailey v. Commonwealth*, 237 S.W. 415, 417 (Ky. 1922) ("[T]he duty of a prosecuting attorney is not to persecute, but

to prosecute, and that he should endeavor to protect the innocent as well as to prosecute the guilty.").

For prosecutors, a conviction does not mean that justice was done for all parties. Prosecutors must make their communities safer and ensure justice. Viewing a prosecutor's role as merely an advocate for the State who exists only to obtain convictions creates dangerous incentives. That mindset encourages police and prosecutors to focus on low-level crimes, while leaving difficult-to-win cases unprosecuted. To truly do justice, prosecutors may use several different instruments, along with incarceration: offender rehabilitation, restorative justice practices, and other alternatives to prosecution. To determine the right strategy, prosecutors must approach each case thoughtfully. When evaluating a case before trial, for example, they must interview the potential witnesses identified by law enforcement to ensure that the charges against the accused are likely to result in a conviction and to ensure themselves that a conviction and eventual incarceration is the appropriate outcome.

The Third Circuit's decision ignores the prosecutor's role as a minister of justice, and the criminal justice system is worse for it. The Court should take this case for three reasons.

First, by concluding that petitioner's witness interview was part of an investigation, not advocacy, the decision diminishes prosecutorial independence. Prosecutors generally leave investigations to the police. If witness interviews, like the one that petitioner conducted, are investigations, prosecutors will be forced to rely more heavily on police when preparing for trial.

The relationship between prosecutors and police is oft criticized, whether deservedly or not. But prohibiting prosecutors from interviewing a witness if they helped identify the witness forces them to be over reliant on police investigations. Tying prosecutors to police in this way limits a prosecutor's discretion, imperils the prosecutor's office's enforcement priorities, and shifts the burden of administering justice away from prosecutors to police. More, denying absolute immunity for interviews like petitioner's frustrates the prosecutor's duty to ensure that the accused's guilt is "decided upon the basis of sufficient evidence." Model Rules of Pro. Conduct r. 3.8 cmt. 1. And it makes it nearly impossible for prosecutors to "prevent . . . the conviction of innocent persons." *Id.*

Second, the Third Circuit's decision also deepens an entrenched circuit split, cementing an unworkable patchwork-immunity regime. Most obviously, the circuit split treats prosecutors in different jurisdictions differently. The criminal justice system forces prosecutors to follow a patchwork of laws and perform many functions. Most prosecutors are elected locally, meaning that they answer directly to their constituents. *E.g.*, Nat'l Study of Prosecutor Elections, *The Prosecutors & Politics Project* at 8 (Feb. 2020) (observing that prosecutors are elected in 45 states). In some states, local prosecutors may also be answerable to the governor. *E.g.*, John A. Horowitz, *Prosecutorial Discretion & the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 Fordham L. Rev. 2571, 2583 (1997) (describing New York Governor George Pataki's efforts to replace Bronx County District Attorney Robert T. Johnson in a high-profile case because of Johnson's reluctance to seek the death penalty). Prosecutors should not be forced to con-

tend with the same competing pressures when assessing whether they will be immune from civil liability under federal law. Making matters worse, some circuits have developed internal disagreements about the contours of absolute immunity, with different panels of some courts of appeals reaching inconsistent conclusions in materially identical cases. These intractable splits deprive prosecutors of their independence and force them to focus their decision-making on avoiding a potential civil suit, not doing justice.

Finally, the Third Circuit's decision also discourages prosecutors from setting aside wrongful convictions. Many of our nation's largest prosecutors' offices have established conviction review units, which review meritorious cases for claims of official misconduct, including misconduct by the prosecuting attorney. Over the past 30 years, these groups have been successful, exonerating thousands of innocent people. Opening the door for exonerees to sue the prosecutor who handled their case could jeopardize that work. Honest and hard-working prosecutors are forced to make split-second decisions that later turn out to be wrong. By denying petitioner absolute immunity for his post-charge interview of Mr. Potter, the Third Circuit's ruling leaves scores of diligent, ethical, and competent prosecutors open to potentially disastrous civil liability.

REASONS FOR GRANTING THE PETITION

I. The decision below erodes absolute immunity and diminishes prosecutorial independence.

Prosecutors are independent because they are immune from civil liability *See Van de Kamp*, 555 U.S. at 341–42. In court, prosecutors must make split-

second decisions during the heat of trial. *See Imbler*, 424 U.S. at 421. Those decisions—whether right or wrong—cannot later be challenged under 42 U.S.C. § 1983 because, as this Court has recognized, the prosecutor cannot, and should not, elevate her own interests over the interests of the community that she serves. *Imbler*, 424 U.S. at 424–25.

The same concerns that underlie absolute immunity for a prosecutor's in-court actions warrant extending that immunity to a prosecutor's post-charge efforts to marshal trial evidence, including meeting with witnesses. To start, prosecutors need to be independent not only in court, but also while they prepare for trial, including when "evaluating the evidence and preparing for its introduction." *Buckley*, 509 U.S. at 282 (Kennedy, J., concurring in part). When a prosecutor decides to put a witness on the stand, her decision is fraught with competing considerations: Do I believe this witness? Will the judge or jury believe him? Is his memory sharp enough? Can he give compelling testimony? Can the defense impeach him and destroy his credibility? The prosecutor should not concern herself with whether, with the benefit of hindsight, she answered any of those questions incorrectly. She must be able to determine in the moment whether the witness should testify.

Placing witness interviews outside absolute immunity's ambit impairs the prosecutor's ability not only to obtain a conviction, but also to avoid wrongful convictions. The ABA's Model Rules, which have been widely adopted by the States, tell prosecutors that they must avoid securing wrongful convictions or convictions that are not supported by the evidence. Likewise, the Department of Justice tells the prosecutors in each United States Attorney's Office that they may not

"commence or recommend federal prosecution" unless they believe that "the admissible evidence will probably be sufficient to obtain and sustain a conviction." U.S. Dep't of Just., *Just. Manual* § 9-27.220 (2018). Creating liability for interviewing potential witnesses encourages the prosecutor to think about herself, not about her obligation to do justice. As a result, fear of potential liability may dissuade the cautious prosecutor from interviewing any witnesses. The prosecutor may miss potentially exculpatory evidence as a result of this avoidance.

Beyond impairing prosecutors from fulfilling their roles as ministers of justice, the Third Circuit's decision forces them to rely too heavily on law enforcement, further sacrificing prosecutorial independence—or at least its appearance. Many in our nation are, to put it mildly, skeptical of police–prosecutor relations. *E.g.*, Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve & Protect Each Other: How Police–Prosecutor Codependence Enables Police Misconduct*, 100 Bos. U. L. Rev. 895, 901 (2020). These critics believe that prosecutors and police have an *omerta*-like silence, enforced within both the police department and prosecutor's office, that compels prosecutors to "align with the police at all costs—even when there were egregious errors in cases." *Id.* at 905. That perception will only deepen if prosecutors are forced to rely on police to conduct substantive witness interviews.

Prosecutors, not police, should shoulder the burden of interviewing witnesses for trial for two reasons. First, interviewing witnesses for trial falls far outside law enforcement's wheelhouse. Police serve many critical functions, but those functions are wide ranging and are often assigned "on an ad hoc basis." Am. Bar Ass'n, *Criminal Justice Standards for the Police Function*,

§ 1.2.1 (2020). While prosecutors train police on investigative tactics, that training is no substitute for the prosecutor's independent judgment about a potential witness' capacity to tell the truth and his credibility. Second, even if police officers may conduct effective witness interviews, putting prosecutors on the sidelines during those interviews forces prosecutors to shirk their ethical obligations. Prosecutors are not "case processor[s]." Am. Bar Ass'n, *Criminal Justice Standards for the Prosecution Function*, Standard 3-1.2(f) (2017). They need not pursue any case that falls into their lap. Nor should they have to. Prosecutors instead are problem solvers, "responsible for considering broad goals of the criminal justice system." The only way a prosecutor may fulfill that role is by participating in each case, including evaluating witness testimony and deciding whether that witness should testify at trial.

Prosecutors fill a special role. A prosecutor is an advocate whose goal is not necessarily to win at trial; she instead advocates for justice in her community. Often, a prosecutor's decisions about what is—and what is not—just are made in the heat of the moment. And this Court has recognized that such decisions require absolute immunity to ensure that the prosecutor thinks of her community, not herself. Prosecutors need absolute immunity not only when they are in court, but also when they perform other core functions, like interviewing trial witnesses. They should be able to call witnesses who, in the moment, they believe to be important to their case without the fear of future civil liability. Yet the Third Circuit's holding prevents prosecutors from participating at critical junctures in the case, resigning them to the role

of case processors, charging ahead on the cases brought to them by law enforcement.

II. The circuit split that petitioner identifies is real, and it creates a patchwork of civil liability for prosecutors across the country.

The courts of appeals can't agree whether post-charge witness interviews are advocacy or investigation. *See* Pet. 12–21. In practical effect, that split leaves prosecutors across the country guessing about when they are, and when they are not, absolutely immune from civil liability. Although a bright-line rule placing all post-charge conduct beyond the reach of the law would be inappropriate, the Court should take this case to confirm that a prosecutor who, after charges have been filed, interviews witnesses to marshal evidence for trial enjoys absolute immunity.

Whether a prosecutor should be absolutely immune from civil liability depends on the nature of her conduct. See *Buckley*, 509 U.S. at 269. This "functional approach," *id.,* strikes a balance between accountability, on the one hand, and the Court's concern that civil liability could "undermine a prosecutor's performance," on the other, *id.* at 270 n.4. Whether a prosecutor enjoys absolute immunity turns on whether she was advocating or was investigating. *Id.* at 274–45.

The circuit courts are split on whether post-indictment interviews meant to marshal evidence for trial are advocacy or investigation. For instance, in the Fifth Circuit, prosecutors (sometimes) enjoy broad immunity from civil liability when they interview witnesses "to secure evidence that would be used in the presentation of the state's case at the pending trial of an already identified suspect." *Cousin v. Small*, 325 F.3d 627, 635

(5th Cir. 2003). In *Cousin*, the court determined that, under *Buckley*, "many, perhaps most, such interviews are likely to be advocatory rather than investigative." *Id.* at 633. So, too, in the First Circuit, which has held that "[p]reparing a witness for trial is at the core of what a prosecutor qua prosecutor does." *Diaz-Colon v. Fuentes-Agostini*, 786 F.3d 144, 150 (1st Cir. 2015). It does not matter if prosecutors "offer[ ] something of value to induce a trial witness to testify," because that type of conduct is "intimately associated with the judicial phase of the criminal proceeding." *Id.* at 151.

The Third Circuit's decision directly conflicts with *Cousin* and *Diaz-Colon*, reading *Buckley* to exclude the same conduct from absolute immunity's ambit. Respondent alleged in essence that petitioner "coerced" or "solicited Potter's false testimony as to motive in return for favorable treatment of the criminal charges pending against him." Pet. App. 9, 12.

The circuit split leaves discrepancies in the methods that prosecutors in different parts of the country may use to advocate for justice. Prosecutors already have to deal with a legal patchwork when working in the criminal justice system. They should not have to deal with the same patchwork when they deal with immunity issues under federal law. While federalism may require a patchwork approach to criminal justice, there's no good reason why prosecutors should be subject to potential civil liability based only on their geographic location.

This Court's intervention is all the more warranted because, as petitioner highlights, intra-circuit conflicts have developed. Pet. 17–18. These conflicts mean that no prosecutor is truly safe; their fate instead depends on the judge or judges assigned to hear their case.

Compare the decision below with the Third Circuit's decision in *Yarris v. County of Delaware*, 465 F.3d 123 (3d Cir. 2006). Much like petitioner, the *Yarris* prosecutor allegedly cajoled a jailhouse snitch into testifying falsely at Yarris' criminal trial. *Id.* at 139. Yet petitioner and that prosecutor suffered different fates; the Third Circuit concluded that the *Yarris* prosecutor was absolutely immune, even though he used the "stick and carrot" treatment to elicit false testimony. *Id.* There's no principled distinction between *Yarris* and the decision below. Yet the Third Circuit concluded that there was. It determined that petitioner's alleged efforts to "influence[ ], entice[ ], and coerce[ ] a jailhouse snitch into giving" a false statement that would be used at trial was somehow different from the *Yarris* prosecutor's stick and carrot approach to obtaining false testimony. Pet. App. 12. While acknowledging that it was a "close call," the panel majority determined that interviewing a witness to allegedly coerce him into giving false testimony was somehow different from offering a witness favorable treatment in exchange for his false testimony. Pet. App. 13.

The Third Circuit's intra-circuit conflict is but one example. The Fifth Circuit's precedent is also in disarray. That court recently denied en banc rehearing of a panel decision that, according to several judges, "dramatically recharacterize[d], and thus confuse[d], the scope of absolute prosecutorial immunity in the Fifth Circuit." *Wearry v. Foster*, 52 F.4th 258, 260 (5th Cir. 2022) (Jones, J., dissential). If the courts of appeals cannot keep their own precedent straight, how could prosecutors possibly be expected to do so? These intra-circuit conflicts exacerbate the effect that absolute immunity's uncertain contours have on prosecutors. No

longer is the concern that like-cases may be treated differently by circuit. Now, like-cases may be treated differently in the same circuit. The prosecutor who once thought she was safe from civil liability now must temper her decision-making, focusing her concern not on doing justice but on ensuring she is not saddled with civil liability.

This Court should take this case because prosecutors deserve to know if they could face civil liability no matter where they are located.

III. Without broad immunity, conviction review units' important work will suffer.

Finally, the Court should take this case because the Third Circuit's decision discourages the vital work done by conviction review units across the country.

Many prosecutors' offices now house conviction review units—a team of prosecutors who review misconduct claims. These teams aren't like other divisions in prosecutors' offices that evaluate convictions, such as appeals, postconviction review, or habeas units. Elizabeth Webster, *The Prosecutor as a Final Safeguard against False Convictions: How Prosecutors Assist with Exoneration*, 110 J. of Crim. L & Criminology 245, 277 (2020); John Hollway, Quattrone Ctr. for the Fair Admin. of Just., *Conviction Review Units: A Nat'l Perspective*, at 6, 24–27 (2016), *available at* https:// www.law.upenn.edu/live/files/5522-cru-final (last visited July 5, 2024) (observing the importance of an independent conviction review unit). Those units are adversarial; they keep the incarcerated behind bars. Webster, *supra.* Conviction review units, by contrast, collaborate with defense attorneys and identify wrongful convictions. *Id.* at 276–77.

Conviction review units have been used successfully in some of our nation's largest jurisdictions. *See generally* Inger H. Chandler, *Conviction Integrity Review Units*, 31 Sum. Crim. Just. 14 (2016) (Harris County, Texas); Cyrus R. Vance, Jr., *The Conscience & Culture of a Prosecutor*, 50 Am. Crim. L. Rev. 629 (2013) (New York County, New York); Mike Ware, *Dallas Cnty. Conviction Integrity Unit & the Importance of Getting it Right the First Time*, 56 N.Y.L. Sch. L. Rev. 1033 (2012) (Dallas County, Texas). For example, since January 1989, New York County's conviction review unit has exonerated more than 50 people in Manhattan. Nat'l Registry of Exonerations, Registry of Exonerations (last modified Apr. 10, 2024), *available at https://www.law.umich.edu/special/exoneration/Pages/browse.aspx*. Dallas County's has exonerated more than 70 in the same period. *Id.* And Harris County's conviction review unit, which oversees convictions from the City of Houston, has exonerated more than 200 people. *Id.* All told, conviction review units nationwide have exonerated nearly 3,500 people, returning more than 30,000 years of their collective lives. *Id.* The benefits of conviction review units have been nothing short of stunning.

Limiting absolute immunity would hinder these successful programs' mission. It's human nature. Conviction review prosecutors are being asked to check the work of their peers—not just those who came before, but their bosses, colleagues, and friends. Of those nearly 3,500 exonerees, almost 2,000 were exonerated fewer than 10 years after their conviction. *Id.* And nearly 1,300 were exonerated in only five years. *Id.* When a conviction review unit exonerates someone, the prosecution isn't ancient history. These units process claims of actual innocence quickly, often leading to

an exoneree's release not within a generation, or even decades. These exonerees are released just a few years after their original conviction. A conviction review unit's quick turnaround thus means that the prosecutor who obtained the invalid conviction remains on staff, perhaps as a superior to the conviction review prosecutor.

That's not to say that there will be no consequences in cases of genuine misconduct. Most conviction review units follow the best practice of referring potentially reckless or malicious conduct to the appropriate authority, whether that be the chief prosecutor or some other investigative agency. *See* Hollway, *supra* at 56–57. While discipline may be appropriate in egregious cases, limiting or eliminating absolute immunity, especially for conduct like petitioner's, may expose many competent, diligent, and ethical prosecutors to civil liability for an honest mistake made on a split-second's thought.

Limiting civil liability has another benefit: increased transparency. Conviction review units, particularly fledgling units, need transparency to bolster their credibility. *See* Hollway, *supra* at 61. Transparency helps stakeholders—including defense attorneys and the community at large—understand the unit's work and priorities. If the original prosecutor lacks absolute immunity, transparency become more problematic. The concern again arises that conviction review prosecutors may be incentivized to withhold information if it exposes their colleagues to civil liability.

Eroding absolute immunity may cause now-successful units to retreat from their efforts. For a conviction review prosecutor, correcting a mistake is one thing; but correcting a mistake that could expose

her boss, colleagues, or friends to civil liability is another.

CONCLUSION

For those reasons, the Court should grant the petition for a writ of certiorari.

ALEXANDER C. DALE
Counsel of Record
CHRISTOPHER S. EDWARDS
WARD AND SMITH, P.A.
127 Racine Drive,
University Corporate Center
P.O. Box 7068
Wilmington, NC 28406-7068
910-794-4800
acd@wardandsmith.com