JAN 14 2011

No. 10-788

IN THE

Supreme Court of the United States

CHARLES A. REHBERG,

Petitioner,

v.

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

Respondents.

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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF GOVERNMENT ACCOUNTABILITY PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION OF GOVERNMENT ACCOUNTABILITY PROJECT FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

The Government Accountability Project (GAP) hereby moves, pursuant to S. Ct. R. 37.2, for leave to file a brief amicus curiae in support of the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. GAP is filing this motion because we have been unable to secure consent from all Respondents.* The proposed brief is attached.

As more fully explained in the Statement of Interest of Amicus Curiae beginning on page 1 of the attached brief, GAP is the nation's foremost civil and human rights organization representing the interests of whistleblowers before the courts and Congress. Accordingly, GAP has a particular interest in cases such as this that involve unlawful and oppressive initiation of criminal proceedings by government officials against individuals who attempt to expose wrongdoing. Although GAP cannot point to statistics to document such a trend, GAP has noted a distressing increase in such cases in recent years.

GAP's brief will assist the Court in determining whether to grant certiorari because the brief highlights the importance of 42 U.S.C. § 1983 in remedying and

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* Petitioner has written to GAP expressing its consent. GAP sent a letter requesting consent via e-mail to counsel for Respondents on January 4, 2011. As of this date, Respondents Kenneth B. Hodges, III, and Kelly R. Burke have sent a letter not objecting, but we have not as yet heard from Respondent James P. Paulk.

deterring such oppressive government conduct—which, significantly, both violates and chills the future exercise of fundamental constitutional rights—and the concomitant importance of affording this deterrence function due weight when considering whether law enforcement officers should be absolutely immune from suit under Section 1983 when they give maliciously false testimony as complaining witnesses before grand juries.

Accordingly, GAP respectfully requests that the Court grant leave to file the attached brief as amicus curiae.

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Government Accountability Project (GAP) is a nonpartisan, nonprofit civil and human rights organization specializing in legal advocacy on behalf of government and corporate whistleblowers who expose illegality, gross waste or mismanagement, abuse of authority, significant threats to public health or safety, or other institutional misconduct detrimental to the public interest. Founded in 1977, GAP is the nation's leading organization devoted to these purposes. The vast majority of GAP's financial support comes from over 10,000 individual donors and from institutions such as the Carnegie Foundation, CS Fund, Ford Foundation, Open Society Institute, and Rockefeller Family Fund. Other funding sources include attorney fees and settlement awards.

GAP attorneys have testified before Congress about the effectiveness of federal statutory protection for whistleblowers, filed numerous amicus curiae briefs on constitutional and statutory issues affecting whistleblowers, and played a leading role in support of the passage of landmark legislation including the Whistleblower Protection Act of 1989, Pub. L. 101-12, 103 Stat. 16 (1989), the 1994 amendments to that Act, and the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).

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1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given at least 10 days' notice of amicus' intention to file this brief.

When GAP participates in litigation as amicus curiae, it brings to bear a broad perspective informed by decades of involvement in a wide range of legal issues affecting whistleblowers. GAP's interest in this case arises because the Petition indicates that Petitioner is a legitimate whistleblower. He complained about unethical billing practices at a hospital. For his effort, Petitioner was wrongfully and maliciously investigated and prosecuted by the local District Attorney's Office, apparently at the urging of powerful local interests to whom the Office was favorably inclined or politically indebted. Although all three grand jury indictments were eventually dismissed, the trauma and expense of fighting incarceration are particularly chilling in themselves and will no doubt discourage others from reporting wrongdoing.

While GAP cannot point to empirical data of this particular trend, we have seen a significant rise in the use of criminal investigation and prosecution in retaliation for legitimate whistleblowing. This trend threatens to undermine the protections provided by state and federal whistleblower laws, as well as state and federal constitutional guarantees of freedom of speech. Especially because current law affords prosecuting attorneys absolute immunity from suit under 42 U.S.C. § 1983 for many acts in furtherance of malicious prosecutions, GAP considers it essential to the integrity of the American system of justice to safeguard and expand access to civil remedies against individuals who participate in such unconstitutional and oppressive schemes as perjurious complaining witnesses.

SUMMARY OF THE ARGUMENT

This Court has recognized that *deterring* unconstitutional conduct is among the core purposes of 42 U.S.C. § 1983. The deterrence interest is especially strong where, as in the case, the wrongful conduct will, if unremedied, chill the future exercise of rights by members of the public other than the claimant. Petitioner is a forensic accountant and whistleblower who threatened powerful interests in his community simply by releasing information that he believed evidenced unethical billing practices at Phoebe Putney Memorial Hospital in Albany, Georgia. A grand jury erroneously indicted him three times on the basis of retaliatory, perjured testimony by Respondent James P. Paulk, the Chief Investigator for the Office of the District Attorney for Dougherty County, Georgia.[2] The Eleventh Circuit's decision, holding Respondent absolutely immune from suit under Section 1983 for violating Petitioner's right to be free from unreasonable seizures, renders Petitioner and others who may be unpopular with state or local officials less secure in the exercise of their rights because it denies them a means to deter abuses of the justice system. In addition to the reasons given in the Petition, the Court should grant certiorari to ensure that Section 1983's deterrence function is taken fully into account in establishing the circumstances in which malicious complaining witnesses can be held liable in damages.

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2. While there are three Respondents, we will refer to Mr. Paulk simply as "Respondent" because the Petition concerns only his liability.

ARGUMENT

Congress enacted the legislation now codified at 42 U.S.C. § 1983 in 1871 at the urging of President Ulysses S. Grant. See *Monroe v. Pape*, 365 U.S. 167, 172-173 (1961), *overruled in part by Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). The constitutional tort action was designed "not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980) (citing *Robertson v. Wegmann*, 436 U.S. 584, 590-591 (1978); *Carey v. Piphus*, 435 U.S. 247, 256-257 (1978)); see also Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. Pa. L. Rev. 755, 760 (1992) (identifying "deterrence and compensation" as twin goals of Section 1983); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 59 (stating that one purpose of Section 1983 is "to deter violations of the Fourth Amendment").

Since *Tenney v. Brandhove*, 341 U.S. 367 (1951) (recognizing absolute legislative immunity), the Court has construed Section 1983 as incorporating immunities and defenses that existed under common law when the statute was passed. The Court determines a defendant's degree of immunity from suit primarily by analyzing the defenses that could be asserted in 1871 by a tort defendant who performed the same "function" under color of law. See *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). Even if a person performing that function was not liable at common law, however, the Court will "consider[] whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Tower*

v. Glover, 467 U.S. 914, 920 (1984); see also *Malley v. Briggs*, 475 U.S. 335, 340 (1986) ("[W]e do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form.").

There is a heavy presumption that a state actor can claim only qualified immunity. See, e.g., *Burns v. Reed*, 500 U.S. 478, 486-487 (1991); *Forrester v. White*, 484 U.S. 219, 230 (1988). Qualified immunity turns on proof of the official's objective good faith and "provides ample protection for all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Absolute immunity from suit, by contrast, is "strong medicine" warranted only by the most compelling of policy concerns embedded in the common law. *Forrester*, 484 U.S. at 230 (quoting *Forrester v. White*, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting)). The Court has accordingly "been quite sparing in [its] recognition of absolute immunity, and ha[s] refused to extend it any further than its justification would warrant." *Burns*, 500 U.S. at 486-87; *Butz v. Economou*, 438 U.S. 478, 506 (1978) ("[Officials who] seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.").

The Court has reserved absolute immunity under Section 1983 for persons sued for violations committed in the performance of legislative, judicial, or quasi-judicial functions. See, e.g., *Superior Ct. of Va. v. Consumers Union*, 446 U.S. 719, 733-734 (1980) (holding state supreme court justices absolutely immune for adopting state bar code, a legislative function); *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (holding judges absolutely immune from suit

"for acts committed within their judicial jurisdiction"); *Buckley*, 509 U.S. at 274 (holding prosecutors entitled only to qualified immunity for prearrest investigative acts). In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Court held that state prosecutors partake of absolute judicial immunity for violating criminal defendants' constitutional rights in "initiating a prosecution [or] presenting the State's case." *Id.* at 430. The *Imbler* Court determined that filing charges and trying cases, although acts performed in the executive branch, are acts "intimately associated with the judicial phase of the criminal process" and, moreover, did not give rise to liability on the part of prosecutors for damages under the common law. *Id.* The Court further held that absolute immunity was justified on policy grounds, as civil lawsuits could distract prosecutors from law enforcement and cause them to hesitate to bring cases, or hesitate to drop them where doing so might cast doubt on the original decision to prosecute. *Id.* at 425-427.

In *Briscoe v. LaHue*, 460 U.S. 325 (1983)—the authority upon which the Eleventh Circuit held Respondent absolutely immune—the Court held that a police officer who gave perjured testimony at a criminal trial was entitled to the absolute quasi-judicial immunity recognized in *Imbler*, because the common law of 1871 deemed witnesses to be as "integral [a] part[] of the judicial process" as the prosecutors who elicit their testimony, and similarly protected the witnesses from post-trial suits for damages. *Id.* at 340. Notably, the *Briscoe* Court recognized "some force" in arguments that police officers should receive only qualified immunity, as they are uniquely important and compelling witnesses who are much less likely than ordinary citizen witnesses to be intimidated into favoring the defendant by the prospect of damages suits—to which

their employers will mount the defense—or, on the other hand, to be indicted by the state and local prosecutors with whom they work on a daily basis for giving perjured testimony in favor of conviction. *Id.* at 341-342. But the Court found these considerations outweighed by the same concerns about potential litigation burdens and skewing of law enforcement decisions that justified absolute immunity for the prosecutor in *Imbler*. *Id.* at 343.

Petitioner, supported by the law of seven Circuits, contends (Pet. 22) that the level of Respondent's immunity for his perjured grand jury testimony is governed not by *Briscoe*, but by *Malley*. The Court held in *Malley* that a police officer acting as a complaining witness in seeking an arrest warrant could claim only qualified immunity, because "[c]omplaining witnesses were not absolutely immune at common law," and applying for an arrest warrant is insufficiently similar, in any event, to the act of a prosecutor seeking an indictment to fall within the absolute immunity rule of *Imbler*. 475 U.S. at 340-344; see also *Kalina v. Fletcher*, 522 U.S. 118, 120, 129-131 (1997) (holding prosecutor not absolutely immune for executing affidavit in support of arrest warrant as complaining witness). GAP fully agrees that under this Court's established approach to Section 1983 immunity, *Malley*'s holding that the common law had no analogue to absolute immunity for complaining witnesses means that Respondent is not absolutely immune from suit. See, e.g., *Malley*, 475 U.S. at 340 (noting that the Court's threshold inquiry is whether the claimed immunity existed at common law); *Tower*, 467 U.S. at 920 (same).

Strong policy considerations likewise support affording Respondent only qualified immunity. Cf. *id.* (noting that

"§ 1983's history or purposes" may support denial of an immunity even if it existed at common law). Those same considerations support granting the Petition to establish uniformity among the Circuits on this significant issue.[3] Petitioner observes (Pet. 22-23) that the policy grounds cited in *Briscoe* in favor of absolute immunity for ordinary law enforcement witnesses in judicial proceedings do not apply to complaining witnesses. Complaining witnesses have voluntarily given evidence as part of setting the criminal process in motion and have shown a personal or professional interest in the outcome. Given the gravity of those steps and the careful reflection that should precede them, the possibility that a complaining witness might be liable in damages to the accused under Section 1983 for testifying falsely and maliciously is extremely unlikely to deter desirable law enforcement conduct. Cf. *Malley*, 475 U.S. at 343 (noting that "reflection" by "an officer [seeking an arrest warrant] who knows that objectively unreasonable decisions may be actionable" is "desirable").

Indeed, the deterrence function of tort law in general, and Section 1983 in particular, takes on special importance in malicious and retaliatory prosecution cases, and weighs heavily against granting absolute immunity from suit. Affording absolute immunity to prosecutors and other law enforcement officers for violating civil rights in criminal proceedings unquestionably comes at the steep price of "leav[ing] the genuinely wronged defendant without civil

3. The Third, Fourth and Eleventh Circuits, which do not recognize the complaining witness exception to the absolute immunity of witnesses in judicial proceedings (see Pet. 14-15), together sit in review of district courts in ten states and the United States Virgin Islands.

redress against [one] whose malicious or dishonest action deprives him of liberty." *Imbler*, 424 U.S. at 427; see also *Gregoire v. Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949) (L. Hand, J.). This case vividly illustrates another, often overlooked cost of absolute immunity for quasi-judicial actors—namely, the oppressive and chilling effects upon citizens at large that result from the inability of the injured parties to obtain justice and thereby deter repetition of the wrongs.

Justice Robert Jackson warned, while serving as Attorney General, that the power to initiate criminal proceedings poses the greatest danger to rights when "law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself." See *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) (quoting Robert Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940). Petitioner fell victim to such a vendetta. He was targeted for indictment in apparent retaliation for his attempt to expose unethical practices at a prominent local institution. The trauma and expense of being illegitimately charged with three crimes is significant, even if the indictments are eventually dismissed. If Petitioner cannot hold Respondent or the prosecutors accountable, other potential whistleblowers in the community will no doubt be discouraged by the prospect that officials may with impunity take similar steps against them. Speech on

matters of public interest will be chilled, and fundamental constitutional protections diminished.[4]

When appropriate weight is given to Section 1983's purpose of *deterring* constitutional violations, in the interest of the public, as well as compensating individual victims of such violations, the policy grounds cited by the Eleventh Circuit for holding Respondent absolutely immune fade in significance. In the Eleventh Circuit's view, "allowing civil suits [against complaining witnesses] for false grand jury testimony would result in depositions, emasculate the confidential nature of grand jury testimony, and eviscerate the traditional absolute immunity for witness testimony in judicial proceedings."

4. Petitioner has a pending claim against Respondent for retaliatory prosecution in violation of his First Amendment free speech rights. The Eleventh Circuit affirmed the District Court's denial of Respondent's motion to dismiss that claim on grounds of absolute and qualified immunity. App. 33a-34a. Although Petitioner therefore might recover from Respondent if the Petition is denied, the dismissal of the malicious prosecution claim at issue in the Petition is significant. Petitioner's retaliatory prosecution claim requires proof, *inter alia*, that Respondent's conduct had a retaliatory motive and was the "but for" cause of the decision by a special prosecutor (who replaced the recused District Attorney) to prosecute Petitioner. App. 33a (citing *Hartman v. Moore*, 547 U.S. 250, 265 (2006)). By contrast, the state of mind and causation elements of a Section 1983 malicious prosecution claim are somewhat less exacting. See *Wood v. Kesler*, 323 F.3d 872, 881-882 (11th Cir. 2003) (stating that elements include a Fourth Amendment violation plus "(1) a criminal prosecution instituted or continued by the present defendant; (2) with malice and without probable cause; (3) that terminated in the plaintiff accused's favor; and (4) caused damage to [him]"). Thus, depending on the facts developed in discovery and at trial, Respondent's degree of immunity from suit for malicious prosecution could be decisive.

The latter concern, however, carries little or no weight, as *Malley* establishes that witness immunity at common law was not "absolute." 475 U.S. at 340. Moreover, trial courts can no doubt fashion procedures to limit the revelation of grand jury testimony to the minimum degree necessary to litigate the particular Section 1983 claims before them.[5] Equally important, the deterrent effect of a Section 1983 remedy for unconstitutional abuse of grand juries by complaining witnesses is an important safeguard of the integrity of the judicial system.

The Eleventh Circuit also went too far in justifying absolutely immunity on the grounds that "[t]he [sole appropriate] remedy for false grand jury testimony is criminal prosecution for perjury and not expanded civil liability and damages." *Jones*, 174 F.3d at 1287 n.10 (quoted in App. 13a). In the first place, of course, prosecution cannot substitute for a civil remedy, as the criminal system will not compensate the victim for the actual harm caused by the offense. But the Eleventh Circuit's view also seriously undervalues Section 1983's deterrence function. Relying solely on the discretion of prosecutors to investigate and charge their own malicious and perjurious complaining witnesses is a dubious means of discouraging future violations of the rights at stake. This is especially true where, as here, the complaining witness is alleged to have been doing the bidding of powerful interests in the community to whom the prosecutor is favorably inclined and may be politically indebted. Cf. *Briscoe*, 460 U.S. at

5. Here, because Respondent was either the sole witness or one of only two witnesses before the grand jury when it returned each of the three indictments (App. 83a-85a), discovery of grand jury material and deliberations would presumably be quite limited.

340-341 (acknowledging "some force" to argument that police officers are unlikely to be prosecuted for perjury).

Wrongful prosecutions of whistleblowers such as Petitioner, and of other individuals who are unpopular with state or local law enforcement officials, both violate and chill the exercise of fundamental constitutional rights. The especially strong public interest in *deterring* as well as remedying such abuses of the justice system merits central consideration in determining whether complaining witnesses are absolutely immune from suit under Section 1983 for maliciously perjured testimony before grand juries. In addition to the reasons set forth in the Petition, the Court should grant certiorari to ensure that Section 1983's deterrence function is afforded due weight in this context.

CONCLUSION

The Court should grant the Petition.

January 14, 2011

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