No. 19-30197

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RENATA SINGLETON; MARC MITCHELL; LAZONIA BAHAM; TIFFANY LACROIX; FAYONA BAILEY; SILENCE IS VIOLENCE; JANE DOE; JOHN ROE,

Plaintiffs-Appellees,

v.

LEON A. CANNIZZARO, JR., in his official capacity as District Attorney of Orleans Parish and in his individual capacity; DAVID PIPES; IAIN DOVER; JASON NAPOLI; ARTHUR MITCHELL; TIFFANY TUCKER; MICHAEL TRUMMEL; INGA PETROVICH; LAURA RODRIGUE; MATTHEW HAMILTON; GRAYMOND MARTIN; SARAH DAWKINS,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Louisiana, Case No. 2:17-cv-10721, Honorable Jane Triche Milazzo, Presiding

BRIEF OF *AMICI CURIAE* CURRENT AND FORMER PROSECUTORS, STATE ATTORNEYS GENERAL, AND DEPARTMENT OF JUSTICE OFFICIALS IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF INTEREST

Amici curiae are 36 current and former local, state, and federal prosecutors, state attorneys general, and former Department of Justice leaders representing 21 different states and including elected and appointed officials from both political parties. Amici all are or have been involved in the investigation and prosecution of criminal cases and ensuring that applicable laws and policies are fairly and justly applied. Amici have a strong interest in this case because the use of fraudulent subpoenas to compel information from victims and witnesses of crime impedes the work of prosecutors and law enforcement officials by undermining confidence in the fairness of the criminal justice system and deterring victims and witnesses from coming forward to provide evidence.[1]

[1] No party's counsel authored this brief in whole or in part. No person, other than amici curiae's counsel, funded the preparation or submission of this brief. All parties consented to the filing of this brief.

SUMMARY OF ARGUMENT

Whether elected, appointed, or career, amici current and former local, state, and federal prosecutors, state attorneys general, and former Department of Justice leaders ("amici") are or have been accountable to their communities to pursue justice fairly and impartially. Their work depends on preserving the integrity of the justice system and building trusting relationships with community members so that those community members will report crimes, cooperate with law enforcement, testify in court proceedings, and sit fairly as jurors. Fostering such relationships and thus protecting the public cannot be achieved when the legitimacy of the criminal justice system is undermined by individual prosecutors acting *ultra vires*, using fraudulent extrajudicial subpoenas to compel information from reluctant or uncooperative victims and witnesses.

Absolute immunity is appropriate for most prosecutorial decision-making. Without it, ethical prosecutors might be deterred from zealously seeking justice for victims of crime out of fear of facing civil liability for missteps made under considerable time and other pressures. As the Supreme Court has recognized, failing to grant absolute immunity for prosecutorial decisions that are "intimately associated with the judicial phase of the criminal process" would "disserve the broader public interest." *Imbler v. Pachtman*, 424 U.S. 409, 430, 427 (1976). But the creation and use of fake subpoenas, in non-compliance with state statutorily created procedures,

is wholly outside "the judicial phase of the criminal process," does not serve the public interest, and does not warrant the protection of absolute immunity.

Amici urge this Court to follow the reasoning of its opinion in *Loupe v. O'Bannon* to conclude that creating fraudulent subpoenas in avoidance of the judicial process is an activity "not intimately associated with the judicial phase of the criminal process[,]" 824 F.3d 534, 540 (5th Cir. 2016), and therefore not entitled to absolute immunity. Amici take no position on the other legal questions raised by the parties on appeal.

ARGUMENT

I. Absolute Immunity for Systemic Fraud on the Criminal Justice System Is Against the Public Interest

> The primary obligation of prosecutors is to see that truth and justice are served. The power of the prosecutor and the court system as a whole derives from the people's willingness to entrust to them the administration of justice. Prosecutors should keep their primary obligation in mind as they make decisions. In doing so they undertake the serious responsibility of serving the interests and concerns of citizens victimized by crime.

Final Report, President's Task Force on Victims of Crime 63 (Dec. 1982), available at https://perma.cc/E2WJ-CLUZ.

Amici believe strongly that absolute immunity is appropriate and necessary for most prosecutorial decisions made in the course of initiating and pursuing criminal cases. As the Supreme Court said in *Imbler v. Pachtman*, when extending the common law doctrine of absolute immunity from civil liability for prosecutors

to suits under 42 U.S.C. § 1983: "Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation." 424 U.S. 409, 425 (1976). Absolute immunity in such circumstances ensures that prosecutors will not be chilled in their pursuit of justice for fear of having to defend themselves in subsequent civil litigation for money damages. But absolute immunity serves no legitimate purpose if it is used to protect prosecutors from liability for systemic fraud on the very criminal justice system within which they are obligated to operate.

Instead, accountability for individual bad actors whose conduct is aimed at avoiding the judicial process can prevent effects that ultimately undermine broader prosecutorial interests. The creation and use of fraudulent subpoenas to compel victims and witnesses to meet with prosecutors outside court—in non-compliance with Louisiana's Code of Criminal Procedure[2]—not only can result in the intimidation of reluctant victims and witnesses, but also erodes the trust between prosecutors and the communities they serve. Such tactics are highly disturbing to amici and do not reflect the ideals of ethical prosecutors. Although the Supreme

[2] Under Article 66 of the Louisiana Code of Criminal Procedure, "[u]pon written motion of the attorney general or district attorney setting forth reasonable grounds therefor, the court may order the clerk to issue subpoenas directed to the persons named in the motion, ordering them to appear at a time and place designated in the order for questioning by the attorney general or district attorney respectively, concerning any offense under investigation by him."

Court has applied absolute immunity where allowing liability would "disserve the broader public interest" and "prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system," *Imbler*, 424 U.S. at 427-28, here, the opposite is true. Granting absolute immunity for the issuance of fraudulent subpoenas as alleged in this case would undermine the work of ethical prosecutors to the detriment of public safety.

A. Victims and witnesses are essential partners in the protection of public safety

The importance of a fair criminal justice system that respects the rights of victims and witnesses—during the initial investigation, at trial and sentencing, and thereafter—cannot be overstated. As amici have experienced, successful prosecutions frequently rely on testimonial evidence or other forms of cooperation from community members. Victims and witnesses who are essential to reporting and providing relevant information about crimes, including first-hand accounts, are sometimes reluctant to cooperate with law enforcement for a variety of reasons that have nothing to do with the conduct of prosecutors. For example, a U.S. Department of Justice study covering 2006 to 2010 determined that 52 percent of all "violent crime victimizations"[3] were not reported to the police. U.S. Department of Justice,

[3] The study used the National Crime Victimization Survey definition of "violent crime," which covers rape, sexual assault, robbery, aggravated assault, and simple assault. U.S. Department of Justice, Bureau of Justice Statistics, *Criminal Victimization, 2010* (Sept. 2011), available at https://perma.cc/9TVE-DPU7.

Bureau of Justice Statistics, *Victimizations Not Reported to the Police, 2006-2010* 1 (Aug. 2012), available at https://perma.cc/K8EC-ZQ6S. The majority of those who did not report their victimizations responded that they failed to do so because they either dealt with the issue some other way (34 percent) or they felt that the crime was not important enough to report (18 percent). A significant percentage did not report their victimizations because of a belief that law enforcement would not help (16 percent) or because they feared reprisal (13 percent). *Id.*

Victims of domestic violence, sexual assault, and stalking in particular often experience emotional trauma in addition to physical injury as a result of the crimes committed against them. It can be difficult for these victims to report their victimization and cooperate with prosecutors "because of the social stigma associated with the crimes and because the victims often have an on-going relationship with the offender." U.S. Department of Justice, Attorney General Guidelines for Victim and Witness Assistance 20 (May 2012), available at https://perma.cc/R6PQ-3EZ4. In addition, "[t]hese victims often are in great danger of future violence after reporting a crime, during investigation and prosecution of cases, and after defendants are released from prison." *Id.*

In amici's experience, the legal process itself can be difficult and painful for many witnesses, victims, and their family members. Often the way a case is handled makes an immeasurable difference in how individuals feel about the justice system

as a whole. *See, e.g.*, *id.* at i ("Every day, Department personnel encounter individuals harmed by crime or who witnessed others being harmed by crime. How we treat those individuals has a huge impact on their confidence in the criminal justice system and their ability to heal and recover from crime."); Samuel R. Gross & Daniel J. Matheson, *What They Say at the End: Capital Victims' Families and The Press*, 88 Cornell L. Rev. 486, 493 (2003) (family members of victims of people charged with capital murder experience "troubling memories of the murder and the victim's suffering" during court dates, and at least one would have preferred commutation to having to relive the experience of a family member's death during hearings).

The willingness of these victims and witnesses to report crimes to law enforcement, cooperate with prosecutors, show up for court proceedings, and testify truthfully therefore depends on their ability to trust those responsible for enforcing the law and to have confidence that the judicial system will treat them fairly and protect them from harm. Both the United States Congress and the Louisiana Legislature have enacted laws that seek to protect these essential partners from mistreatment by the criminal justice system. Federal law provides victims the right "to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8) (2018). Louisiana law ensures that "all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity," and that their

rights "are honored and protected by . . . prosecutors . . . in a manner no less vigorous than the protection afforded the criminal defendants." La. Stat. Ann. § 46:1841 (2018). Indeed, outcomes for victims can be impacted adversely by negative interactions with prosecutors. *See* Mary A. Finn, *The Effects of Victims' Experiences With Prosecutors on Victim Empowerment and Re-occurrence of Intimate Partner Violence*, Research Report Submitted to the National Institute of Justice 7 (August 2003), available at https://perma.cc/8E3S-3KB2 (use of coercive measures against family violence victims, such as threatening arrest of those who withdraw complaints, had the effect of lowering victims' empowerment, and did not reduce the risk of future violence).

It accordingly behooves prosecutors to hold themselves to the highest ethical, moral, and legal standards when engaging with victims and witnesses of crime. This is especially so when interacting with those who might be reluctant to participate in the process. A prosecutor is obligated to "consider the interests of victims and witnesses[] and respect the constitutional and legal rights of all persons[.]" ABA Crim. J. Standards for the Prosecution Function, Standard 3-1.2(b). Most importantly, "[i]n communicating with witnesses, the prosecutor should know and abide by law and ethics rules regarding the use of deceit[,]" "should not act to intimidate or unduly influence any witness[,]" and "should not . . . use methods of obtaining evidence that violate legal rights." *Id.*, Standard 3-3.4.

B. Experience and history demonstrate that coercive practices by law enforcement officials undermine community trust and effective prosecutions

When prosecutors fail to conduct themselves ethically in their interactions with victims and witnesses, it undermines confidence in the criminal justice system as a whole, makes victims less likely to report crime, and discourages witnesses from coming forth to provide evidence. It also can damage the effective functioning of our jury system. Jurors are drawn from the communities in which the crimes being prosecuted occur. In amici's experience, jurors who distrust the prosecutors in their jurisdiction may discredit evidence offered by the prosecution or, worse, fail to follow the law in their deliberations.

History teaches that these concerns are heightened when innocent victims and witnesses fear potential arrest by the very authorities who are responsible for protecting their interests. As far back as 1883, following a decade of requests, the New York legislature abolished the practice of detaining material witnesses. Wesley M. Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J. L. & Liberty 727 (2005). The requests came not from reformers or civil liberties advocates, but from law enforcement officials. The police, in particular, petitioned the government to restrict their own ability to detain witnesses. *Id.* at 728. Their reasoning was straightforward: "[A] public perception evolved that perfectly innocent people ran the risk of being locked up for merely

seeing something. Citizens became afraid to be witnesses, reluctant to let the police know they had helpful information." *Id.* at 765. Although they had long relied on detention and the threat of detention to coerce witnesses to cooperate, officials determined that the damage wrought by its overuse had spoiled the authorities' relationship with the community. *Id.* Ultimately, these efforts did more harm than good to criminal prosecutions, leading to the conclusion that "[t]he real law enforcement interest was creating a perception that witnesses could no longer be detained so that they would again be willing to talk to officers." *Id.*

Since the nineteenth century, little has changed about prosecutors' and law enforcement officials' reliance on the cooperation of victims and witnesses to successfully bring offenders to justice, or the disaffection of community members who fear coercive treatment should they come forward. Recently, a Department of Justice investigation revealed that law enforcement officers in Ville Platte and Evangeline Parish, Louisiana, were serially detaining and imprisoning witnesses to crime without probable cause or valid material witness warrants in violation of their constitutional rights. Department of Justice, Civil Rights Division, *Investigation of the Ville Platte Police Department and the Evangeline Parish Sheriff's Office* (Dec. 2016), available at https://perma.cc/5DXA-5ALH. The officers referred to the detentions as "investigative holds." *Id.* at 2. Disturbingly, the investigation revealed that the district attorney participated in the interrogation of at least one of these

unlawfully detained witnesses. *Id.* at 8. As a result of this longstanding practice, the community developed a widespread mistrust of law enforcement, for they "feared that cooperation would result in detention and questioning pursuant to the investigative hold practice." *Id.* at 13. The "mistrust diminishe[d] officer safety and impede[d] information-gathering in criminal investigations that is essential to the functions of law enforcement and the protection of public safety." *Id.* at 12. This mistrust extended beyond the local law enforcement officials and agencies that engaged in the misconduct; in one example, the reluctance to come forward created a "significant obstacle to a federal homicide investigation" when community members would not speak with an FBI agent. *Id.* at 13.[4]

Although the issuance of subpoenas is not equivalent to the use of material witness warrants or "investigative holds," they share a purpose (compelling victims and witnesses to give evidence) and a common origin in the law,[5] and when abused,

[4] Ultimately, both the Ville Platte Police Department and the Evangeline Parish Sheriff's Office entered into wide-ranging settlement agreements that imposed a number of restrictions and monitoring requirements on them. *See* U.S. Department of Justice & City of Ville Platte, Louisiana, *Settlement Agreement Regarding the Ville Platte Police Department* (June 2018), available at https://perma.cc/F9YM-MS8H; U.S. Department of Justice & Evangeline Parish Sheriff's Office, *Settlement Agreement* (June 2018), available at https://perma.cc/79YD-7EUU.

[5] The First Judiciary Act of 1789, which recognized the duty of witnesses to appear and testify, "also codified the authority to require recognizance of material witnesses in criminal proceedings and to imprison them upon failure to do so." Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The*

they may produce the same fear in reluctant victims or witnesses. This is particularly true among individuals who do not have a sophisticated understanding of the justice system. Amici of course recognize that lawfully obtained subpoenas are essential tools for the prosecution of crime. Even material witness warrants can be appropriate when used in limited circumstances and with adequate consideration of alternative means of procuring cooperation and the deleterious effects of coercive tools on the lives of victims and witnesses. For example, domestic terrorist Terry Lynn Nichols was detained on a material witness warrant related to the investigation of the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, which killed 169 people and injured many more.

But where, as is alleged here, prosecutors violate the law and use extrajudicial methods to compel victims and witnesses to talk to them, the community backlash threatens to strip ethical prosecutors of the effectiveness of these essential tools. Affording absolute immunity for the creation and use of fraudulent subpoenas does not serve the public interest.

History and Future of Material Witness Law, 76 St. John's L. Rev. 483, 489 (2002) (citing Act of Sept. 24, 1789, ch. 20, §§ 30, 33, 1 Stat. 73).

II. Case law does not support extending absolute immunity to creating and using fraudulent extrajudicial subpoenas

A. Application of *Imbler*'s functional test establishes that absolute immunity is unwarranted

In *Imbler v. Pachtman*, the Supreme Court determined that a state prosecuting attorney who acts "within the scope of his duties in initiating and pursuing a criminal prosecution" cannot be held liable under § 1983 for violating a "defendant's constitutional rights." 424 U.S. 409, 410 (1976). In that case, a criminal defendant whose conviction was overturned sued the prosecutor, several police officers, and a fingerprint expert; alleging "a conspiracy among them unlawfully to charge and convict him." *Id.* at 416. Concluding that a denial of immunity would be against the greater public interest, the Court held that prosecutors are absolutely immune from damages claims when they undertake activities "intimately associated with the judicial phase of the criminal process, and thus . . . to which the reasons for absolute immunity apply with full force." *Id.* at 430. Following *Imbler*, the Supreme Court has clarified that its "functional approach" "emphasize[s] that the official seeking absolute immunity bears the burden of showing that [it] is justified for the function in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). There is no justification for granting absolute immunity for creating and using fraudulent subpoenas against victims and witnesses. As the district court held: "Plaintiffs allege that Defendants' entire scheme operated outside of the process legally required by [state law]. To find

that such *ultra vires* conduct is 'intimately associated with the judicial phase of the criminal process' would give no meaning to the 'judicial phase' element of the standard." *Singleton v. Cannizzaro*, No. 17-10721, 2019 U.S. Dist. LEXIS 32100, at *17 (E.D. La. Feb. 28, 2019).

As alleged, this case is about the defendant prosecutors' *intentional avoidance* of lawful judicial process by creating fraudulent documents that had the appearance of lawful court subpoenas. Second Am. Complaint, ¶¶ 34-83 (ROA 19-30197.715 *et seq*.). Thus, even if absolute immunity may be justified for alleged prosecutorial misconduct in the procurement of material witness warrants through the applicable judicial process under Louisiana law—as this Court held in *Doe v. Harris Cty.*, 751 Fed. Appx. 545, 548 (5th Cir. 2018) (and as the district court in the case at bar also held under the authority of *Doe*, *Singleton*, 2019 U.S. Dist. LEXIS 32100, at *22)[6]—it would not be justified here, where the fraudulent subpoenas were created wholly outside the judicial process mandated by Louisiana law. Protecting rogue prosecutors whose *ultra vires* conduct seeks to sidestep legal process does nothing to preserve the functions or effectiveness of ethical *and* zealous prosecutors. *Cf. Imbler*, 424 U.S. at 424-25 ("The public trust of the prosecutor's office would suffer

[6] The Supreme Court has yet to rule on whether the abuse of material witness warrants by prosecutors is subject to absolute immunity. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 744 (2011) (declining to address the "more difficult question" of whether the Attorney General is entitled to absolute immunity for procuring a pretextual material witness warrant).

if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."). The alleged misconduct here does not constitute an "exercise of [legal] discretion" that absolute immunity protects. *Van de Kamp v. Goldstein*, 555 U.S. 335, 344 (2009).

A straightforward application of the factors used to determine whether prosecutorial officials receive absolute immunity for performing a specific function supports this conclusion. Under the Supreme Court's "functional approach," courts must consider whether (1) there is a "historical or common-law basis for the immunity in question," (2) a denial of absolute immunity subjects the official to "obvious risks of entanglement in vexatious litigation," and (3) there exist "other checks that help to prevent abuses of authority from going unredressed." *Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985). All of these factors support denying absolute immunity for defendants' creation and use of fake subpoenas.

i. History and common law

"Absent a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in *Imbler*, [the Supreme Court] ha[s] not been inclined to extend absolute immunity from liability under § 1983." *Burns*, 500 U.S. at 493. At common law, the immunity was specifically intended to apply to "any hearing before a tribunal which performed a judicial function." *Id.* at 490 (1991) (citing W. Prosser, *Law of Torts* § 94, pp. 826-

827 (1941) & Van Vechten Veeder, *Absolute Immunity in Defamation*, 9 Colum. L. Rev. 463, 487-488 (1909)). The historical court-focused origins of the immunity lend support to the notion that unlawful actions taken specifically in avoidance of judicial oversight do not merit absolute immunity. Although *Imbler* and its progeny have held that actions not directly before a court (like the initiation of prosecution) are "intimately associated" with the judicial process, the same cannot be said for actions that fall wholly outside that process. In *Burns*, for example, the Supreme Court held that advising police about the legality of their investigatory conduct was not protected by absolute immunity in part because "review of the historical or commonlaw [sic] basis for the immunity in question d[id] not yield any direct support for the conclusion that a prosecutor's immunity from suit extends to . . . giving legal advice to police officers." *Burns*, 500 U.S. at 492 (quoting court of appeals' decision below); *see also Hughes v. Tarrant Cty.*, 948 F.2d 918, 922-23 (5th Cir. 1991) (finding "no historical or common law basis" to extend immunity to district attorney advising county officials).

Where, as alleged here, the prosecutor creates fraudulent subpoenas wholly outside the judicial process—and wholly outside Louisiana's statutory procedure for obtaining such subpoenas—the historical purposes for prosecutorial immunity, particularly the "possibility that [the prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust[,]" *Imbler*,

424 U.S. at 423, are inapplicable. Unlike litigation related to improperly procured but facially valid court orders (which may delve into murky questions such as the weight of evidence or the prosecutor's subjective intent), a false accusation of creating fraudulent subpoenas could be easily disproved by the court record. Common-law immunity, and the reasons underlying it, do not support its extension to the type of *ultra vires* conduct alleged in this case.

ii. Vexatious litigation

As the Supreme Court made clear in *Imbler*, its principal concern about vexatious litigation was related to potential retaliatory suits by criminal *defendants*, who could "transform [their] resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Id.* at 425; *see also Mitchell*, 472 U.S. at 521-22 (noting that risk of vexatious litigation occurs because "[t]he judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict"). These concerns are greatly diminished in the context of fraudulent subpoenas used to compel victims and witnesses to provide information to prosecutors. Moreover, as previously noted, prosecutors who procure lawful subpoenas are unlikely to face difficulty proving their validity, should retaliatory litigation arise.

iii. Availability of other measures

Unlike criminal defendants, who possess "[v]arious post-trial procedures . . . to determine whether [they] ha[ve] received a fair trial[,]" *Imbler*, 424 U.S. at 427, victims and witnesses of crime who are unlawfully coerced by fraudulent subpoenas have no reasonable alternative means of vindication. By sidestepping the Louisiana procedure for obtaining witness subpoenas, prosecutors have made it impossible to procure "subsequent judicial review of decisions made by prosecutors and . . . subsequent appellate review of lower court decisions [that] provide[] a check upon actions clothed with absolute immunity." *Snell v. Tunnell*, 920 F.2d 673, 687 (10th Cir. 1990) (citing *Mitchell*, 472 U.S. at 522); *see also Mitchell*, 472 U.S. at 522-23 (denying absolute immunity because defendants' conduct fell outside the judicial process and was therefore not "self-correcting" through "procedural rules, appeals, and the possibility of collateral challenges" that "obviate the need for damages actions to prevent unjust results"). This Court explained the protections inherent in the judicial system at length in *Marrero v. City of Hialeah*, noting that "the checks inherent in the judicial process serve to restrain prosecutorial abuse," and that "to the extent that prosecutorial abuse does occur, the judicial process provides its own mechanisms for mitigating any damaging effects." 625 F.2d 499, 509 (5th Cir. 1980). But "when a prosecutor steps outside the confines of the judicial setting, the checks and safeguards inherent in the judicial process do not accompany him, and

thus there is greater need for private actions to curb prosecutorial abuse and to compensate for abuse that does occur." *Id.* Here, the defendant prosecutors purposefully stepped outside the confines of the judicial setting, leaving victims and witnesses reliant on private actions.

Although the options of criminal prosecution or sanctions imposed by a state's legal disciplinary system may be available to curtail and punish prosecutorial misconduct in certain circumstances, these alternatives provide no relief to victims and witnesses who have been subjected to the potential coercive impact of being served with fraudulent subpoenas. Moreover, disbarment of prosecutors for professional misconduct is rare, and criminal prosecutions even more so. *See, e.g.*, Michael Kiefer, *Prosecutorial misconduct alleged in half of capital cases*, Arizona Republic, Oct. 28, 2013, available at https://perma.cc/7KJE-J4DB (finding prosecutorial misconduct alleged in half of all Arizona capital cases, with 16 instances substantiated by the State Supreme Court, but only two resulting in consequences for the prosecutor); Mark Godsey, *For the First Time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man*, The Huffington Post, Nov. 8, 2013, available at https://perma.cc/E3S4-PA2X (describing the rarity of criminal prosecutions of prosecutors for official misconduct).

In amici's view, application of *Imbler*'s functional approach establishes no reason to grant absolute immunity for the fraudulent creation and use of subpoenas,

wholly outside Louisiana's statutorily mandated judicial process, to compel victims and witnesses to meet with prosecutors.

B. Analogous case law establishes that absolute immunity is unwarranted.

In factually analogous circumstances, this Court and others have declined to grant prosecutors absolute immunity for actions that fall outside the judicial process. In *Loupe v. O'Bannon*, this Court held that although the defendant prosecutor in that case enjoyed absolute immunity for her decision to prosecute the plaintiff, she was not absolutely immune for ordering his warrantless arrest. 824 F.3d 534 (2016). In doing so, this Court cited with approval the following language from a similar case in the Ninth Circuit. In that case, the court concluded that by ordering a warrantless arrest, a prosecutor

> acts directly to deprive someone of liberty; he steps outside of his role as an advocate of the state before a neutral and detached judicial body and takes upon himself the responsibility of determining whether probable cause exists, much as police routinely do. Nothing in the procuring of immediate, warrantless arrests is so essential to the judicial process that a prosecutor must be granted absolute immunity.

Id. at 540 (quoting *Lacey v. Maricopa Cty.*, 693 F.3d 896, 914 (9th Cir. 2012). Much like the case at bar, the crux of this Court's decision in *Loupe* was that a warrantless arrest is "conduct outside the judicial process" and "therefore is not protected by absolute immunity." *Id.*

The Ninth Circuit's decision in *Lacey* is even more directly on point. There, a prosecutor created fraudulent documents that purported to be subpoenas and issued

them to a news organization.[7] Although the prosecutor could have procured proper subpoenas from a court, he intentionally avoided doing so. In denying absolute immunity, the court emphasized the steps taken by the defendant to avoid judicial oversight:

> Had [the defendant] followed [state] law, his drafting of the grand jury subpoenas would likely have come within the shield of absolute immunity. But the facts alleged in the complaint suggest that [the defendant] avoided taking the steps that would have protected him from suit, perhaps precisely to avoid the scrutiny of the grand jury or the court.

Lacey, 693 F.3d at 914 (citations omitted). The Ninth Circuit reiterated that the judicial process serves as "a check on prosecutorial actions," which failed "because the prosecutor acted on his own authority, rather than securing the approvals required by [state] law." *Id.* Accordingly, even if authoring a subpoena might otherwise be considered part of the prosecutor's duties, "by avoiding judicial scrutiny, his actions were one step 'further removed from the judicial phase of criminal proceedings.'" *Id.* (citing *Malley v. Briggs*, 475 U.S. 335, 342 (1986)). In sum, "[w]here the prosecutor has side-stepped the judicial process, he has forfeited the protections the law offers to those who work within the process." *Id.* So too here.

[7] After the false subpoenas were served, the owners of the news organization declined to comply and instead published articles critical of the prosecutor. In response, the prosecutor arranged for the owners to be arrested while his request for an arrest warrant was still pending before the court. *Lacey*, 693 F.3d at 910.

In other analogous cases, this Court and others have made similar rulings that prosecutorial conduct that sidesteps the judicial process sheds the protections of absolute immunity. For example, in *Marrero*, this Court denied absolute immunity to a prosecutor who participated in an illegal search and made defamatory comments, concluding that he "step[ped] outside the confines of the judicial setting." 625 F.2d at 509; *see also Mitchell*, 472 U.S. at 522 (denying absolute immunity to officials who performed national security functions that were "carried out in secret").

The same is true for cases where individuals acting as prosecutors have acted clearly beyond the authority granted to them by statute. In *Snell*, the Tenth Circuit denied absolute immunity to a Department of Human Services attorney who stepped outside her statutorily prescribed role by initiating an enforcement action that, under state law, was reserved for the attorney general or district attorney. 920 F.2d 673, 695-96 ("We conclude that although defendant Padley was functioning as a prosecutor, she did so without color of authority in these circumstances and absolute immunity is not warranted."); *see also Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 229-30 (4th Cir. 1997) (denying absolute immunity for *ultra vires* communications with the media and other attorneys general); *cf. Lerwill v. Joslin*, 712 F.2d 435, 439 (10th Cir. 1983) ("a prosecutor is not absolutely immune for prosecutorial acts for which he had no semblance of authority").

In amici's view, creating and serving fake subpoenas on victims and witnesses in purposeful avoidance of Louisiana's judicial procedures for obtaining such subpoenas is conduct for which absolute immunity is unwarranted. Denying immunity for the alleged misconduct here will not deter ethical prosecutors from zealously prosecuting criminal cases in accordance with the rule of law. Creating and using fake subpoenas is simply not "a mistake that many honest prosecutors could make." *Lerwill*, 712 F.2d at 440.

III. Amici disagree that denial of absolute immunity in this case would adversely impact the criminal justice system

Amici share many of the values and principles that the Louisiana District Attorneys Association (LDAA) espouses in its amicus brief. Amici agree that "[p]rosecutors perform a critical function in this nation of laws," Br. for the Louisiana District Attorneys Association as Amicus Curiae in Support of Defendants-Appellants at 6 (ECF No. BL-48) (hereinafter LDAA Brief), and that "[a]bsolute immunity is crucial to safeguarding the independent judgment of prosecutors in their role as advocates in the criminal justice process." *Id.* at 1.

Notably, the LDAA does not discuss in its brief the application of these principles to the act of creating and serving fraudulent subpoenas outside the criminal justice process, but to the extent it suggests that these principles counsel for the application of absolute immunity to these facts, amici disagree. Denial of absolute immunity for creating and using fraudulent subpoenas would not cause prosecutors "to

evaluate every step in the prosecution of a case not only as public officials charged with ensuring that justice is done but also as individuals concerned with the potential attachment of civil liability for any misstep or lapse in judgment that may occur during the process." *Id.* at 7. The creation of fake subpoenas is not a "misstep or lapse in judgment," made during a fast-moving criminal prosecution. *See* La. R. Prof. Conduct 4.1 ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person[.]") & 4.4 ("[A] lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of . . . a [third] person."). It is conduct that casts a pall on ethical prosecutors everywhere and erodes the trust between prosecutors and the communities they serve; a trust that is necessary to effectively preserve public safety.

Nor do amici agree with the LDAA that denial of absolute immunity in this case will cause civil lawsuits to "become a systemic means of harassment to deter or punish a prosecutor engaged in vigorous performance of his duties." LDAA Brief at 8. The conduct at issue in this case is far afield from the "vigorous performance" of prosecutorial duties. It is a fraud on the criminal justice system that amici soundly denounce. Denial of absolute immunity for the conduct alleged in this case would do little to encourage lawsuits against prosecutors carrying out their responsibilities in accordance with law.

As the Supreme Court said in *Berger v. United States* more than 80 years ago, the interest of the prosecutor is "not that it shall win a case, but that justice shall be done." 295 U.S. 78, 88 (1935). Victims, witnesses, and the public need to know that prosecutors can be trusted to prosecute cases fairly and in compliance with established judicial processes. It does no damage to prosecutors' ability to effectively do their jobs to deny absolute immunity in this case.

CONCLUSION

For the reasons above, amici urge this Court to affirm the district court's ruling that defendants are not protected by absolute immunity for the creation and use of fraudulent extrajudicial subpoenas.

Respectfully submitted,

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/s/ Mary B. McCord

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CERTIFICATE OF SERVICE

I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit on July 5, 2019, by using the appellate CM/ECF system, and service was accomplished on all counsel of record by the appellate CM/ECF system.

/s/ Mary B. McCord
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CERTIFICATE OF COMPLIANCE

1. This brief complies with: (1) the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5), 32(a)(7)(B)(i) because it contains 5,850 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. Appl. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word (14-point Times New Roman).

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