IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 16-1186

VLADEK FILLER,

PLAINTIFF-APPELLEE

v.

MARY KELLETT,

DEFENDANT-APPELLANT

HANCOCK COUNTY; WILLIAM CLARK; WASHINGTON COUNTY; DONNIE SMITH; TRAVIS WILLEY; DAVID DENBOW; MICHAEL CRABTREE; TOWN OF GOULDSBORO, ME; TOWN OF ELLSWORTH, ME; JOHN DELEO; CHAD WILMOT; PAUL CAVANAUGH; STEPHEN MCFARLAND; MICHAEL POVICH; CARLETTA BASSANO; ESTATE OF GUY WYCOFF; LINDA GLEASON

DEFENDANTS

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION MAINE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFF-APPELLEE FILLER

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CORPORATE DISCLOSURE STATEMENT

Neither the American Civil Liberties Union, the American Civil Liberties Union of Maine Foundation, nor the Maine Association of Criminal Defense Lawyers has a parent corporation, and no publicly held corporation owns any stake in any of these organizations. Fed.R.App.P. 26.1(a).

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JURISDICTIONAL STATEMENT

Defendant, Assistant District Attorney Mary Kellett, seeks this Court's review of the district court's order denying in part her motion to dismiss Plaintiff Vladek Filler's lawsuit seeking monetary damages pursuant to 42 U.S.C. §1983. Kellett argues that the district court erred by concluding (a) that she is not entitled to absolute immunity for the advice that she gave to various law enforcement officers or for tampering with evidence; and (b) that Filler may state a claim for malicious prosecution under §1983. This Court has jurisdiction to entertain Kellett's appeal.

The district court had subject matter jurisdiction because the case presents questions of federal law. 28 U.S.C. §1331. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1254 and *Nixon v. Fitzgerald*, 457 U.S. 731, 740-43 (1982) over interlocutory appeals of orders denying claims of absolute immunity.

STANDARD OF REVIEW

Kellett seeks appellate review of only a small portion of the district court's order denying in part her motion to dismiss Filler's Amended Complaint. *See infra* n. 1 (discussing the scope of Kellett's appeal); Apdx. 119-196 (Order on Motions to Dismiss, herein after "Order," 1-78). This helps to focus the standard of review.

Kellett sought dismissal on the ground that Filler's Amended Complaint failed to state a claim upon which relief might be granted. Apdx. 140 (Order 22). When a

district court evaluates a motion to dismiss on this ground, it asks whether the complaint contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A plausibility inquiry is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556).

"[A]n inquiry into plausibility necessitates a two-step pavane." *Rodriguez-Reyes v. Molina-Rodriguez*, 711 F.3d 49, 53 (1st Cir. 2013). First, "the court must sift through the averments in the complaint, separating conclusory legal allegations (which may be disregarded) from allegations of fact (which must be credited)." *Id.* at 53. Second, "the court must consider whether the winnowed residue of factual allegations gives rise to a plausible claim to relief." *Id.*

This Court will "review de novo a district court's dismissal of a complaint for failure to state a claim." *Garcia-Catalan*, 734 F.3d 100, 102 (1st Cir. 2013). Importantly, what this Court is reviewing is the district court's application of *Iqbal* and *Twombly*, and its plausibility determination. This Court is not deciding the

merits of the plaintiff's complaint. *See Garcia-Catalan*, 734 F.3d at 102 ("At the pleading stage, the plaintiff need not demonstrate that she is likely to prevail….").

Kellett asserts that the Amended Complaint fails to state well-pleaded facts, *see infra* at page 23. But, the real fight in this case is about the second step of the *Iqbal/Twombly* inquiry: whether the alleged facts give rise to a plausible claim for relief. In this regard, Kellett challenges the district court's interpretation and application of case-law about a prosecutor's entitlement to §1983 immunity.

ISSUES PRESENTED FOR REVIEW

1. Is Kellett absolutely immune from §1983 liability for advising law enforcement officers to ignore lawful subpoenas and court orders, or for either personally tampering with evidence or directing her co-defendants to do so?

2. May Filler state a claim for malicious prosecution under §1983?

STATEMENT OF AMICUS CURIAE

All of the parties have consented to the filing of this Amicus Curiae brief. Fed.R.App.P. 29. This case presents issues of paramount importance. For decades now, the balance of power in our criminal justice system has slowly shifted away from courts and juries and towards prosecutors. *Cf. Blakely v. Washington*, 542 U.S 296, 311 (2004) ("[G]iven the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors'

disposal."); *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) ("[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials."). When prosecutors abuse their power, the law must provide a meaningful opportunity for relief, both to make criminal defendants whole and to deter future transgressions. Here, there is no doubt that the prosecutor acted inappropriately; insofar as this appeal is concerned, the prosecutor has already admitted nearly all of the predicate facts. The only remaining question is whether the district court correctly determined that Plaintiff Filler's case against her may proceed. For all of the reasons discussed herein, it has.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 500,000 members dedicated to the principles of liberty embodied in the Constitution and the nation's civil rights laws. The American Civil Liberties Union of Maine Foundation ("ACLU of Maine") is one of the ACLU's statewide affiliates. Given the ACLU's and the ACLU of Maine's longstanding interest in our criminal justice system, the proper resolution of this case is a matter of substantial importance to the ACLU, its affiliates, and its members.

The Maine Association of Criminal Defense Lawyers ("MACDL") is an organization of criminal defense lawyers who are dedicated to securing justice and due process for persons accused of crime or misconduct. MACDL has an interest in

the issue of when, and under what circumstances, a criminal defendant may seek civil redress for a prosecutor's constitutional violations.

This brief was drafted entirely by counsel for the undersigned amicus curiae; counsel for the parties did not author any part of this brief. Fed.R.App.P. 29(c)(5)(A). Similarly, neither party, nor their counsel contributed money that was intended to fund preparing or submitting the brief. Fed.R.App.P. 29(c)(5)(B).

STATEMENT OF THE CASE

The backdrop to our story is Filler's and Ligia Arguetta Filler's (herein after "Arguetta") fractious divorce. In a misguided and failed attempt to gain custody of the couple's children, Arguetta made specious claims that, *inter alia*, that she was attacked and raped by Filler. These accusations eventually led to Filler's prosecution and conviction for gross sexual assault and misdemeanor assault. The trial court later vacated these convictions and ordered a new trial because of Kellett's pernicious prosecutorial misconduct – but not before Filler's life was completely turned upside down: his personal and business reputation were ruined, he was financially drained, exiled from his own home, susceptible to random and invasive searches, temporarily separated from his children, and altogether so ruined that he had to move out of state to rebuild anew. Kellett admitted to the Maine Board of Bar Overseers that she violated Filler's rights, and her license to practice law was

suspended. Filler now seeks damages pursuant to 42 U.S.C. §1983 for Kellett's egregious behavior.

Despite the voluminous complaint and the tortured history of Filler's criminal prosecution, there is much less to this appeal than initially meets the eye. The district court's order whittled the issues considerably, and Kellett's brief does the same. Instead of arguing that the district court erred by denying her motion in its entirety, Kellett contests the district court's ruling regarding the events detailed below, only. Any adverse rulings not addressed, or arguments not made or developed by Kellett on appeal, are waived.[1] *See e.g. United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); *Diaz-Colon v. Fuentes-Agostini*,

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[1] For example, two of Filler's defamation allegations (Count II of the Amended Complaint) survived Kellett's motion to dismiss. First, the allegation that in September 2008, Kellett informed John Lorenz, the guardian *ad litem* for Filler's children, that she (Kellett) was in possession of a journal that chronicled Arguetta's abuse by Filler, despite the fact that she knew this information was false. Apdx. 72-73, 99 (Amnd. Compl. ¶¶ 355-60, 549). Second, the allegation that Kellett told the Bangor Daily News, one of Maine's largest newspapers, that Filler had engaged in "sexual punishment" of his wife. Apdx. 99, 182 (Amnd. Compl. ¶ 550; Order 64, 66). Kellett recognizes these allegations, but makes no attempt to address them or the district court's ruling denying her motion to dismiss insofar as these claims are concerned. *See* Kellett's Brief 1 n. 2 (recognizing, but never addressing, Filler's defamation claims in Count II of the Amended Complaint).

Kellett's Appellant's Brief also does not address many of the legal conclusions embodied in the district court's order, despite the fact that resolution of any of these issues in Kellett's favor would have resulted in the dismissal of the Amended Complaint. For example, Kellett has waived arguing that the district court's conclusion that dismissal is not appropriate on statute of limitations grounds, Apdx. 162-169 (Order 44-51); or on the ground that Filler failed to state a tort claim under Maine's malicious prosecution law, Apdx 178 (Order 60); or because one of the alleged crimes was not terminated in his favor. Apdx. 179-181 (Order 61-63). Rather, Kellett's appellate argument focuses almost exclusively on whether she is entitled to absolute immunity, and nothing more.

786 F.3d 144, 149 (1st Cir. 2015) ("It is black letter law that we deem waived claims not made or claims adverted to in a cursory fashion, unaccompanied by developed argument.") (internal quotation omitted).

A. Kellett Advised Three Law Enforcement Officers to Disregard Lawful Subpoenas

Count I of the Amended Complaint alleges that, *inter alia*, Kellett assumed the role of legal counsel to three law enforcement officers – Willey, Wilmot and Malloy – and advised them not to comply with lawful subpoenas. Apdx. 94 (Amnd. Compl. ¶ 522)[2]. The district court concluded that "Kellett is not entitled to absolute immunity for the legal advice she gave law enforcement officers about how to respond to defense subpoenas" and it denied Kellett's motion to dismiss in that regard. Apdx. 172-74, 196 (Order 54-56, 78). Kellett devotes nearly all of her Appellant's Brief to this aspect of the district court's order, *see e.g.* Kellett's Brief 2-9, placing this issue squarely before this Court. Kellett gave the following advice to law enforcement officers.

[2] The Amended Complaint inadvertently names Wycoff, not Willey. *See also* Kellett's Brief 9 n. 3.

1. During an interview on April 11, 2007, Arguetta told police that Filler was physically infirm; Filler subpoenaed records of this interview, but Kellett advised Officer Wilmot not to respond to the subpoenas.

Arguetta was interviewed by the police on April 11, 2007, and she acknowledged that Filler was physically frail, had back trouble, and had difficulty maintaining his balance. Apdx. 49, 79 (Amnd. Compl. ¶¶ 201-05, 400-03). Kellett advised Ellsworth Police Officer Chad Wilmot to ignore Filler's subpoena for records and recordings related to this interview. Apdx 49-50, 79, 89 (Amend. Compl. ¶¶ 201-13, 405, 496). The trial court then specifically ordered Kellett to produce all reports and videos pertaining to this interview, but Kellett disobeyed this order, as well. Apdx. 50-51, 79 (Amend. Compl. ¶¶ 214-17, 404-11); *see also* Kellett's Brief 2-6.

2. On April 24, 2007, Arguetta called 911 and the police responded to her call; Filler subpoenaed the 911 call, the cruiser video, and reports about the incident; Kellett advised Deputy Willey to disregard the subpoena.

Law enforcement received several calls from Arguetta and her daughter Natasha on April 24, 2007 (the substance of which is detailed in full at Apdx. 37-39 (Amnd. Compl. ¶¶ 116-23)). On one call, Arguetta sounded delusional and psychotic, and could be heard attempting to convince Natasha to say that Filler molested her. On another call, Natasha told dispatchers that Arguetta was going to make false allegations against Filler in order to gain an advantage in divorce

proceedings against him. Apdx. 38 (Amnd. Compl. ¶ 122). When police responded to Arguetta's and Natasha's calls, they observed Arguetta running on the road in a state of undress, chanting, laughing and crying; and she threatened to kill one of the responding officers and Filler. Apdx. 38 (Amnd. Compl. ¶¶ 124-26). All of this was recorded (both video and audio). Apdx. 39-40 (Amend. Compl. ¶¶ 127-30, 137, 140). The 911 calls, as well as police reports about the calls, were lawfully subpoenaed, ordered by the court to be provided to Filler, and allegedly destroyed. Apdx. 38-40, 55-56, 60-61 (Amnd. Compl. ¶¶ 124-38, 140, 245, 248-51, 272-78). Kellett advised Washington County Sheriff's Deputy Travis Willey not to comply with Filler's subpoena of this information. Apdx. 54-55, 58, 74-78 (Amnd. Compl. ¶¶ 235, 238-45, 262-63, 369, 376-86, 391); *see also* Kellett's Brief 6-7.

3. Records of the 911 calls and the encounter with Arguetta on April 24, 2007 were also maintained by Sergeant Malloy; the defense subpoenaed Malloy for the records; Kellett advised Malloy to disregard the subpoenas.

Notwithstanding the fact that Kellet advised Deputy Willey not to comply with Filler's subpoena, or Willey's representation to Filler's criminal defense attorney that records relating to the 911 calls and incidents on April 24, 2007 were all destroyed, Gouldsboro Police Sergeant James Malloy told Filler's attorney that such records did, in fact, exist and were available *after* Filler's first trial. Apdx. 60 (Amend. Compl. ¶ 272). Sergeant Malloy volunteered to compile and send these

materials to Filler's attorney. Apdx. 60 (Amend. Compl. ¶ 276). Soon thereafter, Filler's attorney subpoenaed the records from Sergeant Malloy. Apdx. 61 (Amend. Compl. ¶ 277). Sergeant Malloy contacted Kellett's office for advice on whether to comply with the subpoena, and Kellett instructed Sergeant Malloy not to comply with the subpoena. Apdx. 61 (Amend. Compl. ¶¶ 279, 283); *see* Kellett's Brief 7-9.

B. Kellett Either Personally Tampered with Evidence or Advised Law Enforcement Officers to Tamper with Evidence.

Count I of the Amended Complaint also alleged, *inter alia*, that Kellett engaged in or supported and approved of, the tampering of evidence by selectively editing a videotaped interview and redacting the exculpatory portions of the recording that were given to the defense. Apdx. 89, 95, 135-136 (Amnd. Compl. ¶ 495, 527; Order 17-18). The district court denied Kellett's motion to dismiss this portion of the case and, in an abundance of caution, Filler reads Kellett's Appellant's Brief as contesting this portion of the court's ruling. Apdx. 196 (Order 78); Kellett's Brief 10 ("Kellett…redacted exculpatory evidence from audio and video recordings…."). The underlying facts are as follows.

1. Kellett redacted exculpatory evidence from audio and video recordings, and gave this falsified evidence to Filler's attorney.

On April 25, 2007, the police interviewed Arguetta, and the interview was videotaped and later transcribed. Arguetta was allowed to bring a friend to the

interview and, when the interviewing officer left the room during a break, Arguetta admitted to her friend that her report of sexual abuse against Filler was her way of "fighting for the children." The friend repeatedly told Arguetta to cry, otherwise "it wouldn't seem real," and Arguetta began crying hysterically when the officer returned to the room. The communication between Arguetta and her friend were captured on the video. Apdx. 42-43, 62-63, 80 (Amnd. Compl. ¶¶ 148-53, 160, 287-300, 415). Kellett engaged in, or approved of, tampering with the video that purported to depict this interview – minus the conversation Arguetta had with her friend, which was edited out. Apdx. 89 (Amend. Compl. ¶¶ 495-98).

ARGUMENT SUMMARY

Both this Court and the U.S. Supreme Court have definitively held that a prosecutor is not entitled to absolute immunity for the advice that she gives to police officers, regardless of when in the course of a criminal case that advice is given. The district court correctly applied that case-law to the facts of this case. Its conclusion that Kellett was not entitled to absolute immunity for the advice she gave to three law enforcement officers to disregard lawful subpoenas and at least one court order was unambiguously correct.

The district court's conclusion that Kellett was not entitled to absolute immunity for tampering with evidence (either as a principal or as an accomplice to her co-defendants) was also correct. Kellett's act of splicing an interrogation video

in order to alter its meaning and impair its veracity constitutes a crime in Maine, and criminal activity is most assuredly not intimately associated with the judicial process of a criminal case.

The district court's conclusion that Filler could pursue a malicious prosecution claim under §1983 was correct, too. This Court has held that a malicious prosecution claim under §1983, grounded in the violation of a plaintiff's Fourth Amendment rights, may proceed. Here, citing to allegations in the Amended Complaint, the district court found that Filler adequately demonstrated a Fourth Amendment violation: he was initially held without bail, and when he was eventually released on bail he was required to abide by a variety of conditions that dictated where he lived and required that he relinquish his right to be free from unreasonable searches and seizures by law enforcement officers at any time.

This Court should affirm the district court's order denying in part Kellett's motion to dismiss and remand the case to the district court for further proceedings.

ARGUMENT

The district court's correctly interpreted and applied this Court's and the U.S. Supreme Court's case-law when it concluded that Kellett was not entitled to absolute immunity.

A. §1983 immunity depends on the "functional nature" of the actor's conduct – not her job title.

There is no blank check. No one is absolutely immune from §1983 liability, regardless of what she may (or may not) have done. An actor's §1983 immunity depends on the "functional" nature of her conduct, not on her job title. *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983) (Immunity does not depend on the "status of the defendant."); *Rehberg v. Paulk*, 132 S.Ct. 1497, 1503 (2012) (explaining the "functional approach" to analyzing §1983 liability); *Acevedo-Garcia v. Vera-Monroig*, 204 F.3d 1, 8 (1st Cir. 2000) (Immunity is "defined by the functions it protects and serves, not by the person to whom it attaches.").

Under the "functional approach," a court first identifies a common-law counterpart to the modern-day conduct in question. *Tower v. Glover*, 467 U.S. 914, 921-22 (1984). If the conduct or the function that it served was accorded immunity from tort liability at common law, then a court must next consider whether the history or purpose of §1983 militate against recognizing the same degree of immunity. *Malley v. Briggs*, 475 U.S. 335, 340 (1986). Only those functions that are "so important and vulnerable to interference through litigation" are afforded absolute immunity under §1983. *Rehberg v. Paulk*, 132 S.Ct. at 1503; *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967). They enjoy this heightened level of protection

in order to "ensure that they [are] performed with independence and without fear of consequences." *Rehberg*, 132 S.Ct. at 1503.

Absolute immunity is the rare exception to §1983's guarantee that "every person" who acts under color of state law to deprive another of a constitutional right is answerable to that person in a suit for damages. 42 U.S.C. §1983; *see also Forrester v. White*, 484 U.S. 219, 222 (1988) (courts are "quite sparing" in recognizing absolute immunity for state actors); *Burns v. Reed*, 500 U.S. 478, 486-87 (1991) ("The presumption is that qualified rather than absolute immunity is sufficient to protect governmental officials in the exercise of their duties."). The Court "has not extended *absolute* immunity to [public] officials in the absence of the most convincing showing that immunity is necessary." *Imbler v. Pachtman*, 424 U.S. 409, 434 (1976) (White, J., concurring) (emphasis original). Only those "absolute immunities so firmly rooted in the common law and supported by such strong reasons" have survived the passage of §1983 and continue today. *Id.*

Case-law about police officers illustrates the way the functional approach works. In *Briscoe*, 450 U.S. at 340-44, the Court considered the function that a police officer performs when he testifies at trial. The Court held that because lay witnesses enjoyed absolute immunity at common law; because a police officer testifying at trial performs the same function as a lay witness; and because subjecting police officers to §1983 liability might undermine the judicial process and the

effective performance of their duties, police officers and lay witnesses enjoy the same level of §1983 protection when testifying: absolute immunity.

In *Malley v. Briggs*, 475 U.S. 335 (1986), the Court considered the function that a police officer performs when he seeks an arrest warrant. The Court held that because, at common law, a complaining witness who procured an arrest warrant was entitled to either qualified immunity or no immunity; because a police officer seeking a warrant performs a similar function as a complaining witness; and because an officer applying for a warrant is removed from the judicial phase of criminal proceedings, a police officer seeking a warrant is not entitled to absolute immunity. *Id.* at 340-43.

For our purposes, the salient point of these cases is that the officer's conduct – not the office he holds – drives the analysis. This holds true for prosecutors, as well.

1. A prosecutor engaged in certain investigative activities enjoys, not the absolute immunity associated with the judicial process, but only a good-faith defense comparable to a policeman's.

When a prosecutor performs the dual functions of initiating a prosecution and presenting the State's case to a judge or jury, she is absolutely immune from §1983 liability. *Imbler*, 424 U.S. at 431. Because these two tasks comprise the bulk of what a prosecutor does, the "general rule" is that a prosecutor is absolutely immune from suit for malicious prosecution." *Id.* at 437 (White J., concurring). But that

does not mean that a prosecutor is absolutely immune for *everything* she does (or fails to do). The functional approach to deciding §1983 liability applies to prosecutors in the same way that it applies to everyone else.

2. Prosecutors are absolutely immune for initiating and presenting the State's case because those functions are intimately associated with the judicial process.

In *Imbler*, the Court utilized the functional approach to explain why prosecutors are absolutely immune for initiating a prosecution and presenting the State's case. At common law, prosecutors were immune from tort liability for such things,[3] and the reasons for that liability exist today: "if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law" and even "the honest prosecutor" could become entangled in litigation, *id.* at 424-25; less protection from liability "could have an adverse effect upon the functioning of the criminal justice system" because it "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system," *id.* at 426-28; and there are other checks

[3] *But see Burns*, 500 U.S. at 499 (Scalia, J., concurring in part and dissenting in part) ("[T]he first case extending *any* form of prosecutorial immunity was decided some 25 years after the enactment of §1983.") (Emphasis original).

on prosecutorial misconduct, including criminal prosecution and professional discipline, *id.* at 429.

Because initiating and presenting the State's case are activities "intimately associated with the judicial phase of the criminal process," they are "functions to which the reasons for absolute immunity apply with full force." *Id.* at 430. But, when a prosecutor's conduct is *not* "intimately associated with the judicial phase of the criminal process" – *e.g.* when "the prosecutor's responsibility cast him in the role of an administrator or investigative officer rather than that of an advocate" – the same historical and public policy rationales may not apply, and absolute immunity is inappropriate. *Id.* at 430-31; *see also id.* at 442 (White, J., concurring) (It does not follow "that prosecutors are absolutely immune from suit for all unconstitutional acts committed in the course of doing their jobs.").

3. A prosecutor is not absolutely immune from §1983 liability when she gives legal advice to the police.

The "prosecutorial nature of an act does not spread backwards like an inkblot, immunizing everything it touches." *Guzman-Rivera v. Rivera-Cruz,* 555 F.3d 26, 29 (1st Cir. 1995); *Burns*, 500 U.S. at 495 ("Almost any action by a prosecutor…could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive.")

Prosecutors perform a variety of functions for which they are *not* absolutely immune from §1983 liability.

In *Burns*, the Court held that a state prosecutor was not entitled to absolute immunity for giving legal advice to police, primarily because there was no "historical or common-law support for extending absolute immunity to such actions by prosecutors." *Burns,* 500 U.S. at 492. And, absent a tradition of common law immunity, courts "have not been inclined to extend absolute immunity from liability under §1983." *Id.* at 493; *see also id.* at 498 (Scalia, J., concurring in part and dissenting in part) ("Where we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under §1983.").

Other secondary reasons bode against extending absolute immunity, too. "Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated with litigation." *Id.* at 494 (emphasis original). This concern "justifies absolute immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation-inducing conduct." *Id.* Moreover, the judicial process "will not necessarily restrain out-of-court actions by a prosecutor that occur prior to the initiation of a prosecution, such as providing legal advice to the police." *Id.* at 496. Unlike initiating and presenting the State's case, the act of providing advice to police officers may never even be "subjected to the crucible of the judicial process." *Id.* (internal citation omitted).

Plus, although the "absence of absolute immunity for the act of giving legal advice may cause prosecutors to consider their advice more carefully, where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Id.* at 495 (internal citation omitted; emphasis original). It would be "incongruous to allow prosecutors to be absolutely immune for liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice." *Id.* Such a rule "would mean that the police, who do not ordinarily hold law degrees, would be required to know the clearly established law, but prosecutors would not." *Id.*

4. A prosecutor is not absolutely immune from §1983 liability when she assumes an investigatory role.

In *Buckley v. Fitzsimmons*, 509 U.S. 259, 273-74 (1993), the Court held that when "a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect one and not the other." It does not matter when the prosecutor's investigative activity occurs: "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability from all actions taken afterwards." *Id.* at 274 n. 5. A prosecutor may engage in "police investigative work" at any time during the pendency of a case. *Id.*

This Court has elaborated: whereas police investigators and detectives gather and corroborate evidence, the prosecutor-as-advocate evaluates evidence and interviews witnesses as she prepares for trial. *Guzman-Rivera*, 55 F.3d at 30. It is not the prosecutor's function to uncover evidence in the first instance, and when that happens, the prosecutor is "not performing a function intimately associated with the *judicial* phase of the criminal process." *Id.* (citing *Imbler*, 424 U.S. at 430) (emphasis added).

5. When a prosecutor tampers with evidence, she is not immune from §1983 liability.

"Deliberate concealment of material evidence by the police, designed to grease the skids for false testimony and encourage wrongful conviction, unarguably implicates a defendant's due process rights." *Haley v. City of Boston*, 657 F.3d 39, 49 (1st Cir. 2011). Indeed, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit." *Id.* at 50 (quoting *Limone v. Condon*, 372 F.3d 39, 44-45 (1st Cir. 2004)). Every reasonable police officer knows that evidence tampering is illegal, and also unconstitutional when it deprives a defendant of access to exculpatory evidence. Police officers are not immune from civil liability for this sort of reprehensible behavior. *Haley*, 657 F.3d at 51. Prosecutors should not be immune, either.

There is a fundamental difference between failing to comply with the strictures of *Brady v. Maryland*, 373 U.S. 83 (1963) through the nondisclosure of scraps of discontinuous exculpatory evidence – something for which prosecutors enjoy absolute immunity, *see e.g. Campbell v. Maine*, 787 F.2d 776, 778 (1st Cir. 1986) – and purposefully doctoring a piece of evidence to exclude all the exculpatory bits, materially altering its original value.

Amici are unaware of any common law cases that declare evidence tampering absolutely immune from civil liability, and tampering is not a function even arguably associated with the judicial phase of the criminal process. Quite the opposite; tampering with evidence is itself a crime. *Cf. Imbler*, 424 U.S. at 442 (White, J., concurring) ("It should hardly need indicating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which §1983 was enacted.").

B. The district court correctly concluded that Kellett was not entitled to absolute immunity either for the advice that she gave to the police or for tampering with material evidence.

The district court correctly articulated and applied the "functional approach" for determining §1983 liability. Apdx. 169-70 (Order 51-52). The district court also properly observed that "under *Buckley,* 509 U.S. at 271 and *Burns*, 500 U.S. at 495,

providing legal advice to the police is not a function closely associated with the judicial process." Apdx. 182 (Order 54). And, it appropriately applied that case-law when it concluded that Kellett was "not entitled to absolute immunity for the legal advice she gave law enforcement officers about how to respond to defense subpoenas." *Id.*

Kellett's arguments to the contrary are not convincing. First, Kellett repeatedly complains that Filler has mischaracterized her behavior. *See e.g.* Kellett Brief 14 ("Mr. Filler is trying to get around the rule of immunity for withholding exculpatory evidence by reframing his claim as one about giving legal advice to police."). But, "it is the party suing, not the party sued, who enjoys the right to frame the claims asserted in the complaint." *Haley*, 657 F.3d at 49. Kellett concedes – as she must – that the U.S. Supreme Court has already definitively answered the question as Filler has it framed. Kellett acknowledges "the Supreme Court has…held that 'advising the police in the investigative phase of a criminal case is not protected by absolute immunity because it is not 'so intimately associated with the judicial phase of the criminal process…that it qualifies for absolute immunity.'" Kellett Brief 25-26 (quoting *Burns*, 500 U.S. at 493). The district court did not err by applying controlling U.S. Supreme Court case-law.

Second, Kellett reads *Burns* much too narrowly when she suggests that prosecutors enjoy absolute immunity for the advice they give to police officers "*after*

the start of criminal proceedings." Kellett Brief 28-29 (emphasis original). *Burns* never held that, and in *Buckley* the Court rejected any sort of temporal fulcrum point for §1983 liability. *See Buckley*, 509 U.S. at 274 n. 5 ("[A] determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards."). The district court correctly applied this rationale from *Buckley* (no absolute immunity for a prosecutor who engages in "police investigative work") to *Burns* (no absolute immunity for a prosecutor who provides advice to the police). After all, the U.S. Supreme Court has admonished time and again that courts must consider the *function* of the conduct in question. *See.e.g. Rehberg*, 132 S.Ct. at 1503. And Kellett's suggestion that this Court instead adopt an arbitrary point between qualified and absolute immunity altogether ignores the function such advice serves.

Third, Kellett's reliance on *Reid v. New Hampshire*, 56 F.3d 332 (1st Cir. 1995) is misplaced. *See* Kellett Brief 20-21. The issue in *Reid* was whether prosecutors enjoyed absolute immunity for withholding exculpatory evidence in direct violation of trial court orders, and repeatedly lying to the trial court about the existence of exculpatory evidence. *Reid*, 56 F.3d at 336. This Court concluded that the district court did not abuse its discretion when it dismissed plaintiff's claims as frivolous under 28 U.S.C. §1915(d). *Id.*

Here, both the substantive question of law and the procedural posture of the case are different (and this, in turn, alters the applicable standard of review). This case comes before this Court on defendant's motion to dismiss for failure to state a claim, and the issue – as the district court properly understood it – is whether Kellett is entitled to absolute immunity when she advised police offices to ignore lawful subpoenas and trial court orders. On that point, the district court correctly applied controlling U.S. Supreme Court case-law, which unambiguously holds that prosecutors are not absolutely immune for the advice they give to police. *See* Apdx. 169-71 (Order 51-53).

Kellett has failed to address – much less explain – why this Court should carve out an exception to *Burns* and *Buckley*, and declare that §1983 immunity depends on the subject matter of the prosecutor's advice. If the U.S. Supreme Court had intended such an exception, it surely would have said so, and the fact that Kellett cites to no other case from any jurisdiction recognizing such a novel exception is telling. *Cf. Buckley*, 509 U.S. at 269 ("[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.") (quoting *Burns*, 500 U.S. at 486).

Fourth, Kellett's curious argument that Filler's "complaint does not contain any factual allegation that would amount to the giving of legal advice," *see* Kellett's Brief 29, is belied by her own Statement of the Case, which painstakingly sets out

in granular detail – for seven pages – all of the ways that Kellett allegedly advised the law enforcement co-defendants to respond to various subpoenas, *see* Kellett's Brief 2-9.

This argument is also belied by the fact that Kellett has already admitted to providing such advice and acknowledged that she violated Filler's constitutional rights by doing so; this formed the basis for the suspension of her law license. *See* Apdx. 174 (Order 56) ("At least the evil of vexatious and frivolous lawsuits is not a concern in this case because ADA Kellett admitted to Justice Ellen Gorman of the Maine Supreme Judicial Court that she 'violated the rights of defendant'…Indeed, Justice Gorman noted that '[t]his case is the first discipline proceeding ever filed with the Court by the Overseers of the Bar against a member of Maine's prosecutorial bar that is based on the prosecutor's representation of the State.'"). Kellett's volley that Filler's "complaint baldly asserts that Ms. Kellett gave legal advice does not mean that the Court must credit that assertion when there are no factual allegations to support it" misses its mark. Kellett Brief at 29. Filler has supplied dates, names and specifics.

Fifth, Kellett seems to suggest that as long as her acts and omissions were directed towards "winning" the prosecution of Filler, they are entitled to absolute immunity. *See e.g.* Kellett Brief 30 ("Either Ms. Kellett was acting with the intent to maliciously prosecute Mr. Filler – in which case her alleged directives to police

were attempts to win the case and are subject to immunity – or she was not – in which case her actions do not amount to malicious prosecution."). In support, Kellett cites to a Fifth Circuit case for the proposition that "advocatory" conduct is that "designed to secure a conviction." *Id.* at 31 (quoting *Cousin v. Small*, 325 F.3d 627, 636 (5th Cir. 2003)). The missing link between those two thoughts would be case-law holding that all "advocatory" conduct is entitled to absolute immunity. Kellett cites no such case because none exists; nor should it.

Sixth, Kellett makes no real attempt to argue that a prosecutor is entitled to absolute (or even qualified) immunity for tampering with evidence. The Amended Complaint alleges that Kellett either personally doctored an interrogation video to remove a highly exculpatory exchange – Arguetta's statement that her report of sexual abuse against Filler was her way of "fighting for the children" and coaching from her friend to cry in order to make her allegations "seem real" – or she supervised and approved of her co-defendants doing the same. Apdx. 42 (Amend. Compl. ¶¶ 147-60). This conduct is criminal in nature, s*ee e.g.* 17-A M.R.S. §455(1)(A), (B),[4] and criminal conduct is plainly not a function intimately associated with the judicial process. *Cf. Imbler*, 424 U.S. at 430; *se also Rouse v. Stacy*, 478

[4] 17-A M.R.S. §455 provides: "(1) A person is guilty of falsifying physical evidence if, believing that an official proceeding…or an official investigation is pending or will be instituted, he (A) Alters, destroys, conceals or removes any thing relevant to such proceeding or investigation with intent to impair its veracity, authenticity or availability in such proceeding or investigation; or (B) Presents or uses any thing for which he knows to be false with intent to deceive a public servant who is or may be engaged in such proceeding or investigation."

F3d. Appx. 945, 951 (6th Cir. 2012) (illegal actions by a prosecutor is not legitimate and, therefore, "clearly beyond his authority," and so are not accorded absolute immunity).

C. The district court plausibly concluded that Filler could state a claim for malicious prosecution under §1983.

Kellett makes two arguments that are independent from one another, and altogether different than her prosecutorial immunity argument. First, she argues that this Court has yet to hold that a malicious prosecution claim against a state prosecutor may be pursued through §1983. Kellett Brief at 24-25. But this fact alone does not provide a reason for this Court to overturn the district court's order. It is Kellett's burden to prove that she is entitled to absolute immunity, and the mere absence of a case directly denying such immunity hardly suffices to satisfy that burden. *Forrester*, 484 U.S. at 224 ("Officials who seek exemption from personal liability have the burden of showing that such an exemption is justified by overriding considerations of public policy….").

Moreover, the Third, Fifth, Sixth, and Tenth Circuits have all held that malicious prosecution violates §1983. *See Rose v. Bartle*, 871 F.2d 331, 349 (3d Cir. 1989); *Brummett v. Campbell*, 946 F.2d 1178, 1180 n. 2 (5th Cir. 1991); *McCune v. Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988); and *Robinson v. Maruffi*, 895 F.2d 649, 654 (10th Cir. 1990). The district court correctly concluded

that this Court would reach a similar holding, particularly since, as Kellett acknowledges, a malicious prosecution claim was "the very type of claim that the Supreme Court addressed in *Imbler* when it ruled that prosecutors enjoy the same absolute immunity under section 1983 as they did under common law." Kellett Brief 25 (citing *Imbler*, 424 U.S. at 420-28).

Second, Kellett argues that the district court erred by concluding that Filler could pursue a §1983 claim for malicious prosecution grounded in the Fourth Amendment right to be free from an unreasonable seizure. Kellett Brief 21-25; *see also* Apdx. 175-78 (Order 57-60).

In *Harrington v. City of Nashua*, 610 F.3d 24, 30 (1st Cir. 2010), this Court held that a plaintiff must "show a deprivation of liberty, pursuant to legal process, that is consistent with the concept of a Fourth Amendment seizure." When a suspect is arrested without a warrant – which was the case for Filler – a plaintiff must show "some *post-arraignment* deprivation of liberty, caused by the application of legal process, that approximates a Fourth Amendment seizure." *Nieves v. McSweeney*, 241 F.3d 46, 54 (1st Cir. 2001) (emphasis original). A plaintiff must allege that he "was in some way forced to 'yield' to the assertion of authority over him and thereby 'had his liberty restrained,' for example by being detained or having his travel restricted." *Moreno-Medina v. Toledo*, 458 Fed. Appx. 4, 8 (1st Cir. 2012) (quoting *Britton v. Maloney*, 196 F.3d 24, 30 (1st Cir. 1999)).

The district court concluded that Filler did all this in spades. The Amended Complaint alleges that Filler was held without bail, and once he posted bail, he was forced to submit to conditions that required him to: live in a motel from April 27, 2007 until May 1, 2007; abide by a strict curfew; and waive his Fourth Amendment rights and submit to warrantless search and seizure at the request of any law enforcement officer, regardless of whether that request was reasonable. Apdx. 177 (Order 59, citing Amend. Compl. ¶¶ 169, 171, 181-82).

The district court's interpretation or application of this Court's case-law was correct. Filler has stated a claim for malicious prosecution under §1983.

CONCLUSION

This Court should affirm the district court's order denying in part Kellett's motion to dismiss Filler's Amended Complaint.

Respectfully submitted,

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CERTIFIATE OF COMPLIANCE WITH RULE 32(A)

RE: ***Filler v. Kellett, et al.***
No. 16-1186

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CERTIFICATE OF SERVICE

I, Jamesa J. Drake, hereby certify that I have served a copy of this Brief of Amicus Curiae upon counsel for Defendant-Appellant Kellett by virtue of filing this brief through the Circuit Court's ECF System, causing a copy to be distributed to all relevant parties.

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