IN THE SUPREME COURT OF IOWA

No. 18-1280

JOSHUA VENCKUS,

Plaintiff-Appellant,

v.

CITY OF IOWA CITY, ANDREW RICH, JOHNSON COUNTY, IOWA, ANNE LAHEY, NAEDA ELLIOTT and DANA CHRISTIANSEN,

Defendants-Appellees.

Appeal from the Iowa District Court for Johnson County,
The Honorable Chad Kepros
LACV079763

AMICUS CURIAE BRIEF of the IOWA ASSOCIATION FOR JUSTICE

Supporting Plaintiff/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL APPELLATE CASES

IOWA SUPREME COURT CASES

FEDERAL STATUTES

IOWA STATUTES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE

The objectives of the Iowa Association for Justice (hereinafter "IAJ") include the promotion of the administration of justice for the public good, and the advancement of the cause for those who are damaged in person or property, or both, and who must seek redress through our civil justice system. As the leading organization for attorneys practicing at the plaintiff's bar in this state, the members of IAJ are uniquely experienced in the application of Iowa law and Iowa legal principles to the issues facing plaintiffs seeking a hearing in our state's courts, redress of grievance, compensation for injury, as well as defense in a criminal proceeding.

Presently comprising more than 700 members, IAJ member attorneys collectively represent thousands of injured Iowans each year. IAJ serves the legal profession and the public through its efforts to strengthen the civil justice system, promote the prevention of injuries, and foster the development of a judicial system wherein any aggrieved party can seek remedies for injuries, wrongs, or losses that are the responsibility of another party, and have that dispute heard by a fair and impartial tribunal. This system, and the rule of law that it supports, are the centerpiece of IAJ's mission to improve our legal system and promote justice in the courts.

The recognition of rights under the Federal and Iowa State

Constitutions, including the developing jurisprudence concerning Constitutional torts and violations as independent causes of action - as well as fundamental notions of fair play and justice - obligate factfinders, jurors, attorneys, and other participants in the judicial system and state and local government to consider the issues of absolute and qualified immunity of governmental actors when plaintiffs seek relief for what they characterize as violations of their fundamental rights under the Iowa and Federal Constitutions.

IAJ members have long upheld the civil rights of plaintiffs in the state and Federal courts of Iowa, and members have extensive experience in the application of Constitutional rights to the legal issues of plaintiffs seeking justice in those courts.

In particular, the scope and application of the Iowa Constitution to the civil rights of all Iowans and the limitations that those rights circumscribe on the actions of government officials and employees are indeed matters where the perspectives and experiences of the proposed amicus can provide this Court with valuable assistance in understanding the issues posed and the arguments presented on both sides of the issue.

It is additionally important to consider prior case law such as *Godfrey* and *Baldwin* and those cases' further application and consideration toward the

resolution of civil law matters and the dispensation of justice in Iowa courts. The issue of absolute immunity and its role in such matters as a potential absolute shield from liability for governmental actors will undoubtedly have significant impact on the citizens of this State and their government, as well as be of paramount importance to future plaintiffs seeking redress of grievances for violations of their civil, Constitutional, and common law rights in our state's courts.

ARGUMENT

I. PROSECUTORIAL IMMUNITY AND THE COMMON LAW

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man, who by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

Hoover v. Iowa State Highway Comm'n, 207 Iowa 56, 222 N.W. 438, 449-40 (Iowa 1928) quoting *United States v. Lee*, 106 U.S. 196, 220 (1882).

Prosecutorial misconduct is a reality. However, absolute prosecutorial immunity has insulated prosecutors against liability for misconduct "including intentionally withholding exculpatory evidence, conspiring to present false testimony, [and] knowingly offering perjured testimony, to name just a few." Mark Niles, *A New Balance of Evils: Prosecutorial Misconduct, Iqbal and the End of Absolute Immunity*, 13 Stan. J. Civ. Rights & Civ. Liberties 137, 139-40 (2017). Given the persistent problem of prosecutorial misconduct, however, absolute prosecutorial immunity has been criticized. *See id*.; John C. Jeffries Jr., *The Liability Rule for Constitutional Torts*, 99 Va.

L. Rev. 207, 220-231 (2013); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53.

How is such intentional prosecutorial misconduct allowed to continue without recourse? Forty years ago the U.S. Supreme Court granted prosecutors absolute immunity for acts committed in their prosecutorial role. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). In *Imbler*, the Supreme Court held that prosecutors are, in most circumstances, entitled to absolute immunity from civil liability under 42 U.S.C. § 1983 actions.

Imbler was decided on two key considerations: first, the Supreme Court's view of immunities historically accorded under the common law, and second, public policy considerations. Forty years later, neither consideration holds up to close scrutiny.

Historical common law immunities as a basis for prosecutorial immunity have been pretty thoroughly debunked:

> "[t]here was, of course, no such thing as absolute prosecutorial immunity when §1983 was enacted." *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (Justice Scalia concurring).

As the Iowa Supreme Court has stated, historically (in the late 1800s):

> "private parties frequently prosecuted criminal cases. *Rehberg v. Paulk*, 566 U.S. ——, ——, 132 S.Ct. 1497, 1503, 182 L.Ed.2d 593, 602 (2012). Although these private individuals did not

> necessarily give testimony at trial, they were called "complaining witnesses." *Id.* at ——, 132 S.Ct. at 1507, 182 L.Ed.2d at 606. "Complaining witnesses" were not absolutely immune from civil liability at common law. *Malley v. Briggs*, 475 U.S. 335, 340, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271, 278 (1986). Public officials increasingly assumed the prosecutorial function after Congress passed the Civil Rights Act of 1871. *Rehberg*, 566 U.S. at ——, 132 S.Ct. at 1504, 182 L.Ed.2d at 603. Unlike private prosecutors, public prosecutors were absolutely immune from tort claims at common law to protect them from harassing litigation. *Id*."

Minor v. State, 819 N.W.2d 383, fn4 (Iowa 2012).

In short, historical common law cases do not support prosecutorial immunity. Further, private prosecutors were historically subject to suit. There is no evidence or data suggesting that the Courts were at that time rushed with a flood of malicious prosecution suits.

The only remaining rationale for prosecutorial immunity is the concern raised by public policy considerations. Those considerations include fear of harassing litigation and that subjecting prosecutors to civil suits will result in negative consequences for prosecutors to effectively perform their duties.

The fear that prosecutors would be deterred from vigorously pursuing justice does not hold up to scrutiny. In light of current Iowa law and common practice, these fears are more imagined than real. Under Iowa law, both State and Municipal employees are protected and indemnified from personal

liability by the State Tort Claims Act and Municipal Tort Claims Act. *See generally* Iowa Code Chapters 669; 670. In Iowa, prosecutors who may violate Iowans' constitutional rights are not personally liable, with the exception of punitive damages. *Id*. Further, the majority of Iowa's public entities are insured for the transgressions of their officers. The Iowa Community Assurance Pool (ICAP) "provides property and casualty coverage to nearly 800 Iowa public entities, including 73 of Iowa's 99 counties." *See* https://www.icapiowa.com.

Because Iowa's city, county, and state prosecutors face no personal exposure under Iowa law, the fear that prosecutors will fail to vigorously pursue justice is substantially diluted.

Absolute immunity is an effective, but excessive, remedy to avoid nuisance suits that chill the ardor of prosecutors. *Baldwin* "all due care to comply with the law" qualified immunity is sufficient to protect prosecutors from vexatious suit. *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018). *Baldwin* qualified immunity would allow prosecutors to both remain zealous advocates, and yet be confined to exercising "all due care to comply with the law."

In consideration of the duties and expectations of our state's prosecutors, a standard that asks them to take all due care to stay within

the metes and bounds of the law should address the concerns of future defendants who believe their rights have been violated, and the concerns of law enforcement and prosecutorial actors who fear that every acquittal will lead to litigation and a microscopic examination of their actions in the case to determine if there was some crucial point at which they should have known that the case would not yield a conviction. The standard does not foreclose events in which an aggrieved plaintiff should be compensated, and where a prosecutor's actions should be held up for accountability and for a finding of damages for both remedy and deterrence purposes.

Prevention of harassing or meritless litigation against prosecutors is a valid concern, however absolute prosecutorial immunity is excessive to deal with it. As Professor Niles observes:

> The simple nuisance problem is essentially unrelated to the ultimate resolution of the lawsuit. The premise of the concern is that prosecutors will be subjected to baseless lawsuits that they will ultimately win but will have to waste their (and their community's) time resolving.
> The problem with the treatment of these distinct concerns as if they were the same is that courts have traditionally applied one remedy—the absolute preclusion of exposure to liability for prosecutors regardless of the nature of the misconduct—to prevent either or both. But absolute prosecutorial

> immunity is an excessive and unnecessary tool to limit simple nuisance and it overcorrects for the complex nuisance problem, which can be readily addressed by the qualified immunity defense.
>
> *******
>
> **Absolute immunity certainly discourages frivolous lawsuits and makes them easy to dismiss, but it does so in much the same way that amputating a leg would cure a sprained ankle—the solution is effective but wildly excessive and incongruous given the actual problem.**

Niles at 169-71 (emphasis added).

Professor Niles is right. Why disallow meritorious claims in the name of preventing meritless claims? Why not strike a reasonable balance that allows meritorious claims to proceed, and allow meritless claims to be dealt with on summary judgment? The citizens of Iowa have a clear state constitutional right to be free of the attachment of criminal investigation or prosecution where evidence does not support such action, and the consequences of an unsupported prosecution are manifold in terms of damages and impositions on fundamental rights. The fundamental injustice of a false or falsely-grounded prosecution are clearly lacking in fundamental fairness, and can cause immense harm to the financial, psychological, or physical well-being of the accused or convicted, as well as amount to potentially irreparable damages to reputation or future.

An equivalent grouping of public policy concerns are evident when prosecutorial misconduct or improper action occurs – where innocent people are convicted of crimes, the guilty parties go free. Reports of misconduct or inconsistency in the prosecutorial process can reduce public faith in prosecutors or courts, and members of the public may be reluctant to assist the government in future cases because of that uncertainty or lack of faith.

Defendant-Appellees, and those supporting them, raise public policy specters of interference with prosecutorial function and the functions of witnesses, as well as an expected spate of litigation as though every aggrieved defendant who is acquitted in the future is expected to file suit alleging constitutional damages in situations where they were prosecuted. Yet, the criminal justice system allows post-conviction relief, habeas corpus, and other remedies for the convicted to seek Constitutional review of their convictions and the system has not yet ground to a halt. Much of that type of litigation is disposed of by summary judgment or is never brought at all after review by counsel.

Similarly, allowing a Constitutional remedy in these relatively rare situations where a prosecution goes out of bounds and treads on fundamental civil and Constitutional rights can be controlled and channeled by in-place legal mechanisms and avoids the situation where a potential plaintiff is limited

in recovery and where society loses its chance to have the legal process perform one of its necessary functions, which is to deter undesirable infringement upon valued and significant rights.

An "all due care to comply with the law" qualified immunity is a reasonable approach for executive officers, including officers of the law and prosecutors alike. "All due care to comply with the law" is "a form of immunity that [is] better tailored to distinguish prosecutors who act reasonably from those who engage in reckless or intentional misconduct." Jeffries at 144. It is "[t]he sense of absolute power engendered by absolute immunity is exactly the problem, and should be constrained wherever possible. " Jeffries at 231.

II. The Role of Deterrence in Moving Beyond Absolute Immunity

A significant portion of a *Godfrey* claim extends beyond the remedy of damages for the plaintiff for the Constitutional wrong or wrongs suffered. Deterrence of such unconstitutional behavior or treatment of others in the future is also contemplated. *Godfrey* at 877. This bundling of compensation for the harmed and deterrence of improper conduct extends to the judicial analysis of whether a current statutory scheme such as the Iowa Municipal Tort Claims Act or Iowa Civil Rights Act is sufficient, or if a new, direct and free-standing Constitutional claim needs to be brought. Under *Godfrey*, the

key language is whether "the Court believes an established statutory remedy is sufficient to vindicate the Constitutional interests of the people expressed in the civil liberties provisions of state constitutions." *Id.* at 873. Deterrence must be an integral part of such a determination.

Citizens of the state of Iowa should be able to expect and demand precision, efficiency, and competence in terms of who is accused of a crime and made the focus of law enforcement and prosecutorial activity. In the event that the pointing finger of law enforcement is extended toward an individual by way of criminal investigation and subsequent prosecution, that the process will cease immediately upon a determination that facts and evidence no longer lead to that conclusion. Any reasonable, competent, and diligent effort to investigate, prosecute, and thence proceed to trial must be designed to only maintain prosecution where a sufficient quantum of evidence exists to support that prosecution for purposes of a probable cause finding or criminal trial.

Still, the defendant seeking a remedy in the system in the event of a conviction that happens despite the defendant's actual innocence cannot count on one being made manifest. One commentator has identified a flaw with the criminal justice system and its ability to identify and deal with wrongful convictions and simultaneously deter misconduct:

> "[W]rongful convictions refer to situations when a criminal defendant has been convicted and should not have been, while misconduct refers to the actions of the prosecutor. Thus, misconduct can occur in cases in which there is no wrongful conviction and vice versa. However, because the protections afforded a criminal defendant are designed not to reign in prosecutors but rather to guard against wrongful convictions, such protections fall short of deterring misconduct. For example, in the appeals or collateral review process, an appellate court may designate forms of misconduct as "harmless error" - "error that does not affect a party's substantive rights or the case's outcome" - which essentially means that despite the misconduct, the defendant would have been convicted anyway. This demonstrates an important instance where the prosecutor's misconduct goes without sanction by the trial and appeals process because the misconduct does not increase the possibility of a wrongful conviction, despite its wrongfulness."
>
> George A. Weiss, *Prosecutorial Accountability after Connick v. Thompson*, 60 Drake L. Rev. 199, 226 (2011).

This is another example of how blanket immunity eliminates civil liability as one possible tool to influence prosecutorial conduct – and with no other clear locus in the rest of the criminal prosecution system to supply deterrence. *See also* Fred C. Zacharias and Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U.L.Rev. 1 (2009) (criticizing reliance on a hope that professional regulation or attorney licensure/ethics boards would step into the absence of civil liability as a check on prosecutorial conduct); Joel B. Rubin, *The Supreme Court Assumes Errant Prosecutors Will be Disciplined by Their Offices or the Bar: Three Case*

Studies that Prove that Assumption Wrong, 80 Fordham L. Rev. 537, 540-43 (2011).

CONCLUSION

Indeed, despite its ultimate holding regarding §1983 cases, the *Imbler* decision stated that immunities should continue so long as they are both "well grounded in history and reason." *Imbler* at 418 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). In a variety of settings, this Court has been challenged to reevaluate grants of absolute immunity that prevent the hearing of cases and the supplying of remedies to those injured or affected by the conduct of others because of hoary common law maxims that – when evaluated in the full light of fairness to litigants and a willingness to look beyond public policy arguments that may have gone stale – can supply new vigor to fundamental claims of Constitutional rights and put teeth into their enforcement and prevention. Baldwin now provides a standard for evaluating matters where a petition alleges violation of Constitutional rights and where no other statute can supply a remedy.

It is simply not clear how absolute immunity can be maintained with the weary acceptance that a few persons will suffer from prosecutorial misconduct or failure to abide by appropriate standards, and may even be convicted – but that the prosecutors will be free to continue making the same mistakes or performing the same Constitutionally suspect acts without the prospect of legal accountability via civil suit where those mistakes or overt

acts can be documented, written into a petition for relief, and survive summary judgment but that plaintiff cannot be granted the right to be heard in court and demonstrate a proper remedy. Moving away from the sheer, unscalable cliff of absolute immunity will promote greater justice and improve the quality of justice in Iowa's courts.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS

This brief complies with the type-volume limitation contained in Iowa R. App. P. 6.903(1)(g)(1) or (2) because it contains 3531 words, excluding those parts exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief also complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the style requirements of Iowa R. App. P. 6.903(1)(f), because it has been prepared in a proportionally spaced typeface, namely Times New Roman, size 14 font, in Microsoft Word.

/s/ Joel E. Fenton

PROOF OF SERVICE AND CERTIFICATE OF FILING

I hereby certify that on January 24, 2018, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Docket Management System, which will send notification to all parties of record.

/s/ Joel E. Fenton