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1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 10-788, Rehberg v. Paulk.

5 Mr. Pincus.

6 ORAL ARGUMENT OF ANDREW J. PINCUS

7 ON BEHALF OF THE PETITIONER

8 MR. PINCUS: Thank you, Mr. Chief Justice,  
9 and may it please the Court:

10 This Court has twice held, in Malley and in  
11 Kalina, that a complaining witness who sets a criminal  
12 prosecution in motion by submitting a false affidavit is  
13 entitled to qualified immunity, but not absolute  
14 immunity, in an action under section 1983. The Court  
15 rested that conclusion on its determination that  
16 complaining witnesses were subject to damages liability  
17 at common law when -- in 1871 when section 1983 was  
18 enacted.

19 The question in this case is whether the  
20 rule of Malley and Kalina also applies to a complaining  
21 witness who sets a prosecution in motion by testifying  
22 before a grand jury. Again, the common law provides the  
23 answer. The law is clear that in 1871 damages liability  
24 could be based on false grand jury testimony.

25 JUSTICE ALITO: The problem I have with your

1 argument is that I don't really know what a complaining  
2 witness is in the grand jury context. Let's take the  
3 Federal grand jury as an example. Do you think there  
4 are complaining witnesses before Federal grand juries?

5 MR. PINCUS: I think there -- there can be.  
6 It depends obviously on the -- the circumstances, Your  
7 Honor, but -- but there certainly can be.

8 JUSTICE ALITO: A complaining witness, I  
9 would think, is a person who files a complaint, who  
10 causes -- so, under the Federal system, it would be  
11 someone who files a complaint and attests to it under  
12 Rule 5. That person is asking that charges be brought.  
13 That's what it means to be a complaining witness, filing  
14 a complaint.

15 Nobody -- no witness before a Federal grand  
16 jury asks that an indictment be returned. They provide  
17 testimony, and they may want an indictment to be  
18 returned, but it's the prosecutor who asks for the  
19 indictment to be returned. So, I don't see how there is  
20 a complaining witness in that sense in the traditional  
21 grand jury context.

22 MR. PINCUS: Well, Your Honor, the common  
23 law confronted precisely the same situation, and after  
24 public prosecutors came into being and when grand juries  
25 were empaneled by them, the common law has concluded

1 that, both in 1871 and in the present, that there can be  
2 a person who is the motivating force behind the  
3 prosecution, who --

4 CHIEF JUSTICE ROBERTS: A person? What --  
5 what if you have three elements to a crime, and you have  
6 one witness for each one. You see somebody sees the guy  
7 trying to get into a car. Well, maybe he left it --  
8 maybe he locked his keys in. Another sees the guy  
9 walking around with a television. It might be his. A  
10 third sees the guy selling the television to somebody  
11 else. There's nothing wrong with that. Each one  
12 testifies before the grand jury. Who is the complaining  
13 witness?

14 MR. PINCUS: Well, Your Honor, at common  
15 law, the complaining witness was more than just someone  
16 who gave evidence that was necessary for the warrant or  
17 the indictment to issue. It was someone who was pushing  
18 for the prosecution to be brought. All of these  
19 problems, of course, occurred at common law, and they  
20 also occur in connection with the circumstances that the  
21 Court addressed in Malley and Kalina.

22 JUSTICE ALITO: Well, let me give you  
23 another example that I think happens with some  
24 frequency. You have a Federal grand jury, and you have  
25 testimony by an FBI or a DEA case agent, the person who

1 has been working on the case, and that witness provides  
2 a lot of information supporting the charges that the  
3 prosecutor wants returned. You also have a cooperating  
4 witness, someone who has entered into a plea bargain  
5 and, in exchange for that, is providing a lot of  
6 incriminating testimony. Now, is there a complaining  
7 witness in that situation?

8 MR. PINCUS: Well, again, Your Honor, there  
9 can be. It -- it depends --

10 JUSTICE ALITO: Which one is it?

11 MR. PINCUS: It could be both.

12 JUSTICE ALITO: Both?

13 MR. PINCUS: It could be one or -- it could  
14 be -- it could be one or the other. I think these --  
15 these circumstances, again, are not unknown to the  
16 common law in the States. They --

17 JUSTICE GINSBURG: Mr. Pincus, you said -- I  
18 think you used the words "the one who motivated the  
19 charge" or something to that effect. And I'm looking at  
20 the complaint that was filed in this case, and it  
21 says -- and this is on page 28 of the joint appendix.  
22 It says Mr. Hodges -- that's the prosecutor -- knew or  
23 should have known there was no probable cause. "He,"  
24 Mr. Hodges, "directed Mr. Paulk to appear before the  
25 grand jury and attest to the truth of such charges."

1                   So, if anyone was the instigator, it was the  
2   prosecutor, not his aide. But the prosecutor gets  
3   absolute immunity.

4                   MR. PINCUS: Well, Your Honor, I -- I don't  
5   think we know, because the complaint also alleges that  
6   Mr. Paulk knew that his testimony was false and -- and  
7   made it -- and gave his testimony anyway. And  
8   certainly, his --

9                   JUSTICE GINSBURG: But if he did it -- if he  
10  did at the prosecutor's bidding, then he is not the  
11  prime mover.

12                  MR. PINCUS: Well, the -- the complaint also  
13  alleges that they were conspiring together to bring this  
14  complaint. And so, again, I think the facts will be  
15  developed. But the -- the first indictment in fact  
16  listed Mr. Paulk as the complainant. So, in many  
17  situations, the concerns that Justice Alito was pointing  
18  to won't be present because there will be a clear  
19  complainant, as there was in this case.

20                  JUSTICE KAGAN: But do you --

21                  JUSTICE KENNEDY: Suppose an important  
22  witness is reluctant to testify but is issued a subpoena  
23  by the United States attorney to appear before the grand  
24  jury, and then with reluctance he comes forward but,  
25  under oath, provides all of the key testimony necessary

1 to indict? Is he a complaining witness?

2 MR. PINCUS: I think some lower courts have  
3 said no, Your Honor. Some lower courts have said all  
4 that --

5 JUSTICE KENNEDY: Well, what's the test  
6 we're supposed to use to decide?

7 MR. PINCUS: Well, the -- the test that this  
8 Court has set forth is whether the complaining witness  
9 is someone who sets the prosecution in motion. That's  
10 -- that's the phrase that this Court has used, and  
11 that's a phrase that's -- that is reflected in the  
12 common law, based on the common law. And the lower  
13 courts have not had a problem applying that case. There  
14 are seven circuits that now have adopted the rule  
15 that --

16 JUSTICE KENNEDY: In the hypothetical I  
17 gave, what's the answer?

18 MR. PINCUS: I would say in the hypothetical  
19 you gave, Your Honor, that that person is not a  
20 complaining witness, because he did nothing other than  
21 come forward when he was subpoenaed. If someone comes  
22 forward to the prosecutor, urges an indictment, urges a  
23 prosecution, and then subsequently is subpoenaed, that  
24 might be a different case because you have --

25 CHIEF JUSTICE ROBERTS: Urges -- urges a



1 prosecution. One area that causes me concern here are  
2 the domestic violence cases, where someone may well  
3 report an episode but, by the time it gets to whatever  
4 the indictment procedure is, a grand jury or otherwise,  
5 is unwilling to -- to testify and pursue it. And yet,  
6 that person may be the one who started the prosecution  
7 in motion. Is that individual a complaining witness?

8 MR. PINCUS: That -- that person may be a  
9 complaining witness. You know, at common law, the  
10 complaining witness also has to be --

11 CHIEF JUSTICE ROBERTS: No, he says -- he or  
12 she says at the time, I -- I don't want prosecution to  
13 go forward. I -- you know, I would prefer that it not  
14 go forward.

15 MR. PINCUS: Then that fact would obviously  
16 mitigate against her being a complaining witness. But  
17 -- but these --

18 JUSTICE SCALIA: Mitigating? Come on.

19 MR. PINCUS: Yes. She would not be --

20 JUSTICE SCALIA: Does it make her not a  
21 complaining witness?

22 MR. PINCUS: Yes, she would not be a  
23 complaining witness, Your Honor.

24 JUSTICE SCALIA: Okay.

25 MR. PINCUS: But I -- just to step back --

1 JUSTICE ALITO: The holding that you're  
2 asking for isn't going to do very much good if the -- if  
3 the mere issuance of the grand jury subpoena renders the  
4 person not a complaining witness.

5 MR. PINCUS: I don't think --

6 JUSTICE ALITO: In that situation, then why  
7 not subpoena everybody?

8 MR. PINCUS: I don't think the mere issuance  
9 of the subpoena does negate things that might -- take  
10 the hypothetical where there is someone who goes to the  
11 prosecutor, says there should be a prosecution here,  
12 maybe does the things that the hospital is alleged to  
13 have done in this case, and then subsequently is  
14 subpoenaed. I don't think the subpoena negates that  
15 prior activity. I don't think you can say, oh, now that  
16 you're subpoenaed, we wipe away everything that you have  
17 done to set the prosecution in motion.

18 But I think in the hypothetical that you  
19 propounded, where there's -- the sole fact is someone  
20 doesn't do anything, they're subpoenaed to come before  
21 the grand jury and they give their evidence, that  
22 wouldn't meet the test. But --

23 JUSTICE KAGAN: In a case where the  
24 prosecutor is the prime mover, can there ever be a  
25 complaining witness? Where the prosecutor is making the

1 decisions, can there ever be a complaining witness?

2 MR. PINCUS: I think there can be, Your  
3 Honor. And, in fact, what this Court has indicated in  
4 other cases is that the fact that the prosecutor  
5 ultimately decides to seek the charge does not negate  
6 what's happened before.

7 In the Hartman case, which dealt with a  
8 retaliatory prosecution under -- a First Amendment  
9 retaliation prosecution, the Court said the postal  
10 inspectors, who in that case were alleged to have been  
11 the motivating force behind the retaliatory prosecution,  
12 could be held liable if there also was no probable  
13 cause.

14 JUSTICE SCALIA: Is the prosecutor a  
15 complaining witness?

16 MR. PINCUS: The prosecutor can't be a  
17 complaining witness because the complaining witness is  
18 the person who provides the impetus to go forward.

19 JUSTICE SCALIA: Who instigates the  
20 prosecutor.

21 MR. PINCUS: Yes.

22 JUSTICE SCALIA: Okay. What about the  
23 person who instigates the instigator?

24 MR. PINCUS: I'm not -- I'm not sure of  
25 the --

1 JUSTICE SCALIA: Well, somebody who comes up  
2 to somebody and says: You know, you ought to -- you  
3 ought to --

4 MR. PINCUS: At common law --

5 JUSTICE SCALIA: -- try to start a  
6 prosecution against this person. They say: Yeah,  
7 that's a good idea. So, that person goes and -- and  
8 gets a prosecution started.

9 MR. PINCUS: And at common law that person  
10 could be -- could be liable for malicious prosecution  
11 because --

12 JUSTICE SCALIA: The person who  
13 instigates the instigator?

14 MR. PINCUS: The person who in testimony --  
15 a complaining witness, as Your Honor pointed out in --  
16 in your opinion in Kalina, a complaining witness does  
17 not have to actually participate in the judicial  
18 proceedings. To be a complaining witness at common law,  
19 you could be a person who outside the judicial process  
20 pushed forward and was the mover behind the --

21 JUSTICE SCALIA: So, the instigator of the  
22 instigator is -- is a complaining witness or can be?

23 MR. PINCUS: Can be.

24 JUSTICE SCALIA: And you know what the next  
25 question's going to be, right?

1 MR. PINCUS: But tort law -- I mean --

2 JUSTICE SCALIA: The instigator of the  
3 instigator of the instigator. I mean, does this go back  
4 forever?

5 MR. PINCUS: I think that's right, Your  
6 Honor. But I don't think the Court is writing on a  
7 blank slate here. Tort law has addressed these issues.  
8 There has been a malicious prosecution tort for hundreds  
9 of years. There certainly was in 1871, and tort law has  
10 dealt and continues to deal with the questions of  
11 causation and proximate cause and all of the questions  
12 that arise in these kinds of cases. So, it's not as if  
13 the Court here would be writing on a blank slate.

14 And I think the critical thing is -- the  
15 question here is whether or not there was an absolute  
16 immunity rule in 1871 for persons in the situation of  
17 the Respondent. That is the critical question that the  
18 Court has framed.

19 JUSTICE GINSBURG: He -- the instigator,  
20 what you call the complaining witness, would have  
21 been immune if he gave the identical testimony at the  
22 trial itself, right?

23 MR. PINCUS: Yes, trial -- because --  
24 because -- well, the trial testimony could not be the  
25 basis for finding the person a complaining witness

1 because by that point, the prosecution has gotten  
2 rolling. The question is, what conduct can be used to  
3 prove that this is the person who was the instigator,  
4 the prime mover behind the prosecution?

5 JUSTICE GINSBURG: It's only -- it's only  
6 what you call the complaining witness that gets this  
7 special treatment? All the other witnesses before the  
8 grand jury would be absolutely immune?

9 MR. PINCUS: Yes, Your Honor. That's what  
10 the common law rule was, and that's what Congress  
11 confronted when it enacted section 1983 in 1871.

12 JUSTICE KAGAN: Could I make sure I  
13 understand what you just said, Mr. Pincus? When you  
14 said it can't be the testimony alone, is that right,  
15 that there have to be other acts exclusive of the  
16 testimony that make somebody a complaining witness?

17 MR. PINCUS: No, Your Honor, it could be the  
18 testimony alone. I didn't mean to say that. I think  
19 what I meant to say, maybe in response to  
20 Justice Alito's question, was the fact of testifying  
21 under subpoena doesn't negate other evidence that's  
22 there. But the testimony alone can be enough, and there  
23 certainly are cases, common law cases, from the 1800s in  
24 which courts rely on testimony.

25 JUSTICE KAGAN: Rely on testimony, but rely

1 on testimony exclusively; do you have any cases that do  
2 that?

3 MR. PINCUS: Well, the cases are -- the  
4 cases are a little bit obscure, Your Honor, about what  
5 the facts are that they are relying on. So, I don't  
6 want to say that absolutely positively there's one --

7 JUSTICE SCALIA: I don't understand.

8 MR. PINCUS: But I think, as a matter of  
9 logic --

10 JUSTICE SCALIA: I really don't understand  
11 this. You have one witness in the grand jury  
12 proceedings. That's the only witness. Can that witness  
13 fall within your rule and be the complaining witness?

14 MR. PINCUS: Absolutely, Your Honor.

15 JUSTICE SCALIA: Just on the basis of the  
16 testimony alone?

17 MR. PINCUS: Yes. But there could be --  
18 there could be other evidence as well. I think --

19 JUSTICE SCALIA: So, it's pretty risky to  
20 testify in a grand jury proceeding, then, right?

21 MR. PINCUS: Well, the same --

22 JUSTICE SCALIA: Because even though you  
23 haven't -- you don't care whether it comes out that way  
24 or not. You're subpoenaed, and even though you're  
25 subpoenaed, you're going to hold me as a complaining

1 witness.

2 MR. PINCUS: It's the same risk that the  
3 affiants bore in Kalina and Malley, and it's the same  
4 risk that the common law imposes on complaining  
5 witnesses.

6 JUSTICE SCALIA: Well, the affiants came  
7 forward. I mean, that -- that's a different situation,  
8 isn't it? They, indeed, were self-starting. But the  
9 person who is subpoenaed to testify at a grand jury is  
10 not self-starting. And you're saying that that person's  
11 mere presence and the mere fact of that person's  
12 testifying is enough to hold him to be the complaining  
13 witness.

14 MR. PINCUS: Your Honor, maybe I've confused  
15 the hypotheticals. I think we have one situation where  
16 there's someone -- all they've done is they've been  
17 subpoenaed and they've come forward and they've given  
18 their evidence.

19 JUSTICE SCALIA: Yes.

20 MR. PINCUS: I think it would be very hard  
21 for that person to be labeled a complaining witness.

22 JUSTICE SCALIA: Hard or impossible?

23 MR. PINCUS: Impossible. Then you have a  
24 person --

25 JUSTICE SCALIA: Hard or impossible?



1           MR. PINCUS: I think it would be impossible,  
2 because I don't think there's any evidence that that  
3 person is the motivating force.

4           JUSTICE SCALIA: Okay. That's a different  
5 word. Thank you. So, the testimony alone cannot be the  
6 basis?

7           MR. PINCUS: Compelled testimony alone. A  
8 person who testifies --

9           JUSTICE SCALIA: Okay.

10          MR. PINCUS: -- voluntarily before the grand  
11 jury I think is a different situation.

12          JUSTICE ALITO: But you said that the  
13 issuance of a subpoena in itself is not sufficient to  
14 make somebody not a complaining witness. So, if you are  
15 issued a subpoena, you still might be a complaining  
16 witness if you really didn't need to get a subpoena. If  
17 you could have been persuaded to go without a subpoena,  
18 then maybe you're -- you could be a complaining witness.

19          MR. PINCUS: No, Your Honor. I think I was  
20 responding to a third -- a third situation. So, we have  
21 one situation where all someone does is testify under  
22 subpoena. We have another situation where someone  
23 testifies, that person not a complaining witness,  
24 someone who testifies voluntarily; that voluntary  
25 testimony certainly could be used as evidence that

1 person --

2 JUSTICE ALITO: I mean, somebody gets  
3 mugged --

4 MR. PINCUS: And then the third situation --  
5 excuse me, Your Honor. I was just -- the third  
6 situation is where there's pre-testimony evidence, and  
7 there's also the fact that that person testified under  
8 subpoena. I don't think the fact that that person  
9 testified under subpoena negates the fact that there is  
10 other evidence that that person may have been the person  
11 who pushed the prosecution forward. So, that's the  
12 distinction that I was trying to draw.

13 JUSTICE BREYER: But what is the reason why,  
14 if we give absolute immunity to the witness at a trial,  
15 we give absolute immunity to the prosecutors and  
16 government officials at the trial, and a grand jury is  
17 sort of like a trial, at least it's testimony under  
18 oath. And in addition there's this special thing about  
19 grand juries being secret, which, if you allow people  
20 who are annoyed -- and they'd be quite rightly angry.  
21 They've been acquitted. They had to go through this  
22 process. They want to sue somebody. If we let them  
23 sue, you'll wreck the secrecy in a lot of cases. So, I  
24 see a reason for treating the grand jury even more  
25 strictly. What's the reason for treating it less

1 strictly?

2 MR. PINCUS: Well, I think there are two  
3 reasons, Your Honor. The first reason is that what this  
4 Court has said is that immunity decisions are based on  
5 the common law as --

6 JUSTICE BREYER: Suppose I don't accept  
7 that. Suppose I say, yes, I accept that, there's a  
8 relationship, but exactly what happened in 1871 is not  
9 precisely always the convincing feature for me. So, I  
10 read what the situation is today, and it is, I think, as  
11 I described it. So, given the situation today, my  
12 question remains.

13 MR. PINCUS: Well, one -- one brief  
14 disagreement with your question, Your Honor. I think  
15 the situation today at common law is what it was.

16 JUSTICE BREYER: You can't disagree with my  
17 question.

18 (Laughter.)

19 MR. PINCUS: But --

20 JUSTICE BREYER: I would like an answer to  
21 my question.

22 MR. PINCUS: The answer is several-fold.  
23 The Court has given absolute immunity to witnesses in  
24 Briscoe. The policy reason -- the principal reason was  
25 the common law rule. The policy reasons that the Court

1 gave were (a) we don't want to deter people from coming  
2 forward; and (b) the testimony will be put through the  
3 adversary process and is public, and those are  
4 protections against false testimony.

5           In the -- in the grand jury situation, those  
6 protections are not present, neither transparency nor an  
7 adversary process. And what the Court said in Malley  
8 about people coming forward I think applies in the grand  
9 jury context as well to complaining witnesses. The  
10 Court in Malley said we want people who are setting the  
11 prosecution in motion, the special category of  
12 complaining witnesses -- we want them to think twice.  
13 That's not a bad thing when they are the motivating  
14 force behind the prosecution.

15           CHIEF JUSTICE ROBERTS: Well, I thought the  
16 whole point of the grand jury was to protect citizens  
17 from unwarranted prosecutions. The grand jury initiates  
18 the prosecution. So, why do we look back beyond that?  
19 That's where the prosecution is initiated. You're not  
20 subject to prosecution until the grand jury returns the  
21 indictment. So, why do we talk about complaining  
22 witnesses initiating the prosecution?

23           MR. PINCUS: I think -- well, we talk about  
24 them, I think, because of the reality that there are  
25 cases, and the common law recognized that there were

1 cases where the reason the prosecution got rolling was  
2 because either a private person or a government person  
3 was the person who was pushing it along.

4 CHIEF JUSTICE ROBERTS: Well, somebody's is  
5 not --

6 MR. PINCUS: It's true that the grand jury  
7 -- I'm sorry.

8 CHIEF JUSTICE ROBERTS: No, go ahead.

9 MR. PINCUS: The grand jury's decision is a  
10 step in the chain, but the Court has not said that, for  
11 example, the judge's decision in Kalina and Malley to  
12 issue the warrant broke the causal link between the  
13 false testimony in the affidavits in those case. Even  
14 though the judge was making an independent decision, the  
15 Court recognized, as the common law recognized, that  
16 there could be a causal chain back to the false  
17 testimony which essentially tainted the decisionmaker,  
18 the judge's decision, just as it taints the grand jury's  
19 decision.

20 And, in fact, what lower courts have said is  
21 that it is only when there is an allegation of false  
22 testimony or other impropriety in the grand jury that  
23 looking back is possible. But, of course, that's the  
24 very situation in this case.

25 JUSTICE GINSBURG: The question is, where do

1   you locate the grand jury? We have on the one side, you  
2   recited Malley. That was an arrest warrant, testimony  
3   in support of an arrest warrant. Then we have the  
4   trial, where everybody gets absolute immunity. And  
5   grand jury is in between those two. So, why should we  
6   bracket it with the arrest warrant rather than with the  
7   trial? The -- the arrest warrant is certainly  
8   pre-prosecution.

9                   MR. PINCUS: Well, the first reason, Your  
10   Honor, is because that's what the common law did. And  
11   what the Court's -- the Court's inquiry here is to look  
12   at the common law and decide what Congress, when it  
13   enacted the statute in 1871, confronted. And when  
14   Congress enacted the statute in 1871, there were -- the  
15   rule was that complaining witnesses who testified before  
16   grand -- that grand jury testimony of people who were  
17   complaining witnesses was not immunized as a basis for  
18   malicious prosecution liability.

19                   What the Respondent is seeking here is to  
20   say my grand jury testimony is immunized as a basis of  
21   section 1983 liability. But at common law, that simply  
22   wasn't the rule. So, the first --

23                   JUSTICE ALITO: And at common law, did any  
24   grand jury witnesses have absolute immunity from a claim  
25   for malicious prosecution?

1           MR. PINCUS: Well, the common law -- at  
2 common law -- at common law, it wasn't a question of  
3 immunity. There was no defamation liability for any  
4 witness.

5           JUSTICE ALITO: Well, could there be --

6           MR. PINCUS: The only liability was for  
7 malicious prosecution.

8           JUSTICE ALITO: And could there be malicious  
9 prosecution liability for a witness before a grand jury  
10 who was not a, quote/unquote, "complaining witness"?

11          MR. PINCUS: No, and that's the source of  
12 the distinction that the Court drew in Malley and  
13 Kalina.

14          JUSTICE ALITO: So, you're not really asking  
15 us to adopt the common law rule, are you? You're asking  
16 for a variation of the common law rule that's limited to  
17 complaining witnesses. Or are you going further? Are  
18 you saying that no witness before a grand jury should  
19 have absolute immunity from a so-called 1983 malicious  
20 prosecution claim?

21          MR. PINCUS: No, Your Honor, we're not.  
22 We're asking for exactly the rule that was at common  
23 law. What the Court has said in Kalina and Malley is --  
24 the rule that the Court adopted there was based on  
25 precisely the same distinction that we rely on here.

1 JUSTICE ALITO: So, if I understand your  
2 answer, that you're not -- it's -- this whole business  
3 about complaining witness is irrelevant. It's any -- no  
4 witness before a grand jury has absolute immunity.

5 MR. PINCUS: No, Your Honor, it's  
6 complaining witnesses. The distinction that the common  
7 law drew -- all witnesses were immune from defamation.  
8 Only -- the only people who could be subject to  
9 liability based on their testimony were people who  
10 qualified as complaining witnesses. That is why the  
11 court in Malley and Kalina drew the line it did. It  
12 said these people -- you were acting as a complaining  
13 witness. The function you're performing by submitting  
14 this affidavit is being a complaining witness. At  
15 common law, that function -- true, it wasn't technically  
16 immune, but it was subject to liability. Liability  
17 could be premised on those statements.

18 JUSTICE ALITO: Any witness could -- who  
19 would satisfy the elements of the malicious prosecution  
20 tort could be liable?

21 MR. PINCUS: Yes.

22 JUSTICE ALITO: All right. That's a little  
23 different, isn't it?

24 MR. PINCUS: Well, what the Court has  
25 said -- it said in Malley and Kalina, and what we're



1    relying on here -- is that those -- those people also --  
2    Congress would have recognized in 1871 that there could  
3    be liability for people who fell into this category, and  
4    so --

5                   JUSTICE SCALIA:  Well, you're saying that  
6    the only people who would be subject to suit for the  
7    malicious prosecution tort were complaining witnesses?

8                   MR. PINCUS:  Yes.

9                   JUSTICE SOTOMAYOR:  Mr. Pincus, you -- in  
10   answer to one of Justice Kagan's questions, you noted  
11   that you really can't find a case where a court relied  
12   exclusively on the grand jury testimony.  In most of the  
13   cases that I've reviewed, there's a discussion that both  
14   non-grand jury and grand jury testimony was being relied  
15   upon; is that accurate?

16                  MR. PINCUS:  I think that's right, Your  
17   Honor.  It's awfully hard to tell, but I wouldn't want  
18   to represent there's one.

19                  JUSTICE SOTOMAYOR:  Could you tell me  
20   what -- the United States as amica is supporting vacatur  
21   and remand on the ground that there might be adequate  
22   independent evidence from the grand jury testimony in  
23   this case to sustain a cause of action.  Do you agree  
24   with their recommendation?  And if you don't agree,  
25   assume that we were to adopt the United States'

1 position. What would be the independent evidence that  
2 you have that would support a malicious prosecution  
3 claim?

4 MR. PINCUS: Well, there -- there is  
5 independent evidence in this case, Your Honor, of --  
6 before the Respondent testified before the grand jury  
7 there were -- there are allegations that he conspired  
8 with the district attorney and others to fabricate the  
9 evidence that he gave. And that obviously --

10 JUSTICE SOTOMAYOR: Now, the court below  
11 took that into account and said: You're only relying on  
12 the grand jury testimony to prove the conspiracy, and  
13 that's not enough.

14 MR. PINCUS: Well, Your Honor, I think that  
15 what the Eleventh Circuit said was because this was all  
16 directed to the grand jury testimony, we're not going to  
17 separate -- uphold -- hold that there could be liability  
18 based on that alone.

19 I think that's wrong for two reasons. First  
20 of all, our principal submission, of course, is there  
21 can be liability premised on the grand jury testimony  
22 and that there's no basis in the common law for a  
23 different rule.

24 And our second position would be, even if  
25 you, the Court, thought that grand jury testimony for

1 some reason was off limits but became permissible as a  
2 basis for finding liability if there was other evidence,  
3 then that's true in this case as well.

4 I want to return to Justice Breyer's  
5 question for 1 minute, because there was the third  
6 policy reason that I wanted to provide, which is, as we  
7 explain in our brief, in the States many prosecutors can  
8 proceed by information or indictment, and we think it  
9 would be a peculiar situation if liability could be  
10 premised when a proceeding is initiated by information,  
11 which Malley and Kalina make clear, but that if the  
12 proceeding is by grand jury, it would be wholly off  
13 limits. That doesn't make much sense, and it's totally  
14 inconsistent with the common law rule.

15 I'd like to reserve the balance of my time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Jones.

18 ORAL ARGUMENT OF JOHN C. JONES

19 ON BEHALF OF THE RESPONDENTS

20 MR. JONES: Mr. Chief Justice, and may it  
21 please the Court:

22 The way the Respondent sees it is the  
23 extension of Briscoe into the absolute immunity for all  
24 witnesses in the grand jury with no distinction with  
25 respect to whether they are the complaining witness or

1 otherwise.

2 As this Court has said in *Briscoe*, that the  
3 -- you look at the purpose of protecting the witnesses,  
4 both at the grand jury proceeding and at trial, and you  
5 want to preserve every man's evidence and you want to  
6 keep the court from harassment --

7 JUSTICE SCALIA: You would acknowledge that  
8 if someone instigates the grand jury proceeding but does  
9 not testify, that person could be sued if indeed the  
10 instigation was malicious?

11 MR. JONES: If it's outside of the grand  
12 jury -- and I go for the but-for test, unlike the *Van de*  
13 *Kamp* --

14 JUSTICE SCALIA: Well, now, just answer my  
15 question. I've given you a hypothetical. He -- no  
16 doubt he instigated the grand jury proceeding. He got  
17 the -- the U.S. attorney to bring the proceeding, but he  
18 didn't testify. Could that person be sued?

19 MR. JONES: Yes, that person could be sued  
20 under the but-for standard.

21 JUSTICE SCALIA: Okay. So, all he has to do  
22 to get himself off the hook is, after instigating it, he  
23 should testify, right? His testimony bathes him clean;  
24 is that it?

25 MR. JONES: No, that isn't, because --

1 JUSTICE SCALIA: All right. So, then it --  
2 so, all you're arguing, then, is that there has to be  
3 some evidence other than the mere testimony; is that  
4 your point?

5 MR. JONES: That is my point.

6 JUSTICE SCALIA: Okay.

7 MR. JONES: That there has to be some  
8 evidence other than the mere testimony. And if there is  
9 evidence other than the mere testimony, indeed you can  
10 go forward with a 1983 claim.

11 JUSTICE GINSBURG: Then you agree with the  
12 -- with the position that the United States took, which  
13 is you can -- if there were -- there was evidence  
14 outside the grand jury proceeding that this person was  
15 the instigator, that that could be the basis for a  
16 malicious prosecution 1983 claim? I thought the United  
17 States' position was: We're not going to use the  
18 testimony before the grand jury, but if this person did  
19 things outside the grand jury to instigate the  
20 prosecution, that's -- that could --

21 MR. JONES: The way I understand the  
22 Solicitor General's position was that if the only way  
23 that you could prove the allegation was to use the grand  
24 jury testimony, then indeed you could not bring a suit  
25 under 1983. But I think as Justice Scalia's question

1 was proffered is that it was an independent act that in  
2 and of itself created a constitutional violation,  
3 independent, and actually caused the prosecution. Then  
4 indeed --

5 JUSTICE KAGAN: But, Mr. Jones, you --

6 JUSTICE KENNEDY: Well, do you agree that we  
7 should vacate and remand according to the suggestion of  
8 the Solicitor General?

9 MR. JONES: No, Your Honor.

10 JUSTICE KENNEDY: And why is that?

11 MR. JONES: Well --

12 JUSTICE KENNEDY: Is it just because of your  
13 view of the evidence, that there's no evidence to  
14 justify the remand?

15 MR. JONES: Well, that's certainly one of  
16 the issues. But nothing like this was -- what the  
17 Solicitor General is recommending, none of those issues  
18 were raised below, none of those issues were raised in  
19 the court of appeals in the Eleventh Circuit, and in  
20 this --

21 JUSTICE KENNEDY: Well, you're saying that  
22 this was waived and was just not in the case? Because  
23 usually if the issue wasn't discussed, that's the reason  
24 we remand.

25 MR. JONES: That's correct. It was waived,

1 and it's -- and it's not before the Court, and that's  
2 not why cert was granted.

3 JUSTICE SCALIA: I don't understand how it's  
4 waived. I don't understand that. How was it waived?

5 MR. JONES: It was never presented by any  
6 side at any -- to any place in the court below.

7 JUSTICE KENNEDY: Well, but if -- if there  
8 is -- if there is a theory of liability and we find that  
9 there is -- that that theory is baseless, we don't  
10 generally dismiss the complaint if there are other  
11 allegations in the complaint that could support  
12 liability on another theory.

13 MR. JONES: Well, certainly, I mean, this  
14 case has to be -- it's going back to the district court  
15 anyway, as Your Honor is well aware. And perhaps it can  
16 be raised again at that time with an amendment. But at  
17 the present time, it's not in the case.

18 JUSTICE KAGAN: Well, Mr. Jones, could I  
19 understand your responses to these questions? Because  
20 you said to Justice Scalia the fact that there's been  
21 testimony at the grand jury does not, if you will,  
22 immunize the person from suit based on other acts. Can  
23 you go further? In a suit based on other acts, could  
24 the grand jury testimony come in as evidence?

25 MR. JONES: If you look at common law,

1 that's exactly what happened. At common law, and as  
2 Justice Scalia mentioned in -- in his concurrence in  
3 Kalina, what you had is two separate acts when you had a  
4 malicious prosecution at common law. The first act was  
5 actually complaining and making a complaint to -- to get  
6 a warrant; in other words, swearing at that point in  
7 time. But there, again, the person that complained  
8 actually didn't have to be a witness.

9 But when he was a witness or when he or she  
10 became a witness at court, that testimony could then be  
11 used to show malice for the prosecution or for actually  
12 bringing the case.

13 JUSTICE KAGAN: So, all you're saying is  
14 that there's absolute immunity for a suit based  
15 exclusively on grand jury testimony, and if the suit is  
16 based on something else, the grand jury testimony can  
17 come in.

18 MR. JONES: That is correct, if indeed it's  
19 an independent cause of action outside of the court,  
20 yes.

21 JUSTICE SOTOMAYOR: I don't know what an  
22 independent cause of action could be, because it is the  
23 grand jury proceeding that initiates the action. So,  
24 why would the common law permit it unless it recognized  
25 that a complaining witness has to do something to get



1 the grand jury up and running --

2 MR. JONES: Well --

3 JUSTICE SOTOMAYOR: -- and go in and testify  
4 to something false to be liable for malicious  
5 prosecution? But the point I'm making is I don't see  
6 how your position differs from the Government's at all,  
7 and I'm not sure what -- how you could have independent  
8 guilt proven that requires anything more than proof,  
9 than the proof they proffered below, which was that this  
10 police officer issued subpoenas and took other steps to  
11 start the grand jury's process. And then you use their  
12 testimony at the grand jury to figure out whether it was  
13 false or not.

14 MR. JONES: First of all, to respond, one,  
15 our position with respect to the Solicitor General on  
16 that issue, I don't see it as any different. What I was  
17 suggesting, what I understood Justice Scalia to say, is  
18 when you have something independent that forms a cause  
19 of action, for example, if you take and plant evidence  
20 in of a crime, for example cocaine or something of that  
21 nature, that is a separate and distinct cause of action,  
22 and that would cause -- that action by an investigator  
23 might very well cause the -- the prosecution or the  
24 district attorney to act when indeed you would have --  
25 they would find something --

1 JUSTICE BREYER: Is it different from -- I  
2 mean, I find the Solicitor General -- it's my fault, I'm  
3 sure -- I don't understand the position they're taking.  
4 I mean, I think in every case there's some evidence  
5 about what goes on outside the courtroom or the grand  
6 jury room, and then there is some evidence about what  
7 went on inside. And I don't know when you're supposed  
8 to introduce what.

9 So, I'm guessing that -- that whatever the  
10 rule is about when you can use what parts of what, that  
11 if you win, the rule about when you should use or when  
12 you still can use the testimony that's given in the  
13 grand jury room is the same as the rule that says when  
14 you can use the testimony of a witness at trial.

15 See, I would have thought that immunity  
16 means you can't use that testimony, but I'm told I'm  
17 wrong about that. You sometimes can use it. So, then I  
18 don't know when you can use it and when you can't.  
19 Maybe you know. You've studied this case. I admit I  
20 haven't studied it as thoroughly as I hope you have.

21 (Laughter.)

22 MR. JONES: I hope I have as well.

23 JUSTICE BREYER: Yes.

24 MR. JONES: At least as I understand with  
25 respect to -- first of all, if you look at Briscoe,

1 everything that's in Briscoe, as you know, is absolutely  
2 immune from civil damage litigation.

3 JUSTICE BREYER: When you say absolutely  
4 immune, I'm thinking of a typical case as follows:  
5 Smith says to his friend: I hate that rat Jones. I am  
6 going to go and lie and say he stole my horse.

7 Next step, he goes to the grand jury or  
8 someone and says: Jones stole my horse.

9 Third step, he's in the grand jury room  
10 saying: Jones stole my horse.

11 Fourth, he's at trial. Okay?

12 So, what comes in and what doesn't? And can  
13 you bring a case in the first place?

14 MR. JONES: Well, I --

15 JUSTICE BREYER: I'm at sea. Whatever you  
16 can help me with, I'd be happy.

17 MR. JONES: First of all -- and it might be  
18 a difficult time. But the -- when you have a grand  
19 jury, you have something different from just bringing a  
20 cause of action. What you have in a grand jury is you  
21 have evidence presented to the prosecutor, typically a  
22 district attorney, and then the district attorney makes  
23 an independent evaluation as to what to bring to the  
24 grand jury and who to indict or whether to indict  
25 anybody whatsoever.

1           That testimony in that grand jury -- if you  
2   bring a cause of action, for example if a cause of  
3   action is brought for malicious prosecution, which  
4   they're trying to do here, what this Court has said in  
5   the Van de Kamp case is that the only time that you can  
6   use that testimony is if there is something else outside  
7   of the grand jury --

8           JUSTICE BREYER:  There's always something  
9   else.  He didn't think of this thing for the first time  
10  in the grand jury room.  The defendant thought of this  
11  thing outside the grand jury room before he even got to  
12  the grand jury, and he probably told somebody about it,  
13  or he could have, or at least there's the evidence he  
14  walked to the grand jury room.  Okay?  So, there's  
15  always something outside the grand jury.

16          MR. JONES:  Sure.  Sure.  But the case law  
17  says that if the prosecutor would not have taken the  
18  case or would not have done the case but for the conduct  
19  of that individual, then indeed you cannot bring the  
20  cause of action.

21          JUSTICE ALITO:  I have the same -- I have  
22  the same concern as Justice Breyer.  And let me try to  
23  ask the question in a different way.

24                 Can you give me an example of a case in  
25  which someone would qualify as a complaining witness

1 under Mr. Pincus's definition and yet would not have  
2 done something outside of the grand jury that would be  
3 sufficient to make out a claim of malicious prosecution?  
4 If that situation doesn't exist, then I don't see any  
5 difference between your position and Mr. Pincus's  
6 position.

7 MR. JONES: It does exist, because typically  
8 when you have an investigation in any type of district  
9 attorney's office, what you have is investigators going  
10 out and investigating a case, bringing the material to  
11 the district attorney, then the district attorney looks  
12 at the material, and then the district attorney is the  
13 one that makes an independent decision.

14 JUSTICE GINSBURG: Well, let's go back one  
15 stage. Let's go back to an arrest warrant. The  
16 witness -- and the concern that the affidavit in support  
17 of the warrant is filled with lies. The affidavit is  
18 presented to a judge. And I would think that's better  
19 than a prosecutor. And yet, there is no absolute  
20 immunity for someone who lies in order to get a warrant,  
21 even though the judge makes the judgment whether the  
22 warrant should issue.

23 MR. JONES: The distinction in Malley is --  
24 is this: First of all, the -- in Malley and when you go  
25 apply for a warrant, the -- the -- at that point in time

1 the investigator is -- he is determining, he or she is  
2 determining, the time, place, and manner in which to go  
3 to the judge, and also possibly he can, he or she can,  
4 select the judge that the person wants to go for. And  
5 then what has happened is that person who presents that  
6 evidence is presenting the evidence that he or she has  
7 gathered and is going to present it in a light most  
8 favorable to the investigation. That person won't  
9 necessarily present the bad part. They might present  
10 just only the -- exclusively the good part. And also  
11 that person isn't under the subpoena power.

12 JUSTICE GINSBURG: Suppose -- suppose we  
13 had, instead of a grand jury proceeding and an  
14 indictment, an accusation to begin the prosecution and a  
15 supporting affidavit in connection with the accusation.  
16 Would there be -- would there be absolute immunity then  
17 for the affidavit that supports the accusation which  
18 will begin the prosecution?

19 MR. JONES: If I understand your question,  
20 and I'm not sure I heard it exactly, are you saying if  
21 there's an affidavit that went before the grand jury?

22 JUSTICE GINSBURG: No. We take the grand  
23 jury out of it. We're going to begin the case, the  
24 prosecution, by an information, or I think the Georgia  
25 law refers to something called an accusation. If -- if

1 we're not before a grand jury and the prosecution is  
2 instituted by an information and there is an affidavit  
3 supporting that information, is there absolute immunity  
4 for the false affidavit in support of the information?

5 MR. JONES: Once again, that's a scenario  
6 essentially in Malley and Kalina, where you had those  
7 individuals coming before -- they were not subpoenaed.  
8 Those individuals -- whether it's affidavit or  
9 testimony, I think either one is testimony.

10 JUSTICE GINSBURG: But you -- you cited a  
11 provision of the Georgia Code that seems to equate  
12 what's called an accusation with an indictment. It's on  
13 the bottom of page 22: "All legal proceedings by which  
14 a person's liability for a crime is determined,  
15 commencing with the return of the indictment or the  
16 filing of the accusation."

17 So, if the Georgia Code equates those two,  
18 the return of the indictment or the filing of the  
19 accusation, why shouldn't the immunity rule be the same  
20 for the two? And you told me that Malley would cover  
21 the filing of the accusation. So, why shouldn't it be  
22 the same for the return of the indictment?

23 MR. JONES: And -- and I'm not positive I  
24 understand the question, but as I understand it, what  
25 you have in a Malley situation is, again, you have

1 somebody that is merely coming before the judge in the  
2 hope of getting a warrant to issue. That person  
3 doesn't -- isn't under the constraint of a prosecutor,  
4 an independent prosecutor, in the meantime. Actually,  
5 the person asking the questions, asking and actually  
6 subpoenaing a witness for like a grand jury, that person  
7 is actually -- and what the Court has said is  
8 potentially wasting judicial resources by bringing a  
9 not-so-good case, just like in Malley, to the court.

10               And so, to protect the court and to protect  
11 the judicial process, the Court has said that person  
12 only has qualified immunity so as to make him think and  
13 make the process think before it happens, before they go  
14 to the judge.

15               But in the grand jury scenario you have an  
16 independent individual, in this case the prosecutor,  
17 receiving the evidence and the prosecutor deciding what  
18 cases to bring.

19               JUSTICE SOTOMAYOR: So, explain to me  
20 again -- over here, Mr. Jones.

21               Explain to me again why the act of sitting  
22 down with the prosecutor in his office and telling him a  
23 falsehood that leads the prosecutor to convene the grand  
24 jury and call you as a witness, why that act of meeting  
25 with the prosecutor and stating the false statement is



1 not actionable independently?

2 Or is it your position that that would be?

3 MR. JONES: It is the position that it can  
4 be, and -- and I hate to say -- equivocate there. But I  
5 will state this: If indeed that district attorney or  
6 the prosecutor in a case would not have proceeded but  
7 for that testimony or that statements before him, in  
8 other words, he would not have done anything there,  
9 like, as I stated earlier, like the planting of the  
10 cocaine or the finding of the cocaine --

11 JUSTICE SOTOMAYOR: No, no, no, no. He sat  
12 down, told the prosecutor exactly what he was later  
13 going to say in the grand jury. I rarely called a  
14 witness to a grand jury when I was a prosecutor who I  
15 hadn't spoken to before. Occasionally, I had to because  
16 of circumstances, but the vast majority you sit down and  
17 talk to and find out what their story is. Identical  
18 story before and after during the grand jury. Is the  
19 story before an independent act sufficient to bring a  
20 malicious prosecution claim?

21 MR. JONES: Under that scenario, no, because  
22 the only way that that act can be proven, the only way  
23 that the malicious prosecution claim can be proven,  
24 would be to get the grand jury testimony before -- to  
25 actually utilize that grand jury testimony, and that

1 testimony is absolutely protected under Briscoe.

2 JUSTICE SCALIA: I don't understand.

3 JUSTICE SOTOMAYOR: You have a time sheet  
4 that shows that the prosecutor met with --

5 JUSTICE SCALIA: Yes.

6 JUSTICE SOTOMAYOR: -- the investigator?

7 MR. JONES: I'm sorry.

8 JUSTICE SOTOMAYOR: You have a time sheet.  
9 You mean, you need a witness to say they met together?  
10 You need someone to say that they talked before the  
11 grand jury? Assuming you have that much evidence, you  
12 think that's enough?

13 MR. JONES: I mean, do you need a witness to  
14 come and testify as to whether they had a communication?

15 JUSTICE SOTOMAYOR: Yes, exactly. Is that  
16 what you're requiring?

17 MR. JONES: It -- it would appear that that  
18 would certainly be an element that you would have to  
19 establish. Now, whether you would need a witness or you  
20 can get one of those two to testify is another issue.

21 JUSTICE GINSBURG: Do you regard the grand  
22 jury as a judicial proceeding?

23 MR. JONES: Yes, I do. And this Court has  
24 so stated, not only in -- well, the Court has stated  
25 first of all in Burns v. Reed; it talks about how you

1 have prosecutorial immunity. And in Malley, it also  
2 states it's the first stage of the criminal proceeding.

3 JUSTICE GINSBURG: But -- but there's no  
4 judge. And it seems to me odd to say -- there's no  
5 presiding judge, there's no cross-examination. And the  
6 indictment has the same function as an information. So,  
7 why should it rank as a judicial proceeding?

8 MR. JONES: Well, it has many more of the  
9 trappings of a trial than, say, coming before a judge  
10 like in the Malley scenario. First of all, you're  
11 subject to compulsory process. The person is placed  
12 under oath. The person may indeed not even want to come  
13 and testify. I think that was earlier mentioned by  
14 Justice Scalia. The person might not even want to be  
15 there, and yet he's subpoenaed and he's forced to be  
16 there.

17 The -- also in that situation, the district  
18 attorney, he or she, is the one that's controlling the  
19 evidence, one that's controlling what is before the  
20 court, and that person is also determining which person  
21 is going to be indicted and the evidence to be  
22 presented.

23 So, the distinction between the two is, as I  
24 see it, significant. And one, the grand jury, is much  
25 more akin to a judicial proceeding and a trial than the

1 scenario you have in Malley.

2 JUSTICE BREYER: Is the prosecutor immune?  
3 I know the prosecutor is not immune or the complaining  
4 witness is not when they get an arrest warrant. Is the  
5 prosecutor immune when he is taking the step of getting  
6 an information or indictment?

7 MR. JONES: Yes.

8 JUSTICE BREYER: He is immune?

9 MR. JONES: Yes.

10 JUSTICE BREYER: All right. So, this is  
11 equivalent to doing that. That's a prosecutorial  
12 function. The prosecution would be immune.

13 MR. JONES: That is correct.

14 JUSTICE BREYER: Of course, this isn't a  
15 prosecutor; this is a subordinate. The person here is  
16 the defendant who is not the prosecutor --

17 MR. JONES: No, the person here is the  
18 investigator who's employed by the prosecutor. And I  
19 think, as Justice Ginsburg pointed out, the prosecutor  
20 himself in this situation directed the investigator to  
21 appear before the grand jury, and directed him as to  
22 what to testify to at the grand jury. So -- and as Your  
23 Honor pointed out, the -- who is absolutely immune, in  
24 the grand jury setting the prosecutor is immune, the  
25 grand jurors are immune. In trial, the prosecutor is

1 also immune, any of the witnesses testifying is immune.  
2 It makes logical sense that anybody that comes before  
3 the grand jury is likewise immune.

4 JUSTICE BREYER: Is there any subordinate  
5 government official involved when a prosecutor gets an  
6 information, files an information or -- the way you get  
7 somebody indicted is you have an indictment, which is a  
8 grand jury, I guess.

9 MR. JONES: Right.

10 JUSTICE BREYER: Or an information.

11 MR. JONES: Right.

12 JUSTICE BREYER: All right. When you get  
13 the information, is it just somebody from the district  
14 attorney's office or the prosecutor's office, or is  
15 there somebody else there? Is there a policeman there  
16 that gives any --

17 MR. JONES: There can be.

18 JUSTICE BREYER: Can be, okay. If there is,  
19 has he ever been held immune or not? The prosecutor is  
20 immune. Now he's there with an assistant, the policeman  
21 to back him up. Is there any law on that, whether the  
22 policeman is immune?

23 MR. JONES: Just if he's asking for an  
24 arrest warrant; is that --

25 JUSTICE BREYER: No, the arrest warrant,

1 he's not immune. We know he's not that. It's just he  
2 files the information.

3 MR. JONES: He files the information, and  
4 it's not in a grand jury setting? No.

5 JUSTICE BREYER: No.

6 MR. JONES: Then indeed, I would suggest  
7 it's very similar to the Malley scenario, where he would  
8 have a qualified immunity.

9 JUSTICE GINSBURG: And that would go for the  
10 prosecutor, too, right?

11 JUSTICE BREYER: No.

12 JUSTICE GINSBURG: For the information? If  
13 you -- if you bracket it with Malley, the -- the  
14 prosecutor who lies to the magistrate is not going to  
15 have absolute immunity at the arrest warrant stage. Is  
16 the prosecutor absolutely immune for making out an  
17 information that's packed with lies?

18 MR. JONES: Yes. Because that is -- that is  
19 what this Court has decided is intimately associated  
20 with the judicial phase of the criminal process. And  
21 any of the conduct that is intimately associated under  
22 Imbler, under Kalina, under various things,  
23 Burns v. Reed are intimately -- anything that's  
24 intimately associated is absolutely immune.

25 JUSTICE GINSBURG: Why isn't -- why isn't an

1 arrest warrant intimately associated?

2 MR. JONES: Well, an arrest warrant in the  
3 -- like in a Kalina and a Malley situation, you didn't  
4 have a prosecutor going before them. That was an  
5 independent action by an investigator who went before a  
6 judge to seek a warrant and present any evidence that  
7 that person had.

8 JUSTICE ALITO: Paragraph 29 of the  
9 complaint alleges Mr. Paulk and Mr. Hodges, acting under  
10 color of law, in retaliation and wrongfully influenced  
11 and instigated the prosecutorial decision to bring  
12 charges against Mr. Rehberg.

13 Why isn't that sufficient to support a claim  
14 of so-called malicious prosecution without regard to the  
15 evidentiary -- without regard to the grand jury  
16 testimony?

17 MR. JONES: Because -- just because they  
18 allegedly conspired together to do this doesn't mean the  
19 act was completed until after, in this case, Mr. Hodges  
20 -- and it was actually Kelly Burke -- actually performed  
21 what they did. Now -- and -- and if the prosecutor  
22 knows about it at that point and they allegedly  
23 conspire, now who is taking the act? It really is not  
24 anymore Mr. Paulk; it is the district attorney who is  
25 acting at that point, and it is the district attorney

1 that is now proceeding in the grand jury. And as -- as  
2 I pointed out earlier, if -- anything that's intimately  
3 associated with the judicial phase, and he's absolutely  
4 immune for his conduct. But even -- just because the  
5 district attorney knows about it and so does the  
6 investigator know about it, it is the conduct and the  
7 independent act now of the prosecutor to get the  
8 indictment.

9 JUSTICE KAGAN: But, Mr. Jones, I feel as  
10 though now we're just arguing about facts. It seems to  
11 me that you have accepted a good deal of Mr. Pincus's  
12 case. You've said that you can bring an action against  
13 somebody based on acts outside of court, that the grand  
14 jury testimony can come in as evidence in that action,  
15 and all you're saying is that there's -- there's no way  
16 to bring this action in this case because your client  
17 didn't in fact do anything.

18 MR. JONES: No. And perhaps that's not my  
19 position. First of all, I'm not saying that they're --  
20 what I'm saying with respect to bringing a malicious  
21 prosecution claim is that -- I think Justice Scalia  
22 asked me if there is a completely independent act, but  
23 if -- in the scenario that you paint, just the fact that  
24 they've talked outside the grand jury, that does not  
25 authorize an independent cause of action for a malicious



1 prosecution claim.

2           What you have to have is an independent act,  
3 just like what you had at common law where you had two  
4 distinct acts: one, where you actually filed a  
5 complaint; now you become the complainant or, as the  
6 common law said, you became the complaining witness even  
7 though you didn't have to be a witness. But then if you  
8 were a witness, indeed, that testimony that you gave in  
9 the -- in the grand jury or in the trial could be used  
10 as to -- to prove your malicious intent in bringing the  
11 charge initially.

12           And that -- that doesn't equate to what we  
13 have here in this -- in this scenario. What we have  
14 here is there may have been a discussion outside of the  
15 court or outside of the grand jury, but that discussion  
16 now ended, and now you have an independent act by the  
17 prosecutor to bring the cause of action. So, completely  
18 distinct, as I see it, completely distinct scenarios.

19           If there are no further questions, thank you  
20 very much.

21           CHIEF JUSTICE ROBERTS: Thank you, counsel.

22           Mr. Pincus, you have 4 minutes.

23           REBUTTAL ARGUMENT OF ANDREW J. PINCUS

24           ON BEHALF OF THE PETITIONER

25           MR. PINCUS: Thank you, Mr. Chief Justice.

1           A couple of points. First of all, the --  
2   the question about whether there -- it's an appropriate  
3   rule that a finding of complaining witness can be based  
4   on evidence outside of the grand jury, but it can't be  
5   based on grand jury testimony, that certainly wasn't the  
6   common law rule. And I note Justice Sotomayor asked  
7   whether there were any common law cases that relied  
8   solely on grand jury testimony. And although the cases  
9   are hard to parse, I would point the Court to the  
10   Anderson and the Moulton cases that we cite on page 3 of  
11   our reply brief. In those cases, in the Anderson case,  
12   the Court is talking about the charge to the jury, and  
13   what it says the evidence was is the fact that the  
14   defendant was listed as the complainant on the  
15   indictment and that he testified before the grand jury.  
16   And then in the Moulton case, the allegations of the  
17   complaint are set forth in the reporting of the case,  
18   and the only allegations are -- relate to the testimony  
19   before the grand jury.

20           So, I think it's very hard to find any basis  
21   in the common law, which as the Court said -- has said  
22   is the controlling principle here, for ruling the grand  
23   jury testimony either entirely out of bounds as a basis  
24   for liability or for saying it's only in bounds if there  
25   is some other extrinsic evidence. There's just no

1 support for that in the common law, and I think it  
2 doesn't really make sense -- if this case had proceeded  
3 by information and Mr. Paulk's grand jury testimony had  
4 simply been placed in an affidavit and submitted in  
5 order to obtain the arrest warrant, Malley and Kalina  
6 would control, and it would be clear that there would be  
7 liability --

8 JUSTICE ALITO: Well, suppose this was a  
9 jurisdiction that didn't have grand juries but returned  
10 felony indictments by means of a preliminary hearing.  
11 Would a witness at a preliminary hearing have absolute  
12 immunity? There's a judge presiding there.

13 MR. PINCUS: A -- a complaining witness, I  
14 don't think -- if that is the proceeding that sets  
15 the -- that determines whether or not there's going to  
16 be a prosecution, I think an ordinary witness would be  
17 absolutely immune, but a complaining witness would not  
18 be.

19 JUSTICE BREYER: Are there States that have  
20 -- or are there any jurisdictions where they don't give  
21 immunity to grand jury testimony for complaining  
22 witnesses or others?

23 MR. PINCUS: Yes, there are. There are.  
24 There are both at the common law and today, Your Honor;  
25 there are --

1 JUSTICE BREYER: Today are there a lot?

2 MR. PINCUS: There are -- I don't know the  
3 number.

4 JUSTICE BREYER: But, I mean, is there any  
5 way to find out what's happened? Have they been -- have  
6 the grand juries been undermined? Have they not been  
7 undermined? I mean, what has actually happened in those  
8 places?

9 MR. PINCUS: Well --

10 JUSTICE BREYER: Can you give me an example  
11 of one or two States that allow these actions?

12 MR. PINCUS: Well, I can -- I can't give you  
13 an example of States. I can give you the example of  
14 seven circuits that -- that have adopted the rule that  
15 we contend for. I don't think --

16 JUSTICE BREYER: For how long have they had  
17 that?

18 MR. PINCUS: Excuse me?

19 JUSTICE BREYER: For how long?

20 MR. PINCUS: For -- some of them since  
21 Malley, certainly since Kalina, about 10 years.

22 JUSTICE BREYER: And -- and have there been  
23 many such grand jury actions?

24 MR. PINCUS: There have been some cases. No  
25 one has said that the grand jury process has been upset.

1 Courts have -- have looked into whether or not there's a  
2 complaining witness. Some courts say, in order to get  
3 grand jury testimony, you have to -- you have to meet  
4 some kind of a threshold. Often, these cases are proven  
5 up by deposing the defendant and asking him what he  
6 testified about before the grand jury without intruding  
7 on the grand jury at all. But I think those seven  
8 circuits, there has been no indication of some kind of  
9 disruption of the process.

10 JUSTICE ALITO: Are those -- are those cases  
11 involving grand jury proceedings like the one here,  
12 which does look somewhat like the complaint situation?  
13 Or are they more traditional grand jury settings?

14 MR. PINCUS: I don't -- I don't want to -- I  
15 don't know, Your Honor. We'd be happy to file something  
16 further, if the Court would like.

17 JUSTICE KAGAN: To me, Mr. Pincus, the  
18 oddest thing about your case is the notion of being able  
19 to sue the investigator when you can't sue the  
20 prosecutor for whom he works. So that even if there  
21 is -- are some set of people that you -- that you could  
22 sue for actions in the grand jury context, the notion  
23 that you can sue an employee of a prosecutor when you  
24 can't sue the prosecutor seems an odd rule.

25 MR. PINCUS: Well, Your Honor, I think the

1 question here would be a factual one, as you pointed  
2 out. Is Mr. Paulk the person who set this in motion?  
3 If the testimony is -- may I finish?

4 If the testimony is that Mr. Paulk was just  
5 told what to do by the prosecutor and didn't have any  
6 additional anything, then perhaps he won't be found  
7 liable anyway.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 11:01 a.m., the case in the  
11 above-entitled matter was submitted.)

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