No. 18-1280

IN THE SUPREME COURT OF IOWA

JOSHUA VENCKUS,

Plaintiff-Appellee,

v.

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

Defendants-Appellants.

Appeal from the Johnson County District Court,
District Court No. LACV079763,
The Honorable Judge Chad Kepros, presiding.

FINAL REPLY BRIEF OF DEFENDANTS-APPELLANTS JOHNSON COUNTY IOWA, ANNE LAHEY, NAEDA ELLIOTT, and DANA CHRISTIANSEN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES AND ISSUE PRESENTED FOR REVIEW

I. Whether the District Court erred in failing to apply immunity to Johnson County Defendants when absolute immunity for prosecutors is justified and necessary?

Cases — Page(s)

ARGUMENT

I. Absolute immunity for prosecutors is justified and necessary; the District Court erred in denying Johnson County's motion to dismiss.

There is no legal or factual imperative for departing from the established doctrine of absolute immunity. Plaintiff is wrong to suggest otherwise.

Absolute immunity is a doctrine developed over more than a century of state and federal litigation throughout the nation. It has been narrowly tailored to protect those functions that are closely associated with the object of its protection – the judicial process. There is no sound legal basis to deviate from this established standard.

Plaintiff argues that this Court should eliminate the universally applied doctrine of absolute immunity and make a freewheeling choice to open the judicial process and prosecutorial functions intimately associated therewith to civil suit. Plaintiff bases this argument for departing from firmly established precedent upon generalized claims of rampant prosecutorial misconduct that are unsupported by the underlying empirical data. Adequate safeguards are currently in place to mitigate the risk of prosecutorial misconduct and there is no reason to depart from the

established doctrine of absolute immunity for prosecutors exercising their discretion within the context of the judicial process.

The Court should apply absolute immunity doctrine to Plaintiff's claims, reverse the District Court, and dismiss Plaintiff's case against the Johnson County Defendants.

A. Public policy and practical considerations require that functions intimately associated with the judicial process must be protected by absolute immunity – whether challenged by *Godfrey* claims or any other cause of action.

Plaintiff suggests that his *Godfrey* claim should not be subject to the same absolute immunity defense as any other cause of action. (Plaintiff's Brief, p. 62-64). The nature of the cause of action, however, does not dictate whether absolute immunity is justified and necessary.

Public policy and practical considerations underlying absolute immunity apply in the same way regardless of the cause of action. That is because the considerations underlying absolute immunity focus on the protection of the judicial process. *See Minor v. State*, 819 N.W.2d 383, 394 (Iowa 2012)(citing *Burns v. Reed*, 500 U.S. 478, 494, 111 S. Ct. 1934, 1943 114 L.Ed.2d 547, 563 (1991), and *Butz v. Economou*, 438 U.S. 478, 512, 98 S. Ct. 2894, 2913, 57 L.Ed.2d 895, 919 (1978) (absolute immunity designed

to free the judicial process from the harassment and intimidation associated with subsequent civil litigation).

"[H]arassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler v. Pachtman*, 424 U.S. 409, 423, 96 S. Ct. 984, 991-93 (1976). The courage and independence required of a prosecutor would be at risk if subjected to suit by those who are not convicted. *Id.* (citing *Peterson v. Reed*, 44 P. 2d 592, 597 (Cal. App. 1935)). Even the most conscientious prosecutors would be subject to such concerns. *Id.* Indeed, a prosecutor would always face this risk whether by proceeding with a prosecution or electing to dismiss the case. *See id.*

> Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify, as is illustrated by the history of this case. If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.

Id. at 426. Because prosecutors frequently must act under tight time constraints and limited information, many decisions could engender colorable claims of constitutional deprivation that would impose intolerable

burdens on the prosecutor to defend these subsequent civil actions years later. *Id*. at 425-26. "[C]ontroversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus." *Butz*, 438 U.S. at 512 (citations omitted).

Considering these public policy and practical concerns for the protection for the judicial process, absolute immunity is justified and necessary to assure that prosecutors can perform their respective functions without the risk of harassment or intimidation from subsequent civil litigation – including *Godfrey* claims. *See id*. Numerous cases from jurisdictions across the nation uniformly apply the doctrine of absolute immunity to protect the judicial process and insulate prosecutors from civil liability (regardless of the cause of damages action) for the functions that are closely connected to the judicial process, like those functions challenged by Plaintiff in the case at bar.

B. Well-reasoned case law has examined the nature and extent of absolute immunity and narrowly tailored the doctrine to address only those functions tied closely to the judicial process.

There is over a century of nuanced absolute immunity litigation by experienced attorneys and jurists that deserves more respect than Plaintiff is willing to extend. Plaintiff suggests that this Court baldly eschew any

guidance it could receive from federal litigation of the absolute immunity doctrine. (Plaintiff's Brief, pp. 60-62). There is no more fertile source of guiding principles to be found, however. Federal absolute immunity litigation surely provides better guidance than Plaintiff's football analogy or ruminations of legal commentators assessing abstract questions of whether there are generally too many wrongful convictions and whether absolute immunity doctrine is to blame. (Plaintiff's Brief, pp. 53-55, 57, 64-67). This is particularly true, as argued below, because the data does not support the notion that prosecutorial immunity runs unchecked.

Most importantly, the body of absolute immunity doctrine is coherent and narrowly tailored to address only those functions that are intimately associated with the judicial process. *See Minor*, 819 N.W.2d at 394 (citations omitted). Stated another way, absolute immunity only protects those functions that are closely associated with the object of its protection – the judicial process. *See, e.g., Imbler*, 424 U.S. at 430, *and, Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S. Ct. 2606, 2616 (1993). The Court should not have to go searching for an appropriate way to balance prosecutorial independence and accountability. Instead, the Court should apply absolute immunity doctrine in this case based on the rationale set forth in the District Court's original order regarding the Motion to Dismiss.

Regardless of whether the Plaintiff is alleging a common law tort or a Godfrey claim, the prosecutors' actions set forth in the petition fall squarely within the scope of actions that reflect the prosecutor's role in the judicial process.

C. Prosecutorial misconduct occurs far less frequently than Plaintiff and the legal commentators claim.

Assistant United States Attorney, Timothy Harker, provides an important analysis regarding the trend of secondary sources claiming rampant prosecutorial misconduct. *See* Harker, *Ethics Corner: The Nation's Prosecutors Uphold Their Sworn Oaths*, NAGTRI Journal, Vol. 3, No. 4, January 2019 (available online at this link). AUSA Harker found that, despite the claims of secondary sources decrying extensive prosecutorial misconduct, there is relatively limited empirical evidence substantiating those propositions. *Id.* at 1. Instead, the data indicates that prosecutorial misconduct occurs with far less frequency. *Id.* at 2.

"Out of hundreds of law review articles, magazine essays, newspaper editorials, and mass media publications that address prosecutorial misconduct", most reference four empirical studies. *Id., also, see, e.g.,* Margaret Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U.L. Rev. 53, 59 (2005) (identifying the same four studies discussed by AUSA Harker); *and,* Ellen Yaroshefsky, *Zealous Advocacy in a Time of*

Uncertainty: Understanding Lawyers' Ethics: Wrongful Convictions: Is it Time to Take Prosecution Discipline Seriously, 8 UDC-DCSL L. Rev. 275, 278-280 (2004).

Several of the secondary sources relied on by Plaintiff cite these studies as the putative impetus for combating prosecutorial misconduct. *See* Yaroshefsky, 8 UDC-DCSL L. Rev. at 278-280 (referring to studies of the Innocence Project, Center for Public Integrity, and to a death penalty verdict study for cases occurring between 1973-1995); Johns, 2005 B.Y.U.L. Rev. at 59; (referring to all four of the studies above); *and,* Angela Davis, *Lawyering at the Edge: Unpopular Clients, Difficult Cases, Zealous Advocates: the Legal Profession's Failure to Discipline Unethical Prosecutors,* 36 Hofstra L. Rev. 275, 278 (2007).

These legal commentators have seemingly taken on the role of pundit rather than researcher by advancing unsupported hyperbole about the frequency of prosecutor misconduct based on the above four empirical studies (that do not support their notion of widespread prosecutor misconduct). *See id., and,* Harker, NAGTRI Journal at p. 2. A careful review of these studies shows that the data from the underlying four studies are stale, reflect a much lower frequency of prosecutor misconduct, conflate

causes, or a combination of all three. *See* Harker, NAGTRI Journal at pp. 2-4.

The first study relied upon by the legal commentators is the 2003 report of the Center for Public Integrity. This study showed that, on average between 1970 and 2003, there were only sixty instances of proven prosecutorial misconduct nationwide per year. *Id.* at 2. "If the frequency of prosecutorial misconduct were actually one hundred times greater than implied by the Center for Public Integrity, approximately 99.73% of all felony convictions in 2007 would have been untarnished by such conduct." *Id.* (average of 60 instances prosecutorial misconduct per year and over 2.2 million felony convictions). As such, the relative rate of prosecutorial misconduct is quite low. *See id.*

The second study frequently relied upon in articles touting prosecutorial misconduct is the 2000 study by the Innocence Project. *Id.* This study centered on the role of DNA testing in exoneration rather than prosecutorial misconduct. *See id.* As such, this study cannot stand for the proposition that all DNA exonerations were due to prosecutorial misconduct. Instead, the study combined several factors as the basis for wrongful conviction, including: bad defense lawyering, police misconduct, mistaken identification, and forensic errors. *Id.*

The third study is from Columbia Law Professor James Liebman. *Id.* at 2-3. An examination of Professor Liebman's study, reveals that, pertaining to prosecutorial misconduct, "during each year from 1973 through 1995, an average of 1.5 innocent defendants were convicted of a capital offense due to either intentional or unintentional prosecutorial misconduct." *Id.* at 4. This is hardly evidence of an ever-increasing frequency of prosecutor misconduct both because it is a relatively low rate and the data is old. *See id.*

The fourth study regularly relied upon by legal commentators is the 1999 *Chicago Tribune* study. *Id.* However, all the incidents of prosecutorial misconduct occurred before the early 1980's. *Id.*

In order to bring home the national statistics of supposed misconduct by prosecutors, Plaintiff cites to the Iowa case of *McGhee v. Pottawattamie County* for the proposition that the prosecutors in that case obtained, manufactured, coerced, and fabricated evidence before filing criminal charges. (Plaintiff's Brief, p. 54, *citing* 547 F.3d 922, 933 (8th Cir. 2008). Plaintiff commits the same mistake as may legal commentators in relying on this as evidence of an increasing problem and generalizing. First, the allegations of misconduct were for prosecutorial actions in the late 1970's. Second, the prosecutors in the *McGhee* case were never found to have

committed such misdeeds[1]. The assertions recited by Plaintiff were merely allegations made in a civil lawsuit, which was settled without adjudication on the merits. Third, the allegations bear no relevance to the functions of Johnson County Attorneys that have been challenged in this case – manufacturing evidence is not akin to evaluating competing evidence and electing to pursue the criminal case.

Other methods for assessing the frequency of prosecutorial misconduct show that the rate is quite low. *Id.* at 5. Based upon data from California courts[2], the rate of prosecutorial misconduct from 1997-2006 was .0002107 (444 instances out of 2,107,067 felony convictions). *See id.* at 5-6. Based on data from Illinois, the rate of prosecutorial misconduct (including both substantiated and unsubstantiated allegations) was 1.440% during the timeframe between 2010 and 2016. *Id.* at 6.

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[1] The only finding of wrongdoing is of a *Brady* violation, and that came because the State did not dispute that information was withheld by the police. *See Harrington v. State*, 659 N.W.2d 509, 522 (Iowa 2003). Indeed, there was evidence that the criminal defendant clearly knew enough about the information independent of the contents of the suppressed police reports. *Id.* at 525 (dissent).

[2] A call to the Office of Professional Responsibility by counsel for the Johnson County Defendants revealed that we are unable to make a similar calculation in Iowa because, while the type of misconduct is tracked, the type of misconduct by classification of lawyer is not.

This Court is tasked with deciding the appropriate legal standard to apply in light of the allegations set forth by the Plaintiff in the petition. Plaintiff is wrong to try and convince the court to abandon the legally well-established doctrine of absolute immunity based on unsubstantiated claims from legal commentators. AUSA Harker illustrates the danger of relying on the representations of these commentators who have manipulated the interpretation of data to generate unsubstantiated hysteria about malicious prosecution.

The Court should not abandon a justified and necessary absolute immunity doctrine based on these unsubstantiated claims.

D. Adequate safeguards are in place to restrain prosecutorial misconduct in Iowa.

Plaintiff's argument relies on the faulty premise that existing safeguards are insufficient to restrain prosecutorial misconduct. However, numerous safeguards already exist to protect against prosecutorial misconduct, such as: the criminal trial process, judicial oversight, the adversarial proceedings, jury trials, appellate review, ethical guidelines and professional discipline. Johns, 2005 B.Y.U.L. Rev at 65-70. In Iowa, perhaps unlike other jurisdictions, we have a robust and effective mechanism to hold prosecutors accountable. That system consists of

conscientious judicial oversight, strong rules of professional conduct coupled with aggressive enforcement, and prosecutor elections.

While some legal commentators claim that ethical sanctions of prosecutors are rare and, thus, inadequate to act as a viable check on prosecutorial misconduct, those claims are not supported in Iowa. Neither this Court nor the Office of Professional Responsibility are likely to be part of Plaintiff's implicit conspiracy to protect the alleged misdeeds of Iowa's prosecutors.

Prosecutorial misconduct is also held in check, in the first instance, by ethical prosecutors. Iowa prosecutors represent the State and seek justice. In cases like the one at bar, where there is a victim of a heinous sexual assault, prosecutors do not try to seek a happy medium where the victim and criminal defendant are both sufficiently appeased as can be the case with a civil settlement. Prosecutors are burdened with seeking justice and when a suspect's sperm is found on the cervix of the victim coupled with contrary evidence adduced by the attorney for the criminal defendant, justice is properly placed in the hand of the jury as fact finder. This is particularly so when probable cause was never questioned by the District Court and there was no judgment of acquittal, which means there was enough evidence to submit the case to the jury.

Plaintiff's arguments regarding the need to have additional tools to rein in prosecutorial misconduct disregards all existing constitutional protections provided to the criminal defendant. The State has the burden of proof beyond a reasonable doubt. The criminal defendant is presumed innocent. The State's case is subject to exclusionary rules that can keep evidence from the jury if the evidence was obtained in violation of the defendant's constitutional rights. The State has a duty to produce exculpatory evidence to the defense. While the criminal defendant has the right to appeal, to seek postconviction relief, the right to challenge an illegal sentence and habeas relief, the State has no right to appeal the judgment based on the defendant's protection from double jeopardy. These are not unique to our jurisdiction, but the high standard of practice by our lawyers and judges in conjunction with Iowa's criminal justice system is an effective counter to would be prosecutorial misconduct.

"[T]he best protection against the abuse of power by prosecutors is a sensitiveness to fair play and sportsmanship, humility, temperament of zeal with human kindness, a desire to seek the truth rather than victims, and service to the law rather than factional purposes." Robert H. Jackson, *The Federal Prosecutor*, 24 J. Am. Jud. Society 18, 20 (1940). Despite Plaintiff's call to eliminate absolute immunity to correct for the carelessness

of our bench and bar, as Plaintiff implies, the best protection comes from the kind of lawyers this State is known to value, respect, and have in its service. *See id.* Adequate safeguards are in place to restrain prosecutorial misconduct in Iowa and justify the role of absolute immunity in Iowa.

E. The functions performed by the Johnson County Attorneys that are under attack by Plaintiff, are closely associated with the judicial process.

In their opening appeal brief, the Johnson County Defendants established that absolute immunity should apply to bar the claims made by Plaintiff in his Amended Petition that attack the functions they performed in prosecuting Plaintiff. (Johnson County Brief, pp. 33-40). Plaintiff clarified in his responsive appeal brief that he is making only one claim – that the Johnson County Attorneys failed to adequately investigate the allegations against Plaintiff after being provided with "overwhelming evidence of his innocence." (Plaintiff's Brief, p. 73).

This is a creative but unavailing effort to characterize the efforts of the Johnson County Attorneys as investigative and, thereby, attempt to separate that function from the judicial process and deprive them of absolute immunity. *See Burr v. Cedar Rapids*, 286 N.W.2d 393, 395 (Iowa 1979) (absolute immunity does not protect prosecutors for investigative activities such as directing police activity, planning police raids, obtaining

search warrants, or supervising investigations). Plaintiff's attempt to portray the efforts of the Johnson County Attorneys as investigative (by not investigating), relies on a selective view of the allegations and ignores the context in which the evidence was presented to the Johnson County Attorneys.

In his appeal brief, Plaintiff also fails to frame the evaluation of this evidence by the Johnson County Attorneys in context. Unlike law enforcement officers whose investigation uncovered the evidence that Plaintiff sexually assaulted the victim, the Johnson County Attorneys merely weighed the evidence presented to them by Plaintiff and law enforcement. (Amended Petition, ¶¶ 5-8, 22, 23, 25, 28, 29, App. 35-37). Indeed, Plaintiff's primary concern is that he provided the Johnson County Attorneys with evidence contrary to the State's case and they still pursued the criminal case. (Plaintiff's Brief, p. 73).

When the allegations are viewed together in context, the Johnson County Attorneys were faced with competing evidence that they evaluated and then decided to continue with the prosecution of Plaintiff. That is a function closely associated with the judicial process and protected by absolute immunity. *Cf. id, and, see Rayhons v. Brunes*, No. 16-CV-3084-LRR, 2016 U.S. Dist. LEXIS 126305, at *9 (N.D. Iowa Sep. 16, 2016)

(quoting *Imbler*, 424 U.S. at 430) ("the duties of the prosecutor . . . involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom. . . . Preparation, both for the initiation of the criminal process and for a trial, may require the obtaining, reviewing, and evaluating of evidence"); *Blanton v. Barrick,* 258 N.W.2d 306, 310 (Iowa 1977) (citing Restatement (Second) Torts § 656) (initiating and continuing criminal proceedings are functions intimately associated with the judicial process and protected by absolute immunity), *and, Beck v. Phillips*, 685 N.W.2d 637, 642 (Iowa 2004) (citing *Buckley*, 509 U.S. at 273) (weighing of evidence and interviewing witnesses in preparation for trial are also functions intimately associated with the judicial process and protected by absolute immunity).

As a function closely associated with the judicial process, absolute immunity is justified and necessary to protect the judicial process and the Johnson County Attorneys. Indeed, prosecutors faced with conflicting evidence should be empowered to exercise independent decision-making, free of concern that subsequent civil liability may arise from their decision to move forward with the prosecution or dismiss the case. In this case, the Johnson County Attorneys were able to make that independent judgment.

Such would not be the case if Plaintiff has his way and the doctrine of absolute immunity is stricken.

F. Direct monitoring of prosecutors is not a prerequisite to absolute immunity.

While the Johnson County Attorneys were not required to submit their prosecutorial decision making to "direct monitoring and supervision by the court," as argued by Plaintiff, it is of no consequence. (Plaintiff's Brief, p. 73). *See, e.g., Harrington v. Almy*, 977 F.2d 37, 42 (1st Cir. 1992) (availability of safeguards to mitigate damages from prosecutorial abuse are not prerequisites to prosecutorial immunity). These decisions were, in fact, subject to judicial oversight.

In this regard, the Court could have found a lack of probable cause when the arrest warrant was issued or at the initial appearance, at the preliminary hearing, or by order of judgment of acquittal during the criminal trial. *See* Iowa Code § 804.1(1) (magistrate must find probable cause to issue an arrest warrant); Iowa R. Crim. P. 2.2(1) (magistrate must find probable cause at the initial appearance, unless defendant brought before the court on an arrest warrant); Iowa R. Crim. P. 2.2(4)(b) (unless waived, magistrate must find probable cause at the preliminary hearing in order to bind defendant over for further proceedings); Iowa R. Crim. P.

2.19(8) (court shall order entry of judgment of acquittal if the evidence at the conclusion of either party's case is insufficient to sustain a conviction).

Based upon the fact that Plaintiff's case was not dismissed until the jury acquitted, the District Court clearly did not find a lack of probable cause or evidence insufficient to sustain a conviction. *See id.* (Amended Petition ¶ 57, App. 7-8). More importantly, however, at each of these stages of the criminal proceedings the Court certainly had oversight of the Johnson County Attorneys' decision to continue with the prosecution and could have dismissed the charges if Plaintiff's evidence was as unqualifiedly overwhelming as he now claims. *See id.*

The availability of absolute immunity is not tied to direct judicial supervision, it is tied to the function performed. *See Minor v. State*, 819 N.W.2d 383, 394 (Iowa 2012) (citations omitted), *accord*, *Harrington*, 977 F.2d at 42. If the function preformed is intimately associated with the judicial process the actor is immunized in order to protect the judicial process. *Id.* (citations omitted). The nature of the actor is immaterial, be it a judge, grand juror, prosecutor, or DHS employee. *See, e.g., id.* at 394, *Beck*, 685 N.W.2d at 642, *Blanton*, 258 N.W.2d at 309-10, and *Imbler,* 424 U.S. at 422-23.

Despite Plaintiff's efforts to carve out an exception for oversight of the functions protected by absolute immunity, which would not succeed on the records showing judicial oversight of the Johnson County Attorneys' decision to prosecute the case given the competing evidence, absolute immunity is justified and necessary for application to the Johnson County Attorneys because it is the judicial process rather than the actor that is protected. *See id.*

G. The all-due-care defense does not provide adequate protection for the judicial process.

Even in its traditional form as used in countless jurisdictions across this nation, qualified immunity is not designed to protect the judicial process. It is used to protect the individual governmental defendant from liability when the plaintiff's case is on shaky constitutional grounds. *See, e.g, Minor*, 819 N.W.2d at 400 (immunity shields an official from liability if a plaintiff fails to assert a viable constitutional claim or asserts a constitutional violation that a reasonable person would not know to be clearly established). Plaintiff is wrong to suggest that the all-due-care defense should replace the absolute immunity doctrine. (Plaintiff's Brief, pp. 67-73)

If a prosecutor could only rely on the traditional qualified immunity defense, the threat of civil litigation would remain and undermine the

prosecutor's performance of duties and harm the judicial process itself. *See Imbler*, 424 U.S. at 424.

> The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and -- ultimately in every case -- the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in actions for post-trial relief, sometimes to differing conclusions. The presentation of such issues in [subsequent civil ligation] often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury.

Id. at 425. As such, even the honest prosecutor would face great difficulty in meeting the standards of traditional qualified immunity. *Id.*

It is anticipated, furthermore, that the new all-due-care defense to direct Iowa constitutional claims will provide even less protection than traditional qualified immunity. Because it is based on a negligence standard, most of the time the all-due-care defense will not be an effective basis for a dispositive motion, which can be defeated with artful pleading or questions of material fact. *See Baldwin v. City of Estherville*, 915 N.W.2d 259, 280 (Iowa 2018) (couching proof of all-due-care on proof of negligence). Additionally, as a negligence question, the all-due-care defense may be a *de facto* jury question. *See Wieseler v. Sisters of Mercy Health Corp.*, 540 N.W.2d 445, 449 (Iowa 1995) (other citations omitted)

("Negligence questions are typically for the jury and in only exceptional situations may negligence cases be decided by the court as a matter of law.).

As between absolute immunity, the all-due-care defense, and qualified immunity, absolute immunity is the only option that could free the judicial process from the harassment and intimidation associated with civil litigation. *See Minor v. State*, 819 N.W.2d 383, 394 (Iowa 2012) (citations omitted). Absolute immunity is justified and necessary to protect the judicial process.

CONCLUSION

Plaintiff asks the Court to permit a virtual retrial of his criminal case in the civil context and expose the Johnson County Attorneys to damages because they exercised independent prosecutorial discretion in a manner contrary to Plaintiff's desire. Plaintiff makes this request even though the Johnson County Attorneys were merely carrying out the quintessential functions of a prosecutor. Initiating criminal functions, weighing evidence, interviewing witnesses, and continuing legal proceedings are vanilla functions closely related to the judicial process.

Criminal cases often involve competing evidence and prosecutors must be empowered to make decisions about witness credibility and proof and whether to pursue a criminal case without having to consider the

potential risk of subsequent civil liability. Such is the case here, when the Johnson County Attorneys had to decide whether Plaintiff's alibi was truthful and his expert believable or whether Plaintiff sexually assaulted a young female victim, his sperm having been found on her cervix. This is a case for which absolute immunity was designed – to protect the independence of the judicial process and those functioning in a manner closely connected to the judicial process.

Iowa has been able to strike a proper balance between prosecutor independence and accountability by the combination of effective safeguards protecting against prosecutor misconduct and the absolute immunity doctrine. There is no legal or factual imperative for departing from the established doctrine of absolute immunity. This Court should reverse the District Court, hold the Johnson County Attorneys absolutely immune from Plaintiff's abuse of process and *Godfrey* claims. The Court should also reverse the District Court and apply immunity to Johnson County based on public policy and Iowa law. The motion to dismiss filed by the Johnson County Defendants should be granted.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface and type-volume limitation of Iowa Rules of Appellate Procedure 6.903 (1)(d), 6.903(1)(e)(1) and 6.903(1)(g)(1) because this brief has been prepared with Microsoft Word in a proportionally spaced typeface, Georgia, size 14; and contains 4,577 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Robert M. Livingston

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on January 10, 2019, the above and foregoing Final Reply Brief was electronically filed with the Clerk of Court for the Supreme Court of Iowa using the EDMS system, service being made by EDMS upon the following:

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