United States Court of Appeals

FIFTH CIRCUIT
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July 01, 2019

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No. 19-30197 Renata Singleton, et al v. Leon Cannizzaro, Jr., et al
USDC No. 2:17-CV-10721

Dear Mr. Downer,

We have reviewed the appellees' brief electronically filed June 28, 2019, and it is sufficient.

You must submit the **7 paper copies** of the appellees' brief required by 5th Cir. R. 31.1 within **5 days** of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1 **(Red front covers are required -See F.R.A.P. 32(a)(2)).**

Failure to timely provide the appropriate number of copies may result in the appellees' brief being stricken.

Sincerely,

LYLE W. CAYCE, Clerk

Dantrell Johnson

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No. 19-30197

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

Plaintiffs – Appellees

v.

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

Defendants – Appellants

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

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellees certify that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellees respectfully request oral argument. This appeal presents complex questions about pendent appellate jurisdiction in an interlocutory appeal and whether prosecutors may avoid accountability for *ultra vires* acts under the doctrine of absolute immunity.

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INTRODUCTION

Plaintiffs—crime victims, witnesses, and a non-profit victims' rights organization—challenge egregious and unlawful conduct perpetrated by the Orleans Parish District Attorney's Office. Specifically, Plaintiffs' Second Amended Complaint ("Complaint") alleges that Defendant District Attorney Leon Cannizzaro, in his official and individual capacities, along with at least a dozen individual prosecutors in his employ, used illegal means—including fraudulent subpoenas—to coerce, arrest, and imprison crime victims and witnesses. The Complaint pleads both official-capacity and individual-capacity claims for damages and equitable relief under the United States Constitution and Louisiana law.

Defendants moved to dismiss the Complaint, arguing, *inter alia*, that immunity defenses precluded liability on most claims for individual damages and that Plaintiffs' claims did not state causes of action. The district court allowed most of Plaintiffs' individual-injunctive and official-capacity claims to survive, finding them sufficiently pled. ROA.1535–54, 1560–61. As to the individual damages claims, the court found that, while Defendants' actions represented "a breed of official misconduct" that "shock[ed] the conscience," much of that misconduct was shielded by immunity. ROA.1534, 1535. In fact, the court granted Defendants' claim to qualified immunity *each* and *every* time they raised it. ROA.1527–35. In addition, the court granted absolute immunity for most of Plaintiffs' individual damages

claims, except for those related to one category of misconduct: the creation and use of fake subpoenas. ROA.1516–26.

This is an *interlocutory* appeal; only the district court's denial of Defendants' immunity defenses is at issue. Accordingly, the sole question properly before this Court is whether the district court correctly denied absolute immunity for the "subpoena"-related conduct. Defendants' attempt to broaden the appeal's scope is baseless. They claim that the district court "implicitly" denied qualified immunity on two damages claims—failure to supervise and failure to intervene—and that this supposed denial requires appellate scrutiny. Not so. As explained below and in Plaintiffs' motion to dismiss briefing, Defendants never presented a qualified immunity defense related to these claims to the district court. Further, Plaintiffs have abandoned those claims; they are no longer in this case. Thus, there is no live controversy for this Court to adjudicate concerning whether immunity applies to them.

Because there are no qualified immunity issues on appeal, there is no basis for this Court to consider the underlying merits of Plaintiffs' claims. Should this Court nevertheless choose to do so, Defendants' arguments are unavailing. As the district court found, Plaintiffs allegations properly state claims for violations of compelled speech, substantive due process, and state law.

JURISDICTIONAL STATEMENT

This Court has jurisdiction over the absolute immunity issues on appeal only. As explained in Part I of the Argument, there is no basis for Defendants' position that qualified immunity or merits questions are also before the Court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Does absolute immunity protect prosecutors who circumvented court oversight by systematically using fraudulent "subpoenas" to coerce witnesses and crime victims to meet privately with them?

(2) Should this Court review the non-immunity issues Defendants raise?

(3) To the extent non-immunity issues are on appeal, have Plaintiffs adequately stated claims?

STATEMENT OF THE CASE

The Orleans Parish District Attorney's Office (the "Office"), led by Defendant Cannizzaro, uses a variety of extrajudicial and unconstitutional means to intimidate, arrest, and jail witnesses and victims of crimes. Defendants would have this Court believe that this conduct is merely the zealous work of an office focused on prosecuting serious crimes. Appellants' Br., Doc. 00514939374, at 6. But this case is not about zealous prosecution. It is about prosecutors' illegal and unconstitutional acts and the Office policies that made those acts routine.

Plaintiffs' allegations focus on two categories of conduct: first, the widespread

use of documents falsely labeled "subpoenas"; and second, the use of falsehoods and material omissions in applications for material witness warrants seeking the arrest of crime victims and witnesses.

I. Factual Summary

A. The Office Policies

For years, prosecutors at the Office fabricated fraudulent documents to pressure crime victims and witnesses to meet privately with them. The documents were labeled, "SUBPOENA," and warned, "A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE." Marked with the official seal of the Office, they directed witnesses to report to the Office for a private meeting with a prosecutor. ROA.715–16 at ¶¶ 35–40. This practice directly contravenes Louisiana law, which requires that prosecutors submit proposed investigative subpoenas to a judge for approval. *See* La. Code Crim. P. art. 66.

This policy came from Office leadership. In 2014, Defendant First Assistant District Attorney Graymond Martin sent an email directing all staff: "Please see the attached/revised DA Subpoena to be used from this date forward. Please disregard any older forms of subpoenas. **Do not use any of the older subpoenas**." ROA.716 ¶ 45; ROA.783–87 (emphasis in original). A template fake subpoena was attached to the email. Based on Plaintiffs' examination of publicly available records, at least 14 different prosecutors have signed these fake subpoenas—four of them

supervisors. ROA.720–21 ¶¶ 63–64. When the policy was made public in 2017, ROA.721 ¶ 67, a spokesman for the Office explained that these documents were intentionally designed to mislead: "Maybe in some places if you send a letter on the DA's letterhead that says, 'You need to come in and talk to us'. . . that is sufficient. It isn't here. *That is why it looks as formal as it does*," ROA.721 ¶ 69 (emphasis added).

The use of fake subpoenas enables another unlawful policy and practice of the Office: submitting material witness warrant applications based on misrepresentations and material omissions. A pre-discovery investigation identified more than 30 prosecutors who have signed or approved material witness warrant applications based on materially false allegations, material omissions, or plainly insufficient allegations. ROA.734 ¶ 139. In at least ten applications, Orleans Parish prosecutors relied on an assertion that the witness had not "obeyed" a fake subpoena—without disclosing that the "subpoena" was not, in fact, a subpoena. ROA.724 ¶ 86.

B. Individual Plaintiffs' Facts

Office employees issued two fraudulent subpoenas to Plaintiff Renata Singleton, a domestic violence victim. When she declined a meeting with Defendant Arthur Mitchell, he obtained a material witness warrant, stating in the warrant application that Ms. Singleton had failed to meet with him after being served with

"subpoenas" (which were fraudulent). When Ms. Singleton ultimately met with Defendant Mitchell, she stated that she did not want to answer questions without an attorney. She was immediately arrested and held in jail for five nights. *See* ROA.743–49 ¶¶ 193–228.

Plaintiff Marc Mitchell was shot multiple times while playing basketball. He cooperated with prosecutors in the case against the men who shot him, the first of whom was tried and sentenced to 100 years in prison for attempted murder. However, while discussing the second suspect, Defendants Matthew Hamilton and Michael Trummel pressured Mr. Mitchell to agree to a false version of events. When Mr. Mitchell consequently told them that he did not want to talk anymore, they secured a material witness warrant for his arrest using false statements. Mr. Mitchell was later arrested at his job and jailed overnight. *See* ROA.749–53 ¶¶ 229–60.

On the day that the boyfriend of Plaintiff Lazonia Baham's daughter was murdered, Ms. Baham saw the suspect near her house. Defendant Jason Napoli sent her several fraudulent subpoenas and pressured her to change her story. Then, pursuant to a material witness warrant premised on material omissions, Ms. Baham was jailed for eight days. *See* ROA.753–56 ¶¶ 261–86.

Plaintiff Jane Doe was a teenage victim in a criminal molestation and child pornography prosecution. Defendant Dover served her with a fraudulent subpoena, threatened her with jail time, and harassed and humiliated her when she did submit

to an interview. *See* ROA.756–58 ¶¶ 287–303.

Plaintiffs Fayona Bailey and Tiffany LaCroix were witnesses in two different murder cases. Defendants Inga Petrovich and Laura Rodrigue served them with fraudulent subpoenas and threatened them with imprisonment. Both Plaintiffs hired an attorney at personal expense. Once their attorney filed motions in the two cases to "quash" the fraudulent documents, the prosecutors withdrew their demands to meet with Ms. Bailey and Ms. LaCroix. Both defendants in the murder cases pled guilty without either witness testifying against them. *See* ROA.759–61 ¶¶ 304–25.

Plaintiff John Roe was attacked by a man armed with an AK-47. After the assault, he cooperated fully with police, who suspected his assailant of also committing a murder. Plaintiff Roe was later arrested on a material witness warrant secured based on false statements made by Defendant Sarah Dawkins. Mr. Roe spent three days in jail, losing his job as a laborer at a cement company because he missed work. He was only released on the condition that he be actively supervised by the Office. *See* ROA.761–67 ¶¶ 326–88.

Plaintiff Silence Is Violence ("SIV") is a non-profit victim advocacy organization with a mission to advocate for crime victims and safer communities. Since Defendant Cannizzaro took office, resources once directed at SIV's core mission must instead be devoted to protecting crime victims from the Office's coercive practices. For example, SIV expended resources accompanying Plaintiff

Mitchell to meet with the judge in his case and assisting him in seeking treatment for his emotional distress. The organization has done similar work for many other victims and witnesses. *See* ROA.767–71 ¶¶ 398–413.

II. Procedural History

In their Complaint, filed on January 25, 2018, Plaintiffs asserted nine constitutional and state law counts against Defendant Cannizzaro, in his official capacity, for the policies, practices, and customs that caused their injuries. ROA.772–80 ¶¶ 415–52. Plaintiffs also brought claims for monetary damages and injunctive relief against thirteen prosecutors in their individual capacities, including Defendant Cannizzaro ("Individual Defendants"). ROA.772–80 ¶¶ 415–52.

In March 2018, Defendants filed a motion to dismiss. Defendants argued that each of the claims against the Individual Defendants for damages should be dismissed based on absolute immunity. ROA.929, 937, 941, 944, 946, 947, 948. On five of the nine counts, Defendants also argued that those claims should be dismissed based on qualified immunity. ROA.930–36, 937–40, 941–42, 944–45, 949–50. Finally, Defendants argued that Plaintiffs' official-capacity claims should be dismissed for failure to state claims on the merits. ROA.936, 940, 942, 945, 946–47, 947–48, 950, 950–53.

A. The District Court's Order

The district court ruled on Defendants' motion to dismiss on February 28,

2019. ROA 1510–1561. The court allowed eight of the nine official-capacity counts to proceed. ROA.1560–61. However, the court dismissed most of Plaintiffs' claims against Individual Defendants based on absolute or qualified immunity. ROA.1523–26; ROA.1527–35.

1. Claims Against Individual Defendants

a. Absolute Immunity

The court found that Individual Defendants were entitled to absolute immunity for most of the challenged conduct, including verbal and written threats against crime victims and witnesses, ROA.1523–25, and making false statements in material witness warrants, ROA.1525–26. However, the court found that Individual Defendants were not absolutely immune from liability for their creation and use of fraudulent subpoenas. ROA.1519–23. As a result of these rulings, the only damages claims against Individual Defendants allowed to proceed were those based on the use of fraudulent subpoenas.

b. Qualified Immunity

Defendants argued that they were entitled to qualified immunity on Plaintiffs' Fourth, First, and Fourteenth Amendment claims. ROA.930–36, 937–40, 941–42, 944–45, 949–50. For every count on which Defendants asserted qualified immunity, the district court granted it. ROA.1527–35. Accordingly, no claims against Individual Defendants for damages were permitted to move forward on any of these

counts.

Defendants did not assert qualified immunity on Plaintiffs' claims for failure to supervise or failure to intervene (Counts VI and VII), ROA.950–51, or on Plaintiffs' state law claims (Counts VIII and IX), ROA.945–48.

c. Surviving Claims Against Individual Defendants

i. Claims for damages

Based on the district court's rulings on absolute and qualified immunity, only two constitutional damages claims against Individual Defendants survived: those for failure to supervise and failure to intervene (Counts VI and VII) against Defendants Cannizzaro, Martin, and Pipes, in their individual capacities. ROA.1560–61. However, these claims are no longer part of this case because Plaintiffs have abandoned them. *See infra* at 17–19.[1]

The district court also allowed Plaintiffs' state law abuse of process claims to proceed against Defendants (to the extent that those claims were based on the use of fraudulent subpoenas), and it allowed Plaintiffs' fraud claims (all of which are based on the use of fraudulent subpoenas) to proceed against Defendants Martin, Dover, Petrovich, and Rodrigue. Because Plaintiffs have withdrawn their failure to

[1] Plaintiffs have not, however, abandoned their individual-injunctive or official-capacity claims based on failure to supervise and intervene. Further, these are stand-alone claims, not just theories of liability. *See infra* at 16–17.

supervise and intervene damages claims, these state law claims are the only claims against Individual Defendants for damages that remain in this case.

ii. Claims for injunctive relief

The district court allowed certain claims for injunctive relief to proceed against Individual Defendants. Those include Plaintiffs' Fourth Amendment claims against Defendants Napoli, Trummel, Hamilton, and Dawkins, and First Amendment claims against Defendants Napoli, Dover, and Dawkins. ROA.1560–61. They also include Plaintiffs' failure to supervise and intervene claims against Defendants Cannizzaro, Martin, and Pipes. ROA.1560–61.

2. Official Capacity Claims

The district court allowed Plaintiffs' official-capacity claims—that is, claims against the Office itself—for damages and injunctive relief to proceed on eight of the nine counts:

- Fourth Amendment claims for damages and injunctive relief based on the use of false and misleading statements in material witness warrant applications (Count I);
- Fourth Amendment claims for injunctive relief based on the creation and use of fraudulent subpoenas (Count II);
- First Amendment compelled-speech and retaliation claims for damages and injunctive relief (Count III);

- Fourteenth Amendment substantive due process claims for damages and injunctive relief (Count V);
- Failure to supervise and intervene claims for damages and injunctive relief (Counts VI and VII);
- State law abuse of process claims for damages and injunctive relief (Count VIII); and
- State law fraud claims for damages and injunctive relief (Count IX).

ROA.1560–61.

B. Plaintiffs' Partial Motion to Dismiss in This Court

On March 12, 2019, Defendants filed a notice of appeal seeking expansive review, which neither enumerated what portions of the district court's opinion Defendants planned to appeal nor explained the basis for the broad appeal they sought. ROA.1575–76. Plaintiffs subsequently filed a partial motion to dismiss in this Court. In that motion, Plaintiffs argued that the only issue properly on appeal at this time is the district court's denial of absolute immunity for the creation and use of fraudulent subpoenas. Appellees' Partial Mot. to Dismiss, Doc. 00514907912, at 6–13 ("Appellees' Mot."). Defendants filed a response in opposition, and after Plaintiffs' reply, Defendants filed a sur-reply. The Court indicated that the partial motion to dismiss would be carried with the case. Order, Doc. 00514937101, at 1.

Therefore, this Court must now decide which issues it can properly consider at this stage of the case.

Defendants' merits brief and responses to Plaintiffs' motion to dismiss now make clear Defendants' position on the scope of the appeal. Aside from the district court's denial of absolute immunity, Defendants seek to include: (1) qualified immunity and the underlying merits of Plaintiffs' First Amendment compelled-speech claims, Appellants' Br. at 30–38; (2) qualified immunity and the underlying merits of Plaintiffs' Fourteenth Amendment substantive due process claims, Appellants' Br. at 38–45; (3) the merits of Plaintiffs' state law abuse of process and fraud claims, Appellants' Br. at 48–53; and (4) whether Plaintiff SIV has stated a claim on any count, Appellants' Br. at 45–48.

Defendants state that they do not seek to appeal the district court's findings concerning Plaintiffs' Fourth Amendment Claims (Counts I and II). Appellants' Br. at 8. They also apparently do not seek to appeal Plaintiffs' First Amendment retaliation claims. Appellants' Br. at 30–38.

SUMMARY OF ARGUMENT

I. Absolute immunity is the only issue on appeal. There is no basis for this Court to assert pendent jurisdiction over the merits. Defendants' assert that qualified immunity is on appeal concerning Plaintiffs' failure to supervise and intervene claims, and that this justifies review of the merits. But that argument is foreclosed

by Plaintiffs' abandonment of the claims at issue and the fact that Defendants failed to raise the qualified immunity defense on those claims below.

II. Absolute immunity does not apply here because Defendants' conduct was *ultra vires*. According to Fifth Circuit and Supreme Court precedent, prosecutors can be immune only for work they are generally authorized to do, not for conduct completely outside the scope of their duties. Further, Defendants' conduct was investigative rather than prosecutorial, and thus not subject to immunity.

III. Although this Court should not reach the question, Plaintiffs have stated claims on the merits. Defendants violated Plaintiffs' First Amendment rights not to speak, their fundamental rights under the Fourteenth Amendment to be free of lawless and harassing government action, and their rights protected by state law.

ARGUMENT

I. There Is No Basis for This Court to Exercise Pendent Jurisdiction

This Court has jurisdiction over just one discrete question in this interlocutory appeal: whether Individual Defendants are entitled to absolute immunity for the creation and use of fraudulent subpoenas. Defendants contend otherwise, insisting qualified immunity is also on appeal. On that basis, they ask this Court to assert pendent jurisdiction over the merits of Plaintiffs' compelled-speech and substantive due process claims in this case. But Defendants have built their bootstrapping arguments on a false premise; Defendants did not raise the qualified immunity

questions at issue before the district court and, accordingly, the district court did not rule on them. Regardless, Plaintiffs abandon the relevant claims on appeal and have sought to withdraw them in the district court; they are no longer part of this case.

Defendants also contend that this Court should exercise jurisdiction over Plaintiffs' state law claims. They base this contention principally on the argument that those claims are "closely related" to the other issues on appeal. Appellants' Br. at 2–3. This is incorrect. The state law claims turn on entirely separate elements from any other issue on appeal, and this Court should not expand this appeal to address them.

A. There Are No Grounds for This Court to Reach the Merits of Plaintiffs' Constitutional Claims

As to Plaintiffs' constitutional claims, Defendants' jurisdictional argument is based entirely on the notion that the district court "implicitly denied qualified immunity to three Individual Defendants (Leon Cannizzaro, Graymond Martin, and David Pipes) by allowing certain federal constitutional claims for damages . . . to proceed against them." Appellants' Opp. to Partial Mot. to Dismiss, Doc. 005144921037 at 2. The "constitutional claims" Defendants reference are the failure to intervene and failure to supervise claims pleaded in Counts VI and VII of the Complaint. Appellants' Sur-Reply, Doc. 00514936023, at 2 & 2 n.3 ("Appellants' Sur-Reply"). Defendants assert that they raised qualified immunity defenses to these claims in the district court; that the district court denied them *sub silentio*; and that

the issue is therefore properly before this Court. None of this is true. As Plaintiffs have detailed at length in their motion to dismiss briefing, Defendants did not raise qualified immunity defenses with respect to these claims. Appellees' Reply, Doc. 00514929716, at 4–7. Defendants even acknowledge that they did not expressly raise them. Appellants' Sur-Reply at 3.

Nonetheless, Defendants now suggest that because the failure to supervise and intervene claims are "secondary" and "premised on" other claims for which qualified immunity was clearly raised, there was no need for them to explicitly invoke the defense. Appellants' Sur-Reply at 3. That is contrary to blackletter law. Although related to Plaintiffs' compelled-speech and substantive due process claims, the failure to supervise and intervene claims in this case are independent causes of action. *See, e.g.*, *Hale v. Townley*, 45 F.3d 914, 919 (5th Cir. 1995) (holding officer could be liable for failure to intervene). That is why these claims were pled separately in the Complaint and addressed separately by the district court. ROA.777–78 ¶¶ 434–40; ROA.1560–61. To assert immunity defenses as to those independent (albeit related) claims, Defendants were required to state them plainly. *See Kelly v. Foti*, 77 F.3d 819, 823 (5th Cir. 1996) (finding that "tangential references to qualified immunity" were not sufficient to raise the defense as to all claims); *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) ("[I]f a litigant desires to preserve an argument for appeal, the litigant must press and not merely

intimate the argument . . . before the district court."). Because Defendants did not do so, the district court could not have "implicitly" ruled, and no such ruling is now on appeal.

More fundamentally, there can now be no doubt about the narrow scope of the issues before this Court because Plaintiffs abandon their individual-capacity failure to supervise and intervene damages claims on appeal. The foregoing statement alone is sufficient to render moot the jurisdictional question Defendants have manufactured. *See United States v. St. Bernard Par*., 756 F.2d 1116, 1118–19 (5th Cir. 1985) ("Since the government abandoned its public nuisance claim on appeal, its dismissal is not before us."); *accord Fedora v. Merit Sys. Prot. Bd*., 868 F.3d 1336, 1337 (Fed. Cir. 2017) (noting with approval that appellant had abandoned claims to "avoid the jurisdictional concern"); *Bldg. Indus. Ass'n of Superior California v. Norton*, 247 F.3d 1241, 1244 (D.C. Cir. 2001) (noting that "it would be passing strange" to compel litigation of claims appellants wished to abandon); *Mahboob v. Dep't of Navy*, 5 F.3d 1506 (Fed. Cir. 1993) (statement in reply brief

sufficient to abandon an issue).[2]

Even so, Plaintiffs have also sought to formally withdraw these claims pursuant to Federal Rule of Civil Procedure 62.1, either through a revision of the district court's order of dismissal or amendment of the Complaint. *See* Pls' Rule 62.1 Mot. for Indicative Ruling, *Singleton v. Cannizzaro*, No. 2:17-cv-10721-JTM-JVM, Doc. 141 (E.D. La. May 13, 2019); *id*., Pls' Br. in Support, Doc. 141-1 (E.D. La. May 13, 2019); *id*., Pls' Reply, Doc. 146 (E.D. La. May 28, 2019).[3] The official deletion of the failure to supervise and intervene damages claims is therefore inevitable. *See Caspary v. Louisiana Land & Expl. Co.*, 725 F.2d 189, 192 (2d Cir. 1984) (noting that it was "inconceivable" the court would hold a plaintiff "to claims that he no longer wishes to press"). Thus, the question of whether or not the district court implicitly allowed these claims to proceed no longer needs an answer.

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[2] In briefing before the district court, Defendants have argued that Plaintiffs' attempt to withdraw these claims constitutes an "improper and disruptive attempt to influence a pending appeal," *see* Defs' Opp. to Rule 62.1 Mot., *Singleton v. Cannizzaro*, No. 2:17-cv-10721-JTM-JVM, Doc. 143, at 2 (E.D. La. May 28, 2019), and will likely repeat some version of that refrain in their reply here. The accusation is false. Under much more extreme circumstances, this Court has repeatedly recognized that a plaintiff's decision to "delete [] federal claims is not a particularly egregious form of forum manipulation, if it is manipulation at all." *Enochs v. Lampasas Cty.*, 641 F.3d 155, 160 (5th Cir. 2011) (approving claim deletion despite fact that doing so would entirely eliminate federal jurisdiction); *Giles v. NYLCare Health Plans, Inc.,* 172 F.3d 332, 340 (5th Cir.1999) (same); *accord Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1093–94 (9th Cir. 2011) ("[A] plaintiff may voluntarily abandon a claim even though his decision may affect the jurisdiction of a federal court; after all, the claim he abandons—once dismissed with prejudice—is the price he pays."); *see also* Pls' Reply, *Singleton v. Cannizzaro*, No. 2:17-cv-10721-JTM-JVM, Doc. 146, at 4–5 (E.D. La. May 28, 2019).

[3] This Court should take judicial notice of these filings in the district court. *See ITT Rayonier Inc. v. United States*, 651 F.2d 343, 345 n.2 (5th Cir. 1981).

Plaintiffs have abandoned these claims; they are not in the case. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1093–94 (9th Cir. 2011) (observing that issue of FLSA and Rule 23 compatibility was "not present in this case" because the appellant "has told us—as he told the district court—that he will not pursue his FLSA claims").

The district court's so-called implicit denial of the Defendants' qualified immunity defense on the failure to intervene and supervise damages claims is the sole basis for Defendants' contention that this Court should engage in a far-reaching review of the merits of Plaintiffs' constitutional claims. Appellants' Br. at 1–2. Defendants contend that the merits of those claims are "inextricably intertwined" only with the qualified immunity issues supposedly before the Court; they make no such claim as to the absolute immunity issues actually on appeal. Appellants' Br. at 1–2.[4] The absence of the failure to intervene and supervise causes of action thus forecloses any argument for pendent jurisdiction with respect to any constitutional claim.

B. This Court Should Not Extend Pendent Jurisdiction to Consider Plaintiffs' State Law Claims Because They Are Not "Closely Related" to an Issue on Appeal

Defendants do not contend that there is any absolute or qualified immunity issue before this Court on Plaintiffs' state law claims. However, Defendants ask this

[4] Nor could they make such an argument. *See* Appellees' Mot. at 8–11.

Court to exercise pendent jurisdiction over those claims because they are "closely related" to issues on appeal. Appellants' Br. at 3. As Defendants explain, pendent jurisdiction over state law claims may be appropriate where those claims "'are neither novel nor complex'" and "'revolve around an identical set of facts and have nearly identical elements to the [claims properly on appeal] and are thus sufficiently intertwined.'" Appellants' Br. at 3 (quoting *Batiste v. Theriot*, 458 F. App'x 351, 359–60 (5th Cir. 2012)).

Defendants' argument fails on its own terms. Plaintiffs' two state law claims turn on *entirely* separate elements from any issue on appeal. The elements of Plaintiffs' abuse of process claims are: "(1) the existence of an ulterior purpose; and (2) a willful act in the use of a process not proper in the regular prosecution of the proceeding." *Mills v. City of Bogalusa*, No. CV 13-5477, 2016 WL 2992502, at *14 (E.D. La. May 24, 2016). The elements of Plaintiffs' fraud claims are (1) a misrepresentation of material fact; (2) made with the intent to deceive; (3) reasonable or justifiable reliance by the plaintiff; and (4) resulting injury. *See Schaumburg v. State Farm Mut. Auto. Ins. Co.*, 421 F. App'x 434, 442 (5th Cir. 2011). No other issue on appeal—even under Defendants' expansive view of this Court's jurisdiction—shares these elements. Defendants have not even attempted to argue otherwise. Moreover, because the only issue properly on appeal is absolute immunity, the sole question before this Court is whether Individual Defendants'

challenged conduct was prosecutorial in nature. This in no way overlaps with the elements of Plaintiffs' state law claims.

Separately, Defendants contend that this Court should exercise jurisdiction over the state law claims because doing so would "'further the purpose of officer-immunities by helping the officer avoid trial.'" Appellants' Br. at 3 (quoting *Escobar v. Montee*, 895 F.3d 387, 392–93 (5th Cir. 2018)). However, this Court does not exercise pendent jurisdiction for that reason alone. It has done so only where the state law claims also met this Court's threshold standard for such jurisdiction, which requires that the claims meaningfully overlap with the issues properly on appeal. *See, e.g.*, *Morin v. Caire*, 77 F.3d 116, 119 (5th Cir. 1996) (explaining that pendent jurisdiction may be appropriate over claims "that are closely related to the issue properly before [it]"); *Batiste*, 458 F. App'x at 360 (asserting pendent jurisdiction because "the state law claims revolve[d] around an identical set of facts and ha[d] nearly identical elements to the federal claims"). Because the state law claims at issue rely on wholly different elements from any issue before this Court, it would be inappropriate—and unprecedented—for this Court to exercise pendent jurisdiction over them.

II. Defendants Are Not Entitled to Absolute Immunity for Their Use of Fraudulent Subpoenas

Plaintiffs challenged several different categories of misconduct in this case. The district court granted Defendants absolute immunity on all but one: the creation

and use of fraudulent subpoenas. ROA.1519–26. Accordingly, the only absolute immunity question on appeal is whether prosecutors may be held liable for these subpoenas. Moreover, because Plaintiffs are no longer pursuing individual damages related to Defendants' failure to supervise or intervene, this question affects only two of Plaintiffs' nine claims:[5] state law abuse of process (Count VIII) and state law fraud (Count IX).[6]

Courts take a "functional approach" to absolute immunity for prosecutors, examining "the nature of the function performed, not the identity of the actor who performed it." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993) (quotations omitted). Under this approach, a prosecutor is absolutely immune only for actions that are "intimately associated with the judicial phase of the criminal process." *Burns v. Reed*, 500 U.S. 478, 486 (1991) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)). Accordingly, a prosecutor is not absolutely immune for acts performed in her role as an "'investigative officer,'" *id*., or for acts completely outside their jurisdiction, *Kerr v. Lyford*, 171 F.3d 330, 337 (5th Cir. 1999), because such actions are by definition not within the prosecutorial function.

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[5] After the district court's order, Individual Defendants remained liable for their creation and use of fraudulent subpoenas on only four claims: failure to supervise (Count VI), failure to intervene (VII), abuse of process (Count VIII), and fraud (Count IX).

[6] Louisiana's absolute immunity doctrine takes the same functional approach used for absolute immunity under § 1983. *See, e.g.*, *Tickle v. Ballay*, 259 So. 3d 435, 438 (La. Ct. App. 2018).

This Court should deny absolute immunity for Individual Defendants' creation and use of fraudulent subpoenas because this conduct was *ultra vires* and because Defendants used the fraudulent subpoenas in an investigative, rather than prosecutorial, capacity.

A. Absolute Immunity Should Not Apply to the Remaining Individual Damages Claims Because Individual Defendants Were Acting *Ultra Vires* When They Created and Used Fraudulent Subpoenas

As the district court correctly found, the creation and use of fraudulent subpoenas by the prosecutors in the Office was "*ultra vires,*" and for that reason, absolute immunity does not apply. ROA.1520–21. Individual Defendants who created and used fraudulent subpoenas "side-stepped the judicial process." ROA.1520. Plaintiffs' allegations, therefore, "describe more than a mere procedural error or expansion of authority. Rather, they describe the usurpation of the power of another branch of government." ROA.1521.

1. Binding Precedent Holds that Ultra Vires Conduct Is Not Entitled to Absolute Immunity

Defendants argue prosecutors are absolutely immune even when they act *ultra vires*. Specifically, they contend that the Ninth Circuit Court of Appeals in *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012), which the district court quoted in its opinion, invented an *ultra vires* exception and that this "contradicts the jurisprudence of this Court and the Supreme Court." Appellants' Br. at 28.

Defendants are wrong and their argument ignores controlling law.

The treatment of *ultra vires* conduct as outside of what absolute immunity protects is not contrary to precedent. In fact, it is a straightforward application of that precedent: it follows directly from the "function test" that governs whether absolute immunity applies. As explained above, "the actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor." *Buckley*, 509 U.S. at 273. Instead, "[a] prosecutor is absolutely immune for initiating and pursuing a criminal prosecution, for actions taken in her role as advocate for the state in the courts, or when her conduct is intimately associated with the judicial process." *Loupe v. O'Bannon*, 824 F.3d 534, 539 (5th Cir. 2016) (quotations omitted). In other words, a prosecutor is immune when she acts within her prosecutorial function.

Accordingly, as this Court and others have recognized, when a prosecutor "act[s] in the 'clear absence of all jurisdiction'" by engaging in conduct wholly outside of what his role as a prosecutor allows, absolute immunity does not shield him. *Kerr*, 171 F.3d at 337 (quoting *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978), *abrogated in part on other grounds by Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003); *see also Cousin v. Small*, 325 F.3d 627, 635 (5th Cir. 2003) (explaining that absolute immunity protection excludes activity outside "the category of conduct in which a prosecutor is generally authorized to engage"); *Snell v. Tunnell*, 920 F.2d 673, 696 (10th Cir. 1990) ("The purpose of absolute

prosecutorial immunity would be ill-served by granting it in cases when the defendant acts without colorable authority.").

This Court directly applied this principle in *Loupe*. There, the Court considered whether absolute immunity shielded a prosecutor who had allegedly ordered a sheriff's deputy to make a warrantless arrest without probable cause. *Loupe*, 824 F.3d at 535. Quoting *Lacey*, this Court reasoned that by ordering a warrantless arrest, the prosecutor "'step[ped] outside of his role as an advocate of the state before a neutral and detached judicial body and t[ook] upon himself the responsibility of determining whether probable cause exist[ed] . . . .'" *Id.* at 540 (quoting *Lacey*, 693 F.3d at 914). This Court then explained, "Ordering a warrantless arrest is not intimately associated with the judicial phase of the criminal process; it is conduct outside the judicial process and therefore is not protected by absolute immunity." *Id.*

These same basic principles—and not any novel doctrinal invention—also undergird the Ninth Circuit's reasoning in *Lacey*. There, a prosecutor issued grand jury subpoenas without grand jury or court approval, even though Arizona law did not allow this. *Lacey*, 693 F.3d at 913. The Ninth Circuit acknowledged that "[p]rosecutors generally enjoy absolute immunity for their conduct before grand juries . . . because that conduct is integral to 'the judicial phase of the criminal process.'" *Id.* at 913 (quoting *Imbler*, 424 U.S. at 430). However, the Arizona

prosecutor's decision to issue subpoenas without the required grand jury or court approval was "designed to *avoid* the 'judicial phase.'" *Id.* (emphasis in original). Thus, the prosecutor had stepped outside of his role as an advocate in the judicial system and was not entitled to the protections a prosecutor normally receives. *See id.* at 914 ("Where the prosecutor has side-stepped the judicial process, he has forfeited the protections the law offers to those who work within the process."). [7]

Both *Loupe* and *Lacey* directly apply here. Louisiana law gives the power to authorize investigative subpoenas *exclusively* to the trial court. *See* La. Code Crim. P. art. 66 (requiring that *the court* authorize and issue investigative subpoenas). Defendants' use of fraudulent subpoenas was a direct usurpation of the judiciary's role in the investigative subpoena process. Instead of using the court-supervised process designed by the legislature, Defendants routinely operated "outside the judicial process." *Loupe*, 824 F.3d at 540. As such, this conduct not prosecutorial and is not shielded by absolute immunity.

2. Defendants Acted Completely Outside Their Jurisdiction, Not Just Unlawfully

Defendants also argue that an *ultra vires* exception is inconsistent with

[7] Defendants argue that this case is distinguishable from *Lacey* because "there are no allegations that Individual Defendants here were abusing authority for personal motives." Appellants' Br. at 29. But *Lacey*'s holding did not turn on the prosecutors' motivations. *Lacey*, 693 F.3d at 912–14. Even so, Plaintiffs *do* allege that Defendants were motivated to "win at all costs" in order to be promoted or eligible for salary increases. ROA.742–43 ¶¶ 187–192.

precedent because absolute immunity extends even to egregious conduct, including "'where the prosecutor knowingly used perjured testimony, deliberately withheld exculpatory information, or failed to make full disclosure of all facts casting doubt upon the state's testimony.'" Appellants' Br. at 28 (quoting *Prince v. Wallace*, 568 F.2d 1176, 1178–79 (5th Cir. 1978)); *see also id.* (noting that absolute immunity applies "to a prosecutor's actions that are 'done maliciously' or 'in excess of his authority'") (quoting *Kerr*, 171 F.3d at 337). They warn that all of these actions could be considered *ultra vires*, and therefore, an *ultra vires* exception would contradict these prior holdings. *Id.* at 28–29.

This argument misunderstands the law. As this Court explained in *Cousin*, the question of whether the prosecutor is acting outside of all jurisdiction "is determined with reference to whether the challenged activity falls within the category of conduct *in which a prosecutor is generally authorized to engage*, rather than with reference to the wrongful nature or excessiveness of the conduct." 325 F.3d at 635 (emphasis added). Thus, even outrageous conduct—such as the intentional suppression of exculpatory evidence—is normally immune because deciding which evidence to turn over is soundly within the scope of a prosecutor's role.[8]

[8] Similarly, the detainment of the witness in *Doe v. Harris County*, 751 F. App'x 545 (5th Cir. 2018), which Defendants cite, was absolutely immune because detaining a witness pursuant to a legitimate court-issued bench warrant to secure trial testimony is prosecutorial.

By contrast, a prosecutor could not be immune for assaulting a recalcitrant trial witness or ordering the beating of a suspect. *See Rouse v. Stacy*, 478 F. App'x 945, 950 (6th Cir. 2012) (denying absolute immunity for a prosecutor that ordered assault of a pretrial detainee). Nor would immunity shield a prosecutor who imposed extrajudicial conditions on criminal defendants in exchange for not charging them. *See Doe v. Phillips*, 81 F.3d 1204, 1210 (2d Cir. 1996) (denying immunity for conditioning dismissal on defendant's swearing on the Bible). That is because, in any of these circumstances, the prosecutor would be acting in the indisputable absence of lawful authority.[9] That is precisely the situation before this Court.

The conduct at issue here—the creation and use of fraudulent subpoenas—is clearly not within "the category of conduct in which a prosecutor is generally authorized to engage." *Cousin*, 325 F.3d at 635. Prosecutors cannot purposefully evade judicial oversight to fabricate and "issue" their own "subpoenas," particularly where the legislature has designed a process by which investigative subpoenas can be obtained *only with judicial approval*. *See* La. Code Crim. P. art. 66 cmt (noting that the court approval requirement prevents "the possible abuse of [the investigative subpoena] by the district attorney"). Defendants circumvented that process to cut the courts out of the equation, freeing them to do exactly what the law prohibits: engage

[9] The logical end point of Defendants' arguments, of course, is that all of this conduct should be protected by immunity.

in abuse and harassment. ROA. 714–24 ¶¶ 30–83; *see also, e.g.*, ROA.756–57 ¶¶ 287–95. This is completely lawless conduct. Absolute immunity does not shield it. *See Simon v. City of New York*, 727 F.3d 167, 174 (2d Cir. 2013) (denying absolute immunity because "a prosecutor has no power to subpoena a witness to appear outside of judicial proceedings to answer questions from the prosecution").

This established framework reveals Defendants' remaining arguments to be equally meritless. First, Defendants contend that the district court erred by applying the *ultra vires* exception because it involved assessing whether the prosecutors' conduct was "lawful" rather than following the function test. Appellants' Br. at 21. But that is not what the district court did. The prosecutors' conduct was not *ultra vires* simply because it was unlawful; it was *ultra vires* because it falls outside of "the category of conduct in which a prosecutor is generally authorized to engage." *Cousin*, 325 F.3d at 635; ROA.1520–21. Moreover, as described above, this analysis does not conflict with the function test; it is a direct application of it.

Second, Defendants argue that the district court and the Ninth Circuit in *Lacey* made a rigid and impermissible distinction between in-court and out-of-court conduct, indicating that the latter could never be entitled to immunity. Appellants' Br. at 23, 27–28. This is a mischaracterization. Neither court did that. Instead, both courts reasoned that when a prosecutor acts entirely outside of his powers as a prosecutor—and particularly where he usurps the powers of the court to avoid

judicial scrutiny—he is not acting in his prosecutorial function. *Lacey*, 693 F.3d at 913–14; ROA.1519–23.

It is also consistent with the Supreme Court's basis for recognizing the absolute immunity doctrine. As the Ninth Circuit noted in *Lacey*, the Supreme Court has reasoned that "'the judicial process is available as a check on prosecutorial actions,' and it reduces the need for private suits for damages to keep prosecutors in line." *Lacey*, 693 F.3d at 912 (quoting *Burns v. Reed*, 500 U.S. 478, 492 (1991)). But the judicial process cannot serve as "'a check on prosecutorial actions'" where, as here, a prosecutor acts outside the law to avoid judicial scrutiny. *Id*. Thus, extending absolute immunity to *ultra vires* conduct does not further the purposes of immunity.

B. Absolute Immunity Should Not Apply Because the Fake Subpoenas Were Issued by the Prosecutors Acting in Their Investigative Capacity

Individual Defendants' conduct is not entitled to absolute immunity for a second reason: the purpose of the conduct was investigative, not prosecutorial. A prosecutor is not afforded absolute immunity for acts taken in her role as "an investigative officer." *Reed*, 500 U.S. at 491 (quotations omitted). Thus, although preparing witnesses to testify at trial is shielded by absolute immunity, investigative interviews are not. *See, e.g.*, *Simon*, 727 F.3d at 173 (denying absolute immunity where prosecutor's interrogation arguably "went beyond . . . clarifying [the

witness's] status or 'preparing' her for a[n] . . . appearance, and became an investigative interview"); *Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995) (denying absolute immunity for prosecutor "intimidat[ing] and coerc[ing] witnesses" because these acts were "a misuse of *investigative* techniques" and "relate[] to a typical police function, the collection of information to be used in a prosecution").

Here, Plaintiffs allege that prosecutors primarily used fraudulent subpoenas to interrogate crime victims and witnesses for information—not to review prior testimony or prepare for trial.[10] Indeed, Defendants' own briefing characterizes their conduct as investigative. They describe prosecutors' conduct as "questioning or seeking to question a witness about past criminal acts they may have witnessed," and characterize this conduct as no different from "questioning by police." Appellants' Br. at 36; *see also id.* at 21 (stating that the "subpoena" instructed a recipient to "*provide information* to an Assistant District Attorney") (emphasis added).

Elsewhere in their brief, Defendants contradict this characterization. They argue that the purpose of the fraudulent subpoenas was *not* investigation, but rather

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[10] *See, e.g.*, ROA.746 ¶ 210 ("Defendant Mitchell . . . ask[ed] Ms. Singleton about the incident with Mr. Crossley"); ROA.755 ¶ 279 ("Defendant Napoli repeatedly asked Ms. Baham about [certain details about] the murder."); ROA.758 ¶ 299 ("Defendant Dover interrogated her about the offenses that victimized her").

"[d]eveloping, securing, preparing, and presenting witness testimony at trial," Defs.' Br. at 22. But at this stage of the litigation, this Court must accept Plaintiffs' allegations as true and draw all inferences in Plaintiffs' favor. *See Harrington v. State Farm Fire & Cas. Co.*, 563 F.3d 141, 147 (5th Cir. 2009). And in light of these allegations, Defendants cannot meet their burden of showing that their conduct was prosecutorial and not investigative. *See Reed*, 500 U.S. at 486 ("[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question").

In addition to disputing Plaintiffs' factual allegations, Defendants argue that their conduct was not investigative because the fraudulent subpoenas were all "issued" to Plaintiffs after charges had been instituted in the underlying criminal case. Appellants' Br. at 22. But whether conduct is investigative hinges on the function of that conduct, not on whether it was committed after a case was formally initiated. *See, e.g.*, *Buckley*, 509 U.S. at 278 (denying absolute immunity for a prosecutor's post-indictment conduct).

Defendants also suggest that their conduct was prosecutorial merely because it is related to an eventual criminal trial. But the Supreme Court has rejected this reasoning, declining to extend immunity to investigative conduct merely because that work may later "be retrospectively described as 'preparation'" for a judicial proceeding. *Id.* at 276. Were that all it took to ensure absolute immunity, "every

prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial." *Id*.; *see Reed*, 500 U.S. at 495 (admonishing that "[a]lmost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute").

III. Defendants' Arguments on the Merits Are Unavailing Because Plaintiffs Have Stated Causes of Action

Defendants ask this Court to reach beyond absolute immunity to review the merits of Plaintiffs' claims. The premise for this request is the fiction that Defendants raised qualified immunity for Plaintiffs' failure to supervise and intervene claims (Counts VI and VII), and that these claims are "inextricably intertwined" with the merits. *See supra* at 15–21.

Specifically, Defendants ask this Court to review (1) qualified immunity and the underlying merits of Plaintiffs' First Amendment compelled-speech claims, Appellants' Br. at 30–38; (2) qualified immunity and the underlying merits of Plaintiffs' Fourteenth Amendment substantive due process claims, Appellants' Br. at 38–45; (3) the merits of Plaintiffs' state law abuse of process and fraud claims, Appellants Br. at 48–53; and (4) whether Plaintiff SIV has stated a claim on any count, Appellants' Br. at 45–48. Defendants do not seek to appeal Plaintiffs' Fourth Amendment Claims (Counts I and II). Appellants' Br. at 8. And they do not appear

to seek to appeal Plaintiffs' First Amendment retaliation claims.[11]

As explained above, because qualified immunity as to Plaintiffs' failure to supervise and intervene claims is not an issue in this appeal, no basis exists for this Court to look beyond the question of absolute immunity. Plaintiffs' abandonment of these claims—combined with the fact that the district court granted qualified immunity on Plaintiffs' First and Fourteenth Amendment claims, ROA.1532, 1535—means that any appellate analysis of qualified immunity for these claims would be purely advisory.

If this Court nevertheless addresses the merits of Plaintiffs' claims, Defendants' arguments fail. As explained below, Defendants' alleged conduct violated the First Amendment's prohibition on compelled-speech and substantive due process under the Fourteenth Amendment, and it constituted abuse of process and fraud under state law.[12]

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[11] Defendants do not address the merits of Plaintiffs' retaliation claims in their brief. Appellants' Br. at 30–38. Thus, any arguments concerning the merits of Plaintiffs' retaliation claim have been waived. *United States v. Jackson,* 426 F.3d 301, 304 n.2 (5th Cir. 2005).

[12] The district court permitted only damages claims against Individual Defendants "regarding the alleged creation and use of 'subpoenas'" to move forward, but that restriction did not apply to Plaintiffs' injunctive claims against Individual Defendants or official-capacity claims.

A. Defendants Violated Plaintiffs' First Amendment Rights Against Compelled Speech

In Count III of the Complaint, Plaintiffs allege that Defendants violated their First Amendment rights against compelled speech and retaliation. ROA.774–76 ¶¶ 422–28. The district court allowed the compelled-speech claims to move forward against Defendant Cannizzaro in his official capacity, and it allowed the retaliation claims to proceed against Defendant Cannizzaro in his official capacity and against Individual Defendants for injunctive relief. ROA.1560. Defendants now ask this Court to review the compelled speech portion of this count. For the reasons that follow, Plaintiffs have stated claims that Defendant Cannizzaro, in his official capacity, violated their First Amendment rights against compelled speech.

1. The Government Cannot Compel Speech Without a Compelling Interest

The Supreme Court has consistently held that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977); *see also Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 797 (1988) (reiterating that the First Amendment includes the freedom to choose "both what to say and what *not* to say"). Compulsion occurs when a person either speaks against her will in response to government pressure or when she suffers some injury because of that pressure (even if she never actually submits to it); *see Wooley*, 430 U.S. at 714–17 (finding a compelled speech

violation where the petitioners were punished for refusing to submit to compulsion).

The right to decide what *not* to say, like other First Amendment rights, is "susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); *see id.* at 645 (Murphy, J., concurring) (noting that the right to refrain from speech can be subordinated when "essential operations of government may require it . . . as is the case of compulsion to give evidence in court").

Thus, while the First Amendment does not bar the government from (for example) compelling testimony when it validly subpoenas a witness, it may not compel speech in all circumstances and for all purposes—particularly where the compulsion is not narrowly tailored to an appropriate government interest. *See Riley*, 487 U.S. at 800–01 (finding a compelled speech violation where the rule at issue was not narrowly tailored to the government's interest); *Wooley*, 430 U.S. at 715–17 (considering whether the government's interest was "sufficiently compelling" to compel the speech at issue); *see also Burns v. Martuscello*, 890 F.3d 77, 89 (2d Cir. 2018) (finding a compelled-speech violation where a prisoner's speech was extrajudicially coerced); *id.* at 92 (reasoning that unlike extrajudicial compulsion, "a [validly issued] subpoena can be contested" and quashed "if it is overbroad, or otherwise abusive").

The conduct challenged here violates these core principles. Defendants used fraudulent, extrajudicial subpoenas and threats of imprisonment to pressure certain Plaintiffs to give *false* statements to advance the prosecution's theory of the case. *See* ROA.749–50 ¶¶ 234–38; ROA.755 ¶¶ 279–82. Compelling a witness to recite a "particular message favored by the Government," *Turner Broad Sys. Inc. v. FCC*, 512 U.S. 622, 641 (1994), when that message conflicts with what the speaker believes to be true contravenes the fundamental rule that the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995); *see Burns*, 890 F.3d at 89 ("[I]t is plain" that refusing to give false testimony is First-Amendment-protected activity); *Jackler v. Byrne*, 658 F.3d 225, 241 (2d Cir. 2011) ("[A] citizen has a First Amendment right to . . . reject governmental efforts to require him to make statements he believes are false"). Indeed, coercing a witness to subscribe to the prosecutor's preferred view of the facts is no less prohibited a form of compelled speech than being forced to salute the flag, to take a loyalty oath that conflicts with one's beliefs, or otherwise to "promot[e] an approved message." *Hurley*, 515 U.S. at 579; *see also Barnette*, 319 U.S. at 642 (compelled salute ruled unconstitutional); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (noting that "compelling individuals to speak a particular message" is a content-based regulation of speech that is presumptively unconstitutional).

Defendants also used these methods to compel crime victims and witnesses to submit to private, out-of-court interrogations. When they were unable to force Plaintiffs to submit, they punished them. For example, Plaintiff Singleton was arrested *at the District Attorney's Office*—where she had gone to comply with Defendants' demands to meet with her—when she refused to speak without the presence of counsel. ROA.746 ¶¶ 210–212. This constitutes impermissible compelled speech, unjustifiably abrogating Plaintiffs' right not to make "statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573.

Defendants' conduct served no legitimate governmental interest—and it was certainly not narrowly tailored to do so—because Defendants had a *legal means* available for securing investigative interviews and chose to evade judicial supervision instead. *See* La. Code Crim. P. art. 66. Far from protecting the "essential operations of government," *Barnette*, 319 U.S. at 645 (Murphy, J., concurring), Defendants' conduct intentionally undermined it.

2. Defendants' Attempts to Distinguish the Speech at Issue Are Unavailing

Nevertheless, Defendants insist that the First Amendment sanctions their conduct. Specifically, they make three arguments, none of which defeat Plaintiffs' claims. First, Defendants contend that the prohibition on compelled speech is limited to political speech. *See* Appellant Br. at 32. This argument is flatly contradicted by

Supreme Court and Fifth Circuit precedent. *See Riley*, 487 U.S. at 797–98 (stating that the First Amendment makes no distinction between "compelled statements of opinion" and "compelled statements of fact," and that "either form of compulsion burdens protected speech") (quotations omitted); *Hersh v. U.S. ex rel. Mukasey*, 553 F.3d 743, 765–66 (5th Cir. 2008) (explaining that "compelled statements of fact as well as compelled statements of opinion burden protected speech" and that, accordingly, the First Amendment "protects an attorney's right not to provide her client with certain factual information"); *accord Burns*, 890 F.3d at 85–86 ("The protections of the First Amendment are hardly confined to political speech"); *Cressman v. Thompson*, 798 F.3d 938, 951 (10th Cir. 2015) ("Th[e] constraint on state compulsion is not limited to ideological messages; compelled statements of fact are equally proscribed by the First Amendment").[13]

Even so, Plaintiffs' speech here, while not "overtly political," does involve matters of public concern. *Burns*, 890 F.3d at 89–90. The "decision to divulge information and incriminate others" involves "[s]afety risks." *Id.* at 89. It also implicates the manner in which the investigation and prosecution are conducted, which "are plainly matters of broad concern." *Id.* at 90. Accordingly, "the Supreme

[13] Indeed, the First Amendment protects even purely commercial speech that has no political or ideological component. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) ("Our question is whether speech which does no more than propose a commercial transaction is so removed from any exposition of ideas … that it lacks all [First Amendment] protection. Our answer is that it is not.") (quotations and citations omitted).

Court's reasoning in *Wooley* and *Barnette*, and the notion of autonomy and 'individual freedom of mind' as guiding First Amendment principles, are central" here. *Id*. (quoting *Wooley*, 430 U.S. at 714).

Second, Defendants argue that Plaintiffs' claims fail because there is "no First Amendment right not to speak to police investigating crimes." Appellants' Br. at 32. To support this point, Defendants rely principally on *Alexander v. City of Round Rock*, 854 F.3d 298 (5th Cir. 2017). But *Alexander* does not say that, and, regardless, its holding does not control here.

To start, this Court's decision in *Alexander* was limited to analysis of whether qualified immunity applied. It assessed only whether or not there is a *clearly established* "First Amendment right not to answer an officer's questions during a traffic stop." *Id.* at 309. Once this Court granted qualified immunity, it explicitly did *not* reach the underlying question of whether or not such a right exists. *Id.* at 308 n.5.[14]

But even had the *Alexander* court actually ruled that there is no First Amendment right to remain silent during a *Terry* stop, it would not be dispositive here. As described, the prohibition on compelled speech may be limited "to prevent

[14] *Koch v. City of Del City*, 660 F.3d 1228 (10th Cir. 2011), and *Abdel-Shafy v. City of San Jose*, No. 17-CV-0723-LHK, 2019 WL 570759 (N.D. Cal. Feb. 12, 2019), which Defendants cite in support of their position, are also limited to the question of qualified immunity.

grave and immediate danger" to lawful state interests. *Barnette*, 319 U.S. at 639. And an officer can make a *Terry* stop when he has "reasonable suspicion . . . that the person is involved in criminal activity." *United States v. Massi*, 761 F.3d 512, 521 (5th Cir. 2014). In that context, to protect its interest in public safety, it makes sense that the First Amendment would not prohibit the government from asking questions or requiring answers to them.

Here, Defendants fabricated legal documents to evade judicial supervision and to coerce out-of-court interviews with potential witnesses in the absence of exigent circumstances. They can claim no lawful interest in this behavior—particularly because they could have pursued *legitimate*, court-issued subpoenas to do legally what they chose to do illegally.[15] *See* La. Code Crim. P. art. 66.

Finally, Defendants minimize the Second Circuit's analysis in *Burns v. Martuscello* by emphasizing that the case's holding is limited to its facts. *See* Appellants' Br. at 35. They ignore, however, the First Amendment principles that the court elucidated in *Burns*, which are directly applicable to this case. For instance, the court rejected the argument that the First Amendment is not implicated when a person provides information to government officials. *Burns*, 890 F.3d at 92 ("First

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[15] Defendants emphasize this Court ultimately found that the *Terry* stop in *Alexander* was unreasonable. Appellants' Br. at 34. This changes nothing. Unlike the categorically prohibited conduct alleged here, a *Terry* stop is a proper function of law enforcement. For these same reasons, none of the police-stop cases Defendants cite are apposite. *See* Appellants' Br. at 33–34 (citing cases).

Amendment rights are clearly at stake when a person gives evidence."); *id.* at 91 (explaining that the First Amendment limits "the government's ability to compel participation in investigative measures"). And it noted that "while the government may compel a witness to divulge evidence under appropriate circumstances," it may not do so in every circumstance—particularly where the protections that come with valid subpoenas are absent. *Id.* at 92 (reasoning that "a [validly] subpoenaed witness enjoys protections utterly unattainable for the [plaintiff]," who was an inmate and pressured to give testimony outside of a court-sanctioned setting). These principles apply just as readily here, where Defendants circumvented the court-sanctioned process for investigative subpoenas—and the protections that come with it—in order to compel private, extrajudicial interviews.

B. Defendants' Conduct Violated Plaintiffs' Substantive Due Process Rights

In Count V of the Complaint, Plaintiffs allege that Defendants violated their Fourteenth Amendment rights to substantive due process by using fraudulent subpoenas and by jailing them based on those fraudulent subpoenas, as well as other falsehoods and omissions. ROA.777 ¶¶ 434–35. The district court permitted this claim to move forward against only Defendant Cannizzaro, in his official capacity. ROA.1560. For the reasons that follow, Plaintiffs' claims must proceed.

A state actor violates substantive due process when her conduct is "so egregious" that it "shock[s] the contemporary conscience." *Reyes v. North Texas*

Tollway Auth., 861 F.3d 558, 562 (5th Cir. 2017). "If this standard is met, a court must next determine whether there exist historical examples of recognition of the claimed liberty protection at some appropriate level of specificity." *Morris v. Dearborne,* 181 F.3d 657, 668 (5th Cir. 1999) (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). Put differently, the plaintiff must show a violation of a "fundamental right" that is "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *accord Brown v. Nationsbank Corp*., 188 F.3d 579, 591 (5th Cir. 1999) (similar).

Defendants contend that Plaintiffs' substantive due process claims fail because they have not alleged the violation of a constitutional right and that, even if they did, the conduct alleged does not "shock the conscience." Appellants' Br. at 41–43. Both arguments are unavailing.

1. Defendants' Conduct Shocked the Conscience

Defendants used *fraudulent*, *extrajudicial* subpoenas backed by threats of imprisonment to compel crime victims and witnesses to submit to private, out-of-court interrogations. They also used these "subpoenas" to pressure crime victims and witnesses to make *false* statements that would advance the prosecution's theory of the case. *See* ROA.749–50 ¶¶ 234–38; ROA.755 ¶¶ 279–82. Defendants then used some Plaintiffs' failures to comply with their fake subpoenas and material

falsehoods as a basis for seeking arrest warrants. Plaintiff Singleton, a victim of domestic violence, was shackled, separated from her children, and incarcerated for five days pursuant to a material witness warrant based on a fake subpoena. ROA.744–47 ¶¶ 195–220. Plaintiff Baham spent more than a week in jail, while sick with the flu, because she refused to honor Defendants' fake subpoenas. ROA.754-55 ¶¶ 270–277. Plaintiffs Mitchell and Roe were incarcerated because of warrants based on material lies and omissions, ROA.751–52 ¶¶ 243–51; ROA.763–65, ¶¶ 349–74; Plaintiff Roe lost his job as a result, ROA.766 ¶ 376.

Defendants are not just ordinary agents of the state; they are prosecutors entrusted with the impartial execution of our laws. *See United States v. Smith*, 814 F.3d 268, 277 (5th Cir. 2016) ("A prosecutor's role is not that it shall win a case, but that justice shall be done.") (quotations omitted); *United States v. Calhoun*, 478 F. App'x 193, 196 (5th Cir. 2012) (Haynes, J., concurring) ("Prosecutors are held to a higher standard."). Defendants routinely violated that trust in service of a "win at all costs" culture that consistently disregarded the rights of the people they were obligated to protect. ROA.742–43 ¶¶ 187–192. Particularly given the prosecutor's venerated role in the legal system, Defendants' willful misconduct is "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Reyes*, 861 F.3d at 562 (quotations omitted).

Defendants attempt to justify their misconduct by claiming that their actions

(1) were taken to further a "legitimate and important interest in prosecuting serious crimes" and (2) constitute, at worst, "excessive zeal in securing witness testimony." Appellants' Br. at 43–44. In essence, this is an argument that prosecutors are free to systematically defraud the courts and the public so long as they have a good reason. Even if this Court were to credit that cynical argument, Defendants had no good reason here. As noted previously, they could have secured the same result by utilizing the lawful court-supervised subpoena process available to them. *See* La. Code Crim. P. art 66. That they could have done so shows that the true purpose of their conduct was not to serve an appropriate interest, but to evade judicial supervision.[16]

Further, Defendants' cannot credibly claim to have been "merely careless" or unwisely overzealous. Appellants Br. at 43 (quotations omitted). Defendants, *as a matter of policy*, acted intentionally to evade judicial supervision through the use of "manufactured subpoenas." ROA.1534. These actions were "not only condoned but directed by top prosecutors and the DA himself." ROA.1534. Defendants were thus considered in their actions, "having time to make unhurried judgments, upon the

[16] Defendants cite *Coleman v. Dretke*, 395 F.3d 216 (5th Cir. 2004), to suggest that pursuit of a legitimate law-enforcement objective guarantees immunity. Appellants' Br. at 44. But *Coleman* turned on the conclusion that the sex offender treatment at issue was not "intended to injure in some way unjustifiable by any government interest" because the state had an interest in sex-offender treatment, and there was no discernible intent to injure. 395 F.3d at 224–25. Here, Defendants had no valid interest in usurping the judiciary's role.

chance for repeated reflection." *Brown*, 188 F.3d at 592 (holding that the FBI's conduct shocked the conscience in part because it had "ample opportunity for cool reflection"). Such intentional conduct "unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

Finally, Defendants' assertion that their actions lacked an intent to "maliciously injure the Plaintiffs" similarly rings hollow. Appellants' Br. at 44. As an initial matter, no malice is required to "shock the conscience." *See Lewis*, 523 U.S. at 849–50, 854 (observing that "recklessness," deliberately indifferent, or grossly negligent conduct can shock the conscience under the Fourteenth Amendment). But there is malice here nonetheless. Defendants threatened and harassed Plaintiffs to compel them to speak. They flouted the court's supervision to do so. And they used fraudulent subpoenas and other falsehoods as a basis for seeking material witness warrants, directly resulting in the incarceration of Plaintiffs Singleton, Baham, and Roe—compounding the trauma they had already experienced as victims and witnesses of violent crimes. At a minimum, Defendants' use of the "subpoenas" against these Plaintiffs—seeking to incarcerate them based on a fraud—was malicious.

2. Defendants Violated a Fundamental Right

Defendants' use of fake subpoenas (and material falsehoods) violated

Plaintiffs' right to be free from lawless, harassing, and "arbitrary" government conduct—protection from which is the very "touchstone of due process." *Jordan v. Fisher*, 823 F.3d 805, 812 (5th Cir. 2016) (quoting *Lewis*, 523 U.S. at 845); *Brown*, 188 F.3d at 591 (observing that substantive due process "was intended to prevent government officials from abusing their power or employing it as an instrument of oppression"). The prevention of such harassment is precisely why the subpoena power is reserved for the courts. *See* La. Code Crim. P. art. 66(a) cmt. (noting that the court approval requirement "answers the only real objection to the device, *i.e.*, the possible abuse of it by the district attorney."); *see also Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (explaining that subpoenas to testify are "subject, of course, to the supervision of the presiding judge as to the propriety, purposes, and scope of . . . the inquiry"). By fraudulently assuming this power for themselves, Defendants here abused their prosecutorial authority in a manner that violates the concept of ordered liberty.

Beyond this arbitrary conduct, Defendants' actions infringed on Plaintiffs' interest in their own bodily autonomy by pressuring them to appear at a prosecutor's office for private interrogation. *See, e.g.*, ROA. 761 ¶ 323 ("Ms. LaCroix . . . did not feel at liberty to travel or leave the state until the purported subpoena was quashed."). For Plaintiffs Singleton and Baham, Defendants' reliance on fake subpoenas *in a court filing* resulted in actual imprisonment. So too with Defendants' falsehoods in

Plaintiff Roe's warrant application. That Defendants' liberty-infringing conduct also involved "a deliberate deception of court" further highlights its unconstitutional nature. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (observing that deceiving the court to procure a conviction is "inconsistent with the rudimentary demands of justice"). The Constitution does not permit the state, with a false document as its only source of authority, to compel its citizens to submit.

The Second Circuit's analysis of the claim in *Burns* illustrates just how deeply-rooted the right to be free from lawless government harassment is, particularly in the context of attempts to compel participation in an investigation. The court noted that "outrage regarding . . . [certain] investigative methods of the British was a major cause of the Revolution, and guided the Framers in crafting the Bill of Rights." *Burns*, 890 F.3d at 90. In particular, these included the "'reviled … 'writs of assistance,'" which allowed a British officer to "command all to assist him" in his investigation. *Id.* (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)). "As Justice Gorsuch recently recounted, such practices ignited the fury of the colonists largely because they forced individuals to serve as 'snitches and snoops' for the Crown." *Id.* (citing Tr. of Oral Arg. at 82, *Carpenter v. United States*, 138 S. Ct. 2206 (2018)). This is exactly the sort of unchecked power Defendants wrongly assumed when they—through a persistent fraud on the Louisiana courts—commanded that Plaintiffs attend private meetings to assist in state prosecutions

under penalty of arrest.

That "these concerns provided the foundation for the Fourth Amendment" and formed the basis of the Second Circuit's First Amendment analysis only underscores that the freedom from lawless government harassment is deeply ingrained in the American tradition. *Burns*, 890 F.3d at 90 (citing *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 327 (1972)). Accordingly, outside the context of a judicial proceeding or process, courts have long recognized a "broader frame of constitutional protection from the government's ability to compel participation in investigative measures." *Id*. at 91; *see also, e.g.*, *Terry v. Ohio*, 392 U.S. 1, 32–33, 88 (1968) (Harlan, J., concurring) ("[O]rdinarily the person addressed has an equal right to ignore his interrogator and walk away"). Defendants did not just violate this core constitutional protection; they made fraudulent use of the judicial process to do it.

3. Plaintiffs' Claims Are Facially Plausible

Defendants also contend in cursory fashion that Plaintiffs' substantive due process claim lacks "facial plausibility" because they did not plead sufficient "factual content." Appellants' Br. at 39. In making this argument, Defendants focus exclusively on the Complaint's summary of Count IV—one paragraph in a 452 paragraph complaint. *Id*. at 38. But courts examine sufficiency based on the complaint as a whole, not isolated paragraphs. *See Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009). Plaintiffs' complaint pleads more than enough facts to allege that Defendants violated their constitutional rights and infringed upon their liberty.

C. Plaintiffs Sufficiently Pled Claims for Abuse of Process and Fraud

1. Abuse of Process

Count VIII alleges that Defendants committed abuse of process for (a) creating and using fraudulent subpoenas and (b) misusing of Louisiana's material witness statute. The district court found that Plaintiffs' abuse of process claims based on the use of fraudulent subpoenas could proceed against Defendant Cannizzaro, in his official capacity, and against certain Individual Defendants for both damages and injunctive relief. ROA.778–79 ¶¶ 441–46. However, per its absolute immunity rulings, the district court allowed the claims based on the misuse of material witness warrants to proceed against only Defendant Cannizzaro in his official capacity and against Individual Defendants for injunctive relief. ROA.1561. For the reasons that follow, Plaintiffs have stated claims for abuse of process based on both categories of conduct.

a. Fraudulent Investigative Subpoenas

Abuse of process involves the "malicious perversion of a legally issued process whereby a result not lawfully or properly obtainable under it is attempted to be secured." *Succession of Cutrer v. Curtis*, 341 So. 2d 1209, 1214 (La. Ct. App. 1976) (quotations omitted). To state an abuse of process claim, a complaint must

allege "(1) the existence of an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular prosecution of the proceeding." *Mills v. City of Bogalusa*, No. CV 13-5477, 2016 WL 2992502, at *14 (E.D. La. May 24, 2016) (citing *Waguespack, Seago & Carmichael (A PLC) v. Lincoln*, 768 So. 2d 287, 290-91 (La. App. 2000)).

Defendants do not dispute that Plaintiffs have pled ulterior motive. *See* Appellants' Br. at 51–52. Instead, they contend that there can be no abuse of process for "allegations that the Defendants used fraudulent documents that were not in fact 'legally issued." *Id.* (quoting cases). In other words, Defendants argue that because their alleged conduct was *illegal*, they did not abuse any "legally issued" process.

Defendants' argument misunderstands the law. In this context, "legally issued" means that the process at issue is normally associated with legal proceedings or courts. *See Almerico v. Dale,* 927 So. 2d 586, 594 (La. Ct. App. 2006) (explaining that "the 'process' part of the cause of action" must refer to "legal process, or court process"); *see also Ioppolo v. Rumana*, 581 F. App'x 321, 326 (5th Cir. 2014) (rejecting claim because the process at issue—an organization's internal disciplinary proceeding—was not "legal process, or court process").

Courts have never limited this tort to process that was *validly* issued. Indeed, the Louisiana Court of Appeals specified that abuse of process occurs when a government officer "fail[s] to comply with the proper procedures or rules set out by

law for conducting official actions." *Taylor v. State*, 617 So. 2d 1198, 1205–06 (La. Ct. App. 1993).

Here, Defendants used an investigative subpoena—undoubtedly a legal process—to "obtain a result not proper under law," *Ioppolo*, 581 F. App'x at 325 (quotations omitted): to secure coercive investigative interviews without court oversight. ROA.779 ¶ 442. This constitutes abuse of process.

b. Material Witness Warrants

Defendants' arguments about whether they committed abuse of process by "issuing" fraudulent subpoenas are inapplicable to the misuse of material witness warrants. Accordingly, Plaintiffs abuse of process claims based on the abuse of material witness warrants must proceed.

Moreover, Defendants' abuse of material witness warrants is a textbook example of the conduct this tort was designed to address. Plaintiffs allege that prosecutors applied for material witness warrants—a legal process that exists to secure essential witness testimony in court—with the ulterior purpose of securing private meetings with the witnesses outside of court. *See* ROA.778–79 ¶¶ 441–42. Since "[u]sing the legal process for an improper reason is the crux of finding an abuse of process," *Melius v. Keiffer*, 980 So. 2d 167, 173 (La. Ct. App. 2008), Plaintiffs' allegations easily meet the pleading standard.

2. Fraud

Count IX of the Complaint alleges that Defendants committed fraud under Louisiana law by creating and delivering documents that purported to be "subpoenas," but which were not, in fact, subpoenas. ROA.780 ¶¶ 447–52. The district court allowed Plaintiffs' fraud claims to proceed against Defendant Cannizzaro, in his official capacity, and against certain Individual Defendants for both damages and injunctive relief. ROA.1561.

Under Louisiana law, the tort of fraud requires (1) a misrepresentation of material fact; (2) made with the intent to deceive; (3) reasonable or justifiable reliance by the plaintiff; and (4) resulting injury. *Schaumburg*, 421 F. App'x at 442 . Defendants do not dispute that Plaintiffs have pled the first two elements. Instead, they contend that Plaintiffs did not rely on the "subpoenas" or experience a "resulting injury." Appellants' Br. at 52–53.

Defendants argue that the fact that Plaintiffs Bailey and LaCroix "hired attorneys to challenge the fraudulent subpoenas" they received demonstrates that "they did *not* believe that these documents were legally valid or act in reliance on such a belief." Appellants' Br. at 53. That assertion defies common sense. Plaintiffs would not have hired lawyers if they thought they were free to disregard these documents. Plaintiffs Bailey and LaCroix also allege that they believed that the

fraudulent subpoenas—and the accompanying threats of jail—were real. *See* ROA.759–761 ¶¶ 310, 316, 319–320, 323. That must be taken as true.

Defendants also argue that Plaintiff Doe did not rely on a "subpoena," but instead retained counsel because of "Defendant Dover's persistent attempts to speak privately with her." ROA.756 ¶ 289; *see* Appellants' Br. at 52. Of course, Defendants ignore Plaintiffs' allegations showing that these "persistent attempts" *started with Defendant Dover's hand-delivery of a fraudulent subpoena*. ROA.756 ¶ 288.

As a result of Defendants' fraud, these Plaintiffs suffered but-for economic injury: the cost of hiring counsel to confront it. This constitutes reliance. *See Sun Drilling Prod. Corp. v. Rayborn*, 798 So. 2d 1141, 1153 (La. Ct. App. 2001).

D. SIV Has Stated Claims for Relief

Plaintiff SIV, a non-profit victims' rights organization, brought claims on its own behalf against Defendant Cannizzaro, in his official capacity, for the unconstitutional policies and practices that harmed it. ROA.772–80 ¶¶ 415–52. The district court allowed SIV's First, Fourth, and Fourteenth Amendment official-capacity claims to move forward. The court also allowed its failure to supervise and intervene claims (Counts VI and VII), and well as its state law claims (Counts VIII and IX), to proceed. ROA.1560–61.

Defendants argue that SIV has not alleged any injury and that it has not

"adequately allege[d] any constitutional violation." Appellants' Br. at 46. In reality, SIV has done both. It alleges that Defendants' policies have violated the constitutional rights of Plaintiffs and others in the ways identified *supra*. ROA.772–80 ¶¶ 415–52. And it alleges that its organizational interests have been harmed as a result, particularly through the diversion of its resources from crime prevention to protecting victims from Defendants' unlawful practices. *See* ROA.740 ¶¶ 171; ROA.767–71 ¶¶ 389–413. Such injuries are plainly cognizable. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (finding that "there c[ould] be no question that the organization[al] plaintiff ha[d] suffered injury in fact" where the challenged policy had allegedly "impaired [its] ability to provide counseling and referral services"); *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350, 360 (5th Cir. 2006) (finding that an organizational plaintiff had shown an injury because the organization had "expended definite resources counteracting the effects" of the challenged policy).[17]

Defendants also cherry-pick passages from Plaintiffs' past briefing to suggest that SIV challenges policies in the abstract rather than actual constitutional violations. But the cited language merely explains that—as the law requires—SIV's

[17] These cases were decided in the context of disputes about standing. However, Defendants have offered no law to suggest that what constitutes injury in the standing context is different from what constitutes injury in order to state a claim on the merits.

official-capacity claims are based on policies to commit constitutional violations, rather than on any isolated violation. *See Hicks-Fields v. Harris County, Tex.*, 860 F.3d 803 (5th Cir. 2017) (explaining need to identify an official policy as the cause of a constitutional violation). Plaintiffs have never suggested that SIV does not need to show that the challenged policies were actually unconstitutional; indeed, Plaintiffs have both pled and argued that they were. ROA.772–80 ¶¶ 415–52; ROA. 1062–91.

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of June, 2019, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Ryan C. Downer

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because it contains 12,973 words, as determined by the word-count function of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2.

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

/s/ Ryan C. Downer

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I hereby certify that, in the foregoing brief filed using the Fifth Circuit CM/ECF document filing system, (1) the privacy redactions required by Fifth Circuit Rule 25.2.13 have been made, (2) the electronic submission is an exact copy of the paper document, and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanner and is free of viruses.

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