TABLE OF CONTENTS

ARGUMENT 2

I. Prosecutorial Immunity Arises Historically Under the Common Law, Not Under Minnesota or Federal Statutes 2

A. *Imbler* and *Brown* Establish the Functional Approach to Prosecutorial Immunity at Common Law 2

B. Decisions by the United State Supreme Court Remain Highly Persuasive Authority in Minnesota for the Common Law Principles of Absolute Immunity 5

C. The Minnesota Court of Appeals Deviated from Common Law by Extending Absolute Immunity to Investigators 7

II. Investigation Is Not a Prosecutorial Function Protected by Absolute Immunity 9

A. Non-Prosecutors Are Entitled to Absolute Immunity When Their Function Is Comparable to That of a Prosecutor Instead of That of a Police Officer 10

B. Investigation Is Not Intimately Involved with the Judicial Process Before the Investigator Has Established Probable Cause 13

III. Denying Absolute Immunity for Investigations Will Not Harm the Judicial Process and Is Necessary to Avoid Blurring the Line Between Prosecutors and Police 15

A. The Safeguards Justifying Absolute Immunity for Quasi-Judicial Conduct Are Not Present During Investigation of a Crime..... 16

B. Applying Absolute Immunity for Investigative Acts Will Blur the Line Between the Work of Prosecutors and Police 18

C. Denying Absolute Immunity for Investigative Acts Will Not Give Rise to Vexatious Litigation or Harm the Judicial Process 19

CONCLUSION..... 22

TABLE OF AUTHORITIES

Page(s)

Cases

Achterhof v. Selvaggio,
886 F.2d 826 (6th Cir. 1989) 11

Austin v. Borel,
830 F.2d 1356 (5th Cir. 1987) 11

Barry v. Johnson,
350 N.W.2d 498 (Minn. Ct. App. 1984).....8

Beaman v. Souk,
863 F. Supp. 2d 752 (C.D. Ill. 2012).....6

Briscoe v. LaHue,
460 U.S. 325 (1983) 10

Brown v. Dayton Hudson Corp.,
314 N.W.2d 210 (Minn. 1981) ..... *passim*

Buckley v. Fitzsimmons,
509 U.S. 259 (1993) ..... *passim*

Burns v. Reed,
500 U.S. 478 (1991) ..... *passim*

Butz v. Economou,
438 U.S. 478 (1978) 16, 17

Chadha v. Charlotte Hungerford Hosp.,
865 A.2d 1163 (Conn. 2005) 6

City of Shorewood v. Metro. Waste Control Comm'n,
533 N.W.2d 402 (Minn. 1995) 15

Elwood v. Rice County,
423 N.W.2d 671 (Minn. 1988) 5, 15, 18

Ernst v. Children and Family Servs.,
108 F.3d 486 (3rd Cir. 1997) 11

Finn v. Alliance Bank,
838 N.W.2d 585 (Minn. Ct. App. 2013) 9

Gilliam v. Dep't of Soc. & Health Servs.,
950 P.2d 20 (Wash. Ct. App. 1998) 12, 17

Hyland v. State,
509 N.W.2d 561 (Minn. Ct. App. 1993) 7, 8

Imbler v. Pachtman,
424 U.S. 409 (1975) ..... *passim*

Malley v. Briggs,
475 U.S. 335 (1986) 20

Rico v. State,
472 N.W.2d 100 (Minn. 1991) 19, 20

Robinette v. Price,
8 N.W.2d 800 (1943).....3

Sellars v. Procunier,
641 F.2d 1295 (9th Cir. 1981) 17

Simms v. Constantine,
688 A.2d 1 (Md. Ct. App. 1997) 6, 14

Snell v. Tunnell,
920 F.2d 673 (10th Cir. 1990) 11

Tennyson v. Children's Servs. Div.,
775 P.2d 1365 (Or. 1989).....12

Thompson v. SCAN Volunteers,
85 F.3d 1365 (8th Cir. 1996) 11

Statutes

42 U.S.C. § 1983 ..... 5, 6, 19, 21

Minn. Stat. § 3.736 7

Minn. Stat. § 466.03 7

Other Authorities

Minn. R. Civ. App. P. 129.03.....1

Sam Hanson, *The Minnesota Court of Appeals: Arguing to, and Limitations of, an Error-correcting Court*, 34 Wm. Mitchell L. Rev. 1261 (2009) 9

INTEREST OF *AMICUS CURIAE*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the protection of civil rights and liberties. The American Civil Liberties Union of Minnesota (ACLU-MN) is one of its statewide affiliates and has more than 8000 members in the state of Minnesota. Its purpose is to protect the rights and liberties guaranteed to all Minnesotans by the state and federal constitutions and state and federal laws.

Since its founding in 1920, the ACLU has been committed to ensuring the fairness and integrity of the justice system and to provide meaningful redress for those whose rights are violated. In furtherance of that goal, the ACLU has been involved in numerous cases across the country interpreting the scope of official immunities. Given the ACLU's mission to protect the rights and liberties of all individuals, it has an interest in ensuring that the application of absolute immunity does not have the effect of allowing government officials to violate the rights of individuals with impunity. In addition to affecting the Appellant in this case, this Court's decision will have a significant impact on the rights of all Minnesotans who seek redress for misconduct by government officials in this state.

---

[1] This brief is filed pursuant to this Court's November 19, 2014, Order granting the American Civil Liberties Union of Minnesota leave to participate as *amicus curiae*. In accordance with Minn. R. Civ. App. P. 129.03, the American Civil Liberties Union of Minnesota certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

ARGUMENT

I. Prosecutorial Immunity Arises Historically Under the Common Law, Not Under Minnesota or Federal Statutes

The grant of absolute immunity to prosecutors for actions taken within the scope of their duties is a judicial creation, not a legislative requirement. Both this Court and the Supreme Court of the United States have acknowledged that the scope of immunity afforded to public prosecutors comes from the common law. *Brown v. Dayton Hudson Corp.*, 314 N.W.2d 210, 212 (Minn. 1981); *Imbler v. Pachtman*, 424 U.S. 409, 421 (1975). The policy justifying the common law scope of immunity is based specifically on the particular function that prosecutors perform in the judicial process, rather than on a defendant's status as a prosecutor. *Imbler*, 424 U.S. at 423. It is therefore erroneous to grant officials absolute immunity based on a statutory grant of prosecutorial powers instead of a review of the function of the officials' challenged conduct.

A. *Imbler* and *Brown* Establish the Functional Approach to Prosecutorial Immunity at Common Law

In *Brown*, this Court recognized *Imbler* as a key authority setting forth the policy considerations that underlie the common law grant of absolute immunity to public prosecutors. *Brown*, 314 N.W.2d at 212. The Supreme Court noted in *Imbler* that the historic common law roots of prosecutorial immunity were based on the functional similarities between judges, grand juries, and prosecutors, all of whom were required to make discretionary judgments based on evidence presented before them. *Imbler*, 424 U.S. at 423 & n.20 ("It is the functional comparability of their

judgments to those of the judge that has resulted in both grand jurors and prosecutors being referred to as 'quasi-judicial' officers, and their immunities being termed 'quasi-judicial' as well."). *Brown* acknowledged that the "overwhelming majority of state courts have extended to prosecuting attorneys an immunity similar to that formulated by the United States Supreme Court in *Imbler*," and agreed that the need to "exercise discretionary judgment on the basis of evidence presented to them" created a need to afford prosecutors absolute quasi-judicial immunity. 314 N.W.2d at 213.

This Court's decision to embrace the functional approach to immunity in *Imbler* was consistent with its earlier opinions, which noted that quasi-judicial immunities are based on judicial function instead of judicial or quasi-judicial status. *Robinette v. Price*, 8 N.W.2d 800, 807 (1943) ("A public officer whose ***functions are judicial or quasi-judicial*** is not liable to persons injured by the honest exercise of his judgment within his jurisdiction, however erroneous his judgment may be." (emphasis added)).

But the Supreme Court was careful to recognize in *Imbler* that absolute immunity did not extend to every act by a prosecutor, because the quasi-judicial justification was absent when the prosecutor's challenged conduct took place outside of her role in the judicial process. *Imbler*, 424 U.S. at 430. The Court noted that the functional approach left standing a substantial body of case law holding "that a prosecutor engaged in certain investigative activities enjoys, not the absolute

immunity associated with the judicial process, but only a good-faith defense comparable to the policeman's." *Id.*

The distinction between a prosecutor's function as a quasi-judicial officer of the court and the non-judicial function of investigation was revisited and clarified by the Supreme Court in both *Burns v. Reed*, 500 U.S. 478 (1991) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993). The Court noted in *Burns* that the common law justification for absolute immunity only covered the initiation and presentation of the State's case insofar as the prosecutor's conduct was "intimately associated with the judicial phase of the criminal process." 500 U.S. at 486. In analyzing whether a prosecutor could obtain absolute immunity for advising police that they could obtain a confession from a witness under hypnosis, the Court found neither historical support in the common law for absolute immunity, *id.* at 492-93, nor any policy reason to justify it, *id.*, at 494-96.

The *Burns* Court acknowledged that not all of a prosecutor's conduct was "intimately connected to the judicial process" merely because it led to litigation. "Absolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor's role in judicial proceedings, not for every litigation inducing conduct." *Id.* at 494.

In *Buckley*, the Court again concluded that the functional approach to absolute immunity justified by the common law did not shield investigative actions from liability merely because they were performed

by a prosecutor. 509 U.S. at 273. The Court distinguished the tasks performed by an advocate in preparing for trial from those of a detective investigating a crime, and concluded "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect one and not the other." *Id.* at 273 (internal quotation omitted).

B. Decisions by the United State Supreme Court Remain Highly Persuasive Authority in Minnesota for the Common Law Principles of Absolute Immunity

Imbler, *Burns*, and *Buckley* all involved the application of prosecutorial immunity in the specific context of a constitutional tort brought under 42 U.S.C. § 1983. This Court has noted that federal immunity principles under section 1983 do not necessarily govern this State's tort law. *Elwood v. Rice County*, 423 N.W.2d 671, 677 (Minn. 1988). That distinction, however, is specific to the application of qualified immunity under section 1983, which has been "completely reformulated … along principles not at all embodied in the common law." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635 (1987)). Instead of applying federal immunity principles to the conduct of police officers accused of violating state law, this Court held that police conduct should be governed by common law principles of good-faith or official immunity, which immunized decisions made by officials whose duties require the exercise of judgment or discretion unless those officials were guilty of willful or malicious wrongs. *Id.*

The analysis of absolute immunity for prosecutors in *Imbler*, however, was based on the common law rule existing before section 1983 was enacted into law, not the federal principles that have since shaped qualified immunity under section 1983. *Imbler* and the federal cases that followed it are therefore still relevant to this Court's own analysis of the common law, if not directly controlling.[2] *See Beaman v. Souk*, 863 F. Supp. 2d 752, 764 (C.D. Ill. 2012) (noting that Illinois and federal doctrines of immunity for prosecutors are coterminous when applied to state-law tort claims, rather than following state-law principles of official immunity).

Unless the common law principles identified by the Supreme Court have been abrogated or modified under Minnesota law, *Imbler*, *Burns*, and *Buckley* remain the best indication of the scope of immunity provided under the common law. *Compare Simms v. Constantine*, 688 A.2d 1, 7 (Md. Ct. App. 1997) (noting that common law principles of immunity have not been abrogated nor modified in Maryland, and that the Supreme Court's analysis of the immunity of governmental officials remains highly persuasive) *with Chadha v. Charlotte Hungerford Hosp.*, 865 A.2d 1163

[2] In opposition to the petition for review in this case, Respondents suggested that reliance on cases brought under section 1983 was misleading because of the history and purpose of that statute. (Resp. to Petition at 2-3 n.1.) Because section 1983 admits of no immunities on its face, courts are reluctant to create new immunities that were not already recognized in the common law before the statute was enacted. *Buckley*, 509 U.S. at 268-69. Although this Court is not so limited in its ability to adopt new immunities to common law torts in this state, such a decision should be informed by the history and justifications of the common law rule identified in *Imbler*, *Burns*, and *Buckley*.

(Conn. 2005) (noting that common-law absolute immunity for quasi-judicial acts was abrogated by Connecticut qualified immunity statutes).

C. The Minnesota Court of Appeals Deviated from Common Law by Extending Absolute Immunity to Investigators

In this case, the panel below did not decide that an official engaged in investigative conduct would have received absolute immunity at common law. Instead, it concluded that, because the Medicaid Fraud Control Unit has statutory authority to investigate and prosecute violations relating to the Medicaid program, its chief investigator should be granted "prosecutorial immunity" for investigating fraud pursuant to that authority. (A. Add. 13.) Not only is it incongruous to base absolute immunity on a statutory grant of prosecutorial authority when there is no statutory immunity for prosecutors themselves,[3] but the grant of absolute immunity for non-judicial investigative conduct is also not supported by the common law.

The panel adopted this "statutory authority" idea from *Hyland v. State*, 509 N.W.2d 561 (Minn. Ct. App. 1993), a case in which the court of appeals held MnDOT employees who investigated a suspected permit violation under state motor-carrier laws were absolutely immune from

[3] The Minnesota Legislature has created statutory immunities for numerous actions and actors under Minnesota law. *See, e.g.*, Minn. Stat. § 3.736 (providing various state governmental entities immunity from enumerated types of tort liability); Minn. Stat. § 466.03 (providing municipal entities immunity from enumerated types of tort liability). The legislature has not, however, provided statutory immunity for prosecutors or for the act of prosecuting crimes.

accusations of slander and tortious interference because their actions were taken "pursuant to their statutory authority," which included both the investigation and prosecution of those motor-carrier laws. *Id.* at 564. The panel also cited as additional support the earlier decision in *Barry v. Johnson*, 350 N.W.2d 498 (Minn. Ct. App. 1984), which also afforded an investigator "prosecutorial immunity," albeit under a different justification than in *Hyland*. (A. Add. 12.) The court of appeals in *Barry* justified absolute immunity for an investigator because he acted at the direction of a prosecuting attorney. 350 N.W.2d at 499.[4]

The court of appeals did not cite or consider the Supreme Court's conclusion in *Burns* and *Buckley* that investigative conduct was not deserving of absolute immunity at common law in either the decision below or the decision in *Hyland*. Instead, both decisions rely on *Barry* for the proposition that Minnesota decided to extend absolute immunity to investigative acts.[5] All three court of appeals decisions failed to analyze and apply the functional approach to absolute immunity adopted by this

---

[4] In granting an individual absolute immunity because his actions were at the direction of a prosecutor instead of considering whether the conduct itself justified absolute immunity, the court of appeals in *Barry* got the functional approach entirely backwards. *See Buckley*, 509 U.S. at 273-74 ("[I]f a prosecutor plans and executes a raid on a suspected weapons cache, he 'has no greater claim to complete immunity than activities of police officers allegedly acting under his direction.'" (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973)).

[5] *Barry* was decided in 1984 before the Supreme Court's decisions in either *Burns* or *Buckley*. *Barry* did cite *Imbler*, but similarly failed to note the Supreme Court's attention to the distinction between investigation and prosecution in that case.

Court in *Brown* and articulated in *Imbler*. By simply extending "prosecutorial immunity" to a non-prosecutor for non-prosecutorial conduct, the court of appeals has created a new rule of law that is inconsistent with immunity principles applied across this country.

Neither *Barry* nor *Hyland* nor the decision below cited any Minnesota authority that suggested the common law had historically extended absolute immunity for investigatory acts, or that the Minnesota legislature or Minnesota Supreme Court had abrogated or amended the common law that was identified in *Imbler* and its progeny. It is well established that the court of appeals is an error-correcting court, and that it does not have the authority to create new law to resolve its cases. *Finn v. Alliance Bank*, 838 N.W.2d 585, 603 (Minn. Ct. App. 2013) (noting the court of appeals' role is "primarily decisional and error correcting" and it is "without authority to change the law"); *see generally*, Sam Hanson, *The Minnesota Court of Appeals: Arguing to, and Limitations of, an Error-correcting Court*, 34 Wm. Mitchell L. Rev. 1261 (2009). Yet the decisions of *Barry, Hyland*, and the decision below all expressed an unsupported change in law by extending absolute immunity to conduct that had never given rise to absolute immunity at common law.

II. Investigation Is Not a Prosecutorial Function Protected by Absolute Immunity

The Supreme Court has made clear that absolute immunity insulates conduct within the scope of a particular function—that a defendant's status or job title does not entitle her to absolute immunity.

Briscoe v. LaHue, 460 U.S. 325, 342 (1983). In *Brown*, this Court noted that the "discretionary decision whether to charge and whether to continue a prosecution lies at the very heart of the prosecutorial function." *Brown*, 314 N.W.2d at 214. Prosecutorial immunity was therefore held to apply specifically to the "duties [of] filing and maintaining criminal charges." *Id.*

While the prosecutorial functions immunized in *Brown* related specifically to the quasi-judicial role of "exercis[ing] discretionary judgment on the basis of evidence presented" to prosecutors, *Id.* at 213, the same is not true for mere investigation, which involves only the gathering of evidence that quasi-judicial actors are tasked with exercising judgment upon. Particularly when this gathering of evidence occurs before probable cause exists to bring charges against a suspect, investigation cannot be said to be so intimately involved in the judicial process as to warrant absolute immunity.

A. Non-Prosecutors Are Entitled to Absolute Immunity When Their Function Is Comparable to That of a Prosecutor Instead of That of a Police Officer

Because absolute immunity is determined by the function of the act in question instead of the status of the actor, it does not matter who the individual is performing it. Non-prosecutors can still receive absolute immunity for tasks that are comparable to that of a prosecutor, because the policy considerations of absolute immunity apply generally to the quasi-judicial function of "exercis[ing] discretionary judgment on the basis of evidence presented." *Brown*, 314 N.W.2d at 214. To refer to the

immunity as "prosecutorial" is really only a shorthand for identifying absolute immunity that is justified by the conduct of an individual that is comparable to "filing and maintaining criminal charges." *Id*. But as *Imbler*, *Burns*, and *Buckley* make clear, investigation has never been a function particular to a prosecutor that justified absolute immunity at common law.

One common example of non-prosecutors receiving quasi-judicial immunity comparable to that of a prosecutor is that of child welfare workers, who have the authority to investigate and initiate court proceedings regarding suspected child abuse. Courts have noted that child welfare workers who initiate judicial proceedings for child abuse are entitled to absolute immunity because the task is prosecutorial in nature. *See, e.g.*, *Ernst v. Children and Family Servs.*, 108 F.3d 486, 496 (3rd Cir. 1997); *Thompson v. SCAN Volunteers*, 85 F.3d 1365, 1373 (8th Cir. 1996).

However, courts are unwilling to afford absolute immunity to investigative actions taken by child welfare workers outside the context of a judicial proceeding. *See, e.g.*, *Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990) (holding that pre-adjudicatory investigative activities by child welfare workers are entitled only to qualified immunity); *Achterhof v. Selvaggio,* 886 F.2d 826 (6th Cir. 1989) (holding that opening and investigating child abuse case and placing parent's name on central registry of abusers are investigative and administrative activities entitled only to qualified immunity); *Austin v. Borel,* 830 F.2d 1356 (5th Cir. 1987)

(holding that filing of complaint that allowed child services to obtain custody but did not initiate adjudicative proceeding was analogous to police officer's complaint filed to obtain arrest warrant and was therefore entitled only to qualified immunity).

In the context of child welfare workers investigating suspected abuse, the Oregon Supreme Court noted that the function performed was no different from the function of police investigating a crime. *Tennyson v. Children's Servs. Div.*, 775 P.2d 1365, 1370 (Or. 1989). The Oregon Supreme Court concluded that this function was not entitled to absolute immunity under the common law principles identified in *Imbler* because "investigating abuse is not an 'integral part of the judicial process.' Investigation may lead no further or may lead to action not involving this court." *Id.*; *see also Gilliam v. Dep't of Soc. & Health Servs.*, 950 P.2d 20, 28 (Wash. Ct. App. 1998) (concluding investigation of child abuse is not intimately associated with the judicial phase of a proceeding).

The fact that an investigation might lead to court proceedings is not sufficient to make investigation "intimately associated with the judicial phase of the criminal process," even when the investigator is the same person making the decision whether to bring charges. The Supreme Court has said 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, but we have never indicated that absolute immunity is that expansive." *Burns v. Reed*, 500 U.S. at 495.

To grant absolute immunity to an official simply because that official has statutory authority to both investigate and prosecute violations of law would be to ignore the functional approach to immunity adopted in *Brown*, and instead base absolute immunity on nothing more than the official's status under a state statute.

B. Investigation Is Not Intimately Involved with the Judicial Process Before the Investigator Has Established Probable Cause

The Supreme Court has acknowledged that some preparatory conduct by a prosecutor is inherently tied to her quasi-judicial function, so absolute immunity does not necessarily depend on in-court activity. *Buckley*, 509 U.S. at 273. However, the Court has also identified one clear line between the quasi-judicial and non-quasi-judicial function of a prosecutor that demonstrates why the investigation the present case should not be afforded absolute immunity.

A prosecutor cannot be said to engage in her quasi-judicial function before probable cause exists to arrest a suspect. *Buckley*, 509 U.S. at 274 ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested."). The fact that an investigation ***might*** lead to an arrest and prosecution is insufficient to give rise to absolute immunity. All investigations might lead to prosecution, so to grant absolute immunity for some investigators and not others would be inconsistent with the principle that immunity is granted because of the function of activity rather than the status of the actor.

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other."

Buckley, 509 U.S. at 273 (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973)). Far from allowing immunity to apply because investigation might lead to eventual prosecution, *Buckley* rejected the notion that ***actual*** prosecution could retroactively immunize a prosecutor's tortious conduct during the investigation phase. *Buckley*, 509 U.S. at 276.

The mere fact that investigative conduct bears a relationship to the decision whether to bring suit is insufficient for the purposes of absolute immunity. *Burns v. Reed*, 500 U.S. at 495; *see also Simms v. Constantine*, 688 A.2d at 12 ("Even though the investigation of the case bears a necessary cause-and-effect relationship to the later judicial phase of the case, that is not enough to entitle the investigative function to absolute immunity.").

By drawing a line at probable cause to arrest or indict an individual suspected of a crime, courts can distinguish the act of ***gathering*** evidence, which is generally associated with police work, from exercising discretion over how to ***use*** the evidence that has been gathered, which is the conduct *Brown* identified as being quasi-judicial in nature. *Brown*, 314 N.W.2d at 213.

III. Denying Absolute Immunity for Investigations Will Not Harm the Judicial Process and Is Necessary to Avoid Blurring the Line Between Prosecutors and Police

This Court has defined quasi-judicial acts as those "which are presumably the product or result of investigation, consideration, and deliberate human judgment based upon evidentiary facts of some sort commanding the exercise of [an official's] discretionary power." *City of Shorewood v. Metro. Waste Control Comm'n*, 533 N.W.2d 402, 404 (Minn. 1995) (internal quotation marks omitted). But the fact that an official is charged with discretion within the scope of her duties is insufficient by itself to warrant absolute immunity. The general default is that "a public official charged by law with duties which call for the exercise of judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." *Elwood v. Rice County*, 423 N.W.2d 671, 677 (Minn. 1988) (internal quotation marks omitted).

It is the "exercise [of] discretionary judgment on the basis of evidence presented" that is the hallmark of absolutely immune quasi-judicial conduct and the judicial process. *Brown*, 314 N.W.2d at 213. Absolute immunity is meant to protect the judicial process itself by ensuring quasi-judicial actors have the wide discretion needed to determine where truth lies. *Imbler*, 424 U.S. at 425; *id.* at, 439-40 (White, J., concurring). This differs from the good-faith immunity that protects the discretionary judgment of most public officials. The judicial process has in place many safeguards that justify denying individuals the right to

bring suits for private damages that might otherwise discourage unlawful conduct.

A. The Safeguards Justifying Absolute Immunity for Quasi-Judicial Conduct Are Not Present During Investigation of a Crime

Generally, private damages actions are an important means of preventing tortious conduct by officials carrying out governmental functions. *See Butz v. Economou*, 438 U.S. 478, 512 (1978). The common law extended absolute immunity to quasi-judicial functions, however, to protect the judicial process itself from harassment or intimidation. *Id.* Although absolute immunity created a risk that citizens will suffer irremediable wrongs at the hands of quasi-judicial figures, courts have justified the tradeoff because the judicial process itself provides checks on unlawful conduct that would otherwise be deterred by lawsuits seeking private damages. *Id.*

> [T]he safeguards built into the judicial process tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct. The insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal are just a few of the many checks on malicious action by judges. Advocates are restrained not only by their professional obligations, but by the knowledge that their assertions will be contested by their adversaries in open court. Jurors are carefully screened to remove all possibility of bias. Witnesses are, of course, subject to the rigors of cross-examination and the penalty of perjury. Because these features of the judicial process tend to enhance the reliability of information and the impartiality of

> the decisionmaking process, there is a less pressing need for individual suits to correct constitutional error.

Id.; *see also Sellars v. Procunier*, 641 F.2d 1295, 1300 (9th Cir. 1981) ("[T]he balance might not be struck in favor of absolute immunity were it not for the presence of safeguards built into the judicial process that tend to reduce the need for private damage actions as a means of controlling unconstitutional conduct.").

The same procedural checks do not exist to help ensure that officials given authority to investigate possible crimes do not abuse their power. *Gilliam v. Dep't of Soc. & Health Servs.*, 950 P.2d 20, 28 (Wash. Ct. App. 1998) ("The mechanisms of the adversarial process do not directly promote proper investigative practices, nor do they supply sufficient assurance that carelessness or deliberate misconduct will come to light before irreparable harm occurs."). Indeed, misconduct during an investigation may never come to light if the suspect is never charged with a crime. *See Burns*, 500 U.S. at 496 ("This is particularly true if a suspect is not eventually prosecuted. In those circumstances, the prosecutor's action is not subject to the 'crucible of the judicial process.'").

Mere investigation of a possible crime—especially investigation that never leads to formal charges—similarly exists outside of any safeguards of the judicial process. An official's investigatory actions are not subject to the checks operating on judicial decisionmakers, nor are they part of or ancillary to pending judicial proceedings supervised by a judge. Because of this, affording absolute immunity for investigatory

conduct would leave individuals without any meaningful remedies for tortious or wrongful conduct by investigating officials.

B. Applying Absolute Immunity for Investigative Acts Will Blur the Line Between the Work of Prosecutors and Police

If investigation of possible crimes were considered to be "intimately associated with the judicial phase of the criminal process," police officers would be entitled to absolute immunity. This is not the case in Minnesota. *Elwood*, 423 N.W. 2d at 677-78 (applying good-faith immunity to police conduct). Instead, the act of gathering evidence is distinct from the act of "exercis[ing] discretionary judgment on the basis of evidence presented," which *Brown* identified as the heart of the prosecutorial function. 314 N.W.2d at 214.

The conduct at issue in this case is nothing more than ordinary police-type investigation involving the gathering and subsequent disposal of evidence. The fact that an agency is granted statutory authority to investigate and prosecute suspected crimes does not somehow elevate investigation by that agency to a different level of conduct than police investigation. It is the function of the challenged activity, not the defendant's status or general job duties, that give rise to absolute immunity.

The judicial process is concerned with deciding the consequences that follow from the examination of the evidence already gathered. If a non-prosecutor is given absolute immunity because her investigative acts are considered preparatory for a judicial phase that never occurred, the

distinction between a police officer's investigation (the gathering of evidence) and the prosecutor's discretionary judgment applied to the facts turned up in an investigation (the use of that evidence) disappears entirely. Without such a clear distinction, courts will apply absolute immunity to investigations by police officers as well, so long as a prosecutor can draw a line between that investigation and her conduct initiating and maintaining charges against the subject of the investigation.

In order to maintain clear lines between absolute and good-faith immunity in Minnesota, officials performing police-type investigative functions should be granted no more immunity than a police officer would be granted for the same activity. This is the law for qualified immunity under section 1983. *See Buckley*, 509 U.S. at 276. It should remain the same for official immunity under the Minnesota common law. *See Rico v. State*, 472 N.W.2d 100, 108 (Minn. 1991) (noting that, although official immunity remained a separate doctrine from qualified immunity, both further the purpose of preventing public officers from being inhibited in the effective and independent performance of their duties and federal decisions under section 1983 are therefore instructive).

C. Denying Absolute Immunity for Investigative Acts Will Not Give Rise to Vexatious Litigation or Harm the Judicial Process

The concern with burdensome litigation in absolute immunity cases is not merely a generalized concern about interference with an official's duties, but instead is a specific concern about litigation interfering with conduct closely related to the judicial process. *See Burns*,

500 U.S. at 494. Prosecutors are afforded absolute immunity for their function as an advocate "because any lesser degree of immunity could impair the judicial process itself." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The judicial process is not similarly threatened when a police officer is afforded only good-faith immunity. *Id.* (rejecting police officer's argument that his function in requesting a warrant was comparable to the functions performed by prosecutors).

When it comes to investigatory conduct, the judicial process is not threatened by less-than-absolute immunity. Good-faith immunity has been sufficient for police officers and other officials in this state, and it will continue to ensure that those investigating crimes—whether police, prosecutors, or others with statutory duties to investigate—will be neither cowed into timidity nor distracted by burdensome litigation. *Burns*, 500 U.S. at 486 ("The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.").[6]

In contrast, the Supreme Court has noted that absolute immunity for prosecutors was justified at common law because it prevented the

[6] In Minnesota, official immunity requires that a defendant have reason to know that the challenged conduct is prohibited before being subjected to lawsuit. *Rico*, 472 N.W.2d at 107. Thus, an official is not threatened with liability simply by performing an act that is subsequently determined to be wrong. *Id.* By barring suit unless an investigating official intentionally commits an act that he or she has reason to believe is prohibited, official immunity will be sufficient to ensure that only clear-cut tort cases go forward. *Cf. Malley*, 475 U.S. at 341 (noting that under section 1983, qualified immunity "provides ample protections to all but the plainly incompetent or those who knowingly violate the law.").

distraction of claims of malicious prosecution, which could follow in every case in which a prosecutor failed to obtain a conviction. *Imbler*, 424 U.S. at 423. This was not an insignificant threat because such suits "could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate." *Id.* at 425.

Officials do not face the same threat of suit related to the mere investigation of a potential crime. There is no common law tort for "malicious investigation," nor is there any general common law right to be free from investigation that might influence a timid official to avoid investigating a potential crime for fear of suit. An official would only face claims related to her investigation if her conduct specifically violated constitutional rights under section 1983 or state common law rights, such as the property rights at issue in the claims against Morton-Peters.

There is no reason to worry that requiring investigators to refrain from conduct that he or she has reason to believe is prohibited will somehow impair his or her ability to conduct investigations in the first place. Rather than cowing an official into timidity with regard to her investigatory duties, official immunity provides incentives for an official to follow clearly established law. The only adverse consequences related to liability for investigatory conduct already "are present with respect to suits against policemen, school teachers, and other executives, and have never before been thought sufficient to immunize an official absolutely

no matter how outrageous his conduct." *Imbler*, 424 U.S. at 436 (White, J., concurring).

CONCLUSION

The State of Minnesota, like the overwhelming majority of states, has adopted the functional approach to absolute immunity that is justified by the common law and outlined in the United States Supreme Court's prosecutorial immunity cases. As the Supreme Court and other courts have repeatedly stated, acts that fulfill an investigatory function do not merit absolute immunity. Investigating officials are sufficiently protected by the good-faith immunity to which police officers are entitled for their own investigative conduct, and an official's prosecutorial status or authority does not transform that conduct into something that warrants absolute immunity.

The court of appeals has on three occasions improperly extended absolute immunity to investigating officials without properly analyzing the function of their conduct under this Court's decision in *Brown*. By failing to apply the functional approach to absolute immunity for investigating officials, the court of appeals has dangerously blurred the line between the conduct of prosecutors and of police officers, who are normally entitled to no more than good-faith immunity for alleged misconduct. The court of appeals has also extended absolute immunity to conduct that does not have the same safeguards as the judicial process to ensure that individuals have some meaningful protection from tortious activity by government officials.

For all of these reasons, this Court should reverse the decision of the court of appeals and re-affirm the functional approach to absolute quasi-judicial immunity that was announced as the law of this state in *Brown v. Dayton Hudson Corp.*

December 8, 2014

Respectfully Submitted,

Richard C. Landon (#0392306)
GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 632-3000

And

Teresa Jo Nelson (#0269736)
AMERICAN CIVIL LIBERTIES
UNION OF MINNESOTA
2300 Myrtle Avenue, Suite 180
Saint Paul, MN 55114
(651) 645-4097 ext. 122

Attorneys for Amicus Curiae American Civil Liberties Union of Minnesota

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. This brief was prepared using Microsoft Word 2010, using Book Antiqua font in 13 point type, and contains 5,672 words, including footnotes.

Richard C. Landon

GP:3845566 v1