**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF VIRGINIA**
**Richmond Division**

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| **MICHELE WHITE,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**JASON S. MIYARES,**<br>**JOSHUA N. LIEF,**<br>**MARK P. DE ALMEIDA, and**<br>**HOWARD MULHOLLAND,**<br><br>**Defendants.** | **Case No. 3:24-cv-00725-HEH** |

**REPLY IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS JASON S. MIYARES AND JOSHUA N. LIEF**

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## PRELIMINARY STATEMENT

The Office of the Attorney General of Virginia (OAG) investigated Michele White for violating Virginia's election laws in the course of her duties as the General Registrar for Prince William County (the "County"). That investigation revealed evidence that White had violated the law, so OAG, with the help of local prosecutors, presented the findings to a grand jury, which found probable cause that White had committed a crime. When a key witness changed his story before trial, however, the Commonwealth reasonably decided not to pursue the charges. Now, White contends that the handling of the matter by Attorney General Jason S. Miyares and former Senior Assistant Attorney General Joshua N. Lief (the "Prosecutors"), and investigators Mark de Almeida and Howard Mulholland (the "Investigators"), amounted to malicious prosecution in violation of federal and state law.

Discovery will show there is no merit to her claims against any of the Defendants. But White's allegations against the Prosecutors cannot even get that far, due to the robust protections of prosecutorial immunity. To circumvent those protections, White tries to pin liability on their roles in creating the OAG's Election Integrity Unit (EIU) as well as on Lief's participation in the criminal investigation. But she has not plausibly shown that creating the EIU proximately caused an unlawful seizure, and her allegations regarding Lief's role in the investigation are conclusory and do not remove the shield of immunity. White's eleventh-hour efforts in her Opposition to embellish her theory of the case lack adequate support in her Complaint.

All claims against the Prosecutors should be dismissed.

## ARGUMENT

### I. THE COURT SHOULD DISMISS THE FEDERAL SECTION 1983 CLAIM AGAINST THE PROSECUTORS.

The factual allegations in the Complaint fall into three buckets: (1) the pre-investigation phase, during which the Prosecutors created and staffed the EIU; (2) the investigation phase, which started when the Investigators were assigned to the case and continued until the grand jury handed down its indictment; and (3) the post-indictment phase, which started after the grand jury indicted White and lasted until all charges were dismissed. White's Opposition never relies on allegations in the third bucket because "acts occurring after an indictment are generally protected by absolute immunity." Pl.'s Mem. in Opp'n to Defs. Miyares and Lief's Mot. to Dismiss 2 n.1, ECF 27 ("Opp'n").

For Attorney General Miyares, White focuses solely on allegations in the first bucket (creation of the EIU). *See* Opp'n 1–2; *see also* Opp'n 21–22. For Lief, White relies on allegations in the first two buckets. She "does not dispute that the act of initiating charges after reviewing the evidence produced during the formal investigation is protected by absolute immunity." Opp'n 2; *see generally* Mem. in Supp. of Mot. to Dismiss by Defs. Miyares and Lief 10–12, ECF 25 ("Mot."). And she insists that she "does not rest her claim on the actual presentation of fabricated evidence to the grand jury." Opp'n 26. *But see* p. 12, *infra*. That leaves allegations beginning with Lief's role in creation of the EIU up until he allegedly convened the grand jury.

None of these allegations states a claim for relief against the Prosecutors.

### A. The Alleged Pre-Investigation Conduct Does Not Support a Claim for Malicious Prosecution.

#### 1. White has not plausibly alleged pre-investigation conduct by the Prosecutors that proximately caused her seizure.

Ordinary principles of proximate cause apply in Section 1983 actions. *Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994). The parties largely agree in substance on the causation standard: proximate cause "require[s] consideration of the 'foreseeability or the scope of the risk created by the predicate conduct'" and a "conclu[sion] that there was 'some direct relation between the injury asserted and the injurious conduct alleged.'" *Cnty. of Los Angeles v. Mendez*, 581 U.S. 420, 431 (2017) (citation omitted); *accord Amisi v. Brooks*, 93 F.4th 659, 670 (4th Cir. 2024) (requiring causal connection and foreseeability of risk).[1]

As the Prosecutors previously explained (Mot. 8), the Prosecutors' pre-investigation conduct—i.e., the "first bucket" allegations—did not proximately cause any unlawful seizure. White's allegations in this first bucket all sound in concerns about the Attorney General's and Lief's roles as supervisors of the EIU. White cites a lack of "any reporting structure or approval process for opening and conducting investigations"; failure to "provide any guidelines, procedures, training materials, or other similar documents to govern the [EIU's] operations"; improper staffing; and inadequate training. Compl. ¶¶ 102–08, ECF 1; Opp'n 3–4. Courts routinely analyze Section 1983 claims based on these types of actions (or inactions) under the framework of supervisory liability. *See, e.g.*, *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (failure to train); *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 400 (1997) ("hiring and training decisions"); *Shaw*, 13 F.3d at 797 (failure to train, supervise, and discipline); *Slakan v. Porter*, 737 F.2d 368,

[1] Although White quibbles with the Prosecutors' choice of citations, Opp'n 9 n.3, 12 n.5, she ultimately agrees that this same standard applies, *see* Opp'n 8 (citing *Amisi* for the causation standard).

371 (4th Cir. 1984) ("failure to enact regulations").[2] White has failed to meet the standard for demonstrating causation sufficient to prove supervisor liability.

The standard for supervisor liability is "rigorous." *Bryan Cnty.*, 520 U.S. at 405. The constitutional injury must be so predictable that failure to address the risk reflects "deliberate indifference." *Slakan*, 737 F.2d at 373. To that end, the "identified deficiency" of the Prosecutors' work "must be closely related to the ultimate injury," *City of Canton*, 489 U.S. at 391—an inquiry that is conducted with some granularity. For example, the Fourth Circuit asked in *Slakan* whether it was reasonably foreseeable that failing to promulgate guidelines on the use of high-pressure hoses would have prevented the abuse of that same tool. 737 F.2d at 375–76. And the Supreme Court in *Connick* held that prior *Brady* violations[3] within one prosecutor's office could not have put that same office on notice of the risk for "the sort of *Brady* violation at issue here"—specifically, the "failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind." 563 U.S. at 62–63. Analyzed at that same level of granularity, White must prove that the "identified deficienc[ies]" in the EIU proximately caused her allegedly unlawful arrest, without probable cause, based on fabricated evidence. *Canton*, 489 U.S. at 391.

Because White does not allege any "direct" link, she can make this showing only if her allegedly unlawful arrest was among "'the natural consequences of [the Prosecutors'] actions'" in setting up the EIU. *Slakan*, 737 F.2d at 376 (citation omitted). White acknowledges that

[2] Though some of these decisions involve municipal liability, the distinction is immaterial. Municipalities are liable under Section 1983 "like every other § 1983 person," *Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978), and whether the supervisor is a municipality or a natural person, the tests are roughly the same and seek to avoid *respondeat superior* liability, *City of Canton v. Harris*, 489 U.S. 378, 391–92 (1989); *Shaw*, 13 F.3d at 798; *see also id.* at 799 (citing *Canton* as support for the supervisory-liability test).

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

"'ordinarily'" she would need to "assert[] a pattern of unlawful arrests" to establish the requisite foreseeability. Opp'n 11 (quoting *Slakan*, 737 F.2d at 373); *see, e.g.*, *Bryan Cnty.*, 520 U.S. at 409; *Shaw*, 13 F.3d at 799. She does not attempt to do so.

Instead, she tries (at Opp'n 11) to fit this case within the Supreme Court's hypothetical "narrow range of circumstances," *Bryan Cnty.*, 520 U.S. at 409, "however rare," in which a "pre-existing pattern of violations" is unnecessary, *Connick*, 563 U.S. at 64. The Court's repeated "hypothetical example" is "of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force." *Id.* at 63 (discussing *Canton*, 489 U.S. at 390 n.10). The hypothetical rests on "the known frequency with which police attempt to arrest fleeing felons and the 'predictability that an officer lacking specific tools to handle that situation will violate citizens' rights,'" all leading to the "'*highly predictable consequence*'" that excessive force would be used. *Id.* at 63–64 (quoting *Bryan Cnty.*, 520 U.S. at 409) (emphasis added).

White leaves the Court to guess why it is just as "highly predictable" that the Prosecutors' failure to institute her proposed reforms would cause a team of investigators (none of whom is alleged to lack investigative experience, generally) to make unlawful arrests based on fabricated evidence. *Bryan Cnty.*, 520 U.S. at 409. Instead, she asserts that this case involves "specific, targeted actions" rather than "passive inaction" and that the allegations suggest a finding of "deliberat[e] indifferen[ce]" or "acquiesce[nce] in the constitutionally offensive conduct of [the Prosecutors'] subordinates." Opp'n 11–12. Assuming she has alleged "specific, targeted actions," she still cannot meet her burden for the reasons described below (pp. 6–7). And she fails to cite any allegation in the Complaint regarding the EIU's creation that would establish deliberate

indifference or acquiescence to such an arrest. *See* Opp'n 12 (citing only to *Slakan*).[4] There is none. Mot. 9–10, 9 n.1.

Instead of supervisor liability, White frames (at Opp'n 8) this case as controlled by the Fourth Circuit's "effective causation" precedents. *Amisi*, 93 F.4th at 670. It requires only a cursory review of the facts of these decisions to appreciate why they are inapposite. In all of them, the defendants took an affirmative action that immediately caused another individual to deprive the plaintiffs of their constitutional rights. For example, in *Amisi*, the defendant official was a prison security guard who "signaled to" another officer "to take" the plaintiff "into the locker room" where the security guard "knew" the other officer "performed strip searches." *Id.* at 665, 670. In *Riddick v. Barber*, a state official "authoriz[ed] exemptions" to regulations governing treatment of involuntarily committed individuals so that a hospital director could "put [the plaintiff] in restraints for two weeks and in seclusion for a year and a half." 109 F.4th 639, 650 (4th Cir. 2024). And in *Sales v. Grant*, the City of Lynchburg's Electoral Board members took a series of steps to persuade and manipulate the new City Registrar to fire the Assistant Registrars based on their political affiliation. 158 F.3d 768, 777–78 (4th Cir. 1998).

Plaintiffs in those cases showed the "requisite causal connection" by pinpointing actions by the defendants that "set[] in motion a series of acts by others which the actors kn[e]w or reasonably should [have] know[n] would cause others to inflict the constitutional injury." *Amisi*,

[4] White refers to the NAACP's collection of documents regarding the EIU under the Virginia Freedom of Information Act. Opp'n 12; *see* Compl. ¶ 103 n.37 (referencing these documents). She neither provides these documents nor explains how they establish that the Prosecutors' "purpose" in setting up the EIU was "a particular result" (by which she presumably refers to unlawful arrests). Opp'n 12; *see* NAACP, Press Release, *Virginia NAACP Obtains Records Regarding Attorney General's "Election Integrity Unit"*, https://naacpva.org/virginia-naacp-obtains-records-regarding-attorney-generals-election-integrity-unit/ (last visited Jan. 27, 2025) (discussing the documents but making no such allegation).

93 F.4th at 670 (quoting *Sales*, 158 F.3d at 776) (ellipsis omitted). The critical distinction from the supervisory-liability cases lies in the knowledge or culpability requirement, which could be deemed a function of just how foreseeable the risk is. *Compare id.* ("know or reasonably should know"), *with Slakan*, 737 F.2d at 373 ("deliberate indifference or 'tacit authorization'"). White has not alleged any affirmative act by the Prosecutors in setting up the EIU that had an effect on her as similarly foreseeable and direct as in the effective-cause cases. *Compare* Compl. ¶¶ 102–08, *with, e.g.*, *Riddick*, 109 F.4th at 650 (allegations at the motion-to-dismiss stage). Moreover, no facts alleged in the Complaint would support an inference that Attorney General Miyares or Lief "kn[e]w or reasonably should [have] know[n]" that their investigators would arrest someone without probable cause and based on fabricated evidence. *Amisi*, 93 F.4th at 670 (quoting *Sales*, 158 F.3d at 776); *see Riddick*, 109 F.4th at 650 (noting that, if the exemption did not "authorize[] the actual conditions alleged by" the plaintiff, then there would be no liability for the official).

Finally, White's arguments against intervening cause are unpersuasive. By White's own telling, the charges against her "rested *entirely* on [the Investigators'] knowingly false and misleading statements" and "misconduct [which] formed the basis of prosecutors' decision to charge" her. Compl. ¶ 8 (emphasis added); *see id.* ¶¶ 9, 120, 127, 138, 143–44, 149, 175. The Opposition claims that the Prosecutors knew or should have known not to trust the Investigators, *see* Opp'n 23, but the Complaint contains no support for that conclusory assertion. Absent that requisite link, White cannot show that an arrest based on fabricated evidence was the foreseeable consequence of the Prosecutors' creation and structuring of the EIU. *See Amisi*, 93 F.4th at 670.[5]

[5] White protests that her allegation that the Investigators misled the Prosecutors "is not an admission" that the Prosecutors "lacked knowledge" about the supposed lack of evidence. Opp'n 14 n.6. But the problem for White is not that she has said too much, but that she has said too little: the Complaint contains *zero* allegations showing that the Prosecutors possessed the relevant

It does not matter whether the Investigators qualify as those "independent intermediar[ies]" whose conduct categorically severs the causal chain, Opp'n 13; a proximate-cause analysis is case-specific and not limited to such individuals. Under White's flawed understanding, a police chief could be charged with malicious prosecution for sending a subordinate detective to investigate a crime scene, unaware that the detective intended to plant evidence that would lead to the suspect's arrest. That would amount to the very *respondeat superior* scheme the Supreme Court has repeatedly disallowed. *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

**2. The Prosecutors are entitled to qualified immunity for the alleged pre-investigation conduct.**

Even if any of the alleged pre-investigation conduct proximately caused White's seizure, the Prosecutors are entitled to qualified immunity for those actions. *See Burns v. Reed*, 500 U.S. 478, 492–96 (1991) (affording qualified immunity to prosecutors for actions taken outside the judicial phase of criminal proceedings). The qualified-immunity inquiry asks whether "the facts alleged show the officer's conduct violated a constitutional right" and, if so, "whether the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). If the answer to either question is "no," then qualified immunity applies. *See Pearson v. Callahan*, 555 U.S. 223, 239–42 (2009) (holding that the court can answer the questions in either order).

The analysis focuses on the defendant's conduct rather than the plaintiff's injury, *see Mullenix v. Luna*, 577 U.S. 7, 12–15 (2015) (per curiam); *Shaw*, 13 F.3d at 802, and cannot be performed "at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). White's framing fails both requirements. To be sure, "the constitutional right to be free from unreasonable searches and seizures is well settled" and "the seizure of an individual effected without probable

knowledge. Moreover, her belated suggestion (at Opp'n 15 n.6) that the Investigators misled *other* prosecutors (who are never specified) likewise has no grounding in the Complaint.

cause is unreasonable," Opp'n 20, but citation to these basic legal standards is "not enough." *Saucier*, 533 U.S. at 201–02; *Mullenix*, 577 U.S. at 12. "The general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *al-Kidd*, 563 U.S. at 742.[6]

White's claim against the Prosecutors rests on their conduct in allegedly creating the EIU in a "shambolic and politicized nature," "failing to appropriately train and staff it," and "creat[ing] pressure on the investigators to deliver a prosecution at any cost." Opp'n 21; *see also* Opp'n 7–8, 16. The Court will search the Complaint in vain for an allegation (indeed, White herself cites none) showing that the Prosecutors pressured the Investigators. So her claim boils down to the speculative allegation that her arrest resulted from a poorly run investigatory unit that was created to further political priorities.

The lack of particular training, guidelines, or staffing in a governmental office is not, in and of itself, a constitutional violation (let alone a clearly established one). *See* Mot. 10. Indeed, the stringent causation requirements for supervisory-liability cases—which distinguish a supervisor's deficiency from the subsequent constitutional injury—illustrate as much. *See, e.g.*, *Canton*, 489 U.S. at 391 (emphasizing the need for "the identified deficiency in a city's training program" to "be closely related to the ultimate injury"); *Slakan*, 737 F.2d at 373 (searching for the "persons in the decisionmaking chain whose deliberate indifference permitted the constitutional abuses to continue unchecked"). And, given the tenuous links between these alleged deficiencies

[6] White additionally argues that "the right to not be deprived of one's liberty by fabrication of evidence is clearly established." Opp'n 20. Those allegations (which apply to Lief only) fall into the second bucket (the investigation through the grand-jury proceedings) and, as explained below (pp. 11–13), run into absolute immunity.

in the EIU and White's subsequent arrest, the Prosecutors could not have been "on notice" that the alleged "conduct would be clearly unlawful." *Saucier*, 533 U.S. at 202.

**B. Absolute Prosecutorial Immunity Shields Lief from a Section 1983 Claim Based on the Remaining Allegations.**

Moving on to the second bucket of allegations, White's claim now trains solely on Lief, *see generally* Opp'n 21–27; *see also* Mot. 12, who she argues "direct[ed] and participat[ed] in the formal investigation [that] proximately caused her seizure," Opp'n 22. Here, it is worth comparing the facts alleged against Lief to those alleged against the prosecutor in *Nero v. Mosby*, 890 F.3d 106 (4th Cir. 2018), a decision White steadfastly tries to avoid, *see* Opp'n 25.

*Nero* involved a malicious-prosecution claim brought by Baltimore police officers against the Maryland State's Attorney who had charged the officers with the murder of Freddie Gray, Jr. 890 F.3d at 113. As here (Compl. ¶ 116), the Officers alleged that Mosby and her office "independently investigated" the matter prior to filing charges. 890 F.3d at 115. As here (Compl. ¶¶ 10, 114; Opp'n 1), the Officers alleged that the investigation was "bogus and [a] sham" and that the prosecutor "manipulated evidence," "created false facts[,] and omitted material facts." 890 F.3d at 120 n.4. As here (Compl. ¶¶ 12, 126–28, 139–49; Opp'n 3), the Officers alleged that, despite "finding no evidence of criminal wrongdoing," Mosby instructed the Sheriff's office to "file false charges" for political reasons. 890 F.3d at 118, 127. And, as here (Compl. ¶¶ 160–61), there was even a press statement accompanying the charges. 890 F.3d at 115.

The Fourth Circuit held that Mosby was entitled to absolute immunity because the Officers' complaint, "[a]t bottom," was "Mosby's decision to prosecute them." *Id.* at 119. None of her acts before filing charges could support a claim either. "[C]onducting an investigation is not actionable—in fact, it was Mosby's *responsibility* to investigate—and the Officers ma[d]e no specific allegation that Mosby engaged in misconduct during that investigation." *Id.* at 120. Of

course, as noted above, the Officers had alleged that Mosby manipulated evidence in the investigation—"[b]ut, absent specific supporting facts, these conclusory allegations [we]re 'not entitled to be assumed true.'" *Id.* at 120 & n.4 (quoting *Iqbal*, 556 U.S. at 681). The "absolute-immunity defense plainly defeat[ed]" the Section 1983 claim, even at the motion-to-dismiss stage, and the court "resoundingly reject[ed]" arguments to the contrary. *Id.* at 114, 120.

This Court should follow suit. Like the Officers in *Nero*, White tries to steer her facts out of the judicial process by focusing on the investigation. But her Complaint is even more bereft of specific allegations regarding the prosecutor's role in the investigation than was the complaint in *Nero*. *Compare* Compl. ¶ 116 (Lief "directed and supervised" the investigation and received evidence), *with* 890 F.3d at 115–16 (prosecutor's statement regarding her deep involvement in the investigation); *see also Rieves v. Town of Smyrna*, 959 F.3d 678, 690 (6th Cir. 2020) (relying on "very specific factual allegations" regarding the prosecutors' investigatory roles to get past absolute immunity). Though she now argues that Lief "personally triggered the opening of the investigation . . . for political reasons," Opp'n 22, the Complaint does not support that assertion. *See* Compl. ¶ 115 (Lief attended a meeting after which "an OAG investigation . . . was initiated")' *see also* Va. Code § 24.2-104(B) (requiring the Attorney General to investigate election-law violations upon request of the State Board of Elections). In any event, mere investigation (whatever the motivation) is neither a search nor a seizure. *See Kentucky v. King*, 563 U.S. 452, 469–70 (2011); *Florida v. Bostick*, 501 U.S. 429, 434–35 (1991). More strenuously, she insists that the Prosecutors "t[ook] steps by and through the [EIU] to generate evidence of election fraud in" the County, Opp'n 9; *see also* Opp'n 12, and that Lief "directed [the Investigators] to generate evidence of election fraud," Opp'n 22. These accusations, too, make their debut in the Opposition because the Complaint says no such thing. *See* Compl. ¶¶ 120-49.

The facts actually pled illustrate only Lief's alleged presentation of evidence to the grand jury. *See* Compl. ¶¶ 150–56; *see also Willis v. Blevins*, 957 F. Supp. 2d 690, 695 n.2 (E.D. Va. 2013) (Hudson, J.) ("This Court . . . makes its own determination as to the appropriate characterization of the allegations."). That is disqualifying. Like Mosby's decision to indict the Officers in *Nero*, "[t]he presentation of testimony and other evidence before an indicting grand jury is a prosecutorial activity 'intimately associated with the judicial phase of the criminal process'" and therefore protected by absolute prosecutorial immunity. *Lyles v. Sparks*, 79 F.3d 372, 377 (4th Cir. 1996) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)).

It makes no difference that White "reframe[s] [her] claim to attack the preparation" for the grand jury "instead of the absolutely immune actions themselves." *Buckley v. Fitzsimmons*, 509 U.S. 259, 283 (1993) (Kennedy, J., concurring in part and dissenting in part); *Willis*, 957 F. Supp. 2d at 699; *see* Opp'n 23 (Lief "allowing himself to be misled"), 26 ("unlawful actions that *created* a misleading presentation to the grand jury"). In the similar context of a grand-jury witness's absolute immunity under Section 1983, the Supreme Court has admonished that "this [immunity] rule may not be circumvented by claiming that a grand jury witness conspired to present false testimony or by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution." *Rehberg v. Paulk*, 566 U.S. 356, 369 (2012) (citing *Buckley*, 509 U.S. at 283 (opinion of Kennedy, J.)). Even closer to this case, the Fourth Circuit has held that, because "the presentation of false testimony in court" during trial triggers "absolute immunity," so too do prosecutors enjoy absolute immunity for claims of "a conspiracy to present false testimony." *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994). That

logic applies equally to grand-jury proceedings. *Willis*, 957 F. Supp. 2d at 699 (conspiracy to present fabricated evidence at bond and pretrial-detention hearings); *see Lyles*, 79 F.3d at 377.[7]

## II. THE STATE-LAW CLAIM AGAINST THE PROSECUTORS FOR MALICIOUS PROSECUTION SHOULD BE DISMISSED.

Both absolute (also called quasi-judicial) and sovereign immunity protect the Prosecutors from White's common-law malicious-prosecution claim. Mot. 15–19. On this topic, White largely reincorporates her federal-law arguments. *See* Opp'n 29 ("The Attorney Defendants' claim to absolute [i.e., quasi-judicial] immunity fails under the same principles restricting federal immunity."). And the Prosecutors' answers have already been laid out in their Motion and above. Two additional points of state law warrant further comment.

*First*, in addition to contesting these immunities, White argues that "the pleading requirements for causation under Virginia common law are much less stringent than the federal causation standard." Opp'n 28. She provides neither elaboration nor support (with her lone cited case applying North Carolina law). *See id.* (citing *Evans*, 703 F.3d at 657). To the extent she means to say (at Opp'n 27–28) that "institut[ing]" a prosecution, *Lewis v. Kei*, 708 S.E.2d 884, 889 (Va. 2011), is a less demanding element than proximate causation, she offers no explanation why. *Cf. Brice v. Nkaru*, 220 F.3d 233, 238–39 (4th Cir. 2000) (applying Virginia's law of malicious prosecution and referencing a case about "proximate[] cause[]" in explaining this element). To the extent she is concerned about Virginia's "pleading requirements," they do not govern in federal court. *Fuller v. Aliff*, 990 F. Supp. 2d 576, 580 (E.D. Va. 2013).

[7] For this reason, White's reliance (at Opp'n 15, 23) on *Franks v. Delaware*, 438 U.S. 154 (1978), and its progeny is misplaced. She has not alleged that Lief attested to any facts as a witness, only that he presented false information as an advocate. *See Kalina v. Fletcher*, 522 U.S. 118, 130–31 (1997) (contrasting absolute immunity for the prosecutor's "presentation of . . . information . . . to the court" with qualified immunity for the prosecutor's swearing out an oath or affirmation as a witness).

*Second*, White's argument (at Opp'n. 29–30) that the Prosecutors have no sovereign immunity against a claim of malice misapprehends Virginia law on sovereign immunity. There are two discrete categories of sovereign immunity for the Commonwealth's officers and employees. *See Messina v. Burden*, 321 S.E.2d 657, 661 (Va. 1984). The first category includes "those who operate at the highest levels of the three branches of government," including "Governors, judges, members of state and local legislative bodies, and other high level governmental officials." *Id.* They enjoy "absolute immunity." *Id.*; *accord James v. Jane*, 282 S.E.2d 864, 869 (Va. 1980). Protection turns on the nature of their office, not on the function performed or the allegations made against them. *See All. to Save the Mattaponi v. Commonwealth*, 621 S.E.2d 78, 96 (Va. 2005) (granting the Executive Secretary of the State Water Control Board "absolute immunity" because he "occupies a high-level governmental position"); *see also Gray v. Va. Sec'y of Transp.*, 662 S.E.2d 66, 71 (Va. 2008) (accepting plaintiffs' "acknowledg[ment]" that constitutional claims against the Secretary of Transportation and the Commissioner of Transportation could only proceed if sovereign immunity had been waived).

For the second category—those further "away from the highest levels of government"—the Virginia Supreme Court has determined sovereign immunity "on a case-by-case basis." *Messina*, 321 S.E.2d at 661; *see id.* at 662 (These cases "do not involve officials at the very highest levels of government who have generally been accorded absolute immunity. Thus, to decide the question of immunity in these appeals, we must make a close examination of the facts and circumstances."). It is for this category that intentional misconduct vitiates any claim to sovereign immunity. *See Cromartie v. Billings*, 837 S.E.2d 247, 254 (Va. 2020) (unlawful-search claim against a police officer); *James*, 282 S.E.2d at 869.

Both Attorney General Miyares and Lief "occup[y] . . . high-level governmental position[s]." *All. to Save the Mattaponi*, 621 S.E.2d at 96; Mot. 17–19. White's only argument to the contrary is that Lief had no "discretion" to violate the Constitution. Opp'n 30 n.9. But that is nonresponsive: Lief's discretion shows that he was a high-level governmental official, not that he was entitled to violate the law. *See* Mot. 18–19. White further criticizes the Prosecutors for purportedly "citing only medical malpractice and negligence cases," rather than cases "protecting a prosecutor with sovereign immunity for a malicious prosecution claim," Opp'n 30—but she fails to cite a case where a prosecutor was *denied* sovereign immunity in this context. The dearth of caselaw on prosecutors invoking sovereign immunity is predictable: few prosecutors occupy the high-level positions at issue here, *see Messina*, 321 S.E.2d at 661, and quasi-judicial immunity usually is dispositive, *see Andrews v. Ring*, 585 S.E.2d 780, 785 (Va. 2003), as it is here. In any event, her medical-malpractice/negligence comment is not only mistaken, *see* Mot. 17–18 (citing *All. to Save the Mattaponi*, 621 S.E.2d 78), but irrelevant. Following the lead of Virginia courts, Defendants cited *Messina* and *James* not because they involved claims identical to White's but because, as leading authorities on sovereign immunity under Virginia law, the broad principles they articulate are controlling here.

The Prosecutors are entitled to sovereign immunity.

## CONCLUSION

For the foregoing reasons and those in the Prosecutors' Memorandum in Support, the Court should dismiss Count II and dismiss Count III as to Defendants Miyares and Lief.

DATED: January 29, 2025

*/s/ Lewis F. Powell III*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of January, 2025, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the following:

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