UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MICHELE WHITE,

Plaintiff,

v.

JASON S. MIYARES; JOSHUA N. LIEF; MARK P. DE ALMEIDA; AND HOWARD MULHOLLAND,

Defendants.

Case No. 3:24-cv-00725-HEH

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS JASON S. MIYARES' AND JOSHUA N. LIEF'S MOTION TO DISMISS

Date: January 15, 2025

Joshua Erlich
The Erlich Law Office
1550 Wilson Blvd Ste 700,
Arlington, VA 22209
Tel: 703-791-9087
jerlich@erlichlawoffice.com

Corey Stoughton (Admitted *pro hac vice*)
Florian Loibl (Admitted *pro hac vice*)
Amanda Miner (Admitted *pro hac vice*)
SELENDY GAY PLLC
1290 Avenue of the Americas
New York, NY 10104

Tel: 212-390-9000

Rachel Goodman (Admitted *pro hac vice*)
Protect Democracy Project
82 Nassau Street, #601
New York, NY 10038
(202) 579-4582
rachel.goodman@protectdemocracy.org

Jessica Marsden (Admitted *pro hac vice*)
Protect Democracy Project
510 Meadowmont Village Circle, No. 328
Chapel Hill, NC 27517
(202) 579-4582
jess.marsden@protectdemocracy.org

Attorneys for Plaintiff Michele White

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PRELIMINARY STATEMENT

The gravamen of Plaintiff Michele White's case against Defendants Jason Miyares and Joshua Lief (together, the "Attorney Defendants") is that they abused their official positions to conduct a sham investigation and prosecution for improper political objectives by creating and structuring an Election Integrity Unit designed to achieve those objectives rather than uncover the truth, identifying a target for investigation in a manner that represented an unprecedented departure from the treatment of similar matters, and deploying and directing the Unit to generate a prosecution, regardless of evidence. In addition, Lief improperly directed and participated in the misconduct-laden investigation that led to the malicious prosecution of Ms. White.

Specifically, Plaintiff alleges Miyares and Lief created the Unit without any evidence of a real election fraud problem and under intense political pressure to find such evidence, Compl. ¶ 84, knowing they needed a prosecution to legitimize the Unit's existence. *Id.* ¶¶ 88-91, 108. They intentionally set the Unit up in a way that ensured it produced a sham prosecution. *Id.* ¶¶ 5-6, 103-107. Acting as detectives, Miyares and Lief actively sought a target and found one in Prince William County ("PWC"), even though the election irregularities allegedly identified there did not amount to a crime, nor had any similar irregularities ever been treated as criminal. *Id.* ¶¶ 114-19. They improperly pressured untrained and inexperienced investigators to generate a prosecution of Ms. White based on those facts. *Id.* ¶¶ 106, 114-19, 120-49. Every act taken during the pre-investigation phase flowed from the desire to legitimize the Unit and generate an appearance of evidence of election fraud. *See, e.g.*, *id.* ¶¶ 98, 166 (Senator Amanda Chase crediting her meetings with Miyares in 2022 as leading to the Unit's creation and resulting in the investigation).

Unlike Miyares', Lief's liability is twofold: the Complaint alleges that he is liable for the pre-investigative acts discussed above and also that he initiated, improperly directed, and

participated in the formal investigation, *id.* ¶¶ 6, 116, 120-149, in which the evidence was further manipulated and distorted to mislead the grand jury into indicting Ms. White, *id.* ¶¶ 154-57.

Those acts foreseeably caused Ms. White's unlawful indictment. *Infra* § I.A, § II.A, & § III.A. Ms. White does not seek to hold Lief and Miyares accountable simply as supervisors (*i.e.*, their failures to act or intervene), *contra* Mot. 9, but rather for their direct roles in setting in motion the constitutional violations she suffered, as is the law in this Circuit. *See Amisi v. Brooks*, 93 F.4th 659, 670 (4th Cir. 2024) (citing 42 U.S.C. § 1983 and collecting cases).

That conduct is not protected by any immunity. For pre-investigative conduct, the Attorney Defendants concede such acts are not protected by absolute immunity. Mot. 7. This makes sense, as they took place before the formal investigation began, meaning no probable cause existed to indict anyone. Courts categorically do not protect such administrative or investigative functions with absolute immunity. *Infra* § I.B. Moreover, because Lief continued to fulfill an investigative, detective-like function during the formal investigation prior to the grand jury presentation, such conduct also fits comfortably within the categories courts routinely decline to protect with absolute immunity. *Infra* § II.B. For these same reasons, the Attorney Defendants' conduct is not protected by state law absolute immunity. *Infra* § III.B. Moreover, the Complaint plausibly alleges their politically motivated actions violated Ms. White's clearly established Fourth Amendment rights. The Attorney Defendants' conclusory arguments otherwise do not meet their burden to establish entitlement to any immunity. *Infra* § I.C, § II.C & § III.B.

To be clear, Plaintiff does not dispute that the act of initiating charges after reviewing the evidence produced during the formal investigation is protected by absolute immunity.[1] But

[1] Likewise, Plaintiff does not contest that acts occurring after an indictment are generally protected by absolute immunity. Mot. 14-15. But those allegations in the Complaint are, at a minimum,

Miyares and Lief can—and must—be held liable for their roles in generating and carrying out a politicized investigation that produced false and misleading evidence used to initiate charges and mislead the grand jury. *Burns v. Reed*, 500 U.S. 478, 495 (1991) ("Almost any act 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 to prosecute, but we have never indicated that absolute immunity is that expansive.").

FACTS

A. Amidst a Background of Intense Politicization of Election Processes, Miyares and Lief Set the Unlawful Investigation in Motion.

Starting in early 2022, against a background of intense politicization of the 2020 election process, Miyares and Lief engaged in, and in some cases actively pursued, meetings with people with professed political goals to validate a false narrative of widespread election fraud. Compl. ¶¶ 5-6, 98-100. The Complaint traces the direct line between those meetings and the investigation and eventual prosecution of Ms. White. For instance, shortly after taking office, Miyares met with Senator Amanda Chase, a prominent proponent of 2020 election fraud theories, to discuss alleged evidence of election fraud. *Id.* ¶ 98. Senator Chase publicly claimed the investigation into PWC and the Unit's creation stemmed from those meetings. *Id.* Similarly, Lief maintained communication with Bill Hawkins, the State Director from Virginians for America First, keeping him informed about the progress of their investigative efforts. *Id.* ¶¶ 99-100, 162-63.

Miyares and Lief created the Unit under political pressure to produce evidence of widespread election fraud, despite no credible evidence supporting such claims. *Id.* ¶¶ 3-5, 80-90, 102, 108. Specifically, the Complaint alleges the Unit's purpose was to legitimize unsubstantiated

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further evidence that Defendants never had probable cause (without the fabricated evidence) *pre-indictment*, as they continued to desperately search for probable cause *post-indictment*.

allegations of election fraud through selective and improper targeting of routine election processes. *Id.* ¶¶ 108, 114-15, 117-19. Accordingly, the Unit was not set up to conduct fair and impartial investigations into the complex mechanisms of election administration and lacked any safeguards to ensure informed and unbiased investigations. *Id.* ¶¶ 103-107. Miyares and Lief did not institute any reporting structure or approval process for opening and conducting investigations. *Id.* ¶ 103. Nor did they provide any guidelines, procedures, training materials, or other similar documents to govern the Unit's operations. *Id.* And even though most of the Unit's staff was inexperienced with Virginia election law, *id.* ¶ 104, Miyares and Lief did not develop, administer or require any training in election law, election administration or election-related crimes for attorneys or investigators assigned to the Unit. *Id.* ¶ 105.

Around the same time, the Attorney Defendants orchestrated an unprecedented criminal investigation into allegations of minor election discrepancies in PWC, leveraging routine clerical errors to justify a criminal investigation when similar errors had previously prompted only a normal review and correction process by state and local election officials. *Id.* ¶¶ 109-15, 117. Almost 18 months after the 2020 Election, Eric Olsen, the successor to Ms. White as PWC General Registrar, conducted an audit of the county's 2020 Election results. *Id.* ¶ 109. Media reports gave conflicting reasons for conducting such audit, including a "public records request" or Olsen claiming he noticed issues while "going through some documents in the office." *Id.* ¶ 110. Contradicting these, Olsen told Defendants Mark P. de Almeida and Howard Mulholland (the "Investigator Defendants") the audit was staff-suggested, while the Investigator Defendants reported to the Attorney Defendants it was prompted by public sources. *Id.* Olsen's audit identified alleged discrepancies between VERIS data and precinct-level election records, including 2,400 overcounted Trump votes and 1,600 undercounted Biden votes in the CAP Precinct due to changes in VERIS on

November 7, 2020. *Id.* ¶ 111. None of the errors affected any election outcome or recount thresholds. The net effect was a 1,648 Biden undercount and 2,327 Trump overcount in a state Biden won by a wide margin. *Id.* ¶¶ 111-12. These minor discrepancies were unrelated to fraud and had historically been handled administratively without referral for criminal investigation. *Id.* ¶¶ 60, 67-79, 110-13. In fact, Mr. Olsen stated the changes "did not appear to him to be intentional." *Id.* ¶ 113. Ms. White did not make those changes on November 7, 2020. *Id.* ¶¶ 65, 123-25.

In April 2022, Lief participated in a closed State Board of Elections ("SBE") meeting, where he elevated these minor discrepancies into a formal criminal referral, *id.* ¶ 115, even though he and Miyares knew or at the very least should have known those discrepancies could not reasonably support an inference of criminal conduct. *Id.* ¶¶ 113-15, 117-19. Similar errors before and after the 2020 Election's certification had never prompted OAG investigations. *Id.* ¶¶ 117-118.

Exemplifying the Unit's predetermined goals, Miyares and Lief tasked the Investigator Defendants with finding election fraud in PWC (and securing an indictment of Ms. White). *Id.* ¶¶ 6, 114. Miyares and Lief could be certain they would get what they asked for because not only did the Unit lack the necessary safeguards to protect Ms. White's constitutional rights, but Almeida and Mulholland were highly inexperienced with Virginia's election law and practice. *Id.* ¶¶ 6, 106.

B. Lief Initiates, Directs, and Participates in the Investigation into Ms. White.

Lief, who was hired shortly after Miyares took office and immediately assumed control of the Unit, *id.* ¶¶ 94, 161, played a central role in transforming those administrative errors detected by Olsen's audit into a formal criminal investigation. As alleged in the Complaint, Lief directly supervised Almeida and Mulholland throughout the investigation and participated in it, playing an unusually hands-on role in the formal investigation of Ms. White and acting as detective rather than prosecutor. *Id.* ¶ 116. The Complaint makes clear that Lief actively steered the investigation to deliver the politically motivated result he and Miyares sought. *Id.* ¶¶114-19. Investigators

reported and forwarded evidence directly to Lief as they gathered it, underscoring his atypical involvement in the investigation's details. *Id.* ¶ 116. Under the top-down pressure from both Lief and Miyares, the Investigator Defendants fabricated probable cause to secure an indictment for election fraud. *Id.* ¶¶ 120-149.

C. Lacking Probable Cause, the Defendants Misled the Grand Jury to Secure an Indictment Timed to Coincide with the Public Announcement of the Unit.

As a direct result of the Attorney Defendants' actions, the criminal investigation of Ms. White was profoundly deficient. The Complaint alleges that the investigation cut corners, ignored exculpatory evidence, relied on false and misleading information, and omitted material facts to justify seeking Ms. White's indictment. *Id.* ¶¶ 8-10, 120-149. Based on this profoundly deficient and unlawful investigation, Defendants together misled the grand jury. *Id.* ¶¶ 154-57.

Miyares and Lief timed the public announcement of the Unit to coincide with Ms. White's indictment, *id.* ¶¶ 160-62, 167. The timing and the events surrounding that announcement reveal an investigation driven by preordained objectives, political pressures, and disregard for lawful procedures. *Id.* ¶¶ 162-63, 165-67. The indictment was celebrated publicly by partisan groups, *id.* ¶¶ 165-66, with whom the Attorney Defendants had closely coordinated the investigation of Ms. White and its announcement to the public. *Id.* ¶¶ 98-100, 162-63.

Ms. White was subjected to a baseless indictment that violated her constitutional rights and caused her significant economic harm, emotional and physical distress, and damage to her reputation. *Id.* ¶¶ 178-82. The Attorney Defendants maliciously and foreseeably caused Ms. White's unlawful indictment, giving rise to civil liability under both federal and state law.

LEGAL STANDARD

The Court's review of a motion to dismiss is "informed and constrained" by the well-pleaded facts contained in the Complaint. *Daly v. Virginia,* 2014 WL 2759078, at *1 (E.D. Va.

June 17, 2014) (Hudson, J.). "The task at hand is to determine the sufficiency of the complaint, 'not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *Id.* (citation omitted). The Complaint need only contain "enough facts to state a claim to relief that is plausible on its face" for the Court to deny the motion. *Id.* (citation omitted). In making this determination, "plaintiff's well-pleaded allegations are taken as true" and the Court must draw "all reasonable inferences that flow from well pleaded allegations." *Id.* at *1, *4 (citation omitted).

ARGUMENT

I. PLAINTIFF HAS STATED A § 1983 MALICIOUS PROSECUTION CLAIM AGAINST MIYARES AND LIEF BASED ON PRE-INVESTIGATORY ACTIONS TO WHICH NO IMMUNITY DEFENSE APPLIES (COUNT II).

To state a § 1983 malicious prosecution claim, Plaintiff must demonstrate that the Attorney Defendants "(1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor." *Thompson v. Fairfax Cnty. Pub. Sch.*, 2024 WL 459064, at *2 (E.D. Va. Feb. 5, 2024); *see Evans v. Chalmers*, 703 F.3d 636, 647 (4th Cir. 2012).

The Attorney Defendants' Motion only disputes causation, *see* Mot 6, 7.[2] However, the Complaint sufficiently alleges Miyares's and Lief's pre-investigative acts caused her wrongful

[2] As for the second element, the Attorney Defendants do not dispute Plaintiff was indicted by a grand jury. *Id.* at 4 (citing Compl. ¶¶ 8, 157); *see Evans*, 703 F.3d at 647 (holding the issuance of an indictment is legally sufficient to establish seizure for malicious prosecution). Additionally, they did not move to dismiss for failure to allege lack of probable cause for "pre-investigative acts." *See* Mot. 7-10, 14-15. Nor could they, because the Complaint adequately pleads that Defendants never had probable cause to seek Plaintiff's indictment. Compl. ¶¶ 120-149. As for the third element (favorable termination), Defendants do not dispute the dismissal of Ms. White's indictment by *nolle prosequi*, *id.* ¶ 203, is sufficient to establish favorable termination. *See Thompson v. Clark*, 596 U.S. 36, 49 (2022) ("A plaintiff need only show that the criminal prosecution ended without a conviction.").

indictment, Section I.A, and those acts are not protected by prosecutorial or qualified immunity, Section I.B-C. The Court must therefore deny the Motion.

A. Plaintiff Plausibly Alleges that the Attorney Defendants' Creation of a Unit Structured and Directed to Generate a Prosecution of Election Fraud Caused Her Seizure.

The Attorney Defendants' own misconduct—not merely their failures as supervisors—caused Plaintiff's seizure. Officials, supervisory or otherwise, are liable for their own actions (or inactions) that proximately cause other officials to carry out constitutional violations. *Amisi*, 93 F.4th at 670 (citing 42 U.S.C. § 1983 and collecting cases); *see also Barber v. Whirlpool Corp*., 34 F.3d 1268, 1277 (4th Cir. 1994) ("Where a defendant does not prosecute a warrant personally, he may still be liable for malicious prosecution if he causes one to be maintained or voluntarily aids or assists in its prosecution."). Causation is established where defendants "set[] in motion a series of acts by others which [defendants] know or reasonably should know would cause others to inflict the constitutional injury.'" *Amisi*, 93 F.4th at 670 (quoting *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 560–61 (1st Cir. 1989)).

To survive a motion to dismiss, the threshold showing is even lower. Plaintiff need only plead facts "plausibly connecting" the Attorney Defendants to her constitutional deprivation for the Court to deny the motion. *Riddick v. Barber*, 109 F.4th 639, 649-50 (4th Cir. 2024) (denying motion to dismiss allegations against supervisor who "authorized" constitutional violations even when such actions were not "hands-on"); *Pinder v. Knorowski*, 660 F.Supp 2d 726, 737 (E.D. Va. Oct. 8, 2009) (denying motion to dismiss where the plaintiff alleged that defendants "set on foot" and "instituted" a prosecution and her rights were violated "as a direct and proximate result of the

actions and omissions" and noting "while Plaintiff has yet to prove these allegations, they are sufficient to survive a motion to dismiss").[3]

Plaintiff has met this burden. The Complaint and the inferences drawn therefrom allege that Lief's and Miyares' actions—including setting up a sham Unit without any safeguards, identifying investigative targets despite the absence of evidence of a crime in a manner that departed from normal practice, and taking steps by and through that Unit to generate evidence of election fraud in PWC based on an unprecedented audit of the 2020 election by Olsen—set in motion the unlawful investigation that led to Ms. White's indictment by a misled grand jury without probable cause, which the Attorney Defendants either knew or reasonably should have known would occur. Specifically:

- Creating the Unit for politicized purposes. Prompted by political figures promoting false election fraud narratives such as Amanda Chase and Bill Hawkins, Miyares and Lief created the Unit in response to intense political pressure to validate a false narrative of widespread election fraud, without regard to truth or due process. Chase herself credited her meetings with Miyares as pivotal in the creation of the Unit and the subsequent investigation into PWC (and Plaintiff). Miyares and Lief intentionally structured the Unit without clear procedures, training, or guidelines, ensuring it could be directed towards politically motivated objectives. The Unit's staff lacked relevant experience in election law or administration or standard safeguards, ensuring the investigation would serve the Attorney Defendants' political aims of securing the desired criminal investigation and prosecution they could present to the public, regardless of the truth. *See* Compl. ¶¶ 5-6, 11-12, 84-91, 98-100, 103-107, 162-66.

- Targeting PWC and Plaintiff. Knowing there was no credible evidence of election fraud, Miyares and Lief orchestrated, or at the very least capitalized on, Olsen's audit, despite Olsen's own acknowledgement that the discrepancies identified were insignificant and unintentional. Those alleged errors—suddenly uncovered nearly 18 months after the election, shortly after Miyares took office—mirrored issues routinely administratively corrected both before and after the certification of the 2020 election. Though no reasonable person

[3] Defendants' reliance on *Cty. Of Los Angeles, Cal. v. Mendez*, 581 U.S. 420 (2017) for a heightened causation standard, Mot. 7, is misplaced. Not only was *Mendez* an entirely different procedural posture (post-trial), but it was also an excessive force case—the only category of § 1983 cases in which the Fourth Circuit requires causation over and above the *Amisi* standard. *Amisi*, 93 F.4th at 670 (rejecting argument that Fourth Amendment claims generally should be subject to heightened causation standard used in excessive force claims).

would have believed the audit revealed an intent to corrupt or affect the outcome of any election, Defendants nevertheless exploited these immaterial discrepancies to launch their politically motivated investigation into PWC and ultimately, Plaintiff. *See id*. ¶¶ 60, 67-76, 109-13, 115-18.

- Seeking an unprecedented referral for a formal investigation. Lief's attendance at the April 13, 2022 closed SBE meeting was a key turning point. Knowing the investigation would lack credibility without SBE involvement, Miyares and Lief used Olsen's audit as a pretext to secure a referral for a formal investigation. The move set in motion the probe into immaterial errors, effectively transforming a minor administrative issue into a criminal matter. This further underscores the improper pressure placed on investigators to produce results aligned with political pressure on the prosecutors. *See id*. ¶¶ 115-16, 109-13.

The facts alleged and inferences therefrom demonstrate these actions directly, proximately, and foreseeably led to Ms. White's unlawful indictment without probable cause.[4] Indeed, on the facts alleged in the Complaint, there is no other explanation why she was prosecuted, other than the Attorney Defendants' politicized exploitation of non-criminal election discrepancies.

1. Attorney Defendants' Vicarious Liability Arguments Are Misplaced.

The Attorney Defendants suggest the claim against them can only be one of supervisory liability premised on vicarious liability for the acts of the Investigator Defendants. Mot. 8-9. Not so. Plaintiff does not seek to hold Miyares and Lief liable merely for actions of others under their supervision. Rather, the Complaint primarily alleges that they *themselves* caused Ms. White's seizure. *Supra* § I.A. Unlike in cases involving mere supervisory liability, *see* Mot. 8-9, the Complaint alleges Miyares and Lief actively set in motion the unlawful investigation that foreseeably resulted in Ms. White's indictment. *Supra* § I.A; *see also infra* § I.A.2. Their improper actions were not incidental, but deliberate, and the Complaint has plausibly alleged this misconduct proximately caused Ms. White's seizure. *Id*. Thus, Plaintiff's claim is not based on vicarious

[4] To the extent the Court disagrees—which it should not—and grants Defendants' motion in whole or in part, Plaintiff requests that the dismissal be without prejudice and that permission to replead be granted.

liability but rather seeks to hold the supervisory defendants liable for their own acts. *Contra* Mot. 8-9. *See Amisi*, 93 F.4th at 670.

Even if Plaintiff's claim was predicated on the supervisory liability standard the Attorney Defendants claim applies, the Complaint still should not be dismissed because that standard is satisfied. The Attorney Defendants complain that Plaintiff cannot state her claim because she has not asserted a pattern of unlawful arrests, Mot. 9, but this is incorrect. While "ordinarily" a plaintiff must provide such evidence, *Slakan* implicitly left open the possibility that a first victim could prevail, 737 F.2d 368, 373 (4th Cir. 1984), which *Bryan Cty.* made explicit. 520 U.S. 397, 409 (1997) ("We did not foreclose the possibility that evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle *recurring situations* presenting an obvious potential for such a violation, could trigger municipal liability."). *See DeHaven v. W. Virginia Div. of Corr*., 2014 WL 2765612, at *4 (S.D.W. Va. June 18, 2014) (denying motion to dismiss because "a supervisor may be liable for a single, isolated incident where the need for training with respect to the subordinate's conduct was 'plainly obvious.'" (citing *Doe v. Broderick*, 225 F.3d 440, 456 (4th Cir. 2000)).

This case is exactly the kind to which this exception should apply. Rather than passive inaction, Plaintiff's Complaint involves specific, targeted actions that directly harmed her and went far beyond mere inaction or deficient policy. *Supra* § I.A. As such, the rationale for requiring proof of widespread conduct does not apply. A single or isolated incident is typically insufficient because "a supervisor cannot be expected to promulgate rules and procedures covering every conceivable occurrence within the area of his responsibilities" or reasonably "guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct." *Slakan*, 737 F 2.d at 373. However, the allegations here suggest a finding the

Attorney Defendants were either "deliberately indifferent" or "acquiesced in the constitutionally offensive conduct of his subordinates." *Id*. Indeed, there is clear evidence (*e.g.*, the NAACP FOIA, Compl. ¶ 103, n.37), that Defendants did not promulgate any policies at all governing the Elections Integrity Unit, did not train the inexperienced investigators, and did so for the purpose of directing a particular result. *See, e.g.*, *Slakan*, 737 F.2d at 376 (acknowledging a "lack of policy" invited the harms suffered by the plaintiff). Ms. White should not be the "sacrificial lamb" for viable future claims against those supervisors just because she was the first victim.[5]

2. The Investigator Defendants' Unlawful Actions Are Not a Superseding Cause Breaking the Chain of Causation Between the Attorney Defendants and the Indictment.

The Attorney Defendants argue that the Investigator Defendants' unlawful acts "were not the foreseeable consequence" of their actions, but rather an "intervening superseding cause" breaking the causal chain between the Attorney Defendants' conduct and the indictment. Mot. 9-10 (citing *Evans*, 703 F.3d at 647). This argument fails.

Plaintiff alleges that the Investigator Defendants' unlawful acts would not have happened but for the Attorney Defendants' acts, including their deliberate structuring of the Unit, combined with their failure to appropriately train and staff it; their unprecedented seizing on immaterial discrepancies to justify securing a formal referral for investigation; and their tasking the Unit with generating evidence to support predetermined claims of election fraud. Compl. ¶¶ 6, 103-07, 114-19, 195. That course of conduct foreseeably pressured the Investigator Defendants—neither of whom had relevant experience in election law—to deliver results that aligned with the Attorney Defendants' politically motivated goal to present a prosecution for election fraud to the public. *Id.*

[5] Moreover, both *Iqbal* and *Slakan* (cited at Mot. 8) are excessive force cases, which, as described in n.3 *supra*, require a heightened pleading standard not applicable here.

Such allegations that Investigator Defendants' unlawful actions were not independent, but rather a natural and foreseeable consequence of the Attorney Defendants' actions, establish a claim for liability. *See*, *e.g.*, *Johnson v. Scott Cnty. Sch. Bd.*, 2012 WL 4458150, at *5 (W.D. Va. July 31, 2012) (citation omitted) (A § 1983 defendant may be held liable for "those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties" and "will not be relieved of liability by an intervening cause that was reasonably foreseeable, even if the intervening force may have 'directly' caused the harm."); *Adams v. NaphCare, Inc.,* 2016 WL 10455885, at *7 (E.D. Va. Dec. 19, 2016), *report and recommendation adopted*, 232 F. Supp. 3d 866 (E.D. Va. 2017) (denying motion to dismiss where third party's intervening action was put into operation by defendant's wrongful acts or omission); *see also Amisi*, 93 F.4th at 670 (denying summary judgment where supervisor's actions set unreasonable search in motion).

The inference that the Attorney Defendants obtained the result they were looking for is bolstered by the timing of the public announcement of the Unit—"[w]ith an election fraud prosecution now in hand, … Defendants Miyares and Lief publicly debuted their Election Integrity Unit" "immediately following Ms. White's indictment." Compl. ¶ 160. Plaintiff need not allege a "smoking gun" demonstrating explicit instructions to arrest individuals without probable cause, *Contra* Mot. 9; *see Riddick*, 109 F.4th at 649-50.

Nor can the Attorney Defendants invoke the independent intermediary doctrine. *Contra* Mot. 7. Only subsequent acts of "independent" "decision-makers" constitute intervening superseding causes. *Johnson v. Ortiz*, 721 F. Supp. 3d 418, 429 (E.D. Va. 2024); *see also Evans*, 703 F. 3d at 647. The Investigator Defendants were neither. *First*, they were not independent—they were part of the Attorney General's Office and acted under the Attorney Defendants' supervision. Compl. ¶¶ 17-18, 116. Moreover, their actions cannot break the chain of causation as

they were "tainted by the actions" of the Attorney Defendants, *see Evans*, 703 F.3d at 648 (citation omitted), who proximately caused the Investigator Defendants' unlawful acts. *Second*, the Investigator Defendants are not "decision-makers." A decision-maker capable of breaking the chain of causation is one charged with making a dispositive determination after being presented with the relevant facts, like a prosecutor, magistrate, or grand jury. *See Evans*, 703 F. 3d at 647. Investigators do not possess authority to return an indictment, and the Motion fails to cite a single case suggesting investigators working under prosecutorial direction can sever causation between the prosecutors and the indictment. Mot. 7-9.

3. Plaintiff's Grand Jury Indictment is Not a Superseding Cause.

The grand jury's decision to indict is not an intervening superseding cause either, because the Complaint specifically alleges Defendants misled the grand jury. Compl. ¶¶ 154-157. *E.g.*, *Trail v. Cressell*, 494 F. Supp. 3d 349, 362 (4th Cir. 2020) (holding "the grand jury's indictment does not establish the existence of probable cause" where Deputy unreasonably and "recklessly omitted material facts in his testimony to grand jury"); *see also Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988) ("An independent intermediary [*e.g.*, a grand jury] breaks the chain of causation unless … the deliberations of that intermediary were in some way tainted by the actions of the defendant."); *Rieves v. Town of Smyrna*, 959 F.3d 678, 696 (6th Cir. 2020) (finding, in claim against prosecutor, that "grand jury indictments, which were allegedly based on false information, did not conclusively establish probable cause"). While the Attorney Defendants argue they were unaware they were misleading the grand jury, Mot. 14, what counts is Plaintiff alleges they did. Compl. ¶¶ 154-57. [6]

[6] The Complaint's allegation that the Investigator Defendants misled "prosecutors," *see* Compl. ¶¶ 120-49, is not an admission that any of the Attorney Defendants lacked knowledge that the investigation generated false and misleading information and ultimately lacked probable cause.

That allegation is more than enough. Fourth Circuit case law does not even require Plaintiffs to plead the Attorney Defendants deliberately and personally misled the grand jury. Even if false and misleading statements were not deliberate, Plaintiff still prevails if the statements were made with reckless disregard for the truth—which the Complaint and the favorable inferences therefrom adequately allege they were, not least because the Attorney Defendants knew that those statements resulted from a politicized process incapable of delivering a fair and impartial investigation, *see supra* § I.A.1. *Miller v. Prince George's Cnty.*, *MD*, 475 F. 3d 621, 631 (4th Cir. 2007) (explaining Plaintiff can succeed on a claim by demonstrating the officer, with a reckless disregard for the truth, made materially false statements); *United States v. Colkley*, 899 F.2d 297, 300 (4th Cir. 1990); *Franks v. Del.*, 438 U.S. 154, 171 (1978). Moreover, a grand jury that has been misled, *regardless of who misled it*, is no longer an "independent decisionmaker" whose decision to indict can break the chain of causation between a preceding act of a prosecutor or police officer and the indictment. *See, e.g.*, *Jackson v. Alleghany Cnty.*, 2008 WL 3992351, at *19 (W.D. Va. Aug. 28, 2008) (rejecting argument for dismissal due to grand jury indictment where plaintiff alleged defendants "submitted to the Office of the Attorney General false evidence that, in turn, was submitted to the grand jury, thereby causing the plaintiff to be indicted without probable cause"). This is particularly true here where the Attorney Defendants' actions proximately caused the wrongdoings of the Investigator Defendants. *Supra* § I.A.2.

The Attorney Defendants were not the only prosecutors involved in Plaintiff's prosecution. Plaintiff is entitled to all reasonable inferences flowing from the allegations the Investigator Defendants and the Attorney Defendants jointly or separately contributed to creating a presentation that misled the grand jury. *See Daly*, 2014 WL 2759078, at *1, *4 (Hudson, J.); *Nahigian v. Juno Loudoun, LLC*, 684 F. Supp. 2d 731, 737 (E.D. Va. 2010) ("'[T]he complaint is to be liberally construed in favor of plaintiff.'") (*quoting Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)).

* * *

To the extent any factual disputes remain regarding proximate cause (including foreseeability, Section I.A.2., or whether or to what extent the Attorney Defendants were aware their grand jury presentation was based on misrepresentations, whether they recklessly disregarded that possibility, or whether they were indifferent to that possibility, Section I.A.3), those disputes cannot be decided on a motion to dismiss. *See Poliquin v. Daniels*, 486 S.E.2d 530, 534 (1997) (proximate cause is a question of law if the facts alleged are susceptible to only one inference); *Goff v. Jones*, 47 F. Supp. 2d 692, 697 (E.D. Va. 1999); *see Pinder*, 660 F. Supp. 2d at 737.

B. Attorney Defendants Concede Absolute Immunity Does Not Apply to Pre-Investigatory Acts Preceding the Launch of the Formal Investigation.

The Attorney Defendants do not even attempt to argue they are entitled to absolute immunity for the "pre-investigative" conduct described above. *See* Mot. 10 (arguing only qualified immunity for pre-investigative acts). This alone defeats their argument that prosecutorial immunity shields them from liability, as Plaintiff's theory of liability flows from that concededly non-immune conduct as discussed in Section I.A., *supra*.

To the extent the Attorney Defendants intend to argue on reply that absolute immunity protects some of the Attorney Defendants' actions taken by and through the Unit prior to the formal investigation, including preliminary evidence gathering meetings with political actors and other actions to generate evidence of election fraud, such arguments fail. Critically, the "official seeking absolute immunity bears the burden of showing that it is justified by the function in question." *Burns*, 500 U.S. at 486 (1991). The Attorney Defendants have not met this burden.

The only actions eligible for absolute immunity are those "intimately associated with the judicial phase of the criminal process." *Burns*, 500 U.S. at 486 (citing *Imbler v. Patchman*, 424 U.S. 409, 430 (1976)). In other words, absolute immunity is afforded only when acting "within the

advocate's role: but it does not apply when prosecutors are acting as investigators or administrators," *Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993), or otherwise performing acts "extraneous to the judicial process," *Conley v. Ryan*, 92 F.Supp.3d 502, 522 (S.D.W.V. Mar. 13, 2015). In the Fourth Circuit, timing is the "key factor" used to determine whether acts are investigative/administrative or protected advocacy. *Annappareddy v. Pascale*, 996 F.3d 120, 139 (4th Cir. 2021) (citations omitted). Where conduct occurs during a preliminary pre-indictment investigation, courts find the function investigatory/administrative and unprotected. *Buckley*, 509 U.S. at 274 (A prosecutor is not an advocate "before he has probable cause to have anyone arrested"); *Kalina v. Fletcher*, 522 U.S. 118 (1997); *Annappareddy*, 996 F.3d at 139; *Goldstein v. Moatz*, 364 F. 3d 205, 214-15 (4th Cir 2004). This is particularly important because, contrary to the Attorney Defendants' claims, Mot. 11, absolute immunity is meant to safeguard the judicial function, not merely public trust in the prosecutor's office. *Burns*, 500 U.S. at 485 (common law immunity is "necessary to protect the judicial process.")

As such, prosecutors cannot claim prosecutorial immunity when "perform[ing] the investigative functions normally performed by a detective or police officer,"` *Buckley*, 509 U.S. at 273, including "initiating and conducting the [] investigation," "searching for evidentiary support that might give a prosecutor probable cause," "fabricat[ing] evidence concerning an unsolved crime," *Bous v. McAfee*, 2023 WL 376997, at *10 (W.D. Tex. Jan. 24, 2023) (citations omitted), or "generat[ing] evidence in support of a [] prosecution," *Roberts v. Lau*, 90 F.4th 618 (3d Cir. 2024), cert. denied sub nom., *Baer v. Roberts*, 2024 WL 4529810 (U.S. Oct. 21, 2024). *See also Hooper v. Sachs* ("*Hooper*"), 618 F. Supp. 963, 976 (D. Md. 1985), *aff'd*, 823 F.2d 547 (4th Cir. 1987) (similar). They likewise cannot claim immunity when acting as administrators, including

when "overs[eeing] and enforc[ing] policies and practices that violate[] Plaintiff's constitutional rights." *Brown v. Reinhart*, 760 F. App'x 175 (4th Cir. 2019).

Here, Miyares and Lief are not entitled to prosecutorial immunity for their conduct prior to the commencement of the formal investigation into PWC's election results in the 2020 election because that conduct was not intimately, let alone sufficiently, connected to the judicial process. The conduct described in Section I.A occurred during the preliminary, pre-indictment investigation before the Attorney Defendants could have had probable cause for seeking any indictment. The timing thus indicates the actions were administrative or investigative in nature and are not immune.

The Attorney Defendants' reliance on *Phatisis v. Clark* is unjustified. Mot. 10-11 (citing 2013 WL 4098488, at *3). In *Phatisis*, the court granted a motion to dismiss, finding the prosecutor defendants' alleged actions related to an advocative role and the allegations were not "particularize[d]" enough to show "what, if any, role [defendants] played in this prosecution or whether the charges were supported by probable cause." *Phatisis*, 2013 WL 4098488, at *5-7. Plaintiff's allegations are entirely unlike those made in *Phatsis* which lacked the necessary level of detail required to "elevate the claims beyond speculation," *id*. at 7. The Complaint alleges from the moment Miyares took office until Lief initiated a formal investigation into PWC's election data, Miyares and Lief acted as investigators, grasping for some hook for a prosecution for election fraud committed during the 2020 election. *See supra* § I.A. Those acts all served the investigative function—generating an appearance of evidence of election fraud to legitimize and support the launch of the Unit—a function courts consistently decline to protect with absolute immunity. *See, e.g.*, *Buckley*, 509 U.S. at 273-74 (denying absolute immunity for manufacturing false evidence during an pre-indictment investigation for an unsolved crime ahead of an upcoming election); *Burns*, 500 U.S. at 487 (finding a prosecutor was entitled to immunity for his participation in a

probable cause hearing**,** but not for his "motivation in seeking the search warrant or his conduct outside of the courtroom relating to the warrant"); *Hooper,* 618 F. Supp. at 976 (denying absolute immunity where prosecutor directed third party to obtain evidence of Medicaid fraud during pre-indictment investigation); *Brown v. Daniel*, 230 F.3d 1351, at *2 (4th Cir 2000) (denying absolute immunity where prosecutors "planned and conducted an unlawful and unfair undercover operation or 'sting operation'...."); *Goldstein*, 364 F. 3d 205, 214-15 (holding no absolute immunity for prosecutor conducting investigative acts prior to probable cause finding).[7]

For these reasons, the Attorney Defendants are not entitled to dismissal based on prosecutorial immunity. To the extent there is any dispute on this issue, it should be resolved after development of the factual record. *Reinhart*, 760 Fed. App'x. at 179 (explaining absolute immunity is a "fact-based" issue "requir[ing] 'development of the record'" (citation omitted)).[8]

C. Attorney Defendants Have Not Established Qualified Immunity for Acts Preceding the Formal Investigation.

The Attorney Defendants are not entitled to qualified immunity. Qualified immunity protects government officials from claims of constitutional violations "for reasonable mistakes as to

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[7] When confronted with similar facts, courts in other circuits likewise find investigative conduct not protected by absolute immunity. *See e.g.*, *Weimer v. Cnty. of Fayette, Penn.*, 972 F.3d 177, 188 (3d Cir. 2020) (no absolute immunity for participating in initial crime-scene investigation and in interviewing witnesses months before criminal charges filed); *Wooten v. Roach*, 964 F.3d 395 (5th Cir. 2020) (no absolute immunity for directing politically motivated investigation and prosecution of state judge); *Bledsoe v. Jefferson Cnty., Kansas*, 275 F. Supp. 3d 1240, 1258 (D. Kan. 2017) (no immunity for conspiring to fabricate a false narrative to pin crime on plaintiff), aff'd in part, dismissed in part sub nom, *Bledsoe v. Vanderbilt*, 934 F.3d 1112 (10th Cir. 2019); *Smith v. Updegraff*, 744 F.2d 1354, 1364 (8th Cir. 1984) (no absolute for hiring person to work undercover to "get [plaintiff] no matter what").

[8] Other circuits likewise find such disputes are better resolved after development of the factual record. *See e.g.*, *Hill v. City of New York,* 45 F.3d 653, 663 (2d Cir.1995) ("When it is unclear from the pleadings whether a prosecutor's conduct was advocative or investigatory, absolute immunity cannot be decided as a matter of law on a motion to dismiss.").

the legality of their actions." *See Saucier v. Katz*, 533 U.S. 194, 206 (2001). A qualified immunity analysis is parsed into two inquiries, which may be assessed in either sequence. The first inquiry is: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [defendant's] conduct violated a constitutional right?" and the second inquiry is, if so, was the right "clearly established." *Id.* at 201. While a "qualified immunity defense can be presented in a 12(b)(6) motion," when it is "asserted at this early stage in the proceedings, the defense faces a formidable hurdle and is usually not successful." *Owens v. Baltimore City State's Att'ys Off.*, 767 F.3d 379, 396 (4th Cir. 2014) (citation omitted).

The Attorney Defendants have not overcome that formidable hurdle here. The facts alleged and the inferences to be drawn therefrom show the Attorney Defendants' acts described in Section I.A, *supra*, violated Plaintiff's constitutional rights, so their defense turns on whether those rights were clearly established such that a reasonable person would have known. But the constitutional right to be free from unreasonable searches and seizures is well settled. *See Merchant v. Bauer*, 677 F.3d 656, 662 (4th Cir. 2012) ("Unquestionably, the Fourth Amendment prohibits law enforcement officers from making unreasonable seizures."). And the seizure of an individual effected without probable cause is unreasonable. *Id.*; *Miller*, 475 F.3d at 627; *see generally Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Illinois v. Wardlow*, 528 U.S. 119, 124-25 (2000). In addition, the right to not be deprived of one's liberty by fabrication of evidence is clearly established. *Willis v. Blevins*, 957 F. Supp. 2d 690, 703 (E.D. Va. 2013).

The Attorney Defendants argue "[i]t is plainly lawful to create a new investigative unit consistent with the Attorney General's statutory duties … staff it as necessary … and train the same staff." Mot. 10. But Plaintiff does not challenge the act of creating an election integrity unit *per se*. The Complaint alleges that the manner and the context in which the Attorney Defendants

established and directed *this* Unit directly and foreseeably set in motion the causal chain that led to White's prosecution. Plaintiff alleges that the Attorney Defendants' deliberate structuring of the Unit, combined with their failure to appropriately train and staff it, Compl. ¶¶ 103-07, created pressure on the investigators to deliver a prosecution at any cost. This was not incidental but part of a broader effort to pursue political objectives, as evidenced by their unprecedented seizing on immaterial discrepancies to justify securing a formal referral for investigation, and their tasking the Unit with generating evidence to support predetermined claims of election fraud. *Id.* ¶¶ 6, 114-19, 195. Thus, Plaintiff does not seek to attach civil liability to the mere fact the Attorney Defendants created the Unit but rather to the broader course of unlawful conduct underlying the shambolic and politicized nature of the Unit's creation, which proximately caused Plaintiff's indictment. *Shrewsbury v. Williams*, 439 F. Supp. 3d 765, 780 (W.D. Va. 2020), *aff'd*, 844 F. App'x 647 (4th Cir. 2021) ("Officers are not entitled to qualified immunity when they are plainly incompetent or knowingly violate the law."). The second and third part of the Attorney Defendants' argument misrepresents the allegations in the Complaint and should be rejected. Indeed, the Complaint clearly alleges the Attorney Defendants *failed* to appropriately staff the Unit and *failed* to train its staff. Compl. ¶ 6. In any event, because the motion hinges on reasonableness, the Attorney Defendants' motion should be denied because "the Court will be in a far better position to assess the agents' actions and determine whether they were objectively reasonable on a more fully developed record." *Daly*, 2014 WL 2759078, at *7 (denying motion to dismiss).

II. PLAINTIFF HAS STATED A § 1983 MALICIOUS PROSECUTION CLAIM AGAINST LIEF FOR IMPROPERLY DIRECTING AND PARTICIPATING IN THE INVESTIGATION TO WHICH NO IMMUNITY DEFENSE APPLIES (COUNT II).

If the Court finds the Attorney Defendants' pre-investigative acts did not cause Plaintiff's seizure—which it should not—Count II of the Complaint still should not be dismissed against Lief

because Plaintiff alleges that his direction of and participation in the formal investigation proximately caused her seizure, Section II.A, and such acts are not protected by prosecutorial or qualified immunity, Section II.B-C.

A. Lief's Directing and Participating in the Formal Investigation Caused Plaintiff's Seizure.

Beyond his role structuring and staffing the Unit to prioritize securing a prosecution over conducting a fair or lawful investigation, *see supra* § I; Compl. ¶¶ 102-07 (alleging Lief played a central role in the Unit's setup, which lacked proper training, policies, and structure to ensure lawful, unbiased investigations), the Complaint alleges that Lief (a) personally triggered the opening of the investigation into PWC for political reasons, knowing no credible evidence of election fraud existed, and inexplicably treating the matter differently than similarly situated election irregularities; and (b) directed the Investigator Defendants to generate evidence of election fraud, which they ultimately did. Compl. ¶¶ 6, 114-19 (alleging Lief "directed and supervised [the Investigators] in conducting the investigation"), 120, 196-97; *see also id.* ¶¶ 154-56. The Complaint further alleges that Lief personally participated in the investigation in a manner beyond prosecutorial guidance or passive supervision and puts his acts on par with the acts of the Investigator Defendants, *id*. ¶ 116 (alleging Lief had "direct and unusual involvement in the investigatory process," including receiving evidence directly from the Investigator Defendants as it was gathered), which Defendants' do not dispute state a claim for malicious prosecution. Mot. § I.B. Lief's involvement in the misconduct-laden investigation was not incidental, but deliberate, carrying a politicized agenda that began with establishing the Unit, and foreseeably caused Ms. White's indictment. *Supra* § I.A.

Any argument that the acts of the Investigator Defendants and the grand jury indictment are intervening or superseding causes of Plaintiffs' seizure fail for the same reasons argued in Section I.A, *supra*. Plaintiff alleges that Lief was part of—not separate from—the Investigator

Defendants' misconduct and misleading of the grand jury. The Complaint's allegations are sufficient to infer, at a minimum, that Lief knew about the Investigator Defendants' misconduct and knew the evidence presented to him during the investigation was false or misleading. *See* Compl. ¶¶ 116, 150, 156 (alleging Lief made the same material misrepresentations and omissions to the grand jury as produced in the investigation). It is inconceivable that a prosecutor who was fully aware of the facts gathered during the investigation and the law, as the Complaint alleges Lief was, would have believed there was probable cause to authorize the seizure of Ms. White. Thus, the Complaint plausibly alleges that Lief knowingly and intentionally participated in the Investigator Defendants' misconduct. There may be other plausible explanations for Leif's actions, but that is not a basis to dismiss the Complaint. *Jien v. Perdue Farms, Inc*., 2022 WL 2818950, at *10 (D. Md. July 19, 2022) ("[T]he existence of a plausible, lawful alternative scenario is not the basis for dismissal… 'the Court cannot pick between equally plausible scenarios when deciding a motion to dismiss."') (quoting *Merryman v. J.P. Morgan Chase Bank, N.A.*, 2016 WL 5477776, at *9 (S.D.N.Y. Sept. 29, 2016).

In any case, any other plausible explanation for Lief's actions as alleged still establishes his liability. If Lief merely took the Investigator Defendants' distorted findings at face value, allowing himself to be misled in reckless disregard of the available evidence and his knowledge of the law, *e.g.* Compl. ¶ 120 (alleging Investigator Defendants misled "prosecutors" generally), he is still liable for setting in motion the chain of events that produced the Investigator Defendants' misconduct. *Miller*, 475 F. 3d at 631; *see also supra* § I.A.3.

B. Lief's Directing and Participating in the Formal Investigation Is Not Entitled to Absolute Immunity.

Lief's investigative acts are not protected by absolute immunity. As discussed in Section I.B., *supra*, a prosecutor is not protected by absolute immunity for his investigative conduct.

Hooper, 618 F. Supp. at 973 ("A prosecutor who assists, directs, or otherwise participates with, the police in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity"); *Buckley*, 509 U.S. at 276 (no absolute immunity for directing investigation and pre-indictment fabrication of evidence; immunity does not protect "the detective's role in searching for the clues and corroboration"). Here, Plaintiff pleads Lief's personal and proactive involvement in participating in the investigative function right alongside the Investigator Defendants, which is more than enough to defeat his claims of immunity. *See supra* § II.A.

Beyond direct participation, Plaintiff also pleads Lief directed and supervised the investigation, *id.*, which courts likewise do not protect with immunity. *Marshall v. Ninth Cir. Solicitor's Office*, 2021 WL 3758059, at *2-4 (D.S.C. Aug. 24, 2021); *Rieves*, 959 F.3d at 692 (no absolute immunity for directing investigation and proactively pushing officers to gather evidence despite knowingly lacking probable cause). On this, *Marshall* is instructive. 2021 WL 3758059, at *2-4. In *Marshall*, the district court declined to dismiss based on prosecutorial immunity because the "alleged conduct implie[d] the performance of an investigative function by [one defendant] under supervision [of the other]." *Id.* Specifically, the plaintiff alleged that one attorney defendant assigned another to investigate and, pursuant to that instruction, the other conducted pre-arrest interviews resulting in plaintiff's seizure. *Id.* Immunity was denied—not only to the prosecutor who conducted the investigation resulting in the unlawful seizure, but also to the prosecutor who assigned that task. Thus, even if Lief merely assigned the Investigator Defendants to conduct the unlawful investigation, immunity should be denied.

Lief makes two arguments to save his absolute immunity defense. Both are wrong on the law, ignore alleged facts, and must be rejected.

First, Lief cites *Nero v. Mosby*, 890 F.3d 106 (4th Cir. 2018) to argue "merely conducting an investigation" is not actionable. Mot 12-13. Not so. Though *Nero* did state in passing that a prosecutor's mere involvement in an investigation itself is not necessarily actionable, courts have explained the statement "must not be read in isolation," and instead, "when read in context" it only referred to the plaintiff's attempt to "create a new rule that participation in an investigation [*per se*] deprives a prosecutor's subsequent acts of absolute immunity." *Marshall*, 2021 WL 3758059, at *2-4 (cleaned up). *Nero* did not "question or call into doubt the [] settled case law directing a 'functional approach' to prosecutorial immunity." *Marshall*, 2021 WL 3758059, at *4; *Reinhart*, 760 F. App'x 175 (similar). Using that approach, courts in this Circuit consistently hold allegations prosecutors acted improperly in their investigative roles are not covered by absolute immunity. *See supra* § I.B (collecting cases). Here, Plaintiff alleges Lief was much more than merely present during the investigatory phase. She alleges he initiated it, directed it, and participated in the unlawful acts prior to the decision to prosecute and the misleading presentation to the grand jury. *Supra* § II.A; *contra* Mot. 12-13.

Second, Lief argues that a prosecutor's "participation in an investigation [does not] deprive [his] subsequent acts of absolute immunity." Mot 12-13. This ignores the Supreme Court's admonition that: "A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial; every prosecutor might then shield himself from liability for any constitutional wrong against innocent citizens by ensuring that they go to trial." *Buckley*, 509 U.S. at 276. It also ignores the established proposition that just because evidence generated by a prosecutor's investigative work is presented to a grand jury "does not retroactively transform that work … into the prosecutorial." *Id.*; *Guzman–Rivera v. Rivera–Cruz*,

55 F.3d 26, 29 (1st Cir.1995) ("The prosecutorial nature of an act does not spread backwards like an inkblot, immunizing everything it touches."). The misconduct Plaintiff alleges was entirely extraneous to the judicial process and began far before the decision to initiate charges against her based on the improper evidence gathered by the investigators during the formal investigation. White does not rest her claim on the actual presentation of fabricated evidence to the grand jury; she alleges liability for Defendants' unlawful actions that *created* a misleading presentation to the grand jury, resulting in a tainted indictment and unlawful seizure.

Other than those arguments, Lief makes no showing his actions were prosecutorial as opposed to investigative. He therefore fails to meet his burden to claim immunity. *Burns*, 500 U.S. at 486 (explaining officials seeking absolute immunity bear the burden of showing immunity is justified for the function in question). To the extent the Court believes a dispute exists whether the conduct was investigative or prosecutorial (which there is not), it must be resolved after development of the factual record. *See supra* § I.B. (citing *Reinhart*, 760 Fed. Appx. at 179).

C. Lief Has Not Established Qualified Immunity.

The Attorney Defendants only argue they are qualifiedly immune for "creating, staffing, and training the EIU." Mot. 10. Because Lief has not argued that he is entitled to qualified immunity for initiating, directing, and participating in the investigation of Ms. White, Lief failed to meet his burden of establishing his right to it. *See Durham v. Jones*, 737 F.3d 291, 299 (4th Cir. 2013).

To the extent Lief intends to argue on reply that these other actions are protected by qualified immunity, those arguments fail. As explained above, qualified immunity protects officials only when their conduct does not violate clearly established constitutional rights. *See supra* § I.C. Here, the Complaint plausibly alleges Lief's conduct during the investigation violated Ms. White's Fourth Amendment rights, which were clearly established at the time. *Id*. A reasonable official would have known initiating and directing a sham investigation to generate evidence to validate

claims of election fraud where no such fraud exists would lead to an unlawful seizure violating Ms. White's constitutional rights. *See, e.g.*, *Rieves*, 959 F.3d at 696 (holding no qualified immunity for "pushing officers to execute the arrests" in face of unreliable and vague evidence supporting probable cause). In any event, at this stage, with the defense turning on the reasonableness of Lief's actions, qualified immunity should not bar the claim, and the issue is better addressed on a more developed factual record. *See Daly*, 2014 WL 2759078, at *7.

III. PLAINTIFF HAS STATED A STATE LAW MALICIOUS PROSECUTION CLAIM AGAINST THE ATTORNEY DEFENDANTS FOR PRE-INVESTIGATORY ACTIONS & AGAINST LIEF FOR DIRECTING THE INVESTIGATION TO WHICH NO IMMUNITY APPLIES (COUNT III).

"A Virginia common-law action for malicious prosecution requires the plaintiff to prove that the prosecution was (1) malicious; (2) instituted by or with the cooperation of the defendant; (3) without probable cause; and (4) terminated in a manner not unfavorable to the plaintiff." *Johnson*, 721 F. Supp. at 425 (internal quotations omitted). Almost exclusively relying on their immunity defenses, the Attorney Defendants' Motion fails to discuss any of those elements and instead rests on a conclusory argument that "[t]he Court cannot plausibly infer from the allegations that the Prosecutors created a new investigative unit with structural flaws that the prosecutors maliciously instituted White's prosecution." Mot. 16-17. Because the Virginia law standard of causation is different from the federal causation standard and because Ms. White's federal § 1983 claim does not require a showing of malice, both elements are briefly discussed below, Section III.A, before turning to the Attorney Defendants' immunity defenses, Section III.B.

A. Plaintiff's Prosecution Was Maliciously Instituted By or With Cooperation of the Attorney Defendants.

To find the "instituted by or with the cooperation" element satisfied, "the Court must ascertain whether a defendant affirmatively, actively, and voluntarily took steps to instigate or to participate in the arrest of the [plaintiff] and whether the defendant exercised some level of control

over the decision to have the plaintiff arrested." *Bennett v. R & L Carriers Shared Servs., LLC*, 744 F. Supp. 2d 494, 512 (E.D. Va. 2010), *aff'd*, 492 Fed. App'x. 315; *Daniczek v. Spencer*, 156 F. Supp. 3d 739, 756 (E.D. Va. 2016) (plaintiff has "pled facts sufficient that a jury could determine that [defendant] did not have probable cause when he initiated the prosecution."). Notably, the pleading requirements for causation under Virginia common law are much less stringent than the federal causation standard. *See Evans*, 703 F.3d at 657 (finding plaintiffs pled a state-law malicious prosecution claim as to officers despite dismissing federal malicious prosecution claim).

Here, the Complaint alleges Ms. White's prosecution was instituted by or with the cooperation of Miyares and Lief because they affirmatively, actively, and voluntarily instigated an unlawful investigation of Plaintiff, over which they exercised full control, and which directly caused Plaintiff's indictment by a grand jury that was misled by Defendants. *See supra* § I.A & § II.A.

As for malice, under Virginia law, "malice" means "any controlling motive other than a good faith desire to further the ends of justice, enforce obedience to the criminal laws, suppress crime, or see that the guilty are punished." *Daniczek*, 156 F. Supp. 3d 739; *Hudson v. Lanier*, 497 S.E.2d 471, 473 (1998). Malice can be more than just "ill will" alone – it can "include[] every sinister or improper motive." *In re Trammell*, 388 B.R. 182, 192 (Bankr. E.D. Va. 2008). Additionally, under established Virginia law, "the want of probable cause alone *can* serve as legally sufficient evidence to support an inference of malice." *Bennett*, 744 F. Supp. 2d at 522.

While the malice inquiry is fact dependent and therefore not best suited for motion to dismiss, *see Hamden v. Denny*, 2021 WL 1167286, at *4 (W.D. Va. 2021), Plaintiff has adequately pled malice. Political pressure and objectives detached from the pursuit of justice drove the probe into minor inaccuracies in PWC's election. Compl. ¶¶ 6, 102-108, 114, 117-19. As described in Section I.A, *supra*, the Attorney Defendants set up the Unit in a politicized manner, including by

tasking two inexperienced investigators with the investigation of Ms. White to achieve their goal of presenting a prosecution of election fraud. Plaintiff has therefore adequately alleged malice. Moreover, because the Attorney Defendants do not and cannot contest the well-pleaded allegations of a complete lack of probable cause, Compl. ¶¶ 121-149, malice can be inferred from that alone.

B. Attorney Defendants are Not Protected by State Absolute or Sovereign Immunity.

The Attorney Defendants' claim to state absolute immunity fails under the same principles restricting federal immunity, as it does not extend to investigative or administrative activities distinct from the judicial process. *Supra* § I.B & § II.B. While state immunity may be interpreted slightly broader than federal immunity—specifically regarding acts related to charging decisions—it remains limited to acts "intimately associated with the judicial process." *Hueston v. Kizer*, 2008 Va. Cir. LEXIS 280, at *34 (Va. Cir. Ct. May 29, 2008). For the same reasons as in Section I.B, the Attorney Defendants' conclusory assertions do not meet their burden to show their pre-investigative acts were intimately connected to the judicial process, as required under *Hueston*. Any argument the Attorney Defendants are entitled to immunity for their actions during what they characterize as the "investigation phase" fails for the same reasons given in Section II.B.

That leaves the Attorney Defendants' argument that their actions are entitled to sovereign immunity. Mot. 18-19. That argument also fails. A qualifying employee is not entitled to sovereign immunity if he "engaged in intentional misconduct," "acted wantonly," or "engaged in wrongful conduct." *Claitt v. Newcomb*, 1990 WL 303956, at *3 (E.D. Va. Aug. 10, 1990). Because Plaintiff alleges malice, *supra* § III.A, the Complaint cannot be dismissed based on sovereign immunity. *See Claitt*, 1990 WL 303956, at *3 (holding allegations of gross negligence, recklessness, and intentional wrongdoing warrant denial of sovereign immunity where alleged defendant made felony arrest without probable cause); *cf. Davison v. Rose*, 2019 WL 13193754, at *19 (E.D. Va. July

31, 2019) ("In the context of defamation, 'willful' in the sovereign immunity analysis essentially equals 'malice.'"), *aff'd*, 19 F.4th 626 (4th Cir. 2021).[9]

If that were not enough, the Attorney Defendants Motion does not cite a single case protecting a prosecutor with sovereign immunity for a malicious prosecution claim. *See generally* Mot. 17-19 (citing only medical malpractice and negligence cases). Courts routinely deny sovereign immunity claims where the alleged conduct violates a constitutional right. *See, e.g.*, *Cromartie v. Billings*, 298 Va. 284, 297 (2020) ("Because [] search was performed contrary to well-established law and violated [plaintiff's] Fourth Amendment rights, it exceeded simple negligence. Therefore, sovereign immunity does not protect [defendant]."). Here, Plaintiff alleges the Attorney Defendants' conduct caused her malicious prosecution, violating her constitutional rights. *Supra* § III.A. Accordingly, the Attorney Defendants cannot shield themselves with sovereign immunity for that misconduct.

CONCLUSION

For the above reasons, Plaintiff respectfully requests that the Court deny the Motion. In the alternative, if the Court grants the Motion in full or in part, Plaintiff request that the dismissal be without prejudice and that permission to replead be granted.

Respectfully submitted,

January 15, 2025

[9] This holds particularly true for Lief, who concedes he is not a constitutional officer but claims sovereign immunity because he "shouldered substantial discretion and policymaking authority," Mot. 18-19. The law is clear, however, that because Lief's alleged conduct violated Plaintiff's constitutional rights, he was not exercising discretion warranting immunity: "Federal officials do not possess discretion to violate constitutional rights or federal statutes." *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) (citation omitted); *Annappareddy v. Lating*, 2023 WL 2540306, at *11 (D. Md. Mar. 16, 2023) ("Because the Government did not possess the discretion to violate Plaintiff's Fourth Amendment rights, there is no discretion to engage in malicious prosecution as alleged here.").

By: /s/ *Joshua Erlich*

Joshua Erlich
The Erlich Law Office
1550 Wilson Blvd
Ste 700
Arlington, VA 22209
Tel: 703-791-9087
jerlich@erlichlawoffice.com

Corey Stoughton (Admitted *pro hac vice*)
Florian Loibl (Admitted *pro hac vice*)
Amanda Miner (Admitted *pro hac vice*)
SELENDY GAY PLLC
1290 Avenue of the Americas New York, NY 10104
Tel: 212-390-9000
cstoughton@selendygay.com
floibl@selendygay.com
aminer@selendygay.com

Rachel Goodman (Admitted *pro hac vice*)
Protect Democracy Project
82 Nassau Street, #601 New York, NY 10038
(202) 579-4582
rachel.goodman@protectdemocracy.org

Jessica Marsden (Admitted *pro hac vice*)
Protect Democracy Project
510 Meadowmont Village Circle, No. 328
Chapel Hill, NC 27517
(202) 579-4582
jess.marsden@protectdemocracy.org

Attorneys for Plaintiff Michele White

CERTIFICATE OF SERVICE

I hereby certify that on this day of January 15, 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 counsel of record.

By: /s/ *Joshua Erlich*

Joshua Erlich
The Erlich Law Office
1550 Wilson Blvd
Ste 700
Arlington, VA 22209
Tel: 703-791-9087
jerlich@erlichlawoffice.com