In the

United States Court of Appeals

For the Seventh Circuit

No. 21-1411

GREENPOINT TACTICAL INCOME FUND LLC, et al.,
Plaintiffs-Appellants,

v.

ALLEN J. PETTIGREW and DARREN C. HALVERSON,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Wisconsin.
No. 2:20-cv-00444-PP — **Pamela Pepper**, *Chief Judge*.

ARGUED NOVEMBER 30, 2021 — DECIDED JUNE 27, 2022

Before WOOD and HAMILTON, *Circuit Judges*.[*]

HAMILTON, *Circuit Judge*. Plaintiffs Greenpoint Tactical Income Fund LLC and its affiliates and managers were the subject of an FBI investigation into suspected fraud, particularly with respect to Greenpoint's asset valuation practices. The

[*] Circuit Judge Kanne heard argument in this case but died on June 16, 2022. He did not participate in the decision of this case, which is being resolved under 28 U.S.C. § 46(d) by a quorum of the panel.

investigation led to issuance of a search warrant for plaintiffs' properties and seizure of some assets. Following execution of the warrant, plaintiffs filed this suit against FBI Special Agent Allen Pettigrew and Assistant United States Attorney Darren Halverson. Plaintiffs allege that Agent Pettigrew and AUSA Halverson violated their Fourth Amendment rights by submitting a false and misleading affidavit in support of the search warrant. They seek damages pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court dismissed the suit for failure to state a claim, concluding that plaintiffs were seeking to extend *Bivens* to a "new context" and that "special factors" counseled hesitation in doing so. *Greenpoint Tactical Income Fund v. Pettigrew*, No. 20-cv-444, 2021 WL 461560, at *8 (E.D. Wis. Feb. 9, 2021), quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017). We affirm the district court's dismissal but on different grounds. Even assuming that *Bivens* can reach the Fourth Amendment violations alleged here, defendant Halverson is entitled to absolute prosecutorial immunity on these claims, and Agent Pettigrew is entitled to qualified immunity on them.

I. *Factual and Procedural Background*

A. *Greenpoint Tactical Income Fund and Its Affiliates*

Because the district court dismissed the case for failure to state a claim, we give plaintiffs the benefit of their factual allegations and draw reasonable inferences in their favor. *Lax v. Mayorkas*, 20 F.4th 1178, 1181 (7th Cir. 2021). Plaintiffs are Greenpoint Tactical Income Fund LLC and several affiliated entities and individuals. Greenpoint is a private investment fund that has over 100 individual investors. Greenpoint invests in various assets, including rare gems and fine minerals, which are the focus of this case. Its wholly-owned subsidiary,

plaintiff GP Rare Earth Trading Account, LLC, maintains Greenpoint's assets. Plaintiffs Chrysalis Financial, LLC and Greenpoint Asset Management II, LLC manage Greenpoint and are managed in turn by plaintiffs Christopher Nohl and Michael Hull respectively. Hull also manages an investment advisory firm, plaintiff Bluepoint Investment Counsel, LLC, that was working with Greenpoint in March 2017.

B. *The Investigation*

In May 2016, the United States Securities and Exchange Commission referred a case it had been working on to FBI Special Agent Allen Pettigrew for further investigation. At that stage, the targets of the investigation were Bluepoint Investment Counsel and Greenpoint Asset Management LLC. The SEC also notified Agent Pettigrew that Greenpoint itself may have been using "suspicious valuation practices for its assets."

Months later, after investigating the SEC's referral, Agent Pettigrew filed a search warrant application in March 2017 seeking access to plaintiffs' properties and assets. Agent Pettigrew's supporting affidavit explained that he had been investigating Christopher Nohl, Michael Hull, and Patrick Hull for suspected mail and wire fraud.[1] The affidavit asserted that there was probable cause to believe that Nohl and Michael Hull had "engaged in a scheme to defraud investors by systematically overvaluing assets held by the private investment fund that Nohl and … Hull[] manage[d]." Agent Pettigrew asserted that the motive for the scheme was to increase the management fees and profit allocations paid to

[1] Patrick Hull is not a plaintiff in this action.

Nohl and Hull, which were based on the value of Greenpoint's assets.

As further evidence supporting his suspicions, Agent Pettigrew's affidavit included details about the significant profits and financial benefits that Greenpoint, Nohl, and Hull had received in the less than three years of Greenpoint's existence. For example, the affidavit noted that Greenpoint had reported an increase of 313% in the value of its gems and minerals in less than three years. According to the affidavit, that increase was also reflected in claims of over $43.1 million in unrealized gains that were based largely on appraisals. The affidavit also reported that Greenpoint's management, Chrysalis and Greenpoint Asset Management II, received major allocations of money that were based wholly or in large part on these unrealized gains that had been driven by appraisals of gems and minerals. Specifically, by December 2015, Greenpoint's management received at least 15% of every investor dollar and amended the profit distribution structure giving themselves over $6.5 million in additional funds. Those changes also allowed the management to retain even more money without investors receiving much benefit. The affidavit also noted that the distributions and allocations to Greenpoint's management had been based almost entirely on the gem and mineral appraisals that Nohl had solicited.

A federal magistrate judge found probable cause and issued the search warrant. On March 22, 2017, FBI agents executed the warrant at plaintiffs' offices and homes and seized documents, computers, and other items. One unusual feature of this search was that the agents also seized Greenpoint's gems, fine minerals, and other materials. Then the agents and their consultants assessed the values of the gems and

minerals. Within a few months, the government returned to plaintiffs all the gem and mineral assets that had been seized during the raid. The criminal investigation ended without criminal charges against any of the plaintiffs or their associates.

C. *District Court Proceedings*

Plaintiffs filed this lawsuit in March 2020 seeking damages pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that the search and seizure of their property violated the Fourth Amendment. In the complaint, plaintiffs alleged that Agent Pettigrew "intentionally, knowingly, and recklessly made … false statements and representations or material omissions" in the search warrant affidavit. Plaintiffs also named Assistant United States Attorney Darren Halverson as a defendant. They claimed that AUSA Halverson "intentionally, knowingly, and recklessly assisted Pettigrew in the preparation and filing of the false statement[s] and representations or material omissions**."** Plaintiffs' complaint identified six representations in Agent Pettigrew's affidavit that they asserted were false and/or deliberately misleading. Those alleged misrepresentations in the affidavit included:

- that Greenpoint was misleading investors because its offering memorandum "retained its emphasis on investments in distressed real estate assets," even though "the majority of the investment dollars received by [Greenpoint] [were] used to purchase gems and fine minerals;"

- that appraisers James Zigras and William Metropolis did not actually complete the appraisals attributed to them, based on language in the affidavit that the appraisals were "purported to be completed by" those individuals;
- that it was unclear whether Metropolis's appraisals were based on fair market value or some other basis because his reports "did not specify the valuation type for the amount;"
- that Nohl improperly influenced Metropolis's valuation of the assets because Metropolis, in response to Nohl's appraisal request, sent him a note asking for "an idea of what you might need for numbers;"
- that the lack of insurance to cover any of the unrealized gains for GP Rare Earth's gems and minerals was further evidence of plaintiffs' fraudulent scheme; and
- that comments from a former GP Rare Earth officer that he left the company "due to unethical and possible illegal activities" and that the "new inventory was inflated and may be a set up for a claim or misleading investors" provided additional evidence of Greenpoint's illegal practices.

Plaintiffs alleged that they were entitled to relief because defendants' representations caused plaintiffs' properties and assets to be searched and seized without probable cause.

Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. They offered four grounds: (1) there is no viable implied cause of action pursuant to *Bivens* in the factual context of this case; (2) absolute immunity bars the claims against AUSA Halverson; (3) qualified immunity bars the claims against AUSA Halverson and Agent Pettigrew; and (4) plaintiffs failed to allege plausibly that the warrant affidavit was false and misleading in a material way, that AUSA Halverson violated an actionable court rule, or that the FBI caused improper damage to plaintiffs' property.

Relying on the Supreme Court's analysis in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the district court granted the motion to dismiss, concluding that no *Bivens* implied cause of action is available here. *Greenpoint Tactical Income Fund*, 2021 WL 461560, at *1, *14. The court reasoned that plaintiffs were seeking to apply *Bivens* to a "new context" and that various "special factors" counsel against extending *Bivens* relief to this case. *Id.* at *12–14. The court did not address absolute or qualified immunity. *Id.* at *14.

II. *Analysis*

A. *Legal Standard*

We review de novo a district court's decision granting a motion to dismiss pursuant to Rule 12(b)(6). *Lax*, 20 F.4th at 1181. We will "construe the complaint in the light most favorable to the plaintiff, accept all well-pleaded facts as true, and draw all reasonable inferences in the plaintiff's favor." *Id.* The complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Warciak v. Subway Restaurants, Inc.*, 949 F.3d 354, 356 (7th Cir. 2020),

quoting Fed. R. Civ. P. 8(a)(2). The facts also must be sufficient to "state a claim to relief that is plausible on its face." *Id.*, quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint presents plausible claims when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Warciak*, 949 F.3d at 356, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. *Bivens Relief*

1. *The Abbasi Framework*

In *Abbasi*, the plaintiffs alleged that they had been detained and subjected to harsh conditions after the 9/11 terrorist attacks because of their race, religion, or national origin. They sought damages from individual federal officials under *Bivens*. 137 S. Ct. at 1853–54. *Bivens* held that courts may recognize an implied cause of action allowing individuals to recover damages for unconstitutional conduct by federal agents acting under color of federal law. 403 U.S. at 389, 397. Since *Bivens* was decided in 1971, circuit and district courts have recognized *Bivens* as a foundation for damages claims against individual federal officials for a wide range of alleged constitutional violations. The case law governing those claims has often paralleled the law under 42 U.S.C. § 1983 for similar claims against state and local government officials, including defenses of absolute and qualified immunity and standards for available damages.

In recent years, however, the Supreme Court has been adopting a narrower view of *Bivens* than has prevailed in the lower courts. The Court in *Abbasi* considered whether the defendants, who included high-level executive branch officials (the former Attorney General, former FBI Director, and

former Immigration and Naturalization Service Commissioner) and prison wardens, could be sued under *Bivens* for the alleged constitutional violations. 137 S. Ct. at 1853–54. The Court referred to its recent reluctance to recognize implied private rights of action in statutes and noted that expanding *Bivens* to new "contexts" is now considered a "'disfavored' judicial activity." *Id.* at 1857, quoting *Iqbal*, 556 U.S. at 675. The Court emphasized: "It is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims…." *Id.* at 1858. Rather, the Court explained, lower courts should focus on separation of powers principles when deciding whether to recognize an implied cause of action to enforce constitutional rights. *Id.* at 1857.

The *Abbasi* Court thus introduced a new analysis for evaluating claims under *Bivens*. The first question a court must ask is whether the plaintiff's claim presents a new *Bivens* "context," "*i.e.*, whether the case is different in a meaningful way from previous *Bivens* cases decided by this Court." *Id.* at 1864 (internal quotation marks omitted). If it is, the court must then decide whether there are "special factors counselling hesitation" in allowing the claim to go forward. *Id.* at 1857, quoting *Carlson v. Green*, 446 U.S. 14, 18 (1980). The focus of that inquiry is "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1858.

The Supreme Court itself has ruled in favor of *Bivens* plaintiffs in only three cases decided by full opinion on the merits: *Bivens* itself, *Davis v. Passman*, 442 U.S. 228 (1979), and *Carlson v. Green*. The plaintiff in *Bivens* claimed that federal

agents violated his Fourth Amendment right to be free from unreasonable searches and seizures when they arrested him and searched his home without a warrant or probable cause. 403 U.S. at 389. In *Davis*, the plaintiff sued a United States Representative for violating the equal protection component of the Fifth Amendment Due Process Clause by discriminating against her on the basis of sex when he fired her. 442 U.S. at 230–31. *Carlson* presented a claim against federal prison officials for deliberate indifference to the serious medical needs of a prisoner, ultimately resulting in his death, in violation of the Eighth Amendment. 446 U.S. at 16 & n.1.

Lower courts have looked at that range of claims and have understandably viewed *Bivens* as authorizing damages claims for a wide range of constitutional violations under clearly established law. It is difficult to identify a principled basis for allowing those three constitutional claims and not others, at least where other special factors, such as military discipline or alternative remedial systems, are not applicable. See, e.g., *Schweiker v. Chilicky*, 487 U.S. 412 (1988) (rejecting procedural due process claim against Social Security officials); *Chappell v. Wallace*, 462 U.S. 296 (1983) (rejecting race discrimination claim against military officers); *Bush v. Lucas*, 462 U.S. 367 (1983) (rejecting First Amendment suit by federal employee); *Doe v. Rumsfeld*, 683 F.3d 390, 394–96 (D.C. Cir. 2012) (declining to apply *Bivens* remedy to plaintiff's claim, stemming from his detention by the military, in part because of special factors related to the military, national security, and intelligence); *Richards v. Kiernan*, 461 F.3d 880, 885 (7th Cir. 2006) (affirming dismissal of plaintiff's *Bivens* action because federal statute provided the "exclusive remedy for an alleged constitutional violation … arising out of federal employment"); *Robbins v. Bentsen*, 41 F.3d 1195, 1202–03 (7th Cir. 1994) (same).

2. *The Parties' Arguments on Appeal*

Plaintiffs argue that the core holding of *Bivens* provides them with a remedy against defendants. As noted, plaintiff Bivens alleged Fourth Amendment violations in the form of a warrantless search. Defendants here obtained a warrant, but plaintiffs allege they obtained it by deliberately misleading the judge who issued it. Plaintiffs see the two contexts as so closely related that this action falls within *Bivens*' sphere of Fourth Amendment claims arising from law enforcement activities. Several pre-*Abbasi* cases recognized that plaintiffs could sue federal agents who allegedly obtained warrants based on fabricated or misleading affidavits. Those cases support plaintiffs' position, though such claims were sometimes defeated on immunity defenses. E.g., *Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 104–05 (1st Cir. 2013) (affirming denial of qualified immunity); *Unus v. Kane*, 565 F.3d 103, 123–25 (4th Cir. 2009) (affirming grant of qualified immunity); *Technical Ordnance, Inc. v. United States*, 244 F.3d 641, 646–50 (8th Cir. 2001) (reversing denial of qualified immunity); *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 462–64 (9th Cir. 1994) (affirming denial of qualified immunity); *Salmon v. Schwarz*, 948 F.2d 1131, 1137–39 (10th Cir. 1991) (affirming in part denial of qualified immunity). Courts also applied *Bivens* to cases where federal agents presented false or misleading information before a grand jury that resulted in an indictment and arrest. E.g., *Webb v. United States*, 789 F.3d 647, 660–63 (6th Cir. 2015) (reversing in part summary judgment for defendants); *Hammond v. Kunard*, 148 F.3d 692, 695–98 (7th Cir. 1998) (affirming denial of absolute and qualified immunity).

Even if this action is deemed to arise in a new *Bivens* context, plaintiffs assert, no factors would make an extension of *Bivens* here "unwarranted or improvident." Allowing a *Bivens* remedy would not lead to an improper, wide-ranging inquiry into the evidence that officers and prosecutors used to obtain the warrant, especially considering that courts conduct similar inquiries and analyses in deciding motions to suppress evidence in criminal cases and in § 1983 cases against state and local law enforcement officials. Plaintiffs also emphasize that they will be left with no remedy for defendants' alleged unconstitutional overreach if they cannot pursue a *Bivens* action.

Defendants contend that plaintiffs seek an improper extension of *Bivens* to a new context. Defendants see a principled difference between officers who violate the Fourth Amendment by carrying out a warrantless search (as in *Bivens* itself) and those who violate it by deceiving a court into issuing a search warrant, as alleged here. They also assert that other factors weigh against applying *Bivens* in this case, including that doing so would intrude into law enforcement operations and would exceed the courts' power where Congress has not chosen to provide a remedy for individuals like plaintiffs who have not faced criminal proceedings or statutory intentional torts. For support, defendants cite circuit court decisions analyzing this issue using the post-*Abbasi* framework. E.g., *Annappareddy v. Pascale*, 996 F.3d 120, 135–38 (4th Cir. 2021) (affirming dismissal in relevant part); *Cantú v. Moody*, 933 F.3d 414, 423–24 (5th Cir. 2019) (affirming dismissal); *Farah v. Weyker*, 926 F.3d 492, 498–502 (8th Cir. 2019) (reversing denial of dismissal).

3. *General Application*

In the wake of *Abbasi*'s new limits on *Bivens* claims, some courts have taken a fresh look at the precedents that have authorized *Bivens* claims in this context of alleged false and misleading warrant applications, choosing instead to limit *Bivens* to cases of warrantless searches and seizures. E.g., *Annappareddy*, 996 F.3d at 135–38 (affirming dismissal of plaintiff's *Bivens* action against defendants for falsifying affidavit to obtain search warrant); *Cantú*, 933 F.3d at 423–24 (affirming denial of *Bivens* relief where plaintiff alleged that defendants violated his Fourth Amendment rights by falsifying affidavits that led to his unlawful seizure); *Farah*, 926 F.3d at 498–502 (reversing denial of motion to dismiss *Bivens* claim where plaintiffs alleged that defendant provided false information and deceived prosecutors and grand jury into instituting criminal proceedings).

In contrast, other courts (or panels) have taken the view that *Abbasi* does not require them to disregard earlier *Bivens* precedents as long as they were not inconsistent with *Abbasi*. E.g., *Hicks v. Ferreyra*, 965 F.3d 302, 311–12 (4th Cir. 2020) (noting that before *Abbasi*, courts regularly applied *Bivens* to Fourth Amendment claims like plaintiff's so plaintiff's action was "not an extension of *Bivens* so much as a replay"); *Jacobs v. Alam*, 915 F.3d 1028, 1035–39 (6th Cir. 2019) (explaining that plaintiff's *Bivens* claims based on excessive force, fabrication of evidence, and other misconduct were "run-of-the-mill challenges … that fall well within *Bivens* itself").

In *Abbasi*, the Supreme Court cautioned that any hesitation about extending *Bivens* is "not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context in which it arose." 137 S. Ct. at 1856.

Instead, the Court explained, because *Bivens* is such "settled law … in this common and recurrent sphere of law enforcement," it should be retained. *Id.* at 1857. The Court's *Bivens* decision in *Hernández v. Mesa*, 140 S. Ct. 735 (2020), is also consistent with this comment about *Bivens*' continued force. In *Hernández*, the plaintiffs sought relief following a cross-border shooting where a U.S. Border Patrol official shot and killed their son, a young Mexican national. *Id.* at 740. The Court found it "glaringly obvious" that the plaintiffs' claims presented a new *Bivens* context because "*Bivens* concerned an allegedly unconstitutional arrest and search carried out in New York City," whereas the incident in *Hernández* occurred in an international context at the border. *Id.* at 743–44. The Court did not focus on the absence of a search warrant in *Bivens* but framed the issue in terms of an unconstitutional arrest and search in the United States, without trying to distinguish among various scenarios involving warrants or different grounds for warrantless searches or seizures.

A domestic search authorized pursuant to a fabricated warrant affidavit is far different from the cross-border shooting in *Hernández*. It does not raise questions of foreign policy or national security. Plaintiffs allege here the sort of Fourth Amendment violation familiar to federal courts and close to the heart of *Bivens*. As a result, we are not persuaded that *Abbasi* or *Hernández* overturned the line of cases recognizing Fourth Amendment *Bivens* claims based on fabricated warrant affidavits and/or grand jury testimony. The Supreme Court previously recognized that a search conducted with a warrant that lacked particularity was equivalent to a warrantless search. *Groh v. Ramirez*, 540 U.S. 551, 558–59 (2004).

Searches conducted with a "plainly invalid" warrant can still violate the Fourth Amendment. *Id.* at 557, 563.[2]

Also, plaintiffs' allegations are similar to the cases cited above applying *Bivens* as a remedy against federal actors who procured warrants based on false and misleading affidavits. Adjudication of plaintiffs' accusations here does not require a novel intrusion into law enforcement operations. Such an inquiry is common in criminal cases where an accused defendant seeks to suppress evidence because statements in an affidavit supporting a warrant were deliberately or recklessly false, e.g., *Franks v. Delaware*, 438 U.S. 154, 171–72 (1978) (allowing an evidentiary hearing after the defendant makes a preliminary proffer that false statements were knowingly, intentionally, or recklessly included in affidavit), and in § 1983 actions against state and local law enforcement officials, e.g., *Lawson v. Veruchi*, 637 F.3d 699, 700, 704–05 (7th Cir. 2011).

C. *Absolute and Qualified Immunity*

Defendants argue as alternative grounds for affirmance that the complaint shows that AUSA Halverson is entitled to absolute immunity on these claims and that Agent Pettigrew is entitled to qualified immunity from liability. We agree.

We may affirm a district court's dismissal of a claim on any ground supported in the record as long as the plaintiff has

---

[2] The Supreme Court recently held in *Egbert v. Boule*, No. 21-147, 596 U.S. –, 142 S. Ct. –, 2022 WL 2056291 (2022), that *Bivens* does not extend to Fourth Amendment violations by federal officials engaged in border-related functions. *Id.* at *3. The opinion in *Egbert* is consistent with the Court's cutting back on the scope of *Bivens* but does not change our understanding of *Bivens*' continued force in its domestic Fourth Amendment context.

had a fair opportunity to address the issue. *Dibble v. Quinn*, 793 F.3d 803, 807 (7th Cir. 2015); see also *Regains v. City of Chicago*, 918 F.3d 529, 533 (7th Cir. 2019). The immunity issues were fully briefed before the district court and before this court, so we base our decision on those grounds without wrestling to the ground the effects of *Abbasi* here.

1. *Absolute Immunity for AUSA Halverson*

Prosecutors enjoy absolute immunity from federal tort liability, including *Bivens* liability, for their work as prosecutors. *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976). This immunity is intended to prevent any threat that harassing civil litigation might interfere with prosecutors' independent judgment and their duties to the public. *Id.* at 422–23.

This immunity follows the work done by a prosecutor as a prosecutor; it does not necessarily apply to every official action by a person who holds office as a prosecutor. Courts apply a functional test to determine whether absolute immunity applies to a particular claim. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993). The functional test focuses on "the nature of the function" the prosecutor performed, not simply the position she held. *Id.*, quoting *Forrester v. White*, 484 U.S. 219, 229 (1988). The question is whether the prosecutor was acting as an advocate in the challenged actions or was instead acting in some other capacity, such as investigator or administrator. *Id.* at 273. Extensive case law offers guidance in drawing these lines and allows us to draw them here on the basis of plaintiffs' allegations in their complaint.

A prosecutor's advocacy role refers to "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial." *Buckley*, 509 U.S. at 273. These actions include

"the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Id.*; accord, e.g., *Brunson v. Murray*, 843 F.3d 698, 704–05 (7th Cir. 2016) (affirming summary judgment because absolute immunity applied to defendant prosecutor's preparation of formal charges against plaintiff and his appearance at the probable cause hearing, which all occurred "after the police investigation had ended"); *Anderson v. Simon*, 217 F.3d 472, 475–76 (7th Cir. 2000) (affirming dismissal of suit because defendant prosecutor's review of evidence and ultimate refusal to file charges was covered by absolute immunity); see also *Jones v. Cummings*, 998 F.3d 782, 788 (7th Cir. 2021) (similar); *Davis v. Zirkelbach*, 149 F.3d 614, 617 (7th Cir. 1998) (similar).

In contrast, a prosecutor acts in an investigative capacity when he fills the role of a detective or officer "searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested." *Buckley*, 509 U.S. at 273. A prosecutor's actions "before he has probable cause to have anyone arrested" may be investigative. *Id.* at 274; accord, *Hill v. Coppleson*, 627 F.3d 601, 605–06 (7th Cir. 2010) (dismissing appeal for lack of jurisdiction based on factual dispute about when defendant prosecutor became involved with case and met with plaintiff—after there was probable cause to arrest plaintiff or before—when officers were still searching for evidence to support arrest). Ultimately, prosecutors may claim only qualified immunity for actions taken in an investigative capacity. *Buckley*, 509 U.S. at 273; *Bianchi v. McQueen*, 818 F.3d 309, 316 (7th Cir. 2016).

Plaintiffs' complaint alleges that AUSA Halverson was acting in an investigative capacity because they claim he was involved in reviewing and drafting the search warrant affidavit. In their reply brief, plaintiffs contend that those activities were merely "litigation-inducing conduct" not shielded by absolute immunity because there was apparently no probable cause for an arrest, and they were never prosecuted. *Mink v. Suthers*, 482 F.3d 1244, 1262 (10th Cir. 2007) ("Absolute immunity applies to the 'prosecutor's role in judicial proceedings, not for every litigation-inducing conduct.'"), quoting *Burns v. Reed*, 500 U.S. 478, 494 (1991).

Defendants first counter that the complaint lacks specific facts about what AUSA Halverson did when he helped prepare the affidavit, and they assert that whatever steps he took "would have been directly tied to his judicial function." They contend that reviewing Agent Pettigrew's affidavit in its draft form was similar to preparing a witness to testify in a trial or a hearing in support of a warrant application. As a result, defendants contend that Halverson's activities were not investigative and that he is entitled to absolute immunity.

Even reading the facts in the light most favorable to plaintiffs, we agree with defendants that AUSA Halverson is entitled to absolute immunity. Plaintiffs' allegations against him concern his activities as an advocate. In *Buckley*, the Supreme Court explained that a prosecutor's advocacy responsibilities include evaluating the evidence assembled by officers. 509 U.S. at 273. Plaintiffs' complaint here alleges that AUSA Halverson assisted Agent Pettigrew in preparing the search warrant affidavit. They also claim that Halverson "directed" Pettigrew in preparing the warrant affidavit, but they do not explain what supposed direction Halverson gave.

These assertions do not suggest that AUSA Halverson was doing anything more than evaluating the evidence that Agent Pettigrew had gathered and presented to him. If that were sufficient to establish that a prosecutor was acting in an investigative capacity, then absolute immunity would disappear for seeking search warrants. See *Anderson*, 217 F.3d at 475–76 (explaining that reviewing and weighing the evidence to decide whether to proceed with charges was "a necessary part of a prosecutor's role of advocate").

Plaintiffs' limited allegations about AUSA Halverson are readily distinguishable from cases where we have held that a prosecutor was or could have been acting in an investigative capacity. For example, in *Fields v. Wharrie*, 740 F.3d 1107 (7th Cir. 2014), we considered whether one of the defendants was entitled to absolute immunity from allegations that he fabricated witness testimony during the investigation of the plaintiff. We concluded that absolute immunity did not apply, affirming in part the district court's denial of his motion to dismiss, in light of evidence that the defendant helped procure false statements from prospective witnesses a month before the plaintiff was even arrested. *Id.* at 1113–14.

Similarly, in *Whitlock v. Brueggemann*, 682 F.3d 567 (7th Cir. 2012), we ultimately dismissed the case for lack of jurisdiction because of a dispute about when probable cause developed. But we did point to evidence in the record that the prosecutor was involved in the investigation at its earliest stages, well before "anyone had sought his advice as a lawyer." *Id.* at 578–80**.** And in *Olson v. Champaign County*, 784 F.3d 1093 (7th Cir. 2015), we held that a prosecutor who actually swears to the truth of the facts in an information or warrant application rather than just signing and filing it is not acting as an advocate.

Id. at 1103. He is instead performing the same function as a police witness. *Id.* In this case, however, there is no allegation that AUSA Halverson was interviewing witnesses himself, was actively involved in the investigation as it was unfolding, or vouched himself for the truth of the allegations in Agent Pettigrew's affidavit.

The facts here are more like *Lewis v. Mills*, 677 F.3d 324 (7th Cir. 2012), where the plaintiff attempted to hold the prosecutor liable for allegedly fabricating evidence as part of an investigation against him. We affirmed the district court's finding that the prosecutor's actions were within his advocate role because he played no meaningful role in the investigation and did not receive the case for his review until the investigation was complete and ready for a grand jury. *Id.* at 331–32; see also *Bianchi*, 818 F.3d at 318 (affirming absolute immunity for claim that defendant prosecutor presented false statements to grand jury and at trial). Because plaintiffs have not alleged that AUSA Halverson acted outside his prosecutorial role in helping to prepare a search warrant affidavit, after others had gathered the relevant evidence, and in presenting it to a judge, he is entitled to absolute immunity.

2. *Qualified Immunity for Agent Pettigrew*

Qualified immunity provides a shield from individual liability for officers "if a reasonable officer could have believed that the action taken was lawful, in light of clearly established law and the information the officer possessed at the time." *Phillips v. Community Insurance Corp.*, 678 F.3d 513, 527–28 (7th Cir. 2012). When evaluating a defense of qualified immunity, courts must consider (1) "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right" and (2) "whether the right at issue was 'clearly

established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (internal citations omitted), quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Betker v. Gomez*, 692 F.3d 854, 860 (7th Cir. 2012).

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures. We have long recognized that a request for a warrant violates the Fourth Amendment if an officer "knowingly, intentionally, or with reckless disregard for the truth, makes false statements in requesting the warrant and the false statements were necessary to the determination that a warrant should issue." *Knox v. Smith*, 342 F.3d 651, 658 (7th Cir. 2003). Such reckless disregard for the truth can be shown through evidence that the officer "'entertained serious doubts as to the truth' of the statements, had 'obvious reasons to doubt' their accuracy, or failed to disclose facts that he or she 'knew would negate probable cause.'" *Betker*, 692 F.3d at 860, quoting *Beauchamp v. City of Noblesville*, 320 F.3d 733, 743 (7th Cir. 2003). The Fourth Amendment is also violated when an officer "intentionally or recklessly withhold[s] material information from a warrant application." *Whitlock v. Brown*, 596 F.3d 406, 408 (7th Cir. 2010). Accord, e.g., *Rainsberger v. Benner*, 913 F.3d 640, 645–49 (7th Cir. 2019) (affirming denial of qualified immunity on summary judgment because evidence omitted from warrant affidavit undermined officer's theory of case and resulted in affidavit with "unremarkable" evidence from which "[a] prudent person could not draw" conclusion that plaintiff committed crime).

An officer is not entitled to qualified immunity if he knowingly or recklessly included false, material information in an affidavit or if he intentionally or recklessly omitted facts

where "it would have been clear to a reasonable officer that the omitted fact[s] [were] material." *Rainsberger*, 913 F.3d at 653–54, quoting *Leaver v. Shortess*, 844 F.3d 665, 669 (7th Cir. 2016). When evaluating whether an officer's alleged lies and omissions are material to the probable cause determination, "[w]e eliminate the alleged false statements, incorporate any allegedly omitted facts, and then evaluate whether the resulting 'hypothetical' affidavit would establish probable cause." *Betker*, 692 F.3d at 862.

Here, plaintiffs' complaint identifies several statements in Agent Pettigrew's affidavit that they claimed were either false or misleading. Even accepting plaintiffs' allegations as true and adding the omitted information, though, Agent Pettigrew's affidavit still stated facts sufficient to establish probable cause, or at least to make a reasonable officer believe there was probable cause for the searches authorized by the magistrate judge.

The key accusation in the affidavit was that plaintiffs, in particular Nohl and Hull, had engaged in a scheme to defraud investors by overvaluing Greenpoint's assets. In support of that allegation, the affidavit noted that in the less than three years since Greenpoint had been launched, it reported an increase of 313% in the value of its gems and minerals. That dramatic increase included over $43.1 million in unrealized gains that were largely based on changes in appraised values.

The affidavit also asserted that Greenpoint's management had received significant allocations of its profits that were based wholly or largely on unrealized gains, also driven by appraisals of gems and minerals that Greenpoint held. In particular, by December 2015, Greenpoint's management, Chrysalis and Greenpoint Asset Management II, received at least

15% of every investor dollar. They allocated over $6.5 million in additional funds to themselves even though investors would not receive any major returns. According to Agent Pettigrew's affidavit, the management's distributions and allocations were also based almost entirely on new, higher appraisals that plaintiff Nohl solicited for the gems and minerals.

Adding to the case for probable cause, the SEC, after conducting its own review, had referred its case to the FBI based on what the SEC deemed "suspicious valuation practices" for Greenpoint's assets. The SEC explained that there were several "irregularities" in Greenpoint's documentation that made the SEC examiners "suspicious of [Greenpoint's] accounting practices."

In light of plaintiffs' contention that Agent Pettigrew omitted facts from his affidavit, we must also consider whether those facts, if included, would have negated probable cause for the searches and seizures. Plaintiffs claim that Agent Pettigrew had access to emails and other documentation, which he failed to disclose to the magistrate judge, that controverted many of the assertions in his affidavit. For example, plaintiffs contend that Pettigrew implied in the affidavit that the individuals who conducted the appraisals may not have really done so, but he had emails from Nohl confirming the identity of the appraisers. Also, they point to an email Nohl sent to Metropolis, one of the appraisers, declining to suggest values for the assets. That email, they assert, contradicts Pettigrew's allegation that Nohl tried to improperly influence the appraisal. Plaintiffs also claim that Pettigrew's allegation that the underinsurance of Greenpoint's assets provided evidence of fraud would have been rebutted if he had included the

documents showing the insurance company was in the process of increasing coverage to cover all the assets.

This omitted evidence would perhaps provide innocent or alternative explanations for plaintiffs' suspicious behavior but would not have negated probable cause. We have often cautioned that "the mere existence of innocent explanations does not necessarily negate probable cause." *United States v. Funches*, 327 F.3d 582, 587 (7th Cir. 2003); accord, e.g., *United States v. Carmel*, 548 F.3d 571, 577 (7th Cir. 2008) (affirming denial of *Franks* hearing because potential alternate, legal use of seized materials did not undermine inference that defendant used materials in connection with possession of illegal weapons); *United States v. Reed*, 443 F.3d 600, 604–05 (7th Cir. 2006) (acknowledging that a person may conceal money for reasons unrelated to illegal drug transactions, but concluding that all the evidence together established probable cause to arrest defendants); *Beauchamp*, 320 F.3d at 744 (explaining that plaintiff's "potentially solid claim of alibi might warrant more credit than a bald assertion of innocence" but did not undermine probable cause because alibi did not "conclusively establish[] [plaintiff's] whereabouts").

To be sure, the omitted facts here do weigh in plaintiffs' favor and against an inference of fraud, but those facts do not override the other allegations in Pettigrew's affidavit, which plaintiffs do not claim were falsified. Those allegations include that Greenpoint reported and claimed remarkable short-term, unrealized profits on its gems and minerals, that Greenpoint's management alone received significant financial gains based on those unrealized profits driven by new and questionable appraisals, and that the SEC also flagged plaintiffs' behavior as suspicious. These allegations, even

combined with the omitted facts, were sufficient to establish probable cause or, at the very least, allowed a reasonable agent in Pettigrew's position to believe they amounted to probable cause. Even giving plaintiffs the benefit of their factual allegations, Pettigrew is entitled to qualified immunity.

The district court's judgment is AFFIRMED.