NOS. 20-1787, 20-1794

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NO. 20-1787

UNITED STATES OF AMERICA,
APPELLEE

V.

SHELLEY M. RICHMOND JOSEPH,
DEFENDANT-APPELLANT

NO. 20-1794

UNITED STATES OF AMERICA,
APPELLEE

V.

WESLEY MACGREGOR,
DEFENDANT-APPELLANT

ON APPEAL FROM AN INTERLOCUTORY ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES

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STATEMENT OF JURISDICTION

The district court (Sorokin, J.) has subject matter jurisdiction because the indictment charges federal offenses. 18 U.S.C. § 3231. Defendants filed motions to dismiss the indictment [A: 39-109], which the court denied on July 27, 2020 [GA: 1-4]. They filed notices of interlocutory appeal on August 10, 2020. [A: 290-294]. Over the government's objection [D.156], the district court stayed all aspects of the proceeding until the appeals are resolved [GA: 5-6]. This Court lacks jurisdiction.[1]

STATEMENT OF ISSUES

1. The Court should dismiss the interlocutory appeals because the district court's ruling that the Tenth Amendment and judicial immunity claims are premature is not a "final decision" under 28 U.S.C. § 1291, and defendants fail every element of the *Midland Asphalt* collateral-order test.

2. If the Court accepts jurisdiction, it should reject the Tenth Amendment claim because: (a) no precedent supports the notion that the anticommandeering doctrine may be invoked to defeat a criminal prosecution; and (b) even if the doctrine could be harnessed for that purpose, the lead premise of the defense theory is false because defendants are being prosecuted for affirmatively thwarting a lawful federal arrest, not for failing to implement federal immigration policy.

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[1] Docket entries are cited as "D.__," the appendix as "A:__," the government's addendum as "GA:__," Judge Joseph's brief as "JJ-Br.__," and Wesley MacGregor's brief as "WM-Br.__."

3. If the Court accepts jurisdiction, it should reject the judicial immunity claim because: (a) judicial immunity does not extend to criminal cases, as seven Supreme Court opinions indicate; and (b) even if it does, the charged conduct is not judicial in nature.

4. Defendants' additional claims are: (a) waived; (b) jurisdictionally barred; (c) premature; and (d) meritless.

STATEMENT OF THE CASE

A. The indictment's allegations

On April 25, 2019, a federal grand jury returned an indictment charging Massachusetts District Court Judge Shelley M. Richmond Joseph and Trial Court Officer Wesley MacGregor with: (1) conspiracy to obstruct justice, in violation of 18 U.S.C. § 1512(k) (Count 1); (2) obstruction of justice and aiding and abetting, in violation of 18 U.S.C. §§ 1512(c)(2) and 2 (Count 2); and (3) obstruction of a federal proceeding and aiding and abetting, in violation of 18 U.S.C. §§ 1505 and 2 (Count 3). [A: 16-32]. The indictment charged defendant MacGregor alone with perjury, in violation of 18 U.S.C. § 1623 (Count 4). [A: 33].

The indictment alleges the following facts relevant to the appeals:

On Friday, March 30, 2018, Newton Police arrested an undocumented immigrant ("A.S.") and charged him with one count of being a fugitive from justice from Pennsylvania and two counts of narcotics possession. [A: 18]. A.S. was

scheduled to be arraigned in Newton District Court by Judge Joseph the next business day, Monday, April 2, 2018. [A: 18].

Fingerprints taken by Newton Police on March 30 and submitted to a national law enforcement database showed that A.S. had twice been deported and was subject to an immigration order prohibiting him from reentering the United States until 2027. [A: 18]. An Immigration Officer with the U.S. Department of Homeland Security ("DHS"), Immigration and Customs Enforcement ("ICE"), issued a federal immigration detainer and a warrant of removal for A.S. and sent them to the Newton Police. [A: 18]. The detainer asked Newton Police to: (a) notify ICE before any release of A.S.; (b) relay the detainer to any other law enforcement agency to which Newton Police transferred A.S.; and (c) maintain custody of A.S. for up to 48 hours so that ICE could take custody of him. [A: 18]. The detainer also stated that ICE had biometric information confirming his identity. [D.71 at 30]. The warrant stated that A.S. was subject to removal from the United States based on a final order by a designated official, and that any Immigration Officer was commanded to take custody of him for removal from the United States. [A: 18-19].

On April 2, Newton Police transferred custody of A.S. to the Newton District Court and forwarded the detainer and the warrant to the Clerk's Office, Probation, the Assistant District Attorney ("ADA"), and a defense attorney retained by A.S. ("Defense Attorney"). [A: 19].

On the morning of April 2, an ICE Officer dressed in plainclothes arrived at Newton District Court to execute the warrant and take custody of A.S. upon his release. [A: 19, 21]. The officer notified the court officers, the clerk of court (the "Clerk"), the ADA, and the Defense Attorney of his identity and the reason he was there. [A: 19, 21]. He then sat in the public audience area of the courtroom. [A: 21].

Judge Joseph called A.S.'s case about noon. [A: 21]. The ADA said she would make a bail request (*i.e.*, seek to detain A.S.) only on the fugitive charge, not the drug charges. [A: 21]. The case was set for a further call in the afternoon. [A: 21].

The Clerk informed Judge Joseph of the ICE Officer's presence and purpose. [A: 21]. Judge Joseph directed the Clerk to tell the officer to leave the courtroom. [A: 21]. In doing so, the judge violated a state judicial policy issued in November 2017, in response to the Massachusetts Supreme Judicial Court's decision in *Lunn v. Commonwealth*, 477 Mass. 517, 78 N.E.3d 1143 (2017). [A: 20, 83-86]. The policy ("Trial Court DHS Policy") was directed to all judges, clerks, court officers, and other courthouse personnel. [A: 20, 83]. It stated in relevant part:

> Trial Court employees should be mindful that courthouses [including courtrooms] *are public spaces that are open to all persons . . . , including . . . DHS employees. . . .*
>
> * * *
>
> *. . . DHS officials are permitted to act in the performance of their official duties in Massachusetts courthouses . . . . DHS officials may enter a courthouse and perform their official duties* provided that their conduct in no way disrupts or delays court operations, or compromises court safety or decorum.

[A: 20, 84-85 (emphasis added)].[2]

When the Clerk relayed Judge Joseph's directive to the ICE Officer, the Clerk also said that, if A.S. were to be released by the court, he would be released out of the courtroom into the courthouse lobby. [A: 21]. This was consistent with the normal custom and practice at Newton District Court, which was to release defendants from the glass dock in the courtroom out into the courtroom, which had only one public entry/exit: the door to the front lobby. [A: 19]. The officer complied with Judge Joseph's directive and waited in the lobby for A.S. [A: 21].

One of the court officers on duty was defendant MacGregor. [A: 20]. The Defense Attorney and MacGregor conferred and agreed that, if Judge Joseph ordered A.S. to be released from court custody, MacGregor would use his security access card to release A.S. out the rear sally port exit of the courthouse in order to evade arrest by the ICE Officer waiting in the front lobby. [A: 25-26].

A.S.'s case was recalled at about 2:48 pm. [A: 22]. The Defense Attorney and the ADA appeared before Judge Joseph. [A: 22]. At a sidebar requested by the Defense Attorney, Judge Joseph stated on the record: "So it's my understanding that

[2] DHS officials were not permitted to execute civil immigration detainers or warrants inside a courtroom absent prior permission from the regional administrative judge or the first justice. [A: 85-86]. They were, however, allowed to sit in a courtroom—just like any other member of the public. [A: 84-85]. Defendants are mistaken in suggesting otherwise. (JJ-Br. 5; WM-Br. 5-6.)

ICE is here." [A: 22]. The ADA, who previously had told Judge Joseph that she would seek to detain A.S. only on the Pennsylvania fugitive charge, now told Judge Joseph that she did not think A.S. was the man wanted in Pennsylvania. [A: 22]. Thus, at this point, Judge Joseph knew the ADA was not going to ask to detain A.S., and knew she would be releasing A.S. from custody.

Still at sidebar, the Defense Attorney told Judge Joseph: "ICE is going to pick him up if he walks out the front door." [A: 22-23]. In response, Judge Joseph proposed holding A.S.'s case until the next day, saying: "The other alternative is if you need more time to figure this out—hold until tomorrow . . . ." [A: 23]. The Defense Attorney explained that Judge Joseph's proposal would not stop ICE from arresting A.S. He said: "There is an ICE detainer. So if he's bailed out from Billerica [House of Correction, where A.S. would stay overnight if his case were held over until the next day] when he goes back there, ICE will pick him up." [A: 23]. Judge Joseph responded: "ICE is gonna get him?" [A: 23]. The Defense Attorney said: "Yeah." [A: 23]. Judge Joseph then made a second proposal: "What if we detain him[?]" [A: 23]. The judge made this suggestion even though she knew the ADA was not seeking detention.

This prompted the Defense Attorney to ask: "Are we on the record?" [A: 23]. Judge Joseph asked the Clerk to go off record, which he did by turning off the courtroom recorder. [A: 23]. Judge Joseph's decision to turn off the recorder violated

a Massachusetts Rule of Court requiring that all state district courts, including Newton District Court, record all courtroom proceedings. [A: 20, 23].

The courtroom recorder was turned off for approximately the next 52 seconds. [A: 23]. During that interval, Judge Joseph and the Defense Attorney agreed to create a pretext that would allow A.S., after being released from court custody by Judge Joseph, to go downstairs to the lockup so that he could be let out the rear sally port exit in order to evade arrest by the ICE Officer waiting in the front lobby. [A: 26]. The purpose of Judge Joseph ordering the recorder to be turned off was to conceal this conversation with the Defense Attorney. [A: 26].

When the recorder was turned back on, the sidebar was over. The Defense Attorney argued that A.S. was not the man wanted in Pennsylvania, based in part on a photo of the Pennsylvania fugitive. [A: 23-24]. The ADA agreed. [A: 24]. The ADA dismissed the fugitive charge and said again that she was not requesting detention on the drug charges. [A: 24].

With the stage now set, the Defense Attorney put the agreed-upon ruse into motion by asking if A.S. could go downstairs instead of being released the normal way through the courtroom and out into the lobby. He said: "I would ask that he, uh – I believe he has some property downstairs. I'd like to speak with him downstairs with the interpreter if I may." [A: 24]. Continuing with the pretext, Judge Joseph replied: "That's fine. Of course." [A: 24].

The Clerk reminded Judge Joseph that an ICE Officer was present to take custody of A.S. He said: "There was a representative from, uh, ICE here in the Court . . . [unintelligible] to, to visit the lockup." [A: 25]. Judge Joseph replied: "That's fine. I'm not gonna allow them [ICE] to come in here. But he's been released on this." [A: 25]. By refusing to let the ICE Officer into the lockup to take custody of A.S., Judge Joseph again violated the Trial Court DHS Policy, which stated in relevant part:

> If, during the processing of an individual subject to release out of the courthouse, a DHS official is present in the courthouse and seeks admission into the courthouse's holding cell area in order to take custody of the individual pursuant to an immigration detainer or warrant, *court officers shall permit the DHS official(s) to enter the holding cell area in order to take custody of the individual* once Trial Court security personnel have finished processing that individual out of the court security personnel's custody, if a security department supervisor determines that the DHS official would otherwise take custody of the individual inside or immediately outside of the courthouse.

[A: 20, 85-86 (emphasis added)].

Advancing the artifice she and the Defense Attorney had agreed upon, Judge Joseph said: "Um, [Defense Attorney] asked if the interpreter can accompany him [A.S.] downstairs, um, to further interview him – and I've allowed that to happen." [A: 25]. Defendant MacGregor led A.S., the Defense Attorney, and the interpreter downstairs to the lockup, where, as previously agreed, MacGregor used his security

access card to open the rear sally port exit to release A.S. out the back door. [A: 25]. He did so just seven minutes after A.S.'s court proceeding ended. [A: 25].

Because A.S. was released through the rear sally port exit of the courthouse, the ICE Officer waiting upstairs in the front lobby was unable to take custody of A.S. at the courthouse. [A: 26]. A.S. was finally arrested about two weeks later.

B. Procedural history of the motions to dismiss the indictment

1. The Tenth Amendment claim

Both defendants moved to dismiss Counts 1-3 on grounds that they were being prosecuted for failing to enforce federal immigration law, in violation of the Tenth Amendment anticommandeering doctrine. [A: 74-78, 104-108, 208-210].[3] The government responded that they were not charged with failing to enforce federal immigration law or failing to assist the ICE Officer in executing the immigration detainer and warrant for A.S. Rather, they were charged with corruptly impeding an immigration proceeding by affirmatively helping an alien evade lawful arrest by an ICE Officer. [A: 149-151, 180-182].

After a hearing [A: 220-289], the district court found the claim was premature:

> . . . [T]he defendants characterize the Indictment as criminalizing their "lawful decision not to assist" the ICE officer in administering federal immigration laws, Joseph's "decisions about how to manage [her] courtroom[]," and MacGregor's "exercise of his daily duties." Doc. No. 60 at 31, 34; Doc. No. 62 at 16, 18; *see also* Doc. No. 115 at 24 (suggesting Joseph engaged in only "lawful and

[3] MacGregor has not challenged the perjury count (Count 4).

> discretionary acts" and "did not 'affirmatively impede' anything"). At bottom, the defendants' constitutional argument[] require[s] the assessment of disputed facts, characterizations of the events underlying the Indictment, or other evidentiary analysis. Such fact-laden determinations are outside the scope of a motion to dismiss. Because the Indictment complies with the governing legal standard, [the Tenth Amendment] challenge [does not] provide[] an avenue to dismissal.

[GA: 3].

2. The judicial immunity claim

Judge Joseph alone asked the district court to dismiss the indictment on a separate ground: That her alleged criminal conduct was shielded from prosecution by absolute judicial immunity. [A: 58-64, 193-197]. The government replied that: (1) the doctrine of judicial immunity does not extend to criminal cases; and (2) even if it does, it afforded the judge no protection because her criminal conduct did not constitute a judicial act. [A: 127-136, 214-219].

The district court likewise viewed the claim as premature:

> The parties hotly contest whether judicial immunity insulates against criminal liability or is restricted to civil lawsuits. . . . The Court need not now resolve this question, for even if judicial immunity extends to the criminal context, it would apply only where "judicial acts performed within a judge's jurisdiction" are concerned. *In re Kendall*, 712 F.3d 814, 833-37 (3d Cir. 2013) (Roth, J., concurring); *see Zenon v. Guzman*, 924 F.3d 611, 616-20 (1st Cir. 2019) (engaging in a fact-intensive analysis of the nature and function of the conduct at issue to determine whether judicial immunity from civil suit applied); *see also Mireles v. Waco*, 502 U.S. 9, 9 n.1, 11-12 (1991) (noting judges are "not *absolutely* immune from criminal liability" (emphasis added)). Of course, any such immunity, if it exists, would never shield "corruption or

> bribery." *In re Kendall*, 712 F.3d at 834. Where the Indictment charges that Joseph acted "corruptly," Doc. No. 1 ¶¶ 27, 30, 38, 40, 42, it is not within this Court's province on a motion to dismiss to determine whether judicial immunity, even if its reach encompasses criminal liability, provides a viable shelter for Joseph in the circumstances alleged here. *See* [*United States v.*] *Stepanets*, 879 F.3d [367] at 372 [(1st Cir. 2018)] (explaining "that a court must deny a motion to dismiss if the motion relies on disputed facts").

[GA: 2-3].

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction. The district court's ruling that the anticommandeering and judicial immunity claims are premature is not a "final decision" under 28 U.S.C. § 1291, and defendants fail every prong of the *Midland Asphalt* collateral-order test. The third prong poses the greatest obstacle since neither claim rests on a statutory or constitutional right not to be tried that is on par with the Double Jeopardy and Speech or Debate Clause rights. In fact, the judicial immunity claim does not even pretend to rely on a statute or on a specific constitutional guarantee; rather, it hinges on an assertion about the common law.

2. If the Court accepts jurisdiction, it should reject the anticommandeering claim. The lead premise of the claim is false: Defendants are being prosecuted for actively obstructing a federal immigration proceeding with corrupt intent, not for refusing to enforce immigration law. The defense theory also misapprehends the scope of the anticommandeering doctrine in two respects. First, the doctrine targets Acts of Congress; its focus has been on legislative overreach. Defendants cite no

authority for the idea that the doctrine may bar a prosecution of individual defendants that is based on concededly valid federal statutes. Second, the Supreme Court has consistently applied the doctrine to federal commands directed at state executive and legislative bodies. It has signaled that, in light of the Supremacy Clause, the doctrine has less to say about federal commands aimed at state court judges.

3. If the Court accepts jurisdiction, it should reject the judicial immunity claim for two distinct reasons. First, judicial immunity does not extend to criminal cases, as seven Supreme Court opinions indicate. Decisions of three circuits support this view. No circuit has held otherwise, and for good reason: The rationale for civil judicial immunity has no force in the criminal context. The common law also confirms this point. Second, the charged conduct is not judicial. The Supreme Court has held that a judge's ministerial actions—supervising court officers and overseeing court operations—are not judicial, even though courthouse control is essential to ensuring justice. Applying that principle here, it is hard to see why a decision about the simple mechanics of how a prisoner will exit the courthouse qualifies as a judicial or adjudicative act.

4. The three additional claims are: (a) waived; (b) jurisdictionally barred; (c) premature; and (d) meritless.

ARGUMENT

I. This Court lacks jurisdiction over the appeals

A. The *Midland Asphalt* standard governs here

With small exceptions, this Court's jurisdiction is limited to appeals of "final decisions" of the district court. 28 U.S.C. § 1291. The term "final" has a specific meaning in the criminal context: "In criminal cases, [section 1291] prohibits appellate review until after conviction and imposition of sentence." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989).

The Supreme Court has "carved out a narrow exception to the normal application of the final judgment rule" known as the "collateral order doctrine." *Midland Asphalt Corp.*, 489 U.S. at 798 (citing *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)). But the Court has "interpreted [this] exception 'with the utmost strictness' in criminal cases." *Id.* at 799 (quoting *Flanagan v. United States*, 465 U.S. 259, 265 (1984)); *see also United States v. Kane*, 955 F.2d 110, 112 (1st Cir. 1992) (per curiam). Section 1291's final decision rule "is strongest in the criminal context" because the "delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *United States v. Ramirez-Burgos*, 44 F.3d 17, 18 (1st Cir. 1995) (internal quotation marks and citations omitted).

History confirms this "strictness." In 1989, the Supreme Court noted that in the forty years since *Cohen*, it had "found denials of only three types of motions to be immediately appealable" in criminal cases: (1) "motions to reduce bail"; (2) "motions to dismiss on double jeopardy grounds"; and (3) "motions to dismiss under the Speech or Debate Clause." *Midland Asphalt Corp.*, 489 U.S. at 799; *see also Kane*, 955 F.2d at 112 (court's view that the collateral-order exception did not apply was "strengthened by the [Supreme] Court's emphasis on the limited nature of the three situations in which it has determined that pretrial orders meet the requirements of the collateral order doctrine").

In the thirty-plus intervening years, the Supreme Court has added just one category to this list: motions to prevent a defendant from being forcibly medicated to restore his competency to stand trial. *See Sell v. United States*, 539 U.S. 166, 176-77 (2003); *United States v. Sueiro*, 946 F.3d 637, 640-42 (4th Cir.) ("*Sell* is best read as a narrow addition to the collateral order doctrine, addressing a harm (forced medication) that exists regardless of the trial context."), *cert. denied*, 140 S. Ct. 2553 (2020); *United States v. Henderson*, 915 F.3d 1127, 1131 (7th Cir. 2019) (similar).

To justify expanding the list, defendants must satisfy a three-part test: "To fall within the limited class of final collateral orders, an order must (1) 'conclusively determine the disputed question,' (2) 'resolve an important issue completely separate from the merits of the action,' and (3) 'be effectively unreviewable on appeal from

a final judgment.'" *Midland Asphalt Corp.*, 489 U.S. at 799 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). The Tenth Amendment and judicial immunity claims fail every prong of the test. Defendants' one-sentence jurisdictional argument to the contrary is unavailing. (JJ-Br. 2; WM-Br. 2.) Thus, the Court should decline to add two new categories to the list of four.

B. There is no jurisdiction to review the Tenth Amendment claim

Defendants argue that Counts 1-3 must be dismissed because in prosecuting them for these offenses the government is effectively punishing them for their failure to administer federal immigration law, in violation of the Tenth Amendment anticommandeering doctrine. While this contention is fruitless, the Court lacks jurisdiction to review it.

The Tenth Amendment theory fails prong one of the collateral-order test because the district court did not "conclusively determine the disputed question." *Midland Asphalt Corp.*, 489 U.S. at 799 (internal quotation marks omitted). Rather, it found the claim was premature because it involved contested facts: "At bottom, the defendants' constitutional argument[] require[s] the assessment of disputed facts, characterizations of the events underlying the Indictment, or other evidentiary analysis. Such fact-laden determinations are outside the scope of a motion to dismiss." [GA: 3].

Prong two is not met because the underlying issue is neither "important" nor "completely separate from the merits of the action." *Midland Asphalt Corp.*, 489 U.S. at 799 (internal quotation marks omitted). It is not important because it is not colorable. (*Infra* 23-30.) And the district court has ruled that the issue implicates "disputed facts" [GA: 3]—facts to be developed at trial—and thus the issue is intertwined with, and not separate from, the "merits of the action."

Even if the district court were incorrect in this assessment, prong three would still stand in the way. "[T]he third prong of the *Coopers & Lybrand* test is satisfied only where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial'"—in other words, a right "*not to be tried at all*." *Midland Asphalt Corp.*, 489 U.S. at 799-800 (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)) (emphasis in original). In this context, "[t]here is a 'crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'" *Id.* at 801 (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982)). Critically, "[a] right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause, . . . or the Speech or Debate Clause." *Id.*

As an initial matter, there is no sign defendants will be unable to pursue their Tenth Amendment theory if convicted after trial. The Supreme Court has said that

defendants have standing to raise Tenth Amendment challenges to criminal statutes, *Bond v. United States*, 564 U.S. 211, 224-26 (2011), so the anticommandeering claim—though doomed on the merits—could "be fully vindicated on appeal from a final judgment of conviction and sentence." *Ramirez-Burgos*, 44 F.3d at 19.

But there is a more basic problem. Defendants offer no reason why their anticommandeering theory entails a right not to be tried at all—that is, a right that is on par with the Double Jeopardy and Speech or Debate Clause rights. They cite no case law supporting such a conclusion. Their one-sentence jurisdictional claim relies solely on a judicial immunity decision. (JJ-Br. 2; WM-Br. 2.) And their district court stay request only cited two irrelevant civil cases: *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); *Robertson v. Morgan County*, 166 F.3d 1222 (10th Cir. 1999) (unpublished). [D.154; D.155].

Even if the anticommandeering claim were "founded on a valid constitutional right," that would not suffice to show that it is the type of right that precludes a trial. *United States v. Tucker*, 745 F.3d 1054, 1063 (10th Cir. 2014). As the Tenth Circuit observed relying on *Hollywood Motor Car Co.*: "[T]he Supreme Court has cautioned that while one might argue that 'any claim, particularly a constitutional claim, that would be dispositive of the entire case if decided favorably to a criminal defendant, should be decided as quickly as possible,' courts must be hesitant to expand the collateral order doctrine lest 'the policy against piecemeal appeals in criminal cases

. . . be swallowed by ever-multiplying exceptions.'" *Tucker*, 745 F.3d at 1065 (quoting *Hollywood Motor Car Co.*, 458 U.S. at 270).

In the best case scenario for defendants, the "right" they invoke here is simply one "'whose remedy [would] require[] the dismissal of charges'" if indeed their anticommandeering thesis had merit. *Midland Asphalt Corp.*, 489 U.S. at 801 (quoting *Hollywood Motor Car Co.*, 458 U.S. at 269). It is not a right not to be tried at all. That only four types of claims have passed through the collateral-order screen in seventy years solidifies the point.

Circuit courts have heeded the *Midland Asphalt* message. Since that opinion, this Court and others have routinely rebuffed efforts to augment the list of approved claims even when constitutional concerns were at stake. *See, e.g.*, *United States v. Schock*, 891 F.3d 334, 337-40 (7th Cir. 2018) (separation-of-powers claim), *cert. denied*, 139 S. Ct. 674 (2019); *United States v. Shalhoub*, 855 F.3d 1255, 1261 (11th Cir. 2017) (denial of motion for counsel); *United States v. Wampler*, 624 F.3d 1330, 1333-40 (10th Cir. 2010) (claims that prosecution was barred by prior plea agreement, separation-of-powers doctrine, and First Amendment); *United States v. Quaintance*, 523 F.3d 1144, 1146-47 (10th Cir. 2008) (First Amendment claim); *United States v. Robinson*, 473 F.3d 487, 490-92 (2d Cir. 2007) (claim concerning death penalty notice); *United States v. Garib-Bazain*, 222 F.3d 17, 18-19 (1st Cir. 2000) (per curiam) (statute of limitations claim); *United States v. Ambort*, 193 F.3d

1169, 1171-72 (10th Cir. 1999) (First Amendment claim); *United States v. Cisneros*, 169 F.3d 763, 767-72 (D.C. Cir. 1999) (separation-of-powers claim: "If we allow this appeal, we risk deciding a constitutional question that might evaporate were the case allowed to go to trial, free of appellate interruption. Refusing to adjudicate constitutional issues unless it is strictly necessary to do so is a time-honored practice of judicial restraint."); *United States v. Macchia*, 41 F.3d 35, 37-39 (2d Cir. 1994) (claim that prosecution was precluded by immunity agreement); *United States v. Crosby*, 20 F.3d 480, 487 (D.C. Cir. 1994) (claim that prosecution was barred by terms of earlier plea agreement); *United States v. Weiss*, 7 F.3d 1088, 1089-91 (2d Cir. 1993) (statute of limitations claim); *Kane*, 955 F.2d at 111-12 (denial of motion for counsel); *United States v. Moreno-Green*, 881 F.2d 680, 681-84 (9th Cir. 1989) (per curiam) (grand jury abuse claim). This case is no different.

C. There is no jurisdiction to review the judicial immunity claim

The judicial immunity claim likewise fails all three prongs of the collateral-order test.

Prong one is hopeless. Far from "conclusively determin[ing] the disputed question," *Midland Asphalt Corp.*, 489 U.S. at 799 (internal quotation marks omitted), the district court viewed the judicial immunity claim as premature. It reasoned that even if such immunity extends to criminal cases, it is questionable whether it could apply in this setting and that a decision on this point would have to

await the resolution of "disputed facts." [GA: 2-3]. And it noted that this Court had "engag[ed] in a fact-intensive analysis of the nature and function of the conduct at issue to determine whether judicial immunity from civil suit applied" in *Zenon v. Guzman*, 924 F.3d 611, 616-20 (1st Cir. 2019). [GA: 3].

This reasoning finds support in Supreme Court precedent and in a second decision of this Court. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995) (order denying qualified immunity defense not appealable since it turned on disputed facts); *Filler v. Kellett*, 859 F.3d 148, 154-55 (1st Cir. 2017) (order denying motion to dismiss filed by prosecutor who claimed absolute immunity not appealable given fact-bound nature of that defense); *cf. District of Columbia v. Trump*, 959 F.3d 126, 132 (4th Cir. 2020) (no jurisdiction for interlocutory appeal involving President's claim of absolute immunity because district court had yet to rule on merits).

Prong two is also beyond reach. Even though the question whether judicial immunity extends to criminal cases is "important" in the abstract, the district court found that the narrower issue of whether the doctrine applies here requires further factual development. [GA: 2-3]. Hence, that issue is not "completely separate from the merits of the action." *Midland Asphalt Corp.*, 489 U.S. at 799 (internal quotation marks omitted).

Prong three erects the most imposing barrier. As noted, "[a] right not to be tried in the sense relevant to the *Cohen* exception rests upon an *explicit statutory or*

constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause, . . . or the Speech or Debate Clause." *Midland Asphalt Corp.*, 489 U.S. at 801 (emphasis added); *see also id.* at 802 (emphasizing that the defendant had identified no "constitutional right not to be tried"). As shown below (*infra* 40-43), the judicial immunity claim does not rest on a statute or on a specific constitutional provision; rather, it is based on a flawed assertion about the common law. Under the logic of *Midland Asphalt*, a common-law theory of judicial immunity is not a fit subject for interlocutory review in a criminal case.

In support of her contrary position, Judge Joseph relies solely on *United States v. Claiborne*, 727 F.2d 842 (9th Cir. 1984) (per curiam) (JJ-Br. 2), but she also cited *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), in her stay motion [D.154]. These cases are easily distinguished. First, in both, the lower court issued a definitive ruling on the law instead of finding that the judicial immunity claim was fact-bound and premature. *Claiborne*, 727 F.2d at 843-44; *Hastings*, 681 F.2d at 708. Second, in both, the immunity claim had a constitutional footing, 727 F.2d at 845-49; 681 F.2d at 709-12, unlike the common-law claim here, which does not even pretend to "rest[] upon an explicit statutory or constitutional guarantee that trial will not occur." *Midland Asphalt Corp.*, 489 U.S. at 801. It also bears noting that *Claiborne* and *Hastings* predate the Supreme Court's seminal opinion in *Midland Asphalt*.

In seeking a stay, Judge Joseph cited civil cases that are now absent from her brief: *Russell v. Richardson*, 905 F.3d 239, 245-46 (3rd Cir. 2018); *Roland v. Phillips*, 19 F.3d 552, 554-55 (9th Cir. 1994); *Branson v. City of Los Angeles*, 912 F.2d 334, 335 & n.1 (9th Cir. 1990). [D.154]. These precedents are off point for two reasons. First, in each case, the district court squarely resolved the immunity issue. *Id.* And second, the civil collateral-order standard does not govern here since the Supreme Court has "interpreted the collateral order exception 'with the utmost strictness' in criminal cases." *Midland Asphalt Corp.*, 489 U.S. at 799 (quoting *Flanagan*, 465 U.S. at 265). Although the three opinions rely on *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), and *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43 (1982), both decisions are civil, both involve district court rulings that rejected the immunity claim as a matter of law, and both predate *Midland Asphalt*.

The Court should steer by *Midland Asphalt*. If it does so, there can be no doubt about the proper result.[4]

[4] The four *amici* refrain from addressing the jurisdictional issues.

II. The Tenth Amendment claim fails on the merits

If the Court examines the merits, review is *de novo*. *See generally United States v. Brissette*, 919 F.3d 670, 676 (1st Cir. 2019). Defendants' Tenth Amendment claim fails because it rests on a misreading of the indictment and the case law.

The Tenth Amendment to the Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. From this text the Supreme Court has derived an "anticommandeering" principle which says that, while Congress may regulate the conduct of private parties, it lacks "the power to issue direct orders to the governments of the States." *Murphy v. National Collegiate Athletic Association*, 138 S. Ct. 1461, 1476 (2018). The focus here is on legislative overreach: "The anticommandeering doctrine simply represents the recognition of this *limit on congressional authority*." *Id.* (emphasis added); *see also id.* at 1475 ("The anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States.").

Precedent confirms the point. In the past three decades, the Supreme Court has trained its anticommandeering lens on Acts of Congress, holding that three federal laws ran afoul of the doctrine. In the "pioneering case," *Murphy*, 138 S. Ct. at 1476, in this series, the Court struck down a federal statute that required states to

"take title" to low-level radioactive waste in certain circumstances or to "regulat[e] according to the instructions of Congress." *New York v. United States*, 505 U.S. 144, 175 (1992). In the second case, the Court invalidated a federal law that required states and local law enforcement agencies to perform background checks in connection with handgun license applications, reasoning that Congress could not "command" states "to administer or enforce a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). And in the third case, the Court faulted a "federal statute that commanded state legislatures to enact or refrain from enacting state law" regarding sports gambling. *Murphy*, 138 S. Ct. at 1478. It held: "Just as Congress lacks the power to order a state legislature not to enact a law authorizing sports gambling, it may not order a state legislature to refrain from enacting a law licensing sports gambling." *Id.* at 1482.

Defendants posit that anticommandeering tenets bar their prosecutions for: (1) conspiracy to obstruct justice, 18 U.S.C. § 1512(k) (Count 1); (2) obstruction of justice and aiding and abetting, 18 U.S.C. §§ 1512(c)(2) and 2 (Count 2); and (3) obstruction of a federal proceeding and aiding and abetting, 18 U.S.C. §§ 1505 and 2 (Count 3). Their thesis is that by prosecuting them under these statutes, the federal government is effectively commanding them and others to administer federal immigration law. (JJ-Br. 27-32; WM-Br. 12-16.)

As discussed below, the lead premise is wrong. At no point has the federal government "forced" defendants to participate "in the actual administration of a federal program." *Printz*, 521 U.S. at 918. Nor does the indictment seek to punish them for their passive failure to implement federal immigration directives. Rather, the indictment alleges they *corruptly impeded* an immigration proceeding by *affirmatively assisting* a deportable alien to evade lawful arrest by an ICE Officer. There is a yawning gap here between theory and fact. But even putting aside this disconnect, the defense-*amici* anticommandeering theory faces two barriers that they overlook in their briefs.

First, in the three anticommandeering cases cited above, the Supreme Court applied the doctrine to nullify a federal statutory provision. Defendants do not—and cannot—claim that the criminal statutes charged here transgress anticommandeering principles. And the Supreme Court has never suggested that the doctrine might bar executive actions that are based on otherwise valid federal laws, let alone that it might preclude a federal prosecution of individual defendants. Defendants and their *amici* cite no case applying the doctrine in this fashion, and the government is aware of none.

Second, in the anticommandeering trilogy, the offending federal statute issued commands to state executives, *see New York*, 505 U.S. at 175, *Printz*, 521 U.S. at 935, and to state legislatures, *see Murphy*, 138 S. Ct. at 1476. Consistent with this

focus, the Supreme Court has said that "the Federal Government may not compel the States to implement, *by legislation or executive action*, federal regulatory programs." *Printz*, 521 U.S. at 925 (emphasis added). Defendants and *amici* cite no case in which the anticommandeering doctrine was applied to commands directed at state judges. This is unsurprising since Supreme Court precedent counsels caution in this area.

The Supreme Court has noted that the anticommandeering doctrine does not disturb "the well established power of Congress to pass laws enforceable in state courts," which those courts must then apply. *New York*, 505 U.S. at 178. As the Court has explained: "Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause" and it does not violate the Tenth Amendment. *Id.* at 178-79; *accord Printz*, 521 U.S. at 928-29; *FERC v. Mississippi*, 456 U.S. 742, 762 (1982) (noting that *Testa v. Katt*, 330 U.S. 386 (1947) "reveals that the Federal Government has some power to enlist a branch of state government—there the judiciary—to further federal ends."); *see also id.* at 760 (similar).

Printz is illustrative. In *Printz*, the government cited early federal statutes that required state courts to take certain actions relating to naturalization and citizenship. *Printz*, 521 U.S. at 905-06. The Supreme Court replied: "These early laws establish, at most, that the Constitution was originally understood to permit imposition of an

obligation on state *judges* to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Id.* at 907 (emphasis in original). The Court continued: "It is understandable why courts should have been viewed distinctively in this regard; unlike legislatures and executives, they applied the law of other sovereigns all the time." *Id.* And the Court concluded: "For these reasons, we do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service." *Id.* But *Printz* reaffirmed that "state courts cannot refuse to apply federal law." *Id.* at 928.[5]

Based in part on *Printz*, a Fifth Circuit panel recently held: "Thus, to the extent provisions of ICWA and the Final Rule require state courts to enforce federal law, the anticommandeering doctrine does not apply." *Brackeen v. Bernhardt*, 937 F.3d 406, 431 (5th Cir.), *reh'g en banc granted*, 942 F.3d 287 (5th Cir. 2019). No circuit has taken a different tack to the government's knowledge.

Even ignoring these two distinctions, the anticommandeering theory fails for the more pedestrian reason that it lacks a factual basis. Defendants plainly are not charged with failing to enforce federal immigration law. Judge Joseph is indicted for conspiring with the Defense Attorney at sidebar (and turning off the courtroom recorder to conceal their discussion) to create a pretext that would allow A.S. to go

[5] The government's brief in *Printz* reveals the extent to which these early statutes enlisted state courts in implementing federal naturalization laws. Brief for the United States, 1996 WL 595005, *28-29 & n.17.

downstairs to the lockup after being released from court custody so that he could escape through the rear sally port exit of the Newton District Courthouse and evade arrest by the ICE Officer waiting in the front lobby, and with executing that scheme. MacGregor is charged with conspiring with the Defense Attorney to release A.S. out the rear sally port exit, contrary to normal custom and practice, in order to help A.S. evade arrest by the ICE Officer, and with carrying out that plan. Thus, both defendants are alleged to have affirmatively and corruptly impeded an immigration proceeding. Neither is charged with passively failing to assist the ICE Officer or with neglecting to further federal immigration mandates.

The distinction between failing to assist and actively impeding ICE was driven home five months before the charged events in a state judicial policy tracking *Lunn v. Commonwealth*, 477 Mass. 517, 78 N.E.3d 1143 (2017). The policy states that if a DHS official seeks to arrest a person who is no longer in court custody—as was the case with A.S. once Judge Joseph ordered his release—court personnel, while barred from "assist[ing]" in the physical act of taking that person into custody, are also prohibited from "imped[ing] DHS officials from doing so." [A: 86]; *see Ryan v. ICE*, 974 F.3d 9, 16 (1st Cir. 2020) ("If an ICE officer attempts to effect a civil arrest of a noncitizen who is not in the court's custody, the policy instructs state-court personnel neither to impede nor to assist with the arrest.").

The Commonwealth's own expressed view in this area thus dovetails with the theory of prosecution; there is no tension between the two. Moreover, no one doubts that the Supremacy Clause would preclude a state from requiring state judges and judicial personnel to actively block immigration-related arrests. *See United States v. Pleau*, 680 F.3d 1, 8 (1st Cir. 2012) (en banc) (holding that under the Supremacy Clause, the Governor of Rhode Island was required to surrender custody of a state inmate wanted on federal capital charges, despite the Governor's opposition to the death penalty, and reasoning that otherwise "the state prison would become a refuge against federal charges"); *see also United States v. Gillock*, 445 U.S. 360, 361 (1980) ("Where important federal interests are at stake, as in the enforcement of federal criminal statutes, principles of comity must yield.").

Finally, defendants' broad interpretation of the anticommandeering doctrine is at odds with a Second Circuit case holding that there was no anticommandeering violation when the federal government conditioned grant monies on the willingness of state grant applicants to: "(1) comply with federal law prohibiting any restrictions on the communication of citizenship and alien status information with federal immigration authorities, *see* 8 U.S.C. § 1373; (2) provide federal authorities, upon request, with the release dates of incarcerated illegal aliens; and (3) afford federal immigration officers access to incarcerated illegal aliens." *New York v. U.S. Dep't*

of Justice, 951 F.3d 84, 90, 111-14 (2d Cir.), *reh'g en banc denied*, 964 F.3d 150 (2d Cir. 2020).

This circuit and others have differed with the Second Circuit in their reading of the statutes at stake in *New York*. *See, e.g.*, *City of Chicago v. Barr,* 961 F.3d 882, 908 (7th Cir. 2020); *City of Providence v. Barr*, 954 F.3d 23, 32-44 (1st Cir. 2020).[6] But, contrary to the *amici* Legal Scholars (Br. 11, 20), these circuits have largely skirted the anticommandeering issue. And no circuit has intimated that the doctrine may ban a prosecution that is based on otherwise valid federal statutes.

The Scholars likewise misread *United States v. Walker*, 490 F.3d 1282 (11th Cir. 2007), in urging that it "held that federal prosecutions may not aim to 'instruct state officials on how to conform their conduct to state law, because this power is reserved to the states.'" (Br. 19.) The quote is out of context. *Walker* merely holds that the charges there did not rest on a "violation of state law;" evidence concerning state law, however, was relevant to "intent." *Id.* at 1299. So too here.

[6] The government has asked the Supreme Court to resolve the circuit split. *See City and County of San Francisco v. Barr*, 965 F.3d 753 (9th Cir. 2020), *petition for cert. docketed*, 2020 WL 6712190 (No. 20-666) (Nov. 13, 2020).

III. The judicial immunity claim fails on the merits

A. Judicial immunity does not extend to criminal cases

1. Supreme Court and circuit court precedent establish that judicial immunity does not apply in the criminal context

In 1869 and 1872, the Supreme Court held that judges are immune from civil lawsuits seeking money damages based on their judicial acts. *See Bradley v. Fisher*, 80 U.S. 335 (1872); *Randall v. Brigham*, 74 U.S. 523 (1869).

In the wake of *Randall* and *Bradley*, the Supreme Court has issued seven opinions signaling that judicial immunity does not extend to criminal cases. *See Ex parte Virginia*, 100 U.S. 339, 348-49 (1879) (holding that a state judge indicted on federal charges had no immunity from criminal prosecution for excluding jurors from service based on their race in violation of the 1875 Civil Rights Act, even "if the selection of jurors could be considered . . . a judicial act"); *Gravel v. United States*, 408 U.S. 606, 627 (1972) ("But we cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress or to frustrate the grand jury's inquiry into whether publication of these classified documents violated a federal criminal statute."); *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974) (warning that "[j]udges who would willfully discriminate on the ground of race or otherwise would willfully deprive the citizen of his constitutional rights, as this complaint alleges, must take account of 18 U.S.C. § 242," stating that even though judges are immune from "civil liability" in certain contexts, "we have never

held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivation of constitutional rights" and that "[o]n the contrary, the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress,'" and citing *Ex parte Virginia* and *Gravel*); *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976) (stating that "[t]his Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law" and that "[e]ven judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. § 242, the criminal analog of § 1983," and citing *O'Shea* and *Gravel*) (footnote omitted); *Dennis v. Sparks*, 449 U.S. 24, 28 n.5 (1980) (describing 18 U.S.C. § 242 as the "criminal analog" of 42 U.S.C. § 1983, stating that "[a] state judge can be found criminally liable under § 242 although that judge may be immune from damages under § 1983," and citing *Imbler* and *O'Shea*); *Pulliam v. Allen*, 466 U.S. 519, 540-44 & n.21 (1984) (holding that judicial immunity does not bar a civil lawsuit against a judge for injunctive relief under 42 U.S.C. § 1983 or prevent the recovery of attorney's fees, noting that it had held in *Ex parte Virginia* that the 1875 Civil Rights Act could be "employed to authorize a criminal indictment against a judge for excluding persons from jury service on account of their race," and stating

that although it had "assumed" in *Ex parte Virginia* that "the judge was performing a ministerial rather than a judicial function . . . [i]t went on to conclude . . . that even if the judge had been performing a judicial function, he would be liable under the statute."); *Mireles v. Waco*, 502 U.S. 9, 9-10 & n.1 (1991) (per curiam) (observing that "[a] long line of this Court's precedents acknowledges that, generally, a judge is immune from a suit for money damages," but that "[t]he Court, however, has recognized that a judge is not absolutely immune from criminal liability, . . . or from a suit for prospective injunctive relief, . . . or from a suit for attorney's fees authorized by statute," and citing *Ex parte Virginia* and *Pulliam*).

In fact, the first case in this series, *Ex parte Virginia*, has already resolved this issue against Judge Joseph. There, a state judge was indicted and arrested for a federal crime: that he violated the 1875 Civil Rights Act because, while acting as "an officer charged by law with the selection of jurors to serve in the circuit and county courts," he excluded people of color from serving as jurors. *Ex parte Virginia*, 100 U.S. at 340. The defendant judge argued he was immune from federal prosecution because his selection of jurors was a judicial act. *Id.* at 348. The Supreme Court disagreed with the initial premise, but went on to hold that the judge could be criminally prosecuted for his role in overseeing the jury pool even "if the selection of jurors could be considered . . . a judicial act." *Id.* at 348-49.

In *Pulliam*, the Supreme Court took special note of the passage just quoted. The Court stated that, in *Ex parte Virginia,* it had initially "assumed" that "the judge was performing a ministerial rather than a judicial function," but that after indulging that assumption it "went on *to conclude* . . . that even if the judge had been performing a judicial function, he would be liable under the statute." *Pulliam*, 466 U.S. at 541 n.21 (emphasis added).

That this statement in *Ex parte Virginia* represents an alternative basis for the outcome does not make it dicta. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 346 n.4 (1986); *Commonwealth of Massachusetts v. United States*, 333 U.S. 611, 623 (1948); *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928). And even if the second rationale could be labeled dicta, it would still command deference. *See United States v. Tsarnaev*, 968 F.3d 24, 89 n.57 (1st Cir. 2020) ("Supreme Court dicta are different from other judicial dicta, because we are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings.") (internal quotation marks omitted). At the very least, *Ex parte Virginia* and the six other decisions leave little doubt about how the Supreme Court would decide the question were it put to it today.

Three circuits have confronted a variation on the same basic theme and all three have held that a federal judge has no immunity from criminal prosecution for judicial acts notwithstanding alleged separation-of-powers concerns. *See United*

States v. Claiborne, 727 F.2d 842, 845-49 & n.6 (9th Cir.) (per curiam) (relying in part on *O'Shea*, *Gravel* and *Dennis*), *cert. denied*, 469 U.S. 829 (1984); *United States v. Hastings*, 681 F.2d 706, 709-11 & n.17 (11th Cir. 1982) (relying in part on *Dennis*, *O'Shea*, and *Imbler*), *cert. denied*, 459 U.S. 1203 (1983); *United States v. Isaacs*, 493 F.2d 1124, 1140-44 (7th Cir.) (per curiam) (relying in part on *Gravel* and *O'Shea*), *cert. denied*, 417 U.S. 976 (1974). A fourth circuit has agreed, albeit in dicta. *See In re Kendall*, 712 F.3d 814, 822 n.4 (3d Cir. 2013) (stating that "[w]ith no support in history, law, or logic, we cannot extend judicial immunity to criminal contempt," and relying in part on *Mireles*, *O'Shea*, *Dennis* and *Pulliam*). No circuit has held to the contrary or even hinted at a different outcome.

While Judge Joseph suggests that *Claiborne*, *Hastings*, and *Isaacs* merely carve out a bribery exception to judicial immunity (JJ-Br. 15, 26), *Ex parte Virginia* says otherwise. And there is no principled reason why a judge should be immune from prosecution for taking judicial actions that advance other categories of crimes such as fraud, public corruption, and obstruction-of-justice offenses.

Judge Joseph and her *amici* muster one district court and three state court decisions to support their opposing view: *United States v. Chaplin*, 54 F. Supp. 926 (S.D. Cal. 1944); *In re Dwyer*, 486 Pa. 585, 406 A.2d 1355 (1979); *Commonwealth v. Tartar*, 239 S.W.2d 265 (Ky. App. 1951); *Petition of McNair*, 324 Pa. 48, 187 A. 498 (1936). (JJ-Br. 23.) These cases are unhelpful. *Chaplin* cited *Ex parte Virginia*

but overlooked its second holding. 54 F. Supp. at 933. *In re Dwyer* relied solely on civil cases and ignored *Ex parte Virginia*, *O'Shea*, and *Gravel*, as the dissent noted. 406 A.2d at 602-03. *Tartar* identified no authority apart from the Supreme Court's civil decision in *Bradley*. 239 S.W. at 266. And *McNair* limited its study of the issue to three sentences. 187 A. at 501. So there is little to be learned here.

2. The principles that support judicial immunity in the civil context do not apply in the criminal context

Broader principles undergirding judicial immunity bolster the conclusion that it has no place in criminal cases. Judge Joseph and her *amici* are silent on this topic.

All forms of immunity—whether judicial, executive, or legislative—represent an exception to a bedrock American legal principle:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

United States v. Lee, 106 U.S. 196, 220 (1882).

It comes as no surprise, then, that the Supreme Court has described absolute immunity as "strong medicine, justified only when the danger of officials' being deflected from the effective performance of their duties is very great." *Forrester v. White*, 484 U.S. 219, 230 (1988) (internal quotation marks and brackets omitted). It

has also said that it has been "quite sparing in its recognition of claims of absolute official immunity," *id.* at 224, and that it will be "cautious in extending" judicial immunity in particular, *id.* at 226.

Where it applies civilly, judicial immunity is based on two main policy concerns: (1) "protecting the finality of judgments or discouraging inappropriate collateral attacks"; and (2) "protect[ing] judicial independence by insulating judges from vexatious actions prosecuted by disgruntled litigants." *Forrester*, 484 U.S. at 225. The Supreme Court has summed up the key rationale:

> If judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious, would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication. Nor are suits against judges the only available means through which litigants can protect themselves from the consequences of judicial error. Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side-effects inevitably associated with exposing judges to personal liability.

484 U.S. at 226-27 (citation omitted).

Neither of these twin concerns—protecting the finality of judgments and protecting judicial independence by insulating judges from vexatious actions by disgruntled litigants—has any force in the criminal context.

A criminal prosecution is brought by a sovereign, not by an ordinary litigant, and the enforcement of the criminal code is a public, not a private, matter—indeed,

a matter of paramount importance to society at large. *See Heath v. Alabama*, 474 U.S. 82, 93 (1985) ("Foremost among the prerogatives of sovereignty is the power to create and enforce a criminal code."); *Standefer v. United States*, 447 U.S. 10, 24 (1980) (noting "the important federal interest in the enforcement of the criminal law" and that the "purpose of a criminal court is not to provide a forum for the ascertainment of private rights" but rather "to vindicate the public interest in the enforcement of the criminal law") (internal quotation marks omitted); *Hastings*, 681 F.2d at 711 n.17 ("A criminal proceeding, unlike a civil action, is not brought to vindicate an individual interest, but rather the public interest in law enforcement."). And unlike civil lawsuits initiated by private litigants, there is a "longstanding presumption of regularity accorded to prosecutorial decisionmaking" and the "presumption [is] that a prosecutor has legitimate grounds for the action he takes." *Hartman v. Moore*, 547 U.S. 250, 263 (2006).

A felony prosecution also faces hurdles that a civil lawsuit does not. First, a government entity must decide that charges are warranted. Second, a grand jury must agree there is probable cause to issue an indictment. Third, the defense may move to dismiss the case as vindictively motivated if it has facts to support the claim. And fourth, at trial, the prosecution must prove its case beyond a reasonable doubt rather than by a preponderance of the evidence.

These unique features of criminal cases ensure that it will be a rare event when a judge is prosecuted for acts related to a judicial function and that such prosecutions will not raise the systemic concerns noted in *Forrester*. And judges often possess a further protection that safeguards their independence: lifetime tenure. There is thus no need for the "strong medicine" of judicial immunity in the criminal arena, because there is no "danger"—let alone a "very great" danger—that without such immunity judges will be "deflected from the effective performance of their duties." *Forrester*, 484 U.S. at 230 (internal quotation marks omitted); *see also Pulliam*, 466 U.S. at 537-38 (reasoning that "injunctive relief against a judge raises concerns different from those addressed by the protection of judges from damages awards," and that the "limitations" on such relief "severely curtail the risk that judges will be harassed and their independence compromised by the threat of having to defend themselves against suits by disgruntled litigants.").

Circuit law is in accord. Citing the distinctive rights afforded to criminal defendants, the Ninth Circuit has said: "it [is] unlikely that judicial independence would be measurably diminished by subjecting judges to the processes of criminal laws." *Claiborne*, 727 F.2d at 848. And echoing *Lee*, it has noted an inarguable truth: "It can scarcely be doubted that the citizenry would justifiably lose respect for and confidence in a system of government under which judges were apparently held to be above the processes of the criminal law." *Id.* at 849. Other circuits have reasoned

similarly. *See In re Kendall*, 712 F.3d at 822 n.4; *Hastings*, 681 F.2d at 710-11 & n.17; *Isaacs*, 493 F.2d at 1144. No circuits have demurred.

3. The common-law tradition reinforces the view that judicial immunity does not apply in the criminal context

Judicial immunity is a judge-made doctrine that is based on "common-law principles." *Pulliam*, 466 U.S. at 529. Thus, a "crucial question is whether the common law recognized judicial immunity from [criminal prosecutions]." *Id.* The answer is evident: it did not.

For insights into common-law criminal topics, the Supreme Court has often turned to Serjeant-at-law William Hawkins's *A Treatise of the Pleas of the Crown*,[7] the standard text on English criminal law and procedure from 1716 until its final edition in 1824. *See* Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 Mich. L. Rev. 1086,

[7] Examples of the Court's reliance on Hawkins include: *Currier v. Virginia*, 138 S. Ct. 2144, 2153 (2018); *Southern Union Co. v. United States*, 567 U.S. 343, 354 (2012); *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177, 183 (2004); *Crawford v. Washington*, 541 U.S. 36, 45 (2004); *Atwater v. City of Lago Vista*, 532 U.S. 318, 332-34 (2001); *Wilson v. Arkansas*, 514 U.S. 927, 932 (1995); *Kungys v. United States*, 485 U.S. 759, 769 (1988); *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975); *Tumey v. State of Ohio*, 273 U.S. 510, 525-26 (1927); *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 51-52 (1911); *Sawyer v. United States*, 202 U.S. 150, 159-60 (1906); *Kepner v. United States*, 195 U.S. 100, 126 (1904); *McGuire v. Commonwealth of Massachusetts*, 70 U.S. 387, 394 (1865); *United States v. Wood*, 39 U.S. 430, 438 (1840); *United States v. Bailey*, 34 U.S. 267, 271-72 (1835); *United States v. Wilson*, 32 U.S. 150, 156 (1833); *United States v. Marchant*, 25 U.S. 480, 482-84 (1827); *United States v. Smith*, 18 U.S. 153, 159 n. d (1820).

1096 (1994) ("The most significant change in the phrasing of the English manuals on the core subjects of criminal procedure during the century was the appearance of Serjeant Hawkins's overwhelmingly influential *Pleas of the Crown*, which became the single most authoritative source for characterization of the common law procedures developed in the wake of the Marian legislation.").

According to this respected authority:

> Justices of the peace are not punishable *civilly* for acts done by them in their judicial capacities, but if they abuse the authority with which they are entrusted, they may be punished *criminally* at the suit of the king by way of information. But in cases where they proceed ministerially rather than judicially, if they act corruptly, they are liable to an action at the suit of the party, as well as to an information at the suit of the king. The court of king's-bench, however, will never grant an information against a justice of the peace for a mere error in judgment; for even where a justice does an illegal act,[8] yet although the judgment was wrong, if his heart was right, if he acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the court will never punish him by the extraordinary course of *information*, but leave the party complaining to the ordinary legal remedy by *action* or by *indictment*: but if they act improperly knowingly, an information shall be granted.

3 William Hawkins, *A Treatise of the Pleas of the Crown* ch. 8 § 74 (7th ed. 1795) (emphasis in original, citations omitted). [GA: 9].

[8] In the eighteenth century, the word "illegal" did not mean "criminal"; it merely meant "Contrary to law." Samuel Johnson, 1 *A Dictionary of the English Language* (1st ed. 1755). [GA: 12]. Thus, Hawkins's point here is that a prosecution could not be based on a mere mistake of law.

The Third Circuit has cited this passage in support of its view that "[w]ith no support in history, law, or logic, we cannot extend judicial immunity to criminal contempt." *In re Kendall*, 712 F.3d at 822 n.4. English opinions have also relied on this section of Hawkins. *See Gelen v. Hall*, 157 E.R. 157, 162 (1857); *Mills v. A. Collett, Clerk*, 130 E.R. 1212, 1213-14 (1829); *see also Rex v. Corbett and Coulson*, 96 E.R. 875, 875-76 (1756) (observing that a justice of the peace could not be "punished criminally" for a mere "mistake arising from an error in judgment" but that "the conduct of the defendants, in the present case, has been so extremely perverse and obstinate, that it must have proceeded from some partial or corrupt motive," and holding that in such circumstances "[a]n information may be filed against justices of the peace for disobedience to a mandamus.").

The lone English authority cited by Judge Joseph and *amici*, *Floyd v. Barker*, 77 E.R. 1305 (1607), dates from the earlier period of the Star Chamber, and it does not call for a different result. First, although *Floyd* has been read as holding that "the judges of the King's Bench [were] immune from prosecution in *competing courts* for their judicial acts," *Pulliam*, 466 U.S. at 531 (emphasis added), *Floyd* itself recognized that a judge could be prosecuted criminally "before the King himself," *Floyd*, 77 E.R. at 1307, as the Supreme Court has noted, 466 U.S. at 531. Second, "the principle of immunity [in *Floyd*] extended only to the higher judges of the King's courts." 466 U.S. at 531. And third, while the Supreme Court cited *Floyd* in

1872 in reaffirming judicial immunity from civil suits, *Bradley*, 80 U.S. at 347-48, it made no mention of *Floyd* seven years later in holding that a state judge could be prosecuted even if the charged conduct "could be considered . . . a judicial act." *Ex parte Virginia*, 100 U.S. at 348-49. Thus, there is every reason to trust Hawkins's *Pleas of the Crown*, a founding-era source that the founders themselves consulted.[9]

B. Even assuming that judicial immunity can be invoked in a criminal case, the acts charged here are not judicial in character

Even if judicial immunity could bar a federal criminal prosecution in some theoretical case, there is a further reason why it does not apply here: Judge Joseph's charged conduct is not judicial in nature.

In the civil context, a "paradigmatic" example of a judicial act covered by absolute immunity is the "resolving [of] disputes between parties who have invoked the jurisdiction of a court." *Forrester*, 484 U.S. at 227. Moving beyond this core

[9] In testimony before the House Judiciary Committee, a leading constitutional scholar described Hawkins as one "of the major writers with whom the founders were intimately conversant," and noted his *Pleas of the Crown* was "widely cited" in the era. *See* Gary L. McDowell, *History of Impeachment*, 1998 WL 781689; *accord* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1255-56 & n.436 (2016). Thomas Jefferson bought a copy in 1771, it is found in his library, and he recommended it in 1787. *See* 11 *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1955), p. 547; 27 *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1997), p. 670; 37 *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 2010), p. 230. John Adams praised the work in 1758 and cited it during the Boston Massacre trials in 1770. *See* 1 *The Adams Papers* (Cambridge: Harvard University Press, 1961), p. 56; 3 *The Adams Papers* (Cambridge: Harvard University Press, 1965), pp. 81-86.

protected conduct, the question whether an act is "truly judicial" and thus deserving of immunity is guided by the following maxim: "immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." *Id.* (emphasis in original). It follows from this function-focused approach that there is "an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.* Ministerial decisions, such as "supervising court employees and overseeing the efficient operation of a court," are not regarded as judicial acts "even though they may be essential to the very functioning of the courts" and may be "quite important in providing the necessary conditions of a sound adjudicative system." *Id.* at 228-29. Judge Joseph relies on *Forrester* but fails to acknowledge its central distinction. (JJ-Br. 16, 18, 20.) The Commonwealth *amicus* bypasses the opinion.

To illustrate the point about ministerial decisions, the Supreme Court in *Forrester* relied on *Ex parte Virginia*. *Forrester*, 484 U.S. at 228. As said, in that case, a state judge was indicted and arrested for violating the 1875 Civil Rights Act because, while acting as "an officer charged by law with the selection of jurors to serve in the circuit and county courts," he excluded people of color from serving as jurors. *Ex parte Virginia*, 100 U.S. at 340. The defendant judge argued he was immune from federal prosecution because his selection of jurors was a judicial act. *Id.* at 348. Although state law vested judges with the power to select jurors, the

Supreme Court readily concluded that this was "merely a ministerial act." *Id.* And as noted, the Court then went on to hold that the judge could be prosecuted even if his actions were in fact judicial. *Id.* at 348-49; *Pulliam*, 466 U.S. at 541 n.21.

If a judge's selection of prospective jurors may constitute a ministerial act, it is hard to see why a decision about the simple mechanics of how a prisoner will exit the courthouse qualifies as a judicial or adjudicative action. Controlling ingress and egress at the courthouse doors may well involve "supervising court employees and overseeing the efficient operation of a court," but this merely confirms that the acts in question are administrative even though courthouse control is undoubtedly "quite important in providing the necessary conditions of a sound adjudicative system" as a general matter. *Forrester*, 484 U.S. at 228-29.

There is no dispute that a judge engages in a judicial function in ordering a defendant to be released from custody. But the physical and logistical details of how that release is accomplished—removing handcuffs, unlocking a cell, returning property, opening courthouse doors, *etc.*—are not judicial or adjudicative subjects. Such tasks are not a "general function normally performed by a judge." *Mireless*, 502 U.S. at 13. To the contrary, they are ministerial matters that are typically handled by court officers. The fact that Judge Joseph inserted herself into this process to further the pretext that enabled A.S. to evade arrest—ostensibly authorizing him to

be taken downstairs instead of being released the normal way through the courtroom and out into the lobby—hardly transforms her conduct into a judicial act.

It follows that Judge Joseph's emphasis on courtroom control (JJ-Br. 11, 14), is beside the point. Likewise, the fact that actions that are judicial may retain their judicial character even if the judge acts with a bad intent (JJ-Br. 16-17), is of no help to her.

IV. Defendants' additional claims are waived, jurisdictionally barred, premature, and meritless

A. Introduction

Under the banner of "federalism" and "due process," defendants advance three additional reasons why the indictment must be dismissed: (1) it fails to state an offense as to the "proceeding" element; (2) it fails to allege facts that would support a finding that they acted "corruptly"; and (3) it rests on an application of the statutes that they could not have anticipated, in violation of notice principles and the rule of lenity. (JJ-Br. 32-41; WM-Br. 16-24.)

B. The claims are waived, and they fail the *Midland Asphalt* collateral-order test regardless

In seeking to halt the proceedings below, defendants told the district court that they were appealing the anticommandeering and judicial immunity rulings, reflecting their apparent belief that there was no jurisdiction to appeal other issues. [D.153; D.154; D.155; D.159]. The court relied on those representations in staying

all aspects of the pending case. [GA: 5]. Now on appeal, defendants opt for a kitchen-sink approach, while making no effort to explain why the collateral-order doctrine permits review of the additional claims.

This should result in waiver. *See* Fed. R. App. P. 28(a)(4)(B) (opening brief must include a jurisdictional statement detailing "the basis for the court of appeals' jurisdiction, with citations to applicable statutory provisions and stating relevant facts establishing jurisdiction"); *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 62 n.6 (4th Cir. 1993) ("We are prevented from reviewing the district court's decision, however, because Mylan has failed to argue these jurisdictional facts in its brief [citing Rule 28]. We therefore conclude that Mylan has waived the arguments on appeal."); *cf. United States v. Casey*, 825 F.3d 1, 12 (1st Cir. 2016) ("arguments raised for the first time in an appellate reply brief [are] ordinarily deemed waived"); *United States v. Pabon*, 819 F.3d 26, 33 (1st Cir. 2016) (failure to address standard of review results in waiver).

In any event, to the extent defendants argue for the first time in their reply briefs that this Court should expand the list of approved collateral-order categories beyond the four that have been recognized in the last seventy years (*supra* 14), to include the three additional claims, they will not be able to satisfy the *Midland Asphalt* collateral-order test.

A glance at the district court's ruling [GA: 3] is enough to confirm that it did not "conclusively determine" the three issues and that the issues are not "completely separate from the merits of the action." *Midland Asphalt Corp.*, 489 U.S. at 799 (internal quotation marks omitted). In addressing the "proceeding" and "corruptly" claims, the court correctly found that the indictment sufficiently tracked the pertinent statutory language and supplied adequate notice of the charges [GA: 3], which is all that is required at this stage. *See United States v. Stepanets*, 879 F.3d 367, 372 (1st Cir. 2018); *United States v. Innamorati*, 996 F.2d 456, 477 (1st Cir. 1993). And in addressing the due process claim, the court found that it "require[d] the assessment of disputed facts, characterizations of the events underlying the Indictment, or other evidentiary analysis." [GA: 3].

As before, the third prong looms largest. Defendants cannot show that their additional claims implicate "[a] right not to be tried [that] rests upon an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause, . . . or the Speech or Debate Clause" as opposed to a right "'whose remedy [would] require[] the dismissal of charges'" if indeed their claims had merit. *Midland Asphalt Corp.*, 489 U.S. at 801.

Binding precedent disqualifies the first two claims for interlocutory review: "First, an order denying a motion to dismiss an indictment for failure to state an offense is *plainly* not 'collateral' in any sense of that term; rather it goes to the very

heart of the issues to be resolved at the upcoming trial. Secondly, the issue resolved adversely to petitioners is such that it may be reviewed effectively, and, if necessary, corrected if and when a final judgment results." *Abney v. United States*, 431 U.S. 651, 663 (1977) (emphasis added). This circuit and others have never deviated from this blanket rule. *See United States v. Bird*, 359 F.3d 1185, 1188 (9th Cir. 2004); *United States v. McDade*, 28 F.3d 283, 297 (3d Cir. 1994); *United States v. Floyd*, 992 F.2d 498, 500 (5th Cir. 1993); *United States v. Slay*, 858 F.2d 1310, 1314 (8th Cir. 1988); *United States v. Moller-Butcher*, 723 F.2d 189, 190-92 (1st Cir. 1983) (applying *Abney* where defendant argued in part that "the superseding indictment should have been dismissed for failure to state an offense against M.E.S. and failure to afford M.E.S. notice of the charges against it."); *United States v. Sisk*, 629 F.2d 1174, 1180-81 (6th Cir. 1980). Defendants cannot avoid *Abney* merely by recasting their failure-to-state-an-offense issues in "federalism" terms.

The due process claim also flunks the third prong. *See United States v. Kouri-Perez*, 187 F.3d 1, 14 (1st Cir. 1999) (collateral-order exception did not apply since "if appellants' due-process rights were violated, there is no reason to assume they cannot be fully vindicated on final appeal."); *accord United States v. Henderson*, 915 F.3d 1127, 1131 (7th Cir. 2019) (same); *United States v. Angilau*, 717 F.3d 781, 786 (10th Cir. 2013) (same); *United States v. Kolter*, 71 F.3d 425, 430 (D.C. Cir. 1995) (same, where due process claim was based on notice and vagueness concerns).

Defendants may argue that if the Court accepts jurisdiction to resolve one of the *other* claims, the three extra claims are interwoven matters that may also be addressed under the collateral-order doctrine. But once again, the Supreme Court has blocked that path. *See MacDonald*, 435 U.S. at 857 n.6 (noting that *Abney* "vitiated" the concept of ancillary collateral-order jurisdiction by holding "that a federal court of appeals is without pendent jurisdiction over otherwise nonappealable claims even though they are joined with a double jeopardy claim over which the appellate court does have interlocutory appellate jurisdiction"); *Abney*, 431 U.S. at 662-63 (holding that claims ancillary to a double jeopardy claim "are appealable if, and only if, they too fall within *Cohen's* collateral-order exception to the final-judgment rule" since "[a]ny other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence."); *Schock*, 891 F.3d at 340 (rejecting "pendent jurisdiction" on collateral-order review because "*Abney* effectively foreclosed its use in criminal prosecutions."); *Angilau*, 717 F.3d at 786 (same); *United States v. Blackwell*, 900 F.2d 742, 746-47 (4th Cir. 1990) (same). That should end the matter.

C. Any review on the merits would be premature in any event

As the government explained below, the three extra claims are baseless. [A: 136-149, 152-153, 168-179, 182-184, 216-219]. Because the district court denied the motion to dismiss as premature, however, it has yet to explore the underlying issues. [GA: 3]. Thus, it would also be premature for this Court to address the substance of those issues in an interlocutory appeal, even if it thought that the collateral-order exception applied to one or more of them. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). If the Court disagrees, the government is prepared to brief the merits of the issues. But it should not have to do so at this stage, where the defendants have made no effort to satisfy the Court of its jurisdiction and where jurisdiction is so palpably lacking.

CONCLUSION

For these reasons, the government respectfully requests that the Court either dismiss the appeals for lack of jurisdiction or affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,978 words (an opening or answering brief may not exceed 13,000 words, a reply brief may not exceed 6,500 words), excluding the parts of the brief exempted by Fed. R. App. P. 32(f) (*i.e.*, the corporate disclosure statement, table of contents, table of citations, addendum, and certificates of counsel).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Times New Roman 14 point, in Microsoft Word version 2016.

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Dated: December 10, 2020

CERTIFICATE OF SERVICE

I, Donald C. Lockhart, Assistant U.S. Attorney, hereby certify that on December 10, 2020, I electronically served a copy of the foregoing document on the following registered participants of the CM/ECF system:

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Nos. 20-1787, 20-1794

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

SHELLY M. RICHMOND JOSEPH,
and WESLEY MACGREGOR,
Defendants-Appellants

Addendum Table of Contents

KeyCite Blue Flag – Appeal Notification
Appeal Filed by US v. JOSEPH, 1st Cir., August 17, 2020

2020 WL 4288425
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

UNITED STATES of America
v.
Shelley M. RICHMOND JOSEPH
and Wesley MacGregor, Defendants.

No. 19-cr-10141-LTS
|
Filed 07/27/2020

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ORDER ON DEFENDANTS' MOTIONS TO DISMISS

SOROKIN, J.

***1** The government has charged Massachusetts District Court Judge Shelley M. Richmond Joseph and Massachusetts Trial Court Officer Wesley MacGregor in an Indictment alleging conspiracy and obstruction of justice in violation of 18 U.S.C. § 1512 and obstruction of a federal proceeding in violation of 18 U.S.C. § 1505. MacGregor also is charged with perjury in violation of 18 U.S.C. § 1623. The defendants have moved to dismiss the conspiracy and obstruction charges pursuant to Federal Rule of Criminal Procedure 12(b)(3), the doctrine of judicial immunity, and the Fifth and Tenth Amendments to the Constitution. In their view, the Indictment fails as a matter of law to allege the elements necessary to establish a crime under the relevant obstruction statutes, and the government's attempt to extend those statutes to the conduct described in the Indictment raises constitutional and other serious legal concerns. After careful consideration, the motions to dismiss are DENIED because the Indictment alleges the elements of the offenses and sufficient supporting factual detail.

I. BACKGROUND

The Indictment describes events that allegedly occurred at the Newton District Court ("NDC") on April 2, 2018, while Joseph was presiding and MacGregor was working as a court officer at the NDC. Doc. No. 1 ¶¶ 6, 14-33. Per the Indictment, an Immigration and Customs Enforcement ("ICE") officer working for the United States Department of Homeland Security ("DHS") arrived at the Courthouse that morning seeking to take into custody an individual who had been arrested days earlier in Newton. Id. ¶¶ 7-10. The Indictment alleges that the individual was the subject of an immigration detainer and a warrant based on "a final order" of removal, reflecting DHS's intent to detain him and effect his removal from the United States in the event he was released from state custody. Id. ¶ 8. Again, according to the Indictment, Joseph and MacGregor, along with a privately retained criminal defense attorney, allegedly facilitated the individual's departure from the NDC using the rear sally port door of the lockup on the lower level of the NDC, rather than through the main door leading from the courtroom to the lobby where the ICE officer was waiting. Id.

Based on these factual allegations, which are amplified further in the Indictment, a grand jury charged the defendants in Count I of the Indictment with conspiring to obstruct justice in violation of 18 U.S.C. §§ 1512(c)(2) and (k) as follows:

> On or about April 2, 2018, in Newton, in the District of Massachusetts, the defendants [Joseph and MacGregor] conspired with the Defense Attorney to corruptly obstruct, influence, and impede an official proceeding, namely, a federal immigration removal proceeding before the United States Department of Homeland Security.

Id. ¶ 38. Count II charges the underlying offense of obstruction of justice in violation of 18 U.S.C. § 1512(c)(2) in nearly identical terms. See id. ¶ 40. In Count III, the

defendants are charged with obstructing a federal proceeding in violation of 18 U.S.C. § 1505 as follows:

> ***2** On or about April 2, 2018, in Newton, in the District of Massachusetts, the defendants [Joseph and MacGregor] did corruptly influence, obstruct, and impede, and endeavor to influence, obstruct and impede, the due and proper administration of the law under which a pending proceeding was being had before a department and agency of the United States, namely, a federal immigration removal proceeding before the United States Department of Homeland Security.

Id. ¶ 42. [1]

On September 6, 2019, the defendants each moved to dismiss the conspiracy and obstruction charges against them. Doc. Nos. 59, 60, 61, 62. With the Court's permission, five amicus curiae briefs were filed supporting various aspects of the defendants' dismissal motions. [2] Doc. Nos. 66, 71, 77, 81, 92. The government opposed the motions, Doc. Nos. 98, 99, Joseph replied, Doc. No. 115, and the government sur-replied, Doc. No. 118. The Court heard oral argument by video on June 11, 2020. Doc. No. 138. The motions are now ripe for disposition.

II. LEGAL STANDARDS

The question presented by a motion seeking dismissal of a lawfully returned criminal indictment "is not whether the government has presented enough evidence to support the charge, but solely whether the allegations in the indictment are sufficient to apprise the defendant of the charged offense." United States v. Savarese, 686 F.3d 1, 7 (1st Cir. 2012); accord United States v. Brissette, 919 F.3d 670, 675 (1st Cir. 2019). The Court presumes the allegations of an indictment are true for purposes of assessing its sufficiency. United States v. Stewart, 744 F.3d 17, 21 (1st Cir. 2014). Because dismissal of an indictment "directly encroaches upon the fundamental role of the grand jury," the circumstances under which a trial court properly may invoke its authority in this regard are "extremely limited." Whitehouse v. U.S. Dist. Court, 53 F.3d 1349, 1360 (1st Cir. 1995); cf. Costello v. United States, 350 U.S. 359, 364 (1956) (declining to permit "defendants to challenge indictments on the ground that they are not supported by adequate or competent evidence," as doing so "would run counter to the whole history of the grand jury institution").

"Defendants challenging the sufficiency of an indictment bear a heavy burden." United States v. Perry, 37 F. Supp. 3d 546, 550 (D. Mass. 2014) (citing United States v. Troy, 618 F.3d 27, 34 (1st Cir. 2010)). "At the indictment stage, the government need not 'show,' but merely must allege, the required elements" of the offenses charged. Stewart, 744 F.3d at 21. "The indictment should be specific enough to notify the defendant of the nature of the accusation against him and to apprise the court of the facts alleged." United States v. Brown, 295 F.3d 152, 154 (1st Cir. 2002). Indeed, as the First Circuit has emphasized, "[a]n indictment need not say much to satisfy" this constitutional notice requirement. United States v. Stepanets, 879 F.3d 367, 372 (1st Cir. 2018). Essentially, a Rule 12 challenge to the sufficiency of an indictment's allegations will fail so long as it "describes all of the elements of the charged offense using the words of the relevant criminal statute." United States v. Wells, 766 F.2d 12, 22 (1st Cir. 1985) (citing Hamling v. United States, 418 U.S. 87, 117 (1974)).

III. DISCUSSION

***3** Joseph levels three types of challenges to the conspiracy and obstruction charges in the Indictment, arguing that she is shielded from prosecution by the doctrine of judicial immunity, that the government has not sufficiently alleged three aspects of the charges against her, and that the invocation of the obstruction statutes in the circumstances presented here violates the Constitution in two ways. Doc. No. 60 at 16-37. MacGregor echoes Joseph's sufficiency and constitutional challenges. Doc. No. 62 at 8-20. The Court will address each challenge in turn and will briefly explain why each fails as a basis for dismissal.

First, Joseph argues that the charges against her violate "core principles of judicial immunity." Doc. No. 60 at 16. The parties hotly contest whether judicial immunity insulates against criminal liability or is restricted to civil lawsuits. Compare id. at 16-22 (arguing the doctrine shields judges from both civil and criminal liability), with Doc. No. 98 at

15-20 (arguing the doctrine cannot protect against criminal charges, and that it would not safeguard Joseph in any event). The Court need not now resolve this question, for even if judicial immunity extends to the criminal context, it would apply only where "judicial acts performed within a judge's jurisdiction" are concerned. In re Kendall, 712 F.3d 814, 833-37 (3d Cir. 2013) (Roth, J., concurring); see Zenon v. Guzman, 924 F.3d 611, 616-20 (1st Cir. 2019) (engaging in a fact-intensive analysis of the nature and function of the conduct at issue to determine whether judicial immunity from civil suit applied); see also Mireles v. Waco, 502 U.S. 9, 9 n.1, 11-12 (1991) (noting judges are "not absolutely immune from criminal liability" (emphasis added)). Of course, any such immunity, if it exists, would never shield "corruption or bribery." In re Kendall, 712 F.3d at 834. Where the Indictment charges that Joseph acted "corruptly," Doc. No. 1 ¶¶ 27, 30, 38, 40, 42, it is not within this Court's province on a motion to dismiss to determine whether judicial immunity, even if its reach encompasses criminal liability, provides a viable shelter for Joseph in the circumstances alleged here. See Stepanets, 879 F.3d at 372 (explaining "that a court must deny a motion to dismiss if the motion relies on disputed facts").

Next, Joseph and MacGregor seek dismissal of the Indictment because, they argue, it fails to state an offense under either of the two obstruction statutes it invokes. In particular, they urge that the Indictment "does not allege any corrupt intent on the part of" either defendant; it alleges interference with "the execution of a civil immigration warrant [which] does not qualify as a 'proceeding' " under either obstruction statute; and it does not allege the sort of crime they assert is required to sustain conspiracy and obstruction charges under § 1512. Doc. No. 60 at 22-30; Doc. No. 62 at 8-15. In advancing these arguments, Joseph and MacGregor lose sight of the governing legal standard. Each of the first three Counts in the Indictment alleges the elements of the charged offense by invoking the relevant statutory language, compare Doc. No. 1 ¶¶ 38, 40, 42, with 18 U.S.C. §§ 1505, 1512(c)(2), and provides sufficient factual detail to "notify the defendant[s] of the nature of the accusation against [them] and to apprise the court of the facts alleged," Brown, 295 F.3d at 154. Cf. United States v. Murphy, 762 F.2d 1151, 1153 (1st Cir. 1985) (finding obstruction indictment insufficient where it "parrot[ed] the statute" but in no way identified the "official proceeding the grand jury had in mind"). Nothing more is required at this stage of the prosecution.

***4** Finally, Joseph and MacGregor suggest that application of the charged obstruction statutes to the conduct at issue violates the Tenth Amendment and principles of Due Process. Doc. No. 60 at 30-37; Doc. No. 62 at 15-20. In advancing these challenges, the defendants characterize the Indictment as criminalizing their "lawful decision not to assist" the ICE officer in administering federal immigration laws, Joseph's "decisions about how to manage [her] courtroom[ ]," and MacGregor's "exercise of his daily duties." Doc. No. 60 at 31, 34; Doc. No. 62 at 16, 18; see also Doc. No. 115 at 24 (suggesting Joseph engaged in only "lawful and discretionary acts" and "did not 'affirmatively impede' anything"). At bottom, the defendants' constitutional arguments require the assessment of disputed facts, characterizations of the events underlying the Indictment, or other evidentiary analysis. Such fact-laden determinations are outside the scope of a motion to dismiss. Because the Indictment complies with the governing legal standard, neither constitutional challenge provides an avenue to dismissal.

IV. CONCLUSION

For the foregoing reasons, the Motions to Dismiss (Doc. Nos. 59 and 61) are DENIED. The discovery motions remain pending. After resolution of those motions, the Court will confer with the parties to establish a schedule for any other matters in this case and the date for trial.

SO ORDERED.

All Citations

Slip Copy, 2020 WL 4288425

Footnotes

1 MacGregor is charged in Count IV with perjury, which is not the subject of the pending motions to dismiss.

2 The Court has considered the amicus briefs only insofar as they discuss issues and challenges raised by one or both defendants in their motions to dismiss. Because amici may not introduce new grounds for dismissal, United States v. Sturm, Ruger & Co., 84 F.3d 1, 6 (1st Cir. 1996), the Court has disregarded any challenges articulated by amici but not advanced by either defendant. The Court appreciates the submission of each amicus curiae but found especially helpful the thoughtful illumination offered by the Commonwealth of Massachusetts and the Legal Scholars as to certain issues raised by the defendants.

End of Document

2020 WL 5880522
Only the Westlaw citation is currently available.
United States District Court, D. Massachusetts.

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No. 19-cr-10141-LTS
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Filed 10/02/2020

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ORDER ON DEFENDANTS' MOTIONS
TO STAY PENDING APPEAL

SOROKIN, United States District Judge

***1** On July 27, 2020, the Court denied the defendants' motions to dismiss three of the four counts charged in the indictment returned against them.[1] The motions raised a number of challenges, including one arising from Judge Shelley M. Richmond Joseph's assertion of judicial immunity from criminal prosecution, and one arising from both defendants' assertion that the Tenth Amendment to the United States Constitution precludes their prosecution. The Court rejected those challenges under the stringent standards governing pretrial dismissal in criminal cases. Doc. No. 142. Both defendants have filed notices of interlocutory appeal, seeking the First Circuit's review of their judicial immunity and Tenth Amendment challenges. Doc. Nos. 147, 149. Both defendants have also filed motions asking this Court to stay further proceedings until their appeals are resolved. Doc. Nos. 153, 155. The government has opposed the motions. Doc. No. 156. Joseph filed a reply. Doc. No. 159.

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982). "Though judicially spawned," this divestiture "rule has sturdy roots" arising from "the principle that jurisdiction over a single case ordinarily should reside in a single court at any single point in time." United States v. Brooks, 145 F.3d 446, 455-456 (1st Cir. 1998). Pursuant to the rule, the defendants' filings of notices of appeal divested this Court "of authority to proceed with respect to any matter touching upon, or involved in, the appeal." United States v. Mala, 7 F.3d 1058, 1051 (1st Cir. 1993).

The government urges the Court to proceed notwithstanding these well-established principles, noting that the divestiture rule has exceptions. According to the government, the twin assertions underlying the stay requests—that the Court of Appeals has jurisdiction over the interlocutory appeals, and that the defendants advance claims that would warrant reversal (i.e., dismissal)—are "patently meritless." Doc. No. 156 at 1, 7. As the First Circuit has explained, "a district court can proceed, notwithstanding the filing of an appeal, if the notice of appeal is defective in some substantial and easily discernible way ... or if it otherwise constitutes a transparently frivolous attempt to impede the progress of the case." Brooks, 145 F.3d at 456. Applying these exceptions, if the government were correct that the defendants have appealed an unappealable order or that the claims advanced were "transparently frivolous," then, of course, the stay requests would be denied.

Whatever the likelihood may be of the defendants prevailing (or not) on appeal on one or both of their arguments for dismissal, their claims are neither "patently meritless" nor "transparently frivolous." See, e.g., In re Kendall, 712 F.3d 814, 833-37 (3d Cir. 2013) (Roth, J., concurring) (endorsing view that judicial immunity can and should protect against criminal prosecution for "judicial actions within the judge's jurisdiction" "absent corruption or bribery").[2]

***2** Similarly, the defendants' notices of appeal are not "defective in some substantial and easily discernible way," as they assert a theory of interlocutory appellate jurisdiction in a criminal case that is at least colorable and has been endorsed

by other Courts of Appeals previously. See United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984) (exercising jurisdiction over interlocutory appeal by a judge of trial court's denial of motion to quash criminal indictment based on assertion of absolute immunity); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982); (same); cf. Filler v. Kellett, 859 F.3d 148, (1st Cir. 2017) (noting "interlocutory jurisdiction" does permit review of immunity rulings that turn "on a question of law," observing claims of "absolute immunity ... only rarely turn[ ] on questions of fact," and explaining in detail why this particular challenge presented factual questions precluding the exercise of interlocutory review). Thus, the government has not established that an exception to the divestiture rule applies here to permit this Court to proceed while the defendants' appeal is pending.

Moreover, in all three of the above-cited cases, the trial court either stayed the case during the pendency of the appeal or erred in failing to do so. See Filler v. Hancock Cty., No. 15-cr-48, ECF No. 60 (D. Me. Apr. 4, 2016) (granting prosecutor's request for stay pending appeal of ruling denying immunity claim, noting absolute immunity includes protection from the burden of discovery); Claiborne, 727 F.2d at 850-51 (explaining that the district court's continuation of proceedings while the interlocutory appeal was pending was error, finding the error was harmless given the resolution of the appeal in the government's favor, but advising the trial court to re-enter any motions and orders filed during the pendency of the appeal to avoid "jurisdictional problems"); Br. U.S., Hastings v. United States, No. 82-863, 1983 WL 961998, at *3 (U.S. Jan. 20, 1983) (reflecting judge-defendant's criminal trial court proceedings were stayed pending his appeal and resumed after Court of Appeals rejected his immunity claim).

Accordingly, the motions to stay (Doc. Nos. 153 and 155) are ALLOWED. [3]

SO ORDERED.

All Citations

Slip Copy, 2020 WL 5880522

Footnotes

1 Count IV alleges a perjury charge against Wesley MacGregor only; he did not seek dismissal of that charge.

2 In so saying, the Court takes no position on the strength or likelihood of success of the judicial immunity or Tenth Amendment arguments either in the Court of Appeals or thereafter, should this case proceed after the appeal concludes.

3 The government alternatively requested that the Court proceed with discovery and other matters, including resolution of the various pending discovery motions. Doc. No. 156 at 8-9. The defendants seek a stay of "all further proceedings," Doc. No. 154 at 1; Doc. No. 155 at 1, but Joseph indicated in her reply brief that, should the Court decline to impose a complete stay, she would "not oppose the Court retaining jurisdiction over" three specific discovery matters, Doc. No. 159 at 5. Under the governing divestiture doctrine and the policies underlying it, the parties may not confer jurisdiction on this Court by agreement. The Court understands and shares the government's expressed interest in proceeding efficiently in this (and all) matters, it has reviewed the various pending motions already, and it will be prepared to proceed promptly in the future if and when it is called upon to do so.

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A

TREATISE

OF THE

PLEAS OF THE CROWN;

OR,

A SYSTEM

OF THE

PRINCIPAL MATTERS RELATING TO THAT SUBJECT,

DIGESTED UNDER PROPER HEADS.

By WILLIAM HAWKINS,

SERJEANT AT LAW.

THE SEVENTH EDITION:

In which the Text is carefully collated with the original Work; the marginal References corrected; new References from the modern Reporters added; a Variety of *Manuſcript Caſes* inſerted; and the whole enlarged by an Incorporation of the ſeveral Statutes upon Subjects of Criminal Law, to the THIRTY-FIFTH YEAR OF GEORGE THE THIRD. To which an Explanatory Preface is prefixed, and new and copious Indexes are ſubjoined.

By THOMAS LEACH, Eſq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

VOL. III.

LONDON:

PRINTED FOR G. G. AND J. ROBINSON, PATERNOSTER-ROW; AND J. BUTTERWORTH, FLEET-STREET.

1795.

to the laws and ſtatutes now in force, juſtices of the peace may lawfully act in any caſe relating to pariſhes or places to the rates and taxes of which ſuch juſtices reſpectively are rated or chargeable;" ENACTS, "That it ſhall and may "be lawful to and for all and every juſtice or juſtices of the "peace for any county, riding, city, liberty, franchiſe, bo-"rough, or town corporate, within their reſpective juriſ-"dictions, to make, do, and execute all and every act or "acts, matter or matters, thing or things, appertaining to "their office as juſtice or juſtices of the peace, ſo far as the "ſame relates to the laws for the relief, ſettlement, and "maintenance of poor perſons; for paſſing and puniſhing "vagrants; for repair of the highways; or to any other "laws concerning parochial taxes, levies, or rates; not-"withſtanding any ſuch juſtice or juſtices of the peace is or "are rated to or chargeable with the taxes, levies, or rates "within any ſuch pariſh, townſhip, or place affected by "any ſuch act or acts of ſuch juſtice or juſtices as afore-"ſaid."—But this act ſhall not authoriſe any juſtice for any county or riding at large to act in the determination of any appeal to the quarter ſeſſions for any ſuch county or riding from any order, matter or thing, relating to any ſuch pariſh, townſhip, or place, where ſuch juſtice or juſtices is or are ſo charged, taxed, or chargeable as aforeſaid.

† *Sect.* 70. And on this ſtatute it has been determined, that on an appeal to the ſeſſions againſt an order of removal, thoſe juſtices who are rated to the relief of the poor in either of the contending pariſhes have no right to vote. Rex v. Yarpole, 4. Term Rep. 71.

XV. How far juſtices of the peace are impowered to adminiſter oaths.

† *Sect.* 71. By 15. Geo. 3. c. 39. "In all caſes where any "penalty is directed to be levied, or diſtreſs to be made, "by any act of parliament now in force, or hereafter to be "made, it ſhall and may be lawful for any juſtice or juſ-"tices acting under the authority of ſuch acts reſpectively, "and he and they is and are hereby authoriſed and em-"powered to adminiſter an oath or oaths, affirmation or "affirmations, to any perſon or perſons, for the purpoſe "of levying ſuch penalties or making ſuch diſtreſſes reſpec-"tively."

XVI. How far juſtices of the peace may act though not of the *quorum*.

† *Sect.* 72. By 7. Geo. 3. c. 21. it is enacted "That all "acts, orders, adjudications, warrants, indentures of ap-"prenticeſhip,

"prenticeship, or other instruments which shall be made, "done, or executed, by virtue of any act or acts of parliament made or to be made by two or more justices of the "peace qualified to act within such cities, boroughs, towns "corporate, franchises and liberties, as have only one justice of the peace of the *quorum* qualified to act within the "same, though neither of the said justices are of the *quorum*, shall be valid and effectual in law, as if one of the "said justices had been of the *quorum*."

XVII. How far justices of the peace are protected in the discharge of their duty.

† *Sect.* 73. JUSTICES OF THE PEACE are strongly protected by the law in the just execution of their office; and therefore all slanderous words spoken of them in the discharge of their duty, as "you are a rascal, a villain, and a "liar," are actionable (*a*), but they must be spoken of them in the execution of their duty (*b*).

(*a*) Aston *v.* Blagrave, Stra. 617. Ld. Ray. 1396. Pocock, Stra. 1157.

(*b*) R. *v.* Kent *v.* Pocock, Stra. 1168. Rex *v.* Revel, Stra. 420.

† *Sect.* 74. Justices of the peace are not punishable *civilly* for acts done by them in their judicial capacities, but if they abuse the authority with which they are entrusted, they may be punished *criminally* at the suit of the king by way of information. But in cases where they proceed ministerially rather than judicially, if they act corruptly, they are liable to an action at the suit of the party, as well as to an information at the suit of the king. The court of king's-bench, however, will never grant an information against a justice of the peace for a mere error in judgment; (*c*) for even where a justice does an illegal act, yet although the judgment was wrong, if his heart was right (*d*), if he acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the court will never punish him by the extraordinary course of *information* (*e*), but leave the party complaining to the ordinary legal remedy by *action* or by *indictment*: but if they act improperly knowingly, an information shall be granted (*f*).

Cro. Eliz. 130. 1 Leon. 187. Post. ch. 13. s. 20.

(*c*) Rex *v.* Cox, 1. Burr. 785.

(*d*) Rex *v.* Young, 1. Burr. 556.

(*e*) Rex *v.* Palmer and Baine, 2. Burr. 1162.

(*f*) Rex *v.* Jackson, 1. Ter. Rep. 653. Barley *v.* Newman, Trin. 16. Geo. 3.

† *Sect.* 75. It is enacted by 7. Jac. 1. c. 5. made perpetual by 21. Jac. 1. c. 12. "That if any action upon the case, trespass, battery, or false imprisonment, shall "be brought against any JUSTICE OF THE PEACE, mayor, "or bailiff of city or town corporate, headborough, portreve, constable, tythingman, or collector, for or concerning any matter, cause, or thing, by them or any of them "done

Cro. Car. 175. 285. 467. Vaughan 213. Noy 32. 1. Roll 274. Moor 845. 1. Mod. 184. 1. Burr. 602. 2. Burr. 1162.

"done by virtue or reason of their or any of their office or "offices, it shall be lawful for such officers or any of them, "and all others which in their aid or assistance, or by their "commandment, shall do any thing touching or concern-"ing his or their office or offices, to plead the general issue, "not guilty, and give the special matter in evidence to the "jury which shall try the same; and if the verdict shall "pass with the defendant in such action, or the plaintiff "become nonsuit, or suffer a *discontinuance*, in every such "case, the justices or justice, or such other judge before "whom the said matter shall be tried, shall allow to the "defendant his double costs."

† *Sect.* 76. And it is further enacted by 21. Jac. 1. c. 12. (which extends the above act to churchwardens and overseers of the poor) "That the said suit shall be laid within "the county where the trespass or fact shall be done and "committed, and not elsewhere; and that upon the trial, "if the plaintiff shall not prove to the jury that it was so "done and committed, the jury shall find the defendant "*not guilty*, without having any regard or respect to any "evidence given by the plaintiff touching the cause of "action."

4. Inst. 174. 1. Inst. 283. Vaughan 113. 115. 117. Morgan's Vade Mec. 49. Stra. 446.

† *Sect.* 77. By 24. Geo. 2. c. 44. "No writ shall be "sued out against, nor any copy of any process, at the suit "of a subject, be served on, any justice of the peace for any "thing by him done in the execution of his office, until "notice in writing of such intended writ or process shall "have been delivered to him or left at the usual place of his "abode, by the attorney or agent for the party who intends "to sue or cause the same to be sued out or served, at least "one calendar month before the suing out or serving the "same; in which notice shall be clearly and explicitly con-"tained the cause of action which such party hath, or "claimeth to have against such justice of the peace; on the "back of which notice shall be indorsed the name of such "attorney or agent, together with the place of his abode, "who shall be intitled to have the fee of twenty shillings "for the preparing and serving such notice, and no more."

† *Sect.* 78. By 24. Geo. 2. c. 44. s. 2. "It shall and "may be lawful to and for such justice of the peace, at any "time within one calendar month after such notice given "as aforesaid, to tender amends to the party complaining, "or to his or her agent or attorney; and, in case the same "is not accepted, to plead such tender in bar to any action "to be brought against him, grounded on such writ or pro-"cess, together with the plea of not guilty, and any other

N.B. By 30. Geo. 2. c. 24. s. 23. this clause is extended to justices acting under that act.

A

DICTIONARY

OF THE

ENGLISH LANGUAGE:

IN WHICH

The WORDS are deduced from their ORIGINALS,

AND

ILLUSTRATED in their DIFFERENT SIGNIFICATIONS

BY

EXAMPLES from the beſt WRITERS.

TO WHICH ARE PREFIXED,

A HISTORY of the LANGUAGE,

AND

AN ENGLISH GRAMMAR.

BY SAMUEL JOHNSON, A. M.

IN TWO VOLUMES.

VOL. I.

Cum tabulis animum cenſoris ſumet honeſti:
Audebit quæcunque parum ſplendoris habebunt,
Et ſine pondere erunt, et honore indigna ferentur.
Verba movere loco; quamvis invita recedant,
Et verſentur adhuc intra penetralia Veſtæ:
Obſcurata diu populo bonus eruet, atque
Proferet in lucem ſpecioſa vocabula rerum,
Quæ priſcis memorata Catonibus atque Cethegis,
Nunc ſitus informis premit et deſerta vetuſtas. HOR.

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Printed by W. STRAHAN,
For J. and P. KNAPTON; T. and T. LONGMAN; C. HITCH and L. HAWES;
A. MILLAR; and R. and J. DODSLEY.
MDCCLV.

connection there is in each link of the chain, whereby the extremes are held together. *Locke.*

I'LLATIVE. *adj.* [*illatus*, Latin.] Relating to illation or conclusion.

In common discourse or writing such causal particles as *for*, *because*, manifest the act of reasoning as well as the *illative* particles then and therefore. *Watts.*

ILLA'UDABLE. *adj.* [*illaudabilis*, Latin.] Unworthy of praise or commendation.

Strength from truth divided and from just,
Illaudable, nought merits but dispraise. *Milton's Par. Lost.*

ILLA'UDABLY. *adv.* [from *illaudable.*] Unworthily; without deserving praise.

It is natural for all people to form, not *illaudably*, too favourable a judgment of their own country. *Broome.*

ILLE'GAL. *adj.* [*in* and *legalis*, Latin.] Contrary to law.

No patent can oblige the subject against law, unless an *illegal* patent passed in one kingdom can bind another, and not itself. *Swift.*

ILLEGA'LITY. *n. s.* [from *illegal.*] Contrariety to law.

He wished them to consider what votes they had passed, of the *illegality* of all those commissions, and of the unjustifiableness of all the proceedings by virtue of them. *Clarendon.*

ILLE'GALLY. *adv.* [from *illegal.*] In a manner contrary to law.

ILLE'GIBLE. *adj.* [*in* and *legibilis*, from *lego*, Latin.] What cannot be read.

The secretary poured the ink-box all over the writings, and so defaced them that they were made altogether *illegible*. *Howel.*

ILLEGI'TIMACY. *n. s.* [from *illegitimate.*] State of bastardry.

ILLEGI'TIMATE. *adj.* [*in* and *legitimus*, Latin.] Unlawfully begotten; not begotten in wedlock.

Grieve not at your state;
For all the word is *illegitimate*. *Cleaveland.*

Being *illegitimate*, I was deprived of that endearing tenderness and uncommon satisfaction, which a good man finds in the love and conversation of a parent. *Addison's Spectator.*

ILLEGI'TIMATELY. *adv.* [from *illegitimate.*] Not in wedlock.

ILLEGITIMA'TION. *n. s.* [from *illegitimate.*] The state of one