NONPRECEDENTIAL DISPOSITION
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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued November 4, 2025
Decided January 12, 2026

Before

MICHAEL B. BRENNAN, *Chief Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

Nos. 24-3165, 24-3246, & 25-1020

DALE W. ECONOMAN and
ECONOMAN AND ASSOCIATES
FAMILY MEDICINE,
Plaintiffs-Appellees,

v.

JAMES LUTTRULL, et al.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

No. 1:20-cv-00032-GSL

Gretchen S. Lund,
Judge.

ORDER

This appeal concerns the criminal "pill-mill" investigation and prosecution of Dale Economan and his medical practice, Economan and Associates Family Medicine. In 2014, federal and Indiana state law enforcement initiated a joint investigation of Economan and EAFM for overprescribing controlled substances. Following a state prosecution, Economan pleaded guilty to a lesser offense and agreed to relinquish his medical license. Economan and EAFM then went on the offensive, invoked 42 U.S.C. § 1983, and sued Drug Enforcement Administration agents, Indiana state prosecutors, and a law firm involved in the criminal case alleging violations of his Fourth and Fifth Amendment rights.

The district court denied defense motions for summary judgment requesting qualified and absolute immunity, and this appeal followed. This case, which has persisted for nearly six years and come before three district court judges, arrives on appeal as a tangled mess, laden with confused claims and the misapplication of legal doctrines. We have done our best to sort it out and provide guidance to move the litigation forward and to finality.

We conclude that all defendants are entitled to qualified immunity on the Fifth Amendment due process claims against them. DEA Investigator Gary Whisenand is entitled to qualified immunity, and prosecutors James Luttrull and Jessica Krug to absolute immunity, on the Fourth Amendment claims against them. We dismiss Garrison Law Firm's Fourth Amendment appeal for lack of jurisdiction.

I

A. Background

Because this is an appeal from the district court's denials of qualified and absolute immunity, and the district court did not identify what material facts remain in dispute, we review the record afresh and construe it in the light most favorable to Economan and EAFM as plaintiffs. See *Mabes v. Thompson*, 136 F.4th 697, 702, 705 (7th Cir. 2025).

Dale Economan was a family practice physician licensed in Indiana. He also held a DEA license to prescribe controlled substances such as opioids. Economan opened a solo practice, EAFM, in 2012 in Marion, Indiana. By 2014 Economan and EAFM found themselves under investigation. All five defendants in this case, comprised of federal, state, and private actors, collaborated in the investigation and ensuing enforcement efforts:

- **Tonda Cockrell**: Supervisor of Kokomo Police Department Drug Taskforce and federally deputized DEA officer;
- **Gary L. Whisenand**: DEA Diversion Investigator;
- **James Luttrull**: Elected Prosecutor of Grant County, Indiana;
- **Jessica Krug**: Indiana Deputy Attorney General in the Medicaid Fraud Control Unit; and
- **Garrison Law Firm**: Private law firm retained by Grant County to prosecute civil racketeering and forfeiture cases on behalf of Indiana.

Economan landed on law enforcement's radar after a series of complaints. In 2013, the Indiana Attorney General's Medicaid Fraud Control Unit received a complaint about him from a patient's relative. Around the same time, Task Force Officer Tonda Cockrell received a complaint from a local printing company that Economan had ordered an unusually large number of prescription pads for controlled substances. Cockrell also learned that the Grant County Joint Efforts Against Narcotics Team, the so-called JEAN Team, had done multiple undercover buys of controlled substances from Economan's patients.

Task Force Officer Cockrell collaborated with DEA Diversion Investigator Gary Whisenand to investigate further. After conducting preliminary interviews with the printing company and pharmacies that expressed concern about Economan's prescribing practices, they opened a formal DEA investigation in February 2014.

In early 2015, Cockrell and Whisenand began to meet periodically with representatives from the Grant County Prosecutor's Office to discuss the investigation and a possible prosecution. Grant County Prosecutor James Luttrull and Indiana Deputy Attorney General Jessica Krug attended one or more of those meetings.

To further the investigation, Whisenand prepared a probable cause affidavit to support a warrant to search the EAFM office and Economan's home. The Whisenand Affidavit explained that the investigation uncovered evidence that Economan had written a suspicious number of controlled substance prescriptions for his patients with little to no accompanying medical examination and that some patients had, in turn, sold the drugs to others or died of drug overdoses. The warrant application sought judicial approval to search for patient files and other evidence relevant to potential violations of state laws regulating controlled substances. Luttrull and Krug reviewed the draft affidavit and provided edits and other feedback.

A Grant County judge issued a search warrant based on the Whisenand Affidavit. The DEA, Indiana Attorney General's Office, Kokomo Police Department, and JEAN Team then performed the searches on July 29, 2015.

Two other legal proceedings followed. First, Prosecutor Luttrull retained the Garrison Law Firm to assist in the investigation. The same day law enforcement conducted the searches, Garrison filed a civil forfeiture complaint against Economan in an Indiana court alleging corrupt business influence, racketeering, and drug dealing, among other state law criminal offenses. The complaint identified Prosecutor Luttrull as the plaintiff.

Garrison supported the civil forfeiture complaint with two affidavits—the one prepared by DEA Investigator Whisenand to support the search warrant application and a second signed by Task Force Officer Cockrell. The Cockrell Affidavit listed eight bank accounts and one retirement account owned by Economan or EAFM that she attested she had "good cause to believe" contained "significant" proceeds from the criminal activities described in the Whisenand Affidavit. The civil forfeiture complaint requested an immediate order freezing those accounts.

A Grant County judge granted the request pursuant to Indiana Code § 34-24-2-3 after finding probable cause to believe the accounts held funds derived from corrupt business influence under Indiana Code § 35-45-6-2. The judge ordered the banks to freeze Economan and EAFM's assets totaling over $1 million.

Next, Indiana Deputy Attorney General Krug sought and obtained an emergency suspension of Economan's medical license from the Indiana Medical Licensing Board. Krug used the Whisenand Affidavit to support the licensing action.

In September 2016, Indiana filed criminal charges against Economan including seven counts of dealing in narcotics and one count of corrupt business influence. The State later added a marijuana possession charge. Economan pleaded guilty to the marijuana charge and, as part of a plea agreement, surrendered his medical license. Indiana then dismissed the remaining criminal charges as well as the civil forfeiture proceeding.

B. Procedural History

Economan and EAFM then invoked 42 U.S.C. § 1983 and sued DEA Investigator Whisenand and Task Force Officer Cockrell, Prosecutor Luttrull, Indiana DAG Krug, and Garrison Law Firm for allegedly violating and conspiring to violate his rights under federal and state law. We confine our recitation of the procedural background and accompanying facts and analysis to the issues pertinent to this appeal, in particular, Economan's Fourth Amendment and Fifth Amendment due process claims. For the remainder of this Order, we refer to Economan and EAFM together as "Economan."

Economan alleged that the defendants violated his Fourth and Fifth Amendment rights by preparing and submitting affidavits containing materially false information and omissions. Our review of the complaint shows that Economan pleaded his claims with substantial imprecision. Each defendant, of course, played a unique role in the case and law enforcement used the Whisenand Affidavit to support multiple applications—a warrant to search Economan's home and office, a civil forfeiture proceeding, and a licensing action before the Indiana Medical Licensing Board. Yet, to our eye, it has been unclear from the beginning which claims Economan raised against which defendants based on which proceedings. The district court grappled with this confusion at summary judgment as we do now on appeal. At oral argument, Economan stated that he brought

Fourth and Fifth Amendment claims against each defendant based *solely* on the civil forfeiture proceeding. We accept his representation and consider any other Fourth and Fifth Amendment claims waived for all purposes in this litigation.

The defendants each separately moved for summary judgment based on qualified immunity (except Luttrull and Krug who filed jointly). In their roles as prosecutors, Luttrull and Krug also sought summary judgment based on absolute immunity. Garrison initially moved for absolute immunity too but only challenges the denial of qualified immunity on appeal.

The district court denied the defense motions for summary judgment across the board as to the claims at issue here. At the threshold, the court determined that all defendants, including the federal and private defendants, qualified as state actors for purposes of § 1983 based on their collaboration in the state investigation and prosecution. From there the district court turned to the merits and concluded that, because the Whisenand and Cockrell Affidavits contained false information material to the probable cause determination in the civil forfeiture proceeding, the defense motions for summary judgment must be denied. But it then went a step further and affirmatively entered summary judgment for Economan on his Fourth and Fifth Amendment claims even though Economan never moved for summary judgment on those claims.

The district court then denied Luttrull absolute immunity without considering Krug's parallel defense. And as a final measure the court denied all defendants qualified immunity.

On defense motions for reconsideration, the district court, to its credit, recognized that Federal Rule of Civil Procedure 56(f) prohibits entry of summary judgment for a nonmoving party without notice, leading the court to vacate this aspect of its prior order and to send Economan's Fourth and Fifth Amendment claims to trial. In ruling on the reconsideration motions, the district court also determined, without much explanation, that qualified immunity would have to be resolved at trial due to material factual disputes. The court did not address absolute immunity in its reconsideration ruling. Finally, the district court seemed to conclude that its prior ruling that the defendants had acted "under color of state law" for purposes of § 1983 could be challenged or revisited at trial.

As the case came to us on appeal, we struggled to discern what rulings were being challenged by what party. Rarely do we see this level of confusion in an appeal. Having done our best to untangle the knots, we believe the following defendants appealed the district court's denial of immunity on the following claims and bases:

Defendant	Fourth Amendment	Fifth Amendment	Basis
Gary Whisenand	Appealed	Appealed	Qualified immunity
Tonda Cockrell	Not appealed	Appealed	Qualified immunity
James Luttrull	Appealed	Appealed	Absolute immunity; Qualified immunity
Jessica Krug	Appealed	Appealed	Absolute immunity; Qualified immunity
Garrison Law Firm	Appealed	Appealed	Qualified immunity

We recognize that there may be an open question about whether the federal and private defendants still qualify as state actors after the district court retracted its initial findings. But this was not a focus of presentation on appeal, so we assume that all defendants qualify as state actors. See *Clark v. Sweeney*, 607 U.S. —, 2025 WL 3260170, at *1 (2025) (reiterating the party presentation principle).

II

We begin with a procedural question on waiver. Economan insists that the defendants waived all immunity defenses by raising them too late in the district court. We review the legal question of whether conduct amounts to waiver *de novo*. See *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 599 (7th Cir. 2007). But we review a district court's decision to allow the late assertion of an affirmative defense only for abuse of discretion. See *Burton v. Ghosh*, 961 F.3d 960, 964 (7th Cir. 2020).

Immunity is an affirmative defense. See *Leiser v. Kloth*, 933 F.3d 696, 701 (7th Cir. 2019) (qualified immunity); *Tully v. Barada*, 599 F.3d 591, 594 (7th Cir. 2010) (absolute immunity). As such, a defendant's failure to plead immunity "may result in a waiver of the defense if the defendant has relinquished it knowingly and intelligently, or forfeiture if the defendant merely failed to preserve the defense by pleading it." *Whyte v. Winkleski*, 34 F.4th 617, 626 (7th Cir. 2022) (quoting *Reed v. Columbia St. Mary's Hosp.*, 915 F.3d 473, 478 (7th Cir. 2019)).

Merely pleading a defense, however, is not enough to preserve it for appeal at summary judgment. A defendant must also raise and develop it at that stage. See *Henry v. Hulett*, 969 F.3d 769, 785 (7th Cir. 2020) (en banc). But a district court may entertain a late affirmative defense if delay has not prejudiced the plaintiff as the non-moving party. See *Burton*, 961 F.3d at 965–66.

For reasons that confound us, the defendants here invoked immunity at different points before the district court and not always in a timely fashion. DEA Investigator Whisenand and Task Force Officer Cockrell pleaded qualified immunity as an affirmative defense but only raised it at summary judgment in reply. Prosecutor Luttrull and Indiana DAG Krug pleaded absolute and qualified immunity as defenses and fully briefed them at summary judgment. Garrison Law Firm did not plead qualified immunity but briefed it at summary judgment.

The district court nevertheless chose to address immunity on the merits for each defendant, opting not to penalize the untimeliness of any defense. We see no abuse of discretion because Economan does not claim, much less show, that he suffered any prejudice.

On the contrary, Economan could and should have anticipated immunity defenses at summary judgment because all defendants, except Garrison Law Firm, pleaded immunity as an affirmative defense in their answers to the complaint. Most defendants then fully briefed immunity at summary judgment. Although Whisenand and Cockrell only raised it in reply, their positions strongly overlapped with those advanced by other defendants, which Economan fully responded to. Further, most defendants (all except Task Force Officer Cockrell and, for absolute immunity, Prosecutor Luttrull) raised immunity in their motions to reconsider. Yet Economan failed to address the merits of those arguments.

On this record, we cannot see how Economan was unfairly surprised by or denied a fair opportunity to respond to any immunity defense. We conclude that each defendant preserved their immunity defense(s) for appeal.

III

We turn next to our own jurisdiction. A denial of immunity is only considered a final decision subject to interlocutory review if it turns on issues of law. See *Smith v. Finkley*, 10 F.4th 725, 734–35 (7th Cir. 2021) (addressing qualified immunity); *Whitlock v. Brueggemann*, 682 F.3d 567, 573 (7th Cir. 2012) (addressing absolute and qualified immunity). "If, however, the denial turns on disputed facts, then we lack jurisdiction to hear the interlocutory appeal." *Davis v. Allen*, 112 F.4th 487, 492 (7th Cir. 2024) (citing *Johnson v. Jones*, 515 U.S. 304, 313 (1995)).

To determine whether an immunity defense turns on legal issues, "we 'closely examine' whether: (1) the district court 'identifie[d] factual disputes as the reason for denying … immunity;' and (2) [the defendant] 'make[s] a back-door effort to use disputed facts' to support his arguments. When we answer yes to both questions … we lack jurisdiction over the appeal." *Stewardson v. Biggs*, 43 F.4th 732, 736 (7th Cir. 2022) (quoting *Finkley*, 10 F.4th at 736).

Having done so, we conclude that we have jurisdiction over all appeals except Garrison's appeal on Economan's Fourth Amendment claim. We explain our reasoning in the ensuing sections of this Order.

IV

Qualified immunity protects a government official from liability for civil damages unless the plaintiff shows that "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). The defense allows room for reasonable but mistaken judgments and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* at 63 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "We review denials of qualified immunity without deference to the district court and cabin our review to legal questions." *Mabes*, 136 F.4th at 705.

We have repeatedly emphasized that "[b]ecause qualified immunity is an affirmative defense" available on an individual basis, "a court must structure its analysis defendant-by-defendant and claim-by-claim." *Id.* at 706. This requires a district court to focus on the facts relevant to a particular defendant's actions under the elements of the claim in question.

The district court's analysis fell short on this front. The court did not approach the qualified immunity inquiries defendant-by-defendant and claim-by-claim but instead grouped defendants and claims together. As best as we can tell, the error occurred this way: once the district court found that the Whisenand and Cockrell Affidavits contained false statements material to the civil forfeiture, the court concluded in summary fashion that all defendants shouldered responsibility for the misstatements and therefore no form of immunity was available to any defendant. The court stopped at this categorical and general level without taking the necessary steps of scrutinizing each defendant's individual actions and clearly established precedent addressing their respective roles.

In a situation like this, we could return the case to the district court for a renewed analysis of each defendant's request for immunity. But we have opted against that approach for two reasons. First, this case has been pending for many years (and assigned to three different district court judges). Second, after undertaking our own examination of the record, we are able to reach clear and confident conclusions about the immunity defenses.

As to the Fifth Amendment claims, all defendants are entitled to qualified immunity. And as to the Fourth Amendment claims, DEA Investigator Whisenand is entitled to qualified immunity while Garrison Law Firm is not, at least at this stage of the proceedings.

A. Fifth Amendment Claims (All Defendants)

Economan brought a Fifth Amendment due process claim against each defendant. We start with this claim because it suffers from a common legal flaw applicable to each defendant.

The Fifth Amendment's Due Process Clause is a misfit for a § 1983 action because it has not been incorporated against the States. See, *e.g.*, *Koessel v. Sublette County Sheriff's Dep't*, 717 F.3d 736, 748 n.2 (10th Cir. 2013) (observing that the Fifth Amendment's Due Process Clause only applies to the federal government's actions); *Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9th Cir. 2008) (same); *Martinez-Rivera v. Sanchez Ramos*, 498 F.3d 3, 8–9 (1st Cir. 2007) (same); *Scott v. Clay County*, 205 F.3d 867, 873 n.8 (6th Cir. 2000) (same); *Nguyen v. U.S. Catholic Conf.*, 719 F.2d 52, 54 (3d Cir. 1983) (same). Perhaps Economan meant to invoke the Fourteenth Amendment's Due Process Clause. But it is far too late in the litigation to amend the complaint.

We therefore dispose of the Fifth Amendment claims on the first prong of qualified immunity by observing that officials acting under color of state law cannot violate a plaintiff's Fifth Amendment due process rights because that clause does not constrain state action. See *Sabo v. Erickson*, 128 F.4th 836, 845 (7th Cir. 2025) (en banc) ("[Section 1983] … does not confer substantive rights. Instead, [it] provides a means of enforcing federal rights conferred elsewhere." (citing *Albright v. Oliver*, 510 U.S. 266, 271 (1994)).

Accordingly, all defendants are entitled to qualified immunity on all Fifth Amendment claims.

B. Fourth Amendment Claim (Defendant Whisenand)

Economan alleged that DEA Investigator Whisenand caused an unlawful seizure of his property by preparing an inaccurate and materially misleading probable cause affidavit for the civil forfeiture proceeding. To defeat qualified immunity, Economan must show that Whisenand violated a constitutional right and that the right was clearly established at the time. Economan fails at the first step.

An officer violates the Fourth Amendment by intentionally or recklessly submitting a probable cause affidavit that includes false statements or omissions material to a probable cause determination. See *Franks v. Delaware*, 438 U.S. 154, 164–65 (1978); *Rainsberger v. Benner*, 913 F.3d 640, 647 (7th Cir. 2019). This principle applies with full force in the civil forfeiture context. See *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 49 (1993) (holding that the Fourth Amendment places "restrictions on seizures conducted for purposes of civil forfeiture").

We evaluate materiality by "eliminat[ing] the alleged false statements, incorporat[ing] any allegedly omitted facts, and then evaluat[ing] whether the resulting 'hypothetical' affidavit would establish probable cause." *Rainsberger*, 913 F.3d at 647 (quoting *Betker v. Gomez*, 692 F.3d 854, 862 (7th Cir. 2012)). Probable cause exists when the remaining facts viewed from the standpoint of an objectively reasonable officer show a "probability or substantial chance of criminal activity." *Wesby*, 583 U.S. at 57 (quoting *Illinois v. Gates*, 462 U.S. 213, 243–44 & n.13 (1983)).

Before assessing the materiality of the alleged misstatements within the Whisenand Affidavit, we must be clear about its purpose in the civil forfeiture proceeding. Whisenand originally drafted the affidavit for a search warrant application. But he later signed a copy of the same affidavit knowing it would be used in the civil forfeiture proceeding. In these circumstances, we assess whether any false statements in or omissions from the affidavit were material to the state court's probable cause determination for its order directing the freezing of Economan's assets because that is the legal proceeding about which Economan complains. See *Manuel v. City of Joliet*, 580 U.S. 357, 369 n.8 (2017) (explaining in the context of pretrial detention that if fabricated evidence is material to a probable cause determination, the legal proceeding is tainted and an ensuing deprivation of liberty violates the Fourth Amendment).

Under Indiana law, the prosecuting attorney for a county may bring a civil forfeiture action for property derived from corrupt business influence. See Ind. Code § 34-24-2-2 (2015). Upon a showing of probable cause of "corrupt business influence," Ind. Code § 35-45-6-2, a judge may issue an order to seize property that is the subject of the forfeiture action. See Ind. Code § 34-24-2-3. The Whisenand Affidavit and civil forfeiture complaint both attested to facts supporting a finding (at least under a probable cause standard) of corrupt business influence connected to Economan and EAFM. Indeed, a Grant County judge issued an order freezing Economan's assets on that very basis.

Seizure of civil assets linked to corrupt business influence requires both probable cause of criminal activity and a nexus between that activity and the property sought to be seized. See Ind. Code § 34-24-2-3 (requiring a showing of probable cause to believe that a violation of § 35-45-6-2 has occurred in the case of property described in § 34-24-2-2(a) to seize the property); see also *Abbott v. State*, 183 N.E.3d 1074, 1080 (Ind. 2022) (recognizing that civil forfeiture under a section using analogous language, Ind. Code § 34-24-2-2, requires a nexus between the property sought in forfeiture and an enumerated offense) (citing *Katner v. State*, 655 N.E.2d 345, 349 (Ind. 1995)).

The Whisenand and Cockrell Affidavits, attached as they were to the civil forfeiture complaint, supplied two clear halves of the inquiry. The Whisenand Affidavit addressed the criminal element, while the Cockrell Affidavit addressed the property to be targeted and its nexus with criminal activity. So the question at the first step of qualified immunity is whether false statements in or omissions from the Whisenand Affidavit were material to a finding of probable cause to believe that Economan committed the crime of corrupt business influence.

Under Indiana law, a person engages in corrupt business influence when they (1) knowingly or intentionally "receive[] any proceeds" from a "pattern of racketeering activity" and use those proceeds to "acquire an interest in property" or to "establish or to operate an enterprise"; (2) "acquire[] or maintain[]" an interest in or control of property or an enterprise through a "pattern of racketeering activity;" or (3) are associated with an enterprise and knowingly or intentionally participate in a "pattern of racketeering activity" through that enterprise. Ind. Code § 35-45-6-2(1)–(3). A "[p]attern of racketeering activity" means engaging in at least two similar incidents of racketeering within five years of each other. *Id.* at § 35-45-6-1(d). Racketeering, in turn, may include "[d]ealing in a controlled substance." *Id.* at § 35-45-6-1(e)(30)–(31). A person deals in a controlled substance by "(1) knowingly or intentionally … (C) deliver[ing]; or (D) financ[ing] the delivery of; a controlled substance … classified in schedule [I, II, III, or IV]." *Id.* at §§ 35-48-4-2, -3.

Licensed medical practitioners like Economan may prescribe controlled substances within professional limits: "Those who prescribe controlled substances outside the scope of their practice or without a legitimate [medical] purpose are subject to sanction under Indiana criminal law." *Dollard v. Whisenand*, 946 F.3d 342, 348 (7th Cir. 2019) (citing 856 Ind. Admin. Code 2-6-3(a)). For example, a physician "must have a legitimate medical purpose to issue a reasonable quantity in the usual course of business." *Id.* And a physician usually cannot prescribe controlled substances without first examining and diagnosing a patient. *Id.* (citing 844 Ind. Admin. Code 5-4-1(a)).

The district court determined that the Whisenand Affidavit contained false statements informing whether probable cause existed to believe Economan committed corrupt business influence. But the court's analysis fell short at multiple points.

Conducting this analysis ourselves and viewing the record in Economan's favor, we conclude that the Whisenand Affidavit supplied probable cause to believe that he committed the crime of corrupt business influence through EAFM, specifically by repeatedly prescribing (and sometimes overprescribing) controlled substances without a legitimate medical purpose. Any false statements or omissions Whisenand made in his affidavit do not undermine that determination and therefore were immaterial.

First, we must strip the Whisenand Affidavit of its false statements and insert omitted information. At a high level, the affidavit included (1) data from Indiana's state prescription drug monitoring program INSPECT, which tracks controlled substance prescriptions, from 2011 to 2014, (2) information about controlled drug buys from Economan's patients, and (3) interview summaries with the local printing company, pharmacists, former employees and colleagues, area practitioners, former patients, and family members of former patients communicating concerns about Economan's prescribing practices.

For his part, Economan emphasizes one false statement in the affidavit. Whisenand attested that INSPECT data showed that Economan wrote a suspiciously high number of prescriptions on certain days in 2014. As it turns out, Whisenand knew that INSPECT data shows when a pharmacy fills a prescription, not the day a physician writes the prescription. So the volume of prescriptions Economan wrote per day may be lower than the affidavit represented. We consider this fact but observe that it does not alter the overall number of prescriptions Economan wrote during the period investigated.

Economan also stresses facts that Whisenand excluded from the affidavit. First, he omitted information bearing on the credibility of former patients and EAFM employees interviewed by law enforcement to prepare the affidavit. But even assuming these individuals offered unreliable accounts, the Whisenand Affidavit contains ample information from other sources whose reliability Economan does not challenge.

Second, Economan points to evidence indicating that former EAFM employees themselves may have been prescribing illegal prescriptions in the course of their employment. Fair enough, but we consider the impact of this omission as minimal on a proper probable cause analysis. The asset freeze order rooted itself in a probable cause determination that Economan and EAFM's accounts contained proceeds obtained through corrupt business influence. It did not require Economan to have been the only person at EAFM involved in that criminal activity.

Finally, the Whisenand Affidavit stated that investigators learned in mid-February 2014 that local Meijer pharmacies were no longer filling EAFM prescriptions. Yet INSPECT data shows that Meijer only stopped filling EAFM prescriptions in February

2014 after Whisenand and Cockrell questioned pharmacies about the clinic. By Economan's account, then, the true facts imply that Meijer stopped filling prescriptions because of the investigation, not because it was independently suspicious of EAFM. Here too the observation is fair, but the record shows that Meijer was not the only pharmacy that Whisenand identified as having looked askance at EAFM's prescribing patterns and practices.

We also consider particular uncontested evidence that the district court did not account for. The district court declined to factor the INSPECT data into its probable cause analysis because it would be inadmissible at trial. But, as the Supreme Court has emphasized, the admissibility of evidence under the Federal Rules plays no role in resolving whether an officer reasonably believed he had probable cause to suspect criminal activity. See *Brinegar v. United States*, 338 U.S. 160, 174 (1949) (observing that it is inappropriate to apply the rules of evidence to probable cause determinations for an arrest or a search and seizure). We too have underscored the same point in analogous circumstances. See, *e.g.*, *Johnson v. Myers*, 53 F.4th 1063, 1067 (7th Cir. 2022) ("[T]he Federal Rules of Evidence do not apply to applications for warrants." (citing Fed. R. Evid. 1101(d)(3))).

The district court also declined to consider interview summaries with Economan's former colleagues, area practitioners, and patients' family members, reasoning that they "are nothing more than allegations." But a probable cause determination can be made based on informant observations so long as those informants are sufficiently reliable. See *United States v. Hollingsworth*, 495 F.3d 795, 805 (7th Cir. 2007). Economan contested the credibility of former patients and employees. Yet he did not claim that any other sources were unreliable, at least not based on information known to Whisenand. The district court should have considered those sources in its analysis.

Even confining our own analysis to uncontested information and including omitted facts, the Whisenand Affidavit supported a probable cause finding in spades. Ample facts suggested that EAFM practitioners, including Economan, wrote an unusually high volume of controlled substance prescriptions during the period under investigation. INSPECT data showed that Economan jumped to the third highest prescriber of controlled substances in Indiana in 2014, ahead of some hospitals. And a printing company became alarmed when Economan ordered substantially more controlled substance prescription pads than other medical providers in the area for his and another nurse's use. Pharmacists likewise reported concerns about the large number of controlled substance prescriptions from EAFM and at least one pharmacy (Walgreens) refused to fill multiple EAFM prescriptions. In short, this information more than supplied probable cause to believe that EAFM practitioners, including Economan, were writing illicit prescriptions.

Other evidence described in the Whisenand Affidavit reinforces this conclusion. The JEAN team arranged undercover buys of controlled substances from people who received prescriptions for those or other controlled substances from Economan during the relevant timeframe. A former colleague who worked with Economan prior to EAFM reported concerns about his prescribing practices based on the young age of patients receiving controlled substances, high dosage amounts, and dangerous combination of the controlled substances he prescribed.

In line with that former colleague's concern, investigators linked six patient deaths between 2011 and 2015 to use of Schedule II and IV controlled substances prescribed by Economan. Family members of deceased patients informed law enforcement of Economan's excessive prescribing practices and failure to conduct accompanying physical examinations. One even mentioned that Economan became known as the "Candyman." Another stated that he never examined her daughter during appointments yet still prescribed a controlled substance.

The Whisenand Affidavit contained still more. One practitioner in the area learned from patients that Economan had loose prescribing practices resulting in addiction. See App. 167 ("[T]hey could just walk in to Economan's practice and 'get what they wanted' as long as they had money."). The Marion General Hospital Emergency Department Director stated that if Economan's name appeared on a patient's chart at the hospital, doctors expected that the patient would have a drug problem.

Considered collectively, this information more than established probable cause to believe that Economan engaged in the crime of corrupt business influence by knowingly and repeatedly writing unwarranted prescriptions for controlled substances. See *Dollard*, 946 F.3d at 354–55 (considering a combination of INSPECT data showing unusually high prescriptions, information from patients and the family of a deceased patient about a doctor's prescribing practices, undercover surveillance and recordings corroborating those observations, concerns voiced by other doctors, and medical expert opinions to support probable cause for dealing in a controlled substance); see *id.* at 357 (holding that the intent element of dealing in a controlled substance can be inferred from the expectation that a doctor understands the limits of their prescribing authority). Indeed, we do not see this question as close.

Nothing that Whisenand later stated in his federal court deposition testimony undermines our conclusion. The district court seemed of the view that Whisenand "admitted" that his affidavit did not establish probable cause. That perspective was mistaken. Whisenand did not admit to including any material false information in the affidavit during his deposition testimony. Instead, he affirmed that his affidavit was truthful and insisted that there was probable cause to conclude that Economan was dealing in controlled substances and engaged in a pattern of racketeering.

The district court homed in on particular testimony from Whisenand's 2022 deposition in which he discussed Brett Blum, another EAFM employee named in the civil forfeiture proceeding (but who is not part of this case). Whisenand agreed in response to a question that he had "no information or evidence to support that … Economan, EAFM, and … Blum had participated in … a corrupt enterprise through a pattern of racketeering activity" the day law enforcement executed the search warrant. This statement lacks context because, so far as we can tell from the deposition excerpts in the record, it came on the heels of a discussion about evidence of Blum's role in the alleged criminal activity. It is also legally irrelevant. Probable cause is an objective standard, with the legal determination made by a judge. Whisenand's role was to supply facts, and his own assessment of probable cause was irrelevant. See *Pryor v. Corrigan*, 124 F.4th 475, 486–87 (7th Cir. 2024). Regardless, Whisenand's alleged admission does not relate to the factual content—or overarching weight of the factual content—in his affidavit.

In the end, we conclude that the Whisenand Affidavit established probable cause to believe that Economan was engaged in a pattern of racketeering by repeatedly prescribing controlled substances at EAFM without a legitimate medical purpose. See Ind. Code § 35-45-6-2. This qualifies as engagement in corrupt business influence at least under § 35-45-6-2(3) (knowingly or intentionally participating in EAFM's activities through a pattern of racketeering) if not § 35-45-6-2(1) (knowingly or intentionally operating EAFM using proceeds derived from a pattern of racketeering).

Another conclusion warrants emphasis. Whisenand cannot be held responsible for failing to include information in his affidavit about the bank and retirement accounts frozen in the investigation. The Cockrell Affidavit addressed this half of the probable cause inquiry and we see no evidence that Whisenand was aware of the content of the Cockrell Affidavit or involved in the investigation of those accounts.

All of this leads us to hold that DEA Investigator Gary Whisenand is entitled to qualified immunity. This conclusion applies only to Whisenand as Task Force Officer Cockrell did not appeal the district court's denial of qualified immunity on the Fourth Amendment claim against her.

C. Fourth Amendment Claim (Defendant Garrison Law Firm)

That brings us to Garrison Law Firm's qualified immunity defense. Recall that Garrison drafted the Cockrell Affidavit and civil forfeiture complaint. Economan alleged that it did so knowing the Cockrell Affidavit contained false information in violation of the Fourth Amendment.

Garrison contends that preparing an affidavit for a civil forfeiture without knowing it contained false information does not violate a clearly established right. Key to Garrison's argument is the assumption that it was ignorant of any false information in the Cockrell Affidavit. But this fact is heavily disputed, leading us to conclude we lack jurisdiction over Garrison's appeal challenging the district court's denial of qualified immunity on Economan's Fourth Amendment claim.

No doubt the district court should have brought more precision to its analysis of the facts demonstrating Garrison's knowledge about specific information in the Cockrell Affidavit. But viewing the record in Economan's favor, a jury could reasonably conclude that Garrison knew or should have known the affidavit contained material misstatements.

The Cockrell Affidavit identified and listed particular bank and retirement accounts held by Economan and EAFM and represented that there was good cause to believe that they held significant funds generated from a criminal enterprise. Yet during Cockrell's depositions in 2018 and 2022, she explained that law enforcement pulled financial information about the accounts from trash outside Economan's home. The recovered documents helped law enforcement identify the bank and retirement accounts but did not reveal what most accounts contained or the source of funds in them. Cockrell acknowledged in her deposition testimony that she had no other evidence showing what was in the accounts or reason to believe they held criminally obtained funds other than that she thought that Economan's sole income came from illegally prescribing controlled substances.

It is undisputed that Garrison used information from law enforcement to prepare the affidavit, presumably the documents from the trash pull. And if Garrison prepared this document with information so incomplete and inconclusive, it is reasonable to infer that Garrison knew it was both an overread and speculative to represent in Cockrell's sworn affidavit that the accounts held funds generated from a criminal enterprise. Yet that statement was key to the probable cause determination needed to freeze the accounts. Garrison's qualified immunity argument depends upon it lacking such knowledge. As the parties dispute this essential fact, we cannot review Garrison's appeal challenging the district court's denial of qualified immunity. See *Johnson*, 515 U.S. at 313; see also *Mabes*, 136 F.4th at 704–05.

V

Finally, we come to Grant County Prosecutor Luttrell and Indiana DAG Krug. Economan's Fourth Amendment claims against Luttrell and Krug are based on their involvement in drafting the Whisenand Affidavit. We could grant Luttrull and Krug qualified immunity on the same basis as Whisenand. But their absolute immunity defenses are solid and bear emphasis.

Luttrell and Krug raised absolute immunity at summary judgment. But the district court only addressed the merits of Luttrell's defense, finding that "the only prosecutor was Defendant Luttrull." It then denied Luttrull absolute immunity by finding his involvement in the affidavit "investigative." The analysis was mistaken on both points.

Prosecutors enjoy absolute immunity "for 'acts undertaken … in the course of [their] role as an advocate for the State.'" *Whitlock*, 682 F.3d at 576 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)). The necessary inquiry is functional, meaning that it is based on the nature of a prosecutor's actions, not their nominal role. See *id.* at 578. Prosecutorial acts include "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial," as distinguished from acts taken in an investigative or administrative capacity. *Buckley*, 509 U.S. at 273.

Luttrull is not the only defendant eligible for absolute immunity. So is Krug. Although she was formally sworn in as a prosecutor in Grant County after Whisenand drafted his affidavit, Krug functionally served as a prosecutor during the state court search warrant application process through her role as a state lawyer involved in a criminal proceeding. So we must consider her immunity defense as well.

Turning to the merits, it is well-established that a prosecutor acts as an advocate by evaluating evidence assembled by law enforcement and preparing it for presentation at trial or before a grand jury. See *Buckley*, 509 U.S. at 273. We recently built on *Buckley* in holding that a prosecutor also acts as an advocate when they help prepare and review an affidavit for a search warrant application. See *Greenpoint Tactical Income Fund LLC v. Pettigrew*, 38 F.4th 555, 565–67 (7th Cir. 2022).

We see no material distinction between this case and *Greenpoint*. The evidence viewed in Economan's favor shows that Luttrull and Krug did nothing more than evaluate the Whisenand Affidavit based on the evidence presented by law enforcement and provide unspecified edits. Nothing suggests that they inserted false facts into the affidavit or directed material omissions.

To be sure, the investigation was still ongoing when Luttrull and Krug reviewed the Whisenand Affidavit. Remember, the original purpose of the affidavit was to support a search warrant. But DEA investigators and agents are not trained as lawyers. And even at the search warrant phase, it is advisable and routine for prosecutors to review affidavits to ensure that legal representations made to a court are accurate. "If that were sufficient to establish that a prosecutor was acting in an investigative capacity, then absolute immunity would disappear for seeking search warrants." *Greenpoint*, 38 F.4th at 566.

The district court also seemed to conclude that Luttrull and Krug somehow conspired with the other defendants to violate Economan's constitutional rights because they (excluding Garrison Law Firm) periodically met to discuss the case and collaborated on the Whisenand Affidavit. We do not see any evidence of a conspiracy. Based on our review, all indications are that Luttrull and Krug acted fully within their prosecutorial capacities in reviewing the affidavit based on evidence already gathered.

It is not clear whether Economan's claim against Luttrull is also premised on the latter's role as a plaintiff in the civil forfeiture complaint. If it is, it also fails because we see no evidence that Luttrull was aware of any false information presented in either the Whisenand or Cockrell Affidavits.

Grant County Prosecutor James Luttrull and Indiana Deputy Attorney General Jessica Krug are entitled to absolute immunity on any and all claims against them. This is not to be revisited on remand.

* * *

Do not mistake today's Order as criticizing any party or the district court. This sprawling § 1983 action has been plagued by disorganization from the outset. Perhaps above all else, our Order illustrates the importance of conducting individualized and fact-focused immunity analyses when a case involves multiple claims and defendants. Grouped analysis only complicates the challenge accompanying multi-party litigation. Having done our best to clarify the complexities, this is where things now stand: all defendants are entitled to qualified immunity on the Fifth Amendment claims. Whisenand is entitled to qualified immunity, and Luttrull and Krug to absolute immunity, on the Fourth Amendment claims. We cannot review Garrison Law Firm's appeal on the Fourth Amendment claim due to material factual disputes.

We DISMISS Garrison Law Firm's appeal on the Fourth Amendment claim for lack of jurisdiction, REVERSE the district court's judgment as to all other appeals, and REMAND for entry of judgment for defendants Gary Whisenand, Tonda Cockrell, James Luttrull, and Jessica Krug in line with this Order.