No. _____

In The
Supreme Court of the United States

JULIET ANILAO, MARK DELA CRUZ,
CLAUDINE GAMAIO, ELMER JACINTO,
JENNIFER LAMPA, RIZZA MAULION,
THERESA RAMOS, HARRIET RAYMUNDO,
RANIER SICHON, JAMES MILLENA,
and FELIX Q. VINLUAN,

Petitioners,

v.

THOMAS J. SPOTA, III, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case presents a paradigmatic example of what the 1871 Reconstruction Congress wanted to remedy when it enacted what became 42 U.S.C. § 1983 as part of the Ku Klux Klan Act of 1871: State officials both violating the Thirteenth Amendment and punishing the victims' lawyer for seeking the federal government's protection for his clients.

Petitioners are ten nurses who quit an abusive job and their lawyer who advised them and filed a federal discrimination claim on their behalf. Respondents are prosecutors who charged petitioners with felonies at the behest of the powerful company that employed the nurses. Respondents knew that New York's nurse-licensing agency, the police, and a civil court had already found that petitioners did nothing wrong. A New York appellate court threw out the charges because they violated the First and Thirteenth Amendments, so the prosecutors lacked authority to bring them. But when petitioners sued under Section 1983, the Second Circuit granted respondents absolute immunity. It held that because respondents filed the unconstitutional charges under a statute they were entitled to enforce, they could not be sued.

The questions presented are:

1. Whether a plaintiff can defeat a prosecutor's absolute immunity from suit under 42 U.S.C. § 1983 by demonstrating that the prosecutor lacked any colorable authority to bring charges under the statute he invoked.

2. Whether the Court should reconsider the doctrine of absolute prosecutorial immunity.

PARTIES TO THE PROCEEDINGS

Juliet Anilao, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, Theresa Ramos, Ranier Sichon, and James Millena, petitioners on review, were plaintiffs-counter-defendants-appellants below.

Harriet Raymundo, petitioner on review, was a plaintiff-counter-defendant-appellant below under her former name, Harriet Avila.

Felix Q. Vinluan, petitioner on review, was a plaintiff-appellant below.

Thomas J. Spota, III, individually and as district attorney of Suffolk County, New York; the Office of the District Attorney of Suffolk County, New York; Leonard Lato, individually and as an assistant district attorney of Suffolk County, New York; the County of Suffolk, New York; and Karla Lato, as administrator of the estate of Leonard Lato, respondents on review, were defendants-appellees below.

Susan O'Connor; Nancy Fitzgerald; Sentosa Care, LLC; Avalon Gardens Rehabilitation and Health Care Center; Prompt Nursing Employment Agency, LLC; Francris Luyun; Bent Philipson; and Berish Rubenstein were defendants-counter-claimants in the district court, but they were not parties to the appeal.

RELATED PROCEEDINGS

U.S. District Court for the Eastern District of New York:

Anilao v. *Spota*, No. 10-cv-00032 (Mar. 31, 2011, and Nov. 28, 2018)

U.S. Court of Appeals for the Second Circuit:

Anilao v. *Spota*, No. 19-3949 (Mar. 9, 2022)

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INTRODUCTION

Respondents are two prosecutors who charged attorney Felix Vinluan for offering good-faith legal advice and filing a federal discrimination claim for his clients. The prosecutors also charged those clients: ten nurses who quit their abusive, at-will jobs with a politically powerful nursing-home operator that had deceived them when recruiting them from the Philippines. A New York appellate court found that the prosecutions violated the First Amendment's protection for giving legal advice and the Thirteenth Amendment's prohibition against involuntary servitude, and that petitioners were therefore being "prosecut[ed] for crimes for which they cannot constitutionally be tried." App. 267a.

When petitioners then sought redress under 42 U.S.C. § 1983, the courts below held that respondents were absolutely immune for bringing the very same unconstitutional charges the New York court had already determined were "without or in excess of" the prosecutors' authority. App. 255a (quoting N.Y. C.P.L.R. § 7803(2)); *see id.* at 36a. Over a vigorous dissent, the court of appeals held that a prosecutor acts within the scope of his authority—and thus absolute immunity attaches—so long as the prosecutor invokes some criminal statute when bringing charges, irrespective of the legal or factual basis to do so.

But this Court has always been clear that prosecutorial immunity is not so boundless. And this is the paradigmatic example of what the 1871 Reconstruction Congress would have wanted to remedy when it enacted Section 1983 in the Ku Klux Klan Act of 1871: state officials both

violating the Thirteenth Amendment and punishing the victims' lawyer for seeking the federal government's protection for his clients. This case raises two questions that, if properly decided, would right the grievous wrongs petitioners suffered.

First, the Second Circuit's decision contradicts this Court's and the common law's rule that immunity is not available for actions "manifestly or palpably beyond [the defendant official's] authority." *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896). The justification for official immunities (including prosecutorial immunity) is to serve the "public interest" by allowing officials to act "vigorous[ly] and fearless[ly]" within their official roles. *Imbler* v. *Pachtman*, 424 U.S. 409, 427-428 (1976). But an essential condition is that the official is in fact acting within the scope of responsibility delegated to him by the public. More than two centuries of this Court's official-immunity decisions have made clear that no official is "excused from liability if he failed to observe obvious statutory or constitutional limitations on his power." *Butz* v. *Economou*, 438 U.S. 478, 494 (1978). The Second Circuit's weak statute-citing test for invoking absolute immunity is irreconcilable with the common law and this Court's precedents.

Second, the Court should take the opportunity to reconsider the doctrine of prosecutorial immunity wholesale. Section 1983's text does not include prosecutorial immunity. And this Court has long acknowledged that there was no common-law basis for absolute prosecutorial immunity in 1871. Decades of experience have undermined the policy justifications this Court has given for adopting prosecutorial absolute immunity, as has the evolution of qualified

immunity to eliminate the main reason the Court gave in *Imbler* for providing prosecutors with a heightened absolute immunity. Although the Second Circuit erred in granting absolute immunity here, that it was even plausible the immunity should apply in this case demonstrates how unmoored the doctrine has become from Section 1983's promise.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-60a) is reported at 27 F.4th 855. The district court's order granting respondents' motion to dismiss (App. 137a-244a) is reported at 774 F. Supp. 2d 457, and its order granting respondents' motion for summary judgment (App. 61a-136a) is reported at 340 F. Supp. 3d 224.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 2022. The court of appeals denied petitioners' motion for rehearing on July 14, 2022. On September 15, 2022, Justice Sotomayor extended the time to file a petition for a writ of certiorari to and including December 12, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides, in relevant part:

> Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people * * * to petition the Government for a redress of grievances.

The Thirteenth Amendment to the U.S. Constitution, Section 1, provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

STATEMENT

A. Factual Background.

1. Sentosa is a large, politically connected New York nursing-home operator. App. 5a, 150a. It relies on recruiting foreign nurses, mostly from the Philippines. *See id.* at 56a. Petitioners include ten such Filipino nurses.

When they arrived in New York, they quickly realized they had been misled. For example, rather than the facility named in their contracts, Sentosa placed the nurses with an employment agency—a much "less stable form of employment." *Id.* at 250a.[1] The nurses also faced overcrowded and substandard housing, they received lower pay and benefits than promised, and they were forced to endure markedly worse working conditions. *Id.* at 147a-148a. And if the nurses wanted to quit before completing three years on the job, Sentosa would try to enforce a $25,000 penalty. *Id.* at 5a, 147a. It turns out Sentosa was no stranger to such bait-and-switch tactics. *Paguirigan* v. *Prompt Nursing Emp. Agency LLC*, 2019 WL 4647648, No. 17-cv-1302, at *18-20 (E.D.N.Y. Sept. 24, 2019) (finding same conduct violated the Trafficking Victims Protection Act, 18 U.S.C. §§ 1589 *et seq.*); *see* App. 30a, 57a-58a.

After their efforts to redress the situation with their employer failed, the nurses sought assistance from the

[1] Sentosa sent the nurses to Avalon Gardens—one of the worst-of-the-worst facilities it ran in New York and a principal subject of a troubling exposé of its nursing homes. *See* Allegra Abramo & Jennifer Lehman, *How N.Y.'s Biggest For-Profit Nursing Home Group Flourishes Despite a Record of Patient Harm*, ProPublica (Oct. 27, 2015, 8:00 AM), https://tinyurl.com/ProPublica-AvalonGardens.

Philippine consulate and were referred to attorney (and now-fellow-petitioner) Felix Vinluan. App. 5a, 36a-37a. Vinluan advised the nurses that they could resign their at-will jobs because Sentosa breached its contracts but that they should not do so during a shift. *Id.* Vinluan also filed a discrimination claim for the nurses with the U.S. Department of Justice. *Id.* at 36a-37a, 76a, 251a. Finding their working conditions intolerable, the nurses quit in April 2006. *Id.* at 5a-6a. They gave ample notice so that no shifts went unfilled and no patients were left without adequate care. *Id.* at 252a. Sentosa's conditions were so bad that, around the same time petitioners quit, nurses at other facilities did the same. *Id.* at 251a.

2. Sentosa launched a retaliatory campaign. It complained to New York's nurse-licensing agency and to the Suffolk County police, alleging "the nurses had abandoned their patients by simultaneously resigning without adequate notice." *Id.* at 252a. But following an investigation, the licensing agency "conclude[ed] that [the nurses] had not committed professional misconduct" and that "no patients were deprived of nursing care." *Id.*; *see id.* at 6a. The police's investigation reached the same conclusion. *Id.* at 6a, 37a, 139a. Sentosa also brought a civil lawsuit seeking an injunction to prevent Vinluan from speaking to Sentosa employees, CA J.A. A1257-58, which the court denied, calling Sentosa's allegations "unsubstantiated" and unlikely to succeed on the merits, *id.* at A1269; *see* App. 37a, 139a.

Undeterred, Sentosa flexed its political contributions and used its influential attorney to arrange a meeting with respondents Thomas J. Spota, III, and Leonard Lato, the district attorney and one of his assistants in Suffolk

County.[2] App. 150a. Sentosa "urge[d] the DA's Office to file criminal charges against the nurses." App. 6a. Vinluan then presented respondents with "significant exculpatory information," including the favorable findings by the nursing regulator, police, and court. *Id.* at 6a-7a, 150a. Respondents never mustered countervailing "facts suggesting an imminent threat to the well-being of the [patients]." *Id.* at 263a-264a. Nor did they dispute that Sentosa obtained coverage from "other nurses and staff members" after the nurses quit so that "no [patients] were deprived of nursing care." *Id.* And for Vinluan, respondents did "not dispute that [he] acted in good faith." *Id.* at 265a. Even so, respondents indicted the nurses and Vinluan for endangering patients and conspiring to do so. *Id.* at 7a. They also charged Vinluan with criminal solicitation for advising the nurses. *Id.* The conspiracy charge against Vinluan was especially farfetched: The alleged objective was to "obtain for the * * * nurses alternative employment" (lawful and protected by the Thirteenth Amendment), and his alleged "overt acts" in furtherance of this "conspiracy" were "m[eeting] with the defendant nurses" to discuss their case and "fil[ing] * * * a Federal discrimination claim" on their behalf (lawful and protected by the First Amendment). C.A. J.A. A1404-06.

The indictment was handed down in March 2007, nearly a year after the nurses quit. App. 252a. Petitioners' lives were left in turmoil as the indictment hung over them for nearly two years.

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[2] Lato has since died, and Spota is in federal prison for other abuses of his prosecutorial power. App. 37a-38a nn.1-2.

3. Some relief came when petitioners sought a writ of prohibition from New York's Appellate Division, arguing that the prosecution was impermissible under the First and Thirteenth Amendments. *Id.* at 248a-249a.

The court agreed in an unsparing opinion. It explained that the prosecution was "the antithesis of the free and voluntary system of labor envisioned by the framers of the Thirteenth Amendment." *Id.* at 261a-262a. And prosecuting Vinluan "for the good faith provision of legal advice" was "an assault on the adversarial system of justice upon which our society, governed by the rule of law rather than individuals, depends." *Id.* at 267a. It was "clear that [Vinluan's] criminal liability [was] predicated upon the exercise of ordinarily protected First Amendment rights." *Id.* at 265a; *see id.* at 44a. Such a prosecution "eviscerate[d] the right to give and receive legal counsel." *Id.* at 266a. A writ of prohibition was thus warranted because petitioners were "threatened with prosecution for crimes for which they cannot constitutionally be tried," *id.* at 267a, and so the prosecution was "without or in excess of jurisdiction," *id.* at 255a (internal quotation marks omitted); *see id.* at 36a.

B. Federal Procedural Background.

1. Petitioners then filed claims under 42 U.S.C. § 1983, alleging, among other things, that respondents Spota and Lato violated their rights by unconstitutionally prosecuting them. *Id.* at 9a-10a. In 2011, on a motion to dismiss, the district court granted respondents absolute prosecutorial immunity for prosecuting petitioners and

presenting the case to the grand jury. *Id.* at 10a. The court let some claims move forward, including allegations about respondents' investigatory conduct. *Id.* at 10a-11a. After several years, the remaining claims were either settled or resolved at summary judgment. *Id.* at 11a. Petitioners then appealed the grant of absolute immunity. *Id.*

2. The Second Circuit affirmed in a divided opinion. The majority held that absolute prosecutorial immunity applied whenever "any relevant criminal statute exists that may have authorized prosecution for the charged conduct." *Id.* at 14a (internal quotation marks omitted). Because respondents were "authorized by statute to prosecute" patient endangerment and related conspiracies, they were entitled to absolute immunity, no matter how obvious it was that no prosecution could be sustained without violating the First and Thirteenth Amendments. *Id.* at 19a-20a.

The majority was uncomfortable with that result but felt bound by precedent. It observed that "§ 1983 itself does not mention absolute prosecutorial immunity," which is "a judicially created doctrine." *Id.* at 12a n.4. And it agreed that the "dissent raises strong, even compelling policy concerns that * * * counsel in favor of significantly curtailing the doctrine of absolute prosecutorial immunity, perhaps across the board." *Id.* at 31a n.13.

3. Judge Chin dissented. He would have held that immunity did not apply because the prosecutors acted "without any colorable claim of authority." *Id.* at 40a. Judge Chin rejected the majority's lax test for prosecutorial immunity, explaining that "[t]he mere invocation of a

statute should not be enough." *Id.* Judge Chin saw Vinluan's indictment as "particularly outrageous": "Surely a prosecutor has no colorable authority to bring charges against a lawyer for giving legal advice to clients and for filling a claim of discrimination on their behalf." *Id.* at 44a. And, in his view, it was clearly "beyond the prosecutors' authority to criminally charge the nurses for resigning to protest what they believed to be discriminatory work co.nditions." *Id.* at 41a. Even if it were a close call, the writ-of-prohibition decision "dispel[led] any doubt as to whether the prosecutors had colorable authority to criminally charge the nurses and their lawyer." *Id.* at 45a.

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH COMMON LAW AND TWO CENTURIES OF THIS COURT'S PRECEDENTS.

In decisions tracing back over two centuries, this Court has recognized that official immunity is unavailable for actions taken in the clear absence of legal authority. Official immunity shields discretionary decisions with the goal of promoting vigorous public service, but there is no legitimate discretion to be exercised in the clear absence of authority. That important limitation is irreconcilable with the Second Circuit's decision below, which immunizes all prosecutorial actions—no matter how far beyond the bounds of valid criminal law or other legal boundaries on prosecutors' authority—so long as the prosecutor cites some criminal statute. This Court should intervene to correct the Second Circuit's disregard of Supreme Court

precedent and the common-law principles it embodies. *See* Sup. Ct. R. 10(c).

A. This Court Has Long Held That Prosecutorial Immunity Incorporates A Straightforward Common-Law Rule Limiting Immunities To Actions Within An Official's Lawful Scope Of Authority.

1. In *Imbler* v. *Pachtman*, this Court held that Section 1983 embraced a form of absolute immunity for prosecutors. 424 U.S. at 431. But the immunity did not reach everything a person with the title of "prosecutor" does. Rather, it is limited by "the immunity historically accorded * * * at common law and the interests behind it." *Id.* at 421. Since then, the Court has repeatedly explained that prosecutorial immunity must be "construed in the light of common-law principles that were well settled at the time of [Section 1983's] enactment." *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997); *see also*, *e.g.*, *Van de Kamp* v. *Goldstein*, 555 U.S. 335, 341 (2009); *Butz*, 438 U.S. at 508-509.

Most important here, absolute immunity does not apply to prosecutors acting clearly outside the scope of their authority. *Imbler*, 424 U.S. at 418, 422-423. After all, the immunity was "based upon the same considerations that underlie the common-law immunities of judges," and that immunity applied only "for 'acts committed within their judicial jurisdiction.'" *Id.* at 418, 422-423 (citing *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 355 (1871)). Likewise, *Imbler* "agree[d] with Judge Learned Hand['s]" view of prosecutorial immunity from *Gregoire* v. *Biddle*. *Id.* at 428. There, Judge Hand explained that prosecutorial immunity

"decisions have * * * always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers." 177 F.2d 579, 581 (2d Cir. 1949).

2. *Imbler* was correct that common law embodied a straightforward rule that no official immunity applied if the defendant was acting outside the legitimate scope of his lawful authority.[3] As Judge Chin's dissent put it, "where a prosecutor acts without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy." App. 40a (internal quotation marks omitted); *accord Lerwill* v. *Joslin*, 712 F.2d 435, 439 (10th Cir. 1983). That framing correctly reflects a longstanding common-law rule. As this Court elaborated shortly after Section 1983's enactment, no official immunity applies when the official's acts are "are manifestly or palpably beyond his authority." *Spalding*, 161 U.S. at 498; *see also Bradley*, 80 U.S. (13 Wall.) at 351. And as the modern Court has put it in surveying its 19th century cases, one way an official acts manifestly beyond his authority is "if he fail[s] to observe obvious statutory or constitutional limitations on his powers." *Butz*, 438 U.S. at 494.

Two centuries of this Court's cases have elaborated that straightforward, administrable rule. They also uniformly reflect that, when the basis for authority was in doubt, the Court made a searching inquiry rather than adopt a shortcut like the Second Circuit's.

a. In the earliest decades of the Republic, this Court repeatedly held that government officials who acted

[3] Although *Imbler* was wrong to suggest that common law in 1871 gave absolute immunity to prosecutors. *See infra* Part II.B.

beyond the scope of their legitimate authority were liable for their unlawful acts.

Most famously, in *Little* v. *Barreme*, a frigate captain seized a cargo vessel that was traveling *from* France, even though the relevant statute authorized only seizing vessels traveling *to* France. 6 U.S. (2 Cranch) 170, 177 (1804). This Court, through Chief Justice Marshall, refused to grant official immunity, even though the President had instructed the captain to seize vessels going both to and from France. *Id.* at 178-179. No instructions could "legalize an act which * * * would have been a plain trespass" under the statute enacted by Congress. *Id.* at 179. As this Court later explained *Barreme*, no immunity was available because the commander had "acted outside of his federal statutory authority." *Butz*, 438 U.S. at 490.[4]

Two years later, Chief Justice Marshall again wrote for the Court in reaching a similar conclusion in *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806). There, a justice of the peace sued a collector of militia fines for trespass because the justice was not susceptible to militia duty and so was outside the bounds of the militia's authority. *Id.* at 332. The Court agreed. *Id.* at 337. It then explained that when the court martial purported to exercise authority over a

[4] Under contemporary doctrine, Captain Little would likely be invoking qualified, rather than absolute, immunity. But the same threshold requirement that an official be acting within the scope of his authority applies to both immunities. *See Stump* v. *Sparkman*, 435 U.S. 349, 356-357 (1978) (absolute immunity); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815-816, 819 n.34 (1982) (qualified immunity).

justice of the peace, it was "clearly without its jurisdiction" and so official immunity did not apply. *Id.*

Antebellum cases also treated the scope-of-authority limitation rigorously. Even where immunity applied, it was only after a searching inquiry to ensure the defendant official was acting within the proper scope of his authority. For example, in *Wilkes* v. *Dinsman*, 48 U.S. (7 How.) 89 (1849), the Court considered a naval commander making disciplinary decisions. The Court explained that such an important "position * * * becomes *quasi* judicial" and thus "exempted from civil prosecution" "for any mere error of judgment." *Id.* at 129 (internal quotation marks omitted). But even discretion as important as a naval commander's was limited: "[F]or acts beyond his jurisdiction * * * he can claim no exemption, and should be allowed none under color of his office, however elevated or however humble the victim." *Id.* at 130. The Court honored that principle by ensuring, in a detailed analysis, that the plaintiff marine actually was properly under the command of the defendant captain to justify official immunity. *See id.* at 124-27. *See also Kendall* v. *Stokes*, 44 U.S. (3 How.) 87, 98-99 (1845) (granting immunity to Postmaster General for "committ[ing] an error" only after ensuring the "matter properly belong[ed] to the department over which he presided").

b. In the years shortly after the 1871 enactment of what is now Section 1983, the Court considered several official immunity cases brought under other causes of action. Those cases confirm the continuing vitality of the scope-of-authority limitation to official immunities.

For instance, in *Bates* v. *Clark*, 95 U.S. 204 (1877), the Court considered a suit against officials who had statutory authority to seize alcoholic beverages in Indian country. The fact that the seizure did not occur in Indian country was "fatal" to their assertion of official immunity because, given the statute's geographic limitations on their power, they were "utterly without any authority in the premises." *Id.* at 209. That they asserted a "good faith" belief that they were acting within their statutory authority was "no defence." *Id.*

Even cases where the Court did grant immunity reaffirmed a strong scope-of-authority limitation. In its 1872 *Bradley* decision—later relied on by *Imbler*—this Court adopted absolute immunity for common-law suits against judges. 80 U.S. (13 Wall.) at 351. But no immunity was available "[w]here there is clearly no jurisdiction" for the judge's actions. *Id.* at 351-352. In such circumstances, "no excuse is permissible" "for the exercise of such authority." *Id.* at 352. The Court elaborated what it meant by "clearly" with an example: If a probate court exercised criminal jurisdiction, the judge's "commission would afford no protection to him in the exercise of the usurped authority." *Id.* By contrast, absolute immunity would apply to a criminal court that erroneously "hold[s] a particular act to be a public offence" or "sentence[s] a party convicted to a greater punishment than that authorized by the law upon its proper construction." *Id.* That is because the latter examples are the sorts of "errors committed in the ordinary prosecution of a suit." *Id.* This rule is captured in Judge Chin's formulation: Where there is a "colorable claim of authority," App. 40a, immunity applies—even if the claim

is ultimately erroneous. But where it is *ab initio* obvious that the judge (or other official) is outside his lawful authority, absolute immunity is unavailable.

Spalding v. *Vilas*, 161 U.S. 483 (1896), then extended absolute immunity to senior executive officials for some claims by analogizing to judicial immunity—just as this Court later did for prosecutors. The Court granted immunity to the Postmaster General for circulating a notice that injured the plaintiff's reputation and contractual relationships. It expressly applied *Bradley*'s "distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority" and those that are within "the general matters committed by law to his control or supervision." *Id.* at 498. Immunity was granted in *Spalding* because the defendant fell on the right side of that divide: He "did not exceed his authority, nor pass the line of his duty." *Id.* at 499. But had he done so, then "no excuse [would have been] permissible." *Id.* at 494 (citing *Bradley*, 80 U.S. (13 Wall.) at 350-351).

c. When this Court crafted modern Section 1983 official immunities, it brought with them the 19th century precedents that recognized a robust scope-of-authority limitation. *See*, *e.g.*, *Imbler*, 424 U.S. at 418; *Stump*, 435 U.S. at 356-357 & n.7.

In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Court surveyed the 19th century immunity case law and drew important lessons. In describing *Barreme*, *Butz* explained that an "official who acted outside his * * * statutory authority would be held strictly liable for his trespassory

acts." *Id.* at 489-490. And in reading *Spalding*, *Butz* explained that "[i]t did not purport to immunize officials who ignore limitations on their authority imposed by law." *Id.* at 493-494. The Court synthesized a simple rule that an "official would not be excused from liability if he failed to observe obvious statutory or constitutional limitations on his powers." *Id.* at 494.

Stump v. *Sparkman* is an illustrative modern case applying this principle to absolute immunity, in that case for judges. There, a judge granted a petition to surreptitiously sterilize a 15-year-old girl. 435 U.S. at 351-352. This Court found that the judge was entitled to absolute immunity from a subsequent civil suit, but only after a searching analysis of the judge's basis for authority. The Court found it "significant that there was no * * * statute and no case law" that prohibited the judge "from considering a petition of the type presented." *Id.* at 358. That analysis confirms *Butz*'s rule is that if there *had* been a statute or case law placing the sterilization petition clearly beyond the judge's authority, then immunity would not have been available.

The leading contemporary scholarly accounts of absolute immunity's history reach a similar conclusion. "[T]he common law * * * categorically denied immunity to discretionary actions when officers *clearly* lacked jurisdiction or delegated authority." Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 Stan. L. Rev. 1337, 1350 (2021); *accord id.* at 1353; *see also* William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online 115, 122-124 (2022); James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. Rev. Online 148, 161-164 (2021).

That is consistent with the purpose of official immunity adopted by this Court, which is to give officials the ability to make discretionary decisions in the public interest without being deterred by retaliatory after-the-fact lawsuits. *E.g.*, *Imbler*, 424 U.S. at 427-428; *Harlow*, 457 U.S. at 806-808. The essential premise, however, is that the official is acting within the zone of her discretion delegated to her by law. If she is clearly *outside* the bounds of authority—such as by ignoring obvious statutory and constitutional limitations—then she is acting on her own, not serving the public trust, and so has no claim to immunity. *Butz*, 438 U.S. at 493-494, 506-507.

B. The Second Circuit's Decision Below Violates This Court's Precedents And The Common Law.

1. The court of appeals contradicted this Court's many precedents on the scope-of-authority limitation and adopted a rule that turns the limitation into a perfunctory statute-citing exercise. The Second Circuit explained that it was enough that "the District Attorney was authorized by statute to prosecute" the sorts of crimes for which petitioners were indicted. App. 19a. As Judge Chin's dissent explained, that logic means that "all a prosecutor need do, to be absolutely immune, is to cite a criminal statute and assert that a defendant violated it." *Id.* at 40a. The scope-of-authority limitation under this reasoning "would be illusory" because, "as long as a prosecutor charged the violation of a statute that fell within the prosecutor's jurisdiction, the prosecutor would be absolutely immune —

even if there was absolutely no factual or legal basis for the charge." *Id.*

Taking the Second Circuit's rule seriously, a prosecutor could automatically receive absolute immunity for charging a newspaper editor who opposed his reelection if he simply labeled the editorial terrorism under an antiterrorism statute. He could arbitrarily charge someone living across the country with a crime selected at random. Or he could even knock an effective criminal defense lawyer out of a case by charging her as an accessory merely for providing her client a defense. In each situation, a court hearing a subsequent Section 1983 suit would have nothing to do but look at the charging document, note that it listed a criminal statute that the prosecutor generally has authority to charge, and grant absolute immunity. (In fact, the charging-the-defense-lawyer example is not far from what happened in this case. *See* App. 266a.)

The Second Circuit's rule—and the absurd results it yields—is irreconcilable with this Court's precedents. They require instead a serious inquiry into whether an official has a colorable claim to authority and whether he is ignoring obvious limitations on his powers before granting immunity.

The captain in *Barreme* and the court martial in *Wise* both had statutory authority that they were purporting to exert. By the Second Circuit's rule, that would have been enough to invoke official immunity. But this Court instead evaluated the law and facts in each case, and when it was clear that the officials had transgressed statutory limitations on their lawful authority, they lost immunity.

Likewise, in *Wilkes* and *Kendall*, the Court did grant immunity, but only after carefully ensuring that the defendants had acted within the bounds of their legal authority. If it was enough merely to invoke a statute, the Court in *Wilkes* would have had no reason to spend pages confirming that the defendant captain actually did have statutory authority to discipline the plaintiff marine.

The post-1871 cases are likewise irreconcilable with the Second Circuit's lax statute-citing rule. The defendants in *Bates* would have been off the hook simply by invoking the liquor-seizure statute as the basis for their actions. The probate judge hypothesized in *Bradley* could circumvent the limitations on his immunity and act as a criminal court, so long as his orders cited a probate statute. And there would have been no need for *Spalding* to determine whether the Postmaster General actually was acting within the bounds of his proper authority if it had been enough to simply to point to statutes giving him some authority.

2. Had the Second Circuit instead followed this Court's precedents and their logic, it would have conducted a careful inquiry into whether it was clear *ab initio* that respondents lacked authority to prosecute a lawyer for offering legal advice and nurses for quitting their at-will employment. Had there been "obvious * * * constitutional limitations on [the prosecutors'] powers" to bring such prosecutions, they "would not be excused from liability." *Butz*, 438 U.S. at 494.

To be sure, that inquiry would place a substantial burden on petitioners. If there were a colorable claim that the

prosecutions fell within respondents' legitimate authority, they would be immune. And because absolute immunity does not allow an inquiry into subjective malice, even "malicious or dishonest" motivations could be immunized if there were an objective, constitutionally permissible basis for the prosecution. *Imbler*, 424 U.S. at 427. But this Court's cases show that a plaintiff can surmount absolute immunity by showing that a prosecutor acted "manifestly or palpably beyond his authority." *Spalding*, 161 U.S. at 498. The Second Circuit should not have short-circuited that inquiry simply by noting that the indictment named a statute.

C. This Court Should Take This Opportunity To Reaffirm An Important Common-Law Limitation On Prosecutorial Immunity.

1. Despite the importance of the scope-of-authority principle at common law, this Court has never decided a case applying it to prosecutorial immunity following *Imbler*. The prosecutorial immunity cases the Court has taken concern another limitation: that a prosecutor must be exercising a "function[ ]" that is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; *see Van de Kamp*, 555 U.S. at 342-343; *Kalina*, 522 U.S. at 124-129; *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 268 (1993); *Burns* v. *Reed*, 500 U.S. 478, 486-487 (1991).

The lower courts have correctly understood that the common-law scope-of-authority limitation applies to prosecutorial immunity. *See Lerwill*, 712 F.2d at 439 (explaining

that *Bradley*'s scope-of-authority limitation "has generally been found applicable to a prosecutor's quasi-judicial immunity as well," and collecting cases). But they have no modern guidance from this Court on how to apply that limitation to prosecutors in Section 1983 suits. That may explain how the Second Circuit applied it here in a manner so grievously inconsistent with the common law and this Court's historic precedents.

2. The Second Circuit's error is hardly the only confusion in the lower courts about how to apply the common-law scope-of-authority limitation to prosecutorial immunity. Some lower courts, for instance, have failed to properly recognize that the scope-of-authority requirement for prosecutorial immunity is distinct from the more commonly litigated requirement that a prosecutor be exercising a judicial function. *E.g.*, *McCarthy* v. *Mayo*, 827 F.2d 1310, 1314 (9th Cir. 1987) (conflating "whether an act is * * * within a prosecutor's authority" with the distinct inquiry into its "nature or function"); *contra, e.g.*, *Snell* v. *Tunnell*, 920 F.2d 673, 696 (10th Cir. 1990) (correctly distinguishing the requirements and holding that a defendant "functioning as a prosecutor" was not entitled to absolute immunity where "she did so without color of authority").

The lower courts have also varied dramatically in how seriously they apply the scope-of-authority limitation and how searchingly they inquire into whether prosecutors crossed obvious constitutional or statutory boundaries. *Compare, e.g.*, *Chalkboard, Inc.* v. *Brandt*, 902 F.2d 1375, 1379 (9th Cir. 1989) (denying immunity for prosecutorial officials who "by-pass[ed] the statutorily mandated procedure"), *and Snell*, 920 F.2d at 695-696 (similar), *with B.S.* v.

Somerset County, 704 F.3d 250, 277-279 (3d Cir. 2013) (Nygaard, J., concurring in part and dissenting in part) (criticizing majority for granting prosecutorial absolute immunity without following Ninth Circuit's *Chalkboard* style of analysis).

The lower courts have also been inconsistent in determining whether prosecutors lose immunity when they combine prosecutorial actions that *are* within the lawful bounds of their authority with actions that are not. *Compare, e.g.*, *Doe* v. *Phillips*, 81 F.3d 1204, 1210 (2d Cir. 1996) (holding that a prosecutor "los[es] his shield of absolute immunity by making his prosecutorial decision conditional on the suspect's performing a demanded act" if the prosecutor lacked " 'any colorable claim of authority' to impose the condition"); *Rouse* v. *Stacy*, 478 F. App'x 945, 952 (6th Cir. 2012) (following *Phillips*'s rule); *and Henzel* v. *Gerstein*, 608 F.2d 654, 657 n.4 (5th Cir. 1979) (similar); *with Phillips*, 81 F.3d at 1213 (Jacobs, J., concurring in part and dissenting in part) (identifying cases from the Fifth, Seventh, and Tenth Circuits that had not followed the *Phillips* rule and had "granted absolute immunity to prosecutors in similar" circumstances).

* * *

The straightforward rule that a prosecutor will lose immunity for "acts without any colorable claim of authority" App. 40a (internal quotation marks omitted)—such as when he "fail[s] to observe obvious statutory or constitutional limitations on his powers," *Butz*, 438 U.S. at 494—is firmly rooted in common law and is essential to limiting prosecutorial absolute immunity to those cases in which it

serves its public-policy purpose to shield the legitimate exercise of prosecutorial discretion. This Court should grant the petition to correct the Second Circuit's manifestly erroneous application of this common-law principle reflected in centuries of precedent. In the process, the Court can provide guidance about this important (but inconsistently applied) principle for the first time since adopting it for prosecutors in *Imbler*.

II. THIS COURT SHOULD RECONSIDER ABSOLUTE PROSECUTORIAL IMMUNITY.

This case also presents an opportunity for the Court to reclaim Section 1983's text and historical mooring to the common law. The Court has long acknowledged that Section 1983's text "on its face admits of no immunities." *Imbler*, 424 U.S. at 417. Absolute prosecutorial immunity also contradicts the relevant common law. When Section 1983 was enacted in 1871, "courts * * * had not yet begun to grant governmental prosecutors absolute immunity." Keller, *supra*, at 1359. Rather, a prosecutor at that time "could be held liable in an action for malicious prosecution if [he] acted with malice and without probable cause." *Rehberg* v. *Paulk*, 566 U.S. 356, 364 (2012). It was not until "decades after the adoption of the 1871 Civil Rights Act" that courts began to craft absolute immunity for prosecutors. *Id.* at 365. As Justice Scalia put it: "There was * * * no such thing as absolute prosecutorial immunity when § 1983 was enacted." *Kalina*, 522 U.S. at 132 (Scalia, J., concurring, joined by Thomas, J.).

This case—where absolute immunity shielded prosecuting a lawyer for offering legal advice and nurses for leaving an abusive job—perfectly illustrates why the Court should revisit its judge-made rule from *Imbler*.

A. Absolute Prosecutorial Immunity Is Atextual.

1. Since the 42d Congress enacted Section 1983, it has never included text that exempted prosecutors. Rather, Section 1983 makes liable "*[e]very* person" acting under color of state law who deprives another of "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (emphasis added); *see Buckley*, 509 U.S. at 268. As *Imbler* itself recognized, the text "creates a species of tort liability that on its face admits of no immunities." 424 U.S. at 988. Only by concluding that Section 1983's text "is not to be taken literally," *Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983), has the Court interpolated official immunities.

2. Jurists of all stripes, including Members of this Court, have agreed Section 1983's text means what it says. Nearly forty years ago, Justice Thurgood Marshall noted that absolute immunity conflicted with Section 1983's unambiguous language and the 42d Congress's intent to abrogate common-law immunities.[5] *Briscoe*, 460

[5] Justice Marshall was correct. In fact, the 42d Congress *expressly* abrogated common-law immunities from Section 1983. *See* Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Calif. L. Rev. 101, 170 (forthcoming), available at https://tinyurl.com/QI-Flawed-Fnd. The original text made state officials liable "notwithstanding" "any * * * custom[ ] or usage"—that is, notwithstanding

U.S. at 347–364 (Marshall, J., dissenting); *see also id.* at 346 (Brennan, J., dissenting); *id.* at 369 (Blackmun, J., dissenting). Justice Scalia embraced the plain-text reading repeatedly. *See*, *e.g.*, *Kalina*, 522 U.S. at 131-135 (Scalia, J., dissenting); *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). Other Justices have shared that view. *See*, *e.g.*, *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1862 (2020) (Thomas, J., dissenting from the denial of certiorari) ("The text of § 1983 makes no mention of defenses or immunities." (internal quotation marks and brackets omitted)); Oral Arg. Tr., *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, No. 21-806, at 36:11–38:10 (Nov. 8, 2022) (Jackson, J.).

Circuit court judges agree. In the Fifth Circuit, Judge Ho recently highlighted "the complete absence of any statutory text to support [official] immunities," including absolute prosecutorial immunity. *Wearry* v. *Foster*, 33 F.4th 260, 279 (5th Cir. 2022) (dubitante). He is hardly alone. *See*, *e.g.*, *Fogle* v. *Sokol*, 957 F.3d 148, 158-160 (3d Cir. 2020) (Matey, J.); *Cox* v. *Wilson*, 971 F.3d 1159, 1161-62 (10th Cir. 2020) (Lucero, J., joined by Phillips, J., dissenting from the denial of rehearing en banc); *K.H. ex rel. Murphy* v. *Morgan*, 914 F.2d 846, 850 (7th Cir. 1990) (Posner, J.) ("The defense [of immunity] is not found in the civil rights statutes themselves, but is a judicial addition"—"a creative graft."); *see also* App. 12a n.4.

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common-law defenses like official immunities. Ku Klux Klan Act, ch. 22, § 1, 17 Stat. 13; *see* Inst. for Just. Amicus Br., *Health & Hosp. Corp. of Marion Cnty.* v. *Talevski*, No. 21-806 (U.S. Sept. 23, 2022) (elaborating this Notwithstanding Clause).

This case presents an ideal opportunity for the Court to revisit *Imbler*'s textual error. Absolute prosecutorial immunity is not "the product of some congressional mandate" that the Court is "powerless to correct," *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in the judgment), but an atextual judicial amendment to the statute Congress enacted.

B. Absolute Prosecutorial Immunity Is Ahistorical.

Absolute prosecutorial immunity also has no basis in any historical common-law immunities that prosecutors enjoyed in 1871.

Imbler assumed that state prosecutors historically enjoyed absolute immunity. *Imbler*, 424 U.S. at 421-427. But when Section 1983 was enacted, "[t]he common law * * * had not recognized absolute immunity for prosecutors." Keller, *supra*, at 1360. To Justice Scalia, this truth had become obvious: "There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted." *Kalina*, 522 U.S. at 132 (Scalia, J., concurring). The unanimous Court in *Kalina* conceded that, in *Imbler*, "[t]he cases that the Court cited were decided after 1871 and granted a broader immunity to public prosecutors than had been available * * * at early common law." 522 U.S. at 124 n.11. The majority, however, excused that historical deficiency for what it considered important "policy considerations." *Id.* But setting that pragmatism aside, "the doctrine of absolute prosecutorial immunity is wrong as an original matter." *Wearry*, 33 F.4th at 273 (Ho, J., dubitante).

1. So if absolute prosecutorial immunity didn't exist in 1871, what *was* the common law? To start, public prosecutors "were fairly rare in 1871." Keller, *supra*, at 1367; *see Kalina*, 522 U.S. at 132 (Scalia, J., concurring). As was true dating back to the "English common-law system, criminal prosecutions were primarily brought by the victim's family and friends." Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 108 & n.419 (2005). By 1871, some States had replaced some private prosecutions with public ones, but private prosecutions still predominated. John D. Bessler, *The Public Interest and the Unconstitutionality of Private Prosecutors*, 47 Ark. L. Rev. 511, 516-518 (1994).

To protect against abuses, "the tort of malicious prosecution was clearly recognized in both the English and American common law." Johns, *Reconsidering*, *supra*, at 111. Neither "public" nor "private" prosecutions in 1871 had immunity from malicious prosecution claims. Keller, *supra*, at 1367 & n.182 (citing *Parker* v. *Huntington*, 68 Mass. (2 Gray) 124, 128 (1854)); *see also Kalina*, 522 U.S. at 132 (Scalia, J., concurring); *Venckus* v. *City of Iowa City*, 930 N.W.2d 792, 816-820 (Iowa 2019) (Appel, J., concurring in part and dissenting in part) (collecting cases). In fact, courts continued to allow malicious-prosecution suits against public prosecutors well after 1871. *E.g.*, *Arnold* v. *Hubble*, 38 S.W. 1041 (Ky. 1897); *Skeffington* v. *Elyward*, 97 Minn. 244 (1906); *Leong Yau* v. *Carden*, 23 Haw. 362 (1916).

2. Prosecutorial liability tracks the Reconstruction-era purposes for Section 1983. "[I]n 1871, the Reconstruction Congress adopted § 1983 in part to address the abusive practice in the South of prosecuting Union officers and

officials who were attempting to establish and enforce civil rights for newly freed slaves." Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 Fordham L. Rev. 509, 510, 523-524 (2011) (explaining southern "state-sanctioned criminal prosecutions of Union officers * * * for attempting to enforce federal laws"). Congress understood that liability was needed to curb "the frequent use of baseless * * * criminal prosecutions to punish and intimidate those who tried to enforce national policy." David Achtenberg, *With Malice Towards Some:* United States v. Kirby*, Malicious Prosecution, and the Fourteenth Amendment*, 26 Rutgers L.J. 273, 275-276 (1995). In Kentucky alone, there were some 3,000 such prosecutions. Cong. Globe, 39th Cong., 1st Sess. 2054 (1866) (remarks of Sen. Wilson); *id.* (remarks of Sen. Clark); *id.* at 2021 (remarks of Sen. Clark). Thus, Section 1983 was "intended to create a federal remedy establishing prosecutorial liability," not to insulate southern prosecutors from liability absolutely. Johns, *Unsupportable*, *supra*, at 526.

3. To be sure, prosecutors were not defenseless in common-law suits in 1871, but they enjoyed only limited protections. *Wearry*, 33 F.4th at 279 (Ho, J., dubitante).

First, for initiating a criminal prosecution within the scope of their authority, prosecutors "would have been protected by something resembling qualified immunity." *Kalina*, 522 U.S. at 133 (Scalia, J., concurring). This was "built into the elements" of a malicious prosecution claim, *id.*, which required a showing of malice. Keller, *supra*, at 1367; *see* Pfander, *supra*, at 161-162 & n.79.

Quasi-judicial immunity, which protected "official acts involving policy discretion," worked similarly for discretionary acts within an official's scope of authority. *Burns*, 500 U.S. at 500 (Scalia, J., concurring in the judgment in part and dissenting in part). Yet this form of immunity was qualified and "could be defeated by a showing of malice." *Id.* (collecting sources); *see*, *e.g.*, *Merriam* v. *Mitchell*, 13 Me. 439, 458 (1836).

Prosecutors had another common-law protection: immunity from defamation lawsuits for statements made *in* court proceedings. *Wearry*, 33 F.4th at 280 (Ho, J., dubitante); *see also Burns*, 500 U.S. at 501 (Scalia, J., concurring in the judgment in part and dissenting in part).

If the Court adapted these actual common-law principles from 1871 to Section 1983 suits, prosecutors may avoid liability for good-faith charging decisions within the lawful scope of their authority, along with much of what follows during litigation. But they would not enjoy anything like the absolute immunity for bad-faith prosecutions this Court has adopted.

C. The Court Should Overrule *Imbler*.

If any case justifies reconsideration of precedent, this is it. Precedent should yield when, among other things, the quality of the decision is weak, the rule the precedent created has proven to be unworkable, and legal developments since the decision have undermined it. *Janus* v. *Am. Fed'n of State, Cnty, & Mun. Emps.*, 138 S. Ct. 2448, 2478-79 (2018). For example, a decision that "failed to ground its decision in text, history, or precedent," or one that "relied

on an erroneous historical narrative," should be reconsidered. *See Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2266 (2022). And it is particularly appropriate to do so when, as here, "the precedent consists of a judge-made rule." *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009). For these judicially created doctrines, correction "should come from this Court, not Congress." *Id.* at 233-234. *Imbler* satisfies all these grounds.

1. Start with the quality of its reasoning: It was both atextual and ahistorical. *Supra* Parts II.A-B. With petitioners' First and Thirteenth Amendment rights at stake, the Court should place a higher value "on having the matter 'settled right'" than on just having it settled. *Dobbs*, 142 S. Ct. at 2262; *see Monroe* v. *Pape*, 365 U.S. 167, 222 (1961) (Frankfurter, J., dissenting) (placing Section 1983 in a "constitutional dimension," weighing against strong adherence to precedent).

Nor did *Imbler*'s policy concern to prevent retaliatory lawsuits justify absolute immunity. Historically, prosecutors would have enjoyed a kind of qualified immunity, which is sufficient. *Buckley*, 509 U.S. at 268; *Butz*, 438 U.S. at 506; *see supra* pp. 29-30. And the *Heck* bar, which generally requires a plaintiff to "demonstrate * * * that he obtained a *favorable termination* of the underlying criminal prosecution" before bringing a § 1983 claim, is another powerful safeguard. *Thompson* v. *Clark*, 142 S. Ct. 1332, 1335 (2022) (citing *Heck* v. *Humphrey*, 512 U.S. 477, 484 & n.4 (1994)). Only cases like this one where there is no plausible public-policy value in avoiding prosecutorial accountability will survive early motions practice.

2. The application of *Imbler*'s judge-made rule has also proved unworkable. To begin, it has spawned a host of questions about when it applies, likely because the immunity's results are so severe. Most notable is baroque line-drawing for when a prosecutor is exercising a judicial function. For the immunity to apply, a court must determine, among other things, whether the prosecutor (1) acted "as an officer of the court," (2) instead performed "investigative functions," or (3) had probable cause to initiate judicial proceedings at the time of the challenged act. *Buckley*, 509 U.S. at 273-275 & n.5. Answering any one of those questions requires messy factual inquiries. *See id.* at 290-291 (Kennedy, J., concurring in part and dissenting in part). Even *Imbler* recognized that "[d]rawing a proper line between these functions may present difficult questions." 424 U.S. at 430-431 & n.33.

This case exemplifies just that. To figure out when exactly respondents were acting as advocates or investigators, and whether the actions they took in each role were unconstitutional, the parties spent *a decade* embattled in discovery and motions practice. It's easy to forget that the unlawful indictments came in 2006, yet the court of appeals didn't fully decide whether absolute immunity applied until 2022.

Moreover, *Imbler* often spawns needlessly complex litigation by forcing plaintiffs to engage in creative pleading to find *someone* to sue who does not have absolute immunity, even if that someone (like a police officer or municipality) is less culpable than the prosecutor. *See Conley* v. *United States*, 5 F.4th 781, 793-794 (7th Cir. 2021) (explaining how a "stark gap in civil relief" has been created

because the police can be sued for misconduct even when a prosecutor is immune for engaging in the same misconduct).

On several dimensions, then, *Imbler* has not created the kind of predictability or simplicity that grounded its policy rationale.

3. Finally, the legal landscape has changed dramatically since 1976 when *Imbler* decided that prosecutors needed a heightened absolute immunity beyond qualified immunity. The Court later transformed qualified immunity in *Harlow* v. *Fitzgerald* into an objective test that officers can be sued only if their actions violated "clearly established law." 457 U.S. 800, 818 (1982). *Imbler*'s central concern was plaintiffs pleading around qualified immunity by alleging subjective bad faith, 424 U.S. at 424-425, but modern qualified immunity's objective test obviates that concern. Where, as here, policy considerations affecting Section 1983 have changed, the Court has not hesitated to reconsider its previous cases. *See Pearson*, 555 U.S. at 231-243.

III. THE QUESTIONS PRESENTED ARE IMPORTANT TO CURTAIL OBVIOUS ABUSES OF PROSECUTORIAL POWER.

The questions presented have significant legal and practical importance. "The prosecutor has more control over life, liberty, and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. Crim. L. & Criminology 3, 3 (1940). Prosecutorial absolute immunity thus often "leave[s] the genuinely wronged defendant without civil redress against a

prosecutor" who "deprive[d] him of liberty." *Imbler*, 424 U.S. at 427. Given the immunity's draconian results, this Court has repeatedly explained that an "official seeking absolute immunity bears the burden of showing that such immunity is justified," and the Court "ha[s] been 'quite sparing' in [its] recognition of absolute immunity." *Burns*, 500 U.S. at 486-487 (quoting *Forrester* v. *White*, 484 U.S. 219, 224 (1988)).

The Second Circuit's lax ruling here, however, exemplifies why robust common-law limitations on prosecutorial absolute immunity—or its overturning altogether—are necessary to avoid gross abuses of official power.

1. There is good reason this Court has only "sparingly" recognized absolute immunity. Prosecutorial misconduct occurs at an alarming rate across the country, Johns, *Reconsidering*, *supra*, at 59-60, but in the Section 1983 suits that follow, prosecutors routinely receive absolute immunity for egregious misconduct. For example, one prosecutor was immune after he dragged a witness into his office and threatened him "with prosecution, imprisonment, and bodily harm unless he agreed to stand by his prior statement," which the prosecutor knew was coerced. *Collins* v. *City of New York*, 923 F. Supp. 2d 462, 466-467 (E.D.N.Y. 2013). Another prosecutor received absolute immunity after she used improper investigative techniques on children to elicit fantastical and grotesque allegations to fuel the "Satanic Panic" of the 1980s. *Michaels* v. *McGrath*, 531 U.S. 1118 (2001) (Thomas, J., dissenting from denial of certiorari).

There are countless other examples. *E.g.*, *Adams* v. *Hanson*, 656 F.3d 397, 399-401 (6th Cir. 2011) (absolute immunity for prosecutor lying to jail a witness and then leveraging release from jail to coerce testimony); *Warney* v. *Monroe County*, 587 F.3d 113, 115–116, 123–124 (2d Cir. 2009) (absolute immunity for delaying disclosure of exonerating DNA evidence); *Bouchard* v. *Olmsted*, 775 F. App'x 701, 702–703 (2d Cir. 2019) (absolute immunity for retaliating against a lawyer "in violation of his First Amendment rights").

2. To curtail the most egregious abuses of prosecutorial power, the Court should enforce a robust scope-of-authority limitation to absolute prosecutorial immunity, or scrap it altogether. That would better track this Court's long history of immunity precedents and the common law from 1871. And it also would not undermine *Imbler*'s policy goals.

Imbler's central concern was probing a prosecutor's subjective knowledge at different stages of the prosecution, which "often would require a virtual retrial of the criminal offense in a new forum." 424 U.S. at 425. But a proper scope-of-authority analysis is entirely objective—asking only whether the prosecutor acted in the clear absence of legal authority when taking a challenged action. That objective test would prevent plaintiffs from "surviv[ing] the pleadings" simply by ascribing "improper and malicious" motives to the prosecutor. *Id.* at 424-425. Likewise, the objective test would prevent second-guessing prosecutorial tactics in trying a case. *Id.* at 425. Instead, the question is simply whether there was a colorable basis

to believe that a criminal law within the prosecutor's proper ambit proscribed the plaintiff's conduct.

Even eliminating absolute prosecutorial immunity entirely would not raise *Imbler*'s concerns because it would leave the modern objective qualified immunity test. *Supra* p. 33. Other common-law immunities available for malicious-prosecution claims in 1871 would also potentially protect prosecutor's discretionary decisions in trying the case. *Supra* pp. 29-30.

Simply put, neither enforcing a firm scope-of-authority limitation nor scrapping absolute prosecutorial immunity will raise *Imbler*'s concern about cases turning on defendants' subjective "motivations." 424 U.S. at 419 n.13. The remaining immunities will allow prosecutors to "vigorous[ly] and fearless[ly]" perform their duties. *Id.* at 427. Only cases of obvious abuses of prosecutorial authority—which serves no public interest—will proceed.[6]

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[6] *Imbler* also suggested that absolute prosecutorial immunity "does not leave the public powerless to deter misconduct or to punish that which occurs." 424 U.S. at 429. The Court hoped that professional and criminal sanctions would provide the needed deterrence. *Id.* But the intervening decades have seen prosecutors "rarely charged" or disciplined. Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under* Imbler*: Providing A Compromise Approach to Claims of Prosecutorial Misconduct*, 48 Gonz. L. Rev. 219, 242 (2012). Likewise, "post-trial procedures" cannot replace constitutional claims under Section 1983. *Imbler*, 424 U.S. at 427. While "appellate review" and "post-conviction collateral remedies" can overturn convictions, *id.*, they cannot remedy completed constitutional violations. This case is illustrative: That the New York Appellate Division eventually reached the right result did nothing to cure the two years of havoc that the unlawful prosecution wreaked on petitioners' lives.

* * *

Reaffirming this Court's historical scope-of-authority rule, or following the 1871 common law fully by eliminating absolute prosecutorial immunity, will not interfere with legitimate prosecutorial discretion. Rather, it will provide accountability for victims of rogue prosecutors acting plainly outside their constitutionally bounded authority. Indeed, this case is exactly what the 42d Congress would have expected Section 1983 to cover: An unlawful prosecution of an attorney trying to protect his clients' Thirteenth Amendment rights.

IV. THIS IS AN EXCELLENT VEHICLE TO REVIEW THE QUESTIONS PRESENTED.

This case is an ideal vehicle for resolving the questions presented. It raises dispositive pure questions of law. In affirming dismissal at the pleading stage of petitioners' claims, the court of appeals did so on a single, threshold legal ground: The prosecutors were entitled to absolute immunity.

And the factual context puts those legal questions into stark relief. A state appellate court has already issued an extraordinary writ by holding that respondents clearly violated the First and Thirteenth Amendments by prosecuting a lawyer for offering good-faith legal advice and nurses for quitting abusive, at-will employment. No case could present a better backdrop for assessing the proper application of the scope-of-authority limitation or the continued validity of prosecutorial immunity itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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