No. 22A-________

In The
Supreme Court of the United States

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

Applicants,

v.

THOMAS J. SPOTA, III, et al.,

Respondents.

Application for an Extension of Time To File a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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To the Honorable Sonia Sotomayor, as Circuit Justice for the United States Court of Appeals for the Second Circuit:

In accordance with this Court's Rules 13.5, 22, 30.2, and 30.3, Applicants respectfully request that the time to file their petition for a writ of certiorari be extended for 60 days, up to and including Monday, December 12, 2022. The Court of Appeals issued its opinion on March 9, 2022 (App. 1a-73a) and denied a petition for rehearing on July 14, 2022 (App. 74a-75a). Absent an extension of time, the petition would be due on October 12, 2022. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

1. This case presents important questions about the scope and continuing validity of the doctrine of absolute prosecutorial immunity in civil-rights suits under 42 U.S.C. § 1983. Those questions arise in the context of an especially egregious abuse of power: prosecuting nurses for quitting their exploitative jobs and the attorney who filed a discrimination claim on their behalf. As a New York appellate court held in quashing the prosecutions, the First and Thirteenth Amendments put it clearly beyond the reach of the criminal law to punish someone for leaving an at-will job or for offering good-faith legal representation. Yet the defendant prosecutors who brought those charges were granted absolute immunity by the federal courts below.

2.a. Applicant Felix Q. Vinluan is an attorney who was connected to the other Applicants (the Nurse Applicants) through the Philippine consulate. The Nurse Applicants came to the United States from the Philippines to work for a large New York nursing-home operator called Sentosa. When they arrived, they discovered that

they were not working at the facility named in their contracts, and they were subjected to overcrowded and substandard housing, lower pay and benefits than promised, and markedly worse working conditions. When their entreaties to their employer went nowhere, they sought Vinluan's assistance. He filed a federal discrimination claim on their behalf and advised them that they could quit if they wished because Sentosa was in breach of its contracts with them, so long as they did not quit in the middle of a shift. Finding their working conditions intolerable, the Nurse Applicants quit after completing any ongoing shifts and giving up to 72 hours' notice.

b. Sentosa responded with a retaliatory campaign to enlist government power to punish the Nurse Applicants for leaving their exploitative jobs. This campaign initially faltered because the nurses had given ample notice and no patients were left without care. New York's nurse-licensing agency investigated the situation and found that the Nurse Applicants had not done anything wrong. The Suffolk County Police Department investigated and, upon reaching a similar conclusion, declined to take any action. Sentosa also sought an injunction in court, but it was denied for lack of likelihood of success on the merits. Sentosa had more luck, however, with then-Suffolk County District Attorney Thomas J. Spota III and his assistant Leonard Lato. Despite knowing full well that the state nursing regulator, the police, and a New York court had all rejected Sentosa's allegations of patient endangerment, the district attorney's office indicted the Applicant Nurses and Vinluan for endangering the welfare of patients, conspiracy to do so, and (for Vinluan) criminal solicitation.

c. Applicants sought the intervention of New York's appellate courts to issue a writ of prohibition against the prosecution, arguing that the prosecution was

plainly impermissible under the First and Thirteenth Amendments to the United States Constitution. In an unsparing opinion, the New York Supreme Court Appellate Division agreed, holding that the prosecution was "without or in excess of jurisdiction." *Vinluan* v. *Doyle*, 60 A.D.3d 237, 244, 250 (N.Y. App. Div. 2009) (quoting N.Y. C.P.L.R. 7803). The court 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 248. 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 251. A writ of prohibition was thus warranted because Applicants were "threatened with prosecution for crimes for which they cannot constitutionally be tried." *Id.* at 251–252.

3.a. Applicants then brought suit under 42 U.S.C. § 1983. Among other claims, they alleged that Respondents Spota, Lato, the district attorney's office, and Suffolk County had violated their constitutional rights by improperly prosecuting them. On a motion to dismiss, Respondents asserted that Spota and Lato were entitled to absolute prosecutorial immunity for prosecuting Applicants and for presenting the case to the grand jury. Although a New York appellate court had held that the prosecutions were plainly outside the constitutional bounds of the criminal law, the district court agreed that Respondents were entitled to invoke absolute immunity.[*]

[*] The motion to dismiss was decided in 2011. Litigation on surviving claims proceeded until they were settled or resolved at summary judgment in 2018, at which point Applicants could appeal the grant of absolute immunity.

b. On appeal, the Second Circuit affirmed in a divided opinion. The majority held that it was bound by circuit precedent to apply absolute prosecutorial immunity whenever "any relevant criminal statute exists that may have authorized prosecution for the charged conduct." App. 17a (internal quotation marks omitted). Because Respondents were "authorized by statute to prosecute" patient endangerment and related conspiracies, *id.* at 24a, they were entitled to absolute immunity no matter how blatantly the prosecutions ran afoul of the First and Thirteenth Amendments. The majority signaled discomfort with the result, however, noting that "§ 1983 itself does not mention absolute prosecutorial immunity," which is "a judicially created doctrine," *id.* at 15a n.4, and observing 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 39a n.13.

c. That dissent was written by Judge Chin. He would have held that the prosecutors here acted "without any colorable claim of authority" and thus lost any absolute immunity they "would otherwise enjoy." *Id.* at 50a (internal quotation marks omitted). He rejected the majority's test for prosecutorial authority, arguing that "[t]he mere invocation of a statute should not be enough." *Id.* at 51a. Otherwise, the beyond-prosecutorial-authority "exception 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 always be absolutely immune—even if there was absolutely no factual or legal basis for the charge." *Id.* In Judge Chin's view, it was not

enough to invoke absolute immunity merely "to cite a statute and assert that a defendant violated it." *Id.* at 50a.

4. This case raises important questions about the boundaries of prosecutorial immunity and the continued legitimacy of the doctrine. As this Court has held, absolute immunity does not apply to acts taken "in the clear absence of all jurisdiction." *Stump* v. *Sparkman*, 435 U.S. 349, 357 (1978) (internal quotation marks omitted) (applying principle to judicial absolute immunity, from which prosecutorial absolute immunity derives). As the divided court of appeals decision suggests, however, this exception has vexed the lower courts and led to inconsistent applications. This case also illustrates broader problems with the doctrine of absolute prosecutorial immunity, reflected in the panel majority's discomfort with its own conclusion. Jurists and scholars who have investigated the doctrine have concluded that "[t]here are good reasons to believe that the doctrine of absolute prosecutorial immunity is wrong as an original matter." *Wearry* v. *Foster*, 33 F.4th 260, 273 (5th Cir. 2022) (Ho, J., dubitante). This case supports that skepticism. After all, when, "[i]n 1871, Congress enacted § 1983 into law," *id.* at 279, it is hard to think of a case it would more want to remedy than malicious state officials abusing the criminal law to abridge Thirteenth Amendment rights and to punish an attorney for seeking federal civil-rights protection.

5. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Applicants have just retained new, *pro bono* representation for the purposes of filing a petition. New lead counsel from the Institute for Justice (IJ) were not previously involved in litigating this case, and they require additional

time to familiarize themselves with the voluminous trial and appellate records—spanning over a decade of litigation—to prepare the petition. New counsel from IJ also face the press of business on numerous other matters, including: (1) presenting oral argument in *McNeary* v. *Council for Better Education*, No. 2021-SC-0522 (Ky.); (2) an opening brief in *Bailey* v. *Iles*, No. 22-30509 (5th Cir.); (3) a motion for summary judgment in *Platt* v. *Moore*, No. CV2016-00389 (Ariz. Super. Ct.); (4) ongoing litigation in *Fambrough* v. *City of East Cleveland*, No. 1:22-cv-00992 (N.D. Ohio); (5) depositions in *Brown* v. *Transportation Security Administration*, No. 2:20-cv-0064 (W.D. Pa); and (6) an amicus brief in *Health & Hospital Corporation of Marion County* v. *Talevski*, No. 21-806 (U.S.). Applicants have not previously sought an extension of time from this Court.

6. For these reasons, Applicants respectfully request that an order be entered extending the time to file a petition for a writ of certiorari to and including Monday, December 12, 2022.

September 13, 2022

Respectfully submitted,

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