No. 22-539

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

BRIEF OF NATIONAL LEGAL AID & DEFENDER ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Legal Aid & Defender Association (NLADA), founded in 1911, is America's oldest and largest nonprofit association devoted to excellence in the delivery of legal services for those who cannot afford counsel. For over 100 years, NLADA has pioneered initiatives that promote access to justice and right to counsel at the national, state, and local levels. NLADA serves as a collective voice for our country's civil legal aid attorneys, public defense providers, and the individuals and communities eligible for these services, and provides advocacy, training, and technical assistance to further its goal of securing equal justice.

SUMMARY OF THE ARGUMENT

The Second Circuit's grant of absolute immunity to the prosecutors in this case sends a disturbing message to lawyers everywhere—be careful whom you choose to represent, because if your client's interests do not align with those of the politically powerful, you risk criminal prosecution simply for providing your client with good-faith legal advice. This decision—coming despite the prosecutors' clear violation of attorney Vinluan's First Amendment rights—will have a chilling effect on the willingness of attorneys to represent the most vulnerable in society. This alone outweighs any policy considerations propounded in support of absolute prosecutorial immunity. Given the

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. *Amicus* has provided notice to all parties of its intent to submit this brief.

general failure of disciplinary procedures to deter prosecutorial misconduct, and the more than adequate protections that would be available to prosecutors through qualified immunity, the Second Circuit's grant of absolute immunity should not stand.

The Court should thus reconsider its decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976), granting prosecutors absolute immunity against Section 1983 damages actions. Not only have intervening developments altered the cost-benefit analysis underpinning that decision, but, on a more fundamental level, the very application of a cost-benefit analysis to the protection of fundamental individual liberties is antithetical to the intent of the founders in enshrining the Bill of Rights in the Constitution, and to congressional intent in enacting Section 1983.

ARGUMENT

A. Under the Second Circuit's Decision, Prosecutors Will Be Free to Violate Attorney First Amendment Rights With Impunity

Petitioner Vinluan provided good-faith legal advice to his clients and nothing in the record suggests otherwise. Nor does the record show that he acted inconsistently with his professional responsibilities or his client's best interests. *See Vinluan v. Doyle*, 873 N.Y.S.2d 72, 82 (N.Y. App. Div. 2009) (noting that "[Respondent Spota] does not dispute that Vinluan acted in good faith"). The advice that Vinluan gave to his clients was thus clearly entitled to First Amendment protection, as the New York Appellate Division recognized in issuing a writ of prohibition to halt Vinluan's prosecution. *Id.* at 83; s*ee also Fla. Bar v.*

Went For It, Inc., 515 U.S. 618, 634 (1995) ("[W]e will accord speech by attorneys on . . . matters of legal representation the strongest protection our Constitution has to offer.").

By granting Respondents Spota and Lato absolute immunity from suit under Section 1983, the Second Circuit not only denied Vinluan a remedy for the violation of his First Amendment rights, it also exempted Respondents from consequences for their commission of this constitutional violation. Consequently, it signaled to the prosecutorial community at large that there is no need to fear Section 1983 damages actions for the initiation of similar unconstitutional prosecutions. *C.f.*, *Imbler v. Pachtman*, 424 U.S. 409, 442 (1976) (White, J., concurring) ("[L]iability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which § 1983 was enacted.").

According to the Second Circuit, all a prosecutor need do to avoid Section 1983 liability for initiating an unconstitutional prosecution is to cite to "any relevant criminal statute . . . that may have authorized prosecution for the charged conduct." *Anilao v. Spota*, 27 F.4th 855, 864-65 (2d Cir. 2022) (internal quotation omitted). And, as the court stressed, this is the case regardless of whether the prosecution was initiated "in the absence of probable cause [or] even if [the prosecutor's] conduct was entirely politically motivated." *Id*. at 868. Therefore, as Judge Chin's dissent recognized, under the majority's logic, "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.* at 877.

The implications of the Second Circuit's decision are deeply unsettling: Because prosecutors are widely authorized by law to levy charges of conspiracy and solicitation, the Second Circuit's absolute immunity standard leaves prosecutors free to use such charges as punishment against attorneys for their exercise of constitutionally protected activities. For example, a prosecutor may use an attorney's provision of good-faith legal advice as the basis for a solicitation charge simply because the prosecutor happens to disagree with that advice, or, more nefariously, because the prosecutor seeks to retaliate against the attorney for his/her decision to advocate on behalf of a client whose interests are not aligned with the interests of the prosecutor or those with influence over the prosecutor.

The typical retort to concerns that absolute immunity incentivizes prosecutors to commit constitutional wrongs is that alternative avenues exist to punish prosecutors who violate constitutional rights. Indeed, in granting prosecutors absolute immunity for their actions in criminal prosecutions, this Court in *Imbler* found significant the availability of safeguards other than Section 1983 damages actions "to deter misconduct or to punish that which occurs." 424 U.S. at 427-29. Such safeguards purportedly include criminal punishment under 18 U.S.C. § 242 and/or professional discipline. *Id.* at 429; *see also Connick v. Thompson*, 563 U.S. 51, 66 (2011) ("An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.").

The promise of these alternative safeguards, however, has not borne out. Notably, "criminal actions against prosecutors who willfully violate a defendant's constitutional rights . . . are almost never brought," "[n]or are prosecutors typically punished by their supervisors or removed from office." Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2094 (2010). For example, according to a Chicago Tribune investigation, out of 381 nationwide homicide cases in which "defendants [] received new trials because prosecutors hid evidence or allowed witnesses to lie," only one prosecutor was fired (but he was reinstated with back pay after a successful appeal). Ken Armstrong & Maurice Possley, *Part 1: The Verdict: Dishonor*, CHICAGO TRIB., Jan. 11, 1999, https://www.chicagotribune.com/investigations/chi-020103trial1-story.html. And, as the Innocence Project has noted, there has only been a single case in the U.S. "in which a former prosecutor has ever been jailed for misconduct that caused a wrongful conviction." Emma Zack, *Why Holding Prosecutors Accountable is So Difficult*, Innocence Project (Apr. 23, 2020), https://www.innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult.

The use of professional discipline to address constitutional violations also is rare. For example, the Center for Prosecutor Integrity found that, out of a set of 3,625 identified instances of prosecutorial misconduct between 1963 and 2013, public sanctions were imposed in only 63 cases (less than 2%), and only 14 of those involved a suspension or disbarment from practice. *An Epidemic of Prosecutor Misconduct*, CTR.

FOR PROSECUTOR INTEGRITY (2013), http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf (last visited Jan. 4, 2023). Indeed, "virtually every commentator has criticized the absence of professional discipline of prosecutors, even in cases of obvious and easily provable violations, and even in cases in which a court has issued a stinging rebuke of the prosecutor." Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, Amicus at 33, (2010), http://digitalcommons.pace.edu/lawfaculty/635/ (collecting law review articles). Moreover, there is reason to believe that much prosecutorial misconduct is never even referred for disciplinary action. *See, e.g.*, Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U.L. REV. 623, 651 (2017) (explaining that "defense lawyers who witness or catch prosecutors overstepping legal and ethical boundaries" rarely refer these cases to the bar, "in part because of a fear of retaliation against them personally or against subsequent clients.").

That the safeguards identified in *Imbler* have proved ineffective at punishing (and thereby deterring) prosecutorial misconduct is reason enough for this Court to reconsider its grant of absolute immunity for prosecutors from liability in Section 1983 damages actions. *C.f.*, *Cleavinger v. Saxner*, 474 U.S. 193, 202, 204-06 (1985) (declining to extend absolute immunity to members of a prison disciplinary committee in part because of the absence of "safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct").

B. The Second Circuit's Decision Will Have a Chilling Effect on the Practice of Law

The New York Appellate Division recognized the chilling effect that Respondents' unconstitutional prosecution of Vinluan may have on the practice of law:

> [I]t would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. The potential impact of allowing an attorney to be prosecuted [for acting as Vinluan did is] profoundly disturbing. A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct.

Vinluan, 873 N.Y.S.2d at 83.

But, by halting the unconstitutional prosecution against Vinluan, the Appellate Division merely stopped the ongoing wrong inflicted upon Vinluan through the ***maintenance*** of the prosecution; it did not undo or otherwise remedy the past constitutional injury that Vinluan suffered as a result of the ***initiation*** of the prosecution. *See, e.g.*, *Laskar v. Hurd*, 972 F.3d 1278, 1292 (11th Cir. 2020) ("The mischief is done by the arrest and disgrace caused by a charge of crime, and by the expense and annoyance attending

the proceeding. A discharge without a trial does not destroy the effect of the mischief." (internal quotations omitted)).

Where a remedy is sought for a completed constitutional violation, "it is damages or nothing." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring); *see also id.* at 395 (explaining that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty"). Because the Second Circuit denied Vinluan a right to damages under Section 1983, and thereby foreclosed the only avenue through which he could remedy the constitutional wrong committed against him, it failed to ameliorate the chilling effect that Vinluan's unconstitutional prosecution will have on the practice of law. *See, e.g.*, *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) ("[W]e have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."). Regrettably, the Second Circuit's decision signals to attorneys that they may face violations of their First Amendment rights—for which they will be permitted no remedy—simply for engaging in client representation and advocacy that is in full compliance with their ethical obligations.

The chilling effect of the Second Circuit's decision is likely to have an outsized impact on society's most vulnerable. For instance, the availability of pro bono and legal aid-based representation for the poor may be reduced, as attorneys who previously provided such representation are discouraged by the risk of an

unconstitutional prosecution that may be brought against them as a result. Thus, the Second Circuit's decision will add to a growing list of considerations weighing against attorney commitment to legal aid or pro bono practice. *See, e.g.*, Jonathan D. Glater, *High Tuition Debts and Low Pay Drain Public Interest Law*, N.Y. TIMES at A1 (Sept. 12, 2003); Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 28-29 (2007) (noting that students "owed so much on their educational loans that they could not afford to live on the low salaries offered by legal aid offices, public defender programs, and other nonprofit organizations, or on the modest salaries offered by many state and local governments"). This is particularly troubling given that low-income households are the most likely to experience legal problems and therefore the most in need of the benefit of legal advice and representation. *See, e.g.*, Paul Prettitore, *Do the Poor Suffer Disproportionately From Legal Problems?*, THE BROOKINGS INSTITUTION (Mar. 23, 2022), https://www.brookings.edu/blog/future-development/2022/03/23/do-the-poor-suffer-disproportionately-from-legal-problems/.

Attorneys may also be less likely to represent clients whose interests are contrary to those of the politically powerful. In particular, attorneys may be deterred from representing clients seeking to challenge any of the multitude of laws that have been enacted as a result of pressure exerted on legislatures by special interest groups, out of a fear of retaliatory prosecution. *See, e.g.*, Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 CHAP. L.

REV. 173, 173 (2003) ("Washington D.C. and the state capitols are filled with lawyers and lobbyists, who work tirelessly to ensure that the special interests they represent will benefit from the myriad new laws and regulations that are passed each year."). Such laws, while providing benefits to the special interests that lobbied for their passage, are often to the detriment of those with less political power, who may seek to challenge them as violative of their fundamental rights. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217 (5th Cir. 2013) (ruling in favor of a group of Benedictine monks who had challenged, as unconstitutional, rules issued by the Lousiana State Board of Funeral Directors "granting funeral homes an exclusive right to sell caskets," which prevented the monks from selling their homemade caskets); *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (finding unconstitutional a licensing scheme that "was designed to favor economically certain constituents at the expense of others similarly situated"). When such a challenge occurs, the impacted special interests undoubtedly are highly motivated to ensure that the benefits they are receiving are not lost. *See, e.g.*, Simpson, *supra*, at 174 (identifying multiple cases in which individuals have challenged laws that have infringed upon their rights to "property and economic liberty," while at the same time "directly benefit[ing] some powerful or entrenched private interest," and noting that "[i]n several of them, the private interests intervened in the cases to defend the laws").

The Second Circuit's decision offers special interest groups an attractive option for quashing such challenges: Just as Sentosa was allegedly able to persuade Respondent Spota to initiate prosecutions

against Petitioners, special interest groups may exert pressure on and ultimately persuade prosecutors to retaliate, through the initiation of an unconstitutional prosecution, against anyone challenging a law that is beneficial to the special interest group. Indeed, as James Madison wrote: "Whenever there is an interest and power to do wrong, wrong will generally be done." *Letter from James Madison to Thomas Jefferson* (Oct. 17, 1788), *in* James Madison: Writings 418, 421 (Jack N. Rakove ed., 1999).

C. The Court Should Reconsider Absolute Prosecutorial Immunity

1. The Protection Afforded to Constitutionally-Guaranteed Rights Should Not Be Subjected to a Cost-Benefit Analysis

In *Imbler*, this Court relied on common law tort principles to justify granting prosecutors absolute immunity from civil liability for violations of constitutional rights. 424 U.S. at 427. In particular, the Court engaged in a cost-benefit analysis that balanced the right of a defendant to meaningful redress, on the one hand, against "the broader public interest" that benefits from "the vigorous and fearless performance of the prosecutor's duty," on the other. *Id.* And in so doing, the Court also borrowed from the common law by relying on Judge Learned Hand's reasoning for invoking prosecutorial immunity to shield prosecutors from suit for the common law tort of malicious prosecution, to justify immunity for prosecutors facing Section 1983 damages actions: "In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to

subject those who try to do their duty to the constant dread of retaliation." *Id.* at 428 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

There are multiple reasons, however, to rethink the Court's application of common law tort principles to limit the protections offered by Section 1983.

First, "a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right." *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring), *overruled on other grounds, Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

The Bill of Rights was added to the Constitution to expressly guarantee protection for those individual liberties deemed by the founders to be fundamental. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."). Because absolute immunity "does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," it is wholly inconsistent with the guaranteed protection of constitutional rights provided by the Constitution. *Imbler*, 424 U.S. at 427; *see also Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 554 (1866) ("A right without a remedy is as if it were not."); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly

cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

Second, in enacting Section 1983, Congress was not seeking to federalize state tort law. *See, e.g.*, *Briscoe v. LaHue*, 460 U.S. 325, 349 (1983) (Marshall, J., dissenting); *see also* Cong. Globe, 42d Cong., 1st Sess. App. 79 (1871) (remarks of Rep. Perry emphasizing, during the debates over Section 1983, that "[a]ll the injuries, denials, a privations," which demand a federal remedy, "are injuries, denials, and privations of rights and immunities under the Constitution and laws of the United States. They are not injuries inflicted by mere individuals or upon ordinary rights of individuals"). Rather, "Congress 'intended to give a broad remedy for violations of federally protected civil rights.'" *Briscoe*, 460 U.S. at 349 (Marshall, J., dissenting) (quoting *Monell*, 436 U.S. at, 685).

Notably, unlike common law tort doctrine, Section 1983 was specifically aimed at public officials, and was designed to "protect[] constitutional rights by restricting the previously existing powers and privileges of state and local officials." David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev. 497, 523-24 (1992); *see also Monroe*, 365 U.S. at 172 (explaining that the central purpose of Section 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."); Cong. Globe, 39th Cong., 1st Sess. 1758 (1866) ("Who is to be punished? . . . . I admit that a ministerial officer or a judge, if he acts corruptly or viciously in the execution or under

color of an illegal act, may be and ought to be punished."). Thus, the importation of immunities that were "designed to minimize the extent to which common-law principles unintentionally impinged on official prerogatives" into Section 1983 is particularly peculiar, given that Section 1983 "was primarily intended to prevent the abuse of those [official] prerogatives." Achtenberg, *supra*, at 524; *see also Briscoe*, 460 U.S. at 348 (Marshall, J., dissenting) ("[I]n enacting § 1983, Congress sought to create a damage action for victims of violations of federal rights; absolute immunity nullifies 'pro tanto the very remedy it appears Congress sought to create.'" (quoting *Imbler*, 424 U.S. at 434 (White, J., concurring))).

Finally, constitutional rights are, by their very nature, difficult to quantify, and thus particularly ill-suited to cost-benefit analyses. *See, e.g.*, Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1750 (1989) (explaining that a "cost-benefit analysis [] tends to devalue constitutional interests").

2. Qualified Immunity Is More Than Adequate to Address Any Policy Concerns Underlying *Imbler*

As Petitioners note, several developments have occurred in the intervening years since this Court's *Imbler* decision that suggest that the protection afforded to government officials through qualified immunity would be more than sufficient to protect a prosecutor from "the threat of § 1983 suits" diverting "his energy and attention . . . from the pressing duty of enforcing the criminal law." *Imbler*, 424 U.S. at 424-25; Pet. at 33; *see also Burns v. Reed*, 500 U.S. 478, 494 (1991)

(explaining that, as the Supreme Court's caselaw has developed, qualified immunity has become "more protective of officials than it was at the time that *Imbler* was decided"). Indeed, this Court has recognized that qualified immunity now provides "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* at 494-95 (internal quotations omitted).

In *Harlow v. Fitzgerald*, for example, this Court moved from a qualified immunity standard in which immunity could only be invoked by an official if the official had held a subjective belief in the legality of his actions, to one in which qualified immunity may be invoked whenever an official's alleged misconduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). Thus, unlike when *Imbler* was decided, qualified immunity can now be used to "defeat[] a suit at the outset, so long as the official's actions were within the scope of the immunity." *Imbler*, 424 U.S. at 419 n.13.

Additionally, in *Heck v. Humphrey*, this Court significantly limited the number of Section 1983 damages actions that can be brought, by requiring that "a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. 477, 486-87 (1994).

And, the amendments made in 1983 to the Federal Rules of Civil Procedure, which "increased the likeli-

hood that vexatious and frivolous litigation would result in sanctions against a plaintiff instead of an extorted settlement award," proved "so significant" that Congressional reform was needed "to decrease the incentives to file for sanction." Douglas J. McNamara, *Buckley, Imbler and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1179-80 (1996).

Notably, because absolute immunity is in tension with the fundamental rule that rights must have corresponding remedies, this Court has been "quite sparing in [its] recognition of absolute immunity and ha[s] refused to extend it any further than its justification would warrant." *Burns*, 500 U.S. at 487 (1991) (internal quotations and citations omitted). Consistent with this, the Court should overrule *Imbler* and instead rely on qualified immunity in its place.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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