No. 22-539

IN THE

Supreme Court of the United States

JULIET ANILAO, *et al.*,

Petitioners,

—v.—

THOMAS J. SPOTA, III, INDIVIDUALLY AND AS DISTRICT ATTORNEY OF SUFFOLK COUNTY, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

SUSAN A. FLYNN
Counsel of Record
DENNIS M. COHEN
SUFFOLK COUNTY ATTORNEY'S OFFICE
H. Lee Dennison Building
100 Veterans Memorial Highway
PO Box 6100
Hauppauge, New York 11788
(631) 853-4049
susan.flynn@suffolkcountyny.gov

Attorneys for Respondents County of Suffolk and Karla Lato as the Administrator of the Estate of Leonard Lato

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

PRELIMINARY STATEMENT

The concept of common law immunities spans decades if not centuries. The issue of whether traditional common law immunities were abrogated by the Civil Rights Act of 1871 (and § 1983 of that Act) was considered by the United States Supreme Court nearly 70 years ago. See, *Tenney v. Brandhove*, 341 U.S. 367(1951). In *Tenney* the Court concluded that immunities "well grounded in history and reason" had not been abrogated "by covert inclusion in the general language" of §1983. The decision established that §1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.

In 1976 the Supreme Court re-affirmed that absolute prosecutorial immunity barred §1983 lawsuits against prosecutors when they act within the scope of their prosecutorial duties. *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976). In subsequent decisions this Court defined the contours of prosecutorial immunity, *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), and recognized there may be times, when acting in an investigatory capacity, a prosecutor may not be entitled to absolute immunity. *Burns v. Reed*, 500 U.S. 478 (1991). At no time has the Supreme Court, or any Circuit determined that the doctrine of absolute prosecutorial immunity has been abrogated by the statutory provisions § 1983.

Here, Petitioners ask this Court to simply disregard the entire body of law (and its underlying rational) that has served as the foundation for the traditional immunity protections afforded to prosecutors for years. This Court should deny such a radical requeset after so many years of established precent from this Court.

Moreover, Petitioners seek to have the Court abandon the absolute immunity doctrine by essentially arguing that the doctrine is unfair and leaves potential plaintiffs with no remedy for purposeful bad acts of overzealous prosecutors. However, as Petitioners must recognize, a remedy will lie where a prosecutor engages in unconstitutional conduct outside of the judicial phase that results in an individual suffering a constitutional deprivation during the the "prosecutorial" phase. It was this exact theory of causation that Judge Bianco relied upon in permitting some of the Petitioners' claims against ADA Lato to survive the initial motion to dismiss.[1] Petitioners provide no sound basis for this Court to upend traditional common law immunity protections that have existed for years and their request to do so should be denied.

Further, the Petitioners' arguments before this Court regarding the infirmity of the absolute immunity doctrine are arguments that are being raised for the first time. The Second Circuit, after recognizing a "narrow limitation to the scope of absolute immunity in §1983 actions" where the prosecutor acts without jurisdiction, noted that the governing principals of absolute immunity are well established and "are not questioned by the parties on

---

[1] In permitting a portion of the complaint to proceed, the Court noted that, although the alleged violation of presenting false information to the grand jury itself was protected by absolute immunity, if the false evidence was created during the investigative stage (and therefore was not entitled to absolute immunity) a claim could lie where that evidence was then used during the grand jury presentation and if it then resulted in a constitutional violation. (App. 173a at fn. 18). It was this allegation, however, that the Court later determined on summary judgment was not supported by the evidence in the record.

appeal." Rather, the Petitioners only argued before the Second Circuit that the "very narrow exception to absolute imunity" applied. App. 15a-16a.

REASONS FOR DENYING THE PETITION

I. THE SECOND CIRCUIT'S DECISION IS BASED ON SOUND PRECEDENT REGARDING ABSOLUTE IMMUNITY

"It is by now well established that "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution," *Imbler,* 424 U.S. at 410, "is immune from a civil suit for damages under § 1983," *id.* at 431, 96 S.Ct. 984." *Shmueli v City of New York,* 424 F.3d 231, 236 (2d Cir. 2005).

This Court has previously stated that although §1983 does not contain, on its face, any defense of immunity, certain immunities were "so well established in 1871" (when §1983 was enacted) that Congress would have specifically abrogated those immunities had it had the specific intent to abolish them. *Buckley v. Fitzsimmons,* 509 U.S. 259, 268 (1993). This Court found that officials who perform "special functions," similar to functions that would have been immune at the time that Congress enacted §1983, "deserve absolute protection from damages liability." *Id. Buckley* did not create a new basis for immunity, but explicitly recognized and affirmed centuries of precedent.

In 1951 this Court recognized a long-standing immunity for legislators acting in the sphere of legitimate legislative activity. *Tenney v. Brandhove,*

341 U.S. 367. Noting that §1983 does not contain an absolute privilege protecting legislators from damages arising out of the performance of their official duties, this Court nonetheless felt constrained to find that the statute did provide such a privilege. "We cannot believe that Congress…would impinge on a tradition so well grounded in history and reason by covert inclusion" in the language of the statute. *Id.* 376. This decision establishes that §1983 is to applied in harmony with general principles of tort immunities and defenses rather than in derogation of them.

Further, as illustrated by *Buckley,* prosecutors are not always absolutely immune for their actions, leaving aggrieved persons without a remedy. The actions of a prosecutor are not always cloaked with absolute immunity. That only occurs when they act as an "officer of the court." If a prosecutor's misdeeds occur while he is acting as an investigator, he is entitled only to qualified immunity. *Burns v. Reed,* 500 U.S. 478 (1991) (prosecutor's act of giving advice to police entitled to only qualified immunity).

Petitioners, in the proceedings below, made that very same argument—that Spota and Lato acted unconstitutionally during the "investigative" phase of the prosecution. Petitioners, however, could not produce evidence to support that claim. Having failed to prove their case under existing precedent, Petitioners raise a new argument before this Court--that the well-established doctrine of absolute immunity should be "reconsidered" and abrogated or abolished.

In 1976 the Supreme Court re-affirmed that absolute prosecutorial immunity barred §1983 lawsuits against prosecutors when they act within the

scope of their prosecutorial duties. *Imbler v. Pachtman*, 424 U.S. 409.

In *Imbler* this Court once again recognized that §1983 "on its face admits of no immunities" and that "some have argued that it should be applied as stringently as it reads. But that view has not prevailed." *Id.* 417. Acknowledging that although *Imbler* was the first case before this Court to address the §1983 liability of a prosecuting officer, this Court observed that the issue had been addressed "many times" by the Courts of Appeal who were "virtually unanimous" in holding that a prosecutor enjoys immunity from §1983 liability when he acts within the scope of his prosecutorial duties. *Id.* 420. Forty-seven years ago, this Court recognized the already widespread common law support for the doctrine of absolute immunity. This is in stark contrast to the arguments of the Petitioners, who attempt to classify the underpinnings of the doctrine as "atextual" and "ahistorical." As stated explicitly in *Imbler,* "the common-law rule of immunity is thus well settled" and the prosecutor is "entitled to the same absolute immunity under §1983 that the prosecutor enjoys at common law." *Id.* 424, 428.

Numerous Circuit Courts have applied absolute immunity and recognized that it is "well-established by decisional law in the Supreme Court" and the circuits. *Wearry v. Foster,* 33 F. 4th 260, 265 (5th Cir. 2022). *See, Anilao v. Spota,* 27 F. 4th 855, 864 (2d Cir. 2022)("our cases make clear that prosecutors enjoy absolute immunity for those prosecutorial activities intimately associated with the judicial phase of the criminal process"); *Kent v. Cardone,* 404 Fed. Appx. 540, 542 (2d Cir. 2011)(prosecutors are entitled to absolute immunity in the judicial phase); *Jones v. Cummings,* 998 F.3d 782, 788 (7th Cir. 2021)(granting

absolute immunity to prosecutors after noting that the only question was whether the defendants were engaged in core prosecutorial functions. "We need not belabor the point."); *Chilcoat v. San Juan County,* 41 F. 4th 1196, 1208 (10th Cir. 2022) (recognizing absolute immunity under the *Imbler* decision, which was "guided by the immunity historically conferred at common law…")

II. THE PROSECUTORS HERE DID NOT ACT "WITHOUT JURISDICTION"

The Petitioners argue that this case falls within the narrow exception to absolute immunity that occurs when a prosecutor acts without a colorable claim or authority and without jurisdiction. App. 10-24.

> "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in

> him." *Gregoire v Biddle*, 177 F.2d 579, 581(2d Cir. 1949).

The fatal flaw with Petitioners' argument regarding jurisdiction could not be more eloquently or simply stated than as stated above by Judge Learned Hand. There can be no argument but that the prosecutors here had the authority to prosecute the same charges that were leveled against the Petitioners. Prosecuting those offenses was well within the jurisdiction of Lato and Spota. Those acts do not become extra-jurisdictional even if they are later found to be wrong, acts taken for an improper purpose, or even if they were later found to be unconstitutional.

Petitioners urge that the actions of the prosecuters here cannot fall within the scope of their authority because the acts were unconstitutional. This argument has been soundly rejected because "any allegation that an official, acting under color of law, has deprived someone of this rights necessarily implies that.. the official exceeded his authority." The proper test is whether the act performed was "manifestly or palpably beyond his authority." *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 678 (9th Cir. 1984), citing *Briggs v. Goodwin*, 569 F. 2d 10, 15-16 (D.C.Cir.1977), cert. denied, 437 U.S. 904 (1978).

Further, the Petitioners' position turns the application of immunity on its head. Since immunity gives an official immunity from suit, not only immunity from damages, this Court "has repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation."

Hunter v. Bryant, 508 U.S. 224 (1991). If the question of immunity were to turn on the issue of jurisdiction—as framed by the Petitioners—an early

resolution of immunity would under most circumstances be impossible because the issue of immunity would turn on the validity of the charges, not the more simple dichotomy of whether the prosecutor was acting as a prosecutor or investigator.

The jurisdictional issue was carefully considered by the Second Circuit in this matter. As recognized in *Barr v. Abrams,* 810 F.2d 358, 361 (2nd Cir. 1987), the Second Circuit noted that a prosecutor is entitled to absolute immunity unless he proceeds "in the clear absence of all jurisdiction" and "without any colorable claim of authority." App. 13a. Barr was investigated by the New York State Attorney General's Office under the New York General Business Law. When the Attorney General procured an order directing Barr to appear for an examination under oath, Barr refused to appear for the examination. The Attorney General ultimately obtained an order directing Barr to appear. Barr did, but refused to answer any questions, invoking his 5th Amendment Rights.

The Attorney General then filed a criminal information charging Barr with contempt. The Criminal Court issued an arrested warrant and Barr was arrested. Ultimately, the charges were dismissed and Barr filed an action under §1983. One of Barr's arguments was that the Attorney General acted without jurisdiction and that the state prosecutors were not entitled to absolute immunity.

The Second Circuit rejected Barr's argument, finding that the Attorney General was empowered to prosecute violations of the Business Law, and the authority to file the criminal contempt charge flowed from that authority. *Id.* at 362. The Court in *Barr* refused to give *Imbler* a "crabbed reading," noting that to hold that a "prosecutor is without absolute

immunity the moment he strays beyond his jurisdictional limits, would do violence to [Imbler's] spirit." *Id.* at 361. Rendering *Barr* indistinguishable from the present case is the fact tht a state court dismissed the contempt charge against Barr. *Id.* at 362.

Similarly, the Circuit Court in *Shmueli v. City of New York*, 424 F. 3d 231 (2d Cir. 2005) rejected plaintiff's argument that his complaint set forth a cognizable cause of action under the "lack of jurisdiction" exception to absolute immunity because it contained allegations that the prosecutors knew, at the postarraignment stage, that the charges against plaintiff were false and that plaintiff was innocent. "In sum, the postarraignment events alleged in the amended complaint consisted only of the prosecution of Shmueli in a court of competent jurisdiction on charges that were within the ADA's authority to bring." *Id.* at 238.

While it may be true that it is difficult for an aggrieved party to overcome absolute immunity based on the narrow jurisdictional exception, there are cases where such claims are allowed, as set forth in Petitioners' brief. Meritorious claims are not foreclosed by the exception. The facts here are, however, are not remotely analogous to facts in the cases where the jurisdictional exception was applied.

The District Attorney is broadly empowered, by statute, to prosecute crimes. "[I]t shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county...for which he has been elected.." New York State County Law §700(1). Unlike the frigate captain in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); the justice of the peace in *Wise v Withers*, 7 U.S. (3 Cranch)

331 (1806); and the liquor official in *Bates v. Clark*, 95 U.S. 204 (1877), who could point to no statutory authority for the actions they took, the prosecutors in this case were doing what the law gave them jurisdiction to do--- prosecute.

The Petitioners are incorrect in stating that under the Second Circuit's rule, because those officials were "purporting" to act under statutory authority, they would be entitled to absolute immunity. Petitioners bring to this Court's attention no case where an official who actually acted outside the bounds of statutorily granted jurisdiction was granted immunity simply because they *claimed* they had statutory jurisdiction. Petitioners bemoan not so much the well-established law governing application of the exception, as the conclusion that the facts in this case do not justify its application.

III. ABSOLUTE IMMUNITY IS AN IMPORTANT LEGAL CONCEPT THAT SERVES AN IMPORTANT PUBLIC PURPOSE

Petitioners argue (for the first time before this Court) that absolute prosecutorial immunity should be "reconsidered" and *Imbler* overruled.

The rationale behind the absolute immunity concept is deep rooted and of the utmost importance. Prosecutors are entitled to immunity for the same reason that judges are entitled to immunity.

> "The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the

> prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter a fairer law enforcement." *Pearson v. Reed*, 6 Cal.App.2d 277, 287, 44 P.2d 592, 597 (1935)." *Imbler v Pachtman*, 424 US 409, 423-24 (1976).

While the application of the absolute immunity doctrine may, in some circumstances, leave an aggrieved person without a remedy, the purpose behind the immunity serves the larger purpose of freeing judges and prosecutors to act "upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 80 U.S. 335, 347 (1871). An official without this freedom would expose the official to "liability to answer to everyone who might feel himself aggrieved by the action" of the official. *Id.*

A prosecutor, like a judge, is required to "disappoint some of the most intense and ungovernable desires that people can have." *Forrester v. White,* 484 U.S. 219, 226 (1988). And prosecutors who were personally liable for erroneous decisions would be subject to an "avalanche of suits, most of them frivolous but vexatious" that would provide powerful incentives to "avoid rendering decisions likely to provide such suits." *Id.* 227. "The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication." *Id.*

CONCLUSION

The Writ should be denied. The Second Circuit properly found that the facts in this case do not fall into the narrow jurisdictional exception to the doctrine of absolute immunity. Further, the doctrine of absolute immunity performs an important public and legal function and should not be abrogated or overruled. For the same reasons, this Court's decision in *Imbler v. Pachtman*, 424 U.S. 409, 420 (1976) should not be overruled.

Dated: March 20, 2023

Respectfully submitted,
Susan A. Flynn
Counsel of Record
Dennis M. Cohen
Suffolk County Attorney's Office
H. Lee Dennison Building
100 Veterans Memorial Highway
PO Box 6100
Hauppauge, New York 11788
(631) 853-4049