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

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INTRODUCTION

The constitutional violations underlying both questions presented are largely ignored by respondents. They don't really defend that they had a colorable basis for concluding the First Amendment permitted them to prosecute a lawyer for giving good-faith legal advice and filing a federal discrimination claim, or that the Thirteenth Amendment allowed prosecuting workers for choosing not to remain involuntarily at an abusive at-will job.

Yet respondents do defend evading any accountability based on the Second Circuit's expansive theory that absolute prosecutorial immunity applies whenever a prosecutor cites a statute generally within his ambit, even if there is an obvious legal barrier or no factual basis to the prosecution. On that view, a prosecutor can charge political foes with crimes selected at random from the penal law. He can charge aggressive defense counsel with conspiracy. Indeed, this Court could declare a New York law unconstitutional on Wednesday, *cf. Roman Cath. Diocese of Brooklyn* v. *Cuomo*, 141 S. Ct. 63 (2020), and on Thursday the prosecutor could indict a pastor for a (constitutionally protected but nominally unlawful) gathering of her congregation. So long as the prosecutor avoids administrative mistakes—for instance, the New York prosecutor doesn't charge someone under a New Jersey statute—he cannot be held to account.

Against the Second Circuit's extraordinary rule stands two centuries of this Court's precedents and the common law, which together refuse immunity to officials who "failed to observe obvious statutory or constitutional

limitations on [their] powers" and which require a searching inquiry into the legal basis for authority. *Butz* v. *Economou*, 438 U.S. 478, 494 (1978); *see* Pet. 11-21. Respondents don't really contest this longstanding legal tradition, and it is irreconcilable with the Second Circuit rule they defend and the egregious abuses it sanctions.

And if the Second Circuit is right—or it's even a close call—then the Court should reconsider absolute prosecutorial immunity wholesale. Respondents do nothing to rebut petitioners' and amici's arguments that the doctrine is atextual, ahistorical, and undermined by subsequent experience and developments in the law. The modern qualified immunity doctrine would serve all *Imbler*'s policy goals without giving prosecutors an unjustified heightened immunity over police officers and other officials.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION TO CORRECT THE SECOND CIRCUIT'S VIOLATION OF SUPREME COURT PRECEDENT.

A. The Second Circuit's Decision Contradicts This Court's Precedents And The Common Law.

1. Two centuries of this Court's decisions have held official immunity—including absolute immunity—unavailable to officers who acted without a colorable claim to authority, including if they surpass obvious constitutional limits. Pet. 12-17. Spota (at 11) "generally agree[s] with

Petitioners' recitation of this Court's statements," and Lato has nothing to say disputing this common-law tradition.

2. So whether the decision below violated Supreme Court precedent turns on whether that precedent is consistent with the Second Circuit's rule that prosecutions are entitled to absolute immunity whenever the prosecutors cite a statute, no matter the legal or factual basis. *See* Pet. 18-20.

a. Spota seems to recognize the Second Circuit's rule cannot be squared with this Court's precedents and so denies that the Second Circuit applied a statute-citing rule. Spota Br. 3, 9. Yet the passage Spota relies on (at 9) embraces that rule. It equates "the absence of all authority" with there being "no statute authoriz[ing] the prosecutor's conduct" and says absolute immunity applies even for a "prosecutor who 'files charges he or she knows to be baseless.'" Pet. App. 15a (quoting *Ashelman* v. *Pope*, 793 F.2d 1072, 1076-77 (9th Cir. 1986) (en banc)). Spota never articulates what alternative rule he believes the Second Circuit applied.

Moreover, the court of appeals' application reflects rote statute-citing. It was enough that respondents were, in the abstract, "authorized by statute to prosecute" the crimes charged. *Id.* at 19a-20a. The court refused to consider whether respondents "knew or should have known at the outset" that the First and Thirteenth Amendments clearly limited their prosecutorial authority, saying such considerations do not "relate to * * * the defendants' statutory authority." *Id.* at 20a-21a.

Just as important is what's *not* in the Second Circuit's opinion: any suggestion that respondents had a colorable claim that the First and Thirteenth Amendments left them authority to prosecute a lawyer for offering good-faith legal advice or nurses for quitting an abusive at-will job. The Second Circuit's rule was exactly what Judge Chin's dissent said it was (and which the majority did not disavow): 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.[1]

b. Lato belies Spota's efforts to evade the Second Circuit's plain language by forthrightly embracing its statute-citing rule: He says (at 9) absolute immunity is automatically triggered here because "[t]he District Attorney is broadly empowered, by statute, to prosecute crimes." Indeed, Lato points out (at 8-9) that the Second Circuit has long applied the same statute-citing test. *See Barr* v. *Abrams*, 810 F.2d 358, 361-362 (2d Cir. 1987).

How does Lato square that automatic-immunity rule with this Court's precedents? He suggests (at 9-10) that officials lose immunity only when they are incorrectly "purporting" or incorrectly "*claimed*" to exercise authority, which Lato distinguishes from "doing what the law gave them jurisdiction to do."

If these semantic distinctions even have any difference, it can't be reconciled with the three cases Lato cites.

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[1] Spota suggests (at 2, 11-13) looking through to the district court's decision. But it's the Second Circuit's judgment at issue, and anyway the district court applied the same statute-citing rule. *E.g.*, Pet. App. 167a, 187a-188a.

In *Little* v. *Barreme*, 6 U.S. (2 Cranch) 170, 177-179 (1804); *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331, 337 (1806); and *Bates* v. *Clark*, 95 U.S. 204, 209 (1877), the defendant officials were all, to use Lato's words, "doing what the law gave them jurisdiction to do": seizing ships, collecting militia fines, and impounding alcoholic beverages. But they nevertheless lost immunity when they "failed to observe obvious statutory or constitutional limitations on [their] powers." *Butz*, 438 U.S. at 494.[2] The First and Thirteenth Amendments limited respondents' authority just as much as the statutory restrictions in *Barreme*, *Wise*, and *Bates*. The same scope-of-authority limitation to immunity should have applied.

B. It Is Important This Court Provide Guidance On Applying The Scope-Of-Authority Limitation.

1. This Court hasn't taken a case since *Imbler* to elaborate how the scope-of-authority limitation applies to prosecutorial immunity, nor has the Court done much in the modern era generally to explain the limitation. Pet. 21-22. Respondents don't disagree. Spota amplifies the problem by emphasizing (at 2, 7-8, 16-17) the New York Appellate Division ruling did not distinguish whether respondents were wholly "without" jurisdiction or merely "in

[2] Even in the petition's cases where immunity was granted, the Court made a searching analysis of legal authority and did not just ask whether the defendants were generally empowered to take the challenged actions. *See* Pet. 14-17.

excess of" jurisdiction.[3] That court didn't have to because either was sufficient to prohibit the unconstitutional prosecution, and there was no need for it to consider the distinct federal immunity question. But Spota's emphasis on the hazy distinction—shared by the courts below—illustrates the need for greater clarity.

In a similar vein, respondents do not disagree that there is significant conflict in the lower courts about how to apply the scope-of-authority limitation. *See* Pet. 22-23. Spota accentuates the confusion by pointing (at 9) to a Second Circuit rule that the limitation is triggered when a prosecutor has "intertwined" a prosecution "with other unauthorized conduct, such as demanding a bribe." But the Second Circuit itself has acknowledged this escape hatch splits from at least three circuits. *See* Pet. 23; *Doe* v. *Phillips*, 81 F.3d 1204, 1213 (2d Cir. 1996) (Jacobs, J., concurring in part and dissenting in part).

Guidance from this Court about how to apply the scope-of-authority limitation is sorely needed.

2. Lato argues (at 7-8) that properly following Supreme Court precedent would make "an early resolution of immunity * * * impossible." But as cases applying the modern objective qualified-immunity standard reveal, courts are plenty capable of applying law to facts early in litigation to determine whether immunity applies. *See* Pet. 20-21, 35-36.

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[3] The Appellate Division never held that there *wasn't* a clear absence of authority, as Spota cursorily suggests citing passages that say nothing of the kind. Spota Br. 2 (citing Pet. App. 256a, 257a, 267a).

The true dire consequences flow instead from failing to enforce the common-law scope-of-authority limitation. Without it, rogue prosecutors may harass anybody they want without constitutional restraint. *See*, *e.g.*, NLADA Amicus Br. 4, 8-11; Anti-Trafficking Amicus Br. 4, 12-13.

II. THIS COURT SHOULD RECONSIDER ABSOLUTE PROSECUTORIAL IMMUNITY.

A. Absolute Prosecutorial Immunity Is Atextual And Ahistorical.

1. Respondents don't defend a textual basis for absolute prosecutorial immunity. Nor can they. Section 1983 "on its face admits of no immunities." Lato Br. 5 (citing *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976)). Jurists of all stripes have called for revisiting *Imbler*'s textual error. Pet. 25-26. This case presents the perfect opportunity.

2. Respondents also fail to defend a historical basis for prosecutorial absolute immunity. Spota (at 13) concedes there is none. Lato, by contrast, argues (at 3) that Section 1983 did not abrogate 1871-era immunities, and thus the immunity must survive. That has at least two fatal errors.

First, Lato never points to any 1871-era basis for absolute prosecutorial immunity. Instead, he relies (at 4-5) on *Imbler* and recent cases from courts of appeals. But this Court has recognized repeatedly that *Imbler* was wrong about the common law. *E.g.*, *Rehberg* v. *Paulk*, 566 U.S. 356, 366 (2012); *Kalina* v. *Fletcher*, 522 U.S. 118, 124 n.11 (1997); *see* Pet. 27. Half the court-of-appeals cases Lato cites say exactly that. *See Wearry* v. *Foster*, 33 F.4th 260,

265 n.2 (5th Cir. 2022); *Chilcoat* v. *San Juan County*, 41 F.4th 1196, 1208 n.16 (10th Cir. 2022). The others simply ignore the common law altogether. *See Jones* v. *Cummings*, 998 F.3d 782, 787-788 (7th Cir. 2021); *Kent* v. *Cardone*, 404 F. App'x 540, 542 (2d Cir. 2011) (unpublished).

Second, Lato's discussion (at 1, 3-4) about *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), which involved legislative immunity, is irrelevant to prosecutorial immunity. Unlike the latter, the former "ha[d] taproots" dating back to "the Sixteenth and Seventeenth Centuries." *Id.* at 372. If *Imbler* had followed *Tenney*'s reasoning, it would have refused to recognize prosecutorial immunity for lacking a "tradition so well grounded in history and reason." *Id.* at 376.

The question is not whether Section 1983 abrogated common-law immunities;[4] it's whether Section 1983 created immunities that didn't exist. At most, prosecutors should enjoy the same sort of immunities that existed at common law in 1871. Those were far from an absolute immunity for even bad-faith prosecutions. Pet. 29-30.

B. The Court Should Overrule *Imbler*.

1. This Court reconsiders precedent when later developments prove the quality of the decision to be weak, the rule unworkable, and the legal landscape changed. *Janus* v. *AFSCME*, 138 S. Ct. 2448, 2478-79 (2018). As the

[4] Although respondents are also wrong that Section 1983 didn't abrogate immunities. The 42d Congress *expressly* did so. Pet. 25 n.5.

petition explained, *Imbler*'s reasoning was atextual and ahistorical, Pet. 31; it has confused lower courts and required baroque line-drawing, *id.* at 32; and qualified immunity or traditional common-law defenses would provide any necessary protection for prosecutors, *id.* at 33. Respondents do not engage with these arguments or those from amici. *E.g.*, NLADA Amicus Br. 14-16.

If anything, respondents confirm the unworkability of prosecutorial immunity. As they make clear, the district court was mired in the doctrinal labyrinth petitioners warned against. *Compare* Pet. 32, *with* Spota Br. 8-9, 14-15. This forced the district court to disentangle respondents' investigatory from prosecutorial functions over nearly a decade of litigation. Spota Br. 8; Lato Br. 2 n.1. That messy inquiry highlights the doctrine's unworkability. *See* Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 Fordham L. Rev. 509, 527 (2011) (collecting cases).

It also reflects the trouble of distinguishing between qualified immunity (for investigations) and absolute immunity (for prosecutions). Here, the proper investigators did the right thing. Pet. 6-7. The nurse-licensing agency and the police concluded that petitioners did nothing wrong. It was only when respondents went over their heads to prosecute the case that petitioners' First and Thirteenth Amendment rights were violated. As this case shows, "absolute immunity gives prosecutors a level of power few officials enjoy." LEAP Amicus Br. 3-6. Forcing plaintiffs to sue less culpable officials or to salami-slice prosecutors' actions—rather that giving all officials the

same qualified immunity—only complicates litigation and frustrates justice.

2. To save *Imbler*, respondents just repeat its original policy justifications. Spota Br. 14 n.3; Lato Br. 10-11. But petitioners already refuted those. Pet. 30-37. So have amici. LEAP Amicus Br. 3-12; NLADA Amicus Br. 14-16. Respondents do not address any of these arguments.

What's more, overruling *Imbler* would not lead to an "avalanche of suits" or parade of horribles. *Contra* Lato Br. 12. Instead, it would "simplify and streamline the law by providing an objective standard"—qualified immunity—that would be uniform for all officials. Johns, *supra*, at 535. Courts are thoroughly familiar with that standard and with resolving qualified immunity questions "at the earliest possible stage in litigation," *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009) (citation omitted), without giving prosecutors a special heightened immunity above the cops on the beat who actually make the difficult split-second decisions that more readily justify immunity. *See Hoggard* v. *Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting denial of certiorari). Countries with similar legal traditions that have rejected absolute prosecutorial immunity have seen no avalanches. *E.g.*, Michael Marin, *The Uncertain Scope of Malicious Prosecution: Insights from Canada*, 24 Tort L. Rev. 80 (2016); *see Nelles* v. *Ontario*, [1989] 2 S.C.R. 170 (Can.) (expressly rejecting *Imbler*'s absolute-immunity rule in favor of common-law and English approach).

III. THIS IS AN EXCELLENT VEHICLE TO CONSIDER THE IMPORTANT QUESTIONS PRESENTED.

1. Respondents do not dispute that the issues presented are purely legal and dispositive. Nor that the petition presents the lead question cleanly and squarely: Are the prosecutors entitled to absolute immunity when they lacked any colorable authority to bring charges? Petitioner Vinluan presents an especially clear-cut case. Every prosecutor should know that the Constitution forbids charging an attorney for good-faith legal advice.

2. In an attempt to muddle that clean issue, respondents suggest the Court dodge the question because there is "alternative" relief that supposedly alleviates the need to hear this case. Spota Br. 18-19. But the suggestions of other remedies are, at best, straw men built to avoid Section 1983's "basic purpose"—"to compensate persons for injuries that are caused by the deprivation of constitutional rights." Anti-Trafficking Amicus Br. 5-6 (quoting *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 307 (1986)). At worst, those "remedies" excuse respondents' flagrant misconduct.

Most astonishing is Spota's chutzpah in suggesting (at 19 n.7) that petitioners should have no Section 1983 remedy because he is in jail for his later and unrelated "conspiracy, obstruction of justice, and witness tampering." Pet. App. 37a n.1. Spota was never held accountable for violating *petitioners*' rights, and the fact that he later violated others' rights exemplifies the need for accountability and deterrence through Section 1983.

Sentosa's settlement also cannot displace petitioners' claims against respondents. *Contra* Spota Br. 16, 19-20. A victim's ability to recover against a defendant does not depend on whether other parties are also liable. If anything, this highlights *Imbler*'s problem of forcing plaintiffs to fish for *someone* to sue when the most culpable defendant is the prosecutor who abused his power. Pet. 32.

As for other remedies, *Imbler*'s hope that alternative safeguards would curb prosecutorial misconduct has proved misplaced. NLADA Amicus Br. 5-6. Less than 0.3% of prosecutorial misconduct results in suspension or disbarment. *Id.* at 5; *see* Pet. 34-36 & n.6.

3. Respondents also suggest, wrongly, that petitioners failed to preserve claims raised in the petition. Most confusingly, Spota suggests (at 16) that petitioners "abandoned" their contention that respondents' unconstitutional prosecution was clearly beyond their power and so they are not entitled to absolute immunity. This issue was the centerpiece of both the Second Circuit's and district court's absolute-immunity holdings and is squarely teed up for review. *See*, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). And the issue didn't arise from nowhere; the courts below expressly recognized that petitioners raised it. *E.g.*, Pet. App. 24a, 183a.

Spota also notes (at 16-17) that petitioners didn't argue that the New York Appellate Division opinion is alone dispositive. That's because it isn't. That court didn't have to consider the federal immunity question. *Supra* pp. 5-6. But, as Judge Chin explained, it's powerful evidence for the scope-of-authority inquiry that a state court found

respondents "did not have authority to commence the prosecution." Pet. App. 45a.

Lato argues (at 2) that petitioners did not preserve their wholesale challenge to absolute prosecutorial immunity. But petitioners strongly criticized the immunity, *e.g.*, C.A. Appellants' Br. 29-30—a criticism shared by the Second Circuit majority, Pet. 9. Pressing the issue further would have been futile and unnecessary because the Second Circuit had no ability to overrule *Imbler*. *See Citizens United* v. *FEC*, 558 U.S. 310, 331 (2010).

* * *

Perhaps the most important point in the petition, never addressed by respondents, is that this case exemplifies what the Reconstruction Congress wanted to remedy when enacting Section 1983: state officials abusing their power to violate the Thirteenth Amendment and to punish a lawyer for seeking federal protection for his clients' rights. Victims of plainly unconstitutional charges by run-amok prosecutors should have recourse. This Court's precedents and the common law's scope-of-authority limitation on immunity would give it to them. And if they don't, then the Court should scrap absolute prosecutorial immunity altogether and vindicate Section 1983's original promise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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