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 Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* LAW ENFORCEMENT ACTION PARTNERSHIP IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Law Enforcement Action Partnership (LEAP) is a nonprofit composed of police, prosecutors, judges, corrections officials, and other criminal-justice professionals who seek to improve public safety, promote alternatives to arrest and incarceration, address the root causes of crime, and heal police-community relations through sensible changes to our criminal-justice system.

Given the backgrounds and experiences of its members, LEAP has a unique understanding of how legal doctrines operate practically. While the parties will no doubt fully address relevant case law on the legal issues raised in this case, the issues raised are also grounded in factual realities about the prosecution of criminal defendants. It is those realities, and how they affect defendants' Constitutional rights and the interests of justice, that LEAP hopes to help the Court understand.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court adopted the doctrine of absolute prosecutorial immunity in the belief that the doctrine was necessary protect the "vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Imbler v. Pachtman*, 424 U.S. 409, 427–28

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[1] All parties received timely notice of this brief. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than amicus curiae, their members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

(1976). A prosecutor's job is indeed essential, and protecting the performance of that job with integrity and dedication is a worthwhile societal interest. The doctrine of absolute immunity, however, has not had the practical effect the Court envisioned.

It is a general truth of human nature that the threat of consequences is necessary to deter bad behavior. It is likewise a general truth of our system of self-government that private litigation customarily serves the deterrence function in contexts where criminal, professional, and political sanctions are inapt or weak corrective measures. In LEAP's experience, such is the case with policing prosecutors. History has shown that *Imbler*'s assumptions were misguided: criminal, professional, and political sanctions do not deter or punish the worst offenders. And rather than freeing the vast majority of prosecutors to do their jobs effectively and in good faith, absolute prosecutorial immunity leaves the worst offenders—those most needing correction—with more license to cross the line.

The current system of absolute prosecutorial immunity fails when prosecutors fail to "seek justice before victory." *Miller v. United States*, 14 A.3d 1094, 1107 (D.C. 2011). For this reason, the Court should reexamine the doctrine of absolute prosecutorial immunity.

ARGUMENT

The immunity offered to prosecutors now is "strong medicine," and its ultimate purpose of protecting prosecutorial discretion is "ill-served by granting it in cases when [a prosecutor] acts without

colorable authority." *Snell v. Tunnell*, 920 F.2d 673, 696 (10th Cir. 1990). For the reasons shown below, prosecutorial immunity as it exists and operates today does not serve the interests of justice. For this reason, the Court should reevaluate the doctrine of absolute prosecutorial immunity and return to the pre-*Imbler* doctrine—that prosecutors can be held civilly liable if they exceed their authority.

I. Absolute Immunity for Prosecutors Does Not Operate in the Way the *Imbler* Court Likely Anticipated.

As discussed below, absolute immunity, though meant to protect prosecutors performing their unquestionably essential duties, in fact gives prosecutors extraordinary power without effective incentives to exercise that power judiciously. This power can be used at various points in a criminal prosecution to deprive a defendant of his or her rights. The checks that exist beyond the civil system have proven inconsistent and ineffective.

a. Absolute Immunity Gives Prosecutors a Level of Power Few Officials Enjoy.

On its own, the prosecutorial discretion implicit in the office of a prosecutor affords enormous power; not just the ability to bring and dismiss charges, but also the ability to seek a plea bargain, grant immunity, and so on. With immunity from civil suit, there are few, if any, checks on this power.

The nature of the adversarial judicial system creates an incentive for prosecutors to wield their power in a certain way by putting a premium on winning, rather than securing a just result, that even

the most idealistic prosecutor would struggle to resist.[2] Prosecutors are more likely to tout and are far more often judged by their record of "wins" (convictions) than the occasions on which they elected not to charge a potential defendant, or to drop charges.[3] As the late prosecutor and Columbia Law professor H. Richard Uviller remarked, "Even the best of the prosecutors—young, idealistic, energetic, dedicated to the interests of justice—are easily caught up in the hunt mentality of an aggressive office."[4]

Unfortunately, empirical measurement of prosecutorial abuse of power is difficult for multiple reasons. Prosecutors can discourage their subordinates from reporting and usually have autonomy over internal policies without judicial oversight.[5] Additionally, many instances of misconduct only come to light during a long trial or an appellate proceeding. But perhaps most problematically, the people who are in the best position to identify misconduct—prosecutors—are very directly disincentivized from doing so.[6]

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[2] Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010).
[3] *Id.*
[4] H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1702 (2000).
[5] David Keenan, Deborah Jane Cooper, David Lebowitz, & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L. J. 203, 209–11 (2011).
[6] *Id.*

The few studies that do exist on the subject of prosecutorial abuses are concerning. A 2003 study by the Center for Public Integrity found "over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals."[7] Another found that between 1973 and 1995, one in six reversed capital cases was the result of "prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty."[8] As remarkable as these numbers appear at first blush, they can be only logical when a prosecutor's influence over the criminal trial process as a whole, beginning to end, is weighed.

b. Prosecutorial misconduct can occur at several essential points in the criminal process.

The justice system and criminal process offer prosecutors frequent opportunities to undermine defendants' rights. Absolute immunity lets them do so with little to no fear of what would otherwise be likely the most effective deterrent.

A prosecutor's job creates multiple moments of power and authority over a life-changing process. This influence begins long before trial. A prosecutor might choose to press charges for political, personal, or prejudicial reasons. They might substitute a higher charge or delay trial as a penalty for a

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[7] *Id.*

[8] James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases*, 1973–1995, 78 TEX. L. REV. 1839, 1846, 1850 (2000).

defendant's behavior or withhold evidence, even sixty years after *Brady v. Maryland*, 373 U.S. 83 (1963).

As serious as that conduct is, misconduct during trial presents a uniquely difficult issue; such timing leaves defendants and their attorneys little chance to respond in strategically effective ways.[9] With that dynamic in mind, prosecutors have intimidated witnesses, *see e.g. United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973); *United States v. Golding*, 168 F.3d 700 (4th Cir. 1999); *Dory v. Ryan*, 25 F.3d 81 (2d Cir. 1994), knowingly used perjured testimony, *see e.g. Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Alcorta v. Texas*, 355 U.S. 28, 31–32 (1957); *Napue v. Illinois*, 360 U.S. 264 (1959), and made impermissible remarks or attempts to introduce improper evidence at trial*, see e.g. Griffin v. California*, 380 U.S. 609 (1965).

II. Alternative Checks on a Prosecutor's Power Are Almost Always Ineffective.

Theoretically, there ought to be other means to deter and punish prosecutorial misconduct beyond civil redress. Leaving to one side that none of these other proffered methods give compensation to a person wronged by a Constitutional violation, the practical dynamics prevent other systematic checks and balances from effectively and consistently curbing corrupt prosecutors.

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[9] Michael D. Cicchini, *Prosecutorial Misconduct at Trial: A New Perspective Rooted in Confrontation Clause Jurisprudence*, 37 SETON HALL L. REV. 335, 340 (2007).

a. The political incentives facing prosecutors do not effectively constrain constitutional violations.

One potential check on a prosecutor is the prospect of losing reelection. But in practical application, this provides little to no threat to a prosecutor determined to violate a defendants' rights.

First, almost all working prosecutors are line employees, not elected officials. Line prosecutors hired by elected prosecutors may abuse the power of their office and never face an electoral check.[10] In all likelihood, voters do not even know who they are, and LEAP is unaware of elected prosecutors who lost election because their staff violated defendants' rights. At best, elections primarily give top prosecutors in the local system an incentive to act in ways acceptable to their constituency, which may not be the same as acting consistently with the law. For instance, one prosecutor in Kansas City faced consistent criticism for unethical behavior but had been hired, not elected, and thus could never be removed from office through public election.[11] This prosecutor eventually became a U.S. Attorney.[12] And

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[10] Lantero, Allison, *The Curtis Flowers Saga: A Failure of Prosecutorial Accountability* (December 20, 2019), *available at*: https://ssrn.com/abstract=3626724 or http://dx.doi.org/10.2139/ssrn.3626724.

[11] *Id.*

[12] Peter J. Tomasek, *Prosecutor Terra Morehead Makes Accountability Seem Impossible*, INTERROGATING JUSTICE (October 8, 2021).

of course, U.S. Attorneys are appointed by the president, not elected.[13]

Forty-five of the fifty states elect their chief local prosecutors.[14] But in these elections, most prosecutors run unopposed; when the incumbent prosecutor runs for reelection, he or she is often the only candidate in the election.[15] According to one study, eighty-five percent of incumbent prosecutors run unopposed in general elections. And when they are opposed, prosecutors win their elections in nearly seventy percent of those races.[16]

Beyond all of this, the public may often struggle, understandably, to measure the performance of a local prosecutor. Court documents are generally publicly available but can be time-confusing to obtain and confusing for laypeople to decipher. Without truly egregious and extremely public misconduct, a challenger to an incumbent prosecutor stands little chance of prevailing because the incumbent, or his or her employees, violated defendants' constitutional rights.

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[13] Ronald F. Wright, *Public Defender Elections and Popular Control over Criminal Justice*, 75 MO. L. REV. at 805 (2010).
[14] *National Study of Prosecutor Elections, The Prosecutors and Politics Project*, U. N.C. (February 2020), at 4, *available at*: https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf
[15] *Id.*
[16] Ronald Wright, *How Prosecutorial Elections Fail Us*, 6 OHIO STATE JOURNAL OF CRIMINAL LAW 581, 593–94 (2009).

b. Professional discipline does not appear to provide effective control of the worst offenders.

All lawyers, including prosecutors, are subject to the sanctions of the states where they are barred. But state bars rarely sanction prosecutors.

There are a variety of reasons for this. First, most ethical rules are not written for prosecutorial misconduct specifically, and thus fail to proscribe it.[17] Additionally, attorney discipline systems give complainants few rights and administrators much discretion, and overlapping policing mechanisms create confusion as to the central disciplinary authority.[18] Practically speaking, judges, prosecutors, and defense attorneys are in the best position to note prosecutorial misconduct, and routinely fail to report it.[19]

The end result is that professional discipline bodies simply are not meant to address prosecutors specifically, and so generally do not. To examine *Brady* violations alone, a five-year, nation-wide study released in 1986 found only nine instances where a state bar considered issuing sanctions and only six instances where they were actually issued.[20] A later update of the study, covering an additional ten-year period, found only seven more cases where discipline

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[17] Keenan et al., *supra* note 5, at 221.
[18] *Id.*
[19] *Id.*
[20] Barkow, *supra* note 2, at 2095.

was sought, and only four where sanctions were issued.[21]

c. Criminal prosecutions of prosecutors are exceedingly rare.

Federal prosecutors may, in their discretion, bring criminal charges against prosecutors who willfully deprive defendants of their rights. 18 U.S.C. § 242. Section 242 requires "willful" conduct, which requires a high showing from the federal prosecutor. *Id.* Such prosecutions happen so rarely that they fail to serve as an effective check to a prosecutor's power.[22]

The first felony case charging prosecutorial misconduct came to a verdict in 1999.[23] All defendants—police officers and prosecutors tried for allegedly framing an innocent man for capital murder—were acquitted.[24] And in one of the few cases in which a prosecutor was found guilty under § 242, the conviction was later used as a mitigating factor in the state disciplinary proceeding. *Brophy v. Comm. on Prof'l Standards*, 442 N.Y.S.2d 818 (N.Y. App. Div. 1981) (finding that a censure rather than license suspension was adequate because the respondent had already "suffered the stigma of a criminal conviction").

It is difficult to discern precisely how many prosecutors have been subject to criminal sanctions for official misconduct, but by all reports, the number

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[21] *Id.* at n. 24.
[22] Lantero, *supra* note 10.
[23] Keenan et al., *supra* note 5, at 217.
[24] *Id.*

is low.[25] Generally, such sanctions are seen as an overly harsh punishment for "technical" errors made by people working demanding and stressful jobs.[26] But as demanding and stressful as their jobs may be, prosecutors' technical errors can change the course of a defendant's future.

One of the above-mentioned cases in particular, *United States v. Golding*, illustrates how prosecutors can engage in unequivocal misconduct—misconduct that is labeled as such by a federal court judge—and face no professional or criminal comeuppance. *United States v. Golding*, 168 F.3d 700, 703 (4th Cir. 1999). In *Golding*, the defendant appealed from his conviction of possession of a firearm by a felon. *Id.* at 701. He argued that his conviction was improper because the Special U.S. Attorney prosecuting him had prejudiced his case by threatening to prosecute his wife if she testified that the shotgun police had found in their home belonged to her. *Id.* at 702. The Fourth Circuit agreed: "[w]hile it is a matter of concern that the Special United States Attorney threatened a defense witness with prosecution simply to prevent testimony which would have been damaging to her own case . . . , [t]he government did not stop with the threat . . . [but] the prosecutrix further abused her power by using the very situation she had created against the defendant in closing argument. *Id.* at 703.

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[25] Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 69 (2005) (finding that, since § 242 was adopted in 1866, only one prosecutor was convicted under the statute).

[26] Keenan et al., *supra* note 5, at 218.

But the special prosecutor received no professional discipline for her actions in *Golding*. As an appointed prosecutor, she faced no electoral check. And she was apparently never prosecuted for her abuse of power. Absolute prosecutorial immunity presumably shielded her from civil liability, illustrating how the rare prosecutors determined to violate obvious rules go without sanction.

CONCLUSION

What makes a prosecutor's immunity *absolute* is that it "leave[s] the genuinely wronged defendant without civil redress," even against an indisputably, and identified, "malicious or dishonest action" that "deprives him of liberty." *Imbler*, 424 U.S. at 427. How can such immunity square with § 1983's command that "*[e]very person*" acting "under color of any statute" who causes a "deprivation of any rights . . . secured by the Constitution and laws, *shall be liable* to the party injured"? 42 U.S.C. § 1983 (emphases added).

Prosecutorial immunity, as a policy, is misguided. *Imbler*'s assumption that the costs would be worth the trade-off because other measures would deter misconduct has not been borne out.

"[T]he common law recognized a fundamental 'distinction between unauthorized acts and discretionary acts,'" with resulting "'strict liability for acting outside of the authority enumerated by the Constitution.'"[27] The Court should reevaluate prosecutorial immunity and return to the common

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[27] William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115, 123 (2022).

law scheme that held prosecutors liable for actions that exceeded the authority of their office.

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