No. _____

In The
Supreme Court of the United States

COMMISSIONER JOE CAROLLO,

Petitioner,

v.

WILLIAM O. FULLER and MARTIN A. PINILLA, II,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eleventh Circuit Court of Appeals' narrow application of the legislative immunity doctrine to a municipal elected official departs from and conflicts with this Court's definition of legislative immunity outlined in this Court's precedents, including *Mitchell v. Forsyth*, 472 U.S. 511 (1985), as encompassing authorized conduct furthering the legislative duties of an elected official.

Whether the Eleventh Circuit Court of Appeals erred in rejecting the application of qualified immunity to a municipal elected official whose conduct encompassed policy-making fact-finding inquiries that are entirely consistent with a municipal official's exercise of discretionary functions described by this Court's precedents, including *Scott v. Harris*, 550 U.S. 372 (2007).

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RELATED CASES

- *Fuller & Pinilla v. Carollo*, No. 1:18-CV-24190, U.S. District Court for the Southern District of Florida. Order on Motion to Dismiss entered May 13, 2021.
- *Fuller & Pinilla v. Carollo*, No. 19-12439, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered October 26, 2020.
- *Fuller & Pinilla v. Carollo*, No. 21-11746, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered April 11, 2022.

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Petitioner, Commissioner Joe Carollo, petitions for issuance of a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 2022 WL 333234 (11th Cir. 2022) and reprinted in the Appendix at App. 1. The order denying the timely petition for rehearing was entered on April 1, 2022 (App. 72-73).

STATEMENT OF JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit entered on February 4, 2022. A timely petition for rehearing and rehearing *en banc* was denied on April 1, 2022. Mandate issued on April 11, 2022. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Section 1983 of Title 42, Chapter 21 of the United States Code provides:

> Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

The doctrines of legislative and qualified immunity are essential to the orderly operation of governments. Elected officials must be allowed to exercise their mandatory and discretionary authority in furtherance of the public good. It is for precisely that reason this Court explained on multiple occasions that local legislators are entitled to absolute immunity from

suit under Section 1983 for acts taken in a legislative capacity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982); *Tower v. Glover*, 467 U.S. 914, 920 (1984) ("The Court has recognized absolute §1983 immunity for legislators acting within their legislative roles. . . ."); *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 731 (1980) ("The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference."); *Owen v. City of Independence*, 445 U.S. 622, 644 (1980); *Tenney v. Brandhove*, 341 U.S. 367 (1951).

Labeling an elected official's actions as "First Amendment Retaliation" is insufficient as a matter of law to overcome the longstanding immunities protecting public officials from suit. Yet, the decision by the Eleventh Circuit Court of Appeals so narrowly construed and applied the legislative and qualified immunity privileges as to effectively truncate and exclude from protection legislative conduct in furtherance of official duties. This petition asks the Court to clarify and confirm the broad scope of legislative and qualified immunity in order to free elected officials from the unwieldy demands of having to mount a defense for actions that are compliant with public official duties and responsibilities.

STATEMENT OF THE CASE

The Eleventh Circuit summarized the pertinent facts of this legislative and qualified immunity challenge to a civil rights case brought against an elected municipal official (App. 3-6). The material facts pertinent to the legislative and qualified immunity claims are derived from that appellate decision.[1]

In 2017, Commissioner Joe Carollo ("Carollo") was a candidate for City of Miami Commission, District 3. Before the general election, he discussed political support with William Fuller ("Fuller"), as the two men appeared to have a good relationship. Carollo advanced to a runoff election against Alfie Leon.

After early voting for the runoff began, Leon held political rallies at a property Fuller owned adjacent to an early voting center. Steve Miro, identified in the complaint as Carollo's campaign chief of staff, noticed Martin Pinilla ("Pinilla"), Fuller's business partner, at the rallies and notified Carollo. On the last day of early voting, Miro saw Pinilla at a rally, called Fuller, and demanded that he shut down the event. According to the complaint, before Carollo was an elected official, Carollo and Miro used contacts in Miami city government to shut down the rally. Carollo defeated Leon in the runoff election in November.

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[1] At the motion to dismiss stage of the case, courts are obligated to accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiffs. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Less than one week later, allegedly at Carollo's direction, dozens of police, fire, building, and other officers raided Sanguich de Miami, a restaurant in which Fuller and Pinilla were investors and landlords. Weeks later, as City Commissioner, Carollo introduced and voted for City of Miami Ordinance 13733, resulting in a city-wide termination of the temporary use permits used to operate Sanguich and similarly situated businesses. When Sanguich attempted to reopen, city officials twice closed the business for code violations, acting on orders allegedly from Carollo and his associates. The complaint asserted that Carollo targeted Sanguich at the Gay 8 Festival where it operated as a tent vendor. Carollo and Miro voiced concerns about Sanguich selling contaminated food to a city fire inspector, who then exercised enforcement authority to conduct a surprise inspection. Carollo did not focus on other festival vendors. When Sanguich relocated to a property not owned by Fuller and Pinilla, it resumed operations in compliance with City Code without interference.

According to the complaint, one month after the runoff election, Carollo attempted to shut down Fuller and Pinilla's office Christmas party for an unpermitted use. Carollo tasked Maria Lugo, a campaign advisor and former city employee, to inform the director of code enforcement to inspect the event and shut it down for lacking the required special events permit. When an enforcement officer reported the event did not violate the code, her supervisor (Lugo's friend) instructed her to remain outside the event until closing. Carollo

complained to the assistant city manager, who instructed the director to attend the party in person. The complaint alleged the director confirmed to Fuller that Carollo's actions were politically motivated.

Three months after the runoff, police and code enforcement stopped the one-year anniversary party of Union Beer Store after Carollo visited the property with the police and code enforcement. Fuller and Pinilla were landlords for, and partners in, Union Beer.

That same month, according to the complaint, Carollo focused on the Ball & Chain nightclub partially owned by Fuller, located in Commission District 3. Carollo and several colleagues visited the club's valet parking lot and photographed cars being illegally parked while performing an "official investigation" of the operation. Carollo visited residents of a nearby building to solicit noise complaints against the club. Carollo conducted an official "park-and-walk" with city employees, including the acting director of code enforcement, to meet with a resident who made a noise complaint against the club. According to the complaint, Carollo arranged the park-and-walk without the knowledge of the city manager. Carollo later texted a parking complaint to the manager, who in turn directed code officers and a police officer to require club employees to move the illegally parked cars from the parking lot. The general manager of the club discovered Carollo and a member of the code enforcement board behind the club attempting to solicit more noise complaints from neighbors.

Carollo also used his official authority in other ways, according to the complaint. Carollo arranged for shutting down Domino Plaza for repairs—the customary site of the monthly Viernes Culturales festival hosted by a Fuller-affiliated organization. After Carollo raised concerns about code violations at Fuller-owned properties during an official City Commission meeting, the City Attorney sent an email to local administrators requesting a review of records and the inspection of properties discussed by the Commissioners, most of which were owned by or connected to Fuller.

Fuller and Pinilla filed their complaint in the district court pursuant to 42 U.S.C. § 1983, alleging Carollo retaliated against them in violation of the First Amendment. Carollo moved to dismiss based on qualified immunity and legislative immunity. A magistrate judge issued a report and recommendation that the district court grant Carollo's motion in part and deny it in part (App. 36-71). The district court adopted that report and recommendation (App. 33-35). The court granted Fuller and Pinilla leave to amend their complaint consistent with the report and recommendation. Carollo's appeal from the denial of his immunity defenses was dismissed by the Eleventh Circuit for lack of jurisdiction. *Fuller v. Carollo*, 977 F.3d 1012 (11th Cir. 2020) (App. 29-32).

Fuller and Pinilla's second amended complaint against Carollo repeated many of the allegations from the amended complaint. Carollo moved to dismiss the second amended complaint, which the district court granted in part and denied in part (App. 11-28). The

district court ruled that Carollo enjoyed legislative immunity only as to "the passage of Ordinance 13733," but that he lacked legislative or qualified immunity for the "multiple actions directed solely at [Fuller and Pinilla] or directed at others who did business with [them]" and where his conduct "involve[d] code enforcement, something the Eleventh Circuit has stated is administrative, not legislative." (App. 26). The court denied Carollo's qualified immunity defense (App. 23-24).

On appeal, the Eleventh Circuit upheld the district court's legislative and qualified immunity rulings. The court agreed "Carollo exceeded the bounds of his legislative responsibilities by repeatedly harassing their [the plaintiffs'] businesses[,]" despite Carollo having engaged in legislative fact finding consistent with the express authority of the City charter (App. 7-8).

The appellate court also determined the allegations that Carollo's actions violated settled law prohibiting retaliation were sufficient to deny qualified immunity notwithstanding that the conduct was authorized by the City charter as an extension of a commissioner's policy-setting role (App. 8).

REASONS FOR GRANTING THE PETITION

I. The appellate court's truncation of legislative immunity from suit conflicts with and departs from the broad definition of legislative immunity established by this Court as encompassing authorized conduct that furthers legislative duties, thus requiring a realignment of legislative immunity as an absolute defense.

Holding that a legislator is entitled to absolute immunity from suit only when engaging in "[a] legislative act [that] involves policy-making rather than [the] mere administrative application of existing policies[,]" (App. 7), the appellate court invoked a heretofore unprecedented definition of legislative immunity that unnecessarily truncated a legislator's exercise of conduct in furtherance of official duties as an essential part of the legislative immunity analysis. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985) ("in evaluating a claim of immunity under the Speech and Debate Clause, a court must analyze the plaintiff's complaint to determine whether the plaintiff seeks to hold a Congressman liable for protected legislative actions or for other, unprotected conduct.").

This Court previously explained that conduct occurring within the "legitimate legislative sphere" is absolutely "immune from judicial interference." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 501 (1975). This immunity is defined and applied "broadly to effectuate its purposes." *Id*. at 501. The purpose of legislative immunity is to protect the integrity of the

legislative process by "insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). This protection extends to civil as well as criminal actions, including actions brought by private individuals. *Id*., 408 U.S. at 502-503.

Contrary to the limited scope of the legislative immunity defined by the Eleventh Circuit, this Court's precedent utilizes a considerably broader approach, including within its ambit components of the deliberative and communicative processes through which legislators gather facts and information necessary for consideration and passage or rejection of proposed legislation as well as other matters coming within the legislative jurisdiction. *Gravel v. United States*, 408 U.S. 606, 625 (1972). Thus, the privilege extends beyond speech and debate in an official proceeding when the conduct is in furtherance of such deliberations. *Id*.

Investigative fact-gathering is among the actions of legislators that constitute an "integral part[] of the deliberative and communicative processes" by which legislators participate in the consideration and passage or rejection of proposed legislation. *Doe v. McMillan*, 412 U.S. 306, 313 (1973). Investigations "are an established part of representative government" deserving of the legislative privilege. *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

Because the scope of legislative immunity protects lawmakers from suit for the entirety of their legislative functions, *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982), this "Court has recognized absolute §1983 immunity

for legislators acting within their legislative roles. . . ." *Tower v. Glover*, 467 U.S. 914, 920 (1984). This broad immunity includes state and local legislators acting "in the sphere of legitimate legislative activity." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 403 (1979).

By ignoring this expansive definition of legislative immunity, the Eleventh Circuit narrowed the scope of legislative immunity to encompass only the actions taken by legislative officials during the actual passage of legislation (App. 7-8). This rule employed by the appellate court excluded from the privilege the express legislative responsibility of city commissioners, codified in the City of Miami Charter at Section 4(a)-(g), to direct inquiries as to matters of public concern. This very fact-finding process is integral to the proper functioning of the legislative sphere, and thereby enables commissioner-legislators to learn about and discuss the impact of proposed legislation. *See Gravel v. United States*, 408 U.S. at 625 ("The heart of the [Speech or Debate] Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House. As the Court of Appeals put it, the courts have extended the privilege to matters beyond pure speech or debate in either House, but only when

necessary to prevent indirect impairment of such deliberations.").

If legitimate and authorized fact-gathering conduct by a legislator can be made the subject of a civil rights complaint, legislative immunity is effectively abrogated for an entire component of legislative conduct that is essential to the development and passage of legislation. The danger of disallowing immunity for the legislative fact-finding and inquiry functions is that elected officials would then be put in harm's way by every action, statement, or inquiry not occurring on the legislative dais, motivating constituents to bring civil rights actions for every real or imagined grievance. The business of government would be seriously undermined, and legislators would be dampened in their efforts to serve the best interests of all the people, thus compromising the important work of local governments.

The decision of the Eleventh Circuit Court of Appeals in this case raises an important question of the law of legislative immunity that should be settled by the Supreme Court. This Court should grant the petition for a writ of certiorari. This Court should examine the boundaries of the legislative prerogative empowering the authority of municipal and other legislative officials to further the public interest without regard to private criticism. As Justice Frankfurter explained in *Tenney v. Brandhove*, 341 U.S. at 377:

> Legislators are immune from deterrents to the uninhibited discharge of their legislative

> duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L.Ed. 162 [(1810)], that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned.

This Court should consider that the truncation of the breadth of legislative immunity by the appellate court's decision severely constrains the legislative process in ways that stifle the exercise of legislative decision-making done in furtherance of the public interest.

II. The doctrine of qualified immunity broadly includes an elected legislator's fact-finding inquiries conducted in accordance with the allowable duties of an elected official.

Utilizing the doctrine of qualified immunity, the Eleventh Circuit agreed that "[Commissioner] Carollo was acting in his discretionary capacity as a city commissioner." (App. 8). But the court nonetheless approved the denial of qualified immunity to the elected commissioner in contravention with the protection of "government officials from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Stanton v. Sims*, 571 U.S. 3, 5-6 (2013) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Qualified immunity, as this Court recognized, is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Scott v. Harris*, 550 U.S. 372, 376 (2007).

The Eleventh Circuit's approach to the qualified immunity analysis departed from this Court's precedent by undermining the "strong public interest in protecting public officials from the costs associated with the defense of damages actions." *Crawford-El v. Britton*, 523 U.S. 574, 590 (1998). The inevitable consequence of this decision to municipal governance is that, by allowing a private businessman to challenge an elected official's pursuit of existing law and authority as applied to licensed businesses, that official and others will be hindered in the effective exercise of allowable authority, a result at odds with *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) ("Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' ").

The qualified immunity test narrowed by the appellate court elevates a citizen's accusations above the traditional immunity standard that

> gives ample room for mistaken judgments by protecting "all but the plainly incompetent or those who knowingly violate the law." [citation omitted]. This accommodation for reasonable error exists because "officials should not err always on the side of caution" because they fear being sued. [citation omitted].

Hunter v. Bryant, 502 U.S. 224, 229 (1991).

The mischievous impact of spurious and questionable constituent accusations that could imperil the important work of municipal officials is evident in the appellate court's decision. The conclusion that immunity is unavailable for officials who retaliate "against constituents who engage in political activities protected by the First Amendment" (App. 8) is inconsistent with the deference required by this Court that "[e]very public officer is presumed to act in obedience to his duty, until the contrary is shown." *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 446 (1935); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.").

The decision of the Eleventh Circuit Court of Appeals on this point conflicts with the qualified immunity path defined by this Court. The appellate court's decision will embolden possibly aggrieved constituents to elevate their disagreements to a constitutional violation even though a public official is presumed to act in accordance with legal authority. The protective body

of qualified immunity law requires a level of examination that is absent from the appellate court's decision. This Court should grant the petition for a writ of certiorari to reaffirm the importance of qualified immunity as a mechanism to empower elected officials to serve the greater public interest.

CONCLUSION

For these reasons, Petitioner Commissioner Joe Carollo respectfully asks that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

Dated: June 29, 2022

Respectfully submitted,

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