No. 07-854

In The Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,
Petitioners,
v.
THOMAS LEE GOLDSTEIN,
Respondent

On Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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Cong. Globe, 42nd Cong., 1st Sess. (1871) 9, 15, 16

Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., (1866) 16

OTHER SOURCES

David Achtenberg, *With Malice Toward Some: United States* v. *Kirby, Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273 (1995) 16

David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497 (1992) 13, 14, 15, 16

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AKHIL REED AMAR, THE CONSTITUTION AND CIVIL PROCEDURE (1997) 6

Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987) 6

Declaration and Resolves of the First Continental Congress (1774), *reprinted in* DOCUMENTS OF AMERICAN HISTORY (1973) 4

THE FEDERALIST No. 83 (Alexander Hamilton) (1788) 5

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Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18 (1940) 26

John Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999) 6

Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53 (2005) 20, 21, 23

M. NEWELL, MALICIOUS PROSECUTION (1892) 13

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farand rev. ed., 1937) 5

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Vintage 1945) 5

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INTEREST OF *AMICUS CURIAE*[*]

The Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of the United States Constitution. Over the past decade, CAC's predecessor organization, Community Rights Counsel, filed numerous briefs in this Court and others in cases raising important questions of constitutional law. CAC continues this project by working with lawyers, government officials, and scholars to deepen understanding of the Constitution and to preserve the rights, freedoms and structural safeguards it secures.

The issue raised by this case goes to the core of CAC's mission: to assure that fundamental civil rights are protected and that all those who hold office under our Constitution are accountable to it.

INTRODUCTION AND SUMMARY OF ARGUMENT

The parties in this case ask the Court to once more clarify the line laid down in *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), between those cases in which a State prosecutor is accorded absolute immunity from Section 1983 actions and ones in which he is afforded "only" qualified immunity. We agree with respondent that the judgment below was correct under this Court's existing case law. See *id.* at 430-31 (distinguishing "those aspects of the prosecutor's responsibility that cast him in the role

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[*]The parties have consented to the filing of this brief. Under Rule 37.6, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

of an administrator * * * rather than that of advocate"); *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 274 (1993) (denying absolute immunity for actions taken "before * * * probable cause" attached). But this brief urges the Court to consider a different course: to recognize that the *Imbler* decision was wrong when decided, is even more clearly so today, and that it must now correct that error.

As this Court's cases make plain, officials claiming absolute immunity for their unconstitutional acts should bear a heavy burden. See, *e.g.*, *Burns* v. *Reed*, 500 U.S. 478, 486 (1991). Doctrines of absolute immunity are antithetical to the principles of accountability and the rule of law that are at the core of our system of government. Indeed, the Framers of the Constitution saw civil suits against wrongdoing officers as a central mechanism for checking government abuses of power, and the Reconstruction Congress that enacted Section 1983 was, if anything, even more focused on assuring an effective remedy against government actors responsible for deprivations of individuals' constitutional rights.

In granting prosecutors absolute immunity, *Imbler* was not only out of step with constitutional first principles, but it was also wrong as a matter of statutory interpretation. The text of Section 1983, the legal background against which it was enacted, and the purposes the statute was meant to serve all make clear that the enacting Congress did not intend to confer such an immunity. Moreover, both *Imbler*'s interpretive method and its result place it at odds with this Court's later Section 1983 immunity case law, which recognizes the intent of the enacting Congress – and not modern-day policy judgments – as the sole legitimate authority for according absolute immunity.

Stare decisis principles do not support preserving the fundamentally flawed *Imbler* rule. As the opinions of this Court and the courts of appeals vividly attest, the *Imbler* regime has proved unworkable and irrational, spawning unnecessary collateral litigation and failing to deliver the predictable, straightforward protection that was supposed to be its prime virtue. Moreover, intervening developments have undermined *Imbler*'s key legal and factual premises – chiefly, that *qualified* immunity would be insufficiently protective of honest prosecutors and that sanctions other than civil liability are adequate to uncover, correct, and punish prosecutors' abuse of their constitutional authority.

Given these realities, and the absence of any sort of justifiable reliance, *Imbler* immunity should discarded. A rule that effectively strips Section 1983's protections from those whose liberty is unlawfully taken away by the most powerful class of local officials is due to be revisited. *Imbler*'s judge-made immunity, which unjustifiably extinguishes a cause of action the 42nd Congress plainly intended to be *available* to those deprived of constitutional rights, should not stand.

ARGUMENT

I. ABSOLUTE PROSECUTORIAL IMMUNITY IS INCOMPATIBLE WITH THE TEXT AND PRINCIPLES OF THE CONSTITUTION

A. Civil Suits Against Those Who Abuse Their Official Authority Are a Central Part of Our Constitutional Tradition

This Court has frequently recognized that rules of absolute immunity represent a stark departure from two bedrock principles reflected in our Constitution – that "'where there is a legal right, there is also a legal

remedy,'" *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 W. BLACKSTONE, COMMENTARIES 23 (1783)), and that "[n]o man in this country is so high that he is above the law," *United States* v. *Lee*, 106 U.S. 196, 261 (1882).

As *Lee* and *Marbury* recognized, the principle that constitutional rights are enforceable through civil suits against wrongdoing officers is itself a vital part of the constitutional tradition. At the time of the Founding, *ultra vires* acts by public officials were remedied through civil damages suits. See, *e.g.*, *Wilkes* v. *Wood*, 98 Eng. Rep. 489 (C.P. 1763) (successful suit under English common law of trespass for an unlawful search and seizure). If the allegedly trespassing official was found liable, he could be "made to pay compensatory and (in egregious cases) punitive damages (though he might well in turn be indemnified by the government)." AKHIL REED AMAR, THE BILL OF RIGHTS 70 (1998). Indeed, in the first steps toward independence, the Founding generation made sure to retain official liability: the First Continental Congress rebuffed parliamentary attempts to immunize from private damage suits government officials accused of wrongdoing. Declaration and Resolves of the First Continental Congress (1774), *reprinted in* DOCUMENTS OF AMERICAN HISTORY 84 (H. Commager 9th ed. 1973).

These civil suits were favored not only because they comported with the Framers' view about the nature of rights and their sense of corrective justice, but also because they advanced constitutional values of popular sovereignty and public accountability. Representing the power and voice of the people, in "both civil and criminal proceedings, the jury played a leading role in protecting ordinary individuals against government overreaching."

AMAR, BILL OF RIGHTS at 84. See I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (Vintage 1945) ("The jury system as it is understood in America [is] as direct and as extreme a consequence of the sovereignty of the people as universal suffrage").[1]

The text and structure of the Constitution and the Bill of Rights reflect this understanding. One of the principal purposes of the Bill of Rights was to place limits on the new federal government's power to search, arrest, and prosecute law breakers. The Fourth, Fifth, Sixth, and Seventh Amendments together aim to prevent abuse of the law enforcement power from the moment of investigation to adjudication. The Fourth Amendment constrains how police forces – our equivalent of eighteenth century constables – intrude on individual privacy and security in search of criminal activity. The Fifth and Sixth govern criminal prosecutions, imposing no less than eight distinct mandates to check prosecutorial overreaching.

Complementing these guarantees, the Seventh Amendment assures that persons wronged by the law enforcement apparatus will have the right to bring their claim before a civil jury of their peers to redress unconstitutional conduct. Thus, for example, "the preferred vehicle for litigating the Fourth Amendment was a tort suit brought by a citizen and tried before a

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[1] Indeed, the epochal debate over whether to add the Bill of Rights was prompted by an objection that the original document had made no provision for juries in civil cases. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587-88 (Max Farand rev. ed., 1937). *Cf.* THE FEDERALIST No. 83 (Hamilton) (1788) (noting that many states objected to the "want of a constitutional provision for trial by jury in civil cases").

Seventh Amendment jury of fellow citizens." AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 14-15, 162 (1997). Consistent with this constitutional understanding, during the nineteenth century, individual public officers were held strictly liable for violations of legal rights. See *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 839 (1824); *Little* v. *Bareme*, 6 U.S. (2 Cranch) 170, 179 (1804); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1486-87 (1987).[2]

This Court's cases reflect the critical role civil actions for damages play in our constitutional scheme. In *Lee*, the Court rejected the defendant officers' pleas for absolute immunity precisely because of the constitutional first principles demanding a civil remedy for violations of fundamental rights:

> Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy

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[2]To be sure, the framers of the Constitution were familiar with official immunities and provided members of Congress with a partial legislative immunity in the Speech or Debate Clause. Speech or Debate Clause immunity, however, has always had a limited effect on those injured: while "[t]he legislator who passes the law [has] absolute immunity, [the] * * * officer who enforces it does not," see John Jeffries, *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 93 n.22 (1999). Thus, many of the Court's legislative immunity cases have *permitted* suit against the legislative officers who enforced the legislature's actions. See, *e.g. Powell* v. *McCormack*, 395 U.S. 486, 503-06 (1969); *Kilbourn* v. *Thompson*, 103 U.S. 168, 199-200 (1880); see also *Gravel* v. *United States*, 408 U.S. 606, 619 (1972) ("The Speech or Debate Clause could not be construed to immunize an illegal arrest even though directed by an immune legislative act"). The legislative immunity operates hand in hand with, and is dependent on, a rule of executive accountability.

> between them and the government, and the docket of this court is crowded with controversies of the latter class. Shall it be said, in the face of all this * * * that the courts cannot give remedy when the citizen [whose] * * * estate [has been] seized and converted to the use of the government without any lawful authority, without any process of law, and without any compensation, because the president has ordered it and his officers are in possession? If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights.

106 U.S. at 221.

In upholding the jury verdict for the plaintiff, *Lee* considered the argument that "the possible interference of judicial action with the exercise of powers of the government essential to some of its most important operations," 106 U.S. at 221, required a different result, rejecting it on grounds of both principle and experience. Not only were these "supposed evils * * * small indeed compared to" the harm threatened to the rule of law, the Court explained, but such concerns are "much diminished, if they do not wholly disappear" when considered in light of experience; in "nearly a century under the present constitution," during which two foreign wars and a civil war had been fought, suits against officers had been "well established," resulting in "no injury * * * to th[e] government," *id.*

B. In Enacting Section 1983, The Reconstruction-Era Congress Ratified And Built Upon This Constitutional Tradition

In enacting Section 1983, the 42nd Congress built on this constitutional tradition by creating a federal damages remedy "to interpose the federal courts between the States and the people * * * – to protect the people from unconstitutional action under state law, 'whether that action be executive, legislative or judicial.'" *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex Parte Virginia,* 100 U.S. 339, 346 (1880)). Cf. *Owen* v. *City of Independence*, 445 U.S. 622, 651-52 (1980) (noting that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees").

Written in sweeping terms, Section 1983 creates a cause of action against "every person" who under color of state law deprives another of "any rights, privileges, or immunities secured by the Constitution." Indeed, unlike the common law causes of action that had provided the means for holding wrongdoing officers accountable in pre-Civil War America, Section 1983 is directed squarely at the "'misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Scheuer* v. *Rhodes*, 416 U.S. 232, 243 (1974) (quoting *Monroe* v. *Pape*, 365 U.S. 167, 184 (1961)). Thus, "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms." *Id.*; *Imbler*, 424 U.S. at 434 (White, J., concurring) ("[T]o extend absolute immunity to any [class] of state officials is to negate pro tanto the very remedy which it appears Congress sought to create").

When the 42nd Congress was debating Section 1983, opponents objected that imposing liability on government officials for violating constitutional guarantees would result in their being "dragged to the bar of a distant and unfriendly court, and * * * placed in the pillory of vexatious, expensive, and protracted litigation, and heavy damages * * * ." Cong. Globe, 42nd Cong., 1st Sess. 365 (1871).

The supporters' response appealed to the familiar and accepted tradition of enforcing constitutional limitations. Section 1983, Senator Edmunds explained, simply "seeks to denounce[] * * * an unconstitutional act; and * * * endeavors to enforce the penalty imposed on that by the proper intervention of the judiciary," thereby ensuring that states and their officers "obey the will of the whole people expressed in the Constitution." Cong. Globe, 42nd Cong., 1st Sess. 691 (1871); see also *id.* at 482 ("[What legislation could be more appropriate than to give a person injured by another under color of such unconstitutional laws a remedy by civil action?").

In light of this historic practice of enforcing constitutional rights in civil damages actions and Section 1983's specific provision of a damages remedy to hold accountable state officers who violate constitutional guarantees, absolute immunities in Section 1983 litigation should be rare, and immunities limited to ones familiar to (and accepted by) those in the 42nd Congress who secured the statute's passage. This Court's cases have recognized as much. See *Burns*, 500 U.S. at 486-87, 493-94; *id.* at 497-98 (Scalia, J., concurring in part and dissenting in part); *Malley* v. *Briggs*, 475 U.S. 335, 339-40 (1986); *Tower* v. *Glover*, 467 U.S. 914, 920-21 (1984).

Under this approach, the vast majority of government officials are entitled to qualified immunity. See *Burns*,

500 U.S. at 498 n.1 (Scalia, J., concurring in part and dissenting in part) (observing that "the common law extended qualified immunity to public officials quite liberally" while "[a]bsolute immunity * * * was exceedingly rare"). While such immunity takes account of the responsibilities that many government officers shoulder and provides them significant substantive and procedural protections, it remains fundamentally consistent with constitutional first principles by ensuring that officers are accountable to the Constitution and to those whom they injure through abuse of authority; preserving the role of the courts in articulating what the law requires, see *Marbury*, 5 U.S. at 177; and, in cases where violations of clearly established constitutional law are alleged, respecting the power of a civil jury to render its verdict on the officer's conduct.

Absolute immunity, in contrast, removes official accountability for even the most flagrant abuses of civil rights. A rule that provides absolute immunity to *prosecutors* – a huge class of officials with sweeping powers over the lives of ordinary citizens – works a direct blow to the system of official accountability established in the Constitution and reinforced in Section 1983.

II. *IMBLER'S* CONSTRUCTION OF SECTION 1983 IS ERRONEOUS AND SHOULD BE OVERRULED

A. *Imbler* Was Wrongly Decided

In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), this Court first announced an approach for determining claims of immunity by those sued under Section 1983. Rejecting the argument that the text of the statute left no room for legislative immunity, the Court declined to read the statute's encompassing "general language" as abrogating

a doctrine it found firmly "grounded in history and reason," *id.* at 376. As the Court would later explain, the *Tenney* decision rested on a judgment as to "likely" legislative intent: "members of the 42nd Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and * * * they likely intended these common-law principles to obtain." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

In subsequent Section 1983 cases, the Court has made clear (1) that absolute immunity is a disfavored exception, not the rule, see *Burns*, 500 U.S. at 486-487; (2) that the focal point of the historical inquiry is the common law at "the time of [§ 1983's] enactment," see *Kalina* v. *Fletcher*, 522 U.S. at 123; and (3) that an 1871 common law pedigree is a "*necessary*" condition for absolute immunity under § 1983, not a *"sufficient"* one, *Burns*, 500 U.S. at 497 (Scalia, J., concurring in part and dissenting in part) (emphasis original). "If an official was accorded [absolute] immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions," *Tower* v. *Glover*, 467 U.S. 914, 920 (1984). Accord *Malley* v. *Briggs*, 475 U.S. 335, 340 (1985).

Under these principles, the error of *Imbler* is manifest. First, although the *Imbler* Court expressly recognized that considerations of policy alone could not support a judicially-promulgated rule of absolute prosecutorial immunity – and that any such protection would have to be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law," 424 U.S. at 421, the Court's

decision failed to answer – or even ask – "the first and crucial question," *Pulliam* v. *Allen,* 466 U.S. 522, 529 (1984), whether, *at the time Section 1983 was enacted*, "the common law recognized [the absolute immunity asserted]," *id.*

Rather, while the *Imbler* Court described absolute prosecutorial immunity as the "well-settled common-law rule," *id.* at 424, its own account identified *Griffith* v. *Slinkard*, 146 Ind. 117 (1896), a decision rendered a quarter century after Section 1983's enactment, as the "first American case" to embrace the rule, *id.* at 421, and the Court's roster of supporting authorities, see *id.* at 424 n.21, began with *Anderson* v. *Rohrer*, 3 F. Supp. 367 (S.D. Fla. 1933)), decided nearly four decades after that.

If the *Imbler* Court had sought an answer to this legally dispositive question, it would have found that "[t]here was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted," *Kalina*, 522 U.S. at 132 (Scalia, J., concurring); see also *Burns*, 500 U.S. at 505 (Scalia, J.) (*Imbler* "relied * * * upon a common-law tradition * * * that * * * was not even a logical extrapolation from then-established immunities"). Many nineteenth century cases allowed malicious prosecution suits to proceed against privately-retained prosecutors who then handled most criminal cases. See *Warfield* v. *Campbell*, 35 Ala. 349, 350 (1859); *Burnap* v. *Marsh*, 13 Ill. 535, 538 (1852) (explaining that exempting prosecuting attorneys from liability would "authoriz[e] those who are the most capable of mischief to commit the grossest wrong"); *Wood* v. *Weir*, 44 Ky. 544, 547 (1845) (because attorneys have great power with courts, "for good or evil, * * * holding [them] to a strict accountability will have the effect to exalt and dignify the profession by purging it of ignorant, meretricious and

reckless members"). And *Parker v. Huntington,* 68 Mass. 124 (1854), indicated that a plaintiff could maintain a malicious prosecution action against a District Attorney who had elicited and used false testimony in a criminal prosecution.[3]

A treatise on malicious prosecution published two decades *after* Section 1983's enactment gave no indication that prosecutors (whether public or private) were immune from such suits and stated that "quasi-judicial officers" – those situated "midway between the judicial and ministerial ones," and whose duties entailed " looking into the facts and acting upon them" – were liable if they acted "dishonestly or maliciously." See M. NEWELL, MALICIOUS PROSECUTION 166 (1892). Numerous courts continued to allow public prosecutors to be sued for that tort well after 1871. See *Arnold* v. *Hubble*, 38 S.W. 1041 (1897); *Skeffington* v. *Eylward*, 97 Minn. 244, 248 (1906); *Leong Yau* v. *Carden*, 23 Haw. 362, 369 (1916); see also *Dean* v. *Kochendorfer*, 237 N.Y. 384 (1924).

Furthermore, as Justice Scalia explained in *Burns*, of the three possibly analogous immunities in place in 1871,

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[3] Although public prosecutors were less common in the nineteenth century, they were not entirely unknown in America. See *Burns*, 500 U.S. at 493. Moreover, to conclude that Congress intended – or would have intended – public officials to have greater immunity than private actors ignores the text and purposes of Section 1983. See Achtenberg, 86 NW. U. L. REV. at 524 ("Unlike common law tort doctrine, § 1983 was specifically aimed at public officials. Immunities designed to minimize the extent to which common-law principles unintentionally impinged on official prerogatives would be peculiarly ill-suited to a statute * * * primarily intended to prevent the abuse of those prerogatives"). And as explained *infra*, the historical evidence of the 42nd Congress's specific concern about *prosecutorial* wrongdoing makes that suggestion especially implausible.

the closest one, for government servants performing discretionary "quasi-judicial acts," was *not* absolute and could be overcome by proving malice. See 500 U.S. at 500 ("I do not doubt that prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial" and citing contemporaneous cases applying that doctrine).[4]

Nor did *Imbler* venture an answer to the *second* critical question: whether "*1983's history or purposes* * * * counsel against recognizing the [common law] immunity," *Tower*, 467 U.S. at 920 (emphasis added). See *Gomez* v. *Toledo*, 446 U.S. 635, 639 (1980) (immunities must be "*both* 'well established at common law' *and* 'compatible with the purposes of the Civil Rights Act'") (quoting *Owen*, 445 U.S. at 638) (emphasis added). Although the *Imbler* Court canvassed various policies supporting its absolute immunity holding, it made no attempt to ascertain the general purposes or specific intentions of the 42nd Congress.

This was an extraordinarily consequential omission. The legislative history of the Act makes clear the primacy of providing a remedy for violations of federal rights. See David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 539 (1992) ("For the 42nd

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[4]Justice Scalia explained that prosecutors would not have been entitled to absolute judicial immunity and that though the common law also accorded complaining witnesses absolute immunity – that was "*only* against suits for defamation" – they could "still be sued for malicious prosecution." And as respondent explains, even nineteenth century absolute *judicial* immunity did not extend to *administrative* acts performed by a judge. See Br. 42-43; see also *Forrester* v. *White*, 484 U.S. 219, 229 (1988); *Ex parte Virginia,* 100 U.S. 339, 348 (1880).

Congress * * * protection of individual rights was more than one desirable goal among many. It was a hierarchically superior purpose – a goal that government had a duty to achieve as completely as possible before other goals could be considered"). Thus, Representative Dawes, a member of the select committee that drafted the bill, explained, "If you can show me that there is in the arsenal of the Constitution any weapon of defense that the American citizen can take with him to face any unlawful attempt to trench upon the rights secured to him by it, I will use it," Cong. Globe, 42nd Cong., 1st Sess., at 476, Senator Edmunds, the manager of the bill in the Senate, stated he was willing to enact "every measure of constitutional legislation which will have a tendency to preserve life and liberty and uphold order." *Id.* at 691. Indeed, these expressions of single-mindedness were not mere rhetoric: the civil action codified as Section 1983 was one avowedly "mild" component, *id.* at 482, of an act other provisions of which "gave the President the unprecedented authority to use federal troops to protect individual rights when the States failed or were unable to do so, and * * * authorized the President to suspend the writ of habeas corpus to insure the prosecution of conspirators who violated individual rights." 86 NW. U. L. REV. at 547.

The drafters of Section 1983 meant the new statutory remedy to be implemented in accordance with its broad terms. Representative Shellabarger, the author and manager of the bill in the House, posited an approach to construing the statute starkly at odds with judicially-crafted exemptions:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are

> liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, * * * the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42nd Cong., 1st Sess., App. 68 (1871).[5]

Not only did Congress intend Section 1983 to be construed in accord with its broad terms, but its authors were concerned about the problem of wrongful prosecutions. Abuse of prosecutorial power was no mere abstraction for the legislators who enacted Section 1983, but rather a protracted "crisis that provoked vigorous debate and decisive legislative action." Achtenberg, *With Malice Toward Some: United States* v. *Kirby, Malicious Prosecution, and the Fourteenth Amendment*, 26 RUTGERS L.J. 273, 342 (1995). As members of the 42nd Congress were keenly aware, Confederate sympathizers in Kentucky, Virginia, Texas, and other States were able to take over the machinery of state and local government after the Civil War, initiating thousands of civil suits and criminal prosecutions against African Americans and Union loyalists, for "offenses" such as violating the slave

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[5]As Professor Achtenberg explains, the notion that the 42nd Congress intended to vest this Court with broad discretion to dispense absolute immunities is historically inapt. Not only was anger at the Court's *Dred Scott* decision still alive among those who enacted Section 1983, but the legislators debated and enacted a series of extraordinary measures in the late 1860s aimed at curbing the Supreme Court's power to rule on the constitutionality of civil rights legislation See 86 NW U. L. REV. at 532.

code, capturing confederate soldiers during the war, and acting "disloyally" by challenging in court the Virginia law prohibiting African Americans from testifying. *Id.* at 299, 340-41. See Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., at xvii-xviii (1866) (reporting that "prosecutions have been instituted in State courts against Union officers for acts done in the line of official duty, and similar prosecutions are threatened elsewhere as soon as the United States troops are removed").

Thus, *Imbler* erred in creating absolute prosecutorial immunity in the face of evidence that prosecutors were liable for malicious prosecution at the time Section 1983 was enacted and that the drafters of Section 1983 fully expected the statute's remedy to protect against such misconduct.

B. *Imbler* Should Be Overruled

This Court's subsequent prosecutorial immunity decisions have sought to pare back and rationalize *Imbler*. But they have never revisited its central, erroneous holding: that even prosecutors who knowingly deprive a citizen of his clearly established constitutional rights need not answer to him in a § 1983 action. Indeed, even Court opinions that have acknowledged *Imbler*'s analytical shortcomings have suggested, without further elaboration, that "reasons of *stare decisis*" support adhering to *Imbler*'s absolute immunity rule, *Burns*, 500 U.S. at 505 (Scalia, J., concurring in part and dissenting in part); accord *Kalina*, 522 U.S. at 135 (Scalia, J., concurring). We respectfully disagree.

As in *Monell*, it is "'beyond doubt'" that *Imbler* "'misapprehended'" the meaning and history of section 1983, and that overruling the decision is "clearly proper."

Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 700 (1978) (quoting *Monroe*, 365 U.S. at 192 (Harlan, J., concurring)); see *id.* at 705 (Powell, J., concurring) (finding overruling *Monroe*'s conclusion concerning municipal liability warranted, based on "[t]he oddness of [its] result, and the weakness of the historical evidence relied on by the Court in support of it").

Moreover, as discussed above, because absolute immunities run counter to the principles of accountability running throughout the original and amended Constitution, it is especially important that the Court cease applying absolute prosecutorial immunity in cases where constitutional rights are flagrantly violated – and where Congress has never provided for it.

1. This Court's Subsequent Section 1983 Cases Are Inconsistent With *Imbler* And Have Eroded The Justifications For *Imbler*'s Rule Of Absolute Immunity.

A series of developments in this Court's Section 1983 jurisprudence have "weakened the decision's conceptual underpinnings," *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989).

First and most important, *Imbler*'s central premise, arguably its holding, that affording prosecutors qualified, rather than absolute, immunity would provide inadequate protection – has been overtaken by developments in this Court's later case law. The *Imbler* Court identified what it determined to be the important "difference between the absolute and the qualified immunities": that "[a]n absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity," whereas the "fate of an official with qualified immunity depends upon the circumstances and

motivations of his actions, as established by the evidence at trial." 424 U.S. at 419 n.13. This distinction, however, no longer holds true.

Not only has the determination *Imbler* treated as straightforward – whether "the official's actions were within the scope of the immunity," increasingly vexed the federal courts, see *infra* – but still more important, the Court has, since *Imbler*, "'completely reformulated qualified immunity [by] replacing the common-law subjective standard with an objective standard that allows liability only where the official violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Burns*, 500 U.S. at 494 n.8 (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987) and *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). As the Court explained, "[t]his change was 'specifically designed to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment, and we believe it sufficiently serves this goal.'" 500 U.S. at 494 n.8 (quoting *Malley*, 475 U.S. at 341).

In addition, since *Imbler*, government officials have been afforded the right to immediately appeal denials of qualified immunity, *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985); see also *Anderson*, 483 U.S. at 646 n.6 ("qualified immunity questions should be resolved at the earliest possible stage of a litigation" and that initial "discovery should be tailored specifically to the question of * * * qualified immunity"). Accordingly, *Imbler*'s finding of absolute immunity where it was not legislatively authorized can no longer be justified based on the inadequacy of qualified immunity.

Finally, this Court's intervening decision in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), substantially dampens

Imbler's concern that prosecutors would be inundated with vindictive suits by "resent[ful]" defendants. See 424 U.S. at 425. Citing the necessity of harmonizing Section 1983 with the federalism and comity considerations incorporated in the federal habeas corpus statute, *Heck* held that the Section 1983 cause of action is unavailable to challenge the constitutionality of actions that resulted in a criminal conviction, unless those proceedings had terminated "favorabl[y]" to the prospective plaintiff. 512 U.S. at 484. Although *Heck* is no bar to claims by Goldstein and other exonerees, the class of litigants who will be able to overcome that limitation *and* defeat the *Harlow* qualified immunity defense is a small subset of those who might feel "resentment" against prosecutors.

2. The *Imbler* Regime Has Proved Unworkable And Arbitrary

The *Imbler* holding has become "a positive detriment to coherence and consistency in the law." *Patterson*, 491 U.S. at 172-73. *Imbler* and its progeny have produced confusion within the domain in which they operate directly – Section 1983 suits against prosecutors. The "line" between prosecutorial conduct that is accorded absolute immunity and that subject to qualified immunity shifts from Circuit to Circuit, and the courts of appeals are sharply divided on a number of large issues, including: whether a prosecutor is entitled to absolute immunity for fabricating evidence that is then used in a judicial proceeding; whether probable cause is *always* required before absolute immunity will attach; how to determine whether *Buckley*'s probable cause cut-off has been met; and how to determine whether a prosecutor is acting as an investigator or advocate when misconduct followed establishment of probable cause. See generally Margaret

Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. at 56-57, 89-106 (detailing these conflicts). Indeed, "[w]hile the lower courts have been vexed with confusion about absolute prosecutorial immunity for many years, since 2003 this uncertainty has become increasingly problematic." *Id.* at 90.

The appellate courts' various resolutions of these immunity questions are not only unpredictable – itself a serious vice in a regime where legal certainty is of central import – but the determination of the "level of immunity" question requires the kind of complex, fact-intensive litigation that is the opposite of the speedy, conclusive dismissal right that the *Imbler* Court assumed it was conferring. See Johns, 2005 BYU L. REV. at 58. See *Swift & Co.* v. *Wickham*, 382 U.S. 111, 124 (1965) (explaining that a rule intended "to expedite important litigation * * * should not be interpreted in such a way that litigation * * * is delayed while [collateral issue] is litigated," and therefore overruling *Kesler* v. *Department of Public Safety*, 369 U.S. 153 (1962)).

This Court's prosecutorial immunity decisions echo the discord among the lower courts. Having failed to focus on congressional intent, the Court has struggled, and failed, to establish clear, administrable rules on prosecutorial liability. Thus, it is hardly surprising that separate opinions in these cases highlight the arbitrariness and complexity of the current doctrine. For example, in *Buckley*, Justice Kennedy, while acknowledging that policing the line between advocatory and investigatory functions often requires "difficult and subtle distinctions," 509 U.S. at 290 (opinion concurring in part and dissenting in part), maintained that the Court's decision would "create[] more problems than it has solved," *id.*, and that "the classic case for the invocation of

absolute immunity [would] fall[] on the unprotected side of the Court's new dividing line," *id.* at 287. See also *Kalina*, 522 U.S. at 132 (Scalia, J., concurring) (observing that "[a] conscientious prosecutor reading our cases" would find that the Court's approach to prosecutorial immunity questions has produced results that were "exactly opposite" of "the common law as it existed in 1871, when § 1983 was enacted").[6]

This arbitrariness and unpredictability erodes the virtue most ardently claimed for the *Imbler* rule: that it could remove the cloud of potential civil liability that might otherwise hang over the head of a well-intended prosecutor.

3. *Imbler's* Factual Premises Have Been Shown To Be Erroneous

Experience since *Imbler* has also cast serious doubt on key factual premises of that decision: that sanctions such as professional discipline and criminal punishment would provide a meaningful alternative deterrent to unconstitutional action and that the constitutional violations of prosecutors are more likely to be detected and remedied than those committed by other government officials. See 424 U.S. at 426. Cf. *Mitchell*, 472 U.S. at 522-23 (observing that "officials who are entitled to absolute immunity from liability for damages are subject

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[6]As this case also well illustrates, the *procedural* regime to which *Imbler* and progeny have given rise is wasteful and undesirable. Because denials of absolute immunity are immediately appealable, *Mitchell*, 472 U.S. at 525 – and because a defendant does not forfeit the right to assert a qualified immunity defense by limiting his appeal to the absolute immunity issue, "preliminary" proceedings can consume years. See *Buckley*, 20 F.3d 789, 793 (7th Cir. 1994) (noting that case was "five years old, [but] defendants have yet to answer the complaint").

to other checks that help to prevent abuses of authority from going unredressed * * * , and the judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results").

The evidence concerning alternative sanctions leave little hope that they might deter a prosecutor otherwise disposed to abuse his authority. The *Imbler* Court did not cite any case in which 18 U.S.C. § 242 charges had been filed against a prosecutor, and Professor Johns, in an article published in 2005, could find only one such case since the statute's 1866 enactment. 2005 BYU L. Rev. at 71 & n.130 (citing *Brophy* v. *Comm. on Prof'l Standards*, 442 N.Y.S.2d 818 (N.Y. App. Div. 1981), in which a state board cited the conviction as a *mitigating* factor in disciplinary proceedings).

Attorney disciplinary proceedings against prosecutors are likewise surpassingly rare. One study found that between 1886 and 2000, disciplinary proceedings against prosecutors averaged less than one per year *nationally*. See Johns, 2005 BYU L. REV. at 70. See also M. Zapler, "Prosecutors, Defense Rarely Disciplined," *San Jose Mercury News* (Feb. 12, 2006) (finding, after investigating 1500 state disciplinary actions against California attorneys, that only *one* involved a prosecutor – who was sanctioned for covertly assisting a person under investigation and received a brief suspension). Even the relatively mild dignitary sanction of naming a transgressing prosecutor in an appellate decision is very rare, Johns, 2005 BYU L. REV. at 109. A celebrated exception to that general rule, the California Supreme Court's decision in *People* v. *Hill*, 952 P.2d 673 (1997), which identified prosecutor Rosalie Morton by name more than 120 times and documented a "mountain of

deceit and unethical behavior," *id.* at 698, in obtaining a murder conviction, apparently did not result in so much as a reprimand. See Zapler (noting that though the case was "cited in textbooks and court filings as the epitome of prosecutorial misconduct in California[,] the bar * * * took no action").

Moreover, recent studies of cases of individuals wrongfully convicted – including many definitively exculpated through DNA testing – have confirmed the centrality of abuses of prosecutorial power in many of the most severe injustices and highlight the extent to which *Imbler*'s confidence in the self-correcting character of the criminal justice system was misplaced. See, *e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 127 (2008).

These findings underscore two facts that the *Imbler* decision largely ignored (though they were well known to the nineteenth-century lawyers who enacted Section 1983): that much of the most egregious and extreme prosecutorial misconduct is likely to evade detection and correction, cf. *Imbler*, 424 U.S. at 443 (White, J., concurring), and the injuries these extreme abuses of power cause – up to and including death sentences for innocent persons go far beyond those of actors who remain accountable under Section 1983 for violations of clearly established law. See, *e.g.*, *Wood* v. *Strickland*, 420 U.S. 308 (1975) (school board members); *Wilson* v. *Layne*, 526 U.S. 603 (1999) (deputy marshals)

4. No Legitimate Reliance Interests Support Preserving *Imbler*'s Erroneous Rule Of Absolute Immunity

No litigant can justifiably claim a *bona fide* expectation that the *Imbler* rule would remain the law. As the Court explained in *Monell*, "[t]his is not an area of

commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision." 436 U.S. at 700 (quoting *Monroe*, 365 U.S. at 221-222 (Frankfurter, J., dissenting in part)); *State Oil Co.* v. *Khan*, 522 U.S. 3, 20-21 (1997) (observing that "*stare decisis* concerns are at their acme in cases involving property and contract rights") (citing *Payne* v. *Tennessee,* 501 U.S. 808, 828 (1991)).

The only class of cases directly affected by overruling *Imbler* are those involving defendants who violate clearly established constitutional rights: abolishing absolute immunity would still leave "all but the plainly incompetent or those who knowingly violate the [Constitution]," *Malley*, 475 U.S. at 341, immune from suit. Those who are sworn to uphold the Constitution can have no legitimate reliance interest in remaining free to flagrantly violate constitutional rights with impunity. See U.S. Const. art. VI ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution").

III. SECTION 1983'S INTENDED ROLE AS BULWARK FOR CONSTITUTIONAL RIGHTS LESSENS ANY *STARE DECISIS* DEFERENCE TO *IMBLER*

While the considerations on which this Court ordinarily relies in considering whether to overrule one of its precedents all point to overruling *Imbler* here, additional considerations, specific to Section 1983 and its role as a bulwark for constitutional rights, provide further reasons for doing so.

Section 1983 is no ordinary statute: it was enacted to provide a federal remedy for violations of hard-won civil rights, by a Congress unique in history for its commitment to exercising the full extent of its constitutional authority to make individual rights judicially enforceable. As explained above, granting absolute immunity from suit for constitutional violations is at odds with core constitutional values and a longstanding tradition of using civil damages actions to check abuses of power. A rule of law that relieves those exercising governmental authority from accountability to those whose constitutional rights they deprive is no small matter. But it is all the more grave to read such a rule into Section 1983, a provision whose sole concern is the unconstitutional behavior of those acting cloaked with government authority and whose central purpose was to provide a civil remedy to those injured – and do so for a class of officials recognized to have "more control over life, liberty, and reputation than any other person[s] in America." Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC'Y 18 (1940). *Imbler*'s rule of absolute immunity is an indefensible judicial revision of the nation's pivotal civil rights statute, and is anathema to the system of official accountability to citizens established by the Constitution.

CONCLUSION

The judgment of the court of appeals should be affirmed, and in doing so the Court should overrule *Imbler*.

Respectfully submitted,

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SEPTEMBER 2008