No. 18-2261

United States Court of Appeals
For the First Circuit

ROLANDO PENATE

Plaintiff - Appellee

v.

ANNE KACZMAREK

Defendant – Appellant

KRIS FOSTER; RANDALL RAVITZ; JOSEPH BALLOU; ROBERT IRWIN; RANDY THOMAS; SONJA FARAK; SHARON SALEM; JAMES HANCHETT; JULIE NASSIF; LINDA HAN; ESTATE OF KEVIN BURNHAM; STEVEN KENT; JOHN WADLEGGER; GREGG BIGDA; EDWARD KALISH; CITY OF SPRINGFIELD

Defendants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTSS

AMICI CURIA BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS AND MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFF-APPELLEE ROLANDO PENATE

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Dated: April 19, 2019

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INTRODUCTION

After he was incarcerated for more than five years and seven months, plaintiff-appellee Rolando Penate was released in 2017 when a Massachusetts trial court concluded that two former attorneys in the Massachusetts Attorney General's Office engaged in "egregious" misconduct, perpetrating a "fraud on the court," that marred the prosecution of Penate for drug offenses. RA025, RA070. Those two attorneys, though prosecutors, were never assigned to prosecute Penate. Now one of them, defendant-appellee Anne Kaczmarek, appeals the denial of her claim for absolute prosecutorial immunity from liability to Penate. Because Kaczmarek had no legitimate advocacy role in the Penate prosecution, and instead participated in that prosecution purely through misconduct, the district court correctly concluded that she is not entitled to absolute prosecutorial immunity.

As alleged in Penate's complaint,[1] former assistant attorneys general Anne Kaczmarek and Kris Foster covered up evidence that state chemist Sonja Farak used illegal drugs when she certified that the substances at issue in Penate's case were drugs. Penate contends that Kaczmarek deliberately withheld relevant evidence from the Hampden County Assistant District Attorneys who were

[1] As required by this case's procedural posture, amici accept all allegations in the complaint as true and draw all reasonable inferences in Penate's favor.

prosecuting Penate on drug charges and then worked with others to shield such evidence from discovery orders and subpoenas. In 2014, this cover-up misled a Massachusetts Superior Court into finding, incorrectly, that Farak's drug use began in the summer of 2012, *after* she worked on Penate's case, when in reality Farak had used drugs at the lab on a daily basis from about 2004 until her January 2013 arrest. RA063; *see Comm. for Pub. Counsel Servs. v. Att'y Gen.*, 480 Mass. 700, 706-09, 108 N.E.3d 966, 973-75 (2018) ("*CPCS*"). Because of this cover-up, Penate was released only in 2017, when a Superior Court judge held that "intentional and deceptive actions" by Kaczmarek and Foster "ensured that justice would certainly be delayed, if not outright denied." *CPCS*, 480 Mass. at 720, 108 N.E.3d at 982. The Massachusetts Supreme Judicial Court has characterized the facts found by the Superior Court as "the deceptive withholding of exculpatory evidence by members of the Attorney General's office." *Id.* at 702, 108 N.E.3d at 969.

Seeking a remedy for this egregious misconduct, Penate brought claims against individuals from the Attorney General's Office, Department of Public Health, and Massachusetts State Police, as well as the City of Springfield, alleging "multiple, overlapping conspiracies to suppress highly exculpatory evidence." RA025. This appeal concerns only former AAG Kaczmarek. Penate contends that Kaczmarek violated his right to procedural due process under 42 U.S.C. § 1983

(Count IV); he also brings a state law tort claim for intentional infliction of emotional distress (Count VIII). Kaczmarek—despite never prosecuting Penate—seeks to hide behind the shield of absolute prosecutorial immunity, asserting that this narrowly-construed defense to § 1983 should be read expansively to include her role "as an advocate" who worked closely with the lead investigator in the Farak investigation and other members of the Attorney General's office to obstruct access to relevant evidence.

The district court appropriately rejected Kaczmarek's invitation to dramatically expand the scope of prosecutorial immunity to reach any "advocacy" by a government lawyer. Consistent with the text, purpose, and public policy of § 1983, this Court should affirm.

INTEREST OF AMICI CURIAE

Amici curiae are two organizations that have an interest in the fair and efficient administration of criminal justice.[2]

The American Civil Liberties Union of Massachusetts, Inc. (ACLUM), an affiliate of the national ACLU, is a nonprofit, nonpartisan organization dedicated to defending civil rights and civil liberties. ACLUM has participated in several cases concerning the misconduct by government actors that has resulted in tens of

[2] No party or counsel for any party authored any part of this brief or made a monetary contribution intended to fund the preparation or submission of this brief. Amici have filed a motion seeking leave of court to file this brief.

thousands of wrongful convictions in the Massachusetts lab scandals. *See, e.g.*, *Comm. for Pub. Counsel Servs. v. Att'y Gen.*, 480 Mass. 700 (2018); *Bridgeman v. District Attorney for the Suffolk Dist.*, 476 Mass. 298 (2017); *Bridgeman v. District Attorney for the Suffolk Dist.*, 471 Mass. 465, 487 (2015).

The Massachusetts Association of Criminal Defense Lawyers (MACDL) is an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying, and attempting to avoid or correct, problems in the criminal justice system. It files amicus curiae briefs in cases raising questions of importance to the administration of justice.

ARGUMENT

I. Section 1983 Is a Broad Remedial Statute That Was Enacted to Provide a Remedy to Individuals Deprived of Their Constitutional Rights By a State Official's Unlawful Acts

Enacted during Reconstruction to protect the constitutional rights of individuals targeted for unlawful conduct by state actors, § 1983 is intended to protect individuals from—and to provide a remedy for—abuses of power carried out "under color of" state law and custom. 42 U.S.C. § 1983. The statute is aimed 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)). It seeks "to interpose the federal courts between the States and the people . . . to protect the people from unconstitutional action under color of 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 (1879)).

Section 1983 is intended to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe*, 365 U.S. at 172. Indeed, the Supreme Court has recognized that this "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980). The damages remedy is particularly important where "the wrongdoer is the institution that has been established to protect the very rights it has transgressed." *Id.*

Section 1983 must be "broadly construed," a view "compelled by the statutory language, which speaks of deprivations of '*any* rights privileges, or immunities secured by the Constitution and laws." *Dennis v. Higgins*, 498 U.S. 439, 443 (1991) (quoting 42 U.S.C. § 1983). Indeed, "[t]he legislative history of the section also stresses that as a remedial statute, it should be '"liberally and beneficently construed."' *Id.* (quoting *Monell v. N.Y. City Dep't of Social Servs.*, 436 U.S. 658, 684 (1978) (quoting Rep. Shellabarger, Cong. Globe, 42d Cong., 1st

Sess., App. 68 (1871))); *see also* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for Legislative Will*, 86 Nw. U. L. Rev. 497, 539-47 (1992) (explaining that for 42nd Congress that enacted § 1983, protection of individual rights was the single "hierarchically superior purpose" of the legislation, and not merely one "desirable goal among many).

II. Absolute Prosecutorial Immunity Is a Rare Exception to § 1983 Liability That Already Stretches Far Beyond the Statutory Text and its Public Policy Rationale

The text of § 1983 does not include an immunity defense. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993). Indeed, given the statute's broad language, "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under its terms." *Scheuer*, 416 U.S. at 243. Nevertheless, nearly a century after § 1983's enactment, the Supreme Court pointed to the common law and "considerations of public policy" in holding that certain prosecutorial functions were absolutely immune from § 1983 liability. *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976).[3] The Court concluded that "a state

[3] The Court's reliance on the common law has been challenged. *Imbler* relied on decisions allowing prosecutorial immunity in cases decided decades *after* § 1983 was enacted. 424 U.S. at 421-24 & n.21. As Justice Scalia bluntly observed, "There was, of course, no such thing as absolute prosecutorial immunity when § 1983 was enacted." *Kalina v. Fletcher*, 522 U.S. 118, 132 (1997) (Scalia, J., concurring). Scholars concur. During Reconstruction, legislators looking to the common law "would have found the well-established tort of malicious prosecution, which had been upheld in an action against a public prosecutor" and "would have

prosecuting attorney who acted within the scope of his duties in *initiating and pursuing* a criminal prosecution" is immune from suit. *Id.* at 410 (emphasis added). The Court later extended absolute immunity to government attorneys who "perform[] certain functions analogous to those of a prosecutor" like "initiat[ing] administrative proceedings" and "presenting evidence in an agency hearing." *Butz v. Economou*, 438 U.S. 478, 515-16 (1978). The test is functional: prosecutorial immunity is determined by the "'judicial process itself,'" *not* "any special 'esteem for those who perform [prosecutorial] functions.'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).

Imbler hypothesized that extending absolute immunity for the prosecutorial function would "not leave the public powerless to deter misconduct or to punish that which occurs." 424 U.S. at 429.[4] The Court assumed that prosecutors would

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found no immunity defense to insulate the prosecutor from liability . . . for there was *not a single decision* affording prosecutors any kind of immunity defense from liability for malicious prosecution." Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 114 (2005). Indeed, Congress minimized "[t]raditional immunities" in its eagerness to confront the serious constitutional violations during Reconstruction. Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L. Rev. 482, 485 (1982).

[4] *See also Malley*, 475 U.S. at 343 n.5 (positing that the "development and enforcement of professional standards for prosecutors" would "lessen the danger that absolute immunity will become a shield for prosecutorial misconduct"); *Connick v. Thompson*, 563 U.S. 51, 66, (2011) (asserting that "[a]n attorney who violates his or her ethical obligations is subject to professional discipline").

face criminal liability for "willful acts," and "professional discipline" for less egregious acts, *id.* at 429; for example, using perjured testimony or withholding exculpatory information would "warrant[] criminal prosecution as well as disbarment," *id.* at 431 n.34. But, in the 43 years since *Imbler*, it has become abundantly clear that these assumptions are deeply flawed.[5] Prosecutors are, in fact, almost never held accountable for misconduct.

A. Prosecutorial Misconduct Is Significant and Underreported

While Kaczmarek was not acting in a prosecutorial function when she withheld exculpatory information from Penate, the act of withholding exculpatory information from defendants is, in fact "the most recurring and pervasive of all constitutional procedural violations." Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 Case W. Res. L. Rev. 531, 533 (2007). "*Brady* violations have reached epidemic proportions in recent years." *United States v. Olsen*, 737 F.3d 625, 631-32 (9th Cir. 2013) (Kozinski, J., dissenting from order denying pet. for r'hrg en banc) (collecting cases in which courts have ordered

[5] Commentators have argued that *Imbler* was wrongly decided because it creates an immunity that did not exist at the time Section 1983 was enacted and because its policy analysis relies on inaccurate assumptions. *See, e.g.*, Amicus Br. of Const. Accountability Ctr., *Van De Kamp v. Goldstein*, 2008 WL 4181889, at *10-17 (2008) (No. 07-854) (noting that "the error of *Imbler* is manifest"); Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, Amicus, Harvard Civ. Rights-Civ. Liberties L. Rev. (Aug. 2010) (referring to *Imbler*'s "revisionist history and dubious policy"). At a minimum, these criticisms suggest that the immunity created by *Imbler* should not be expanded.

new trials due to the suppression of exculpatory material). The consequences of such violations are "disastrous": "innocent people are wrongfully convicted, imprisoned, and even executed; the reputation of U.S. prosecutors suffers; and the absence of meaningful legal and ethical enforcement has a corrosive effect on the public's perception of [the] justice system." Gershman, *supra*, at 533.

The failure to disclose exculpatory evidence is a substantial factor in wrongful convictions. Studies have found that at least ten percent of convictions reversed on appeal or in post-conviction proceedings involve prosecutors' suppression of exculpatory evidence. *See* Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 Wash. & Lee Rev. 1533, 1540 n.40 (2010); *see also* Shawn Musgrave, *Wayward Prosecutors: Scant discipline follows prosecutors' impropriety in Massachusetts*, New England Center for Investigative Reporting (Mar. 6, 2017), https://www.necir.org/2017/03/06/scant-discipline-follows-prosecutors-impropriety-massachusetts/ (finding appellate reversals in 120 out of 1,000+ Massachusetts cases involving allegations of prosecutorial misconduct and at least ten percent involved suppression of exculpatory evidence). Where individuals have been exonerated by DNA after claims of prosecutorial misconduct, 41% of the cases "involved withholding potentially exculpatory evidence such as knowledge of alternative suspects and forensic science evidence that may have weakened the prosecution's case." Emily M. West, *Court Findings of Prosecutorial Misconduct*

Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases, Innocence Project (Oct. 2010), at 4, https://www.innocenceproject.org/wp-content/uploads/2016/04/pmc_appeals_255_final_oct_2011.pdf.

Known *Brady* violations are merely the "tip of the iceberg." Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 Cardozo L. Rev. 2161, 2175 (2010) ("[c]laims about the frequency of disclosure error are hard to prove or disprove, precisely because prosecutors have not systematically studied their mistakes," and "[n]o one else can do so, given that prosecutors ordinarily have exclusive access to information needed to assess how and why—and often whether—disclosure errors occurred"). The very nature of such misconduct, which involves the withholding of evidence that a defendant may never discover, makes it "highly unlikely wrongdoing will ever come to light in the first place." *Olsen*, 737 F.3d at 630. "[P]roven Brady errors hint at a larger problem because the vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day." Daniel S. Medwed, *supra*, at 1540.

B. The Proliferation of Plea Bargaining Has Concentrated Substantial Control Over the Criminal Justice System in the Hands of Prosecutors

The true extent of *Brady* violations is obscured by the prevalence of plea bargains. "*Brady* is a hidden problem for which it is impossible to gather accurate data because attorneys raise most *Brady* or other disclosure issues at trial, on appeal, or in post-conviction proceedings. Since most cases result in guilty pleas, it is very difficult to gather data and to actually study the extent to which disclosure issues are a significant problem." Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 Cardozo L. Rev. 1943, 1945 (2010).

While the jury trial provides an "inestimable safeguard against the corrupt or overzealous prosecutor," that constitutional protection has eroded with the expansion of plea bargaining. *Cf. Duncan v. Louisiana*, 391 U.S. 145, 151, 156 (1968); *Ludwig v. Massachusetts*, 427 U.S. 718 (1976) ("the jury serves its function of protecting against prosecutorial and judicial misconduct") . "[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Most convictions are now the result of plea bargains. *See Lafler*, 566 U.S. at 170 (in 2009, pleas made up "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions"); Suja A. Thomas, *What Happened to the American Jury? Proposals for Revamping Plea*

Bargaining and Summary Judgment, 43 Litigation 3, Spring 2017, at 25 ("[J]uries today decide only 1-4 percent of criminal cases filed in federal and state court."). In both the Amherst drug lab scandal at issue in Penate's case and the Hinton drug lab scandal—which together led to tens of thousands of wrongful convictions based on tainted evidence—nearly all defendants pled guilty instead of exercising their constitutional rights to a fair trial. *See, e.g.*, Leon Neyfakh, *A Shocking Reminder of How Reliant Prosecutors Are on Plea Deals*, Slate Magazine (July 21, 2016), https://tinyurl.com/hpovhv2; Adam Frenier, *Drug Convictions With Ties to Chemist Sonja Farak Will Be Dismissed*, New England Public Radio, https://tinyurl.com/y6zp23ed (noting that over 99 percent of defendants pled guilty in some counties impacted by Sonja Farak's mishandling of drug evidence). Innocent defendants may plead guilty. *See Town of Newton v. Rumery*, 480 U.S. 386, 400 (1987) (O'Connor, J., concurring) ("The risk and expense of a criminal trial can easily intimidate even an innocent person whose civil and constitutional rights have been violated."); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157 (2014).

The expansion of plea bargaining has concentrated institutional power in the hands of prosecutors, who control charging decisions, the discovery provided to defendants prior to a plea, and the terms of the bargains themselves, which often

dictate sentencing outcomes and post-release conditions. Combined with inadequate mechanisms for accountability, this creates an environment ripe for abuse and a high risk of wrongful convictions, both of which undermine the integrity of the criminal justice system.[6]

C. Prosecutors Are Rarely Held Accountable for Misconduct

Prosecutors almost never face criminal charges for their conduct, and as such, the possibility of criminal liability is too remote to change behavior. A 2003 study of more than 2,000 cases involving prejudicial prosecutorial misconduct found that *none* of the prosecutors faced criminal charges for their actions. *See* Ctr. for Pub. Integrity, *Harmful Error: Investigating America's Local Prosecutors*, at app. 79-90 (2003); *see also* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 60 (2005).[7]

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[6] As many commentators have observed, deliberate prosecutorial misconduct is not the only concern. Prosecutors tend to exhibit confirmation bias about the strength of their cases, which makes them overconfident in defendants' guilt in a manner that may contribute to constitutional violations. *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, The New York Review of Books (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/; Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 Hofstra L. Rev. 87, 105-06 (2017); Ellen Yaroshefsky, *Why Do Brady Violations Happen? Cognitive Bias and Beyond* (2013), *available at* http://scholarlycommons.law.hofstra.edu/faculty_scholarship/1025/; Alafair S. Burke, *Prosecutorial, Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 183 (2007).

[7] The failure to prosecute government officials who engage in constitutional violations is illustrated by the history of another Reconstruction-era statute, 18

Disciplinary boards likewise exercise virtually no oversight over prosecutors. *See Medwed*, *supra*, at 1544-45 (collecting authorities). "[P]rofessional discipline of prosecutors is extremely rare." Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tx. L. Rev. 685, 722 (2006). And even when they are disciplined, "prosecutors have been treated more leniently than other lawyers facing discipline for similar misconduct." Richard Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 733 (1987).

A 2017 review of over 1000 cases involving claims of prosecutorial misconduct in Massachusetts determined that, although convictions had been reversed at least 120 times in whole or in part because of prosecutorial misconduct, only two publicly available decisions since 1980 from the Massachusetts Board of Bar Overseers (BBO) named prosecutors who were disciplined for improper trial behavior. Musgrave, *supra*. Nine other prosecutors received admonishments, but their names were not released. *Id.* In general, the review concluded that prosecutors in Massachusetts face virtually no discipline, even though prosecutors had engaged in conduct judges characterized as "improper" in more than 100 of the cases

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U.S.C. § 242. Johns, *supra*, at 70. That statute specifically sought to hold government officials criminally liable for violating constitutional protections, but at least as of 2005, only one prosecutor had ever been convicted under this statute. *See id.*

reviewed, and in conduct judges described as "misconduct" and/or "egregious" in 20 cases. *Id.*[8]

Even when disciplinary boards investigate prosecutorial misconduct, they take limited action and issue weak sanctions. In 2017, in a rare disciplinary proceeding against a prosecutor, the BBO disciplined Martha's Vineyard Assistant District Attorney Laura Marshard. George Brennan, *Martha's Vineyard prosecutor guilty of misconduct*, MV Times, Oct. 30, 2017, *available at* https://www.mvtimes.com/2017/10/30/marthas-vineyard-prosecutor-guilty-misconduct/. Although she was tried on disciplinary charges related to suppressing exculpatory evidence, failing to correct false testimony, and meeting with a represented witness without notifying or obtaining permission from the witness's lawyer, she was only disciplined for the last count. *Id.* Indeed, Marshard's lawyer even argued she should not be found responsible for withholding exculpatory evidence precisely because no prosecutors in Massachusetts have ever been

[8] Massachusetts is not unique in failing to hold prosecutors accountable. For instance, a New York Bar Association task force reviewing action against prosecutors found that among the 53 cases it surveyed, there were no "public disciplinary steps against prosecutors" and thus there is "little or no risk" to prosecutors who engage in misconduct. N.Y. State Bar Ass'n, *Final Report of the N.Y. State Bar Association's Task Force on Wrongful Convictions*, at 29 (2009), https://www.nysba.org/wcreport. A California review likewise found that no cases involving prejudicial misconduct even resulted in a report to the state bar, despite the fact that judges are required by state law to make such reports. *See* Cal. Comm'n on the Fair Admin. of Justice, *California Commission on the Fair Administration of Justice Final Report* 71 (2008), https://tinyurl.com/y6ncbxvu.

disciplined for failure to disclose exculpatory evidence. Barry Stringfellow, *Disciplinary hearing begins for assistant district attorney*, MV Times, May 3, 2017, *available at* http://www.mvtimes.com/2017/05/03/disciplinary-hearing-begins-assistant-district-attorney/. Moreover, the BBO merely imposed a public reprimand rather than more serious consequences, such as suspension of her license. Brennan, *supra*.

III. Prosecutorial Immunity Need Not, and Should Not, Be Extended to Protect the Misconduct at Issue Here

Neither party claims to have found an immunity case just like this one, and for good reason. This case is unusual; Kaczmarek was indeed a prosecutor, but she harmed Penate's criminal case with ever being called upon to prosecute *him*. Kaczmarek "bears the burden of showing that," under these unusual circumstances, absolute immunity "is justified for the function in question." *Buckley*, 509 U.S. at 269 (citation omitted). This is because "[o]ur system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law." *Butz*, 438 U.S. at 506.[9] Given that absolute prosecutorial immunity already appears to have reached beyond its asserted basis in § 1983 or in public

[9] *See also United States v. Lee*, 106 U.S. 196, 220 (1882) ("No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.").

policy, as shown above, the doctrine should not be further extended to reach the particular facts alleged here.

A. Kaczmarek Had No Legitimate Advocacy Role Supporting the Penate Prosecution

Kaczmarek was certainly a prosecutor at the time of the events at issue here, but she was not Penate's prosecutor. Instead, she harmed Penate primarily in two other ways. First, while prosecuting someone else—Sonja Farak—Kaczmarek came to possess evidence that was exculpatory as to Penate. She was under instructions, and ethical obligations, to pass along that evidence to district attorneys, so that they in turn could fulfill their constitutional obligations to disclose that evidence to Penate and other defendants that were being and had been prosecuted based on Farak's say-so. *See CPCS*, 480 Mass. at 710; RA050, RA052. But she did not do so. Second, in response to subpoenas issued to her and others, Kaczmarek again withheld the exculpatory evidence. Kaczmarek therefore perpetrated a fraud on the court, allowing Penate to be tried with tainted evidence. *See Napue v. Illinois*, 360 U.S. 264 (1959) (government's knowing use of false evidence violates Fourteenth Amendment).

Under the functional test for assessing claims of absolute prosecutorial immunity, Kaczmarek is not entitled to immunity because she was never called upon to "perform[] certain functions analogous to those of a prosecutor" of *Penate*.

See Butz, 438 U.S. at 515. She never litigated against Penate; she was never tasked with advancing the criminal case against him at all.

Indeed, because Kaczmarek was assigned to prosecute Sonja Farak, and because developing the criminal case against Farak would tend to generate exculpatory evidence with respect to defendants prosecuted with Farak's help, it presumably would have been highly improper for the Attorney General's Office to assign Kaczmarek *any* advocacy role with respect to Penate or any other "Farak defendant." *See* Mass. R. Prof. Conduct 1.7 (governing conflicts of interest). So it is hardly surprising that neither Kaczmarek nor the Attorney General's Office, so far as amici are aware, has ever claimed that Kaczmarek was asked to be a legal advocate with respect to Penate or any other Farak defendant.

Thus, when Kaczmarek argues that she was "at all relevant times, functioning as an advocate," Appellant Br. 24, this is a sleight of hand. Kaczmarek performed legitimate advocacy with respect to *Farak*, but never with respect to Penate. When Kaczmarek *chose* to take actions that were adverse to Penate and to thousands of other Farak defendants, this was advocacy that she improperly assigned to herself.[10]

[10] Accordingly, the Supreme Judicial Court has held that Kaczmarek's misconduct was "prosecutorial" for purposes of certain criminal law doctrines, and amicus the ACLU of Massachusetts has argued that Kaczmarek's misconduct violated ethics rules governing prosecutors. *See CPCS*, 480 Mass. at 730 n.13; Mem. of the

B. Extending Absolute Immunity to Kaczmarek Would Needlessly Stymie Individual Accountability and Crucial Deterrence

The overall context of the Farak lab scandal confirms that absolute prosecutorial immunity is unwarranted here. The actions of former assistant attorneys general Kaczmarek and Foster have wreaked substantial havoc not only on Penate but also on the Massachusetts justice system. Citing their egregious misconduct, the Massachusetts Supreme Judicial Court has ordered the dismissal of every case in which Sonja Farak signed a drug certificate, plus substantial numbers of other cases that passed through the Amherst Lab during Farak's tenure. *CPCS*, 480 Mass. at 704-05. As a sanction for the misconduct committed by Kaczmarek and Foster, the Supreme Judicial Court has also ordered the state Attorney General's Office to pay for notice to the defendants. *Id.* at 730 n.13.

Yet, to this point, no consequences have been ordered against Kaczmarek and Foster themselves. Neither one has been charged with a crime. Nor, so far as the record reflects, was either one fired from the Attorney General's Office.

Innocence Project, Inc., et al., *Commonwealth v. Cotto*, Mass. Sup. Ct. No. 2007-770 (Mar. 16, 2017), *available at* https://tinyurl.com/yyun6ate (arguing that Kaczmarek's conduct violated numerous of the Massachusetts Rules of Professional Conduct, including Rule 3.3, requiring candor towards the court, Rule 4.1, requiring truthfulness in statements to others, and Rule 3.8, imposing additional rules on individuals who serve as prosecutors). But the application of these doctrines and rules do not, of course, mean that Kaczmarek meets the requirements of *Imbler*'s functional test where her alleged decision to act as a prosecutor of Penate was itself an act of misconduct.

Perhaps *because* Kaczmarek never entered an appearance in the criminal cases against Penate and the other Farak defendants, no sanction has ever been ordered against her in those cases. A bar complaint against Kaczmarek and Foster has been pending for nearly two years, so any discipline will come, if at all, long after the relevant misconduct. Thus, at a May 2018 oral argument before the Massachusetts Supreme Judicial Court, an attorney for the state Attorney General's Office was constrained to say that the only consequence imposed on Kaczmarek and Foster to date had been Judge Carey's "strongly worded opinion."[11]

This is precisely the sort of accountability vacuum that § 1983 liability is supposed to fill. Section 1983 acts "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). "It is almost axiomatic that the threat of damages has a deterrent effect." *Carlson v. Green*, 446 U.S. 14, 21 (1980); *see also Imbler*, 424 U.S. at 442 ("It should hardly need stating that, ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct."). Liability creates "an incentive for officials who may harbor doubts

[11] *See* SJC Oral Arguments Archive, https://boston.suffolk.edu/sjc/archive.php (May 8, 2018) (argument for SJC-12471, at 1:02:24).

about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S. at 651-52.

Academic analyses have confirmed that § 1983 litigation has a deterrent effect that propels change, both because "valuable information is unearthed and exposed" during § 1983 litigation, which can lead to policy changes, and because policymakers are subject to the "publicity that attends the exposure of the information." Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845, 859, 61 (2001); *see also* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841 (2012) (constitutional tort suits help police departments identify systemic problems and focus personnel and training decisions, and are more effective in spurring reforms to protect constitutional rights than other mechanisms such as civilian complaints or use-of-force reports); Jeffrey Standen, *The Exclusionary Rule and Damages: An Economic Comparison of Private Remedies for Unconstitutional Police Conduct*, 2000 BYU L. Rev. 1443, 1487 (2000) (finding damages remedies imposed via constitutional tort suits have a greater deterrent effect on police misconduct that the exclusionary rule); *see also* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144, 1211 (2016) (noting that deterrent effect exists even where agencies are insured).

Here, the deterrent value of § 1983 liability is especially important precisely because Kaczmarek improperly took it upon herself to advocate against Penate. Government lawyers should not be permitted to inject themselves into criminal cases through misconduct, and acquire immunity for doing so, in one fell swoop. A contrary ruling would invite substantial mischief.

CONCLUSION

For the reasons set forth above and in Penate's brief, this Court should affirm the district court's denial of Kaczmarek's motion for absolute prosecutorial immunity.

April 19, 2019

Respectfully submitted,

/s/ Emma Quinn-Judge
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(5), I hereby certify that this brief uses 14-Point Times New Roman, a proportionally-spaced font. Pursuant to Fed. R. App. P. 32 (a)(7)(B), I certify that the brief was prepared using Microsoft Word, and contains 5,964 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(i), and according to that system's word count function.

Date: April 19, 2019 /s/ Emma Quinn-Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2019, I have electronically filed the foregoing brief with the United States Court of Appeals for the First Circuit by the CM/ECF system, which will then send notification of such filing to all counsel of record.

Date: April 19, 2019 /s/ Emma Quinn-Judge