THEODORE ROOSEVELT AMERICAN INN OF COURT

– *PRESENTS* –

SLAVERY, INFLUENCE PEDDLING, POLITICAL CORRUPTION AND PROSECUTORIAL MISCONDUCT – N.Y. IN THE 21st CENTURY

June 15, 2022

HARRY H. KUTNER, JR.

1325 Franklin Avenue, Suite 225
Garden City, New York 11530
(B) (516) 741-1400

hhkutnerlaw@gmail.com

Education:

Fordham University School of Law, New York, NY 1973
J.D., Doctor of Jurisprudence

Iona College, New Rochelle, New York 1969
B.A., Bachelor of Arts (Political Science)

Admitted:

New York, 1974
U.S. Federal Courts, 1975 (EDNY and SDNY)
U.S. Court of Appeals Second Circuit 1980
U.S. Supreme Court 1980
U.S. Tax Court 1982

Martindale-Hubbell rating: AV Preeminent

Professional experience:

Legal career in a general practice spanning forty-eight years, noteworthy for its variety and results across a wide spectrum of legal issues, in both civil and criminal litigation in federal and state courts. Reported cases involve personal injury, wrongful death, zoning and land use, class action frauds, estates, real estate, commercial sales and financing, civil rights, extradition, intentional torts, medical malpractice, Article 78, criminal, and commercial.

HARRY H. KUTNER, JR.

ATTORNEY-AT-LAW

Professional Affiliations:

Theodore Roosevelt American Inn of Court (1993-present)
Criminal Courts Bar Association (1974-present, Past President '89-'90)
Catholic Lawyers Guild (1974-present, Past President '86-'87)

Public service:

Nassau Community College, Trustee ('91-'97)
Nassau County Planning Commission, Commissioner ('79-'82)

Military service:

U.S.M.C. 1970-1972 (Honorable Discharge)

Expert testimony:

In addition to many appearances before courts as to the prevailing rates and value of legal services performed, has testified in front of the House of Representatives Banking Committee as an outgrowth of his successful pursuit of a federal class action against banks, mortgage brokers, home improvement contractors, title companies, at more than a serious risk of death from them (as a result of which, in the adjunct criminal prosecution, 68 individuals were federally convicted), and although it became mildly contentious with the Committee Chairman (later imprisoned), his testimony contributed to several bank-consumer lending reforms.

JAMES O. DRUKER

Update this Page

516-746-4300

EMAIL

Attorney Profile
Top Rated Tax Attorney in Garden City, NY

Kase & Druker
1325 Franklin Ave, Suite 225
Garden City, NY 11530
Visit: http://www.drukerlawny.com
Phone: 516-746-4300
Fax: 516-742-9415

Selected to Super Lawyers: 2014 - 2022
Licensed in New York Since: 1974
Education: Boston College Law School
Practice Areas: Tax: Business, Criminal Defense: White Collar

ATTORNEY PROFILE

Attorney James O. Druker is the managing partner of Kase & Druker law firm in Garden City, New York. Nationally recognized as among the preeminent trial attorneys in the country, Mr. Druker has more than 51 years of total legal experience, and he provides exceptional counsel and support to clients throughout Nassau County and the surrounding areas of Long Island and New York City who have legal needs involving any of the following:

· Federal and state tax law for businesses

· Tax controversies and tax-related criminal matters

· White collar criminal defense

Widely regarded as a leader in his field, Mr. Druker has served as master of the bench for the Theodore Roosevelt American Inn of Court since 1987, and he has written extensively on matters pertaining to taxation, criminal procedure, legal ethics and other subjects. He has also conducted numerous lectures and continuing legal education seminars on a variety of legal topics, and he has served as adjunct law professor at Fordham University School of Law.

Early in his legal career, Mr. Druker served as assistant district attorney with the Nassau County District Attorney's Office, where he was also chief of the Rackets and Narcotics Bureau. He has also served as assistant U.S. attorney for the U.S. District Court for the Eastern District of New York as well as deputy chief of the criminal division and chief of the Official Corruption Section. In addition, he has served as special attorney with the U.S. Department of Justice and assistant attorney general for the Commonwealth of Massachusetts.

Since entering private practice, Mr. Druker has achieved considerable success advocating on behalf of those who stand accused of serious white collar offenses as well as tax-related criminal violations, and he has earned numerous awards and honors for his professionalism and service. He has earned an AV Preeminent peer review rating* from Martindale-Hubbell along with perennial designations as one of the top trial attorneys in his region.

A 1967 graduate of The University of North Carolina, Chapel Hill, Mr. Druker obtained his Juris Doctor from Boston College Law School in 1969, where he won the Grimes Moot Court competition and received awards for Best Oral Argument and Best Brief. Among his other professional affiliations, he is an active member of the Nassau County Bar Association's Taxation Committee as well as the New York State Bar Association, the Massachusetts Bar Association and the American Bar Association's Criminal Justice Section.

Mr. Druker holds his license to practice in Massachusetts, New York and Florida. He is also admitted to practice before the U.S. District Courts for the Southern and Eastern Districts of New York, and before the U.S. District Court for the Southern District of Florida, the District of Massachusetts and the Eastern District of Columbia. In addition, he holds his admission to practice before the U.S. Court of Appeals for the 1st and 2nd Circuits, the U.S. Tax Court and the U.S. Supreme Court.

Susan Fagen Britt
25 Athem Drive
Glen Cove, New York 11542
(516) 791-4545 Home
(516) 551-4122 Cell Phone

Experience

2010 to Present **Supreme Court, State of New York, County of Nassau**
Mediator
Assigned to assist the court and attorneys in resolving cases in mandatory program.

Aug 1997 to January 2021 **Hirsch, Britt & Mosé** Garden City, New York
Partner

Representation of clients from the inception of the lawsuit through the trial. Includes examinations before trial, court conferences, settlement negotiations, client conferences, jury selection and trial. Lectures on advanced topics pertaining to medical malpractice for client hospitals, provide new developments in the medical legal field and related topics to client hospitals and organizations. Provide risk management services to client hospitals and organizations. Practice areas include medical litigation, general liability, corporate services, contracts, personal injury, employment litigation, discrimination in the workplace and sexual harassment. Representation of attorneys in legal malpractice and professional partnership dissolution. Attended mediation and arbitration on behalf of clients.

Matturro & Hirsch Carle Place, New York

Jan 1992 to Aug 1997
Partner

Trial attorney, representation of clients in all matters concerning medical malpractice, personal injury and mental health issues. Attend Court conferences, meetings, arbitration and mediation, risk management consultations, lectures for clients and settlement negotiations.

Hofstra University Hempstead, New York

Sept 2016 to present *Assistant Adjunct professor* Masters in Health Administration

Teaching courses:
Health Law and Ethics
Health Policy and Analysis
Remote teaching via Zoom from March 2020 to October 2021

Aug 1991 to present **New York College of Osteopathic Medicine** Old Westbury, New York
Assistant Adjunct Professor Now called Subject Matter Expert, Department of Medicine/Public Health

Course Director for class in Medical Jurisprudence and Medical Ethics. Teaching required course for second year medical students in the area of medical malpractice, health care law, biomedical ethics, HMO and managed health care plans, contracts and torts.

Remote teaching by way of video November 2020 to present

Jan 1989 to present **Hofstra University School of Law**
Instructor - NITA Program

Trial Techniques. Course offering training in all areas of the trial. Course taught by litigators and law professors with emphasis on trial practice and techniques.

Aug 1984 to Jan 1991 **Rivkin Radler Bayh Hart & Kremer** Uniondale, New York
Associate Attorney

Representation of clients from inception of lawsuit through the trial. Includes examinations before trial, client conferences, settlement negotiations, court conferences, jury selection and trial. Provided educational programs and risk management services to client hospitals and organizations.

1980 to 1981 **Downstate Medical Center, Brooklyn, New York**
Research assistant in Department of Biochemistry

Participated in the investigation and collection of scientific data for human enzyme research.

1967 to 1973 **Brookdale Hospital and Medical Center, Brooklyn, New York**
Registered Professional Nurse

Involved in all areas of nursing practice including patient care, supervision of support staff, education of patients and their families, participation in the collection of statistical data for various public health studies in industrial medicine and development of nursing protocol.

1973 to 1974 **Brooklyn College** Brooklyn, New York
Adjunct lecturer, Department of Biology
Taught course designed for second year nursing students, in Microbiology.

Education

1984 **Hofstra University School of Law** Hempstead, New York
Juris Doctor

1979 **Adelphi University** Garden City, New York
Bachelor of Science, Major in Biology

1967 **Kingsborough Community Colleg**e Brooklyn, New York
Associate Degree in Science, Major: Nursing
License to practice nursing 1967

Admissions to the Bar
New York State 1985
United States District Court for the Eastern District 1985
United States District Court for the Southern District 1985

Memberships
Nassau County Bar Association
Theodore Roosevelt Chapter of the American Inns of Court
Elected to Board of Trustees for the American Lung Association of Nassau-Suffolk Counties, New York
Institutional Review Board, New York College of Osteopathic Medicine
Executive Board INNS OF COURT

Lawyers.com

Scott M. Druker

Peer Reviews
no reviews

Client Reviews
no reviews

Licensed for 15 years

View Website

Contact View Phone #

About Scott M. Druker

Former Associate, Ivan Fisher Law Firm, 2006-2009.

KASE & DRUKER

Areas of Law

Criminal Defense

Attorney Reviews

WRITE A CLIENT REVIEW

CLIENT (0) PEER (0)

This attorney does not have any client reviews yet.

Credentials

Position

Associate

Admission Details

2007, New York

Law School Attended

Touro Law School
Class of 2006
J.D.

University Attended

Bucknell University
Class of 2002
B.A.

Birth Information

Born in 1980
N.Y., New York, July 2, 1980

Associations & Memberships

New York City and New York State Bar Associations

Theodore Roosevelt American Inn of Court.

Representative Cases

TABLE OF CONTENTS

Kase & Druker
Counsellors at Law
1325 Franklin Avenue
Suite 225
Garden City, N.Y. 11530

(516) 746-4300
FAX NO. (516) 742-9415

JAMES O. DRUKER*
ELIZABETH S. KASE

COUNSEL
PAULA SCHWARTZ FROME
ALAN G. KRAUT

* (MEMBER N.Y., MASS. & FLA BAR)

WESTCHESTER OFFICE
136 PALMER AVENUE
MAMARONECK, N.Y. 10543
(914) 834-4600

SARASOTA OFFICE
JAMES O. DRUKER
408 GULF OF MEXICO DRIVE
LONGBOAT KEY, FLORIDA 34228
(941) 383-3500

MEMORANDUM

TO: New York State
Office of the Attorney General
ATT: James A. Rogers, Esq.
Deputy Attorney General for Social Justice

FROM: James O. Druker, Esq.

DATE: April 29, 2008

SUBJECT: People v. Vinluan, et al.
Indictment No. I-769A-K/2007

I represent the ten nurse-defendants who are presently awaiting trial in Suffolk County, New York, for an alleged conspiracy with their attorney to quit their jobs, and with endangering the welfare of patients. It is the purpose of this memorandum to apprise you of a series of violations of New York State criminal and civil statutes by the complainants. These violations of law directly affected the nurses; indeed, they provided the impetus for the nurses to resign their employment.

Background

The conspiracy alleged in the indictment charges that the ten nurses retained the services of an attorney to advise whether they would be in breach of their contracts if they resigned from their employment. The nurses described their

grievances to their attorney, who advised them that their employer's multiple violations of the contract and, not incidentally, of the Labor Law left them free to quit their jobs. These violations are detailed herein, along with documentation. In order for all of this to make sense, I provide a sketch of the background.

To alleviate the severe nursing shortage in the United States, qualified nurses were recruited from abroad, primarily the Philippines. There are dozens of agencies in that country recruiting nurses to emigrate to the United States. In this regard, the Sentosa empire (one of the largest private employers in New York State) used its recruiting arm to sponsor and bring nurses into the United States to work in its nineteen facilities in the metropolitan New York area. The bulk of the recruiting was done by "Sentosa Recruitment Agency" through internet and newspaper advertising in the Philippines. Sentosa's recruiting brochures and other literature guaranteed in writing that "Sentosa is a **direct-hire** company that dedicates itself to offering real job positions for Filipino nurses in our own health facilities in New York."

The nurses chose Sentosa in large part because they did not want to be "agency nurses"; rather, they wished to be employed directly by the facility with which they were contracting in order, among other things, to obtain enhanced benefits and

higher pay. The benefits promised in Sentosa's recruiting literature included free medical and dental coverage, relocation and housing allowances, free malpractice insurance, paid vacation, and sick days. Sentosa further promised "comprehensive training" and "generous shift differentials, flexible eight and twelve hours schedules." Copies of two of Sentosa's recruiting brochures are attached hereto as Exhibit 1(a) and 1(b). The relevant portions have been highlighted. These brochures, or other brochures containing identical promises, were provided to the nurses and induced them to make agreements with Sentosa.

Sentosa's practice was to execute employment contracts with the nurses at an early stage in the process. These contracts, which were signed on behalf of the Sponsoring Employer, were submitted to the United States Immigration authorities for review and to begin the lengthy process of obtaining green cards to afford the nurses entry into the United States. A sampling of the representative contracts is annexed hereto as a group as Exhibit 2. It should be noted that the contracts were not with the parent Sentosa entity or with an employment agency such as "Prompt," which was also an arm of Sentosa. Rather, each was signed by a representative of a specific facility that served as the "Petitioning Employer."

Among other things, each contract guaranteed 37½ hours of work per week to the employee. Each nurse was promised that he/she would work one of three daily shifts: 7 a.m. to 3 p.m., 3 p.m. to 11 p.m., or 11 p.m. to 7 a.m., with a 7% "shift differential" for hours worked between 11 p.m. and 7 a.m. Each nurse was promised vacation and holiday benefits, including paid leave on the nurse's birthday. Each contract contained a clause requiring the employee to pay $25,000 to the employer if the employee "willfully and voluntarily resigns, abandons, or terminates employment with employer before the completion of at least a three (3) year term." The contract specified that the $25,000 represents "a liquidated damages penalty."

Some (but not all) of the contracts contained a paragraph that provided "Employer has the right at its sole discretion to transfer this agreement to any of its affiliated facilities, such as Sentosa Care."

It is noteworthy that each contract was purportedly notarized by Meyer Fischl, a notary public qualified in Kings County, New York. Each nurse has confirmed that there was no such person present when they signed their contracts. This, of course, is a misdemeanor under New York State's notary laws.

Attached as a group as Exhibit 3 are summaries of the interviews of three of the indicted nurses (Mark Dela Cruz, James Millena and Elmer Jacinto), as well as a summary of the

interview of a fourth (unindicted) nurse. Upon arriving in the United States, each nurse learned that he/she would not be working at the sponsoring facility, but rather at Avalon Gardens in Smithtown. Further, the nurses learned that they were not direct-hire employees, but rather were "agency nurses" and were, in fact, paid by "Sentosa Services."

It should be noted that "Sentosa Services" was not a payroll service, but was the nurses' actual employer. It was Sentosa Services that provided benefits and that paid unemployment, disability and FICA on the nurses' behalf. Sentosa Services was paid by the facilities for each hour the nurses worked, as is customary in the industry for the hiring of agency nurses.

Attached as Exhibit 4 are copies of the W-2 forms of Juliet Anilao and Claudine Gamaio reflecting Prompt Nursing Employment Agency, LLC as their employer.

As a result of all of the contractual violations detailed hereinafter (and others not included herein), the nurses individually and collectively decided that they could no longer continue to work for Sentosa. Before resigning, they consulted with an immigration and employment discrimination attorney, Felix Vinluan, who advised them that Sentosa had egregiously violated their contracts and that they were free to resign.

Vinluan, as set forth earlier, was indicted for rendering this perfectly proper advice.

In any event, on April 7, 2006, the nurses collectively resigned by submitting their written letters of resignation to their supervisor as well as mailing them to Bent Philipson. It should be noted that no nurse abandoned his/her shift. Indeed, while some were scheduled to work the following day, others were not scheduled for two or three days. The only nurse who was on duty at the time of the resignations (Ma Theresa Ramos, at 4:30 p.m.) completed her shift at 7:00 p.m. and at the request of her supervisor, stayed an additional 4 hours to ensure that there was a full complement of relief nurses.

The reaction of the complainant employer was to hold meetings with nurses from other facilities to warn them of the perils of resigning, including prosecution, deportation and loss of license. The employer filed a complaint with the Suffolk County Police Department, which declined to initiate an investigation of the matter. The employer filed a complaint with the New York State Department of Education, the agency charged with overseeing the nurses' conduct and licensing. After investigating the matter, that agency concluded that the nurses were guilty of no wrongdoing and that they had not endangered their patients. See Exhibit 11. The New York State

Department of Health subsequently arrived at the same conclusion.

Finally, the principal of Sentosa and his attorney found a receptive audience for their complaint with the Suffolk County District Attorney's Office, which proceeded to present the case to a grand jury, which returned an indictment against the 11 defendants.

I.

In direct violation of Section 193 of the New York State Labor Law, none of the nurses who resigned was paid for his or her last week of employment. This, obviously, was a punitive measure. In addition (and also in violation of Section 193), under the guise of "loans," Sentosa withheld substantial sums on a weekly basis from the paychecks of a number of the nurses. These sums were purportedly to repay Sentosa for "loans" that were advanced to nurses by Sentosa, as well as for other, unspecified payments. Such deductions, of course, are prohibited by law. A sample of the pay stubs evidencing this practice are attached as Exhibit 5.

II.

When Local 1199 sought to organize the nurses at Avalon, the facility issued phony supervisor badges to the nurses,

knowing that the supervisory designation would preclude them from joining the Union. At the time, some of the purported "supervisors" were limited permit nurses. Their permits required that they be supervised, and designating them as "supervisors" violated the conditions of their permits. Samples of the badges are attached hereto as Exhibit 6, along with the State's report containing the admissions of Administrator Susan O'Connor, who conceded that "subject nurses were given the title of nursing supervisor because [of] the Union contract. However, she advised that the nurses did not act or perform supervisory tasks; that their tasks or responsibilities did not change." Three of the nurses did not receive their supervisory badges because their shifts did not coincide with the time that the office was open during the day.

III. Night differential, overtime, and other wage violations.

Despite contractual guarantees, the nurses were frequently deprived altogether of night differential payments and/or overtime. See Exhibit 7, copies of the pay stubs of Jennifer Lampa who, although working only on night shifts (7 p.m. to 7 a.m.) did not receive any night differential.

In addition, Sentosa regularly failed to honor the contractual provisions regarding birthday and holiday pay.

Attached as Exhibit 8 are the following: letter dated February 16, 2006, from the nurses to Bent Philipson (a principal of all Sentosa entities) in which the nurses detail their employment issues; letter dated March 3, 2006, from the nurses to Susan O'Connor in which they outline their complaints; and the Affidavit of Ranier Sichon dated April 5, 2006.

IV.

In order to protect U.S. nurses from being undercut by cheap foreign labor, the law required that immigrant nurses be paid the same "prevailing wage" as that received by domestic nurses. At the end of 2005, the law mandated an hourly increase in the nurses' wages. To offset this, Sentosa reduced the number of hours per week that the nurses were allowed to work. This was accomplished by memoranda from Prompt Nursing Employment Agency and Prompt/Sentosa Services dated 1/3/06 and 3/13/06, attached hereto as Exhibit 8. This certainly violated the spirit, if not the letter of the law, as well as the nurses' understanding of their status.

V.

Before their resignations on April 7, 2006, the nurses had expressed their grievances repeatedly to Avalon's management and ownership, both in the form of face-to-face meetings and letters

delivered to management (Exhibit 9). The response by management was to have Avalon's administrator, Susan O'Connor, present the nurses with the "opportunity" for new agreements that would make them "per diem employees of Avalon" and would assure them of receiving their proper overtime pay. When some of the nurses balked at signing the new agreements, they were told that their paychecks would be withheld unless they complied. This led them to sign the documents under duress, each of which was captioned "Application for Employment." Samples of the new agreements are attached hereto as Exhibit 10. Significantly, each form contained a provision on the last page that read, "I understand that my employment can be terminated at any time and for any reason, at the option of either Avalon Gardens Rehabilitation and Health Care Center or myself." [Emphasis added].

VI.

As a postscript, after the resignations of the "Avalon 10" and several dozen other nurses from other Sentosa facilities in early April, 2006, Bent Philipson, the principal owner of the Sentosa entities, held a mass meeting at the Split Rock facility. There, he and the administrator of that facility addressed the nurses in an effort to deter them from similarly resigning from their employment. During the course of that meeting, Philipson told the nurses that those who had resigned

had made the biggest mistake of their lives and that he would see to it that they were prosecuted, deported, and that they would be the subject to the loss of their licenses. Philipson did succeed in having them prosecuted, but has been unsuccessful so far in carrying out his other threats.

In short, this tale represents the naked abuse of power by a politically-connected entity. Sentosa and its principals, as well as its attorney, have used their political contributions to purchase special treatment from New York State authorities. They have succeeded in persuading the authorities to institute an unprecedented (and probably illegal) prosecution of nurses who did nothing more than quit jobs that they reasonably found intolerable. They succeeded in bringing about the prosecution of an attorney who did nothing more than advise them of their rights and file a legal proceeding on their behalf. They have used their connections to quash the appointment of a special prosecutor that was requested not only by the nurses, but by the State Nursing Association, Local 1199 of the Service Employees International Union, the National Employment Lawyers' Association, and others. Sentosa and its principals have violated their contracts with the nurses, the New York State Law Law, and federal immigration law with impunity. We ask that you consider these violations and that you provide justice to these nurses.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D20723
O/prt

_____AD3d_____

Submitted - June 9, 2008

FRED T. SANTUCCI, J.P.
DANIEL D. ANGIOLILLO
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2008-02568

OPINION & JUDGMENT

In the Matter of Felix Vinluan, et al., petitioners,
v Robert W. Doyle, etc., et al., respondents.

Proceeding pursuant to CPLR article 78 to prohibit the respondent Thomas J. Spota, District Attorney, from prosecuting the petitioners in the Supreme Court, Suffolk County, under Indictment No. 00769-07, and to prohibit the respondent Robert W. Doyle, Justice of the Supreme Court, Suffolk County, from presiding over the matter, on the grounds, inter alia, that the prosecution would violate the First Amendment rights of the petitioner Felix Vinluan, and the Thirteenth Amendment rights of the remaining petitioners.

Sandback, Birnbaum & Michelen, Mineola, N.Y. (Oscar Michelen of counsel), for petitioner Felix Vinluan.

Kase & Druker, Garden City, N.Y. (James O. Druker and Paula Frome of counsel), for petitioners Elmer Jacinto, Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamiao, Jennifer Lampa, Rizza Maulion, James Millena, Ma Theresa Ramos, and Ranier Sichon.

Thomas J. Spota, District Attorney, Riverhead, N.Y. (Leonard Lato of counsel), respondent pro se.

Spivak Lipton, LLP, New York, N.Y. (Elizabeth Orfan and Adrienne L. Saldana of counsel), for American Nurses Association and New York State Nurses Association, amici curiae.

Giskin, Solotaroff, Anderson & Steward, LLP, New York, N.Y. (Darnley D. Stewart of counsel), and Steven Banks, New York, N.Y. (Adriene L. Holder, Christopher D. Lamb, Amy M. Hong, and Richard Blum of counsel), for National Employment Lawyers Association/New York, amicus curiae (one brief filed).

Levy Ratner, P.C., New York, N.Y. (David M. Slutsky of counsel), for 1199 SEIU United Healthcare Workers East, amicus curiae.

ENG, J. Ten nurses, all from the Republic of the Philippines, are under indictment in Suffolk County for the misdemeanor offenses of conspiracy in the sixth degree, endangering the welfare of a child, and endangering the welfare of a physically-disabled person. The prosecution of these individuals came in the aftermath of their simultaneous resignations from positions at a Long Island nursing home. The attorney who provided these nurses with legal advice was also indicted.

The Thirteenth Amendment to the United States Constitution, enacted at the conclusion of the Civil War primarily to abolish the institution of slavery, declares that involuntary servitude shall not be permitted to exist within the United States. In this proceeding, we are asked to determine whether the constitutional prohibition against involuntary servitude would be violated by prosecuting these nurses, and whether the prosecution of their attorney would violate constitutionally-protected First Amendment rights. For the reasons which follow, we find that these criminal prosecutions constitute an impermissible infringement upon the constitutional rights of these nurses and their attorney, and that the issuance of a writ of prohibition to halt these prosecutions is the appropriate remedy in this matter.

The petitioners Elmer Jacinto, Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamiao, Jennifer Lampa, Rizza Maulion, James Millena, Ma Theresa Ramos, and Ranier Sichon (hereinafter the nurses) were recruited to work in the United States by the Sentosa Recruitment Agency, a Philippines-based company that hires nurses for several nursing care facilities in New York controlled and managed by Sentosa Care, LLC (hereinafter Sentosa). According to the nurses, the recruitment agency promised that they would be hired directly by individual nursing homes within the Sentosa network. To this end, each of the nurses signed an employment contract with the specific nursing homes for which they had been selected to work. Under the terms of these employment contracts, the nurses were to receive free travel to the United States, two months of free housing and medical coverage, training, and assistance in obtaining legal residency and nursing

licenses. In recognition of the substantial expenses incurred in the recruitment process, the contracts required the nurses to give their prospective employers a three-year commitment, and provided for liquidated damages in the amount of $25,000 should the nurses fail to honor their commitment.

When the nurses arrived in the United States, they learned that they would be working for an employment agency instead of the specific nursing homes they had signed contracts with, which allegedly is a lower paid and less stable form of employment. The nurses were assigned by the employment agency to the Avalon Gardens Rehabilitation and Health Care Center (hereinafter Avalon Gardens), a nursing home located in Smithtown, New York. Among the patients at Avalon Gardens are chronically ill children who need the assistance of ventilators to breathe. All of the nurses were trained to care for children on ventilators, and five of the nurses worked almost exclusively with these children.

The nurses alleged that almost immediately upon their arrival at Avalon Gardens, issues arose concerning the terms of their employment, and the promises made to them in the Philippines were breached. When the nurses first arrived at the facility to begin their employment, they discovered that Avalon Gardens had not obtained their limited nursing licenses, and thus many of them were initially required to work as clerks for about $12 per hour. Furthermore, the nurses allegedly were housed in a single-family staff house with only one bathroom, inadequate heat, and no telephone service. After informal oral complaints about their working conditions and pay went unheeded, in February and March of 2006 the nurses wrote several letters to Sentosa and Avalon Gardens outlining their concerns, including the failure to compensate them properly for overtime and night shifts, short staffing, and last minute shift changes.

Believing that their complaints were not being properly addressed, the nurses sought assistance from the Philippine Consulate, and were referred to the petitioner Felix Vinluan, an attorney specializing in immigration law. When Vinluan met with the nurses to discuss their options, they told him that they wanted to resign because they could not tolerate the working conditions they were experiencing much longer. Vinluan advised the nurses that under the New York Education Law, they could not leave their positions during a shift when they were on duty. Although Vinluan also counseled the nurses that they had the right to resign once their shifts had ended, he suggested that it might be in their best interest to remain at Avalon Gardens while he pursued other remedies on their behalf. Following his meeting with the nurses, on April 6, 2006, Vinluan traveled to Washington D.C., where he filed a complaint on their behalf with the Office of Special Counsel

for Immigration Related Unfair Employment Practices.

On the following day, April 7, 2006, the nurses resigned from their employment either at the end of their shift, or in advance of their next shift, using an identical form letter which they had agreed upon together. The amount of notice provided before the next scheduled shift for each nurse ranged from 8 to 72 hours. Vinluan claims that he was unaware of the nurses' intention to resign on April 7. The nurses maintain that they decided to collectively resign with limited notice because they feared retaliation during any notice period they might have given. Fourteen other Filipino nurses employed by three other Sentosa nursing homes also resigned from their employment between April 6 and April 7.

In the wake of the resignations, Sentosa commenced a civil action against Vinluan and the nurses in the Nassau County Supreme Court seeking damages, inter alia, for breach of contract and tortious interference with contract. In addition, on April 10, 2006, Avalon Gardens' Director of Nursing sent the New York State Education Department (hereinafter the Education Department) a letter of complaint charging that the nurses had abandoned their patients by simultaneously resigning without adequate notice. Following an investigation, on September 28, 2006, the Education Department closed the nurses' cases, concluding that they had not committed professional misconduct because none of them had resigned in mid-shift, and no patients were deprived of nursing care since the facility was able to obtain appropriate coverage.

However, in March 2007, nearly one year after the resignations, a Suffolk County Grand Jury handed down a 13-count indictment against the petitioners. The first count of the indictment charged Vinluan and the nurses with conspiracy in the sixth degree predicated upon their alleged intent to engage in conduct constituting the crimes of endangering the welfare of a child and endangering the welfare of a physically disabled person. The first count theorized that the object of the conspiracy was to obtain alternative employment for the nurses and a release from their three-year commitment to Sentosa without incurring a financial penalty of $25,000. Furthermore, the indictment alleged that Vinluan and the nurses pursued their objective "without regard to the consequences that their pursuit would have on Avalon Gardens' pediatric patients," and that the nurses resigned without notice despite "knowing that their resignations and the prior resignations at other Sentosa Care facilities would render it difficult for Avalon Gardens to find, in a timely manner, skilled replacement nurses for Avalon Gardens' pediatric patients." The overt acts alleged to have been committed in furtherance of the conspiracy consisted of Vinluan's filing of a federal

discrimination claim on behalf of the nurses, and the nurses' submission of their resignation letters.

The second count of the indictment charged Vinluan alone with criminal solicitation in the fifth degree, asserting that he, with the intent that the nurses engage in conduct constituting the crimes of endangering the welfare of a child and endangering the welfare of a physically-disabled person, "requested and otherwise attempted to cause the nurses to resign immediately from Avalon Gardens."

Counts three through seven of the indictment charged that all of the petitioners had acted in concert to endanger the welfare of five of Avalon Gardens' pediatric patients by knowingly acting in a manner likely to be injurious to the physical and mental welfare of the children. The six remaining counts further charged that the petitioners had acted in concert to endanger the welfare of six physically-disabled patients by knowingly acting in a manner likely to be injurious to their physical welfare.

Vinluan and the nurses separately moved to dismiss the criminal indictment in the Supreme Court, Suffolk County. In support of their motion, the nurses argued, among other things, that the prosecution violated their Thirteenth Amendment rights. The Supreme Court denied the motions to dismiss, concluding that there was ample evidence before the grand jury to support all of the counts against the petitioners. Addressing the nurses' constitutional argument, the court found that the prosecution did not violate their Thirteenth Amendment rights because it could not be said that the People were attempting to compel their continued employment by any particular entity. Vinluan and the nurses commenced this proceeding pursuant to CPLR article 78 to prohibit the respondent Thomas J. Spota, District Attorney, from prosecuting them, and to prohibit the respondent Robert W. Doyle, Justice of the Supreme Court, Suffolk County, from presiding over the matter, upon the grounds, inter alia, that the prosecution violates the nurses' Thirteenth Amendment rights and Vinluan's First Amendment rights. Justice Doyle has elected not to appear in this proceeding pursuant to CPLR 7804(i).

When a petitioner seeks relief in the nature of prohibition, the court must engage in a "two-tiered analysis" which requires it to determine, as a threshold question, "whether the issue presented is the type for which the remedy may be granted" (*Matter of Holtzman v Goldman*, 71 NY2d 564, 568). Thus, we begin by examining whether a proceeding for a writ of prohibition is an appropriate vehicle in which to raise this challenge to the constitutionality of a pending criminal proceeding. Historically issued by the Crown of England to curb the powers of ecclesiastical courts,

writs of prohibition have evolved into "a basic means of protection for the individual in his [or her] relations with the State" (*Matter of Rush v Mordue,* 68 NY2d 348, 353; *see Matter of Dondi v Jones,* 40 NY2d 8; *LaRocca v Lane,* 37 NY2d 575, 578-579, *cert denied* 424 US 968). As codified by CPLR 7803(2), prohibition lies to prevent a body or officer acting in a judicial or quasi-judicial capacity from proceeding, or threatening to proceed, "without or in excess of jurisdiction" (*Matter of Town of Huntington v New York State Div. of Human Rights,* 82 NY2d 783, 786; *see Matter of Schumer v Holtzman,* 60 NY2d 46, 51).

The primary function of prohibition is to prevent "an arrogation of power in violation of a person's rights, particularly constitutional rights" (*Matter of Nicholson v State Comm. on Jud. Conduct,* 50 NY2d 597, 606). Although "not all constitutional claims are cognizable by way of prohibition" (*Matter of Rush v Mordue,* 68 NY2d 348, 354), the presentation of an "arguable and substantial claim" which implicates a fundamental constitutional right generally results in the availability of a proceeding in the nature of prohibition (*Matter of Nicholson v State Comm. on Jud. Conduct,* 50 NY2d 597, 606). Thus, for example, a CPLR article 78 proceeding in the nature of prohibition has been permitted to interrupt pending criminal proceedings where a defendant is about to be prosecuted in violation of his constitutional right against double jeopardy (*see Matter of Rush v Mordue,* 68 NY2d 348, 354; *Matter of Kraemer v County Ct. of Suffolk County,* 6 NY2d 363), or in violation of his Fifth Amendment privilege against self-incrimination (*see Matter of Rush v Mordue,* 68 NY2d at 355; *Matter of Lee v County Ct. of Erie County,* 27 NY2d 432 *cert denied* 404 US 923). In such circumstances, the Court of Appeals has concluded that a CPLR article 78 proceeding in the nature of prohibition may properly be utilized to prevent the defendants from being prosecuted for crimes for which they could not be constitutionally tried. The Court of Appeals also has found prohibition to be a proper vehicle to vindicate claimed infringements on the First Amendment rights of freedom of religion and freedom of association (*see Matter of Nicholson v State Comm. on Jud. Conduct,* 50 NY2d 597; *LaRocca v Lane,* 37 NY2d 575).

In the case before us, the petitioners raise claims of equally compelling constitutional dimension. They invoke the remedy of prohibition on the theory that the prosecution itself is not a proper proceeding because it contravenes the Thirteenth Amendment proscription against involuntary servitude by seeking to impose criminal sanctions upon the nurses for resigning their positions, and attempts to punish Vinluan for exercising his First Amendment right of free speech in providing the nurses with legal advice. If the prosecution impermissibly infringes upon these

constitutional rights, the act of prosecuting the petitioners would be an excess in power, rather than a mere error of law, and prohibition would be an available remedy (*see Matter of Rush v Mordue*, 68 NY2d 348, 352; *Matter of Nicholson v State Comm. on Jud. Conduct*, 50 NY2d 597, 606-607; *Matter of Cohen v Lotto*, 19 AD3d 485, 486).

Where, as here, the issue presented allows for the issuance of a writ of prohibition, the court must proceed to the second tier of the analysis, which requires it to determine whether the remedy of prohibition is "warranted by the merits of the claim" (*Matter of Holtzman v Goldman*, 71 NY2d 564, 568; *see Matter of Town of Huntington v New York State Div. of Human Rights*, 82 NY2d 783, 786). We note that "even if prohibition lies and an act in excess of power is perceived, the remedy is not granted as of right but only in the sound discretion of the reviewing court" (*Matter of Holtzman v Goldman*, 71 NY2d 564, 569). Thus, if there is merit to the petitioners' claim that the subject prosecution violates their constitutional rights, as a final step in our inquiry we must decide whether a writ of prohibition should issue as a matter of discretion by weighing relevant factors, including the gravity of the potential harm caused by the threatened excess of power, whether the potential harm can be adequately corrected on appeal or by other proceedings in law or equity, and "whether prohibition would furnish 'a more complete and efficacious remedy . . . even though other methods of redress are technically available'"(*Matter of Rush v Mordue*, 68 NY2d 348, 354, quoting *Matter of Dondi v Jones*, 40 NY2d 8, 14).

Turning to the merits, the nurses contend that subjecting them to criminal sanctions for their act of resigning effectively compels them to remain at their jobs and, therefore, subjects them to involuntary servitude in violation of the Thirteenth Amendment. The Thirteenth Amendment, added to the Constitution in 1865, declares that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States." It has been observed that "[b]y forbidding not only slavery but also factual situations that resemble slavery, the Framers expressed a view of personal liberty that extends beyond freedom from legal ownership by another person" (Kares, Lauren, *The Unlucky Thirteenth: A Constitutional Amendment in Search of a Doctrine*, Cornell Law Review, January 1995). "While the general spirit of the phrase 'involuntary servitude' is easily comprehended, the exact range of conditions it prohibits is harder to define" (*United States v Kozminski*, 487 U.S. 931, 942). Nevertheless, Supreme Court precedent makes clear that absent "exceptional circumstances," the Thirteenth Amendment bars compulsory labor "enforced by the use or threatened use of physical or legal

coercion" (*United States v Kozminski* 487 US at 944).

Compelling the performance of labor through legal coercion was at issue in three cases decided by the United States Supreme Court in the first half of the last century, *Pollock v Williams* (322 US 4), *Taylor v Georgia* (315 US 25), and *Bailey v Alabama* (219 US 219). In all three cases, the Supreme Court struck down state laws which criminalized the failure to perform a contract for labor or services for which an advance had been received. The challenged statutes all made a worker's mere failure to perform services for which money had been obtained prima facie evidence of an intent to defraud. In the first of the three cases addressing this issue, *Bailey v Alabama*, the Supreme Court explained that while the ostensible purpose of the statute under review was to punish fraud, "its natural and inevitable effect is to expose to conviction for a crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt." Continuing its analysis, the *Bailey* Court stated that "[w]hat the state may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which, upon proof of no other fact, exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question . . . and it is apparent that it furnishes a convenient instrument for the coercion" forbidden by the Thirteenth Amendment (*id.* at 244).

Confronted with a similar statutory provision in *Taylor v Georgia*, the Supreme Court concluded that the challenged statute squarely contravened the Thirteenth Amendment because the necessary consequence of the law "is that one who has received an advance on a contract for services which he is unable to repay is bound by the threat of penal sanction to remain at his employment until the debt has been discharged."

More than 30 years after its decision in *Bailey*, the Supreme Court in *Pollock v Williams* was again obligated to address the constitutionality of a law making it a crime to obtain property by fraudulently promising to perform labor or service when Florida enacted a statute essentially identical to those that it had previously struck down. In adhering to the conclusion that imposing criminal penalties for the mere failure to perform labor or services was unconstitutional, the Supreme Court emphasized in *Pollock* that the aim of the Thirteenth Amendment was not merely to end slavery, "but to maintain a system of completely free and voluntary labor throughout the United States" (*id.* at 18). In this regard, the court pointed out that as a general rule, the right to

change employers was a worker's defense "against oppressive hours, pay, working conditions, or treatment," and that depriving workers of this right would result in "depression of working conditions and living standards" (*id.* at 18). Although the *Pollock* court recognized that there was great societal value in the enforcement of contracts and collection of debt, it concluded that the constitutional prohibition against compulsory service "means that no state can make the quitting of work any component of a crime, or make criminal sanctions available for holding unwilling persons to labor . . . the statutory test is a practical inquiry into the utilization of an act as well as its mere forms and terms" (*id.* at 18).

The New York Court of Appeals subsequently relied upon the Supreme Court's decisions in *Bailey*, *Taylor*, and *Pollock* to conclude that an Administrative Code provision which made it a misdemeanor to abandon or willfully fail to perform a home improvement contract was unconstitutional (*see People v Lavender*, 48 NY2d 334). The *Lavender* court found that the Administrative Code provision at issue violated the Thirteenth Amendment because it was directed at the failure to perform the services necessary to carry out the home improvement contract. Thus, the court reversed the defendant's conviction of three counts of an indictment which charged him with having abandoned three home improvement contracts without justification.

In the case at bar, the Penal Law provisions relating to endangerment of children and the physically disabled, which all the petitioners are charged with violating, do not on their face infringe upon Thirteenth Amendment rights by making the failure to perform labor or services an element of a crime. The Supreme Court's rationale in *Pollock*, *Taylor*, and *Bailey* is nevertheless instructive because the indictment handed down against the petitioners explicitly makes the nurses' conduct in resigning their positions a component of each of the crimes charged. Thus, the indictment places the nurses in the position of being required to remain in Sentosa's service after submitting their resignations, even if only for a relatively brief period of notice, or being subject to criminal sanction. Accordingly, the prosecution has the practical effect of exposing the nurses to criminal penalty for exercising their right to leave their employment at will. The imposition of such a limitation upon the nurses' ability to freely exercise their right to resign from the service of an employer who allegedly failed to fulfill the promises and commitments made to them is the antithesis of the free and voluntary system of labor envisioned by the framers of the Thirteenth Amendment. While we are, of course, mindful that protecting vulnerable children from harm is of enormous importance, the fact that the prosecution may serve a legitimate societal aim does not suspend the

nurses' constitutional right to be free from involuntary service (*see Pollock v Williams*, 322 US 4).

We are also cognizant of the fact that Thirteenth Amendment rights are not absolute, and that "not all situations in which labor is compelled . . . by force of law" are unconstitutional (*United States v Kozminsky*, 487 US 931, 943; *see United States v Ballek*, 170 F3d 871, 874, *cert denied* 528 US 853; *Immediato v Rye Neck School Dist.*, 73 F3d 454, 459, *cert denied* 519 US 813; *Jobson v Henne*, 355 F2d 129, 131). It has been recognized that the Thirteen Amendment "was not intended to apply to exceptional cases well established in the common law at the time" of its enactment (*United States v Kozminsky*, 487 US at 944, relying on *Robertson v Baldwin*, 165 US 275). Thus, the Amendment has been held inapplicable to a narrow class of civic duties that have traditionally been enforced by means of imprisonment, including military service (*see United States v Kozminsky*, 487 US at 944; *Selective Law Draft Cases*, 245 US 366, 390; *United States v Ballek*, 170 F3d 871, 874, *cert denied* 528 US 853). Addressing this issue in *Bailey*, the Supreme Court explained that an individual's right to be free from involuntary service may be limited in "exceptional cases, such as the service of a sailor . . . the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employee of his post of labor in any extreme cases" (*Bailey v Alabama* 219 US at 243).

Guided by these principles, we conclude that this is not an exceptional case justifying a restriction of the petitioners' Thirteenth Amendment rights. The nurses in this case were engaged in private employment rather than the performance of public service. Moreover, while they possessed the education and training necessary to care for chronically ill patients, including children on ventilators, these skills are not so unique or specialized that they cannot be readily performed by other qualified nurses. Furthermore, although an employee's abandonment of his or her post in an "extreme case" may constitute an exceptional circumstance which warrants infringement upon the right to freely leave employment, the respondent District Attorney proffers no reason why this is an "extreme case." The nurses did not abandon their posts in the middle of their shifts. Rather, they resigned after the completion of their shifts, when the pediatric patients at Avalon Gardens were under the care of other nurses and staff members. Moreover, while the indictment alleges that the nurses collectively resigned "knowing that their resignations and the prior resignations at other Sentosa Care facilities would render it difficult for Avalon Gardens to find, in a timely manner, skilled replacement nurses for Avalon Gardens' pediatric patients," it is undisputed that coverage was indeed obtained, and no facts suggesting an imminent threat to the well being of the children

have been alleged. Indeed, the fact that no children were deprived of nursing care played a large role in the Education Department's decision to clear the nurses of professional misconduct. Under these circumstances, we cannot conclude that this is such an "extreme case" that the State's interest in prosecuting the petitioners for misdemeanor offenses based upon the speculative possibility that the nurses' conduct could have harmed the pediatric patients at Avalon Gardens justifies abridging the nurses' Thirteenth Amendment rights by criminalizing their resignations from the service of their private employer.

Indeed, the relevant Penal Law sections underlying these prosecutions proscribe the creation of risk to children and the physically disabled. Under the facts as presented herein, the greatest risk created by the resignation of these nurses was to the financial health of Sentosa.

Furthermore, the prosecution impermissibly violates Vinluan's constitutionally protected rights of expression and association in violation of the First and Fourteenth Amendments. It cannot be doubted that an attorney has a constitutional right to provide legal advice to his clients within the bounds of the law (*see Matter of Primus*, 436 US 412, 432; *United Transp. Union v State Bar of Michigan*, 401 US 576, 580; *Brotherhood of R.R. Trainmen v Virginia*, 377 US 1, 7-8; *National Assn. for Advancement of Colored People v Button*, 371 US 415, 429; *see also Walters v National Assn. of Radiation Survivors*, 473 US 305, 368 n 16 [Stevens, J., dissenting]). "The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights' . . . including 'advis[ing] another that his legal rights have been infringed'" (*Matter of Primus*, 436 US at 432, quoting *National Assn. for Advancement of Colored People v Button*, 371 US at 437). Thus, in *Button*, the Supreme Court found constitutionally protected, as modes of expression and association, the actions of NAACP staff lawyers in, inter alia, advising African Americans "of their constitutional rights, [and] urging them to institute litigation of a particular kind" (*National Assn. for Advancement of Colored People v Button* 371 US at 447; *see also Matter of Primus*, 436 US at 425, n. 16). Similarly, the Supreme Court concluded in *Primus* that an attorney's letter communicating an offer of free legal assistance by ACLU attorneys to a woman with whom she had previously discussed the possibility of seeking redress for an allegedly unconstitutional sterilization procedure was a form of protected expression.

As charged in the indictment, it is clear that Vinluan's criminal liability is predicated upon the exercise of ordinarily protected First Amendment rights. The indictment asserts that Vinluan committed the charged offenses by counseling the nurses to immediately resign from

Avalon Gardens, and filing a discrimination claim on their behalf. Thus, the indictment affirmatively seeks to punish Vinlaun for providing legal advice, which he avers was given in good faith. The District Attorney does not dispute that Vinluan acted in good faith, but urges this court to conclude that his legal advice to the nurses was not constitutionally protected because he advised them to commit a crime. However, since the nurses' conduct in resigning cannot, under the circumstances of this case, subject them to criminal prosecution, we cannot agree that Vinlaun advised the nurses to commit a crime.

More importantly, regardless of whether Vinlaun's legal assessment was accurate, it was objectively reasonable. We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal, loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. The potential impact of allowing an attorney to be prosecuted in circumstances such as those presented here are profoundly disturbing. A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct.

Moreover, by placing an attorney in the position of being required to defend the advice that he or she has provided, the state compels revelation of, and thus places within its reach, confidential communications between attorney and client. Such communications have long been held to be privileged in order to enable citizens to safely and readily secure "the aid of persons having knowledge of the law and [skill] in its practice" (*Hunt v Blackburn*, 128 US 464, 470). A prosecution which would compel the disclosure of privileged attorney-client confidences, and potentially inflict punishment for the good faith provision of legal advice is, in our view, more than a First Amendment violation. It is an assault on the adversarial system of justice upon which our society, governed by the rule of law rather than individuals, depends.

Finally, the last step in our inquiry requires us to determine whether a writ of prohibition should issue as a matter of discretion. Upon weighing the relevant factors (*see Matter of Rush v Mordue*, 68 NY2d 348, 354), we conclude that prohibition is an appropriate exercise of discretion. Where, as here, the petitioners are threatened with prosecution for crimes for which they cannot

constitutionally be tried, the potential harm to them is "so great and the ordinary appellate process so inadequate to redress that harm" that prohibition should lie (*Matter of Rush v Mordue*, 68 NY2d at 354).

Accordingly, the petition is granted, the respondent Thomas J. Spota, District Attorney, is prohibited from prosecuting the petitioners in the Supreme Court, Suffolk County, under Indictment No. 00769-07, and the respondent Robert W. Doyle is prohibited from presiding over the matter.

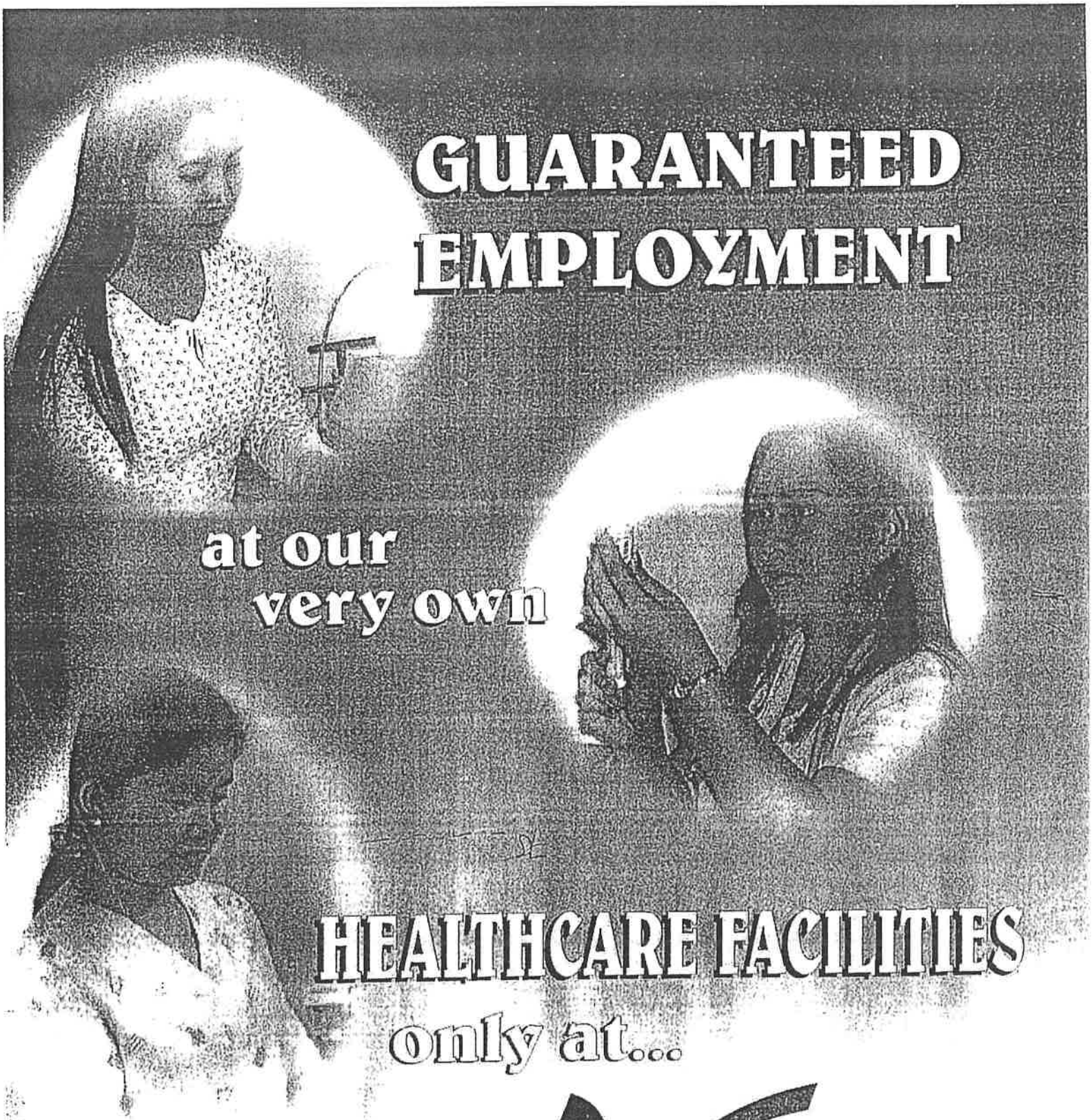
In light of our determination, we need not reach the petitioners' remaining contentions.

SANTUCCI, J.P., ANGIOLILLO, CHAMBERS, JJ., concur.

ADJUDGED that the petition is granted, without costs or disbursements, the respondent Thomas J. Spota, District Attorney, is prohibited from prosecuting the petitioners in the Supreme Court, Suffolk County, under Indictment No. 00769-07, and the respondent Robert W. Doyle is prohibited from presiding over the matter.

ENTER:

James Edward Pelzer
Clerk of the Court


GUARANTEED
EMPLOYMENT
at our
very own
HEALTHCARE FACILITIES
only at...
Sentosa

Easy steps to join Sentosa

t Sentosa assist you in completing your requirements.

tick the appropriate box for those requirements that you already have and mail or fax this form to us (632.631.8020).

	☐ TOEFL/TSE/IELTS Certificate
ɔt of Records	☐ Visa Screen Certificate
Diploma	☐ PRC License
ɛrtificate	☐ Certificate of Seminars/Trainings
nent Certificate	☐ 2 Copies of 2 x 2 Pictures
CGFNS Exam Results/Certificate	☐ Passport

_____

_____

_____

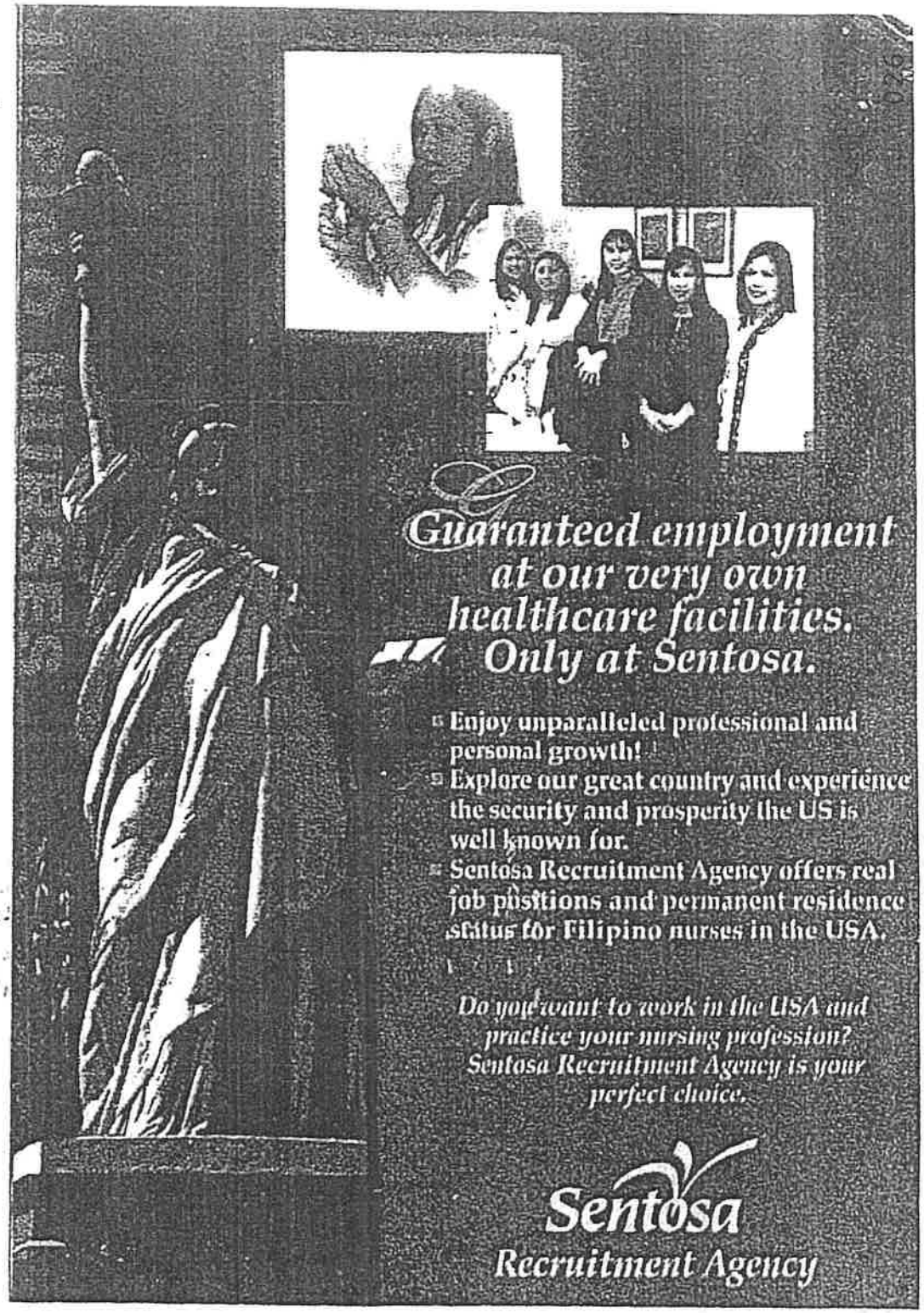
_____

_____

t delay - a world of opportunity and excitement awaits you at Sentosa. You can also visit our Web site w.sentosarecruitment.com for more detailed information.

Sentosa
Recruitment Agency

0, Jollibee Plaza Condominium, Emerald Avenue, Ortigas Center, Pasig City
Tels: 632 6338114 • 632 6339117
Fax: 632 6318020
Web site: www.sentosarecruitment.com
E-mail:info@sentosarecruitment.com
POEA License No. POEA -092-LB-030104-PL



Guaranteed employment at our very own healthcare facilities. Only at Sentosa.

- Enjoy unparalleled professional and personal growth!
- Explore our great country and experience the security and prosperity the US is well known for.
- Sentosa Recruitment Agency offers real job positions and permanent residence status for Filipino nurses in the USA.

Do you want to work in the USA and practice your nursing profession? Sentosa Recruitment Agency is your perfect choice.

Sentosa
Recruitment Agency

Why choose Sentosa?

Sentosa employs nurses for permanent residency status (Green Card). Members of our company's expert legal team will assist you in the immigration process to work in the U.S. as quickly as possible, without any delays.

WHAT ARE THE BENEFITS

- Competitive Salary ranging from $21 to $35 per hour
- Medical Coverage
- Dental Coverage
- Relocation and Housing allowances
- Free Malpractice Insurance
- Paid Vacation days
- Paid Sick days
- Paid Birthday
- Paid Holiday
- Free Airfare from Manila to New York
- Reimbursement of fees for processing certification and licensures
- Generous Shift Differentials, Flexible 8 and 12 hours Schedules
- Paid Study Leave
- Comprehensive Training

NO PLACEMENT FEE

Begin that all important career step in the right direction.
Contact us today!

Who we are

Sentosa is a direct-hire company that dedicates itself to offering real job positions for Filipino nurses in our own health facilities in New York. The Sentosa Recruitment team consist of Filipino nurses, legal advisors and clinical support staff who are responsible for the entire recruitment and immigration process. Our immigration lawyers perform all the filing, processing and follow ups with the INS.

We provide a "one-stop shop" answer to your needs for FREE - screening and evaluation of nurse documents. This includes the English language test (TSE, IELTS), Lawyer and Immigration processing, Visa Screen Certificate and NY State CGFNS Verification for Licensure. Also, there's NO AGENCY FEES.

Hear from Sentosa Nurses

Read these testimonials from our successful nurses.

Riadel Ramos-Manzano, BSN RN
Director of Nursing

I was given the opportunity to advance in my chosen field of nursing here. Being a director of nursing is a very big responsibility. I appreciate all the help, support and trust that SentosaCare gave me.

Esther Agpalo, BSN I
Assistant Director of Nurs

Loyalty and belonging are vei influences in a workplace. It that I find my work most gratif rewarding. I'm proud to be a SentosaCare group.

Ingrid Bragat-Luyun, BSN RN
Assistant Director of Nursing

I started working with SentosaCare in 1994 to this time. And professional growth is unlimited. I started as a charge nurse and now as an assistant director of nursing.

Agapito Pasinos, O
Occupational Therapy Supe

Sentosa is the best place to sta immigrants like myself. The me the opportunity to show an my potential.

Zaide Tunac-Belarde, BSN RN
Nursing Supervisor

Sentosa opened the door for me to live the American dream. I came here with an Immigrant Visa and so did my family. They gave me the opportunity to work in a very nice, and family-oriented company.

Earlyn Nicholas, BSN I
Nurse Coordinator

I am very lucky to start my nursin here in New York and Sentos the instrument. They processed Immigrant Visa and my License guided me with everything

The Sentosa system worked for these nurses and it can work for

WHAT IF I DON'T HAVE ALL THE REQUIREM

Sentosa will assist, guide and help you to process all necessary requirements such as, CGFNS Certificate, TOEFL/TSE, IELTS, IC Certificates

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, GREENBERG, FORMATO & EINIGER, LLP

FIRM OVERVIEW
PRACTICE AREAS
ATTORNEY BIOGRAPHIES
ARTICLES
WHAT'S NEW
EVENTS AND SEMINARS
ONLINE FORM
CONTACT US
RESOURCE LINKS
HOME

print this page
email to a friend
save to favorites

Howard Fensterman
Lake Success, New York
Managing Partner
phone
(516) 328-3953
fax
(516) 328-6638
email
hfensterman@abramslaw.com

Howard Fensterman is the managing partner of the firm. He received his J.D. from Georgetown Law Center. He is admitted to practice in New York, New Jersey, Maryland and the District of Columbia.

Mr. Fensterman is involved in all facets of our firm's law practice, including representing corporations, partnerships, LLCs and LLPs, as well as other business entities and individuals in connection with litigation, settlement negotiations, purchase and sale of business entities, asset-based lending, matrimonial and family law, shareholder and partnership agreements and real estate matters.

Mr. Fensterman has also represented health care professionals and facilities in a variety of matters including professional misconduct matters and enforcement actions by state and federal regulators.

Mr. Fensterman is currently the chairman of finance on Long Island for United States Senator Charles Schumer. In addition, he is the chairman of finance on Long Island for Attorney General Andrew Cuomo. He also holds the positions of Chairman of the Industrial Development Agency of Nassau County and ViceChairman of the Democratic Party Judicial Screening Committee of Nassau County. His involvement in the political process has resulted in Mr. Fensterman's having forged special relationships with several U.S. Senators, congresspersons, state senators and assembly persons.

AREAS OF PRACTICE >>

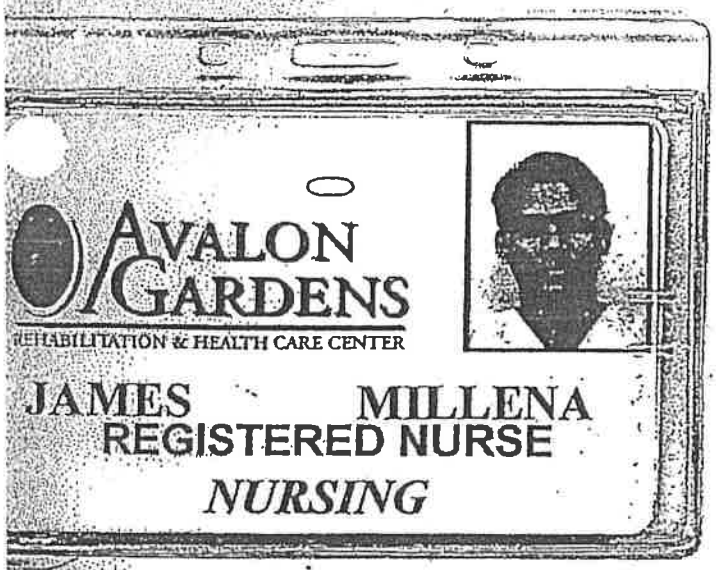
CIVIL LITIGATION AND APPEALS
COMMERCIAL REAL ESTATE DEVELOPMENT & HEALTH CARE FINANCE
CORPORATE AND TRANSACTIONAL LAW
CRIMINAL LAW
DIVORCE AND FAMILY LAW
ELDER LAW
ESTATE PLANNING, ASSET PROTECTION, AND ESTATE ADMINISTRATION
GUARDIANSHIP LAW
HEALTH CARE COLLECTION AND REIMBURSEMENT RECOVERY
HEALTH LAW
NEGLIGENCE AND PERSONAL INJURY
REAL ESTATE LAW

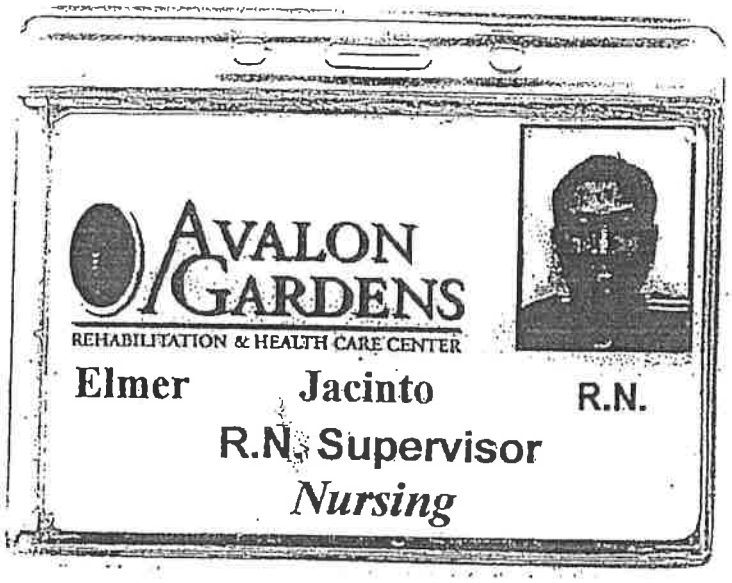
NEW YORK
1111 Marcus Avenue, Suite 107
Lake Success, New York 11042
Telephone: (516) 328-2300 / (516) 407-7975

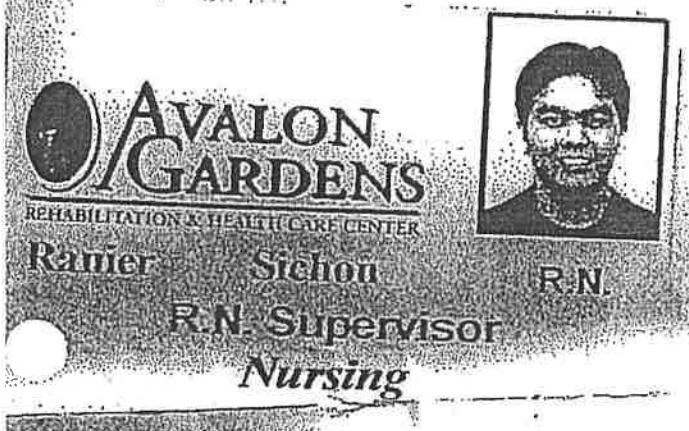
220 East 42nd Street, Suite 505
New York, NY 10017
Phone 212-279-0200
Fax 212-279-0600

NEW JERSEY
75 Raritan Avenue-Suite 225
Box 5
Highland Park, New Jersey 08904
Telephone (732) 828-4211
Fax (732) 247-2646

Firm Overview Practice Areas Attorney Biographies Articles What's New Events and Seminars
Online Form Contact Us Resources Links Home Disclaimer


AVALON GARDENS
REHABILITATION & HEALTH CARE CENTER
JAMES MILLENA
REGISTERED NURSE
NURSING


AVALON GARDENS
REHABILITATION & HEALTH CARE CENTER
Elmer Jacinto R.N.
R.N. Supervisor
Nursing


AVALON GARDENS
REHABILITATION & HEALTH CARE CENTER
Ranier Sichon R.N.
R.N. Supervisor
Nursing


AVALON GARDENS
REHABILITATION & HEALTH CARE CENTER
Harriet Avila
R.N. Supervisor
Nursing


AGENCY
EMPLOYEE
CLAUDINE GAMIAO
REGISTERED NURSE
NURSING


AVALON GARDENS
REHABILITATION & HEALTH CARE CENTER
MARK DELA CRUZ
REGISTERED NURSE
NURSING


AVALON GARDENS
REHABILITATION & HEALTH CARE CENTER
Juliet Anilao R.N.
R.N. Supervisor

Prompt Nursing Emp. Agency, LLC.

204 Broadway
Brooklyn, NY 11211
(718) 302-1000

January 3, 2006

Dear valued employee,

Please be advised that as of January 2006 there will be some changes in your payroll. Firstly, your weekly hours will change to **thirty-five** hours a week (versus thirty seven and a half). You will then notice an increase in your pay rate.

Please note that your salary will not differ. The decrease in hours and increase in pay rate will even out. Your salary will remain unaffected.

Should you have any questions, Please feel free to contact us at the above number.

Looking forward to your cooperation.

Barry Rubinstein,
Director of Human Resources

March 3, 2006

SUSAN O'CONNOR
Administrator
Avalon Gardens

Dear Ms. O'Connor,

We, Sentosa Care Agency Nurses, are writing to inform you of the difficulties we have encountered for the last month. We feel the need to bring these matters to your attention because these difficulties have brought more than enough damages to us.

We have noticed discrepancies in the salaries that we have received. Some of our Shift Differentials have not been properly paid particularly those working the night shifts. Under our contract, we understand that we are to receive a 7 per cent shift differential during the night shifts. We have referred the matter to our agency, **MR. BARRY RUBINSTEIN** and **ELKY** of the accounting department, in particular and through **MR. FRANCIS LUYUN**, we were made to understand that this matter will be looked into. However, to this date, the aid payments have not been given.

With the meeting we had with MR. FRANCIS LUYUN two weeks ago, we understood that the working hours have been reduced to 35 hours every week and anything beyond that is considered overtime with a rate of $38/hour. In fact, MR. LUYUN emphasized that this was approved by **MR. BEN PHILLIPSON**. This was emphasized to us in 2 *meetings* (Feb. 16 & 24) However, we noticed that our paychecks have not been adjusted to the said rate and the number of hours.

During these meetings, we were also informed that **AVALON GARDENS** will have to pay hours worked more than the regular work week. This, according to Mr. Francis Luyun, has been approved by **MR. BEN PHILLIPSON** as well. We have noticed however, the discrepancies with our paychecks. Some received even less than the number of hours they have worked for, much more, the hours worked more than the regular work week has not been paid.

This situation has caused us a lot of detriments. The losses we have incurred because of these difficulties might result to irreparable financial damages as we have bills to pay and commitments to fulfill. The discrepancies with our paychecks had repeated itself for many weeks now and we cannot afford to suffer any more delays since most of us have been behind our financial commitments and have been finding it hard to bring up some of our families who are dependent upon us.

We would like to find out when we can have our proper compensation since we have made financial commitments to businesses and persons (Please see separate letter from MR. DELA CRUZ.) We are asking this of you not as a favor but because this is in return for the honest living we have made. We hope to have positive results by **Monday, March 6, 2006** or we will have to opt not to work until we are treated with fairness and respect.

DEFENDANT'S EXHIBIT
LUYUN E
ID 11/27/07

031

As contract nurses, we have tried to do our jobs as best as we can and have provided **AVALON GARDENS** with the best nursing services we can. We have also been trying hard to adjust and to accept things and situations, particularly your issues with the **UNION**, as we know we are on the losing end given the situation. These current incidents have cost us financial damages and repercussions. We do not see why these are not valid concerns.

We try as much to keep open communications with our agency and your facility to work things out and to come up with acceptable results. We are hoping for a positive response from you since we have not been getting one from the people we have previously approached.

We understand that you are very busy people but we believe our concerns are not something to be set aside.

Mark M. Cruz

RAINER C SICHON

Elmer R. Jaunte

JAMES B. MILLENA

CLAUDINE CAMILAO

FE C. CINCO

MA. THERESA RAMOS

RIZZA P. MAMUON

April 7, 2006

Mr. Bent Philipson
Chief Operating Officer
Franklin Center For Rehabilitation
142-27 Franklin Avenue
Flushing, NY 11355

Dear Mr. Philipson:

In view of the substantial breach of your company of our contract, I hereby tender my resignation effective immediately.

Very truly yours,

Elmer R. Jacinto
Registered Nurse

cc: Sentosa (c/o Mr. Ben Philipson, Chief Operating Officer)

Avalon Gardens Rehabilitation and Health Care center (c/o Mr. Ben Philipson, Chief Operating Officer)

Franklin Center For Rehabilitation and Nursing (c/o Mr. Ben Philipson, Chief Operating Officer)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

SENTOSA CARE, LLC, AVALON GARDENS REHABILITATION AND HEALTH CARE CENTER, LLC, BROOKHAVEN REHABILITATION AND HEALTH CARE CENTER, LLC, BAYVIEW MANOR, LLC, SPLIT ROCK REHABILITATION AND HEALTH CARE CENTER, LLC, NEW FRANKLIN REHABILITATION AND HEALTH CARE CENTER, LLC, GARDEN CARE CENTER, INC., GOLDEN GATE REHABILITATION AND HEALTH CARE CENTER, LLC, NEW SURFSIDE NURSING HOME, LLC, TOWNHOUSE OPERATING CO., LLC, WOODMERE REHABILITATION AND HEALTH CARE CENTER, INC. and PROMPT NURSING EMPLOYMENT AGENCY, LLC,

Plaintiffs,

-against-

JULIET ANILAO, HARRIETT AVILA, MARK DELA CRUZ, CLAUDINE GAMAIO, ELMER JACINTO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, THERESA RAMOS, RAINER SICHON, ARLYN TORRENA, DON DON PARUNGAO, DULCE BAYOT, ARCHIEL BUAGAS, ANNABELLE CAPULONG, MARICELLE DEALO, CARLO CONRAD GARCIA, EDUARDO ILAGAN, RHEAN MONTECILLO, MITZI ONG, LOUELLA PAGLINAWAN, RITCHEL SALVE, EILEEN MAGNAYE, NORALYN ORTEGA, MARITONI DELA ROSA, CECILLE JAYO, ALIPIO ESGUERRA, JR., FELIX Q. VINLUAN and JUNO HEALTHCARE STAFFING SYSTEM, INC.,

Defendants.

----------x

Index No. 006079/06
(Bucaria, J.)

AMENDED COMPLAINT

Plaintiffs Sentosa Care, LLC ("Sentosa"), Avalon Gardens Rehabilitation and Health Care Center, LLC ("Avalon"), Brookhaven Rehabilitation and Health Care Center, LLC ("Brookhaven"), Bayview Manor, LLC ("Bayview"), Split Rock Rehabilitation and Health Care Center, LLC ("Split

Rock"), New Franklin Rehabilitation and Health Care Facility, LLC ("Franklin"), Garden Care Center, Inc. ("Garden Care"), Golden Gate Rehabilitation and Health Care Facility, LLC ("Golden Gate"), New Surfside Nursing Home, LLC ("Surfside"), Townhouse Operating Co., LLC ("Townhouse"), Woodmere Rehabilitation and Health Care Center, Inc. ("Woodmere") and Prompt Nursing Employment Agency, LLC ("Prompt"), by their attorneys Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman, LLP, for their complaint allege:

1. Sentosa is a New York limited liability company with its principal place of business located at 20 Franklin Place, Woodmere, NY 11598.

2. Avalon is a New York limited liability company with its principal place of business located at 7 Route 25 A, Smithtown, NY 11787 and owns and operates a skilled nursing facility.

3. Brookhaven is a New York limited liability company with its principal place of business located at 250 Beach 17th St., Far Rockaway, NY 11691 and owns and operates a skilled nursing facility.

4. Bayview is a New York limited liability company with its principal place of business located at One Long Beach Road, Island Park, NY and owns and operates a skilled nursing facility.

5. Split Rock is a New York limited liability company with its principal place of business located at 3525 Baychester Ave., Bronx, NY 10466 and owns and operates a skilled nursing facility.

6. Franklin is a New York limited liability company with its principal place of business located at 142-27 Franklin Avenue, Flushing, NY 11355 and owns and operates a skilled nursing facility.

7. Garden Care is a New York corporation with its principal place of business located at 135 Franklin Ave., Franklin Square, NY 11010 and owns and operates a skilled nursing facility.

8. Golden Gate is a New York limited liability company with its principal place of business located at 191 Bradley Avenue, State Island, NY 10314 and owns and operates a skilled nursing facility.

9. Surfside is a New York limited liability company with its principal place of business located at 22-41 New Haven Avenue, Far Rockaway, NY 11691 and owns and operates a skilled nursing facility.

10. Townhouse is a New York limited liability company with its principal place of business located at 755 Hempstead Turnpike, Uniondale, NY and owns and operates a skilled nursing facility.

11. Woodmere is a New York corporation with its principal place of business located at 121 Franklin Place, Woodmere, NY 11598 and owns and operates a skilled nursing facility (together with Sentosa, Avalon, Brookhaven, Bayview, Split Rock, Franklin, Garden Care, Golden Gate, Surfside, Townhouse, the "Sentosa Facilities").

12. Prompt is a New York corporation with its principal place of business located at 204 Broadway, Brooklyn, NY 11211, engaged in the recruitment and placement of nurses and other health care workers with employers.

13. Upon information and belief, all defendants except for Felix Q. Vinluan ("Vinluan") and Juno Healthcare Staffing System, Inc. ("Juno") are all citizens of the Philippines, residents of the state of New York and employed by plaintiffs as nurses, except Don Don Parungao ("Parungao"),

who was employed by plaintiffs as a physical therapist (all defendants, except Vinluan and Juno, collectively referred to as the "Nurses").

14. Upon information and belief, Vinluan is an attorney educated in the Philippines and admitted to the bar of the state of New York in 1998, with offices located at 224 W. 35th St., Suite 603, New York, NY 10001.

15. Upon information and belief, Juno is a New York corporation with offices located at 91-31 Queens Boulevard, Elmhurst, New York, 11373 and is a health care staffing company focusing on recruitment in the Philippines and placement in the tri-state area.

Background

16. Representatives of Prompt traveled to the Philippines and recruited the Nurses, many of whom had little or no experience working as nurses, to work at the Sentosa Facilities.

17. Among other things, Prompt financed the Nurses' travel expenses to come to the United States, provided them with housing for two months at no cost, provided them with several weeks of orientation, training, financed the licensing process with the New York Department of Education and financed the immigration process to enable them to enter, work and remain in the United States.

18. Prompt informed the Nurses in advance that they would be expected to work a minimum of three years for the Sentosa Facilities, initially at a reduced rate of compensation which would be increased from to time.

19. Upon commencement of their employment, the Nurses were also given health care coverage, two weeks vacation and an extra week to study and prepare for licensing tests.

20. Each of the Nurses entered into a written contract with the Sentosa Facilities which provided, among other things, that the Nurses and the Sentosa Facilities agreed that the Sentosa Facilities were incurring substantial expenses and expending enormous resources and time in recruiting the Nurses for employment, sponsoring the Nurses for immigrant visas, training the Nurses in practice and procedures, orienting the Nurses to living in the New York area and recruiting a new nurse to replace the Nurses should the contract be breached by the Nurses.

21. Pursuant to their contracts with the Sentosa Facilities, the Nurses agreed that if they willfully and voluntarily resigned , abandoned or terminated employment before the completion of at least a three year term they would be obligated to pay the Sentosa Facilities $25,000 as actual damages, representing the loss of the value of the recruitment fee, which sum becomes due and payable immediately upon the resignation, abandonment or termination of employment.

22. Some or all of the employment agreements also provide that if the Nurse fails to reimburse the Sentosa Facility as contemplated by the employment agreement, the Sentosa Facility shall have the right to obtain a monetary judgment in New York State Supreme Court for $25,000.00 plus court costs, disbursements, attorneys fees and the highest interest rate allowed by law.

23. Some of the contracts also explicitly provided that the Sentosa Facility has the right at its sole discretion to transfer the agreement to any of the other Sentosa Facilities.

The Nurses' Resignations

24. On April 6, 2006, at approximately 9:30 pm, defendants Dulce Bayot, Archiel Buagas, Annabelle Capulong, Maricelle Dealo, Carlo Conrad Garcia, Eduardo Ilagan, Rhean

Montecillo, Mitzi Ong, Louella Paglinawan, Ritchel Salve tendered their resignations as a group effective immediately by delivering resignation letters to the Nursing Office at Brookhaven.

25. Archiel Buagas, Annabelle Capulong, Maricelle Dealo were scheduled for the shift commencing at 11:00 pm on April 6, 2006 at Brookhaven.

26. Dulce Bayot, Carlo Conrad Garcia, Rhean Montecillo and Louella Paglinawan were scheduled for the shift commencing at 7:00 am on April 7, 2006 at Brookhaven.

27. None of Archiel Buagas, Annabelle Capulong, Maricelle Dealo, Dulce Bayot, Carlo Conrad Garcia, Rhean Montecillo and Louella Paglinawan appeared for work as scheduled.

28. On April 7, 2006, at approximately 5:40 pm, Juliet Anilao, Harriett Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, James Millena, Theresa Ramos, Rainer Sichon and Don Don Parungao tendered their resignations as a group by delivering resignation letters to the Director of Nursing at Avalon.

29. The Director of Nursing at Avalon informed them that they could not resign in such manner and that they needed to provide reasonable notice so Avalon could ensure appropriate staffing and resident care and returned the letters to them.

30. On April 7, 2006, at approximately 7:00 pm, Avalon received the same letters of resignation from Juliet Anilao, Harriett Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, James Millena, Theresa Ramos, Rainer Sichon and Don Don Parungao by facsimile.

31. Most, if not all, of Juliet Anilao, Harriett Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, James Millena, Theresa Ramos, Rainer Sichon and

Don Don Parungao were scheduled for shifts commencing at 7:00 pm on April 7, 2006, 7:00 am on April 8, 2006, 7:00 pm on April 8, 2006 or 7:00 am on April 9, 2006 at Avalon.

32. None of them appeared for work as scheduled.

33. These resignations constituted almost half of the regular nursing staff at Avalon, leaving not only Avalon's elderly population vulnerable, but also its pediatric vent unit residents who are particularly dependent on sufficient nurse staffing.

34. On April 7, 2006, at approximately 12:30 pm, defendants Eileen Magnaye and Noralyn Ortega tendered their resignations effective immediately by delivering resignation letters to the Director of Nursing at Bayview.

35. The Director of Nursing told them that he would not accept their resignations which were not tendered with sufficient notice. They nevertheless walked out of the facility.

36. Eileen Magnaye and Noralyn Ortega and were scheduled for the shift commencing at 3:00 pm on April 7, 2006 at Bayview.

37. Neither of them appeared for work as scheduled.

38. On April 7, 2006, at approximately 3:00 pm, defendant Cecille Jayo tendered her resignation and that of defendant Maritoni Dela Rosa effective immediately by delivering resignation letters to the staffing coordinator at Split Rock.

39. The staffing coordinator told Cecille Jayo that it was unprofessional not to give at least two weeks' notice prior to resigning. Cecille Jayo left the facility with no response.

40. The Administrator at Split Rock then called Maritoni Dela Rosa and reminded her that he had seen her just two days earlier , had inquired how things were and that she had told him "fine". He asked her the reason for her resignation. She told him it was in the letter. He told her

nothing was in the letter and that her actions were unprofessional and inappropriate. She declined to speak to him any more and hung up the telephone.

41. Cecille Jayo was scheduled for the shift commencing at 3:00 pm on April 7, 2006 at Split Rock. Maritoni Dela Rosa was scheduled for the shift commencing at 7:00 am on April 8, 2006 at Split Rock.

42. Neither of them appeared for work as scheduled.

43. On April 8, 2006, at approximately 11:00 am, defendant Alipio Esguerra, Jr. tendered his resignation effective immediately by delivering a resignation letter to office of the Director of Nursing at Franklin.

44. Alipio Esguerra, Jr. was scheduled for the shift commencing at 3:00 pm on April 8, 2006 at Franklin.

45. He did not appear for work as scheduled.

46. By timing their resignations when they did, the Nurses knew that the Sentosa Facilities would have difficulty finding replacement staff for the weekend on such short notice.

47. In addition, the Nurses knew that the ownership of the Sentosa Facilities is comprised largely of observant, Orthodox Jews who senior management of the Sentosa Facilities would not likely be able to contact immediately.

48. The Nurses' resignations had the potential of impairing the operation of at least Avalon and Brookhaven in the provision of care to their residents.

49. The abandonment of patients in need of immediate professional care by the Nurses without making reasonable arrangements for the continuation of such care constitutes professional misconduct by the Nurses.

FIRST CAUSE OF ACTION
(Breach of Contract)

50. Plaintiffs repeat the allegations of paragraphs 1 – 49.

51. None of the terms of the Nurses' contracts had expired at the time of their resignations.

52. Pursuant to their contracts, the Nurses also promised to conduct themselves in strict conformance to the principles of medical ethics and standards of the medical profession and its governing bodies.

53. The Nurses' coordinated resignations with insufficient notice to Sentosa and the Sentosa Facilities constitutes professional misconduct and a violation of Sentosa and the Sentosa Facilities' policies, standards and procedures.

54. The Nurses each breached their respective contracts with the Sentosa Facilities.

55. By reason of the foregoing, each Nurse is liable to the Sentosa Facilities in an amount to be proved at trial, but no less than $25,000, plus interest and attorneys' fees.

SECOND CAUSE OF ACTION
(Tortious Interference with Contract)

56. Plaintiffs repeat the allegations of paragraphs 1 – 55.

57. The Nurses have valid and binding contracts with the Sentosa Facilities.

58. Vinluan knew that the Nurses had valid and binding contracts with the Sentosa Facilities.

59. On information and belief, Vinluan, acting on behalf of himself and others, including but not limited to Juno, advised and induced the Nurses to resign from the Sentosa Facilities and abandon their employment without reasonable notice to the Sentosa Facilities, in some cases only within hours of their next scheduled shifts, in violation of their contracts with the Sentosa Facilities and the New York Education Law.

60. The Nurses' resignations from the Sentosa Facilities and abandonment of their employment, particularly without reasonable notice to the Sentosa Facilities, constituted breaches of their contracts with the Sentosa Facilities.

61. As a result of the foregoing, plaintiffs are entitled to a permanent injunction restraining and enjoining Vinluan, Juno, their agents, servants, employees and all others acting in concert or privity with them, from (a) soliciting or advising any other employees under contract with the Sentosa Facilities to terminate their employment with the Sentosa Facilities before the end of their contract terms and (b) entering upon the premises at which the Sentosa Facilities operate.

62. By reason of the foregoing, Vinluan and Juno are liable to the Sentosa Facilities in an amount to be proved at trial.

63. In light of, among other things, the timing of the resignations, the coordination of the resignations, the number of the resignations and the risk to patient care caused by the resignations, all orchestrated by Vinluan, the Sentosa Facilities are entitled to punitive damages.

WHEREFORE, plaintiffs demand judgment::

a. on the first cause of action, against each of the Nurses, awarding damages in amount of $25,000 plus interest and attorneys' fees;

b. on the second cause of action, against Vinluan and Juno, jointly and severally, awarding damages in an amount to be proved at trial, punitive damages in the amount of

$50,000,000 and a permanent injunction restraining and enjoining all defendants, their agents, servants, employees and all others acting in concert or privity with them, from (i) soliciting or advising any other employees under contract with the Sentosa Facilities to terminate their employment with the Sentosa Facilities before the end of their contract terms and (ii) entering upon the premises at which the Sentosa Facilities operate;

c. awarding the costs and disbursements of this action; and

d. granting such other and further relief as the Court deems just and proper.

Dated: November 27, 2006

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, GREENBERG, FORMATO & EINIGER, LLP

By Sarah C. Lichtenstein

Sarah C. Lichtenstein, Esq.
1111 Marcus Avenue, Suite 107
Lake Success, NY 11042
(516) 328-2300
Attorneys for plaintiffs

03-22-07

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

- X

THE PEOPLE OF THE STATE OF NEW YORK

- against -

FELIX VINLUAN,
ELMER JACINTO,
JULIET ANILAO,
HARRIET AVILA,
MARK DELA CRUZ,
CLAUDINE GAMIAO,
JENNIFER LAMPA,
RIZZA MAULION,
JAMES MILLENA,
MA THERESA RAMOS and
RANIER SICHON,

Defendants.

- X

I N D I C T M E N T

I-**-07

(Penal Law §§ 100.00, 105.00, 105.20, 260.10(1), 260.25 and 20.00)

Introduction

1. At all times relevant to this Indictment, Sentosa Recruitment Agency was a direct-hire agency located in the Republic of the Philippines. The agency recruited Filipino nurses for work in the United States at Sentosa Care Group, which operated nursing facilities in New York City and on Long Island.

2. Sentosa Care and a nurse whom Sentosa Recruitment had recruited entered into a contract. Under the contract's terms, Sentosa Care obtained for the nurse an immigrant visa from the United States Embassy in Manila and the United States Department of Homeland Security. Because Sentosa Care incurred expenses in

the nurse-procurement process, a recruited nurse gave Sentosa Care a three-year commitment that, upon the nurse's breach, made the nurse liable to Sentosa Care for money damages of $25,000.

3. In New York City, Sentosa Care operated, among other facilities, the Brookhaven Rehabilitation & Health Care Center and the Split Rock Rehabilitation & Health Care Center. On Long Island, Sentosa Care operated, among other facilities, the Bayview Rehabilitation & Health Care Center and the Avalon Gardens Rehabilitation & Health Care Center. Avalon Gardens, located on Route 25A in Smithtown, was the only Sentosa Care facility in Suffolk County. Avalon Gardens was also the only nursing facility on Long Island containing a pediatric unit.

4. Avalon Gardens' pediatric unit was equipped to provide care for chronically ill children, including children on ventilators. A ventilator, a mechanical device that delivers air to the lungs of a patient who is unable to breathe sufficiently, provided critical breathing assistance to the Avalon Gardens' children who had chronic conditions that required ventilation up to twenty-four hours a day.

5. The Avalon Gardens' children who received ventilation did so through a tracheostomy, a surgically constructed opening in the trachea. These children also needed periodic suctioning from a sterile catheter to remove bronchial secretions that could obstruct ventilation. Because a ventilator failure could

result in death, each Avalon Gardens' ventilator was equipped with an alarm to alert healthcare professionals to dangers such as air-pressure changes, patient breathing problems, ventilator malfunction and power failure.

The Defendant Nurses

6. Sentosa Recruitment recruited the defendants ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON to be nurses for Sentosa Care. Sentosa Care, through its nursing facilities, entered into contracts with the defendant nurses and assigned them to Avalon Gardens.

7. All the defendant nurses were trained to care for children on ventilators. And in early April 2006, the defendant nurses CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, MA THERESA RAMOS and RANIER SICHON were the only Avalon Gardens' nurses, other than a nurse who was on vacation, who worked almost exclusively with children on ventilators.

The Defendant Nurses' Duty to Their Patients

8. The New York Education Law and the rules of the New York Board of Regents governed conduct among healthcare professionals, including nurses. Under the Education Law and the rules of the Board of Regents, a nurse committed unprofessional conduct when the nurse abandoned a patient without making reasonable arrangements for the patient's

continued care or when the nurse abandoned employment at a health-care facility without giving reasonable notice to the facility and under circumstances that seriously impaired the delivery of professional care to patients.

The Defendant Nurses' Breach of Their Duty

9. The defendant FELIX VINLUAN was an attorney who had an office in Manhattan and an office in the Philippines. FELIX VINLUAN represented Sentosa Recruitment competitors and, on or about April 5, 2006, advised the defendant nurses to resign from Avalon Gardens and Sentosa Care.

10. On April 6, 2006, ten nurses from Brookhaven Rehabilitation submitted resignation letters. On April 7, 2006, two nurses from Split Rock and two nurses from Bayview Rehabilitation submitted resignation letters. The content of the fourteen aforementioned letters was identical and stated that the resignation was effective immediately.

11. Still later on April 7, 2006, the defendant nurses, knowing that nurses at other Sentosa Care facilities had resigned, also submitted resignation letters. The content of each letter was identical to the content of the letters to the other Sentosa Care facilities and stated that the resignation was effective immediately.

12. With the pool of possible temporary replacement nurses depleted because of the resignations at other Sentosa Care

facilities, the sudden resignations of the defendant nurses at Avalon Gardens endangered the welfare of Avalon Gardens' pediatric patients, particularly the terminally ill JB, the child NL and the ventilated children NC, BC, TM and TT, all of whose identities are known to the grand jury.

COUNT ONE
(Conspiracy in the Sixth Degree)

13. The grand jury repeats paragraphs 1 through 12 and charges that on or about and between April 5, 2006, and April 7, 2006, in Suffolk County, New York, and elsewhere, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, with intent to perform conduct constituting the crimes of Endangering the Welfare of a Child and Endangering the Welfare of a Physically Disabled Person, agreed to engage in and cause the performance of such conduct.

14. It was the conspiracy's objective to obtain for the Avalon Gardens' nurses alternative employment and a release from their three-year commitment to Sentosa Care without incurring a financial penalty of $25,000.

15. In pursuit of their objective, the defendant FELIX VINLUAN and the defendant nurses sought to establish that

Sentosa Care had breached the contracts and had discriminated against the nurses.

16. The defendants pursued their objective without regard to the consequences that their pursuit would have on Avalon Gardens' pediatric patients. The defendants agreed that the defendant nurses, including all the available nurses who cared for children on ventilators, would resign without giving Avalon Gardens notice. The defendants did so knowing that their resignations and the prior resignations at other Sentosa Care facilities would render it difficult for Avalon Gardens to find, in a timely manner, skilled replacement nurses for Avalon Gardens' pediatric patients, particularly the terminally ill JB, the child NL and the ventilated children NC, BC, TM and TT.

17. In furtherance of the conspiracy and in pursuit of its objective, the defendants committed the following overt acts:

a. On or about April 5, 2006, in Suffolk County, the defendant FELIX VINLUAN met with the defendant nurses and asked them to bring a discrimination claim against Avalon Gardens and Sentosa Care. The defendants ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON agreed to bring the claim.

b. On April 6, 2006, in Washington, D.C., the defendant FELIX VINLUAN, acting on the defendant nurses' behalf,

filed with the Civil Rights Division of the United States Department of Justice a Federal discrimination claim against Avalon Gardens and Sentosa Care.

c. On April 7, 2006, at Avalon Gardens, the defendants ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON approached Avalon Gardens' director, whose identity is known to the grand jury, and submitted their resignation letters.

(Penal Law §§ 105.00 and 105.20)

COUNT TWO
(Criminal Solicitation in the Fifth Degree)

18. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on or about and between April 5, 2006, and April 7, 2006, in Suffolk County, New York, the defendant FELIX VINLUAN, with intent that the defendant nurses engage in conduct constituting the crimes of Endangering the Welfare of a Child and Endangering the Welfare of a Physically Disabled Person, requested and otherwise attempted to cause the nurses to resign immediately from Avalon Gardens.

(Penal Law § 100.00)

COUNT THREE
(Endangering the Welfare of a Child)

19. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County,

New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to be injurious to the physical welfare of NC, a seven-year-old child.

(Penal Law §§ 260.10(1) and 20.00)

COUNT FOUR
(Endangering the Welfare of a Child)

20. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County, New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to be injurious to the physical welfare of BC, a two-year-old child.

(Penal Law §§ 260.10(1) and 20.00)

COUNT FIVE
(Endangering the Welfare of a Child)

21. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County, New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to

be injurious to the physical and mental welfare of TM, a four-year-old child.

(Penal Law §§ 260.10(1) and 20.00)

COUNT SIX

(Endangering the Welfare of a Child)

22. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County, New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to be injurious to the physical and mental welfare of TT, a three-year-old child.

(Penal Law §§ 260.10(1) and 20.00)

COUNT SEVEN

(Endangering the Welfare of a Child)

23. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County, New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to be injurious to the physical welfare of NL, a seven-year-old child.

(Penal Law §§ 260.10(1) and 20.00)

COUNT EIGHT

(Endangering the Welfare of a Physically Disabled Person)

24. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County, New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to be injurious to the physical welfare of NC, a person who was unable to care for herself because of a physical disability.

(Penal Law §§ 260.25 and 20.00)

COUNT NINE

(Endangering the Welfare of a Physically Disabled Person)

25. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County, New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to be injurious to the physical welfare of BC, a person who was unable to care for himself because of a physical disability.

(Penal Law §§ 260.25 and 20.00)

COUNT TEN

(Endangering the Welfare of a Physically Disabled Person)

26. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County, New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to be injurious to the physical welfare of TM, a person who was unable to care for herself because of a physical disability.

(Penal Law §§ 260.25 and 20.00)

COUNT ELEVEN

(Endangering the Welfare of a Physically Disabled Person)

27. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County, New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to be injurious to the physical welfare of TT, a person who was unable to care for herself because of a physical disability.

(Penal Law §§ 260.25 and 20.00)

COUNT TWELVE

(Endangering the Welfare of a Physically Disabled Person)

28. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County, New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to be injurious to the physical welfare of NL, a person who was unable to care for himself because of a physical disability.

(Penal Law §§ 260.25 and 20.00)

COUNT THIRTEEN

(Endangering the Welfare of a Physically Disabled Person)

29. The grand jury repeats paragraphs 1 through 12 and 14 through 16 and charges that on April 7, 2006, in Suffolk County, New York, the defendants FELIX VINLUAN, ELMER JACINTO, JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMIAO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, MA THERESA RAMOS and RANIER SICHON, acting in concert, knowingly acted in a manner likely to be injurious to the physical welfare of JB, a person who was unable to care for herself because of a physical disability.

(Penal Law §§ 260.25 and 20.00)

A TRUE BILL

ıg, Long Island
sday
AY.COM

COMING SUNDAY
Money for schools
Get engaged in the conversation. See essays and contribute to an online panel discussion on the future of state aid to schools.
SUNDAY IN OPINION

PART 2
The joker's wild
Jackie Martling, the raunchy 'Joke Man' and former writer for Howard Stern, plays dirty on LI this weekend. **B2**

REAL ESTATE
His signs sell
Why 5,000 agents rely on Michael Tiefenworth's for-sale postings — plus, his tips for yours **C12**

Classified inside Part 2

Lottery	A83
Movie listings	B6
Obituaries	A56
Stocks	A55
World & Nation	A24
Reaching Newsday	A46

ORECAST
mostly cloudy with chance
owers. Highs, 50s. **A58**

BSCRIPTIONS: 800-NEWSDAY
Thursday to Sunday: $3.00
Sunday only: $1.85
PTIONS: 631-843-2000
26 weeks: $137.28 (daily) / $67.31 (Sun.)
52 weeks: $274.56 (daily) / $134.68 (Sun.)
ed daily except Sunday by Newsday Inc.
ation, NY. Postmaster: Send address changes
wsday also published by Newsday Inc.

and employment ads C1

Nurses charged after walking off the job

BY SUSANA ENRIQUEZ
susana.enriquez@newsday.com

Ten nurses who abruptly resigned from their jobs last year at a Smithtown nursing center were charged yesterday — along with an attorney who advised them — with endangering children.

The nurses who work for Avalon Gardens Rehabilitation and Health Center were accused of endangering six children ranging in age from 2 to 7 — four were on ventilators, one was on oxygen support and another was terminally ill — when they abandoned their posts April 7 at the end of their shifts, said Suffolk County assistant district attorney Leonard Lato.

"You cannot walk out on disabled children who have nobody to call," Lato said. "Whatever their dispute, they could have said they intended to walk out in 24 hours."

The nurses' sudden departure, he said, left the center scrambling for replacements on a Friday evening. The action was spurred, their current attorney said, by complaints about pay and hours.

The nurses were Philippine citizens who worked for Sentosa Care, a group of nursing facilities located throughout New York. The affiliated Sentosa Recruitment Agency recruits nurses from the Philippines for permanent employment in the U.S.

Felix Vinluan, 42, of Westbury, is the attorney accused of advising the nurses to resign.

All 11 were charged with sixth-degree conspiracy, five counts of endangering the welfare of a child and six counts of endangering the welfare of a physically disabled person — all misdemeanors. Vinluan also was charged with fifth-degree criminal solicitation, a misdemeanor.

All pleaded not guilty in Suffolk County Court in Riverhead and were released. If convicted, they could face up to six years in prison and deportation.

"There is no crime," said the nurses' attorney, James Druker, of Garden City. "Nobody was endangered."

The nurses, who had been on the job a few months to two years, were recruited from the Philippines. They had a three-year commitment to Sentosa Care, and because they broke their contracts when they left, the nurses were liable for $25,000, the indictment said.

"They just wanted out," Druker said. "They didn't leave for better jobs; they were just tired of broken promises."

The nurses, he said, were not allowed to work the shifts they were promised, were not given a night differential and were not being paid for overtime.

Vinluan, the attorney who advised the nurses, was just doing his job, said his attorney, Oscar Michelen, of Mineola. "[Vinluan] only advised them of what their legal rights were under the law," Michelen said. "The contract allowed them to leave."

The indictment says the same day the 10 nurses resigned, two nurses from Split Rock Rehabilitation and Health Care Center in the Bronx and two nurses from Bayview Nursing and Rehabilitation Center in Island Park had also resigned; the day before, 10 nurses from Brookhaven Rehabilitation and Health Care Center in Far Rockaway had resigned. All are owned by Sentosa Care. Those nurses were not charged.

Staff writer Eden Laiken contributed to this story.

PHOTO BY PATRICK DEHLER

Nurses Ranier Sichon, left, and Elmer Jacinto leave Riverhead Court yesterday.

Accused of abandoning patients

All 11 were charged with:
- 1 count of sixth-degree conspiracy;
- 5 counts of endangering the welfare of a child;
- 6 counts of endangering the welfare of a disabled person;

Charged were:
- Juliet Anilao, 35, Kew Gardens
- Harriet Avila, 24, Elmhurst
- Mark Dela Cruz, 29, Elmhurst
- Claudine Gamiao, 39, Elmhurst
- Elmer Jacinto, 31, Elmhurst
- Jennifer Lampa, 37, Smithtown
- Rizza Maulion, 35, Smithtown
- James Millena, 32, Brooklyn
- Theresa Ramos, 33, Smithtown
- Ranier Sichon, 32, Radcliff, Ky.
- Attorney Felix Vinluan, 42, Westbury

Vinluan also was was charged with one count of fifth-degree criminal solicitation.

— EDEN LAIKIN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Nº 10-CV-00032 (JFB) (WDW)

JULIET ANILAO, ET AL.,

Plaintiffs,

VERSUS

THOMAS J. SPOTA, III, INDIVIDUALLY AND AS DISTRICT ATTORNEY OF SUFFOLK COUNTY, ET AL.,

Defendants.

MEMORANDUM AND ORDER
January 25, 2013

JOSEPH F. BIANCO, District Judge:

Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, James Millena, Theresa Ramos, Ranier Sichon (the "nurse plaintiffs" or "nurses"), and Felix Q. Vinluan ("Vinluan") (collectively, "plaintiffs") brought this action against Thomas J. Spota, III, individually and as District Attorney of Suffolk County ("District Attorney Spota" or "Spota"), the Office of the District Attorney of Suffolk County ("the DA's Office"), Leonard Lato, individually and as Assistant District Attorney of Suffolk County ("Lato"), and the County of Suffolk (collectively, the "County defendants"), as well as against Sentosa Care, LLC ("Sentosa Care"), Avalon Gardens Rehabilitation and Health Care Center ("Avalon Gardens"), Prompt Nursing Employment Agency, LLC ("Prompt"), Francris Luyun ("Luyun"), Bent Philipson ("Philipson"), Berish Rubenstein ("Rubenstein"), Susan O'Connor ("O'Connor"), and Nancy Fitzgerald ("Fitzgerald") (collectively, the "Sentosa defendants"), alleging that the County defendants and the Sentosa defendants violated plaintiffs' constitutional rights pursuant to 42 U.S.C. § 1983.

Presently before the Court is a motion by plaintiffs to unseal the minutes of the proceedings of, and release the exhibits presented to, the Grand Jury under Indictments 00769A-07 through 00769K-07, which charged plaintiffs with endangering the welfare of a child, endangering the welfare of a physically disabled person,

conspiring to do the same, and solicitation. Plaintiffs contend that "[i]n this unique case, the plaintiffs have shown that the minutes of the grand jury proceedings are critical to their case" and "[t]he public interest in the integrity of prosecutions, and the resolution of the serious issues in this case should outweigh the usual reasons for grand jury secrecy." (Pls.' Mot. to Unseal at 3.) Defendants County of Suffolk and Lato oppose the motion and argue, *inter alia*, that "[w]here, as here, the parties will have the ability to examine witnesses (including the prosecutor that presented the matter to the grand jury) by deposition and to obtain statements made by them, there exists other means to obtain information without invading the sanctity of the grand jury proceeding." (Defs.' Opp'n to Mot. to Unseal at 3.)[1] For the reasons set forth below, after careful consideration of the issue, the Court concludes that plaintiffs' motion should be granted.

This Court recognizes, as has been articulated in both Supreme Court and Second Circuit jurisprudence, the importance of grand jury secrecy and the strong policy considerations that support such secrecy. In this unusual case, however, plaintiffs have met their burden and have made a more than sufficient showing of need for inspection of the Grand Jury materials. Plaintiffs have therefore overcome the need for continued grand jury secrecy in this case under the well-established test for analyzing motions to unseal grand jury materials.

First, plaintiffs have certainly demonstrated a particularized and compelling need for disclosure of the Grand Jury materials based upon the history of this case, the specific allegations in the complaint, and the Court's *ex parte* review of the Grand Jury materials. Although defendants contend that plaintiffs' arguments for access are speculative, the Court disagrees. As a threshold matter, the Second Department took the extraordinary step of issuing a writ of prohibition against further prosecution of the Indictment because it found that the criminal prosecution was an impermissible infringement on the constitutional rights of both the nurses and their attorney, and that, as a result, plaintiffs were being prosecuted for crimes for which they could not constitutionally be tried. Additionally, plaintiffs do not simply make conclusory allegations of wrongdoing, but rather, point to specific alleged misconduct by the prosecution in the Grand Jury, including falsely informing the Grand Jury that one or more of the nurses had resigned during a shift and failing to tell the Grand Jury that the Education Department had already determined that the nurse plaintiffs had not violated the Education Law (even though the Education Law was the basis for the duty to the patients contained in the Indictment). Although prosecutors have absolute immunity for any alleged misconduct in the grand jury, access to the Grand Jury materials is indispensable in this case to plaintiffs' ability to, among other things, (1) prove the Section 1983 conspiracy claim against the Sentosa defendants (who have no such immunity) and against the County defendants (during the investigative phase), and (2) rebut the presumption of probable cause that would otherwise attach to the Indictment in connection with plaintiffs' false arrest and malicious prosecution claims. Moreover, although the County defendants argue that any such request to unseal the Grand Jury materials should await the outcome of discovery, the Court does not

[1] Although the Sentosa defendants did not file a written opposition, counsel for the Sentosa defendants orally opposed plaintiffs' motion at oral argument on January 16, 2013.

believe that such a delay will be productive or change the analysis in this particular case because, among other things, (1) the prosecutor is not permitted to discuss what transpired in the Grand Jury at a deposition (absent relief from the Court), (2) without the Grand Jury materials, plaintiffs will be unable to fully determine which witnesses to focus on in the discovery phase, and (3) there is a significant risk that witnesses' memories have faded due to the long passage of time since the events in question. Thus, postponing this determination will, in this case, result in unnecessary delay, duplication of effort, and most importantly, will significantly hinder plaintiffs' ability to conduct thorough and meaningful discovery with respect to their claims. In short, this is clearly a compelling situation for authorizing access to grand jury materials to plaintiffs who are attempting to vindicate the alleged violation of their civil rights in the aftermath of an Indictment that a state court dismissed and found infringed on plaintiffs' constitutional rights. Such a release is necessary, under the circumstances of this particular case, to avoid an injustice by unnecessarily hampering plaintiffs' ability to fully develop the proof for their civil rights claims.

Second, the Court finds that the need for disclosure of the Grand Jury materials is much greater than the need for continued secrecy. The policy considerations underlying grand jury secrecy are extremely weak in this particular case. For example, there is no interference with any aspect of the grand jury process or an ongoing law enforcement investigation/prosecution because the Indictment has been dismissed and the criminal case has been completed for several years. Similarly, there is no need to protect any individuals innocently accused or investigated because the plaintiffs were publically indicted and named as defendants before the case was dismissed. In essence, the only policy consideration favoring secrecy in this case is the need to encourage witnesses to testify freely in future grand juries without fear that their testimony will later become public. Although that is certainly an important policy consideration, it is overwhelmingly outweighed in this case by the particular and compelling need for disclosure. In fact, the Supreme Court, Suffolk County, has already reviewed the Grand Jury minutes in this case and (although ultimately deferred to this Court) found, after balancing these considerations, that there was "ample reasons to release the grand jury minutes, testimony and exhibits." *In re Druker*, No. 11-12243, slip op. at 4 (Sup. Ct. Suffolk Cnty. May 8, 2012). Thus, disclosure in this case does not violate the strong policy of comity between state and federal sovereignties because a state court has thoroughly considered the important state interest in secrecy and has already opined that the privilege of secrecy in state grand jury proceedings would not be undermined by disclosure in this case.

Finally, the Court has carefully reviewed the Grand Jury transcript to determine whether plaintiffs' request has been structured to cover only the material needed. In other words, the Court reviewed the entire transcript to determine whether the testimony of all witnesses and all minutes of the Grand Jury proceedings are needed, or whether some more targeted disclosure would address plaintiffs' compelling basis for disclosure. After a careful review, the Court has not identified any portion of the materials that can be held back without significantly hindering plaintiffs' ability to utilize the materials for the compelling reasons articulated by them. The allegations in this case are broad, and include an anticipated challenge to the probable cause

determination by the Grand Jury. Therefore, in this particular case, based upon the Court's review of the entire transcript, a compelling basis has been demonstrated for disclosure of all of the Grand Jury materials.

Accordingly, the Court concludes, as discussed in detail below, that disclosure of the Grand Jury materials to the parties is warranted. However, before the materials are disclosed, the Court will place restrictions on their dissemination at this juncture to ensure that they are not disclosed to the public, even though they are being made available to the parties for purposes of discovery in this litigation.

I. BACKGROUND

A. Facts[2]

1. Events Leading Up to Grand Jury Indictment

Each of the nurse plaintiffs is a citizen of the Philippines and a legal resident of the United States. (Am. Compl. ¶ 1.) Sentosa Recruitment Agency, Inc. ("Sentosa Recruitment"), operating through individual defendant Luyun, recruited the nurse plaintiffs in this case to come and work as nurses in the United States. (*Id.* ¶¶ 25, 29-31.) Plaintiffs allege that Sentosa Recruitment made a number of knowingly false promises to induce them to sign contracts to work in the United States. (*Id.* ¶¶ 29-32.) Acting in reliance on these promises, each plaintiff signed a contract to work at a specific facility affiliated with Sentosa; none of the plaintiffs, however, signed a contract with Avalon Gardens. (*Id.* ¶¶ 33-34, 39.) The contracts provided, *inter alia*, that plaintiffs would be required to work at the facilities with which they contracted for a period of three years, and that if they resigned prior to that time, they would be required to pay a $25,000 penalty. (*Id.* ¶¶ 35-36.)

Upon arriving in the United States, plaintiffs were employed by Prompt and assigned to work at Avalon Gardens. (*Id.* ¶ 40.) Plaintiffs claim that they began to complain about the conditions at Avalon Gardens soon after their arrival, but that the alleged problems were never resolved. (*Id.* ¶¶ 40, 44.) Indeed, plaintiffs allege that the Sentosa defendants breached the promises made to the nurses in a variety of respects. (*Id.* ¶ 37.) Plaintiffs claim that they contacted the Philippine Consulate in New York for a referral to an attorney who could advise them of their rights. (*Id.* ¶ 45.) The Consulate referred them to Vinluan, who advised them that their employment contracts had already been breached in multiple ways by the Sentosa defendants and that, accordingly, they were not bound under those contracts to continue their employment. (*Id.* ¶¶ 46-47.) Based upon this advice of counsel, and upon the fact that the Sentosa defendants allegedly refused to remedy any of the problems plaintiffs complained of, plaintiffs resigned their employment on April 7, 2006. (*Id.* ¶ 48.)

Avalon Gardens, Prompt, and other Sentosa-affiliated entities then began taking a series of retaliatory actions against plaintiffs, including filing a complaint in Nassau County Supreme Court alleging, *inter alia*, breach of contract and tortious interference with contract and seeking to enforce the $25,000 penalty in plaintiffs' contracts and $50,000 in punitive damages. (*Id.* ¶ 52.) They also sought a preliminary injunction to enjoin plaintiffs from speaking with other nurses about resigning, (*id.* ¶ 53),

[2] Given that the Court has already issued a written Memorandum and Order in this case, the Court assumes familiarity with the case for purposes of this motion. The following facts relevant to the issues at hand are taken mainly from the amended complaint and are not findings of fact by the Court.

and filed a complaint with the New York State Education Department, which is responsible for licensing nurses and governing their conduct, (*id.* ¶ 54.) Additionally, approximately three weeks after plaintiffs resigned, defendant O'Connor, or another person acting at her behest and on behalf of Avalon Gardens, called the Suffolk County Police Department to file a complaint. (*Id.* ¶ 59.) According to the amended complaint, these retaliatory actions ultimately failed. For example, the Suffolk County Police Department refused to take any action against plaintiffs because, "in their stated opinion, no crime had been committed." (*Id.*) Moreover, in June 2006, Justice Stephen Bucaria of the New York State Supreme Court denied the Sentosa entities' motion for preliminary injunction on the ground that they had failed to establish a likelihood of success on the merits. (*Id.* ¶ 55.) Finally, in September 2006, the Education Department sent an email to Vinluan stating that plaintiffs had been fully exonerated of any wrongdoing. (*Id.* ¶ 57.)

Howard Fensterman ("Fensterman"), attorney for Sentosa Care, allegedly arranged a private meeting with District Attorney Spota, Philipson, Luyun, and others. (*Id.* ¶ 60.) Plaintiffs assert that Fensterman and principals of Sentosa have made substantial contributions to various politicians and, as a result, have "amassed political power and influence," enabling them to obtain favorable actions from elected officials. (*Id.* ¶¶ 61-62.) Plaintiffs claim that, as a result of the meeting, Spota assigned the case to one of his deputies, defendant Lato, "for the purpose of gathering evidence and securing an indictment." (*Id.* ¶ 70.) In early November 2006, Lato interviewed Vinluan, (*id.* ¶ 71), who provided Lato with "significant exculpatory information," (*id.* ¶ 72.) Plaintiffs claim that, "[n]onetheless[,] Lato, with the consent and at the urging of Spota, presented the case to a Grand Jury." (*Id.*)

Plaintiffs make numerous allegations of wrongdoing involving the presentation of evidence to, and the procuring of the Indictment from, the Grand Jury. Plaintiffs also claim that the allegations in the Indictment against Vinluan — that Vinluan "advised the defendant Nurses to resign" and that the purpose of the conspiracy was to obtain alternative employment for the nurses — were baseless and were founded upon false testimony of Philipson and possibly other Sentosa employees or principals. (*Id.* ¶¶ 80-82.) Likewise, plaintiffs assert that "the [I]ndictment was further based upon knowingly false testimony by Philipson or other Sentosa principals . . . that one or more of the Nurse Plaintiffs had walked off during a shift, that shifts were inadequately covered, and that patients, including the children on ventilators . . . were endangered." (*Id.* ¶ 84.) Plaintiffs claim that both the Sentosa witnesses and the County defendants "knew that this testimony was false, but nonetheless presented it to the Grand Jury pursuant to their agreement with the Sentosa Defendants." (*Id.* ¶¶ 85-86.) Finally, plaintiffs allege that the Grand Jury was not properly charged on the law, was falsely informed that one or more of the nurses had resigned during their shifts, and was not told that the Education Department had already determined that the nurse plaintiffs had not violated the Education Law. (*Id.* ¶ 83.)

2. Grand Jury Indictment and Subsequent Dismissal of the Indictment

Approximately one year after plaintiffs' resignations, the Grand Jury returned an Indictment charging plaintiffs and Vinluan with endangering the welfare of a child, endangering the welfare of a physically disabled person, conspiring to do the same,

and solicitation (for allegedly requesting and attempting to cause the nurses to resign). (*Id.* ¶¶ 78-79.) Plaintiffs were arrested as a result of the Indictment. (*Id.* ¶ 87.) Plaintiffs moved to dismiss the Indictment on the grounds that, *inter alia*, the prosecution violated the nurse plaintiffs' Thirteenth Amendment rights and Vinluan's First Amendment rights. (*Id.* ¶ 94.) Their motion was denied by the state trial court judge on September 27, 2007. (*Id.* ¶ 95.) Plaintiffs thereafter filed an application for a writ of prohibition with the Appellate Division, which stayed all proceedings pending a determination on plaintiffs' petition. (*Id.* ¶¶ 96-97.) On January 13, 2009, the Appellate Division issued a writ of prohibition against further prosecution of the Indictment, finding that the criminal prosecution "constitute[d] an impermissible infringement upon the constitutional rights of these nurses and their attorney, and that the insurance of a writ of prohibition to halt these prosecutions is the appropriate remedy in this matter." *Vinluan v. Doyle*, 60 A.D.3d 237, 240 (2d Dep't 2009).

The Appellate Division explained that, because the Indictment explicitly made "the nurses' conduct in resigning their positions a component of each of the crimes charged . . . the prosecution ha[d] the practical effect of exposing the nurses to criminal penalty for exercising their right to leave their employment at will." *Id.* at 248. In addition, "although an employee's abandonment of his or her post in an 'extreme case' may constitute an exceptional circumstance which warrants infringement upon the right to freely leave employment, the respondent District Attorney proffer[ed] no reason why this [was] an 'extreme case.'" *Id.* at 249. Indeed, the court noted that the nurses did not abandon their posts in the middle of their shifts, but instead resigned after the completion of their shifts. *Id.* Accordingly, although the nurses' resignation may have made it difficult for Sentosa to find skilled replacement nurses in a timely fashion, it was "undisputed that coverage was indeed obtained, and no facts suggesting an imminent threat to the well-being of the children [were] alleged." *Id.* Thus, the court explained:

> [W]e cannot conclude that this is such an "extreme case" that the State's interest in prosecuting the petitioners for misdemeanor offenses based upon the speculative possibility that the nurses' conduct could have harmed the pediatric patients at Avalon Gardens justifies abridging the nurses' Thirteenth Amendment rights by criminalizing their resignations from the service of their private employer.

Id.

As to Vinluan, the court found that his prosecution "impermissibly violate[d] [his] constitutionally protected rights of expression and association in violation of the First and Fourteenth Amendments." *Id.* at 250. In so holding, the court relied upon the Supreme Court's instruction that "'[t]he First and Fourteenth Amendments require a measure of protection for advocating lawful means of vindicating legal rights including advising another that his legal rights have been infringed.'" *Id.* (quoting *In re Primus*, 436 U.S. 412, 432 (1978)) (internal quotation marks and alterations omitted). The Appellate Division found that the Indictment impermissibly sought to punish Vinluan for exercising his First Amendment right to provide legal advice, and held that "it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice." *Id.* at 251.

Accordingly, the court concluded that "[w]here, as here, the petitioners are threatened with prosecution for crimes for which they cannot constitutionally be tried, the potential harm to them is 'so great and the ordinary appellate process so inadequate to redress that harm' that prohibition should lie." *Id.* (quoting *Rush v. Mordue*, 68 N.Y.2d 348, 354 (1986)). The court analogized the situation to one in which a defendant was about to be prosecuted in violation of his constitutional right against Double Jeopardy or in violation of his Fifth Amendment right against self-incrimination — which would likewise present situations in which a defendant was being prosecuted for a crime for which he could not be constitutionally tried — and, thus, granted plaintiffs' petition and prohibited District Attorney Spota from prosecuting plaintiffs under the Indictment. *Id.* at 244. The Indictment against plaintiffs was dismissed by the Supreme Court, Suffolk County on October 29, 2009.

B. Procedural History

1. Actions Prior to Requests for Unsealing of Grand Jury Materials

Plaintiffs filed their complaint on January 6, 2010. The County defendants filed a motion to dismiss on March 23, 2010, as did the Sentosa defendants. On May 10, 2010, plaintiffs filed an opposition to both motions to dismiss. The Sentosa defendants filed a reply on June 14, 2010, and the County defendants replied on June 15, 2010. On July 8, 2010, the Court held oral argument and gave plaintiffs leave to file an amended complaint. Plaintiffs filed their amended complaint on July 29, 2010. On August 19, 2010, the Sentosa defendants and the County defendants filed supplemental letters in support of their motions to dismiss the amended complaint. Plaintiffs filed supplemental responses in opposition on September 7, 2010. The County defendants and the Sentosa defendants filed supplemental replies on September 21 and September 22, 2010, respectively.

On March 31, 2011, the Court issued a written Memorandum and Order, granting in part and denying in part defendants' motions to dismiss. As to the County defendants, the Court concluded the following: (1) the individual County defendants are entitled to absolute immunity for conduct taken in their role as advocates in connection with the presentation of the case to the Grand Jury; (2) the individual County defendants are not entitled to absolute immunity for alleged misconduct during the investigation of plaintiffs, but the Court could not determine, at that time, whether the individual County defendants are entitled to qualified immunity for their actions in the investigation phase; (3) plaintiffs have sufficiently pled Section 1983 claims against the individual County defendants for alleged Due Process violations in the investigation phase; and (4) plaintiffs have sufficiently pled a claim for municipal liability against the County of Suffolk. As to the Sentosa defendants, the Court concluded the following: (1) plaintiffs have sufficiently alleged that they were acting under color of state law, and (2) plaintiffs have sufficiently pled claims for malicious prosecution and false arrest under both Section 1983 and state law, as well as a Section 1983 conspiracy claim. The Court dismissed, without prejudice, the claims against defendants O'Connor and Fitzgerald for (1) plaintiffs' failure to plead that the two defendants were acting under color of state law, and (2) plaintiffs' failure to satisfy the elements of the state-law malicious prosecution and false arrest claims against the two defendants.

The Sentosa defendants filed an answer to plaintiffs' amended complaint on April 13, 2011. The County defendants filed an

answer to the amended complaint on April 14, 2011. On May 3, 2011, the Sentosa defendants filed an amended answer to plaintiffs' amended complaint, adding a counterclaim under New York Civil Rights Law § 70-a. On June 13, 2011, plaintiffs filed a motion to dismiss the Sentosa defendants' counterclaim. The Sentosa defendants filed an opposition on July 13, 2011, and plaintiffs filed a reply on July 20, 2011. On September 21, 2011, the Court held oral argument and denied plaintiffs' motion. Plaintiffs subsequently filed an answer to the Sentosa defendants' counterclaim on September 22, 2011, and on October 7, 2011, Magistrate Judge Wall set a discovery schedule.

2. Plaintiffs' Requests to Unseal Grand Jury Materials

Plaintiffs then petitioned the Supreme Court, Suffolk County for a judgment permitting them to obtain a copy of the minutes, exhibits, and testimony of the state Grand Jury that indicted them. The Supreme Court, Suffolk County granted the petition and issued a written decision on May 8, 2012, expressing its opinion that the Grand Jury materials should be released, but asking this Court to make the final determination. The state court first indicated the relevant New York State Criminal Procedure provisions and listed the many policy reasons for grand jury secrecy: (1) prevention of flight by a defendant about to be indicted; (2) protection of grand jurors from those under investigation; (3) prevention of tampering with prospective witnesses at trial, should an indictment issue; (4) protection of an innocent accused of unfounded accusations if no indictment is returned; and (5) assurance of secrecy to prospective grand jury witnesses so that they will be willing to testify freely. *In re Druker*, No. 11-12243, slip op. at 3 (quoting *People v. Di Napoli*, 27 N.Y.2d 229, 335 (1970)). The court also explained that a party requesting disclosure of grand jury materials must show a "compelling and particularized need", *id.* at 4 (citing *Peple v. Robinson*, 98 NY2d 755 (2002)), and indicated the following reasons advanced by plaintiffs for why they need the materials:

> The petitioners contend, among other things, that disclosure is required under these facts to establish their claims that the County defendants conspired with the Sentosa defendants to procure false evidence and present it to the grand jury as well as to hide exculpatory evidence from the grand jury, that both sides in the federal court litigation have a particularized need for the information, and that the Eastern District action is a matter of public interest, involving alleged wrongdoing on the part of public officials.

Id.

The court then evaluated the policy considerations related to grand jury secrecy and concluded that "there are ample reasons to release the grand jury minutes, testimony and exhibits." *Id.* The court was persuaded by the following findings: (1) because the Indictments were dismissed, there is no risk that a defendant about to be indicted will take flight; (2) because the Grand Jury concluded its proceedings, there is no risk of interference from those under investigation or subornation of perjury and tampering with prospective witnesses; (3) plaintiffs were the accused under the Indictments, so they require no protection from unfounded accusations; (4) if it is established that the Sentosa defendants testified falsely before the Grand Jury, they cannot claim they relied on secrecy in exchange for their willingness to testify freely; and (5)

disclosure would not have a chilling effect on the ability of future grand juries to obtain witnesses, especially in this case, where the "public's interest in accurate information about its public officials outweighs the assurance of secrecy for witnesses in future grand jury proceedings." *Id.* (quoting *Jones v. State*, 79 A.D.2d 273 (4th Dep't 1981)).

Despite the fact that the state court found compelling reasons to release the Grand Jury materials, the court, "mindful of the limited record submitted in th[e] special proceeding" and its limited knowledge "of the progress of discovery in [the federal civil] action", deferred to this Court for a final determination of whether the materials requested should be disclosed. *Id.* at 5. Accordingly, the Supreme Court, Suffolk County entered a Judgment on June 27, 2012 directing the Suffolk County District Attorney's Office to deliver the entirety of the Grand Jury proceedings to this Court *in camera* for a determination of what information, if any, contained therein should be released to the parties.

On July 11, 2012, plaintiffs filed a letter motion to unseal the Grand Jury minutes with this Court. The County defendants filed an opposition on August 11, 2012 and plaintiffs filed replies on August 14, 2012. On September 28, 2012, plaintiffs filed a further reply in support of their motion to unseal, noting that they are amenable to the Court imposing any reasonable restrictions on the use of the Grand Jury materials. On January 4, 2013, plaintiffs again filed a letter with this Court, requesting that the Court render a decision on their pending motion to unseal so that discovery can proceed accordingly. On January 16, 2013, the Court held oral argument. On January 17, 2013, plaintiffs filed a post-argument letter addressing an issue that was discussed at oral argument. The Court has fully considered the submissions of the parties. Moreover, the Court has reviewed *in camera* the transcript of the Grand Jury proceedings.

II. Power of Federal Court to Compel Disclosure of Grand Jury Transcripts

In general, requests for disclosure of grand jury materials should be first directed to the court that supervised the grand jury's activities. *Douglas Oil Co. of Cal. v. Petrol Stops Nw.*, 441 U.S. 211, 224-25 (1979) ("Indeed, those who seek grand jury transcripts have little choice other than to file a request with the court that supervised the grand jury, as it is the only court with control over the transcripts."). Thus, as a matter of comity, a party seeking disclosure of materials from a state grand jury proceeding for purposes of a federal civil lawsuit should "first make [its] application to the state court supervising the grand jury at issue." *Ruther v. Boyle*, 879 F. Supp. 247, 250 (E.D.N.Y. 1995). "This preliminary stage is designed merely to forestall unnecessary intrusion by the federal courts in state grand jury proceedings or, at least, to ensure that the important state interest in secrecy is thoroughly considered." *Socialist Workers Party v. Grubisic*, 619 F.2d 641, 644 (7th Cir. 1980).

However, because "a federal court is not bound by state law protecting the secrecy of state grand jury proceedings", the federal court presiding over the federal civil lawsuit must then make "an independent determination of whether the grand jury transcripts should be released" if the state court denies the request and the party seeking disclosure challenges that decision before the federal court. *Frederick v. New York City*, 11 Civ. 469 (JPO), 2012 WL 4947806, at *11 (S.D.N.Y. Oct. 11, 2012) (internal citations and quotation marks omitted) (concluding that comity does not require acceptance of state court's denial of plaintiff's request to unseal grand jury

minutes); *see also Douglas Oil Co.*, 441 U.S. at 230 (explaining that, although the supervisory court is usually in the best position to evaluate the competing needs of secrecy and disclosure, courts in which related civil actions are pending are "armed with . . . special knowledge of the status of the civil actions"). Nevertheless, if the federal court can recognize state privileges "at no substantial cost to substantive and procedural policy", the "strong policy of comity between state and federal sovereignties" urges the federal court to do so. *Frederick*, 2012 WL 4947806, at *11 (quoting *Wilson v. City of New York*, 06 Civ. 229, 2007 WL 4565138, at *1 (E.D.N.Y. Dec. 21, 2007)).

Here, plaintiffs correctly applied first to the Supreme Court, Suffolk County – the court in which the Grand Jury had been empaneled. Judge Garguilo of the Supreme Court, Suffolk County considered New York state law on the issue, as well as the relevant policy considerations, and determined that the Grand Jury minutes, testimony, and exhibits should be released. However, because of the "limited record submitted in [the] special proceeding" held before the court to unseal the materials and the court's limited knowledge of the "progress of discovery" in the federal action, the court directed that the Grand Jury materials be released *in camera* to the Judge and/or Magistrate Judge assigned to the federal action "for his or her determination regarding what information contained therein should be released to the parties in that action, and when and how it should be released." *In re Druker*, slip op. at 5 ("It is clear that the trial court has discretion to control the method and manner of disclosure of grand jury proceedings." (citations omitted)).

In *Douglas Oil Co. of California v. Petrol Stops Northwest*, the Supreme Court contemplated situations like this one – situations where the court presiding over the grand jury proceeding determines that the grand jury materials should be released, but does not have firsthand knowledge of the pending federal civil suit for which disclosure of the materials is sought. 441 U.S. at 226.[3] The Court recommended that, in such situations, the court that empaneled the grand jury should "mak[e] a written evaluation of the need for continued grand jury secrecy and a determination that the limited evidence before it showed that disclosure might be appropriate, [and] send the requested materials to the court where the civil case[] [is] pending." *Id.* at 230. That is precisely what the Supreme Court, Suffolk County did here. (*See* Pls.' Mot. to Unseal Ex. B. (setting forth state court's knowledge of the pending federal civil suit, state law regarding the need for grand jury secrecy, state law and policy considerations leading to state court's determination that disclosure is appropriate, and reasons for submitting the materials to federal court for *in camera* review).) Accordingly, this Court is imbued with the power to make an independent determination of whether the Grand Jury materials requested should be released and, if so, the degree to which and the manner by which they should be disclosed. The Court is mindful of the doctrine of comity, and has therefore considered state privileges – to the extent doing so does not come at the cost of federal

[3] The Court notes that the specific situation the Supreme Court was faced with was one where a federal grand jury was empaneled by one district (the Central District of California) and the federal civil action for which disclosure of the grand jury materials was sought was pending in another district (the District of Arizona). This case raises a slightly different factual context – a grand jury empaneled in state court and a civil suit pending in the same state, but in federal court. Because the same practical and policy considerations apply, the Court follows the reasoning of the Supreme Court in *Douglas Oil*.

substantive and procedural policy – in making its determination.

III. Legal Standard For Disclosing Grand Jury Materials

Since the 17th century, grand jury proceedings, as well as the records of such proceedings, have been reserved from the public. *Douglas Oil Co.*, 441 U.S. at 219. Accordingly, there is a "long-established policy [of] maintain[ing] the secrecy of the grand jury proceedings in the federal courts." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958); *see also In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 28 (2d Cir. 1981) ("This time-honored policy of secrecy has been the most essential, indeed indispensable, characteristic of grand jury proceedings."). Moreover, the requirement of grand jury secrecy is codified in Federal Rule of Criminal Procedure 6(e), which provides that "[a] grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony [or] an attorney for the Government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. . . . A knowing violation of rule 6 may be punished as a contempt of court." *Douglas Oil Co.*, 441 U.S. at 218 n.9 (quoting Fed. R. Crim. P. 6(e)).

The Supreme Court has enumerated the following reasons for grand jury secrecy:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subordination of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Procter & Gamble Co., 356 U.S. at 681 n.6 (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)). In particular, the Court has emphasized that secrecy in the grand jury context serves to encourage witnesses to testify freely, without fear of retaliation: "The grand jury as a public institution serving the community might suffer if those testifying today knew that the secrecy of their testimony would be lifted tomorrow." *Id.* at 682; *see also United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 424 (1983) ("[I]f preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly . . . ."). "Grand jury secrecy, then, is 'as important for the protection of the innocent as for the pursuit of the guilty.'" *Sells Eng'g*, 463 U.S. at 424 (quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943)).

Despite this long-standing tradition of maintaining the secrecy of grand jury proceedings, it has been recognized that disclosure may be warranted in certain situations. In particular, Federal Rule of Criminal Procedure 6(e)(3)(E)(i) provides that disclosure of grand jury transcripts may

be made when so directed by a court "preliminarily to or in connection with a judicial proceeding."[4] The Supreme Court has set forth a tripartite analysis to guide lower courts in determining when disclosure of traditionally kept secret grand jury transcripts may be appropriate: "[p]arties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." *Douglas Oil Co.*, 441 U.S. at 222 (citing *Procter & Gamble Co.*, 356 U.S. at 682-83 and *Dennis v. United States*, 384 U.S. 855, 872 (1966)). The burden of demonstrating that the need for disclosure is greater than the public interest in secrecy is a heavy one, and it rests with the party seeking disclosure. *See id.* at 223. Thus, a party seeking the disclosure of grand jury minutes must make a strong showing of "particularized need" for those materials. *See Sells Eng'g*, 463 U.S. at 443; *In re Craig*, 131 F.3d at 104 n.5 (reciting *Douglas Oil*'s "highly flexible 'particularized need' test for parties seeking to compel disclosure under Rule 6(e)").[5,6] A showing of "mere relevance, economy, and efficiency will not suffice." *Pizutti v. United States*, 809 F. Supp. 2d 164, 194 (S.D.N.Y. 2011) (citation omitted). Moreover, unspecific allegations of need or mere speculation are not adequate. *United States v. Anderson*, 12CR29A, 2012 U.S. Dist. LEXIS 164215, at *13 (W.D.N.Y. Nov. 16, 2012); *see also In re Craig*, 131 F.3d at 105 (stating that "blanket assertion" of public interest in information contained in grand jury transcripts is not alone enough to warrant disclosure of the materials).

This showing of "particularized need" is not only required when the transcripts requested are from an ongoing grand jury proceeding. A party requesting materials from a grand jury who has concluded its operations must similarly satisfy the "particularized need" test set forth in *Douglas Oil*. This is because disclosure of those transcripts may affect future grand juries, as persons called upon to testify might consider the likelihood that their testimony will be disclosed to the public

[4] Federal Rule of Criminal Procedure 6(e) also provides four other exceptions to the rule of grand jury secrecy: (1) a court may grant the request of a defendant "who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury", Fed. R. Crim. P. 6(e)(3)(E)(ii); (2) a court may grant the request of the government "when sought by a foreign court or prosecutor for use in an official criminal investigation", *id.* at 6(e)(3)(E)(iii); (3) a court may grant the request of the government "if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate" entity or official for the purpose of enforcing that law, *id.* at 6(e)(3)(E)(iv); and (4) at the request of the government "if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law," *id.* at 6(e)(3)(E)(v). Additionally, the Second Circuit has held that a court has power to release grand jury minutes in situations beyond the three instances spelled out in Rule 6(e). *See In re Craig*, 131 F.3d 99, 103 (2d Cir. 1997) (citing *In re Biaggi*, 478 F.2d 489, 494 (2d Cir. 1973) (supplemental opinion) and *In re Hastings*, 735 F.2d 1261, 1268 (11th Cir. 1984)).

[5] This "particularized need" test applies both in cases where a party seeks to disclose federal grand jury materials, and in cases where a party requests to disclose materials from a state grand jury proceeding. *See Myers v. Phillips*, 04 Civ 4365, 2007 WL 2276388, at *2 (E.D.N.Y. Aug. 7, 2007).

[6] The Supreme Court has found that the "particularized need" requirement is typically met by a showing that the grand jury transcript could be used "to impeach a witness, to refresh his recollection, to test his credibility and the like." *Douglas Oil Co.*, 441 U.S. at 222 n.12 (quoting *Procter & Gamble Co.*, 356 U.S. at 683); *see also In re Air Cargo Shipping Servs. Antitrust Litig.* No. 06-MD-1775, 2012 WL 5989756, at *1 (E.D.N.Y. Oct. 24, 2012).

later and, as a result, think twice about giving "frank and full testimony." *United States v. Sobotka*, 623 F.2d 764, 767 (2d Cir. 1980) ("Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties." (citation omitted)); *see also In re EyeCare Physicians of Am.*, 100 F.3d 514, 518 (7th Cir. 1996) ("District courts that contemplate ordering disclosure must consider the possible effects upon the functioning of future grand juries." (citation omitted)).

The court called upon to determine whether grand jury transcripts should be disclosed is imbued with wide discretion. *See Douglas Oil Co.*, 441 U.S. at 223, 228; *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 399 (1959). The Second Circuit has explained that this discretion granted to a trial court deciding whether to make grand jury materials public is "one of the broadest and most sensitive exercises of careful judgment that a trial judge can make." *In re Craig*, 131 F.3d at 104. The court must carefully weigh the need for disclosure of the grand jury transcript, whether in full or in part, and the public interest in secrecy. In so doing, the court must consider the particular, relevant circumstances of the case. *See Douglas Oil Co.*, 441 U.S. at 223 ("[A]s the considerations justifying secrecy become less relevant, a party asserting a need for grand jury transcripts will have a lesser burden in showing justification."); *In re Craig*, 131 F.3d at 107 (explaining that factors weighing in favor of both secrecy and disclosure must be "evaluated in the context of the specific case by the court to which the petition has been properly brought"). A court that determines that the party seeking disclosure has met its burden of showing that the need for disclosure is greater than the public interest in secrecy may also choose to limit the amount of the grand jury transcript disclosed and/or include protective limitations on the use of the material unsealed. *Douglas Oil Co.*, 441 U.S. at 222-23; *see also Ruther*, 879 F. Supp. at 251 ("[I]f disclosure is warranted the material can be subject to an appropriate protective order.").[7]

IV. ANALYSIS

For the reasons set forth below, after carefully balancing the above-referenced factors in the context of the Court's *ex parte* review of the Grand Jury transcript itself, the Court concludes that release of the Grand Jury materials is warranted in this particular case.

A. Whether Release of the Grand Jury Materials is Necessary to Avoid an Injustice

Plaintiffs commenced this action alleging, *inter alia*, Section 1983 claims of malicious prosecution against both the County defendants and the Sentosa defendants, and false arrest against the Sentosa defendants. Plaintiffs allege that "the grand jury was not properly charged on the law, that exculpatory evidence was withheld, that irrelevant and unduly prejudicial evidence was admitted, and that certain witnesses, including defendant Philipson, gave false inculpatory evidence against the plaintiffs." (Pls.' Mot. to Unseal at 2.) Accordingly, plaintiffs claim that they need access to the grand jury minutes to substantiate their malicious prosecution and false arrest claims. As discussed in detail below, after carefully considering the arguments of the parties and reviewing the Grand Jury transcript, the Court finds that plaintiffs have made a compelling case that

[7] In making its determination, a court may conduct *in camera* review of the grand jury materials for which disclosure is requested. *Ruther*, 879 F. Supp. at 251.

the Grand Jury minutes are necessary to the prosecution of this civil case.

1. Applicable Law

To prevail on a Section 1983 malicious prosecution claim, a plaintiff must show "a seizure or other perversion of proper legal procedures implicating the claimant's personal liberty and privacy interests under the Fourth Amendment," and must establish the elements of a malicious prosecution claim under state law. *Washington v. Cnty. of Rockland*, 373 F.3d 310, 316 (2d Cir. 2004) (internal citation and quotation marks omitted). The elements of a malicious prosecution claim under New York law are as follows: "'(1) the initiation or continuation of a criminal proceeding against plaintiff; (2) termination of the proceeding in plaintiff's favor; (3) lack of probable cause for commencing the proceeding; and (4) actual malice as a motivation for defendant's actions.'" *Jocks v. Tavernier*, 316 F.3d 128, 136 (2d Cir. 2003) (quoting *Murphy v. Lynn*, 118 F.3d 938, 947 (2d Cir. 1997)).

Courts in this circuit have recognized that the *Douglas Oil* test can be satisfied where a civil rights claim for malicious prosecution would be hindered by denial of access to grand jury materials. *See Frederick*, 2012 WL 4947806, at *7 (explaining that "the interests of justice may be thwarted by refusal to unseal grand jury minutes" in malicious prosecution cases). However, unsealing is not automatically warranted simply because the person requesting disclosure is a malicious prosecution plaintiff. *See id.* at *8 ("'Authorizing a fishing expedition based solely on conclusory allegations of misconduct before the grand jury would result in every plaintiff who claimed malicious prosecution being given access to the minutes of the grand jury that voted on the underlying indictment . . . [which] would defeat the purpose behind the particularized need test . . . .'" (quoting *Alvarado v. City of New York*, 04 Civ. 2558, 2006 WL 2252511, at *2 (E.D.N.Y. Aug. 5, 2006))). "Indeed, '[a] review of grand jury minutes is rarely permitted without specific factual allegations of government misconduct.'" *Wilson*, 2007 WL 4565138, at *2 (quoting *United States v. Torres*, 901 F.2d 205, 233 (2d Cir. 1990)); *see also Frederick*, 2012 WL 4947806, at *10 (explaining that first prong of *Douglas Oil* test can be met when "plaintiffs adduce facts that strongly suggest misconduct at the grand jury"). Essentially, the party requesting disclosure of grand jury materials, either in whole or in part, must make a "showing of likely success in defeating the presumption of probable cause." *Frederick*, 2012 WL 4947806, at *9.[8] A party's own version of the events alone will not suffice; the party requesting disclosure must present more than its own version of events to potentially rebut the presumption of probable cause created by a grand jury indictment. *Id.* at *10 (quoting *Brandon v. City of New York*, 705 F. Supp. 2d 261, 273 (S.D.N.Y. 2010)).

Courts in this circuit have also found that the *Douglas Oil* test can be satisfied where a civil rights claim for false arrest would be hindered by denial of access to grand jury materials. *See Palmer v. Estate of Stuart*, 02 Civ 4076, 2004 WL 2429806, at *3 (S.D.N.Y. Nov. 1, 2004) ("With respect to a 'possible injustice' Palmer has made a compelling case that the grand jury

[8] In *Frederick v. New York City*, Judge Oetken of the Southern District of New York explained the importance of requiring this particularized showing in malicious prosecution cases: Granting all motions to unseal grand jury materials in malicious prosecution cases "would trammel grand jury secrecy, but denying all of them would undoubtedly create a potential for injustice in some meritorious § 1983 suits." 2012 WL 4947806, at *9.

testimony may be necessary to the prosecution of this [false arrest and false imprisonment civil] case."). To prevail on a Section 1983 false arrest claim, a plaintiff must prove the four elements of a false imprisonment claim under New York law: "(1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not contest to the confinement, and (4) the confinement was not otherwise privileged." *Broughton v. State*, 335 N.E.2d 310, 314 (N.Y. 1975). Grand jury proceedings may be relevant to a determination of whether there was intent to confine and/or whether there was probable cause for the arrest. *See Palmer*, 2004 WL 2429806, at *3 ("Palmer's claim centers on whether the police had probable cause to arrest him and whether they gave false testimony at the preliminary hearing that resulted in his being held in jail", and Palmer needed access to grand jury testimony from the later proceeding that did not result in an indictment to analyze "the dramatic change in the probable cause findings" to substantiate his claim.).

Before a court evaluating an unsealing request determines that releasing grand jury minutes is necessary to avoid a possible injustice, it must determine that "no alternative means of illuminating the grand jury proceeding exist." *Frederick*, 2012 WL 4947806, at *14; *see also Lucas v. Turner*, 725 F.2d 1095, 1102 (7th Cir. 1984) (explaining that party requesting disclosure must demonstrate that grand jury materials contain information "necessary, rather than simply beneficial to their [civil] action and that the information contained therein could not have been obtained through normal discovery channels"). The Supreme Court has noted the "useful purpose" that "[m]odern instruments of discovery serve", and has accordingly required proof that without the grand jury materials a "defense would be greatly prejudiced or that without reference to [the grand jury materials] an injustice would be done." *Procter & Gamble Co.*, 356 U.S. at 682.

2. Analysis

Plaintiffs claim that their Grand Jury Indictment was procured through, *inter alia*, false testimony, improper charging on the law, and the withholding of exculpatory evidence. Though conclusory allegations of misconduct or a generalized desire for grand jury materials do not warrant disclosure, this is not such a case. Plaintiffs have pointed to the proceedings in state court following the Grand Jury's issuance of the Indictment – the Second Department's issuance of a writ of prohibition and the Supreme Court's subsequent dismissal of the Indictment. These state court proceedings established that plaintiffs were previously being threatened with prosecution for crimes for which they could not constitutionally be tried. The fact that the Grand Jury issued an Indictment for crimes for which plaintiffs could not constitutionally be tried provides a compelling basis for disclosure of the Grand Jury materials in this civil rights case. After all, grand jurors concluded that plaintiffs *could* be constitutionally indicted for the crimes charged, unlike the Second Department, which later issued a writ of prohibition to prevent prosecution pursuant to the Indictment. Plaintiffs are entitled to see in this case what evidence and legal instructions led to those impermissible charges. These circumstances alone are sufficient to support the conclusion that there is a significant risk of injustice if plaintiffs are not permitted to examine the Grand Jury minutes. *See, e.g., Palmer*, 2004 WL 2429806, at *3 (when probable cause to believe plaintiff committed a felony was found based on testimony at a preliminary hearing but not at the grand jury, plaintiff needed to examine grand jury testimony to fully litigate his civil claims).

However, plaintiffs' showing of particularized need is not solely based upon the writ of prohibition. Plaintiffs have also made specific allegations of misconduct in connection with the Grand Jury proceeding. For example, plaintiffs assert that the Grand Jury was falsely informed that one or more of the nurses had resigned during a shift, and that the prosecution failed to tell the Grand Jury that the Education Department had already determined that the nurse plaintiffs had not violated the Education Law (even though the Education Law was the basis for the duty to the patients contained in the Indictment).

Although prosecutors have absolute immunity for any alleged misconduct in grand jury proceedings, evidence of such misconduct in this case would be critical to undermine the presumption of probable cause that would otherwise attach to the Grand Jury Indictment in response to claims of false arrest or malicious prosecution that are not based upon the Grand Jury proceeding itself. For example, the Grand Jury minutes are extremely important for plaintiffs' false arrest claim against the Sentosa defendants. That claim centers on whether the Sentosa defendants intended to confine plaintiffs and whether plaintiffs' arrest was otherwise privileged. In regards to the Sentosa defendants' intent to confine, plaintiffs have alleged that the Sentosa defendants entered into an agreement with the County defendants to procure plaintiffs' Indictment through false testimony and the withholding of exculpatory evidence. (Am. Compl. ¶ 113.) The events of the Grand Jury proceedings are, therefore, critical to plaintiffs' false arrest claim, and because plaintiffs were not present during the Grand Jury proceedings, "without the grand jury minutes, [plaintiffs are] in no position to make specific arguments on this score." *Palmer*, 2004 WL 2429806, at *3. Thus, the Court concludes that denying plaintiffs access to evidence of what happened at the Grand Jury would create a strong potential for injustice in their pursuit of the civil rights claims in this case.

Having found that denying plaintiffs access to the Grand Jury minutes would create a potential for injustice, the Court must consider whether there are sufficient alternative means of shedding light on the proceedings. *See Frederick*, 2012 WL 4947806, at *14. Defendants urge the following: (1) "release of the minutes to the plaintiffs is unnecessary to determine if the grand jury was properly charged on the law, if exculpatory evidence was withheld, or if irrelevant and unduly prejudicial evidence was admitted during the proceeding," as these issues are matters of law and the Court can make such determinations during its *in camera* inspection without also releasing the materials to plaintiffs, (Defs.' Opp'n to Mot. to Unseal at 2), and (2) release to determine whether witnesses gave false testimony is unnecessary because other means of obtaining that information exist – namely, through deposition testimony, (*id.* at 2-3.)

On the first issue, the Court has already conducted an *in camera* review of the grand jury materials and, as discussed *infra*, concludes that the materials should be unsealed in their entirety. Moreover, the Court disagrees with defendants' contention that the issues raised in connection with the Grand Jury proceeding are simply matters of law that can be decided by the Court without input from the parties. For example, as discussed at oral argument, whether false evidence was presented to the Grand Jury is contingent upon what other evidence plaintiffs develop to challenge what was presented to the Grand Jury. Thus, the Court is in no position to make those assessments in a vacuum without reference to all other evidence that can be presented by the parties.

As to defendants' second contention – that plaintiffs can determine whether false testimony or erroneous legal instructions were given at the Grand Jury through deposition testimony – the Court disagrees. First, absent relief via an order from the Court, the prosecutor would not be able to discuss what transpired in the Grand Jury proceeding at his deposition. Second, without access to the Grand Jury materials, plaintiffs cannot discern the identity of everyone who testified before the Grand Jury, (Pl.'s Reply in Supp. of Mot. to Unseal at 2), and will therefore be significantly hampered in their ability to determine which fact witnesses to focus on for purposes of discovery, including depositions. Third, due to the significant passage of time between the Grand Jury proceedings and when depositions in this litigation would take place, there is a significant risk that witnesses will not recall all the details of the relevant events or their Grand Jury testimony. *See Palmer*, 2004 WL 2429806, at *3 ("It is highly unlikely that the surviving officers in 2004 could recall precisely what they said before the grand jury in 1999, at the time the matter was freshest in their minds."); *Dale v. Bartels*, 532 F. Supp. 973, 977 (S.D.N.Y. 1981) (finding it unlikely that witness would be able to give the entire substance of his grand jury testimony years later at a deposition).[9] Thus, without the minutes, plaintiffs could not refresh a witness's recollection during a deposition or impeach a witness with inconsistent testimony. For all of these reasons, without the actual Grand Jury materials, plaintiffs will be prejudiced in their ability to, among other things, decide which witnesses to question, discern what questions to ask at depositions, and determine the issues for which witnesses might need to have their recollection refreshed.

Finally, regardless of what transpires in discovery, plaintiffs will need to access the Grand Jury minutes to rebut the probable cause presumption that would otherwise attach to the Grand Jury Indictment. Thus, there is a particular and compelling need for disclosure at *this* juncture, as opposed to re-assessing plaintiffs' disclosure request at the conclusion of discovery.

In sum, the Court concludes that the first of the *Douglas Oil* factors weighs in favor of granting plaintiffs' unsealing request.

A. Whether the Need for Disclosure is Greater than the Need for Continued Secrecy

The second prong of the *Douglas Oil* test requires this Court to balance plaintiffs' need for disclosure with the need for continued secrecy. As discussed *supra*, the Supreme Court has enumerated five reasons for grand jury secrecy to guide courts in their evaluation of requests to unseal, *see Procter & Gamble Co.*, 356 U.S. at 681 n.6, and the Court must consider those reasons in light of the specific context of this case, *see Douglas Oil Co.*, 441 U.S. at 223.

As a preliminary matter, the Court notes that the Supreme Court's fifth reason for grand jury secrecy – to protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation – is not applicable here. Plaintiffs were originally indicted by the

[9] The Court notes that any passage of time in this case has not been the result of "inactivity" by or any "lethargic attitude" of plaintiffs' counsel. *Lucas*, 725 F.2d at 1102-03 (acknowledging that many delays negatively impacted plaintiffs' ability to obtain comparable information during discovery, but concluding that, because much of the delay was the result of "the plaintiffs' attorneys own inactivity" and "the plaintiffs' previous attorneys' lethargic attitude toward the present litigation", delay in and of itself did not merit disclosure of grand jury minutes).

Grand Jury and, even though their Indictment was later dismissed, they were publically named as defendants before such dismissal.

The Court further notes that "the passage of time erodes many of the justifications for continued secrecy." *In re Craig*, 131 F.3d at 107. This is especially true when, as here, the materials for which disclosure is requested are from grand jury proceedings that have been completed – for in such situations, the secrecy factors that relate to preventing the escape of those whose indictment may be contemplated, protecting the grand jury's deliberations, and preventing subordination of perjury or tampering with witnesses who may testify before the grand jury are simply not applicable. *See, e.g., In re Application of Exec. Secs. Corp.*, 702 F.2d 406, 410 (2d Cir. 1983) (finding no risk that members of grand jury will be influenced by release of grand jury minutes because grand jury was no longer in session); *Palmer*, 2004 WL 2429806, at *5 (explaining that because the grand jury proceeding is over, disclosure of testimony will not facilitate any escape or cause any witness tampering). However, the Court is mindful that "the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities." *Douglas Oil Co.*, 441 U.S. at 222; *see also Sobotka*, 623 F.2d at 767 ("We conclude that while the necessity here be less compelling in view of the termination of the grand jury, nonetheless some necessity need be shown by the party seeking disclosure."). Thus, the Court must consider what, if any, self-censorship effects the disclosure of the Grand Jury materials in this case will have on future grand juries.

The Court also concludes that it is highly unlikely that any prospective grand jury witness who learns of this Court's decision to unseal plaintiffs' Grand Jury minutes will be less inclined to give full and frank testimony at a future grand jury proceeding. As a threshold matter, several courts have noted that the release of grand jury testimony is no longer a rarity, and grand jury witnesses are likely to learn that before testifying. For example, in *Frederick v. New York City*, the Southern District of New York considered a request for the release of state grand jury materials for use in a related civil case predicated on a Section 1983 claim. 2012 WL 4947806, at *1. Evaluating the self-censorship concern related to the release of such traditionally kept secret materials, the court stated the following:

> Grand jury witnesses should *expect* that their testimony may well be used against a third party at trial – whether the criminal suspect under investigation or someone else entirely. If that happens, their grand jury testimony may also come into play; indeed, prosecutors regularly turn over portions of grand jury testimony to criminal defendants pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500. For that reason, it is hard to imagine that grand jury witnesses would be less likely to provide testimony, or more likely to distort it, simply because their words might be used against another person. This is even more obviously the case when we turn to the decidedly unlikely specter of self-censorship resulting from fear that grand jury statements may ultimately be used against other people in a civil suit arising years later from misconduct in the original criminal case.

Id. at *6; *see also In re Application of Exec. Secs. Corp.*, 702 F.2d at 409 n.4 ("[T]he

1970 amendment of the Jencks Act has made the release of grand jury testimony a frequent occurrence" and, as such, "[e]very sophisticated grand jury witness knows that, if he becomes a witness at trial, his grand jury testimony will most likely be revealed to the public."); *Palmer*, 2004 WL 2429806, at *5 ("After all, whenever a witness testifies for the prosecution at a criminal trial, the grand jury testimony of that witness relating to the subject matter of his or her trial testimony is automatically made available to the defendant." (citing CPL § 240.45(1)(a))). Although the increased release of grand jury testimony in recent years has lessened the strength of the self-censorship interest as it relates to future grand juries, it is still an important consideration that must be carefully weighed by the Court. However, concern about the general chilling effect that disclosure could have on future grand jury witnesses is significantly diminished in this case because this case is not the ordinary case – namely, it involves the extraordinary situation where a state court issued a writ of prohibition precluding prosecution of the Indictment because the criminal prosecution of those charges constituted "an impressible infringement upon the constitutional rights of these nurses and their attorney." *Vinluan*, 60 A.D.3d at 240. In short, this self-censorship concern is overwhelmingly outweighed by the other compelling factors favoring disclosure in this case.

Moreover, in recognition of the strong policy of comity between federal and state sovereignties – a policy that, as discussed *supra*, is very important in the grand jury disclosure context – the Court has also considered state privileges and policy considerations. However, in this particular case, there is no concern that release would violate the comity between federal and state sovereignties because of the litigation regarding these materials that has already taken place in state court. In particular, before turning over the Grand Jury materials to this Court for *in camera* review, the Supreme Court, Suffolk County issued a written opinion detailing the state privileges and policies that it considered in arriving at its recommendation that the materials be released. The court first recognized the traditional policy of secrecy of grand jury proceedings, listed the policy reasons for secrecy as propounded by the New York Court of Appeals, acknowledged the particularized need standard for disclosure, and recognized the discretion that a court, "balanc[ing] the competing interests involved, the public interest in disclosure against that in secrecy," has to disclose grand jury materials. *In re Druker*, No. 11-12243, slip op. at 4. The court then addressed many of the same policy considerations already discussed in this opinion – namely, the fact that many of the reasons for secrecy are inapplicable because the Grand Jury has completed its proceedings. *Id.* The court also similarly concluded that disclosure in this case would not have a chilling effect on the ability of future grand juries to obtain witnesses. *Id.* Finally, the court addressed one additional policy consideration – that "the public's interest in accurate information about its public officials outweighs the assurance of secrecy for witnesses in future grand jury proceedings." *Id.* (citing *Jones v. State of New York*, 79 A.D.2d 273, 436 N.Y.S.2d 489 (4th Dep't 1981)). Thus, though the Court recognizes that it is not bound by state law regarding disclosure of grand jury materials, the fact that it made a similar determination to the state court that first considered the question means that its decision considers both federal and state privileges and policy considerations.

The Court, therefore, concludes that the second of the *Douglas Oil* factors also

weighs in favor of granting plaintiffs' unsealing request.

B. Whether the Request was Structured to Cover Only Material Needed

"The substantial discretion afforded to district courts in deciding motions to unseal grand jury minutes extends to control over the extent of any disclosure ultimately authorized." *Frederick*, 2012 WL 4947806, at *14. However, district courts are required to ensure that disclosure requests are "structured to cover only material so needed." *Douglas Oil Co.*, 441 U.S. at 222. Accordingly, the Second Circuit has stated that if a court determines that grand jury materials should be disclosed, its "disclosure order must be structured to cover only the material required in the interests of justice." *Sobotka*, 623 F.2d at 768.[10]

Plaintiffs have requested that all of the Grand Jury materials be disclosed – the entirety of the minutes, all charges on the law, any and all dialogue between grand jurors and the prosecutor, and all evidence presented to the Grand Jury by the prosecution. (*See* Pl.'s Mot. to Unseal at 1-2.) The Court has determined that although this request may on first glance seem broad, it is in fact structured to cover the material required in this case in the interest of justice.

First, this is not a case in which misconduct is alleged as to a particular person's testimony or as to a particular issue. The misconduct alleged relates to the entirety of the Grand Jury proceedings, including both factual and legal issues. Thus, in this particular case, it is impossible to parse out portions of the Grand Jury materials for disclosure purposes.

Second, the Court has conducted an *in camera* review of the Grand Jury materials for which disclosure is sought. *In camera* review of grand jury materials "allows an even more refined assessment of the delicate balance between justice and secrecy and thus a more accurately calibrated determination of whether the plaintiff states a 'particularized need' under *Douglas Oil*." *Frederick*, 2012 WL 4947806, at *14. Having reviewed the minutes, keeping in mind that strong policy favors the secrecy of grand jury proceedings, the Court concludes that plaintiffs have a particularized and compelling need for all of the Grand Jury materials, and that the materials should, therefore, be released in their entirety.

Third, the Supreme Court, Suffolk County considered whether the materials requested should be disclosed and recommended that they be released in their entirety. The court considered the issue in the context of state privileges and policy concerns and concluded that all, rather than a limited subset, of the Grand Jury materials should be released. *In re Druker*, No. 11-12243, slip op. at 4. ("In examining the policy considerations as they relate to the case at bar, this Court finds that there are ample reasons to release the grand jury minutes, testimony and exhibits."); *id.* ("In light of the findings herein, and the slight need for keeping the grand jury proceedings secret, the information should be released." (citations omitted)). Thus, this Court's similar determination that all of the Grand Jury materials should be released is in recognition of state privileges and, therefore, in adherence with the strong policy of comity between state and federal

[10] The Court notes that though Rule 6(e) applies to both documents and testimony before the grand jury, "[a] request for grand jury documents may evoke different, and less exacting, considerations than a request for transcripts of grand jury testimony." *SEC v. Everest Mgmt. Corp.*, No. 71 Civ. 4932 (D.N.E.), 87 F.R.D. 100, 105 (S.D.N.Y. 1980); *see also In re Grand Jury Proceedings, Miller Brewing Co.*, 687 F.2d 1079, 1089 (7th Cir. 1982).

sovereignties. *See Frederick*, 2012 WL 4947806, at *11.

Moreover, the Second Department – in considering whether to issue a writ of prohibition to prevent the district attorney from prosecuting plaintiffs under the Indictment issued by the Grand Jury – held that "[w]here, as here, the petitioners are threatened with prosecution for crimes for which they cannot constitutionally be tried, the potential harm to them is so great and the ordinary appellate process so inadequate to redress that harm that prohibition should lie." *Vinluan*, 60 A.D.3d at 251 (internal citation and quotations omitted). This conclusion further supports a finding of "good cause" for disclosure of the Grand Jury materials in their entirety. *See Proctor & Gamble Co.*, 356 U.S. at 684 ("It is only when the criminal procedure is subverted that 'good cause' [within the meaning of Rule 34 of the Federal Rule of Civil Procedure] for wholesale discovery and production of a grand jury transcript would be warranted."); *United States v. Procter & Gamble Co.*, 180 F. Supp. 195, 207 (D.N.J. 1959) (interpreting Supreme Court's holding in *Procter & Gamble Co.*, 356 U.S. 677, and stating that "if the Government's use of the grand jury has been completely wrong . . ., the 'entire Grand Jury transcript' is discoverable to the defendants without the showing of other cause; . . . but if there is a subversion by the partial unlawful use of the Grand Jury . . ., then that portion of the transcript is to be discovered wholesale, without the showing of other particularized cause").

For all of these reasons, the Court concludes that the third *Douglas Oil* factor also weighs in favor of granting plaintiffs' unsealing request.

* * *

In sum, the Court, having considered all three *Douglas Oil* factors in the context of the Court's review of the Grand Jury transcript, as well as the state court's written recommendation that the Grand Jury materials be released, concludes in its discretion that the Grand Jury materials for which plaintiffs seek disclosure should be released to the parties in their entirety. However, before the materials are disclosed, the Court will place restrictions on their dissemination at this juncture to ensure that they are not disclosed to the public, even though they are being made available to the parties for purposes of discovery in this litigation.

V. CONCLUSION

For the foregoing reasons, plaintiffs' motion to order disclosure of the Grand Jury materials is granted. The Court will schedule a telephone conference to discuss the scope of the restrictions on dissemination of the Grand Jury materials by the parties.

SO ORDERED.

Judge Joseph F. Bianco
United States District Judge

Date: January 25, 2013
Central Islip, NY

Plaintiffs are represented by James Druker of Kase & Druker, Esqs., 1325 Franklin Avenue, Suite 225, Garden City, NY 11530. Plaintiff Vinluan is also represented by Oscar Michelen of Cuomo LLC, 200 Old Country Road, Suite 2 South, Mineola, NY 11501. The County defendants are represented by Brian C. Mitchell, Suffolk County Department of Law, County Attorney, 100 Veterans Memorial Highway, P.O. Box 6100, Hauppauge, NY 11788. The

Sentosa defendants are represented by Sarah C. Lichtenstein of Abrams, Fensterman, Fensterman, Flowers, Greenberg & Eisman, 111 Marcus Avenue, Suite 107, Lake Success, NY 11042.

ANILAO vs. SPOTA

LEONARD LATO – 5/12/14

CONFIDENTIAL

CONDENSED TRANSCRIPT AND CONCORDANCE
PREPARED BY:

REALTIME REPORTING, INC.
124 East Main Street
Suite 202
Babylon, New York 11702
Phone: (516) 938-4000
Fax: (631) 983-8938

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMAIO, ELMER JACINTO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILLENA, THERESA RAMOS, RANIER SICHON and FELIX Q. VINLUAN,
Plaintiffs,
- against -
THOMAS J. SPOTA, III, Individually and as District Attorney of Suffolk County, OFFICE OF THE DISTRICT ATTORNEY OF SUFFOLK COUNTY; LEONARD LATO, Individually and as an ASSISTANT DISTRICT ATTORNEY OF SUFFOLK COUNTY; COUNTY OF SUFFOLK; SENTOSA CARE, LLC; AVALON GARDENS REHABILITATION AND HEALTH CARE CENTER; PROMPT NURSING EMPLOYMENT AGENCY, LLC; FRANCRIS LUYUN; BENT PHILIPSON; BERISH RUBINSTEN, SUSAN O'CONNOR and NANCY FITZGERALD,,
Defendants.
Index No.: 10 cv 00032-JFB-WDW
----------x

1325 Franklin Avenue
Garden City, New York

May 12, 2014
10:12 a.m.

Confidential Deposition of the Defendant LEONARD LATO, pursuant to Notice, Court Order and Agreement, before Erika Gunther, RPR, a Notary Public of the State of New York.

REALTIME REPORTING, INC.
124 East Main Street, Suite 202
Babylon, New York 11702
516-938-4000
www.realtimereporting.com

APPEARANCES:

KASE & DRUKER
Attorneys for Plaintiffs Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, James Millena, Theresa Ramos and Ranier Sichon

1325 Franklin Avenue, Suite 225
Garden City, New York 11530

BY: JAMES DRUKER, ESQ.

- and -

SCOTT M. DRUKER, ESQ.

CUOMO LLC
Attorneys for Plaintiff Felix Q. Vinluan

200 Old Country Road, Suite 2 South
New York, New York 11501

BY: OSCAR MICHELEN, ESQ.

GARRETT W. SWENSON, JR., ESQ.
Attorneys for Defendant Thomas J. Spota, III, Individually

76 Bay Road
Brookhaven, New York 11719

BY: GARRETT W. SWENSON, JR., ESQ.

APPEARANCES: (Continued)

SUFFOLK COUNTY ATTORNEY
Attorneys for Defendants Thomas J. Spota, III, as District Attorney of Suffolk County, Office of the District Attorney of Suffolk County, Leonard Lato, Individually and as an Assistant District Attorney of Suffolk County, County of Suffolk

100 Veterans Memorial Highway
Hauppauge, New York 11788

BY: MEGAN O'DONNELL, ESQ.

ABRAMS, FENSTERMAN, FENSTERMAN, EISMAN, FORMATO, FERRARA & WOLF, LLP
Attorneys for Defendants Sentosa Care, LLC, Avalon Gardens Rehabilitation and Health Care Center, Prompt Nursing Employment Agency, LLC, Francris Luyun, Bent Philipson, Berish Rubinsten, Susan O'Connor and Nancy Fitzgerald

1111 Marcus Avenue, Suite 107
Lake Success, New York 11042

BY: SARAH C. LICHTENSTEIN, ESQ.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties herein, that the filing, sealing and certification of the within deposition be waived.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to the form of the question, shall be reserved to the time of the trial.

IT IS FURTHER STIPULATED AND AGREED that the within deposition may be sworn to and signed before any officer authorized to administer an oath with the same force and effect as if signed and sworn to before the Court.

- oOo -

225

Lato - Confidential

MR. J. DRUKER: Why don't we take a break.

(Discussion off the record.)

Q. I'm going to direct your attention to Lato Exhibit 6A. That's the minutes of February 1, 2007. I will ask you to look at page 24, line 20 -- lines 18 --

A. Is it 20 or 18?

Q. Line 18 through line 3 on page 25.

MS. LICHTENSTEIN: What's the date?

MR. J. DRUKER: February 1st.

MS. LICHTENSTEIN: Page 24?

MR. J. DRUKER: Page 24, line 18 through 25, line 3.

A. Where do you want me to read to?

Q. 25, line 3.

A. All right, I read it.

Q. That was the second time, wasn't it, that a grand juror wanted to know if they finished their shifts?

A. Don't know if it was the second time.

226

Lato - Confidential

Q. Well, I read you the first one. It happened on January 30th. Do you remember that?

A. I don't know if it was the first one.

Q. About a half an hour ago. It's at least the second time, isn't it?

MS. LICHTENSTEIN: Objection.

A. I don't know if it's the second time. It could be the third time.

(Reporter clarification.)

Q. It's at least the second time, isn't it?

A. No.

Q. It's not?

A. That's what I just said.

Q. You said it could be the third one?

A. Correct. I don't know how many times it occurred. It's the second time it happened today here that you've asked me about it.

Q. This is a repeat of an earlier

227

Lato - Confidential

request by a grand juror, is it not?

MR. SWENSON: Objection.

A. It is not.

Q. Is it a repeat of an earlier request made to you by one of the grand jurors?

MS. LICHTENSTEIN: Objection.

A. No.

Q. This is a new request?

A. No.

Q. We'll treat this -- were you asked by a grand juror the following question: "I would also like to know if they finished their shifts when they resigned at 5:00?"

Did a grand juror ask that on February 1, 2007?

A. Yes.

Q. Did you answer the grand juror?

A. No.

Q. Why not?

A. Because it would have been improper.

Q. Did you tell the grand juror you were going to ask that question of Susan

228

Lato - Confidential

O'Connor?

A. That's not what I said.

Q. Did you say, "I'll actually have Susan O'Connor actually at the home. She will be in a position to tell you who was there, who finished and who didn't finish?"

A. That's what I said.

Q. Did you tell the jury that?

Did you ever ask Susan O'Connor in the grand jury if any of the nurses at Avalon actually walked off during a shift?

A. I don't recall without looking at her testimony.

Q. As you sit here today, would it have been an appropriate question to have asked her?

MS. LICHTENSTEIN: Objection.

A. Asked whom?

Q. Susan O'Connor.

A. Asked her what?

Q. You want to play games, Mr. Lato? I think the question is clear.

A. That's nice.

MR. J. DRUKER: Read it back,

Lato - Confidential

MS. O'DONNELL: 9.

Q. Philipson is actually the one. What number is that?

A. There's two of them.

Q. March 3rd. I'm sorry, March 3rd to O'Connor. I was correct.

MS. O'DONNELL: You want March 3rd to O'Connor?

Q. March 3rd to O'Connor, the last sentence on the first page of that letter.

A. All right.

Q. "We hope to have positive results by Monday, March 6, 2006 or we will have to opt not to work until we are treated with fairness and respect," and it's signed by eight or nine of the nurses.

Do you see that?

A. Yes.

Q. Do you think that that -- in your opinion, did that constitute any kind of notice to the administration of Avalon Gardens that the nurses were contemplating resigning or leaving?

A. No. To the contrary. It says we

Lato - Confidential

will walk out until conditions improve because it says until we are treated. That implies they will be on strike or the equivalent thereof, but not quit.

Q. Would that have been permissible under the criminal laws, in your opinion, if instead of resigning if they had gone on strike and not worked after the completion of their shifts?

MS. LICHTENSTEIN: Objection.

MS. O'DONNELL: Objection.

MR. J. DRUKER: You don't poke your attorney and ask her --

THE WITNESS: I can do whatever I want, okay? Too fucking bad.

MR. J. DRUKER: You got all that?

THE WITNESS: Tell me what to do? I don't take orders from you.

DI MS. O'DONNELL: I would not answer that question.

THE WITNESS: Okay.

MR. MICHELEN: Maybe we can just say don't answer so you can instruct him.

Lato - Confidential

MR. J. DRUKER: Let it go.

MR. MICHELEN: Jim --

THE WITNESS: Cocksucker.

MR. J. DRUKER: The word cocksucker is not appropriate in this proceeding either, Mr. Lato. Are you finished or do you have any more invectives you want to throw at me?

THE WITNESS: Depends what you say to me.

MR. J. DRUKER: You're not threatening me, are you?

MR. SWENSON: I don't hear a threat.

MR. J. DRUKER: I --

MR. SWENSON: Please, you're engaging --

MR. J. DRUKER: I didn't ask you, Mr. Swenson.

MR. SWENSON: I'm trying to get through this.

BY MR. J. DRUKER:

Q. Do you remember meeting with Mr. Michelen and me in the parking lot outside

Lato - Confidential

the courthouse in Riverhead --

A. Yes.

Q. -- after the arrangement?

Do you remember discussing the grand jury presentation with Mr. Michelen and me?

A. Among other things.

Q. Do you remember telling us that the grand jury was reluctant to indict the nurses initially?

A. No.

Q. Do you remember telling us that you presented some large color photographs of the little children and that evoked tears on the part of the grand jurors?

A. I may have. I don't recall that specifically, but that sounds like something I might have said to you.

Q. And that the grand jurors did a 180 after that and were more than willing to indict our clients?

A. Not in those terms, no.

Q. What terms did you put it in, Mr. Lato?

19-3949-cv
Anilao v. Spota

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 2020

(Argued: December 4, 2020 Decided: March 9, 2022)

Docket No. 19-3949-cv

JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMAIO, ELMER JACINTO, JENNIFER LAMPA, RIZZA MAULION, THERESA RAMOS, RANIER SICHON, AND JAMES MILLENA,

Plaintiffs-Counter-Defendants-Appellants,

FELIX Q. VINLUAN,

Plaintiff-Appellant,

v.

THOMAS J. SPOTA, III, INDIVIDUALLY AND AS DISTRICT ATTORNEY OF SUFFOLK COUNTY, OFFICE OF THE DISTRICT ATTORNEY OF SUFFOLK COUNTY, LEONARD LATO, INDIVIDUALLY AND AS AN ASSISTANT DISTRICT ATTORNEY OF SUFFOLK COUNTY, COUNTY OF SUFFOLK, KARLA LATO, AS ADMINISTRATOR OF THE ESTATE OF LEONARD LATO,

Defendants-Appellees,

SUSAN O'CONNOR, NANCY FITZGERALD, SENTOSA CARE, LLC, AVALON GARDENS REHABILITATION

AND HEALTH CARE CENTER, PROMPT NURSING EMPLOYMENT AGENCY, LLC, FRANCRIS LUYUN, BENT PHILIPSON, BERISH RUBINSTEIN,

Defendants-Counter-Claimants.[*]

Before:

SACK, CHIN, and LOHIER, *Circuit Judges*.

Ten nurses and their former attorney filed claims under 42 U.S.C. § 1983 as well as common-law claims of false arrest and malicious prosecution under New York law against the defendants, including the District Attorney of Suffolk County and one of his bureau chiefs. The two principal questions presented on appeal are whether the individual defendants were entitled to absolute immunity for the actions they undertook as prosecutors, and whether there was any admissible evidence showing that they violated the plaintiffs' constitutional rights during the investigative phase of the case. Because we agree with the United States District Court for the Eastern District of New York (Bianco, J.) that the defendants were entitled to absolute immunity from claims arising from the prosecutorial phase of the case and to summary judgment on the remaining claims arising from the investigative phase of the prosecution, we **AFFIRM**.

Judge Chin dissents in a separate opinion.

STEPHEN L. O'BRIEN, O'Brien & O'Brien, LLP, Nesconset, NY, *for Defendant-Appellee* Thomas J. Spota, III.

BRIAN C. MITCHELL, Assistant County Attorney, Suffolk County Attorney's Office, Hauppauge, NY, *for Defendants-Appellees* County of Suffolk and Karla Lato, as Administrator of the Estate of Leonard Lato.

---

[*] The Clerk of Court is directed to amend the caption as set forth above.

OSCAR MICHELEN, Cuomo LLC, Mineola, NY, *for Plaintiff-Appellant* Felix Vinluan.

PAULA SCHWARTZ FROME (James O. Druker, *on the brief*), Kase & Druker, Esqs., Garden City, NY, *for Plaintiffs-Counter-Defendants-Appellants* Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, Theresa Ramos, Ranier Sichon, and James Millena.

LOHIER, *Circuit Judge*:

Ten nurses and their former attorney, Felix Vinluan, filed claims under 42 U.S.C. § 1983 as well as common-law claims of false arrest and malicious prosecution under New York law against the defendants — the County of Suffolk, the Office of the District Attorney of Suffolk County (the "DA's Office"), Thomas J. Spota, III, the District Attorney of Suffolk County, and Leonard Lato, an Assistant District Attorney who was at all relevant times the Chief of the Insurance Crimes Bureau at the DA's Office. The plaintiffs allege that Spota and Lato improperly prosecuted them for child endangerment, endangerment of a physically disabled person, and related charges by fabricating evidence and engaging in other improper conduct before a grand jury, in violation of the plaintiffs' federal constitutional rights and New York state law. The state prosecution ended only when a New York state appellate

court concluded that the plaintiffs were being "threatened with prosecution for crimes for which they cannot be constitutionally tried." Matter of Vinluan v. Doyle, 873 N.Y.S.2d 72, 83 (2d Dep't 2009). The United States District Court for the Eastern District of New York (Bianco, J.) found that Spota and Lato were entitled to absolute immunity for starting the criminal prosecution and presenting the case to the grand jury, and it dismissed the plaintiffs' claims arising from any alleged misconduct during that prosecutorial stage. Anilao v. Spota, 774 F. Supp. 2d 457, 466–68 (E.D.N.Y. 2011) ("Anilao I"). The District Court later granted summary judgment in favor of the prosecutors and the DA's Office as to the remaining claims after concluding that there was insufficient evidence that Spota or Lato had violated the plaintiffs' constitutional rights during the investigative phase of the criminal proceedings. Anilao v. Spota, 340 F. Supp. 3d 224, 250 (E.D.N.Y. 2018) ("Anilao II"). And "given the absence of any underlying constitutional violation in the investigative stage," the court concluded, "no municipal liability can exist against Suffolk County as a matter of law." Id. at 251.

For the reasons that follow, we affirm the District Court's judgment. Although Spota and Lato may have unlawfully penalized the plaintiffs for

exercising the right to quit their jobs on the advice of counsel, under our precedent both of them are entitled to absolute immunity for their actions during the judicial phase of the criminal process. As for the plaintiffs' claim that Spota and Lato fabricated evidence during the investigative phase of the criminal process, we agree with the District Court that there was insufficient admissible evidence of fabrication to defeat summary judgment. We therefore affirm.

BACKGROUND

Sentosa Care, LLC ("Sentosa")[1] operates health care facilities throughout New York and recruited the nurse plaintiffs from the Philippines to work in various Sentosa nursing home facilities on Long Island, New York. Each nurse signed an employment contract that required the nurses to work for at least three years or face a $25,000 penalty. When they arrived in New York, the nurses learned that they would be working for an employment agency, not Sentosa, and that the agency had assigned them to work at

[1] Sentosa, Avalon Gardens Rehabilitation and Health Care Center, Prompt Nursing Employment Agency LLC, Francris Luyun, Bent Philipson, Berish Rubinstein, Susan O'Connor, and Nancy Fitzgerald were originally defendants in this case, but they are not parties to this appeal.

Avalon Gardens Rehabilitation and Health Center ("Avalon"), a nursing home for both adults and children.

Following a relatively brief stint at Avalon, the nurses began to complain about their working and living conditions — longer than expected work shifts, overcrowded and substandard housing, lower insurance benefits and pay, and less vacation time than their contracts provided. The nurses also voiced their concerns to the Philippine Consulate in New York, which referred them to Vinluan, an immigration and employment attorney, for advice. After speaking with the nurses and evaluating the facts, Vinluan concluded that Sentosa had breached its contracts with the nurses and advised them that they were free to resign from their positions without legal repercussion once their shifts ended. Based on Vinluan's advice, on April 7, 2006, all ten nurses resigned either after their shift was over or in advance of their next shift.

Soon after the nurses resigned, Sentosa filed a complaint with the New York State Department of Education, which licenses and regulates nurses. The company also filed a complaint in Nassau County Supreme Court to enjoin the nurses and Vinluan from speaking to other nurses about resigning.

It even filed a complaint with the Suffolk County Police Department. None of Sentosa's complaints led to any action against the plaintiffs, however, and on September 28, 2006, the Department of Education closed the case after determining that the nurses had not engaged in any professional misconduct or deprived any patient of nursing care.

Unfazed, Sentosa continued its campaign against the plaintiffs. It finally found a receptive audience in Spota. Not long after representatives of Sentosa met with Spota to urge the DA's Office to file criminal charges against the nurses for imperiling the health and safety of Avalon's patients, Spota assigned the criminal investigation to Lato. Lato then quickly interviewed the plaintiffs, as well as other witnesses, like Francris Luyun, the head of Sentosa's recruitment agency.

In defense of the plaintiffs, who were now plainly the targets of a criminal investigation, Vinluan presented Lato with "significant exculpatory information." App'x 55. Among other things, Vinluan pointed to the fact that the Department of Education and the New York State Supreme Court had declined to act against the nurses. He also provided "information . . .

that," contrary to Sentosa's assertion, "none of the Nurse Plaintiffs had ceased work during a shift." App'x 55.

Lato was unpersuaded by Vinluan's arguments and presented several witnesses to a grand jury in Suffolk County. Among the witnesses were several Sentosa employees, an investigator in the DA's Office, a nurse who had also resigned but who is not a party to this appeal, and a nurse who filled in at Avalon immediately after the nurse plaintiffs resigned. The grand jury returned an indictment charging the nurses and Vinluan with (1) conspiracy in the sixth degree, in violation of New York Penal Law (N.Y.P.L.) §§ 105.00 and 105.20; (2) endangering the welfare of a child, in violation of N.Y.P.L. §§ 260.10(1) and 20.00; and (3) endangering the welfare of a physically disabled person, in violation of N.Y.P.L. §§ 260.25 and 20.00. Vinluan was also charged with criminal solicitation in the fifth degree, in violation of N.Y.P.L. § 100.00.

In response, the nurses and Vinluan moved in New York State Supreme Court in Suffolk County to, among other things, dismiss the charges against them. All of them insisted that their conduct was not criminal and that, in any event, the indictment was not supported by sufficient evidence. They also argued that the prosecution violated their constitutional rights. The

nurses claimed that the prosecution violated their rights under the Thirteenth Amendment of the federal Constitution, which, with one exception not relevant here, prohibits any form of involuntary or forced labor without pay. Vinluan argued that the prosecution against him violated his First Amendment rights to free speech and to association in connection with providing counsel to his clients.

The state court rejected the plaintiffs' claims of insufficient evidence, holding that "the evidence [was] legally sufficient to support [all] the charges contained in the indictment" and "that each count of the indictment properly charges these defendants with a crime . . . ." App'x 814.[2] The court also rejected the plaintiffs' constitutional arguments. With respect to the nurses' constitutional challenge, the state court concluded that "[t]here is absolutely no evidence to suggest that this prosecution in any way violates the rights of any of these defendants under the Thirteenth Amendment to the United

[2] The state court also explained that "[i]n the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged," a standard significantly lower than the proof beyond a reasonable doubt required at a criminal trial. App'x 814–15. "Under these standards of review," the court said, "there was ample evidence before the Grand Jury to support all counts of the indictment against [the nurses and Vinluan]." App'x 815.

States Constitution." App'x 815. As for Vinluan's First Amendment challenge, the court determined, there was "no basis to disturb" the grand jury's finding that there was "sufficient evidence that [Vinluan] had entered into an agreement to perform an act which would endanger the welfare of children and disabled persons and that an overt act was committed in furtherance of that agreement." App'x 819.

Having failed to persuade the state court to dismiss the indictment against them, the plaintiffs petitioned the New York Appellate Division, Second Department for a writ of prohibition. See N.Y. C.P.L.R. § 7803(2). In January 2009 the Appellate Division granted the writ, which we describe further below, after finding that the prosecution of the nurses and of Vinluan "constitute[d] an impermissible infringement upon [their] constitutional rights . . . and that the issuance of a writ of prohibition to halt these prosecutions is the appropriate remedy in this matter." Vinluan, 873 N.Y.S.2d at 75. In its decision granting the writ, the Appellate Division explained that the nurses had not committed a crime by ending their employment at will, since they had "resigned after the completion of their shifts, when the pediatric patients at Avalon Gardens were under the care of other nurses and

staff members," id., and that Vinluan's good faith legal advice was likewise protected from prosecution under the First and Fourteenth Amendments, id. at 82–83. But the Appellate Division also explicitly acknowledged that "the [New York] Penal Law provisions relating to the endangerment of children and the physically disabled . . . do not on their face infringe upon Thirteenth Amendment rights by making the failure to perform labor or services an element of a crime," and that under "exceptional circumstance[s]," restrictions of an individual's Thirteenth Amendment rights may be warranted. Id. at 80–81. The problem with the prosecution, the court explained, was that the "District Attorney proffer[ed] no reason why this [was] an 'extreme case.'" Id. at 81.

The plaintiffs started this federal litigation in 2010. The complaint alleges, among other things, that Spota and Lato acted in concert with Sentosa to secure an indictment that they knew violated the plaintiffs' constitutional rights and that they lacked probable cause to bring in the first instance. In particular, the complaint asserts that "the Grand Jury was not properly charged as to the law," was "falsely informed that one or more of the nurses had resigned and left the facility before completing his or her shift," and was

"not informed that the Education Department had previously determined that the Nurse Plaintiffs had not violated the very regulations which they were indicted for violating." App'x 56. The complaint also alleges that at Sentosa's behest, Spota and Lato sought to punish the nurses for resigning from their employment at Avalon and discourage others from doing the same. Finally, the complaint claims that the County is liable under the principles of municipal liability announced in Monell v. Department of Social Services, 436 U.S. 658 (1978).

The defendants filed a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The District Court granted the motion in part as to any claims arising from Spota and Lato's actions during the non-investigative, prosecutorial phase of their case against the plaintiffs, including the selection of charges, the initiation of the prosecution, and the presentation of testimony and evidence to the grand jury. As to those claims, the District Court concluded, Spota and Lato were entitled to absolute immunity from suit. See Anilao I, 774 F. Supp. 2d at 479–81.

But the District Court declined to dismiss on absolute immunity grounds the plaintiffs' claims arising from any alleged prosecutorial

misconduct by Spota or Lato during the investigative phase of the case, finding instead that the defendants were at most entitled only to qualified immunity. Id. at 477, 482. For that reason, to the extent that the complaint plausibly alleged that Spota and Lato had violated the plaintiffs' constitutional rights during the investigative phase, the District Court decided that the case would have to proceed past the pleading stage to discovery and summary judgment. See id. at 485, 493. After discovery, however, the District Court granted summary judgment in favor of the defendants because "there [wa]s simply no evidence in the record that [Spota and Lato] engaged in any constitutional wrongdoing in the investigative stage of the case," Anilao II, 340 F. Supp. 3d at 234. This was so even though the District Court had previously recognized (in Anilao I) that the case involved the "highly unusual set of circumstances in which the police not only lacked involvement in the investigation of [the plaintiffs] but also had expressly declined to investigate" them. Anilao I, 774 F. Supp. 2d at 481. The District Court then also dismissed the Monell claim against the County because there was no underlying constitutional violation. Anilao II, 340 F. Supp. 3d at 251.

This appeal followed.

DISCUSSION

The two questions presented on appeal are whether Spota and Lato were entitled to absolute immunity for the actions they undertook as prosecutors, and whether there was any evidence showing that they violated the plaintiffs' constitutional rights during the investigative phase of the prosecution, a phase with respect to which they are entitled at most only to qualified immunity. We address each question in turn.

I

The doctrine of absolute immunity applies broadly to shield a prosecutor from liability for money damages (but not injunctive relief) in a § 1983 lawsuit, even when the result may be that a wronged plaintiff is left without an immediate remedy.[3] See Imbler v. Pachtman, 424 U.S. 409, 427 (1976). Our cases make clear that prosecutors enjoy "absolute immunity from

[3] Recognizing that it would be unjust to allow prosecutorial misconduct to go unpunished and that absolute immunity does not render the public powerless, we have pointed to other methods, such as criminal and professional sanctions, to deter and redress wrongdoing. See Schloss v. Bouse, 876 F.2d 287, 292 (2d Cir. 1989); see also Imbler, 424 U.S. at 429 & n.29.

§ 1983 liability for those prosecutorial activities intimately associated with the judicial phase of the criminal process."[4] Barr v. Abrams, 810 F.2d 358, 361 (2d Cir. 1987) (quotation marks omitted). The immunity covers "virtually all acts, regardless of motivation, associated with [the prosecutor's] function as an advocate." Hill v. City of New York, 45 F.3d 643, 661 (2d Cir. 1995) (quoting Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994)). For example, a prosecutor enjoys absolute immunity when determining which offenses to charge, initiating a prosecution, presenting a case to a grand jury, and preparing for trial. See id.; Imbler, 424 U.S. at 431 (concluding that a prosecutor is absolutely immune from a § 1983 suit for damages based on his "initiating a prosecution and . . . presenting the State's case"). For that reason, we have held that absolute immunity extends even to a prosecutor who "conspir[es] to present false evidence at a criminal trial. The fact that such a conspiracy is certainly not something that is properly within the role of a prosecutor is immaterial,

[4] To be clear, § 1983 itself does not mention absolute prosecutorial immunity (or, for that matter, any immunity). It is a judicially created doctrine that has developed over time.

because the immunity attaches to his function, not to the manner in which he performed it." Dory, 25 F.3d at 83 (cleaned up).

"Thus, unless a prosecutor proceeds in the clear absence of all jurisdiction, absolute immunity [from § 1983 liability] exists for those prosecutorial activities intimately associated with the judicial phase of the criminal process." Barr, 810 F.2d at 361 (emphasis added); see Shmueli v. City of New York, 424 F.3d 231, 237 (2d Cir. 2005). "Conversely, where a prosecutor acts without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy" and is left with only qualified immunity as a potential shield. Barr, 810 F.2d at 361 (emphasis added); see Shmueli, 424 F.3d at 237. "[A] limitation upon the immunity," Chief Judge Hand explained, "[is] that the official's act must have been within the scope of his powers," but this does not mean that "to exercise a power dishonestly is necessarily to overstep its bounds." Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.). Instead, "[w]hat is meant by saying that the officer must be acting within his power cannot be more than that the occasion must

be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." Id.

A narrow limitation to the scope of absolute immunity in § 1983 actions thus exists where the defect is jurisdictional — that is, where the prosecutor acted well outside the scope of authority, rather than where the defect relates, as here, to the prosecutor's motivation or the reasonableness of his official action. The jurisdictional defect must be clear and obvious. "In considering whether a given prosecution was clearly beyond the scope of that jurisdiction, or whether instead there was at least a colorable claim of authority, . . . we inquire whether" any relevant criminal statute exists that "may have authorized prosecution for the charged conduct." Shmueli, 424 F.3d at 237; see, e.g., Lerwill v. Joslin, 712 F.2d 435, 440 (10th Cir. 1983) (prosecutor who initiates prosecution under statutes he is not authorized to invoke is afforded absolute immunity if he "is arguably empowered to prosecute the alleged

conduct under some statute" and "the statute he incorrectly invokes also arguably applies to the criminal defendant's alleged conduct").[5]

So "[e]ven if a prosecutor may lose his absolute immunity for prosecutorial acts for which he has no colorable claim of authority," it is not lost "immediately upon crossing the technical bounds of the power conferred on him by local law," or "simply because he acted in excess of his authority." Lerwill, 712 F.2d at 439; see Ashleman v. Pope, 793 F.2d 1072, 1076–77 (9th Cir. 1986) (en banc) (unanimously holding that prosecutor was entitled to absolute immunity after overruling prior Ninth Circuit holding that prosecutor who "files charges he or she knows to be baseless . . . is acting outside the scope of his or her authority and thus lacks immunity" (quotation marks omitted)). Instead, "absolute immunity must be denied" only where there is both the absence of all authority (because, for example, no statute authorizes the prosecutor's conduct) and the absence of any doubt that the

[5] If the laws authorize prosecution for the charged crimes, a prosecutor may still be liable if he "has intertwined his exercise of authorized prosecutorial discretion with other, unauthorized conduct." Bernard v. County of Suffolk, 356 F.3d 495, 504 (2d Cir. 2004). Cited examples in which officials act clearly outside the scope of their powers include charging decisions that are accompanied by unauthorized demands for a bribe, sexual favors, the defendant's performance of a religious act, or the like. See id. Presumably no statute would authorize those acts under any circumstances.

challenged action falls well outside the scope of prosecutorial authority. Bernard v. County of Suffolk, 356 F.3d 495, 504 (2d Cir. 2004). In the vast majority of cases "the laws do authorize prosecution for the charged crimes," id. (emphasis added), and if the charging decision or other act is within the prosecutor's jurisdiction as a judicial officer, then absolute immunity attaches to their actions "regardless of any allegations" that their "actions were undertaken with an improper state of mind or improper motive," Shmueli, 424 F.3d at 237. Prosecutors thus have absolute immunity in a § 1983 action even if it turns out that "state law did not empower [them] to bring the charges," so long as "they have at least a semblance of jurisdiction" that does not run far afield of their job description. Barr, 810 F.3d at 361 (declining to adopt "a holding that a prosecutor is without absolute immunity the moment he strays beyond his jurisdictional limits," because doing so would "do violence to [the] spirit" of the doctrine).

These governing principles of law are well established and are not questioned by the parties on appeal — so much so that the plaintiffs recognize that the doctrine of absolute immunity creates a "formidable obstacle" to their cause of action. Appellants' Br. at 29 (quotation marks

omitted). Nevertheless, the plaintiffs contend that the very narrow exception to absolute immunity for prosecutorial acts that we have just described applies to the facts of this case. We disagree.

We start with our decision in Barr. There the plaintiff had been questioned by the State prosecutor's office as part of an investigation into alleged violations of state securities law. The plaintiff refused to answer any questions and invoked his Fifth Amendment right to remain silent. See 810 F.2d at 359–60. In response, the prosecutors charged the plaintiff with criminal contempt in violation of New York's penal law. See id. at 360. The contempt charge was eventually dismissed in state court on the ground that the plaintiff had merely exercised his Fifth Amendment right. Id. The plaintiff then filed a § 1983 civil damages action against the prosecutors, which the district court dismissed. On appeal, we held that the prosecutors were entitled to absolute immunity because they were broadly authorized by statute to pursue criminal contempt charges — even though they had trampled the plaintiff's Fifth Amendment rights. Id. at 362.

Likewise, in Bernard we considered whether county prosecutors were entitled to absolute immunity for their politically motivated investigation and

prosecution of the plaintiffs without probable cause. See 356 F.3d at 497–98. The plaintiffs alleged that the prosecutors had sought indictments without probable cause and "knowingly present[ed] false evidence to, while at the same time withholding exculpatory evidence from, the various grand juries that returned the[] flawed indictments." Id. at 503. We held that even in the absence of probable cause, "as long as a prosecutor acts with colorable authority, absolute immunity shields his performance of advocative functions regardless of motivation." Id. at 498, 505; see also id. at 503 (collecting cases in which prosecutors were absolutely immune for initiating prosecutions without probable cause and/or presenting false evidence to a grand jury).[6] In doing so, we reaffirmed the principle that "[w]here, as in this case, a prosecutor's charging decisions are not accompanied by any . . . unauthorized demands," such as for a bribe or sexual favors, "the fact that improper motives may influence his authorized discretion cannot deprive him of

[6] We therefore reversed the decision of the district court in Bernard, which had denied the defendants' motion to dismiss as to the advocative misconduct claim on the ground that an improper political motive could take prosecutorial decisions and the prosecutor's conduct before the grand jury outside the scope of official functions shielded by absolute prosecutorial immunity. 356 F.3d at 505.

absolute immunity." Id. at 504; see Dorman v. Higgins, 821 F.2d 133, 139 (2d Cir. 1987) (holding that "absolute immunity spares the official any scrutiny of his motives" so that allegations of "bad faith or . . . malice [cannot] defeat[ ] a claim of absolute immunity").

In Shmueli, decided a year after Bernard, we held that absolute immunity applied to protect local prosecutors who engaged in conduct that, if it occurred, was nothing short of outrageous. The plaintiff alleged that two New York County Assistant District Attorneys maliciously prosecuted her for aggravated harassment of her former domestic partner "despite knowing that the charges against her were false and that [she] was innocent" of those charges. 424 F.3d at 233. The plaintiff also alleged that the prosecutors made several threatening phone calls to her home during the prosecution. Id. at 233–34. The district court rejected the prosecutors' defense of absolute immunity because they acted "without clear jurisdiction and without any colorable claim of authority." Id. at 235. We reversed, holding that the district court had improperly "equat[ed] an allegedly improper prosecutorial state of mind with a lack of prosecutorial jurisdiction." Id. Absolute immunity, we explained, shielded the prosecutors' conduct because the

indictment contained allegations that, even if completely false, could authorize the prosecutors to prosecute Shmueli under the New York Penal Law prohibiting aggravated harassment in the second degree. Id. at 238–39.[7] The prosecutors' "jurisdiction . . . to prosecute Shmueli," we said, "depended on the authority conferred by the New York statutes" — no more, no less. Id. at 238.

We have extended absolute immunity to prosecutorial misconduct that was arguably more reprehensible than the conduct in Shmueli. See, e.g., Pinaud v. County of Suffolk, 52 F.3d 1139, 1148 (2d Cir. 1995) (granting

[7] Our sister circuits have similarly held that a prosecutor who initiates a prosecution with improper motives and without probable cause is absolutely immune from a claim for damages in a § 1983 action, even where the prosecutor's alleged misconduct during the judicial stage was reprehensible and violated the plaintiffs' constitutional rights. See, e.g., Jones v. Cummings, 998 F.3d 782, 784–85, 788 (7th Cir. 2021) (prosecutors alleged to have maliciously filed untimely amendment to plaintiff's criminal charges, which increased his term of imprisonment by several decades); Sample v. City of Woodbury, 836 F.3d 913, 915–16 (8th Cir. 2016) (city prosecutors filed criminal charges against plaintiff despite conflict of interest that arose because they represented the alleged victim in other domestic civil actions); Kulwicki v. Dawson, 969 F.2d 1454, 1464 (3d Cir. 1992) (prosecutor entitled to absolute immunity after bringing baseless conspiracy and attempted infant trafficking charges against political rival who merely tried to help family through adoption process); Ashleman, 793 F.2d at 1076–77 (prosecutor allegedly conspired with judge to predetermine outcome of a judicial proceeding); Lerwill, 712 F.2d at 43637 (city prosecutor initiated prosecution based on state felony statute, which he had no authority to enforce).

absolute immunity to prosecutors who improperly sought to increase plaintiff's bail; made false representations to prompt a plea agreement which they later breached; manufactured a bail jumping charge; lied to the Bureau of Prisons; and unnecessarily transferring plaintiff from county to state jail); Dory, 25 F.3d at 83 (granting absolute immunity to prosecutor who allegedly participated in a conspiracy to present false evidence at trial).

The lessons and holdings of Barr, Bernard, and Shmueli are hard to escape in this case. There is no dispute on appeal that the District Attorney was authorized by statute to prosecute the plaintiffs for endangering children and physically disabled persons, for conspiring to do the same, and for soliciting others to do so.[8] Neither the dissent nor the plaintiffs propose that

[8] The dissent suggests that the indictment does not charge any criminal objectives of the conspiracy. Respectfully, the suggestion is wrong, as it rests on the indictment's most innocuous allegations and sidesteps the indictment's most serious allegations of criminal endangerment, which, under New York law and contrary to the dissent's view, requires only the threat of harm, not actual harm. See People v. Hitchcock, 98 N.Y.2d 586, 589 (2002) ("Under Penal Law § 60.10(1), a person endangers the welfare of a child when '[h]e knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.'"); see, e.g., App'x 1405 ("The defendants pursued their objective without regard to the consequences that their pursuit would have on Avalon Gardens' pediatric patients. The defendants agreed that the defendant nurses, including all the available nurses who cared for children on ventilators, would resign without giving Avalon Gardens notice. The defendants did so knowing that their resignations and the prior

the state Supreme Court of Suffolk County lacked jurisdiction over the offense. Instead, the plaintiffs submit only that the prosecutors in this case had no power to act as they did — not because they lacked the statutory authority to do so, but because their conduct violated the nurses' rights under

---

resignations at other Sentosa Care facilities would render it difficult for Avalon Gardens to find, in a timely manner, skilled replacement nurses for Avalon Gardens' pediatric patients, particularly the terminally ill JB, the child NL and the ventilated children NC, BC, TM and TT."). It is not enough to criticize, as the dissent does, the manner in which the prosecutors performed their "quintessential prosecutorial functions" of evaluating the evidence and initiating a criminal prosecution. Shmueli, 424 F.3d at 237. As we have already noted, absolute immunity "attaches to [the prosecutor's] function" or task, "not the manner in which he performed it." Dory, 25 F.3d at 83 (quoting Barrett v. United States, 798 F.2d 565, 573 (2d Cir. 1986)); see also Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (explaining that a prosecutor's "professional evaluation of the evidence" is protected by absolute immunity); Bernard, 356 F.3d at 505. And "whether a given prosecution was clearly beyond the scope of the prosecutor's jurisdiction" or function, "and so whether absolute immunity applies, depends on "whether the pertinent statutes may have authorized prosecution for the charged conduct." Shmueli, 424 F.3d at 237. In this case, even the Appellate Division acknowledged that, under New York law, "an employee's abandonment of his or her post in an 'extreme case' may constitute an exceptional circumstance which warrants infringement upon the right to freely leave employment." Vinluan, 873 N.Y.S.2d at 81. There can be no serious dispute under New York law that the claim of child endangerment was at least a colorable one that the prosecutors had authority to charge.

the Thirteenth Amendment and Vinluan's rights under the First Amendment. See Appellants' Br. at 33, 42.

In advancing their argument, the plaintiffs take their cue from the state appellate court's earlier conclusion in this case that "no facts suggesting an imminent threat to the well being of the children have been alleged." Vinluan, 873 N.Y.S.2d at 82. They also argue that Spota and Lato knew or should have known at the outset of the case that their prosecution of the plaintiffs was constitutionally infirm. But fundamentally, in our view, these arguments relate to the existence or absence of probable cause — not, as Barr, Bernard, and Shmueli instruct us to consider, the defendants' statutory authority to pursue the prosecution in the first place. As already noted, under our precedent absolute immunity shields Spota and Lato for their prosecutorial and advocative conduct even in the absence of probable cause and even if their conduct was entirely politically motivated. See, e.g., Shmueli, 424 F.3d at 237–38 (improper motive does not factor into absolute immunity analysis);[9] accord Bernard, 356 F.3d at 505; see also Buckley v.

[9] As we stated in Shmueli:

Fitzsimmons, 509 U.S. 259, 274 n.5 (1993) (explaining that a prosecutor's entitlement "to absolute immunity for the malicious prosecution of someone whom he lacked probable cause to indict" is rooted in the common-law).[10]

The Appellate Division's issuance of a writ of prohibition complicates but does not change our decision. The writ, rarely used, applies only to end a prosecution, not to undo what the prosecution has already done. United States v. Hoffman, 71 U.S. 158, 161–62 (1867) ("[T]he only effect of a writ of prohibition is to suspend all action, and to prevent any further proceeding in

---

> [A] defense of absolute immunity from a claim for damages must be upheld against a § 1983 claim that the prosecutor commenced and continued a prosecution that was within his jurisdiction but did so for purposes of retaliation, or for purely political reasons. A prosecutor is also entitled to absolute immunity despite allegations of his knowing use of perjured testimony and the deliberate withholding of exculpatory information. Although such conduct would be reprehensible, it does not make the prosecutor amenable to a civil suit for damages. In sum, the nature of absolute immunity is such that it accords protection from any judicial scrutiny of the motive for and reasonableness of official action. These principles are not affected by allegations that improperly motivated prosecutions were commenced or continued pursuant to a conspiracy.

424 F.3d at 237–38 (cleaned up).

[10] The plaintiffs also allege that Lato made false statements and selectively allowed hearsay testimony to be presented when it benefitted him during the grand jury presentation, but in view of the precedent described above, the doctrine of absolute immunity clearly also protects his conduct against a claim of damages under § 1983. See Hill, 45 F.3d at 662.

the prohibited direction."). Under New York law, the prohibition lies "only when there is a clear legal right" to such relief, and, as relevant here, when the judicial officer "exceeds its authorized powers in a proceeding over which it has jurisdiction." Matter of State of New York v. King, 36 N.Y.2d 59, 62 (1975). By issuing the writ here, the Appellate Division ended the prosecution, stopping it from proceeding any further. But in this case, it did so because the prosecutors had violated the plaintiffs' rights based on the specific facts of the case and thus exceeded the jurisdiction conferred upon them by statute. See Vinluan, 873 N.Y.S.2d at 81–82. As we have seen, however, not even exceeding prosecutorial authority, let alone misusing it, is enough to lift the immunity under federal law, which requires the clear and obvious absence of any authority under any set of facts. Here, the Appellate Division did not suggest that the prosecutors were incapable of properly

charging the plaintiffs under any set of facts or that they acted clearly and obviously outside of all jurisdictional bounds.[11]

This case is practically indistinguishable from Barr, in which the state court issued a writ of prohibition and dismissed criminal contempt charges against the plaintiffs, but made clear that "contempt, if properly charged, in the context of the facts of this case is an underlying act of continuous concealment directly related to the securities fraud investigation, and therefore is within the jurisdiction of the Attorney General." Barr, 810 F.2d at 362 (emphasis added). Similarly, the Appellate Division here noted that the criminal laws relating to the endangerment of children "do not on their face infringe upon Thirteenth Amendment rights." Vinluan, 873 N.Y.S.2d at 82 (emphasis added). The Appellate Division also reaffirmed an attorney's right "to provide legal advice within the bounds of the law," id. (emphasis added),

---

[11] Although a writ may issue where an officer acts "without jurisdiction in a matter over which it has no power over the subject matter," Matter of State of New York, 36 N.Y.2d at 62, the plaintiffs do not contend on appeal that the Appellate Division, in issuing the writ, expressly found that the prosecutors acted "without jurisdiction." We therefore conclude that they have abandoned the argument on appeal. LoSacco v. City of Middletown, 71 F.3d 88, 92–93 (2d Cir. 1995). And in any event, we agree with the District Court that the Appellate Division found only that "the prosecution would be an excess in power." Vinluan, 873 N.Y.S.2d at 78; Anilao I, 774 F. Supp. 2d at 486.

including Vinluan's right to do so "under the circumstances of th[e] case." Id. at 82. But it did not suggest that a lawyer in Vinluan's position could never be prosecuted for advising a client to commit a crime. The Appellate Division, in other words, recognized that the prosecutors had the general authority to charge the plaintiffs under New York law, even though the federal Constitution prevented them from doing so under the particular facts of the case. See id. at 81–82.

The plaintiffs urge us to adopt a new rule under which absolute immunity would no longer apply to cases "where a prosecution is unconstitutional" from the start, where the unconstitutional nature of the prosecution "was evident or should have been evident to the prosecutor from the facts and the law, and where the prosecution is based upon evidence deliberately fabricated by the prosecutors." Appellants' Br. at 33. In inviting us to alter our approach to absolute immunity, the plaintiffs turn our attention to Fields v. Wharrie, 740 F.3d 1107 (7th Cir. 2014). There, the Seventh Circuit held that a prosecutor "acting pre-prosecution as an investigator" was not entitled to absolute immunity because he "fabricate[d] evidence" and eventually "introduce[d] the fabricated evidence at trial." Id.

at 1113. "A prosecutor cannot retroactively immunize himself from conduct," the Seventh Circuit said, "by perfecting his wrongdoing through introducing the fabricated evidence at trial." Id. at 1114. Fields makes clear that a prosecutor's action in the investigative stage of a case is not spared from liability simply because the results of his investigative work are presented at trial. See id. (citing Zahrey v. Coffey, 221 F.3d 342, 354 (2d Cir. 2000)).

Our view, and the District Court's, is consistent with Fields. After all, the District Court determined that Spota and Lato were absolutely immune for their conduct as advocates during the judicial phase (initiating the prosecution, using allegedly perjured testimony during the grand jury, and making allegedly false statements to the grand jury), but held, as in Fields, that they were not immune for their conduct during the investigative stage of the prosecution. And Barr and Shmueli prevent us from accepting the plaintiffs' invitation to further extend the exception to absolute immunity beyond Fields, to situations in which prosecutors during the advocacy phase bring charges they know violate an individual's constitutional rights. See Barr, 810 F.2d at 361; see also Shmueli, 424 F.3d at 238 (prosecutors are afforded absolute immunity for bringing charges that they knew were false

because a contrary ruling would "confuse[] jurisdiction with state of mind"). Because the "postarraignment events" described above "consisted only of the prosecution" of the plaintiffs "in a court of competent jurisdiction on charges that were within the [prosecutors'] authority to bring," the prosecutors "are entitled to absolute immunity against" the plaintiffs' "claims for damages for those events." Shmueli, 424 F.3d at 239. The evidence that "the charges were brought for improper purposes do[es] not deprive" the prosecutors of that immunity. Id.

We therefore affirm the District Court's dismissal of the claims arising from the defendants' actions taken in their role as advocates during the judicial phase of the prosecution. In doing so, "[w]e recognize, as Chief Judge Hand pointed out, that sometimes such immunity deprives a plaintiff of compensation that [she] undoubtedly merits." Van de Kamp v. Goldstein, 555 U.S. 335, 348 (2009). "Especially in cases, such as the present one, in which a plaintiff plausibly alleges disgraceful behavior by district attorneys, the application of this doctrine is more than disquieting." Pinaud v. County of Suffolk, 52 F.3d 1139, 1147 (2d Cir. 1995). "[B]ut the impediments to the fair, efficient functioning of a prosecutorial office that liability could create

lead us to find that [immunity] must apply here." Van de Kamp, 555 U.S. at 348.

II

The District Court concluded from the pleadings that Spota and Lato were not entitled to absolute immunity for their conduct during the investigative stage of the prosecution, and that the plaintiffs had stated a claim for relief that was plausible on its face under § 1983. Anilao I, 774 F. Supp. 2d at 485, 513. The defendants do not challenge either conclusion on appeal, and the first conclusion in any event follows from our prior decisions. See Zahrey, 221 F.3d at 346–47; see also Buckley, 509 U.S. at 273. But the plaintiffs do challenge the District Court's grant of summary judgment in the defendants' favor. We therefore turn to whether there is a genuine factual issue about whether Spota and Lato violated the plaintiffs' constitutional rights during their investigation.

We review a grant of summary judgment de novo. See Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 19 (2d Cir. 2014). "Summary judgment is appropriate only where, construing all the evidence in the light most favorable to the non-movant and drawing all reasonable

inferences in that party's favor, there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Id. (quotation marks omitted). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts" and "must come forward with specific facts showing that there is a genuine issue for trial." Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002) (quotation marks omitted). The non-movant cannot rely on conclusory allegations or denials and must provide "concrete particulars" to show that a trial is needed. R.G. Grp., Inc. v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir. 1984) (quotation marks omitted).

The District Court held that "Lato and Spota are entitled to summary judgment because . . . no rational jury could find that they knowingly fabricated evidence during the investigation, or otherwise violated plaintiffs' constitutional rights in the investigative phase of this case." Anilao II, 340 F. Supp. 3d at 250. Upon review of the record, we agree and affirm the District Court's grant of summary judgment.

On appeal, the plaintiffs, like our dissenting colleague, emphasize that there is at least a factual dispute as to whether Lato conspired with Sentosa to

fabricate evidence to present to the grand jury, and in particular whether Lato conspired with Luyun to testify falsely against Vinluan before the grand jury. The plaintiffs highlight that Lato had been provided a Philippines-based advertisement showing that Vinluan was an immigration attorney, not a nurse recruiter, see App'x 1554–55, but that Lato nevertheless prodded Luyun to falsely testify that he had seen an advertisement that Vinluan was recruiting nurses to the United States, see App'x 654. Because Lato admitted that he met with all the witnesses who testified in the grand jury proceedings, the plaintiffs insist that Lato must have met with Luyun and conspired with him to lie to the grand jury.

This is, in our view, little more than speculation. As such it poses no bar to summary judgment in the defendants' favor. Speculation aside, the plaintiffs fail to point to any admissible evidence that could lead a reasonable juror to conclude that Lato (or Spota) conspired with Luyun to fabricate evidence.[12] They had every opportunity to develop the record and to uncover

[12] Relying on Morse v. Fusto, 804 F.3d 538 (2d Cir. 2015), our dissenting colleague points to Lato's failure to disclose to the grand jury the Department of Education's findings in favor of the plaintiffs, the state court's denial of a preliminary injunction, and the Nassau County Police Department's decision not to take any action against

---

the plaintiffs. With respect, Lato's decision not to present evidence — also available to the plaintiffs at the time of the grand jury proceeding — of agency or judicial action or inaction does not come close to the defendant's egregious conduct in Morse. There the defendants actively "creat[ed] false or fraudulently altered documents," and we described the "constitutional violation" as the affirmative "manipulation of data to create false or misleading documents, knowing that such information was false or misleading at the time," and then deliberately presenting the false documents, with the fake facts, to the grand jury. Id. at 549–50 (quotation marks omitted) (emphasis in original). Neither the dissent nor the plaintiffs describe any similar fabrication of evidence on Lato's part, characterizing Lato's conduct instead as a wrongful refusal to disclose potentially exculpatory evidence to the grand jury. To be sure, Lato's decision not to present that evidence is far less than ideal in a world where we expect far more from prosecutors in our country; it would, for example, undoubtedly have violated the internal guidance that regulates the conduct of federal prosecutors. See U.S. Department of Justice, Justice Manual, Title 9, Chapter 11, § 9-11-233 (although not required to do so under federal law, "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person"). On the other hand, the plaintiffs had a right under New York law, upon waiving immunity, to testify before the grand jury and to present the same exculpatory evidence that was available to them. See People v. Mitchell, 82 N.Y.2d 509, 513–14 (1993) (citing N.Y. C.P.L.R. § 190.50)). None sought to enforce that right. Ultimately, the dissent's view ignores that the core function of the grand jury in New York is to determine if the charges are sufficiently supported by evidence to warrant a trial of the charge. See People v. Calbud, Inc., 49 N.Y.2d 389, 394 (1980). Trial, not the grand jury proceeding, is the crucible to air and test the full and final contentions of the parties for or against guilt in New York. Although, like our dissenting colleague, we might wish that the rule were otherwise and even share his palpable sense of unfairness, the reality is that a prosecutor in New York usually has no obligation to present to the grand jury evidence that is exculpatory. See People v. Hemphill, 35 N.Y.3d 1035, 1036 (2020) ("Contrary to defendant's claim that the indictment should be dismissed based on the prosecutor's failure to alert the grand jury to exculpatory evidence that implicated another, the People were not obligated to present evidence that someone else was initially identified as the shooter."), cert. granted sub nom. on other grounds, Hemphill v. New York, 141 S. Ct. 2510 (2021). New York law clearly

that evidence if it existed. But during Lato's deposition, for example, when given the chance to explore the alleged plot, they declined to question Lato about his meeting with Luyun. Answers to those questions might have yielded some firm evidence of the existence of a conspiracy between the two men, such as whether they ever discussed the contradictory newspaper advertisements about Vinluan.

The plaintiffs separately rely on the plotline that the police refused to investigate the nurses despite having been urged to do so by Spota and Lato. At best, however, this implies that Spota and Lato had a very weak and decidedly unappealing case against the nurses, not that they conspired with Luyun to fabricate evidence to present to the grand jury, or that they otherwise clearly violated the plaintiffs' constitutional rights during the investigation.

We briefly respond to the dissent's suggestion that racial prejudice triggered and infects this entire litigation. Our dissenting colleague understandably focuses a great deal of attention on the reprehensible conduct

---

permitted Lato to withhold from the grand jury the information that the dissent, like the plaintiffs, claim he was obliged to disclose to that body.

of Sentosa, which may well have been motivated to kickstart the case and to prompt the criminal prosecution in part because the nurses were Filipino rather than "White and American citizens." Dissenting Op. at 24. As the dissent observes, Sentosa has been "found to have violated the rights of Filipino nurses" it employed, and it recently agreed to pay $3 million to a class of Filipino nurses in settlement. Id. at 25–26. But the immediate issue before us involves the conduct and immunity of the prosecutors, not Sentosa. As to that issue, not even the dissent proposes that the prosecutors were directly motivated by racial animus, and the plaintiffs' amended complaint likewise does not allege that the prosecution against them was prompted by race or national origin discrimination. Nevertheless, our colleague asserts that "[w]hatever their motivation" for proceeding with the investigation and ultimately prosecuting the plaintiffs, the prosecutors — Spota and Lato — were "complicit in Sentosa's effort to deter its Filipino nurses from pursuing their rights." Id. at 26. That may be true, but the dissent hedges on whether their complicity was itself racially motivated in the way that Sentosa's initiating campaign may have been. At best, asserts the dissent, "there is enough to put the issue" of whether "race played a part in the prosecutors'

actions" "to a jury," even if it means that the plaintiffs must resort to a "cat's paw" theory of manipulation and control usually reserved for Title VII cases. Id. at 27 n.12.

Whatever its other faults,[13] the most glaring problem with the dissent's view is that it is not shared by the plaintiffs, who have never embraced it at any point in this hard-fought and well-counseled litigation — not in the complaint, not on summary judgment, not even on appeal. "Few principles are better established in our Circuit than the rule that 'arguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court.'" New York v. Dep't of Justice, 964 F.3d 150,

[13] Although our dissenting colleague suggests that Spota and Lato acted with racial animus, the plaintiffs have repeatedly emphasized that, at worse, Spota and Lato were politically motivated to pursue the charges against them. See Appellants' Br. at 42; Oral Arg. Tr. at 5–6. They have not once mentioned that the defendants were motivated by racial or national origin animus. And we are bound by our prior holding in Bernard that "racially invidious or partisan prosecutions, pursued without probable cause, are reprehensible, but such motives do not necessarily remove conduct from the protection of absolute immunity." Bernard, 356 F.3d at 504. To be sure, the dissent raises strong, even compelling policy concerns that, in our view, counsel in favor of significantly curtailing the doctrine of absolute prosecutorial immunity, perhaps across the board, and certainly as it relates to racially invidious prosecutions. But precedent – Barr, Bernard, Shmueli – limits the ability of this panel in the present case to modify or abrogate the doctrine. We are bound by these decisions absent overruling by the Court in banc, an intervening decision from the Supreme Court, or an act of Congress.

166 (2d Cir. 2020) (Katzmann, C.J., dissenting from denial of reh'g en banc) (quoting JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005)). However attractive it might be to us, reaching the dissent's desired result based on legal arguments that the plaintiffs have never advanced would veer us far from "the normal rules of appellate litigation." Id. As Justice Ginsburg recently wrote for a unanimous Supreme Court in United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020), "in our adversarial system of adjudication, we follow the principle of party presentation. [I]n both civil and criminal cases, in the first instance and on appeal, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." Id. at 1579 (cleaned up). Even putting aside the principle of party presentation for a moment, Bernard binds us to the rule that "[t]he appropriate inquiry . . . is not whether authorized acts are performed with a good or bad motive, but whether the acts at issue are beyond the prosecutor's authority." 356 F.3d at 504 (emphasis in original). For the reasons already explained, the prosecutors acted within their authority to charge the plaintiffs under New York law.

III

Finally, we turn to the County's liability under Monell v. Department of Social Services, 436 U.S. 658 (1978).

"Monell does not provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006). In other words, a Monell claim cannot succeed without an independent constitutional violation. See id. "[I]nherent in the principle that a municipality can be liable under § 1983 only where its policies are the moving force [behind] the constitutional violation, is the concept that the plaintiff must show a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." Outlaw v. City of Hartford, 884 F.3d 351, 373 (2d Cir. 2018) (cleaned up). "[I]f the challenged action is directed by an official with final policymaking authority, . . . the municipality may be liable even in the absence of a broader policy." Mandell v. County of Suffolk, 316 F.3d 368, 385 (2d Cir. 2003) (quotation marks omitted). As more directly

relevant here, we have held that "the actions of county prosecutors in New York are generally controlled by municipal policymakers for purposes of Monell, with a narrow exception . . . being the decision of whether, and on what charges, to prosecute." Bellamy v. City of New York, 914 F.3d 727, 758–59 (2d Cir. 2019) (quotation marks omitted). Under the narrow exception that we noted in Bellamy, a district attorney in New York "is not an officer or employee of the municipality but is instead a quasi-judicial officer acting for the state in criminal matters." Ying Jing Gan v. City of New York, 996 F.2d 522, 535–36 (2d Cir. 1993) (quotation marks omitted).

With these principles in mind, we reject the plaintiffs' first claim that the County is liable for the individual defendants' conduct, including the fabrication of evidence, during the investigative stage. As discussed above, there was no evidence of a constitutional violation by the DA's Office at that stage, and we agree with the District Court that "the absence of any underlying constitutional violation arising from the conduct of Spota or Lato in the investigative stage" means that "no municipal liability can exist against Suffolk County" based on that conduct. Anilao II, 340 F. Supp. 3d at 251; see Askins v. Doe No. 1, 727 F.3d 248, 253–54 (2d Cir. 2013).

The plaintiffs separately also claim that the County is liable under Monell for Spota's alleged administrative mismanagement of the DA's Office. But we agree with the District Court that the plaintiffs have not provided the "direct causal link" we require under these circumstances between Spota's alleged mismanagement and the alleged misconduct and constitutional deprivations involving the plaintiffs. Outlaw, 884 F.3d at 373; see Anilao II, 340 F. Supp. 3d at 251 n.36. To the extent the plaintiffs' claim centers on Spota's decision to prosecute the case rather than his management of the DA's Office, the claim fails because, in making that decision, Spota was clearly acting for New York State in a criminal matter, not for the County. See Ying Jing Gan, 996 F.2d at 536. [14]

[14] To the extent the County suggests that it cannot be liable for Spota's and Lato's conduct during the judicial phase because of their absolute immunity, that argument is squarely foreclosed by our precedent. See Pinaud, 52 F.3d at 1153 ("Since municipalities do not enjoy immunity from suit — either absolute or qualified — under § 1983, [the plaintiff's] malicious prosecution claim against the County of Suffolk is not barred by prosecutorial immunity." (quotation marks omitted)); see also Askins, 727 F.3d at 254 ("[T]he entitlement of the individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is also irrelevant to the liability of the municipality.").

We therefore affirm the District Court's grant of summary judgment in the County's favor.

CONCLUSION

We have considered the plaintiffs' remaining arguments and conclude that they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

19-3949-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JULIET ANILAO, HARRIET AVILA, MARK DELA-CRUZ, CLAUDINE GAMAIO, ELMER JACINTO, JENNIFER LAMPE, RIZZA MAULION, THERESA RAMOS, RANIER SICHON, JAMES MILLENA,

Plaintiffs-Counter-Defendants-Appellants,

and

FELIX Q. VINLUAN,

Plaintiff-Appellant,

v.

THOMAS J. SPOTA, III, INDIVIDUALLY AND AS DISTRICT ATTORNEY OF SUFFOLK COUNTY, OFFICE OF THE DISTRICT ATTORNEY OF SUFFOLK COUNTY, LEONARD LATO, INDIVIDUALLY AND AS AN ASSISTANT DISTRICT ATTORNEY OF SUFFOLK COUNTY, COUNTY OF SUFFOLK, SUSAN O'CONNOR, NANCY FITZGERALD, KARLA LATO, AS ADMINISTRATOR OF THE ESTATE OF LEONARD LATO,

Defendants-Appellees,

(Caption Continued on the Reverse)

On Appeal from the United States District Court for the Eastern District of New York

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

DRUKER, P.C.
1325 Franklin Avenue, Suite 225
Garden City, New York 11530
516-746-4300

CUOMO LLC
200 Old Country Road
Suite 2 South
Mineola, New York 11501
516-741-3222

Attorneys for Plaintiff-Appellant and Plaintiffs-Counter-Defendants-Appellants

and

SENTOSA CARE, LLC, AVALON GARDENS REHABILITATION AND HEALTH CARE CENTER, PROMPT NURSING EMPLOYMENT AGENCY, LLC, FRANCRIS LUYUN, BENT PHILIPSON, BERISH RUBINSTEIN,

Defendants-Counter-Claimants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Absolute immunity is a judicially implied doctrine that shields prosecutors from liability for even gross constitutional violations. But decades of this Court's precedents have made clear that absolute immunity does *not* apply "where a prosecutor acts without any colorable claim of authority." *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987). Rather, when an act is plainly outside a prosecutor's scope of authority, he cannot claim absolute immunity just because his job title is district attorney. The panel majority made this longstanding principle a dead letter by holding that prosecutors can claim absolutely immunity if they merely invoke a valid criminal statute as the basis for their unconstitutional actions, no matter how divorced the statute is from those actions. As Judge Chin's dissent explained, that holding makes the limitation of absolute immunity to acts within a prosecutor's authority completely "illusory"; immunity will become limitless if prosecutors with "absolutely no factual or legal basis" for their actions can merely point to a statute.

The facts of this case are shocking and illustrate why the longstanding scope-of-authority limit on absolute immunity is so essential. Here, a group of nurses quit their jobs at a nursing home after their employer breached its contract and subjected them to unfair and discriminatory workplace treatment, but only after their shifts had ended and after ensuring coverage would be available for the

patients. A lawyer provided them legal advice about their employment situation and represented them in filing a federal employment and discrimination complaint. The New York nurse-licensing agency and a New York court said the nurses had done nothing wrong. And yet, months later, a prosecutor charged the nurses with criminal patient endangerment and their lawyer with criminal solicitation—effectively seeking to use criminal law to force the nurses to remain in an abusive employment relationship, and to proscribe their lawyer from providing legal advice and petitioning a federal agency for redress. A New York appellate court issued a writ of prohibition to end the prosecution because it clearly violated the nurses' Thirteenth Amendment rights and their attorney's First and Fourteenth Amendment rights. That meant that the defendant prosecutors were "proceeding . . . without or in excess of jurisdiction." [Dissent at 13 (internal quotation marks omitted).]

It is hard to think of a clearer statement that the prosecutors in this case were acting outside their authority. Nor is it easy to think of a fact pattern more suited to the Section 1983 remedy that Congress enacted with the Civil Rights Act of 1871 during the Reconstruction era. Here a state prosecutor attempted to impose indentured servitude in violation of the Thirteenth Amendment and to prevent a lawyer from asserting his clients' federal rights. The Court should rehear this case en banc to reaffirm the longstanding jurisdictional limitation on absolute immunity.

BACKGROUND AND PROCEDURAL HISTORY

Ten nurses were lured from the Philippines by Sentosa—a massive and politically connected New York nursing-home company—which promptly breached promises it had made to them and subjected them to unfair and discriminatory workplace treatment. [Dissent 2] Seeking a way out, the nurses received a referral from the Philippine Consulate for attorney Felix Q. Vinluan, who filed a federal discrimination claim with the U.S. Department of Justice and also advised the nurses they could resign because their employer had committed immigration fraud in inducing them to emigrate and because they were at-will employees—but that they should not do so until *after* completing their shifts. [Dissent 2-3] The nurses did so, but only after completing their shifts and giving between 8 and 72 hours' notice, and after ensuring that their duties would be covered by other employees. [Dissent 3]. In fact, indicted nurse Teresa Ramos, who gave the shortest notice, insisted on staying on for hour hours after her shift even though her replacement was ready to take over her patients at the end of her shift. Dissent at

Sentosa then launched a legal crusade against the nurses and accused them of abandoning vulnerable patients. But the New York State Department of Education, the state's nurse licensing agency, determined that the nurses had done nothing wrong. [Op. 6–7.] The Nassau County Supreme Court held that the

employer was unlikely to succeed in a civil suit against the nurses and their lawyer. [Op. 6–7; Dissent 3]. And the Suffolk County Policy Department took no action on complaint filed by Sentosa. [Op. 7.]

Having struck out before New York's expert agency on nursing, before a judge, and before the police, the employer then turned to the Suffolk County District Attorney's Office (SCDAO). Sentosa representatives met with District Attorney Thomas J. Spota,[1] who promptly assigned the case to Leonard Lato, chief of the insurance crimes bureau. [Op. 7.] Vinluan presented Lato with "significant exculpatory information," including the favorable decisions from the Department of Education and the New York State Supreme Court. [Op. 7 (citation omitted).] He also provided evidence that, "contrary to Sentosa's assertion, none of the Nurse Plaintiffs had ceased work during a shift." [Op. 8 (internal quotation marks omitted).] Despite knowing that the allegations of patient abandonment had already failed repeatedly, and despite being confronted with the evidence that the nurses had abandoned nobody, the SCDAO began an investigation and brought charges

[1] Spota resigned from office on November 10, 2017. He was convicted of obstruction, witness tampering, and conspiracy charges for crimes unrelated to this case in December 2019 and disbarred in June 2020. Spota was sentenced to 5 years in federal prison and a $100,000 fine on August 10, 2021 and began serving his sentence on December 11, 2021. https://www.nbcnewyork.com/news/local/crime-and-courts/former-long-island-prosecutor-begins-prison-sentence/3445845/; https://en.wikipedia.org/wiki/Thomas_Spota#:~:text=Spota%20resigned%20from%20office%20on,fine%20on%20August%2010%2C%202021.

against the nurses for endangering their patients' welfare and against Vinluan for criminal solicitation. [Op. 8.]

After the trial court upheld the indictment, the nurses and Vinluan sought an extraordinary writ of prohibition from the New York Appellate Division, Second Department. [Op. 10.] The Second Department granted it, holding that the prosecution "constitute[d] an impermissible infringement upon [their] constitutional rights . . . and that the issuance of a writ of prohibition to halt these prosecutions is the appropriate remedy in this matter." [Op. 10 (alterations the panel's) (quoting *Vinluan v. Doyle*, 873 N.Y.S.2d 72, 75 (2009)).] That meant that the. prosecutors were "proceeding . . . 'without or in excess of jurisdiction,'" *Vinluan*, 873 N.Y.S.2d at 77 (quoting N.Y. C.P.L.R. § 7803(2)), and that the "act of prosecuting the [plaintiffs] w[as] an excess in power, rather than a mere error of law," *id.* at 78.

The nurses and Vinluan then filed this suit, bringing claims under 42 U.S.C. § 1983 as well as common-law claims of false arrest and malicious prosecution under New York law against the defendants—the County of Suffolk, the Office of the District Attorney of Suffolk County (the "DA's Office"), Spota, and Lato. The complaint alleged that Spota and Lato improperly prosecuted the plaintiffs and also that they fabricated evidence and engaged in other misconduct before a grand jury,

all in violation of the plaintiffs' federal constitutional rights and New York state law.

As the Second Department recognized when issuing the writ of prohibition, Appellants were "threatened with prosecution for crimes for which they [could not] constitutionally be tried," and the " criminal prosecutions constitute[d] an impermissible infringement upon the constitutional rights of these nurses and their attorney." *Vinluan*, 873 N.Y.S.2d at 83.

The United States District Court for the Eastern District of New York (Bianco, J.) found that Appellees were entitled to absolute immunity for pursuing the criminal prosecution, and it dismissed the plaintiffs' claims arising from any alleged misconduct during the prosecutorial stage. *Anilao v. Spota*, 774 F. Supp. 2d 457, 466–68 (E.D.N.Y. 2011) ("*Anilao I*"). The District Court later found Appellees qualifiedly immune for the investigatory stage granting summary judgment in favor of Appellees *Anilao v. Spota*, 340 F. Supp. 3d 224, 250 (E.D.N.Y. 2018) ("*Anilao II*"). e," the court concluded, "no municipal liability can exist against Suffolk County as a matter of law." *Id.* at 251.

This Court affirmed the District Court in a 2-1 decision, with Judge Chin dissenting.

REASONS FOR EN BANC REVIEW

I. THE PANEL CONTRADICTED SUPREME COURT AND SECOND CIRCUIT LAW AND ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF LAW BY DRAMATICALLY EXPANDING ABSOLUTE IMMUNITY TO SHIELD ROGUE GOVERNMENTAL ABUSES.

Longstanding precedent establishes that a prosecutor "who acted *within the scope of his duties* in initiating and pursuing a criminal prosecution . . . is immune from a civil suit for damages under § 1983," but that immunity does not apply if the prosecutor "proceeds in the clear absence of all jurisdiction" or "without any colorable claim of authority." *Shmueli v. City of New York*, 424 F.3d 231, 236–237 (2d Cir. 2005) (emphasis added) (internal quotation marks omitted). Here, a New York appellate court granted a writ of prohibition that required finding that the prosecutor was indeed "proceeding . . . 'without or in excess of jurisdiction.'" *Vinluan*, 873 N.Y.S.2d at 77 (quoting N.Y. C.P.L.R. § 7803(2)). In practical terms, it was obvious to that court—and should have been obvious to the defendants here—that New York law does not give prosecutors jurisdiction nor authority to impose indentured servitude or to punish a lawyer for providing legal advice and asserting his clients' civil rights. By holding that absolute immunity nonetheless applied, the panel majority contravened longstanding precedent on absolute immunity and, without any basis in law, expanded absolute immunity to shield rogue acts of persecution from accountability.

The cases relied upon by the majority, *Barr, Bernard, Shmueli*, for this expansion of absolute immunity are not applicable to the facts of this case. In *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987), an attorney invoked his fifth amendment privilege in response to an order requiring him to appear, answer questions, and produce documents to the Office of the Attorney General (OAG) when it was conducting an investigation into securities fraud. The OAG charged Barr with criminal contempt under PL §215.50 for failure to comply with the order. Barr's motion to dismiss the charges was granted upon the court's finding Barr was within his rights to invoke the Fifth Amendment. Barr then sued under 42 U.S.C. §1983 and the district court granted summary judgment finding that the prosecutors were absolutely immune. In affirming the district court, the Second Circuit held that because Barr's refusal to cooperate impeded the investigation, the OAG had jurisdiction to act. *Id.* at 362. Key to that decision is that the underlying investigation was properly brought. *Id.* Therefore, any acts taken by the OAG under that valid investigation were covered under absolute immunity.

The majority opinion referred to *Barr* as "practically indistinguishable" from the case at bar, finding that in *Barr*, there had also been a writ of prohibition. *Anilao* at 16. But in *Barr*, the prosecution was stopped not when a writ of prohibition was issued but when the trial court dismissed the charges on Barr's motion on the ground that Barr had a fifth amendment right to refuse to answer the

questions posed and to produce the requested documents. *Id.* at 360. In this case, however, the prosecution was prohibited as unconstitutional *ab initio* and there was no set of facts under which the criminal elements of a crime could have been made out. Refusal to answer questions at a valid investigation could be criminal behavior, it just was not criminal in Barr's case because he had a constitutional right to refuse to answer. Here, as stated in the dissent, "[T]he bringing of these charges was beyond the prosecutors' authority . . . for as a factual matter the indictment charged only legally permissible conduct. Dissent at 8.

Bernard v. County of Suffolk, 356 F.3d 495, 504 (2d Cir. 2004) is also inapposite. The Second Department reversed the district court's denial of dismissal of a complaint against the Suffolk County District Attorney's Office where plaintiffs alleged they were arrested without probable cause and because the prosecution was political-motivated. *Id.* But in the opinion the Second Circuit stated

> The appropriate inquiry, thus, is not whether authorized acts are performed with a good or bad motive, but whether the acts at issue are beyond the prosecutor's authority. Accordingly, where a prosecutor is sued under § 1983 for unconstitutional abuse of his discretion to initiate prosecutions, a court will begin by considering *whether relevant statutes authorize prosecution for the charged conduct.* If they do not, absolute immunity must be denied.

Id. (emphasis added). The conduct alleged by the indictment and the evidence presented in the Grand Jury do not authorize charging the Appellants here. Again, the proof of that is the indictment which only alleges legal conduct.

Similarly, in *Shmueli v. City of New York*, 424 F.3d 231, (2d. Cir. 2005), this Court dismissed the plaintiff's complaint that his civil rights were violated when he was prosecuted for aggravated harassment based on false allegations and due to a personal motive of the prosecutor. *Id.* at 237-238. There was no dispute that the allegations set forth by the complainant if true, made out a prosecutable offense covered by relevant penal statutes. Here, however, even if the allegations in the indictment were true, they do not make out a crime.

From the beginning of the investigation, there was no factual basis for anyone to find that the nurses had abandoned their patients or exposed them to harm. There was no factual basis to believe that Vinluan has conspired with the nurses to expose the patients to harm or that Vinluan in any way importuned his clients to engage in criminal activity. As every reviewing governmental body that looked at the facts determined, the facts clearly established that all Appellants had behaved legally. That is why the indictment only alleges legal conduct; because there is no illegality to be alleged.

As the Second Department found, prosecutors lack authority and act without jurisdiction when they bring criminal charges for wholly legal conduct.

Expanding absolute immunity to this scenario abrogates the long-standing exemption to the doctrine for when prosecutors abuse their office by acting outside their authority.

II. APPELLEES SHOULD NOT HAVE BEEN AFFORDED QUALIFIED IMMUNITY ON SUMMARY JUDGMENT BECAUSE A REASONABLE JURY COULD HAVE FOUND THAT DEFENDANTS LIED AND PRESENTED FALSE EVIDENCE TO THE GRAND JURY.

The panel also ruled that the Appellees were protected by qualified immunity for their investigatory conduct because there was insufficient evidence for a jury to find that the prosecutors had deceived the jury. Op. 34. Appellants argued that the lack of any constitutional basis was evident from the moment the Appellees learned of the State Education Department decision exonerating the nurses. Appellees from the start of their investigation were in possession of all the relevant facts establishing that no illegality occurred. So, the same argument that exempts Appellees from the protection of absolute immunity also exempts them from receiving qualified immunity as there was no basis to move forward under the "objective reasonableness" standard long applied to qualified immunity review instead seemingly requiring direct evidence of collusion between Appellees and Sentosa. Op. 35

In finding that qualified immunity applies, the majority ignored several facts and the logical conclusions therefrom. For example, in presenting the case to

the Grand Jury, Lato falsely and repeatedly referred to the nurses "who walked out without notice." App'x at 380; see also App'x at 378. This direct lie was not mentioned by the majority at all. With regard to Sentosa nurse recruiter Francris Luyun, who provided the scant evidence there was regarding Appellant Vinluan, the majority found that there was no evidence that Appellee Lato met with Luyun. Op. 35. Yet in the same paragraph the majority also notes that Lato testified that he met with all the Grand Jury witnesses prior to their testifying. Also, the majority notes that Lato had received an advertisement for Vinluan's legal services yet allowed Luyun to falsely testify that Vinluan was advertising as a nurse recruiter. *Id.*at 35. While there was no direct evidence that Lato knew Luyun was perjuring himself, it was a fair inference since Lato had met with Luyun and had the ad in his possession; furthermore, allowing Luyun to testify falsely about the only piece of evidence even remotely relating to Appellee Vinluan when he had documentary proof of its falsity in his file is "willful blindness" which is the equivalent of actual fraud and lack of good faith. *See, e.g., SIPC v. BLMIS, LLC*, 2021 Bankr. LEXIS 2101 (U.S. S.D.N.Y. Bankr. Ct. 2021).

Similarly, Appellants alleged Lato allowed Sentosa lawyer Sarah Lichtenstein to testify falsely that there was "no material difference" between the sponsoring entity and the entity to which the Appellants were assigned to work (A603-604). But this was a matter of simple documentary proof that the nurses

had been working at the corporate entity Avalon Gardens Rehabilitation and Health Care Center but none of the nurses were sponsored by Avalon; they were sponsored as direct hire nurses from different legal entities. And when a grand juror asked Lato if Luyun knew "of any of the nurses that left and went to work for Vinluan's organization," it was Lato and not Luyun who responded "[y]es." App'x at 658. This was a lie as there was no "Vinluan organization" and no nurse went to work for any entity that Vinluan had even represented as an attorney. Lato also had in his file the Supreme Court Order denying Sentosa a preliminary injunction because Sentosa had no likelihood of success on the merits of its claim that Vinluan had interfered with its contractual relationship with the nurses.

Finally, as the dissent noted, Lato also withheld from the Grand Jury evidence that the State Education Department had exonerated the nurses of any wrongdoing. Lato harped on the false "walking out" theme by relying on State Education Department guidelines stating, "the Education Law says that if a medical professional, doctor or nurse, walks out in the middle of a shift, that would be abandonment." R. at 381. Lato permitted one witness to testify that at a different facility "nine Filipino nurses" resigned at the same time, three of them during their shifts and then falsely testify that at Avalon Gardens "nine nurses did the same thing, that they handed [in] their resignation similar to the resignation[s] . . . in Brookhaven." App'x at 649-50. Lato also "made up" the charge he read to the

Grand Jury about the nurses' obligations – conflating the obligations owed by a nurse to a patient with the obligation owed to an employer. This language was set forth in the indictment.

Qualified immunity turns on "the objective legal reasonableness of the action," *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (internal quotation marks omitted), and as the Supreme Court has repeatedly observed, "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ziglar v. Abassi*, 137 S. Ct 1843, 1867 (2017) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). There certainly was sufficient circumstantial evidence of either intentional fabrication or willful blindness. There was a mountain of evidence of incompetence and indifference to Appellants' constitutional rights. Here, there was ample evidence that the prosecutors willfully misled the jury by making false statements to the Grand Jury; withholding exculpatory material; and presenting false testimony and grossly misleading accounts. In examining summary judgment all reasonable inferences must be decided in favor of the non-movant. *Santiago v. Joyce*, 127 A.D.3d 954 (2d Dep't 2015).

Examined under an objective reasonableness standard, a jury could find that Lato and Spota could not have believed that it was reasonable to start this investigation and prosecute the Appellants. *See, Malley v. Briggs*, 475 U.S. 335,

341 (1986). En banc review is merited to address this egregious prosecutorial overreach.

CONCLUSION

For the reasons set forth above, we respectfully request that the Court grant this petition for rehearing en banc.

Dated: March 21, 2022

/s/Oscar Michelen
OSCAR MICHELEN
Attorney for Appellant Vinluan

/s/Paula S. Frome
PAULA S. FROME
Attorney for Appellant Nurses

CERTIFICATION OF COMPLIANCE

PURSUANT TO CIRCUIT RULES 35-4(a) AND
40-1(a) FOR CASE NO. 19-3949-cv

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) and Circuit Rule 40-1 because this brief contains 3,293 words.

Dated: March 21, 2022

Respectfully submitted,

s/Oscar Michelen
OSCAR MICHELEN

ADDENDUM

**UNITED STATES COURT
OF APPEALS
FOR THE SECOND CIRCUIT**

August Term, 2020

(Argued: December 4, 2020 Decided: March 9, 2022)

Docket No. 19-3949-cv

JULIET ANILAO, HARRIET AVILA, MARK DELA CRUZ, CLAUDINE GAMAIO, ELMER JACINTO, JENNIFER LAMPA, RIZZA MAULION, THERESA RAMOS, RANIER SICHON, AND JAMES MILLENA,

Plaintiffs-Counter-Defendants-Appellants,

FELIX Q. VINLUAN,

Plaintiff-Appellant,

v.

THOMAS J. SPOTA, III, INDIVIDUALLY AND AS DISTRICT ATTORNEY OF SUFFOLK COUNTY, OFFICE OF THE DISTRICT ATTORNEY OF SUFFOLK COUNTY, LEONARD LATO, INDIVIDUALLY AND AS AN ASSISTANT DISTRICT ATTORNEY OF SUFFOLK COUNTY, COUNTY OF SUFFOLK, KARLA LATO, AS ADMINISTRATOR OF THE ESTATE OF LEONARD LATO,

Defendants-Appellees,

SUSAN O'CONNOR, NANCY FITZGERALD, SENTOSA CARE, LLC, AVALON GARDENS REHABILITATION

AND HEALTH CARE CENTER, PROMPT NURSING EMPLOYMENT AGENCY, LLC, FRANCRIS LUYUN, BENT PHILIPSON, BERISH RUBINSTEIN,

Defendants-Counter-Claimants.[*]

Before:

SACK, CHIN, and LOHIER, *Circuit Judges*.

Ten nurses and their former attorney filed claims under 42 U.S.C. § 1983 as well as common-law claims of false arrest and malicious prosecution under New York law against the defendants, including the District Attorney of Suffolk County and one of his bureau chiefs. The two principal questions presented on appeal are whether the individual defendants were entitled to absolute immunity for the actions they undertook as prosecutors, and whether there was any admissible evidence showing that they violated the plaintiffs' constitutional rights during the investigative phase of the case. Because we agree with the United States District Court for the Eastern District of New York (Bianco, J.) that the defendants were entitled to absolute immunity from claims arising from the prosecutorial phase of the case and to summary judgment on the remaining claims arising from the investigative phase of the prosecution, we **AFFIRM**.

Judge Chin dissents in a separate opinion.

STEPHEN L. O'BRIEN, O'Brien & O'Brien, LLP, Nesconset, NY, *for Defendant-Appellee* Thomas J. Spota, III.

BRIAN C. MITCHELL, Assistant County Attorney, Suffolk County Attorney's Office, Hauppauge, NY, *for Defendants-Appellees* County of Suffolk and Karla Lato, as Administrator of the Estate of Leonard Lato.

---

[*] The Clerk of Court is directed to amend the caption as set forth above.

OSCAR MICHELEN, Cuomo LLC, Mineola, NY, *for Plaintiff-Appellant* Felix Vinluan.

PAULA SCHWARTZ FROME (James O. Druker, *on the brief*), Kase & Druker, Esqs., Garden City, NY, *for Plaintiffs-Counter-Defendants-Appellants* Juliet Anilao, Harriet Avila, Mark Dela Cruz, Claudine Gamaio, Elmer Jacinto, Jennifer Lampa, Rizza Maulion, Theresa Ramos, Ranier Sichon, and James Millena.

LOHIER, *Circuit Judge*:

Ten nurses and their former attorney, Felix Vinluan, filed claims under 42 U.S.C. § 1983 as well as common-law claims of false arrest and malicious prosecution under New York law against the defendants — the County of Suffolk, the Office of the District Attorney of Suffolk County (the "DA's Office"), Thomas J. Spota, III, the District Attorney of Suffolk County, and Leonard Lato, an Assistant District Attorney who was at all relevant times the Chief of the Insurance Crimes Bureau at the DA's Office. The plaintiffs allege that Spota and Lato improperly prosecuted them for child endangerment, endangerment of a physically disabled person, and related charges by fabricating evidence and engaging in other improper conduct before a grand jury, in violation of the plaintiffs' federal constitutional rights and New York state law. The state prosecution ended only when a New York state appellate

court concluded that the plaintiffs were being "threatened with prosecution for crimes for which they cannot be constitutionally tried." Matter of Vinluan v. Doyle, 873 N.Y.S.2d 72, 83 (2d Dep't 2009). The United States District Court for the Eastern District of New York (Bianco, J.) found that Spota and Lato were entitled to absolute immunity for starting the criminal prosecution and presenting the case to the grand jury, and it dismissed the plaintiffs' claims arising from any alleged misconduct during that prosecutorial stage. Anilao v. Spota, 774 F. Supp. 2d 457, 466–68 (E.D.N.Y. 2011) ("Anilao I"). The District Court later granted summary judgment in favor of the prosecutors and the DA's Office as to the remaining claims after concluding that there was insufficient evidence that Spota or Lato had violated the plaintiffs' constitutional rights during the investigative phase of the criminal proceedings. Anilao v. Spota, 340 F. Supp. 3d 224, 250 (E.D.N.Y. 2018) ("Anilao II"). And "given the absence of any underlying constitutional violation in the investigative stage," the court concluded, "no municipal liability can exist against Suffolk County as a matter of law." Id. at 251.

For the reasons that follow, we affirm the District Court's judgment. Although Spota and Lato may have unlawfully penalized the plaintiffs for

exercising the right to quit their jobs on the advice of counsel, under our precedent both of them are entitled to absolute immunity for their actions during the judicial phase of the criminal process. As for the plaintiffs' claim that Spota and Lato fabricated evidence during the investigative phase of the criminal process, we agree with the District Court that there was insufficient admissible evidence of fabrication to defeat summary judgment. We therefore affirm.

BACKGROUND

Sentosa Care, LLC ("Sentosa")[1] operates health care facilities throughout New York and recruited the nurse plaintiffs from the Philippines to work in various Sentosa nursing home facilities on Long Island, New York. Each nurse signed an employment contract that required the nurses to work for at least three years or face a $25,000 penalty. When they arrived in New York, the nurses learned that they would be working for an employment agency, not Sentosa, and that the agency had assigned them to work at

[1] Sentosa, Avalon Gardens Rehabilitation and Health Care Center, Prompt Nursing Employment Agency LLC, Francris Luyun, Bent Philipson, Berish Rubinstein, Susan O'Connor, and Nancy Fitzgerald were originally defendants in this case, but they are not parties to this appeal.

Avalon Gardens Rehabilitation and Health Center ("Avalon"), a nursing home for both adults and children.

Following a relatively brief stint at Avalon, the nurses began to complain about their working and living conditions — longer than expected work shifts, overcrowded and substandard housing, lower insurance benefits and pay, and less vacation time than their contracts provided. The nurses also voiced their concerns to the Philippine Consulate in New York, which referred them to Vinluan, an immigration and employment attorney, for advice. After speaking with the nurses and evaluating the facts, Vinluan concluded that Sentosa had breached its contracts with the nurses and advised them that they were free to resign from their positions without legal repercussion once their shifts ended. Based on Vinluan's advice, on April 7, 2006, all ten nurses resigned either after their shift was over or in advance of their next shift.

Soon after the nurses resigned, Sentosa filed a complaint with the New York State Department of Education, which licenses and regulates nurses. The company also filed a complaint in Nassau County Supreme Court to enjoin the nurses and Vinluan from speaking to other nurses about resigning.

It even filed a complaint with the Suffolk County Police Department. None of Sentosa's complaints led to any action against the plaintiffs, however, and on September 28, 2006, the Department of Education closed the case after determining that the nurses had not engaged in any professional misconduct or deprived any patient of nursing care.

Unfazed, Sentosa continued its campaign against the plaintiffs. It finally found a receptive audience in Spota. Not long after representatives of Sentosa met with Spota to urge the DA's Office to file criminal charges against the nurses for imperiling the health and safety of Avalon's patients, Spota assigned the criminal investigation to Lato. Lato then quickly interviewed the plaintiffs, as well as other witnesses, like Francris Luyun, the head of Sentosa's recruitment agency.

In defense of the plaintiffs, who were now plainly the targets of a criminal investigation, Vinluan presented Lato with "significant exculpatory information." App'x 55. Among other things, Vinluan pointed to the fact that the Department of Education and the New York State Supreme Court had declined to act against the nurses. He also provided "information . . .

that," contrary to Sentosa's assertion, "none of the Nurse Plaintiffs had ceased work during a shift." App'x 55.

Lato was unpersuaded by Vinluan's arguments and presented several witnesses to a grand jury in Suffolk County. Among the witnesses were several Sentosa employees, an investigator in the DA's Office, a nurse who had also resigned but who is not a party to this appeal, and a nurse who filled in at Avalon immediately after the nurse plaintiffs resigned. The grand jury returned an indictment charging the nurses and Vinluan with (1) conspiracy in the sixth degree, in violation of New York Penal Law (N.Y.P.L.) §§ 105.00 and 105.20; (2) endangering the welfare of a child, in violation of N.Y.P.L. §§ 260.10(1) and 20.00; and (3) endangering the welfare of a physically disabled person, in violation of N.Y.P.L. §§ 260.25 and 20.00. Vinluan was also charged with criminal solicitation in the fifth degree, in violation of N.Y.P.L. § 100.00.

In response, the nurses and Vinluan moved in New York State Supreme Court in Suffolk County to, among other things, dismiss the charges against them. All of them insisted that their conduct was not criminal and that, in any event, the indictment was not supported by sufficient evidence. They also argued that the prosecution violated their constitutional rights. The

nurses claimed that the prosecution violated their rights under the Thirteenth Amendment of the federal Constitution, which, with one exception not relevant here, prohibits any form of involuntary or forced labor without pay. Vinluan argued that the prosecution against him violated his First Amendment rights to free speech and to association in connection with providing counsel to his clients.

The state court rejected the plaintiffs' claims of insufficient evidence, holding that "the evidence [was] legally sufficient to support [all] the charges contained in the indictment" and "that each count of the indictment properly charges these defendants with a crime . . . ." App'x 814.[2] The court also rejected the plaintiffs' constitutional arguments. With respect to the nurses' constitutional challenge, the state court concluded that "[t]here is absolutely no evidence to suggest that this prosecution in any way violates the rights of any of these defendants under the Thirteenth Amendment to the United

[2] The state court also explained that "[i]n the context of a Grand Jury proceeding, legal sufficiency means prima facie proof of the crimes charged," a standard significantly lower than the proof beyond a reasonable doubt required at a criminal trial. App'x 814–15. "Under these standards of review," the court said, "there was ample evidence before the Grand Jury to support all counts of the indictment against [the nurses and Vinluan]." App'x 815.

States Constitution." App'x 815. As for Vinluan's First Amendment challenge, the court determined, there was "no basis to disturb" the grand jury's finding that there was "sufficient evidence that [Vinluan] had entered into an agreement to perform an act which would endanger the welfare of children and disabled persons and that an overt act was committed in furtherance of that agreement." App'x 819.

Having failed to persuade the state court to dismiss the indictment against them, the plaintiffs petitioned the New York Appellate Division, Second Department for a writ of prohibition. See N.Y. C.P.L.R. § 7803(2). In January 2009 the Appellate Division granted the writ, which we describe further below, after finding that the prosecution of the nurses and of Vinluan "constitute[d] an impermissible infringement upon [their] constitutional rights . . . and that the issuance of a writ of prohibition to halt these prosecutions is the appropriate remedy in this matter." Vinluan, 873 N.Y.S.2d at 75. In its decision granting the writ, the Appellate Division explained that the nurses had not committed a crime by ending their employment at will, since they had "resigned after the completion of their shifts, when the pediatric patients at Avalon Gardens were under the care of other nurses and

staff members," id., and that Vinluan's good faith legal advice was likewise protected from prosecution under the First and Fourteenth Amendments, id. at 82–83. But the Appellate Division also explicitly acknowledged that "the [New York] Penal Law provisions relating to the endangerment of children and the physically disabled . . . do not on their face infringe upon Thirteenth Amendment rights by making the failure to perform labor or services an element of a crime," and that under "exceptional circumstance[s]," restrictions of an individual's Thirteenth Amendment rights may be warranted. Id. at 80–81. The problem with the prosecution, the court explained, was that the "District Attorney proffer[ed] no reason why this [was] an 'extreme case.'" Id. at 81.

The plaintiffs started this federal litigation in 2010. The complaint alleges, among other things, that Spota and Lato acted in concert with Sentosa to secure an indictment that they knew violated the plaintiffs' constitutional rights and that they lacked probable cause to bring in the first instance. In particular, the complaint asserts that "the Grand Jury was not properly charged as to the law," was "falsely informed that one or more of the nurses had resigned and left the facility before completing his or her shift," and was

"not informed that the Education Department had previously determined that the Nurse Plaintiffs had not violated the very regulations which they were indicted for violating." App'x 56. The complaint also alleges that at Sentosa's behest, Spota and Lato sought to punish the nurses for resigning from their employment at Avalon and discourage others from doing the same. Finally, the complaint claims that the County is liable under the principles of municipal liability announced in Monell v. Department of Social Services, 436 U.S. 658 (1978).

The defendants filed a motion to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The District Court granted the motion in part as to any claims arising from Spota and Lato's actions during the non-investigative, prosecutorial phase of their case against the plaintiffs, including the selection of charges, the initiation of the prosecution, and the presentation of testimony and evidence to the grand jury. As to those claims, the District Court concluded, Spota and Lato were entitled to absolute immunity from suit. See Anilao I, 774 F. Supp. 2d at 479–81.

But the District Court declined to dismiss on absolute immunity grounds the plaintiffs' claims arising from any alleged prosecutorial

misconduct by Spota or Lato during the investigative phase of the case, finding instead that the defendants were at most entitled only to qualified immunity. Id. at 477, 482. For that reason, to the extent that the complaint plausibly alleged that Spota and Lato had violated the plaintiffs' constitutional rights during the investigative phase, the District Court decided that the case would have to proceed past the pleading stage to discovery and summary judgment. See id. at 485, 493. After discovery, however, the District Court granted summary judgment in favor of the defendants because "there [wa]s simply no evidence in the record that [Spota and Lato] engaged in any constitutional wrongdoing in the investigative stage of the case," Anilao II, 340 F. Supp. 3d at 234. This was so even though the District Court had previously recognized (in Anilao I) that the case involved the "highly unusual set of circumstances in which the police not only lacked involvement in the investigation of [the plaintiffs] but also had expressly declined to investigate" them. Anilao I, 774 F. Supp. 2d at 481. The District Court then also dismissed the Monell claim against the County because there was no underlying constitutional violation. Anilao II, 340 F. Supp. 3d at 251.

This appeal followed.

DISCUSSION

The two questions presented on appeal are whether Spota and Lato were entitled to absolute immunity for the actions they undertook as prosecutors, and whether there was any evidence showing that they violated the plaintiffs' constitutional rights during the investigative phase of the prosecution, a phase with respect to which they are entitled at most only to qualified immunity. We address each question in turn.

I

The doctrine of absolute immunity applies broadly to shield a prosecutor from liability for money damages (but not injunctive relief) in a § 1983 lawsuit, even when the result may be that a wronged plaintiff is left without an immediate remedy.[3] See Imbler v. Pachtman, 424 U.S. 409, 427 (1976). Our cases make clear that prosecutors enjoy "absolute immunity from

[3] Recognizing that it would be unjust to allow prosecutorial misconduct to go unpunished and that absolute immunity does not render the public powerless, we have pointed to other methods, such as criminal and professional sanctions, to deter and redress wrongdoing. See Schloss v. Bouse, 876 F.2d 287, 292 (2d Cir. 1989); see also Imbler, 424 U.S. at 429 & n.29.

§ 1983 liability for those prosecutorial activities intimately associated with the judicial phase of the criminal process."[4] Barr v. Abrams, 810 F.2d 358, 361 (2d Cir. 1987) (quotation marks omitted). The immunity covers "virtually all acts, regardless of motivation, associated with [the prosecutor's] function as an advocate." Hill v. City of New York, 45 F.3d 643, 661 (2d Cir. 1995) (quoting Dory v. Ryan, 25 F.3d 81, 83 (2d Cir. 1994)). For example, a prosecutor enjoys absolute immunity when determining which offenses to charge, initiating a prosecution, presenting a case to a grand jury, and preparing for trial. See id.; Imbler, 424 U.S. at 431 (concluding that a prosecutor is absolutely immune from a § 1983 suit for damages based on his "initiating a prosecution and . . . presenting the State's case"). For that reason, we have held that absolute immunity extends even to a prosecutor who "conspir[es] to present false evidence at a criminal trial. The fact that such a conspiracy is certainly not something that is properly within the role of a prosecutor is immaterial,

[4] To be clear, § 1983 itself does not mention absolute prosecutorial immunity (or, for that matter, any immunity). It is a judicially created doctrine that has developed over time.

because the immunity attaches to his function, not to the manner in which he performed it." Dory, 25 F.3d at 83 (cleaned up).

"Thus, unless a prosecutor proceeds in the clear absence of all jurisdiction, absolute immunity [from § 1983 liability] exists for those prosecutorial activities intimately associated with the judicial phase of the criminal process." Barr, 810 F.2d at 361 (emphasis added); see Shmueli v. City of New York, 424 F.3d 231, 237 (2d Cir. 2005). "Conversely, where a prosecutor acts without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy" and is left with only qualified immunity as a potential shield. Barr, 810 F.2d at 361 (emphasis added); see Shmueli, 424 F.3d at 237. "[A] limitation upon the immunity," Chief Judge Hand explained, "[is] that the official's act must have been within the scope of his powers," but this does not mean that "to exercise a power dishonestly is necessarily to overstep its bounds." Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.). Instead, "[w]hat is meant by saying that the officer must be acting within his power cannot be more than that the occasion must

be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." Id.

A narrow limitation to the scope of absolute immunity in § 1983 actions thus exists where the defect is jurisdictional — that is, where the prosecutor acted well outside the scope of authority, rather than where the defect relates, as here, to the prosecutor's motivation or the reasonableness of his official action. The jurisdictional defect must be clear and obvious. "In considering whether a given prosecution was clearly beyond the scope of that jurisdiction, or whether instead there was at least a colorable claim of authority, . . . we inquire whether" any relevant criminal statute exists that "may have authorized prosecution for the charged conduct." Shmueli, 424 F.3d at 237; see, e.g., Lerwill v. Joslin, 712 F.2d 435, 440 (10th Cir. 1983) (prosecutor who initiates prosecution under statutes he is not authorized to invoke is afforded absolute immunity if he "is arguably empowered to prosecute the alleged

conduct under some statute" and "the statute he incorrectly invokes also arguably applies to the criminal defendant's alleged conduct").[5]

So "[e]ven if a prosecutor may lose his absolute immunity for prosecutorial acts for which he has no colorable claim of authority," it is not lost "immediately upon crossing the technical bounds of the power conferred on him by local law," or "simply because he acted in excess of his authority." Lerwill, 712 F.2d at 439; see Ashleman v. Pope, 793 F.2d 1072, 1076–77 (9th Cir. 1986) (en banc) (unanimously holding that prosecutor was entitled to absolute immunity after overruling prior Ninth Circuit holding that prosecutor who "files charges he or she knows to be baseless . . . is acting outside the scope of his or her authority and thus lacks immunity" (quotation marks omitted)). Instead, "absolute immunity must be denied" only where there is both the absence of all authority (because, for example, no statute authorizes the prosecutor's conduct) and the absence of any doubt that the

[5] If the laws authorize prosecution for the charged crimes, a prosecutor may still be liable if he "has intertwined his exercise of authorized prosecutorial discretion with other, unauthorized conduct." Bernard v. County of Suffolk, 356 F.3d 495, 504 (2d Cir. 2004). Cited examples in which officials act clearly outside the scope of their powers include charging decisions that are accompanied by unauthorized demands for a bribe, sexual favors, the defendant's performance of a religious act, or the like. See id. Presumably no statute would authorize those acts under any circumstances.

challenged action falls well outside the scope of prosecutorial authority. Bernard v. County of Suffolk, 356 F.3d 495, 504 (2d Cir. 2004). In the vast majority of cases "the laws do authorize prosecution for the charged crimes," id. (emphasis added), and if the charging decision or other act is within the prosecutor's jurisdiction as a judicial officer, then absolute immunity attaches to their actions "regardless of any allegations" that their "actions were undertaken with an improper state of mind or improper motive," Shmueli, 424 F.3d at 237. Prosecutors thus have absolute immunity in a § 1983 action even if it turns out that "state law did not empower [them] to bring the charges," so long as "they have at least a semblance of jurisdiction" that does not run far afield of their job description. Barr, 810 F.3d at 361 (declining to adopt "a holding that a prosecutor is without absolute immunity the moment he strays beyond his jurisdictional limits," because doing so would "do violence to [the] spirit" of the doctrine).

These governing principles of law are well established and are not questioned by the parties on appeal — so much so that the plaintiffs recognize that the doctrine of absolute immunity creates a "formidable obstacle" to their cause of action. Appellants' Br. at 29 (quotation marks

omitted). Nevertheless, the plaintiffs contend that the very narrow exception to absolute immunity for prosecutorial acts that we have just described applies to the facts of this case. We disagree.

We start with our decision in Barr. There the plaintiff had been questioned by the State prosecutor's office as part of an investigation into alleged violations of state securities law. The plaintiff refused to answer any questions and invoked his Fifth Amendment right to remain silent. See 810 F.2d at 359–60. In response, the prosecutors charged the plaintiff with criminal contempt in violation of New York's penal law. See id. at 360. The contempt charge was eventually dismissed in state court on the ground that the plaintiff had merely exercised his Fifth Amendment right. Id. The plaintiff then filed a § 1983 civil damages action against the prosecutors, which the district court dismissed. On appeal, we held that the prosecutors were entitled to absolute immunity because they were broadly authorized by statute to pursue criminal contempt charges — even though they had trampled the plaintiff's Fifth Amendment rights. Id. at 362.

Likewise, in Bernard we considered whether county prosecutors were entitled to absolute immunity for their politically motivated investigation and

prosecution of the plaintiffs without probable cause. See 356 F.3d at 497–98. The plaintiffs alleged that the prosecutors had sought indictments without probable cause and "knowingly present[ed] false evidence to, while at the same time withholding exculpatory evidence from, the various grand juries that returned the[] flawed indictments." Id. at 503. We held that even in the absence of probable cause, "as long as a prosecutor acts with colorable authority, absolute immunity shields his performance of advocative functions regardless of motivation." Id. at 498, 505; see also id. at 503 (collecting cases in which prosecutors were absolutely immune for initiating prosecutions without probable cause and/or presenting false evidence to a grand jury).[6] In doing so, we reaffirmed the principle that "[w]here, as in this case, a prosecutor's charging decisions are not accompanied by any . . . unauthorized demands," such as for a bribe or sexual favors, "the fact that improper motives may influence his authorized discretion cannot deprive him of

[6] We therefore reversed the decision of the district court in Bernard, which had denied the defendants' motion to dismiss as to the advocative misconduct claim on the ground that an improper political motive could take prosecutorial decisions and the prosecutor's conduct before the grand jury outside the scope of official functions shielded by absolute prosecutorial immunity. 356 F.3d at 505.

absolute immunity." Id. at 504; see Dorman v. Higgins, 821 F.2d 133, 139 (2d Cir. 1987) (holding that "absolute immunity spares the official any scrutiny of his motives" so that allegations of "bad faith or . . . malice [cannot] defeat[ ] a claim of absolute immunity").

In Shmueli, decided a year after Bernard, we held that absolute immunity applied to protect local prosecutors who engaged in conduct that, if it occurred, was nothing short of outrageous. The plaintiff alleged that two New York County Assistant District Attorneys maliciously prosecuted her for aggravated harassment of her former domestic partner "despite knowing that the charges against her were false and that [she] was innocent" of those charges. 424 F.3d at 233. The plaintiff also alleged that the prosecutors made several threatening phone calls to her home during the prosecution. Id. at 233–34. The district court rejected the prosecutors' defense of absolute immunity because they acted "without clear jurisdiction and without any colorable claim of authority." Id. at 235. We reversed, holding that the district court had improperly "equat[ed] an allegedly improper prosecutorial state of mind with a lack of prosecutorial jurisdiction." Id. Absolute immunity, we explained, shielded the prosecutors' conduct because the

indictment contained allegations that, even if completely false, could authorize the prosecutors to prosecute Shmueli under the New York Penal Law prohibiting aggravated harassment in the second degree. Id. at 238–39.[7] The prosecutors' "jurisdiction . . . to prosecute Shmueli," we said, "depended on the authority conferred by the New York statutes" — no more, no less. Id. at 238.

We have extended absolute immunity to prosecutorial misconduct that was arguably more reprehensible than the conduct in Shmueli. See, e.g., Pinaud v. County of Suffolk, 52 F.3d 1139, 1148 (2d Cir. 1995) (granting

[7] Our sister circuits have similarly held that a prosecutor who initiates a prosecution with improper motives and without probable cause is absolutely immune from a claim for damages in a § 1983 action, even where the prosecutor's alleged misconduct during the judicial stage was reprehensible and violated the plaintiffs' constitutional rights. See, e.g., Jones v. Cummings, 998 F.3d 782, 784–85, 788 (7th Cir. 2021) (prosecutors alleged to have maliciously filed untimely amendment to plaintiff's criminal charges, which increased his term of imprisonment by several decades); Sample v. City of Woodbury, 836 F.3d 913, 915–16 (8th Cir. 2016) (city prosecutors filed criminal charges against plaintiff despite conflict of interest that arose because they represented the alleged victim in other domestic civil actions); Kulwicki v. Dawson, 969 F.2d 1454, 1464 (3d Cir. 1992) (prosecutor entitled to absolute immunity after bringing baseless conspiracy and attempted infant trafficking charges against political rival who merely tried to help family through adoption process); Ashleman, 793 F.2d at 1076–77 (prosecutor allegedly conspired with judge to predetermine outcome of a judicial proceeding); Lerwill, 712 F.2d at 43637 (city prosecutor initiated prosecution based on state felony statute, which he had no authority to enforce).

absolute immunity to prosecutors who improperly sought to increase plaintiff's bail; made false representations to prompt a plea agreement which they later breached; manufactured a bail jumping charge; lied to the Bureau of Prisons; and unnecessarily transferring plaintiff from county to state jail); Dory, 25 F.3d at 83 (granting absolute immunity to prosecutor who allegedly participated in a conspiracy to present false evidence at trial).

The lessons and holdings of Barr, Bernard, and Shmueli are hard to escape in this case. There is no dispute on appeal that the District Attorney was authorized by statute to prosecute the plaintiffs for endangering children and physically disabled persons, for conspiring to do the same, and for soliciting others to do so.[8] Neither the dissent nor the plaintiffs propose that

[8] The dissent suggests that the indictment does not charge any criminal objectives of the conspiracy. Respectfully, the suggestion is wrong, as it rests on the indictment's most innocuous allegations and sidesteps the indictment's most serious allegations of criminal endangerment, which, under New York law and contrary to the dissent's view, requires only the threat of harm, not actual harm. See People v. Hitchcock, 98 N.Y.2d 586, 589 (2002) ("Under Penal Law § 60.10(1), a person endangers the welfare of a child when '[h]e knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.'"); see, e.g., App'x 1405 ("The defendants pursued their objective without regard to the consequences that their pursuit would have on Avalon Gardens' pediatric patients. The defendants agreed that the defendant nurses, including all the available nurses who cared for children on ventilators, would resign without giving Avalon Gardens notice. The defendants did so knowing that their resignations and the prior

the state Supreme Court of Suffolk County lacked jurisdiction over the offense. Instead, the plaintiffs submit only that the prosecutors in this case had no power to act as they did — not because they lacked the statutory authority to do so, but because their conduct violated the nurses' rights under

---

resignations at other Sentosa Care facilities would render it difficult for Avalon Gardens to find, in a timely manner, skilled replacement nurses for Avalon Gardens' pediatric patients, particularly the terminally ill JB, the child NL and the ventilated children NC, BC, TM and TT."). It is not enough to criticize, as the dissent does, the manner in which the prosecutors performed their "quintessential prosecutorial functions" of evaluating the evidence and initiating a criminal prosecution. Shmueli, 424 F.3d at 237. As we have already noted, absolute immunity "attaches to [the prosecutor's] function" or task, "not the manner in which he performed it." Dory, 25 F.3d at 83 (quoting Barrett v. United States, 798 F.2d 565, 573 (2d Cir. 1986)); see also Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (explaining that a prosecutor's "professional evaluation of the evidence" is protected by absolute immunity); Bernard, 356 F.3d at 505. And "whether a given prosecution was clearly beyond the scope of the prosecutor's jurisdiction" or function, "and so whether absolute immunity applies, depends on "whether the pertinent statutes may have authorized prosecution for the charged conduct." Shmueli, 424 F.3d at 237. In this case, even the Appellate Division acknowledged that, under New York law, "an employee's abandonment of his or her post in an 'extreme case' may constitute an exceptional circumstance which warrants infringement upon the right to freely leave employment." Vinluan, 873 N.Y.S.2d at 81. There can be no serious dispute under New York law that the claim of child endangerment was at least a colorable one that the prosecutors had authority to charge.

the Thirteenth Amendment and Vinluan's rights under the First Amendment. See Appellants' Br. at 33, 42.

In advancing their argument, the plaintiffs take their cue from the state appellate court's earlier conclusion in this case that "no facts suggesting an imminent threat to the well being of the children have been alleged." Vinluan, 873 N.Y.S.2d at 82. They also argue that Spota and Lato knew or should have known at the outset of the case that their prosecution of the plaintiffs was constitutionally infirm. But fundamentally, in our view, these arguments relate to the existence or absence of probable cause — not, as Barr, Bernard, and Shmueli instruct us to consider, the defendants' statutory authority to pursue the prosecution in the first place. As already noted, under our precedent absolute immunity shields Spota and Lato for their prosecutorial and advocative conduct even in the absence of probable cause and even if their conduct was entirely politically motivated. See, e.g., Shmueli, 424 F.3d at 237–38 (improper motive does not factor into absolute immunity analysis);[9] accord Bernard, 356 F.3d at 505; see also Buckley v.

[9] As we stated in Shmueli:

Fitzsimmons, 509 U.S. 259, 274 n.5 (1993) (explaining that a prosecutor's entitlement "to absolute immunity for the malicious prosecution of someone whom he lacked probable cause to indict" is rooted in the common-law).[10]

The Appellate Division's issuance of a writ of prohibition complicates but does not change our decision. The writ, rarely used, applies only to end a prosecution, not to undo what the prosecution has already done. United States v. Hoffman, 71 U.S. 158, 161–62 (1867) ("[T]he only effect of a writ of prohibition is to suspend all action, and to prevent any further proceeding in

---

> [A] defense of absolute immunity from a claim for damages must be upheld against a § 1983 claim that the prosecutor commenced and continued a prosecution that was within his jurisdiction but did so for purposes of retaliation, or for purely political reasons. A prosecutor is also entitled to absolute immunity despite allegations of his knowing use of perjured testimony and the deliberate withholding of exculpatory information. Although such conduct would be reprehensible, it does not make the prosecutor amenable to a civil suit for damages. In sum, the nature of absolute immunity is such that it accords protection from any judicial scrutiny of the motive for and reasonableness of official action. These principles are not affected by allegations that improperly motivated prosecutions were commenced or continued pursuant to a conspiracy.

424 F.3d at 237–38 (cleaned up).

[10] The plaintiffs also allege that Lato made false statements and selectively allowed hearsay testimony to be presented when it benefitted him during the grand jury presentation, but in view of the precedent described above, the doctrine of absolute immunity clearly also protects his conduct against a claim of damages under § 1983. See Hill, 45 F.3d at 662.

the prohibited direction."). Under New York law, the prohibition lies "only when there is a clear legal right" to such relief, and, as relevant here, when the judicial officer "exceeds its authorized powers in a proceeding over which it has jurisdiction." Matter of State of New York v. King, 36 N.Y.2d 59, 62 (1975). By issuing the writ here, the Appellate Division ended the prosecution, stopping it from proceeding any further. But in this case, it did so because the prosecutors had violated the plaintiffs' rights based on the specific facts of the case and thus exceeded the jurisdiction conferred upon them by statute. See Vinluan, 873 N.Y.S.2d at 81–82. As we have seen, however, not even exceeding prosecutorial authority, let alone misusing it, is enough to lift the immunity under federal law, which requires the clear and obvious absence of any authority under any set of facts. Here, the Appellate Division did not suggest that the prosecutors were incapable of properly

charging the plaintiffs under any set of facts or that they acted clearly and obviously outside of all jurisdictional bounds.[11]

This case is practically indistinguishable from Barr, in which the state court issued a writ of prohibition and dismissed criminal contempt charges against the plaintiffs, but made clear that "contempt, if properly charged, in the context of the facts of this case is an underlying act of continuous concealment directly related to the securities fraud investigation, and therefore is within the jurisdiction of the Attorney General." Barr, 810 F.2d at 362 (emphasis added). Similarly, the Appellate Division here noted that the criminal laws relating to the endangerment of children "do not on their face infringe upon Thirteenth Amendment rights." Vinluan, 873 N.Y.S.2d at 82 (emphasis added). The Appellate Division also reaffirmed an attorney's right "to provide legal advice within the bounds of the law," id. (emphasis added),

[11] Although a writ may issue where an officer acts "without jurisdiction in a matter over which it has no power over the subject matter," Matter of State of New York, 36 N.Y.2d at 62, the plaintiffs do not contend on appeal that the Appellate Division, in issuing the writ, expressly found that the prosecutors acted "without jurisdiction." We therefore conclude that they have abandoned the argument on appeal. LoSacco v. City of Middletown, 71 F.3d 88, 92–93 (2d Cir. 1995). And in any event, we agree with the District Court that the Appellate Division found only that "the prosecution would be an excess in power." Vinluan, 873 N.Y.S.2d at 78; Anilao I, 774 F. Supp. 2d at 486.

including Vinluan's right to do so "under the circumstances of th[e] case." Id. at 82. But it did not suggest that a lawyer in Vinluan's position could never be prosecuted for advising a client to commit a crime. The Appellate Division, in other words, recognized that the prosecutors had the general authority to charge the plaintiffs under New York law, even though the federal Constitution prevented them from doing so under the particular facts of the case. See id. at 81–82.

The plaintiffs urge us to adopt a new rule under which absolute immunity would no longer apply to cases "where a prosecution is unconstitutional" from the start, where the unconstitutional nature of the prosecution "was evident or should have been evident to the prosecutor from the facts and the law, and where the prosecution is based upon evidence deliberately fabricated by the prosecutors." Appellants' Br. at 33. In inviting us to alter our approach to absolute immunity, the plaintiffs turn our attention to Fields v. Wharrie, 740 F.3d 1107 (7th Cir. 2014). There, the Seventh Circuit held that a prosecutor "acting pre-prosecution as an investigator" was not entitled to absolute immunity because he "fabricate[d] evidence" and eventually "introduce[d] the fabricated evidence at trial." Id.

at 1113. "A prosecutor cannot retroactively immunize himself from conduct," the Seventh Circuit said, "by perfecting his wrongdoing through introducing the fabricated evidence at trial." Id. at 1114. Fields makes clear that a prosecutor's action in the investigative stage of a case is not spared from liability simply because the results of his investigative work are presented at trial. See id. (citing Zahrey v. Coffey, 221 F.3d 342, 354 (2d Cir. 2000)).

Our view, and the District Court's, is consistent with Fields. After all, the District Court determined that Spota and Lato were absolutely immune for their conduct as advocates during the judicial phase (initiating the prosecution, using allegedly perjured testimony during the grand jury, and making allegedly false statements to the grand jury), but held, as in Fields, that they were not immune for their conduct during the investigative stage of the prosecution. And Barr and Shmueli prevent us from accepting the plaintiffs' invitation to further extend the exception to absolute immunity beyond Fields, to situations in which prosecutors during the advocacy phase bring charges they know violate an individual's constitutional rights. See Barr, 810 F.2d at 361; see also Shmueli, 424 F.3d at 238 (prosecutors are afforded absolute immunity for bringing charges that they knew were false

because a contrary ruling would "confuse[] jurisdiction with state of mind"). Because the "postarraignment events" described above "consisted only of the prosecution" of the plaintiffs "in a court of competent jurisdiction on charges that were within the [prosecutors'] authority to bring," the prosecutors "are entitled to absolute immunity against" the plaintiffs' "claims for damages for those events." Shmueli, 424 F.3d at 239. The evidence that "the charges were brought for improper purposes do[es] not deprive" the prosecutors of that immunity. Id.

We therefore affirm the District Court's dismissal of the claims arising from the defendants' actions taken in their role as advocates during the judicial phase of the prosecution. In doing so, "[w]e recognize, as Chief Judge Hand pointed out, that sometimes such immunity deprives a plaintiff of compensation that [she] undoubtedly merits." Van de Kamp v. Goldstein, 555 U.S. 335, 348 (2009). "Especially in cases, such as the present one, in which a plaintiff plausibly alleges disgraceful behavior by district attorneys, the application of this doctrine is more than disquieting." Pinaud v. County of Suffolk, 52 F.3d 1139, 1147 (2d Cir. 1995). "[B]ut the impediments to the fair, efficient functioning of a prosecutorial office that liability could create

lead us to find that [immunity] must apply here." Van de Kamp, 555 U.S. at 348.

II

The District Court concluded from the pleadings that Spota and Lato were not entitled to absolute immunity for their conduct during the investigative stage of the prosecution, and that the plaintiffs had stated a claim for relief that was plausible on its face under § 1983. Anilao I, 774 F. Supp. 2d at 485, 513. The defendants do not challenge either conclusion on appeal, and the first conclusion in any event follows from our prior decisions. See Zahrey, 221 F.3d at 346–47; see also Buckley, 509 U.S. at 273. But the plaintiffs do challenge the District Court's grant of summary judgment in the defendants' favor. We therefore turn to whether there is a genuine factual issue about whether Spota and Lato violated the plaintiffs' constitutional rights during their investigation.

We review a grant of summary judgment de novo. See Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 19 (2d Cir. 2014). "Summary judgment is appropriate only where, construing all the evidence in the light most favorable to the non-movant and drawing all reasonable

inferences in that party's favor, there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Id. (quotation marks omitted). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts" and "must come forward with specific facts showing that there is a genuine issue for trial." Caldarola v. Calabrese, 298 F.3d 156, 160 (2d Cir. 2002) (quotation marks omitted). The non-movant cannot rely on conclusory allegations or denials and must provide "concrete particulars" to show that a trial is needed. R.G. Grp., Inc. v. Horn & Hardart Co., 751 F.2d 69, 77 (2d Cir. 1984) (quotation marks omitted).

The District Court held that "Lato and Spota are entitled to summary judgment because . . . no rational jury could find that they knowingly fabricated evidence during the investigation, or otherwise violated plaintiffs' constitutional rights in the investigative phase of this case." Anilao II, 340 F. Supp. 3d at 250. Upon review of the record, we agree and affirm the District Court's grant of summary judgment.

On appeal, the plaintiffs, like our dissenting colleague, emphasize that there is at least a factual dispute as to whether Lato conspired with Sentosa to

fabricate evidence to present to the grand jury, and in particular whether Lato conspired with Luyun to testify falsely against Vinluan before the grand jury. The plaintiffs highlight that Lato had been provided a Philippines-based advertisement showing that Vinluan was an immigration attorney, not a nurse recruiter, see App'x 1554–55, but that Lato nevertheless prodded Luyun to falsely testify that he had seen an advertisement that Vinluan was recruiting nurses to the United States, see App'x 654. Because Lato admitted that he met with all the witnesses who testified in the grand jury proceedings, the plaintiffs insist that Lato must have met with Luyun and conspired with him to lie to the grand jury.

This is, in our view, little more than speculation. As such it poses no bar to summary judgment in the defendants' favor. Speculation aside, the plaintiffs fail to point to any admissible evidence that could lead a reasonable juror to conclude that Lato (or Spota) conspired with Luyun to fabricate evidence.[12] They had every opportunity to develop the record and to uncover

[12] Relying on Morse v. Fusto, 804 F.3d 538 (2d Cir. 2015), our dissenting colleague points to Lato's failure to disclose to the grand jury the Department of Education's findings in favor of the plaintiffs, the state court's denial of a preliminary injunction, and the Nassau County Police Department's decision not to take any action against

the plaintiffs. With respect, Lato's decision not to present evidence — also available to the plaintiffs at the time of the grand jury proceeding — of agency or judicial action or inaction does not come close to the defendant's egregious conduct in Morse. There the defendants actively "creat[ed] false or fraudulently altered documents," and we described the "constitutional violation" as the affirmative "manipulation of data to create false or misleading documents, knowing that such information was false or misleading at the time," and then deliberately presenting the false documents, with the fake facts, to the grand jury. Id. at 549–50 (quotation marks omitted) (emphasis in original). Neither the dissent nor the plaintiffs describe any similar fabrication of evidence on Lato's part, characterizing Lato's conduct instead as a wrongful refusal to disclose potentially exculpatory evidence to the grand jury. To be sure, Lato's decision not to present that evidence is far less than ideal in a world where we expect far more from prosecutors in our country; it would, for example, undoubtedly have violated the internal guidance that regulates the conduct of federal prosecutors. See U.S. Department of Justice, Justice Manual, Title 9, Chapter 11, § 9-11-233 (although not required to do so under federal law, "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person"). On the other hand, the plaintiffs had a right under New York law, upon waiving immunity, to testify before the grand jury and to present the same exculpatory evidence that was available to them. See People v. Mitchell, 82 N.Y.2d 509, 513–14 (1993) (citing N.Y. C.P.L.R. § 190.50)). None sought to enforce that right. Ultimately, the dissent's view ignores that the core function of the grand jury in New York is to determine if the charges are sufficiently supported by evidence to warrant a trial of the charge. See People v. Calbud, Inc., 49 N.Y.2d 389, 394 (1980). Trial, not the grand jury proceeding, is the crucible to air and test the full and final contentions of the parties for or against guilt in New York. Although, like our dissenting colleague, we might wish that the rule were otherwise and even share his palpable sense of unfairness, the reality is that a prosecutor in New York usually has no obligation to present to the grand jury evidence that is exculpatory. See People v. Hemphill, 35 N.Y.3d 1035, 1036 (2020) ("Contrary to defendant's claim that the indictment should be dismissed based on the prosecutor's failure to alert the grand jury to exculpatory evidence that implicated another, the People were not obligated to present evidence that someone else was initially identified as the shooter."), cert. granted sub nom. on other grounds, Hemphill v. New York, 141 S. Ct. 2510 (2021). New York law clearly

that evidence if it existed. But during Lato's deposition, for example, when given the chance to explore the alleged plot, they declined to question Lato about his meeting with Luyun. Answers to those questions might have yielded some firm evidence of the existence of a conspiracy between the two men, such as whether they ever discussed the contradictory newspaper advertisements about Vinluan.

The plaintiffs separately rely on the plotline that the police refused to investigate the nurses despite having been urged to do so by Spota and Lato. At best, however, this implies that Spota and Lato had a very weak and decidedly unappealing case against the nurses, not that they conspired with Luyun to fabricate evidence to present to the grand jury, or that they otherwise clearly violated the plaintiffs' constitutional rights during the investigation.

We briefly respond to the dissent's suggestion that racial prejudice triggered and infects this entire litigation. Our dissenting colleague understandably focuses a great deal of attention on the reprehensible conduct

---

permitted Lato to withhold from the grand jury the information that the dissent, like the plaintiffs, claim he was obliged to disclose to that body.

of Sentosa, which may well have been motivated to kickstart the case and to prompt the criminal prosecution in part because the nurses were Filipino rather than "White and American citizens." Dissenting Op. at 24. As the dissent observes, Sentosa has been "found to have violated the rights of Filipino nurses" it employed, and it recently agreed to pay $3 million to a class of Filipino nurses in settlement. Id. at 25–26. But the immediate issue before us involves the conduct and immunity of the prosecutors, not Sentosa. As to that issue, not even the dissent proposes that the prosecutors were directly motivated by racial animus, and the plaintiffs' amended complaint likewise does not allege that the prosecution against them was prompted by race or national origin discrimination. Nevertheless, our colleague asserts that "[w]hatever their motivation" for proceeding with the investigation and ultimately prosecuting the plaintiffs, the prosecutors — Spota and Lato — were "complicit in Sentosa's effort to deter its Filipino nurses from pursuing their rights." Id. at 26. That may be true, but the dissent hedges on whether their complicity was itself racially motivated in the way that Sentosa's initiating campaign may have been. At best, asserts the dissent, "there is enough to put the issue" of whether "race played a part in the prosecutors'

actions" "to a jury," even if it means that the plaintiffs must resort to a "cat's paw" theory of manipulation and control usually reserved for Title VII cases. Id. at 27 n.12.

Whatever its other faults,[13] the most glaring problem with the dissent's view is that it is not shared by the plaintiffs, who have never embraced it at any point in this hard-fought and well-counseled litigation — not in the complaint, not on summary judgment, not even on appeal. "Few principles are better established in our Circuit than the rule that 'arguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court.'" New York v. Dep't of Justice, 964 F.3d 150,

[13] Although our dissenting colleague suggests that Spota and Lato acted with racial animus, the plaintiffs have repeatedly emphasized that, at worse, Spota and Lato were politically motivated to pursue the charges against them. See Appellants' Br. at 42; Oral Arg. Tr. at 5–6. They have not once mentioned that the defendants were motivated by racial or national origin animus. And we are bound by our prior holding in Bernard that "racially invidious or partisan prosecutions, pursued without probable cause, are reprehensible, but such motives do not necessarily remove conduct from the protection of absolute immunity." Bernard, 356 F.3d at 504. To be sure, the dissent raises strong, even compelling policy concerns that, in our view, counsel in favor of significantly curtailing the doctrine of absolute prosecutorial immunity, perhaps across the board, and certainly as it relates to racially invidious prosecutions. But precedent – Barr, Bernard, Shmueli – limits the ability of this panel in the present case to modify or abrogate the doctrine. We are bound by these decisions absent overruling by the Court in banc, an intervening decision from the Supreme Court, or an act of Congress.

166 (2d Cir. 2020) (Katzmann, C.J., dissenting from denial of reh'g en banc) (quoting JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005)). However attractive it might be to us, reaching the dissent's desired result based on legal arguments that the plaintiffs have never advanced would veer us far from "the normal rules of appellate litigation." Id. As Justice Ginsburg recently wrote for a unanimous Supreme Court in United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020), "in our adversarial system of adjudication, we follow the principle of party presentation. [I]n both civil and criminal cases, in the first instance and on appeal, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." Id. at 1579 (cleaned up). Even putting aside the principle of party presentation for a moment, Bernard binds us to the rule that "[t]he appropriate inquiry . . . is not whether authorized acts are performed with a good or bad motive, but whether the acts at issue are beyond the prosecutor's authority." 356 F.3d at 504 (emphasis in original). For the reasons already explained, the prosecutors acted within their authority to charge the plaintiffs under New York law.

III

Finally, we turn to the County's liability under Monell v. Department of Social Services, 436 U.S. 658 (1978).

"Monell does not provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation." Segal v. City of New York, 459 F.3d 207, 219 (2d Cir. 2006). In other words, a Monell claim cannot succeed without an independent constitutional violation. See id. "[I]nherent in the principle that a municipality can be liable under § 1983 only where its policies are the moving force [behind] the constitutional violation, is the concept that the plaintiff must show a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." Outlaw v. City of Hartford, 884 F.3d 351, 373 (2d Cir. 2018) (cleaned up). "[I]f the challenged action is directed by an official with final policymaking authority, . . . the municipality may be liable even in the absence of a broader policy." Mandell v. County of Suffolk, 316 F.3d 368, 385 (2d Cir. 2003) (quotation marks omitted). As more directly

relevant here, we have held that "the actions of county prosecutors in New York are generally controlled by municipal policymakers for purposes of Monell, with a narrow exception . . . being the decision of whether, and on what charges, to prosecute." Bellamy v. City of New York, 914 F.3d 727, 758–59 (2d Cir. 2019) (quotation marks omitted). Under the narrow exception that we noted in Bellamy, a district attorney in New York "is not an officer or employee of the municipality but is instead a quasi-judicial officer acting for the state in criminal matters." Ying Jing Gan v. City of New York, 996 F.2d 522, 535–36 (2d Cir. 1993) (quotation marks omitted).

With these principles in mind, we reject the plaintiffs' first claim that the County is liable for the individual defendants' conduct, including the fabrication of evidence, during the investigative stage. As discussed above, there was no evidence of a constitutional violation by the DA's Office at that stage, and we agree with the District Court that "the absence of any underlying constitutional violation arising from the conduct of Spota or Lato in the investigative stage" means that "no municipal liability can exist against Suffolk County" based on that conduct. Anilao II, 340 F. Supp. 3d at 251; see Askins v. Doe No. 1, 727 F.3d 248, 253–54 (2d Cir. 2013).

The plaintiffs separately also claim that the County is liable under Monell for Spota's alleged administrative mismanagement of the DA's Office. But we agree with the District Court that the plaintiffs have not provided the "direct causal link" we require under these circumstances between Spota's alleged mismanagement and the alleged misconduct and constitutional deprivations involving the plaintiffs. Outlaw, 884 F.3d at 373; see Anilao II, 340 F. Supp. 3d at 251 n.36. To the extent the plaintiffs' claim centers on Spota's decision to prosecute the case rather than his management of the DA's Office, the claim fails because, in making that decision, Spota was clearly acting for New York State in a criminal matter, not for the County. See Ying Jing Gan, 996 F.2d at 536. [14]

[14] To the extent the County suggests that it cannot be liable for Spota's and Lato's conduct during the judicial phase because of their absolute immunity, that argument is squarely foreclosed by our precedent. See Pinaud, 52 F.3d at 1153 ("Since municipalities do not enjoy immunity from suit — either absolute or qualified — under § 1983, [the plaintiff's] malicious prosecution claim against the County of Suffolk is not barred by prosecutorial immunity." (quotation marks omitted)); see also Askins, 727 F.3d at 254 ("[T]he entitlement of the individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is also irrelevant to the liability of the municipality.").

We therefore affirm the District Court's grant of summary judgment in the County's favor.

CONCLUSION

We have considered the plaintiffs' remaining arguments and conclude that they are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the District Court.

CHIN, *Circuit Judge*, dissenting:

In this case, the Suffolk County District Attorney's Office (the "DA's Office") brought criminal charges against ten nurses and their lawyer for "patient abandonment" because the nurses resigned their positions at a nursing home to protest their work conditions and the lawyer advised them of their rights and filed a discrimination claim on their behalf with the Department of Justice. The Appellate Division, Second Department, took the extraordinary step of issuing a writ of prohibition to *bar* the DA's Office from pursuing the charges, recognizing that the nurses and their attorney were "threatened with prosecution for crimes for which they [could not] constitutionally be tried." *Vinluan v. Doyle*, 873 N.Y.S.2d 72, 83 (2d Dep't 2009) (Eng, *J.*). Indeed, as the Second Department held, "these criminal prosecutions constitute[d] an impermissible infringement upon the constitutional rights of these nurses and their attorney." *Id.* at 75.

Yet, the district court held that the nurses and their lawyer were precluded from pursuing civil rights claims against the prosecutors because they acted within their jurisdiction and were therefore protected by the doctrines of absolute and qualified immunity. This Court now affirms. In my view, however, the complaint plausibly alleged, as the Second Department found, that

the nurses and their lawyer could not be prosecuted for the charged conduct and thus the immunities do not apply. In the extraordinary circumstances presented here, where the prosecutors were "proceeding . . . 'without or in excess of jurisdiction,'" *Vinluan*, 873 N.Y.S.2d at 77 (quoting N.Y. C.P.L.R. § 7803(2)), they were not protected by absolute or qualified immunity. Accordingly, I respectfully dissent.

I.

The ten nurses were recruited in the Philippines to work at nursing homes in New York operated by Sentosa Care, LLC ("Sentosa"). After arriving in the United States, they commenced employment at the Avalon Gardens Rehabilitation and Health Care Center ("Avalon Gardens"), a 353-bed private nursing facility on Long Island. The nurses soon concluded that Sentosa had breached certain promises it had made to them and that Sentosa was treating them in an unfair and discriminatory manner. They contacted the Philippine Consulate, which referred them to Vincent Q. Vinluan, an attorney based in New York. Vinluan advised them that, in his view, Sentosa had breached its contract with them and that they could resign to protest their poor work conditions, but that they should not do so until after completing their shifts. He filed a claim of

discrimination on their behalf with the immigrant and employee rights office of the Civil Rights Division in the Department of Justice in Washington, D.C. The next day, after completing their shifts and each giving notice of 8 to 72 hours, the nurses resigned. *See Vinluan*, 873 N.Y.S.2d at 76.

Sentosa complained to various authorities. In April 2006, it filed a complaint with the Suffolk County Police Department, which declined to take action after investigating the matter. Sentosa also brought suit against the nurses and Vinluan in the Supreme Court of the State of New York, Nassau County, seeking a preliminary injunction. The court denied the motion in July 2006, finding that Sentosa had failed to establish a likelihood of success on the merits. And the Office of Professional Discipline of the State Education Department ("DOE"), the entity with licensing jurisdiction over the nurses, investigated and concluded that the nurses' "conduct did not constitute patient abandonment"; it closed the investigation in October 2006 without taking any disciplinary action. App'x at 1280.

Sentosa then turned to the DA's Office and was able to obtain a personal meeting with then-Suffolk County District Attorney Thomas J. Spota

III.[1] Although it was clear that the nurses had not engaged in "patient abandonment" -- the Suffolk County Police Department and DOE had declined to take action against them, and the state court had determined that Sentosa had not shown a likelihood of success on the merits of its claims of patient abandonment -- the DA's Office indicted the ten nurses *and* their lawyer, criminally charging them with endangering the welfare of patients and conspiracy to do the same, and also charging Vinluan with criminal solicitation.

The nurses and Vinluan brought an Article 78 proceeding in state court seeking a writ of prohibition to stop the prosecutions. On January 13, 2009, the Second Department granted the writ -- prohibiting the DA's Office from proceeding with the prosecutions. *See Vinluan*, 873 N.Y.S.2d at 83.

Thereafter, the nurses and Vinluan brought this action below against the County of Suffolk (the "County"), Spota, and former Assistant District Attorney Leonard Lato,[2] seeking damages pursuant to 42 U.S.C. § 1983 for

---

[1] Spota was convicted in December 2019 in the Eastern District of New York on unrelated charges of conspiracy, obstruction of justice, and witness tampering. On August 10, 2021, he was sentenced to five years imprisonment. He was then denied bail pending appeal on October 15, 2021.

[2] Lato died in 2018. *See* Robert Brodsky, *Officials: Leonard Lato, Defense Attorney, Ex-prosecutor, Found Dead*, Newsday (Sept. 19, 2018), https://www.newsday.com/long-island/defense-attorney-leonard-lato-dies-1.21104324.

violation of their constitutional rights. The district court dismissed the claims, first granting in part defendants' motion to dismiss and second granting their motion for summary judgment, holding that Spota and Lato both were protected by absolute immunity to the extent they were acting as prosecutors and by qualified immunity to the extent they were acting as investigators.

This appeal followed.

II.

I address first the issue of absolute immunity.

I agree with the majority that prosecutors enjoy broad absolute immunity from liability for "prosecutorial activities intimately associated with the judicial phase of the criminal process." *Barr v. Abrams*, 810 F.2d 358, 361 (2d Cir. 1987). I acknowledge that this protection extends to "virtually all acts, regardless of motivation, associated with [the prosecutor's] function as an advocate." *Hill v. City of New York*, 45 F.3d 653, 661 (2d Cir. 1995) (internal quotation marks omitted). Still, the rule is not without exception. As this Court has explained:

> A [prosecutor] engaged in advocative functions will be denied absolute immunity only if he acts without any colorable claim of authority. The appropriate inquiry, thus, is not whether authorized acts are performed with a good or bad *motive*, but whether the *acts* at

> issue are beyond the prosecutor's authority. Accordingly, where a prosecutor is sued under § 1983 for constitutional abuse of his discretion to initiate prosecutions, a court will begin by considering whether relevant statutes authorize prosecution for the charged conduct. If they do not, absolute immunity must be denied. But if the laws do authorize prosecution for the charged crimes, a court will further consider whether the [prosecutor] has intertwined his exercise of authorized prosecutorial discretion with other, unauthorized conduct. For example, where a prosecutor has linked his authorized discretion to initiate or drop criminal charges to an unauthorized demand for a bribe, sexual favors, or the defendant's performance of a religious act, absolute immunity has been denied.

Bernard v. County of Suffolk, 356 F.3d 495, 504 (2d Cir. 2004) (internal quotation marks and citations omitted). Hence, "where a prosecutor acts without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy." *Barr*, 810 F.2d at 361; *accord Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005).

Here, the question is whether plaintiffs plausibly alleged in their complaint that Spota and Lato proceeded without any colorable claim of authority. I believe they did.

As a threshold matter, what does it mean for a prosecutor to act "without any colorable claim of authority?" I do not think that all a prosecutor need do, to be absolutely immune, is to cite a criminal statute and assert that a defendant violated it. That is what the majority essentially suggests, as it

observes that "[t]here is no dispute on appeal that the District Attorney was authorized by statute to prosecute the plaintiffs for endangering children and physically disabled persons, for conspiring to do the same, and for soliciting others to do so." Maj. Op. at 24. The mere invocation of a statute should not be enough. If that were the case, the exception would be illusory, and no plaintiff could ever invoke it. Under this reasoning, as long as a prosecutor charged the violation of a statute that fell within the prosecutor's jurisdiction, the prosecutor would always be absolutely immune -- even if there was absolutely no factual or legal basis for the charge.

The indictment here charged the nurses and Vinluan with conspiracy in the sixth degree,[3] five counts of endangering the welfare of a child,[4] and six counts of endangering the welfare of a physically disabled person,[5] and it also charged Vinluan with criminal solicitation in the fifth

---

[3] A person commits the offense when "with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct." N.Y. Penal Law § 105.00.

[4] A person commits the offense when he "knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old." *Id.* § 260.10(1).

[5] A person commits the offense when he "knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a person who is unable to care for himself or herself because of physical disability, mental disease or defect." *Id.* § 260.25.

degree.[6] I agree that Spota and Lato had authority to prosecute these *types* of crimes. But in my view, the DA's Office did not have colorable authority to prosecute the nurses or Vinluan for the charged conduct. It was beyond the prosecutors' authority to criminally charge the nurses for resigning to protest what they believed to be discriminatory work conditions or their lawyer for giving them legal advice and filing a charge of discrimination on their behalf.

Additionally, the bringing of these charges was beyond the prosecutors' authority, *see Bernard*, 356 F.3d at 504, for as a factual matter the indictment charged only legally permissible conduct. For example, the indictment alleged that:

> 14. It was the conspiracy's objective to obtain for the Avalon Gardens' nurses alternative employment and a release from their three-year commitment to Sentosa Care without incurring a financial penalty of $25,000.
>
> 15. In pursuit of their objective, the defendant [Vinluan] and the defendant nurses sought to establish that Sentosa Care had breached the contracts and had discriminated against the nurses.

App'x at 1404-05. These were not criminal objectives.

---

[6] A person commits the offense when "with intent that another person engage in conduct constituting a crime, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct." *Id.* § 100.00.

The indictment charged three "overt acts" in furtherance of this purported criminal conspiracy:

- Vinluan asked the nurses to bring a claim against Avalon Gardens and Sentosa for discrimination and they agreed to bring the claim;
- Vinluan, on the nurses' behalf, filed a claim of discrimination with the Civil Rights Division of the Department of Justice against Avalon Gardens and Sentosa; and
- The ten nurses submitted their resignation letters to Avalon Gardens.

These were not, by any stretch of the imagination, criminal acts.[7] Moreover, while the charges were premised on the claim of patient

---

[7] The majority suggests that I have pointed only to "the indictment's most innocuous allegations and sidestep[ped]" altogether "the indictment's serious allegations of criminal endangerment." Maj. Op. at 24 n.8. Not so. Paragraphs 14 and 15 of the indictment quoted above are the heart of the conspiracy charged in Count One, identifying the "conspiracy's objective" and the actions taken by the defendants "[i]n pursuit of their objective." App'x at 1404-05. The three overt acts cited above are the *only* overt acts alleged in the conspiracy count. Moreover, the endangerment counts do not add any specific factual allegations, but instead rely on the facts alleged in the paragraphs of the indictment identified above. While it is true, as the majority notes, that the indictment contains language tracking the endangerment statute, the critical factual allegation is that the nurses resigned their positions -- conduct that is simply not criminal. And while the indictment also charges that the nurse defendants resigned "knowing that their resignations and the prior resignations at other Sentosa Care facilities would render it difficult for Avalon Gardens to find, in a timely manner,

abandonment, DOE -- the agency with licensing jurisdiction over the nurses -- had concluded otherwise, finding that there was no basis even to discipline the nurses, much less criminally charge them. The Suffolk County Police Department had also declined to take action, and the Suffolk County Supreme Court had concluded that Sentosa had not established a likelihood of success on the merits of its claim of patient abandonment. The DA's Office knew *all* this -- and still proceeded to charge the nurses and Vinluan.

The indictment's charge of patient abandonment was specious. The indictment did not allege that the nurses walked out during a shift or that any patients were actually harmed, or threatened with harm, by the nurses' resignations, nor could it have. As the Second Department explained:

> The nurses did not abandon their posts in the middle of their shifts. Rather, they resigned after the completion of their shifts, when the pediatric patients at Avalon Gardens were under the care of other nurses and staff members. Moreover, . . . coverage [for the patients] was indeed obtained, and no facts suggesting an imminent threat to the well being of the children have been alleged. Indeed, the fact that no children were deprived of nursing care played a large role in [DOE]'s decision to clear the nurses of professional misconduct.

---

skilled replacement nurses," *id.* at 1405, it cannot be criminal for an employee to resign merely because she knows her employer will have difficulty finding a replacement.

Vinluan, 873 N.Y.S.2d at 81-82. Even assuming that a nurse *could* criminally endanger her patients simply by resigning from her job, the acts charged in the indictment did not come close to constituting criminal conduct.

The indictment of Vinluan is particularly outrageous. Surely a prosecutor has no colorable authority to bring charges against a lawyer for giving legal advice to clients and for filing a claim of discrimination on their behalf. As the Second Department held, "[a]s charged in the indictment, it is clear that Vinluan's criminal liability is predicated upon the exercise of ordinarily protected First Amendment rights." *Id.* at 82. The court observed unequivocally that the prosecution of Vinluan was "an assault on the adversarial system of justice upon which our society, governed by the rule of law rather than individuals, depends." *Id.* at 83; *see also id.* at 82 ("It cannot be doubted that an attorney has a constitutional right to provide legal advice to his clients within the bounds of the law.") (collecting cases). I agree.

The majority observes that the Second Department's decision "complicates" the decision. Maj. Op. at 27. It does more than that; it dispels any doubt as to whether the prosecutors had colorable authority to criminally charge the nurses and their lawyer. As the Second Department concluded, the

prosecutors did not. While the court's opinion focused on the constitutionality of the prosecutions, the court squarely held that the conduct of the nurses and their lawyer was not proscribed by the relevant statutes. *See Vinluan*, 873 N.Y.S.2d at 82-83 ("[S]ince the nurses' conduct in resigning cannot, under the circumstances of this case, subject them to criminal prosecution, we cannot agree that Vinluan advised the nurses to commit a crime.").

New York law provides for a writ of prohibition "to prevent a body or officer acting in a judicial or quasi-judicial capacity from proceeding, or threatening to proceed, 'without or in excess of jurisdiction.'" *Id.* at 77 (quoting C.P.L.R. § 7803(2)); *see also id.* (providing that an Article 78 proceeding may be commenced to determine "whether [a] body or officer *proceeded* . . . without or in excess of jurisdiction" (emphasis added)). By granting the writ, the Second Department made clear that Spota and Lato had no colorable authority to bring these charges. And while the majority seeks to distinguish the Second Department's decision on the basis that a writ of prohibition is used only to end a prosecution and "not to undo what the prosecution has already done," Maj. Op. at 27, the Second Department's reasoning applies with equal force here. Spota and Lato did not have authority to commence the prosecution, and "the relevant

statutes [did not] authorize prosecution for the charged conduct." *Bernard*, 356 F.3d at 504.

Finally, I note that the issue of absolute immunity arose on defendants' Rule 12(b)(6) motion. At a minimum, based on the circumstances described above and viewing all facts in the light most favorable to plaintiffs, plaintiffs plausibly alleged that the exception to absolute immunity applies here and they should have been allowed to proceed with their claims. As the majority acknowledges, the writ of prohibition is "rarely used." Maj. Op. at 27. The fact that the Second Department took the extraordinary step of issuing the writ here is most telling.

The majority cites a number of cases barring claims against prosecutors based on absolute immunity, and, indeed, there are many of them. What sets this case apart, however, is the Second Department's decision holding that the prosecutors were "proceeding . . . 'without or in excess of jurisdiction,'" *Vinluan*, 873 N.Y.S.2d at 77 (quoting N.Y. C.P.L.R. § 7803(2)) -- holding that Spota and Lato had no colorable authority to indict the ten nurses for resigning to

protest work conditions and their lawyer for filing a claim of discrimination on their behalf. I would permit the claim to proceed.[8]

III.

I turn to the question of qualified immunity.

Where a prosecutor acts in an investigative capacity, he enjoys only qualified -- as opposed to absolute -- immunity from suit. *See Zahrey v. Coffey*, 221 F.3d 342, 346 (2d Cir. 2000). "Qualified immunity protects a public official from liability for conduct that 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 347 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see Horn v. Stephenson*, 11 F.4th 163, 168-69 (2d Cir. 2021). Qualified immunity turns on "the objective legal reasonableness of the action," *Pearson v. Callahan*, 555 U.S. 223, 244 (2009) (internal quotation marks omitted), and as the Supreme Court has repeatedly observed, "qualified immunity protects 'all but the plainly incompetent or those

---

[8] The cases cited by the majority, *see, e.g., Shmueli*, 424 F.3d at 233, 235, 238-39, emphasize that motivation is irrelevant to the question of absolute immunity. I do not take issue with that point. My concern is, as the Second Department concluded, that the prosecutors here simply did not have authority to charge plaintiffs for the conduct in question.

who knowingly violate the law.'" *Ziglar v. Abassi*, 137 S. Ct 1843, 1867 (2017) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

This Court recognizes a constitutional "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity." *Zahrey*, 221 F.3d at 344. We have explained that evidence may be fabricated not just through use of false statements, but also through "omissions that are both material and made knowingly." *Morse v. Fusto*, 804 F.3d 538, 547 (2d Cir. 2015), *cert. denied*, 137 S. Ct. 126 (2016).

In *Morse*, we upheld a jury's award of more than $7 million in compensatory and punitive damages against a prosecutor and an investigator for denying a dentist his right to a fair trial in a Medicaid fraud prosecution. *Id.* at 541, 544. The jury found that the defendants had falsified billing summaries by omitting material information, they did so knowingly and as part of their investigation, and the "evidence was material to the grand jury's decision to indict." *Id.* at 543, 548 (internal quotation marks omitted). While we recognized that prosecutors have no obligation to present exculpatory evidence to a grand jury, *id.* at 547, we nonetheless held that the defendants were not protected by qualified immunity:

> [F]alse information likely to influence a jury's decision violates the accused's constitutional right to a fair trial, because to hold otherwise, works an unacceptable corruption of the truth-seeking function of the trial process. Information may be false if material omissions render an otherwise true statement false. For example, . . . we [have] affirmed a verdict against a police officer who was found to have misrepresented the evidence to the prosecutors, or failed to provide the prosecutor with material evidence or information, or gave testimony to the Grand Jury that *was false or contained material omissions*, while knowing that he was making a material misrepresentation or omission by giving false testimony. . . . [T]he integrity of the judicial process can be unlawfully compromised by a government official's submission of information to a jury that implicates the accused based in part on material omissions.

Id. at 548 (cleaned up). We rejected the defendants' attempt to distinguish between the obligations of prosecutors and those of police officers, as well as their attempt to distinguish between "affirmative misrepresentations and misleading omissions." *Id.*[9]

---

[9] The majority contends that the conduct here "does not come close to the defendant's egregious conduct in *Morse*." Maj. Op. at 36 n.12. *Morse*, however, squarely involved omissions in the evidence. There, "the jury found that by making material omissions in the billing summaries, the defendants in effect falsified them, and they did so knowingly and as part of their investigation." 804 F.3d at 548; *see also id.* at 547 ("We conclude that the omissions in this case were properly considered under the rubric of *Zahrey*, under which government officials may be held liable for fabricating evidence through false statements or omissions that are both material and made knowingly."); *accord Ashley v. City of New York*, 992 F.3d 128, 143 (2d Cir. 2021) ("The fabrication element requires only that the defendant knowingly make a false statement or omission.") (citing *Morse*, 804 F.3d at 547). While there are, of course, differences between the conduct here and the conduct in *Morse*, in my view there was enough for the matter to go to a jury.

In my view, in this case plaintiffs presented sufficient evidence to raise genuine issues of fact as to whether Spota and Lato compromised the integrity of the judicial process by knowingly submitting false evidence or information to the grand jury that implicated the nurses and Vinluan, including through material omissions. The omitted information was highly relevant to the grand jury's decision to indict. *Morse,* 804 F.3d at 548; *see also Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 130 (2d Cir. 1997) (denying qualified immunity to police officers where a reasonable jury could find they "violated the plaintiffs' clearly established constitutional rights by conspiring to fabricate and forward to prosecutors a known false confession almost certain to influence a jury's verdict").[10]

For example, Lato did not tell the grand jury of DOE's "decision to clear the nurses of professional misconduct." *Vinluan,* 873 N.Y.S.2d at 81-82. DOE concluded that "the nurses' conduct did not constitute patient abandonment." App'x at 1280. Yet, Lato repeatedly referred to the nurses "who

---

[10] The majority emphasizes that "a prosecutor in New York usually has no obligation to present to the grand jury evidence that is exculpatory." Maj. Op. at 36 n.12. Of course, I do not disagree. My concern here is with the nature and extent of the prosecutor's omissions -- as discussed below, they were so extensive and so material as to seriously compromise the truth-seeking function of the process.

walked out without notice." *Id.* at 380; *see also id.* at 378 (Lato: "On April 7 of [2006], all of the nurses who cared for the children in the pediatric area, without notice, they just came in and said we are out of here."). In fact, each nurse gave between 8 to 72 hours' notice. *See Vinluan*, 873 N.Y.S.2d at 76. Abandonment, of course, was the critical issue for the grand jury, and in his preliminary remarks to the grand jurors, Lato explained that "[t]he only focus to determine whether criminal charges have to be filed is nurses abandoning patients." *Id.* at 377, 379-80. He specifically referred to DOE and its definition of "abandonment" -- without disclosing that DOE had found that there was *no* abandonment. *Id.* at 381-82. Lato did not merely omit this critical information, but he presented evidence that he knew was squarely contradicted by the omissions.

Likewise, Lato also withheld from the grand jury the Nassau County Supreme Court's ruling that Sentosa had failed to show a likelihood of success on the merits of its claims of patient abandonment. In fact, Lato called Sentosa's lawyer to elicit that she had sued the nurses and Vinluan on Sentosa's behalf. And yet he did not ask her about the state court's decision some seven months earlier denying Sentosa's motion for a preliminary injunction.

Similarly, although Lato spent pages of transcript eliciting testimony from multiple witnesses about the acute conditions of the children, including the death of one child, he withheld from the grand jury that, as the Second Department found, "coverage [for the children] was indeed obtained," and "no children were deprived of nursing care." *Vinluan*, 873 N.Y.S.2d at 81-82.

In his preliminary remarks, Lato explained that "the Education Law says that if a medical professional, doctor or nurse, walks out in the middle of a shift, that would be abandonment." App'x at 381. Whether the nurses walked out during a shift, while perhaps not dispositive, *see id.* at 381-82, was obviously an important factual question. At one point later in the grand jury proceedings, a grand juror asked Lato a question about a witness's testimony, specifically whether the nurses "walked out" during a shift:

> GRAND JUROR: [The witness] used the term "walked out" several times which seems to indicate they walked out in the middle of their shifts. I would like to know if they did in fact walk off the job during their shift.

Id. at 434. Lato refused to answer the question. *Id.* And although the witness, an investigator with the DA's Office, was recalled to answer certain questions, Lato chose not to ask him whether the investigator knew or had been told that the nurses had walked out during a shift. *See id.* at 426-32. In fact, as Lato knew (or

should have known), none of the nurses walked out during a shift. *See Vinluan*, 873 N.Y.S.2d at 81-82 ("The nurses did not abandon their posts in the middle of their shifts. Rather, they resigned after the completion of their shifts, when the pediatric patients at Avalon Gardens were under the care of other nurses and staff members.").

While supervisors and others with personal knowledge of what happened when the nurses resigned were called to testify in the grand jury, Lato withheld from the grand jurors evidence that the nurses did *not* walk out during a shift. To the contrary, he permitted one witness to testify that at a different facility (Brookhaven) the night before, "nine Filipino nurses" resigned at the same time, three of them during their shifts **[JA 649]**, and that at Avalon Gardens "nine nurses did the same thing, that they handed [in] their resignation similar to the resignation[s] . . . in Brookhaven." App'x at 649-50. In fact, one of the nurses, Theresa Ramos, completed her shift at 7 p.m. and then stayed an extra four hours until 11 p.m. to ensure there was coverage -- and *still* she was indicted.

At his deposition in this case, Lato explained that he withheld the information about DOE's determination because it was hearsay, "misleading," and "legally inadmissible." Sealed App'x at 432-33. Reports of a government

agency, however, are admissible under New York's common law rule providing a hearsay exception for "official written statements, often called the official entries or public document rule." *Consol. Midland Corp. v. Columbia Pharm. Corp.*, 345 N.Y.S.2d 105, 106 (2d Dep't 1973) (internal quotation marks omitted); *accord Richards v. Robin*, 165 N.Y.S. 780, 784 (1st Dep't 1917). To the extent there was any doubt, Lato could have called a witness from DOE to lay a foundation for admitting the report.

In contrast to his withholding of DOE's highly relevant determination, Lato permitted Francis Luyun, the CEO of Sentosa, to testify to rank hearsay: Luyun told the grand jurors that Vinluan was "trying to recruit his own nurses also to send here in the United States," App'x at 654, and that his knowledge was based on statements purportedly made to him by *unidentified* nurses. Moreover, plaintiffs presented evidence to show that Luyun's testimony was fabricated and that Lato knew it was false. Luyun testified in the grand jury that he knew Vinluan was trying to recruit nurses in the Philippines "[b]ecause it's in the newspaper ads he says he's promising them that he can give them a job with good benefits." App'x at 654. Yet, plaintiffs presented evidence to show that Lato knew, based on his investigation into Vinluan's business, that Vinluan

was an immigration lawyer and not a nursing recruiter. Lato had in his files, for example, a copy of Vinluan's advertisement in a Philippines newspaper offering his services not as a recruiter but as an immigration attorney for individuals seeking to work in the United States. And when a grand juror asked Lato if Luyun knew "of any of the nurses that left and went to work for Vinluan's organization," Lato responded "[y]es." App'x at 658. No details of the new employment were provided, and although Lato knew that some or all of the nurses had obtained new employment, it does not appear that he asked his investigators to contact the new employers to determine whether they were connected to Vinluan. Moreover, Lato permitted Luyun to testify as he did even though the Nassau County Supreme Court had ruled six months earlier that Sentosa had no likelihood of success on the merits of its claim that Vinluan had interfered with its contractual relationship with the nurses. A reasonable prosecutor would have known of this ruling.

Taken together, all of these omissions unlawfully compromised the integrity of the judicial process by implicating the nurses and the lawyer based in part on material omissions. *See Morse*, 804 F.3d at 548.

Finally, Lato's actions must be considered against the larger context: the DA's Office indicted ten Filipino nurses who believed they were being unfairly treated for resigning their jobs. The prosecutors indicted the nurses' lawyer for giving them legal advice, and for filing a claim of discrimination on their behalf. They did so even though the agency with licensing authority cleared the nurses of any professional misconduct. And the prosecutors indicted the nurses even though they gave notice of their resignation, arrangements were made for coverage, they did not "walk out" during their shifts, and no patients were jeopardized. As the Second Department concluded in taking the extraordinary step of granting a writ of prohibition, this prosecution never should have been brought.

The qualified immunity doctrine protects all but the "plainly incompetent." *Ziglar*, 137 S. Ct. at 1867. This is one of the rare cases where the government officials indeed were "plainly incompetent." In my view, a jury could very well find on this record that no reasonable prosecutor would have indicted the ten nurses and their lawyer in the circumstances here or omitted the material information discussed above.

Beyond plain incompetence, the record also suggests bad faith. While Lato was the lead prosecutor on the case, the record contains ample evidence that Spota was intimately involved. Lato testified at his deposition that "I went through everything with Mr. Spota, how I saw the case, the complaints of the nurses and the complaints of everyone else." App'x at 1373. Lato "was to report to [Spota] on this," and while Lato was "running" the investigation, Spota was "ultimately in charge." *Id.* at 1364, 1368-69. Spota reviewed and edited a draft of the indictment, even though it was "unusual" for him to do so. *Id.* at 1379-80. Moreover, at the request of Howard Fensterman, Sentosa's attorney, Spota personally met with Sentosa's representatives to discuss the matter. *Id.* at 1340-42. And both Spota and Lato went to lunch with the representatives of Sentosa. *Id.* at 1369. Hence, triable issues of fact exist as to whether Spota is protected by qualified immunity. *See Arteaga v. State of New York*, 72 N.Y.2d 212, 216 (1988) (New York law grants government officials qualified immunity on state law claims, including false arrest claims, if their actions entail "making decisions of a judicial nature," unless "there is bad faith or the action taken is without a reasonable basis."); *see also Lore v. City of Syracuse*, 670 F.3d 127, 166 (2d Cir. 2012) ("In contrast to the federal standard, which is objectively reasonable

reliance on existing law, the New York standard for entitlement to qualified immunity has both objective and subjective components." (internal quotation marks and citations omitted)).

Finally, the district court dismissed the claims against the County because it rejected the claims against Spota and Lato. As I would vacate the dismissal of the claims against Spota and Lato, I would also vacate the dismissal of the claims against the County.

* * * * *

The ten nurses and their lawyer were subjected to an outrageous criminal prosecution, and I cannot help but think that race and national origin were a factor. Sentosa employs many Filipino nurses, not just the ten plaintiffs, and, in pursuing these criminal charges, it clearly was sending a message to its Filipino nurses and others in the Philippines thinking of coming to the United States that they dare not challenge their work conditions.[11] It is hard to imagine that the ten nurses would have been prosecuted for resigning their jobs if they had been White and American citizens. *See Vinluan*, 873 N.Y.S.2d at 81

---

[11] At one point, Bent Philipson, one of the owners of Sentosa, told the grand jury that these nurses "were all brought over from the Philippines," and now that nurses were quitting, "we have to make sure this thing doesn't happen anywhere else." App'x at 458.

("Accordingly, the prosecution has the practical effect of exposing the nurses to criminal penalty for exercising their right to leave their employment at will. The imposition of such a limitation upon the nurses' ability to freely exercise their right to resign from the service of an employer who allegedly failed to fulfill the promises and commitments made to them is the antithesis of the free and voluntary system of labor envisioned by the framers of the Thirteenth Amendment.").[12]

Significantly, while we must assume for purposes of this appeal that the nurses were indeed treated in a discriminatory manner as they alleged below, *see* App'x at 1169-70 (in letter to Avalon Gardens, nurses complained of discrepancies in pay and hours and asked to be "treated with fairness and respect"), Sentosa has in fact been found to have violated the rights of Filipino

---

12 The issue of the exploitation of Filipino nurses has been the subject of attention. *See generally* Heather McAdams, *Liquidated Damages or Human Trafficking? How A Recent Eastern District Of New York Decision Could Impact The Nationwide Nursing Shortage*, 169 Univ. Pa. L. Rev. Online 1 (2020) (discussing how predatory staffing agencies exploit Filipino nurses and offer labor contracts that enable human trafficking-like conditions); Dan Papscun, *Filipino Nurses Win $1.56 Million in Trafficking Victims Case*, Bloomberg Law (June 1, 2021), https://www.bloomberglaw.com/bloomberglawnews/%20daily-labor-report/XBRBTCH8000000?bna_news_filter=daily-labor-report; *see also* Paulina Cachero, *From AIDS to COVID-19, America's Medical System has a Long History of Relying on Filipino Nurses to Fight on the Frontlines*, Time (May 30, 2021), https://time.com/6051754/history-filipino-nurses-us/.

nurses. A group of Filipino nurses successfully sued Sentosa in the Eastern District of New York for violations of the Trafficking Victims Protection Act, 18 U.S.C. § 1589 *et seq.* and for breach of contract. The district court denied Sentosa's motion to dismiss the complaint, *see Paguirigan v. Prompt Nursing Empl. Agency LLC*, 286 F. Supp. 3d 430 (E.D.N.Y. 2017), and thereafter granted summary judgment in *favor* of plaintiffs on liability, *see Paguirigan v. Prompt Nursing Empl. Agency LLC*, No. 17-CV-1302, 2019 WL 4647648, at *1, *21 (E.D.N.Y. Sept. 24, 2019), *aff'd in part and appeal dismissed in part*, 827 F. App'x 116 (2d Cir. 2020) (summary order). The district awarded compensatory damages of $1,559,099.79. *See Paguirigan v. Prompt Nursing Empl. Agency LLC*, No. 17-CV-1302, 2021 WL 2206738, at *1, *8 (E.D.N.Y. June 1, 2021). And recently, the court preliminary approved a class action settlement pursuant to which Sentosa will pay $3 million to the nurses in the class. *See* Order Granting Preliminary Approval of Class Action Settlement, *Paguirigan v. Prompt Nursing Empl. Agency LLC* (E.D.N.Y. Nov. 22, 2021) (No. 17-1302).

For whatever their motivation, the prosecutors were complicit in Sentosa's effort to deter its Filipino nurses from pursuing their rights.[13] One of the grand jurors even asked Lato during the grand jury whether Sentosa was

---

[13] The majority contends that my dissent "hedges on whether [the prosecutors'] complicity was itself racially motivated in the way that Sentosa's initiating campaign may have been." Maj. Op. at 38. That race played a part in the prosecutors' actions is, in my view, certainly plausible. "[C]lever men may easily conceal their motivations," *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1043 (2d Cir. 1979) (internal quotation marks omitted), and here, where there is, as the majority seems to acknowledge, a "palpable sense of unfairness," Maj. Op. at 36 n.12, there is enough to put the issue to a jury. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1187 (2d Cir. 1992) (noting that even if there is no "smoking gun," "a thick cloud of smoke" is enough to require defendant to "convince the factfinder that, despite the smoke, there is no fire") (cleaned up). In addition, even assuming the prosecutors did not act out of a discriminatory motive, they may have been manipulated into taking action by parties with such a motive. *Cf. Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267, 271-73 (2d Cir. 2016) (adopting a "cat's paw" theory of liability that may be used to support a Title VII claim for retaliation). While the majority argues that plaintiffs "never embraced" race as a motivating factor, Maj. Op. at 39, plaintiffs' briefs on appeal and their amended complaint below contained repeated references to the nurses being Filipino, the nurses being from the Philippines, the unfair treatment of Filipino nurses, and the violation of the nurses' civil rights under the Thirteenth and Fourteenth Amendments. Indeed, plaintiffs' reply brief explicitly argues that "the Sentosa Defendants demonstrated that their purpose in contacting the District Attorney[] and their insistence on a prosecution was to intimidate the Filipino and other foreign nurses remaining in their employ." Appellants' Reply Br. at 9. Moreover, we have the discretion to consider an issue not raised below "when we think it is necessary to remedy an obvious injustice." *United States v. Stillwell*, 986 F.3d 196, 200 (2d Cir. 2021). Finally, while the majority emphasizes that motivation is not relevant to the question of absolute immunity, Maj. Op. at 39 n.13, it may be relevant to the question of qualified immunity. *See Ziglar*, 137 S. Ct. at 1867 ("qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law'") (citation omitted).

"using the District Attorney as a bargaining chip" to prevent nurses from leaving despite poor work conditions:

> GRAND JUROR: Does [Philipson] plan on going back to the Philippines and doing anymore recruiting?
>
> LATO: Why would that --
>
> GRAND JUROR: Because if he's using the District Attorney as a bargaining chip.
>
> LATO : If he's using --
>
> GRAND JUROR: I'm just saying now, during contracts, if he's going to say, listen, if you fail to show up there could be criminal charges against you.
>
> LATO: I can't ask him that question because it's not pertinent. I understand what you are saying. That's the type of thing that would pre-suppose there is some type of arrangement between the District Attorney's office and him. I'll have to have Tom Spota testify, which is not going to happen, you know. So.

App'x at 483-84. Of course the question was pertinent.

The nurses and their lawyer should be permitted to pursue their claims for damages on the merits. I dissent.

ork Law Journal

THURSDAY, MARCH 10, 2022 Serving the Bench and Bar Since 1888 ALM.

AP PHOTO

urrency exchange office employee changes the digits showing the hange rate to zero on the screen as his office stopped exchange operations h the Euro in St. Petersburg, Russia, on Wednesday.

atham, Squire, Freshfields oin Big Law's Russia Exodus

BRUCE LOVE
D SARAH TINCHER-NUMBERS

VERAL Am Law 100 firms ealed plans on Wednesday to se their Russian offices or sus- d operations in the country, ng events in Ukraine as the etus behind the development. atham & Watkins, Squire Pat- Boggs, Freshfields Bruckhaus inger, and Morgan, Lewis & kius on Wednesday joined a wing group of Am Law 100 firms hutter their Russian operations, r Linklaters kicked off a flurry g Law departures from Russia riday.

Eversheds Sutherland and Norton Rose Fulbright also announced plans to wind down their operations in Russia this week.

"As circumstances surrounding the conflict in Ukraine continue to change rapidly, it has become clear that it is no longer tenable for us to continue our operations in Russia and we have therefore decided to wind down our Moscow office," Squire Patton Boggs wrote in a statement.

The firm's closure effectively concludes its relationship with a number of clients "in adherence with our professional obligations," the statement continued, adding "all other existing work » Page 6

2nd Circuit: Ex-Suffolk DA Entitled To Absolute Immunity for Baseless 2006 Prosecution

BY TOM MCPARLAND

A DIVIDED panel of the U.S. Court of Appeals for the Second Circuit ruled Wednesday that convicted former Suffolk County District Attorney Tom Spota and an ex-lieutenant could not be sued for their decision to pursue criminal charges against 10 nurses who quit their jobs at a Long Island nursing home in 2006.

A majority of the three-judge panel held that Spota and Leonard Lato, the former head of the DA office's insurance crime bureau, were entitled to absolute immunity for bringing the criminal case, which was later shut down by a state appellate court.

The decision, outlined in a 44-page majority opinion, upheld the immunity doctrine's broad application under Second Circuit case law, and rejected the nurses' request to narrow the protections in cases where "prosecution is unconstitutional from the start."

"Although Spota and Lato may have unlawfully penalized the plaintiffs for exercising the right to quit their jobs on the advice of counsel, under our precedent both of them are entitled to absolute immunity for their actions during the judicial phase of the criminal process," U.S. Circuit Judge Raymond J. Lohier wrote.

He was joined in the majority by U.S. Circuit Judge Robert D. Sack.

SETH WENIG/AP

The panel on a 2-1 vote ruled that former District Attorney **Tom Spota** could not be sued for bringing a criminal case.

The ruling, meanwhile, came over the objection of U.S. Circuit Judge Denny Chin, who wrote in a 29-page dissent that the prosecutors could not receive immunity under the "extraordinary circumstances" of the case. » Page 7

ormer State Bar President David Miranda ecomes Group's First New GC in Over 3 Decades

ASON GRANT

Miranda began his new position with bar association, which with 70,000 members is the nation's

LSAC: Applicant Data Dipped, 'But Numbers Aren't Down

Spota

« Continued from page 1

The lawsuit, filed in 2010, accused Spota and Lato of acting "in concert" with the plaintiffs' employer to secure an indictment against the nurses and their lawyer, Felix Vinluan, for patient endangerment and other charges after the nurses quit in protest of working conditions at Avalon Gardens Rehabilitation and Health Center.

The complaint alleged that the prosecutors lacked probable cause to pursue the criminal charges, and claimed that they had tricked a state grand jury into incorrectly thinking that the nurses had walked off during their shifts.

According to court documents, the prosecution was only halted when the New York Appellate Division, Second Department issued a rare "writ of prohibition," finding that the nurses and their attorney were being "threatened with prosecution for crimes for which they [could not] constitutionally be tried."

Spota was convicted in 2019 on unrelated federal charges of conspiracy, obstruction of justice and witness tampering for helping cover for a police chief who assaulted a handcuffed man suspected of stealing sex toys and pornography from his police department SUV.

Lato died in 2018, when, according to Newsday, his body was found on an ocean beach in Quogue.

In the majority ruling Wednesday, the Second Circuit declined to extend a "narrow limitation" under the absolute immunity doctrine to the prosecutors' actions investigating the doomed criminal case.

Lohier wrote that the exception applied only when prosecutors acted "well outside" the scope of their statutory authority, and not when their motivations of the "reasonableness" of the inquiry were called in question.

"Under our precedent absolute immunity shields Spota and Lato for their prosecutorial and advocative conduct even in the absence of probable cause and even if their conduct was entirely politically motivated," the judge wrote.

In his dissent, however, Chin argued for a more limited application of immunity when prosecutors have "no colorable authority to indict" or are acting "without or in excess of" their jurisdiction.

"The complaint plausibly alleged, as the Second Department found, that the nurses and their lawyer could not be prosecuted for the charged conduct and thus the immunities do not apply," Chin said. "In the extraordinary circumstances presented here...they were not protected by absolute or qualified immunity."

Lawyers for the nurses and their attorney said in an interview Wednesday that they were "heartened" by Chin's dissent, which could provide a road map for further review of the case.

"We do feel this gives us hope that additional review, either en banc or on certiorari to the Supreme Court will yield a different result," said Oscar Michelen, a lawyer with Cuomo LLC, who represented Vinluan.

"The decision hardly vindicates the Suffolk County district attorney's office and Tom Spota," he said.

James Druker, who represents the nurses, agreed.

"We're hoping that we can get the Supreme Court to take certiorari on this," said Druker, managing partner with Kase & Druker in Garden City.

Attorneys for Spota and the Suffolk County DA's office did not immediately respond to requests for comment on the ruling.

Spota was represented by Stephen O'Brien of O'Brien & O'Brien in Nesconset.

The case, before the Second Circuit, was captioned *Anilao v. Spota*.

@ Tom McParland can be reached at tmcparland@alm.com. Twitter: @tom_mcparland_

Associates

« Continued from page 2

der what they might be getting themselves into.

What is Motivating Associates Beyond Money?

Research shows that a number of factors are equally, if not more, important than money to career satisfaction, including things like gaining autonomy, developing strong relationships, and deriving purpose from one's work. Focus more on these and other types of intangible qualities can make firms better-positioned to attract associates for whom money is not the primary motivator.

Some of the issues that matter most to associates who are considering a move include:

Flexibility. I've worked with several candidates who desired to make a move to a more highly regarded practice at another firm, but did not want to move geographically. The firms that accommodated these flexibility minded lawyers by allowing them to work remotely—but made sure they would be trained and mentored as part of the group—were successful one area of practice to another.

A Clear Path Forward. There is far less to be concerned about from accepting a six-figure bonus if you have a short-term mindset about your career. As we all know, the legal profession is not for everyone, circumstances change, there are abundant opportunities outside of the law, and, as a result, it might make sense for someone to maximize their short-term earning potential. However, to attract a lawyer with a longer term vision, it's important for a prospective employer to be transparent about things like prospects for partnership in order to allay concerns about what could be perceived as a too-good-to-be-true offer.

In short, when it comes to recruiting great candidates these days, it's complicated because the needs and desires of associates are multifaceted. Despite working really hard in their current positions, and being tempted by the allure of a grass-is-greener outlook about new opportunities, many are focusing intently on what they might be giving up by making a move—not just on what they stand to gain.

The strong relationships, valuable goodwill, insider knowledge of how things work, established support networks, and other intangible why someone might forego a six-figure signing bonus if that's the primary value proposition being offered in exchange for making a leap to a new law firm.

'Survivor'

« Continued from page 2

pel against GlaxoSmithKline in multidistrict litigation over the carcinogenic side effects of the heartburn medication Zantac.

"My life experience influenced the work I was going to do. I like that I'm representing cancer victims—as a cancer survivor, that the appealing part of my job," Strunk said.

For Strunk, surviving major challenges in court or in life has a different meaning—and that became especially true when he was standing on a boat on his way to film the show. He broke down crying.

"It reminded me how lucky I are to be here," Strunk said. "There are just a few moments in your life when you are really, really thankful to be alive."

The 42nd season of "Survivor" premiered March 9 on CBS at 8 p.m. ET.

United States Code Annotated
Constitution of the United States
Annotated
Amendment I. Religion; Speech and the Press; Assembly; Petition

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances

Currentness

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 a redress of grievances.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const Amend. I--Establishment clause; Free Exercise clause>

<USCA Const Amend. I--Free Speech clause; Free Press clause>

<USCA Const Amend. I--Assembly clause; Petition clause>

U.S.C.A. Const. Amend. I, USCA CONST Amend. I
Current through P.L. 117-130. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIII. Slavery Abolished; Enforcement

U.S.C.A. Const. Amend. XIII

Amendment XIII. Slavery Abolished; Enforcement

Currentness

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

<This amendment is further displayed as separate documents for sections 1 and 2, see USCA Const Amend. XIII, § 1 or see USCA Const Amend. XIII, § 2>

U.S.C.A. Const. Amend. XIII, USCA CONST Amend. XIII
Current through P.L. 117-130. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 78. Proceeding Against Body or Officer (Refs & Annos)

McKinney's CPLR § 7801

§ 7801. Nature of proceeding

Currentness

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

Credits
(L.1962, c. 308. Amended L.1962, c. 318, § 25.)

McKinney's CPLR § 7801, NY CPLR § 7801
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 78. Proceeding Against Body or Officer (Refs & Annos)

McKinney's CPLR § 7802

§ 7802. Parties

Currentness

(a) Definition of "body or officer". The expression "body or officer" includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article [1]

(b) Persons whose terms of office have expired; successors. Whenever necessary to accomplish substantial justice, a proceeding under this article may be maintained against an officer exercising judicial or quasi-judicial functions, or member of a body whose term of office has expired. Any party may join the successor of such officer or member of a body or other person having custody of the record of proceedings under review.

(c) Prohibition in favor of another. Where the proceeding is brought to restrain a body or officer from proceeding without or in excess of jurisdiction in favor of another, the latter shall be joined as a party.

(d) Other interested persons. The court may direct that notice of the proceeding be given to any person. It may allow other interested persons to intervene.

Credits
(L.1962, c. 308. Amended L.1981, c. 502, § 1.)

Footnotes

1 So in original. A period should probably be inserted.

McKinney's CPLR § 7802, NY CPLR § 7802
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 78. Proceeding Against Body or Officer (Refs & Annos)

McKinney's CPLR § 7803

§ 7803. Questions raised

Effective: September 1, 2003
Currentness

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

5. A proceeding to review the final determination or order of the state review officer pursuant to subdivision three of section forty-four hundred four of the education law shall be brought pursuant to article four of this chapter and such subdivision; provided, however, that the provisions of this article shall not apply to any proceeding commenced on or after the effective date of this subdivision.

Credits
(L.1962, c. 308. Amended L.1962, c. 318, § 26; L.2003, c. 492, § 2, eff. Sept. 1, 2003.)

McKinney's CPLR § 7803, NY CPLR § 7803
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 78. Proceeding Against Body or Officer (Refs & Annos)

McKinney's CPLR § 7804

§ 7804. Procedure

Currentness

(a) Special proceeding. A proceeding under this article is a special proceeding.

(b) Where proceeding brought. A proceeding under this article shall be brought in the supreme court in the county specified in subdivision (b) of section 506 except as that subdivision otherwise provides.

(c) Time for service of notice of petition and answer. Unless the court grants an order to show cause to be served in lieu of a notice of petition at a time and in a manner specified therein, a notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least twenty days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least five days before such time. A reply, together with supporting affidavits, if any, shall be served at least one day before such time. In the case of a proceeding pursuant to this article against a state body or officers, or against members of a state body or officers whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, commenced either by order to show cause or notice of petition, in addition to the service thereof provided in this section, the order to show cause or notice of petition must be served upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which venue of the proceeding is designated, or if there is no office of the attorney general within such county, at the office of the attorney general nearest such county. In the case of a proceeding pursuant to this article against members of bodies of governmental subdivisions whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, the order to show cause or notice of petition must be served upon such governmental subdivision in accordance with section 311 of this chapter.

(d) Pleadings. There shall be a verified petition, which may be accompanied by affidavits or other written proof. Where there is an adverse party there shall be a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of. There shall be a reply to a counterclaim denominated as such and there shall be a reply to new matter in the answer or where the accuracy of proceedings annexed to the answer is disputed. The court may permit such other pleadings as are authorized in an action upon such terms as it may specify.

(e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact. The court may order the body or officer to supply any defect or omission in the answer, transcript or an answering affidavit. Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted.

(f) Objections in point of law. The respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer. If the motion is denied, the court shall permit the respondent to answer, upon such terms as may be just; and unless the order specifies otherwise, such answer shall be served and filed within five days after service of the order with notice of entry; and the petitioner may re-notice the matter for hearing upon two days' notice, or the respondent may re-notice the matter for hearing upon service of the answer upon seven days' notice. The petitioner may raise an objection in point of law to new matter contained in the answer by setting it forth in his reply or by moving to strike such matter on the day the petition is noticed or re-noticed to be heard.

(g) Hearing and determination; transfer to appellate division. Where the substantial evidence issue specified in question four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding.

(h) Trial. If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith. Where the proceeding was transferred to the appellate division, the issue of fact shall be tried by a referee or by a justice of the supreme court and the verdict, report or decision rendered after the trial shall be returned to, and the order thereon made by, the appellate division.

(i) Appearance by judicial officer. Notwithstanding any other provision of law, where a proceeding is brought under this article against a justice, judge, referee or judicial hearing officer appointed by a court and (1) it is brought by a party to a pending action or proceeding, and (2) it is based upon an act or acts performed by the respondent in that pending action or proceeding either granting or denying relief sought by a party thereto, and (3) the respondent is not a named party to the pending action or proceeding, in addition to service on the respondent, the petitioner shall serve a copy of the petition together with copies of all moving papers upon all other parties to the pending action or proceeding. All such parties shall be designated as respondents. Unless ordered by the court upon application of a party the respondent justice, judge, referee or judicial hearing officer need not appear in the proceeding in which case the allegations of the petition shall not be deemed admitted or denied by him. Upon election of the justice, judge, referee or judicial hearing officer not to appear, any ruling, order or judgment of the court in such proceeding shall bind said respondent. If such respondent does appear he shall respond to the petition and shall be entitled to be represented by the attorney general. If such respondent does not elect to appear all other parties shall be given notice thereof.

Credits

(L.1962, c. 308. Amended L.1965, c. 814, §§ 1, 2; L.1972, c. 752, § 3; L.1981, c. 502, § 2; L.1981, c. 580, § 1; L.1983, c. 840, § 7; L.1986, c. 355, § 13; L.1987, c. 384, § 1; L.1990, c. 575, § 1; L.1993, c. 202, § 1.)

McKinney's CPLR § 7804, NY CPLR § 7804

Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 5. Venue (Refs & Annos)

McKinney's CPLR § 506

§ 506. Where special proceeding commenced

Currentness

(a) Generally. Unless otherwise prescribed in subdivision (b) or in the law authorizing the proceeding, a special proceeding may be commenced in any county within the judicial district where the proceeding is triable.

(b) Proceeding against body or officer. A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located, except that

1. a proceeding against a justice of the supreme court or a judge of a county court or the court of general sessions shall be commenced in the appellate division in the judicial department where the action, in the course of which the matter sought to be enforced or restrained originated, is triable, unless a term of the appellate division in that department is not in session, in which case the proceeding may be commenced in the appellate division in an adjoining judicial department; and

2. a proceeding against the regents of the university of the state of New York, the commissioner of education, the commissioner of taxation and finance, the tax appeals tribunal except as provided in section two thousand sixteen of the tax law, the public service commission, the commissioner or the department of transportation relating to articles three, four, five, six, seven, eight, nine or ten of the transportation law or to the railroad law, the water resources board, the comptroller or the department of agriculture and markets, shall be commenced in the supreme court, Albany county.

3. notwithstanding the provisions of paragraph two of this subdivision, a proceeding against the commissioner of education pursuant to section forty-four hundred four of the education law may be commenced in the supreme court in the county of residence of the petitioner.

4. a proceeding against the New York city tax appeals tribunal established by section one hundred sixty-eight of the New York city charter shall be commenced in the appellate division of the supreme court, first department.

Credits

(L.1962, c. 308. Amended L.1962, c. 318, § 3; L.1970, c. 267, § 8; L.1986, c. 282, § 16; L.1988, c. 41, § 1; L.1992, c. 47, § 1; L.1992, c. 808, § 1.)

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 78. Proceeding Against Body or Officer (Refs & Annos)

McKinney's CPLR § 7805

§ 7805. Stay

Currentness

On the motion of any party or on its own initiative, the court may stay further proceedings, or the enforcement of any determination under review, upon terms including notice, security and payment of costs, except that the enforcement of an order or judgment granted by the appellate division in a proceeding under this article may be stayed only by order of the appellate division or the court of appeals. Unless otherwise ordered, security given on a stay is effective in favor of a person subsequently joined as a party under section 7802.

Credits
(L.1962, c. 308.)

McKinney's CPLR § 7805, NY CPLR § 7805
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 78. Proceeding Against Body or Officer (Refs & Annos)

McKinney's CPLR § 7806

§ 7806. Judgment

Currentness

The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.

Credits
(L.1962, c. 308. Amended L.1962, c. 318, § 27.)

McKinney's CPLR § 7806, NY CPLR § 7806
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated Laws (Refs & Annos)
Article 6. Payment of Wages (Refs & Annos)

McKinney's Labor Law § 190

§ 190. Definitions

Effective: January 14, 2008
Currentness

As used in this article:

1. "Wages" means the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. The term "wages" also includes benefits or wage supplements as defined in section one hundred ninety-eight-c of this article, except for the purposes of sections one hundred ninety-one and one hundred ninety-two of this article.

2. "Employee" means any person employed for hire by an employer in any employment.

3. "Employer" includes any person, corporation, limited liability company, or association employing any individual in any occupation, industry, trade, business or service. The term "employer" shall not include a governmental agency.

4. "Manual worker" means a mechanic, workingman or laborer.

5. "Railroad worker" means any person employed by an employer who operates a steam, electric or diesel surface railroad or is engaged in the sleeping car business. The term "railroad worker" shall not include a person employed in an executive capacity.

6. "Commission salesman" means any employee whose principal activity is the selling of any goods, wares, merchandise, services, real estate, securities, insurance or any article or thing and whose earnings are based in whole or in part on commissions. The term "commission salesman" does not include an employee whose principal activity is of a supervisory, managerial, executive or administrative nature.

7. "Clerical and other worker" includes all employees not included in subdivisions four, five and six of this section, except any person employed in a bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week.

8. "Week" means a calendar week or a regularly established payroll week. "Month" means a calendar month or a regularly established fiscal month.

9. "Non-profitmaking organization" means a corporation, unincorporated association, community chest, fund or foundation organized and operated exclusively for religious, charitable or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual.

Credits

(Added L.1966, c. 548, § 2. Amended L.1972, c. 328, § 1; L.1976, c. 288, § 1; L.1984, c. 496, § 1; L.1992, c. 165, § 1; L.2002, c. 281, § 1, eff. Aug. 6, 2002; L.2007, c. 304, § 1, eff. Jan. 14, 2008.)

McKinney's Labor Law § 190, NY LABOR § 190

Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated Laws (Refs & Annos)
Article 6. Payment of Wages (Refs & Annos)

McKinney's Labor Law § 193

§ 193. Deductions from wages

Effective: August 19, 2021 to January 1, 2040
Currentness

<[Eff. until Nov. 6, 2022, pursuant to L.2012, c. 451, § 3. See, also, other § 193.]>

1. No employer shall make any deduction from the wages of an employee, except deductions which:

a. are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency including regulations promulgated under paragraph c and paragraph d of this subdivision; or

b. are expressly authorized in writing by the employee and are for the benefit of the employee, provided that such authorization is voluntary and only given following receipt by the employee of written notice of all terms and conditions of the payment and/or its benefits and the details of the manner in which deductions will be made. Whenever there is a substantial change in the terms or conditions of the payment, including but not limited to, any change in the amount of the deduction, or a substantial change in the benefits of the deduction or the details in the manner in which deductions shall be made, the employer shall, as soon as practicable, but in each case before any increased deduction is made on the employee's behalf, notify the employee prior to the implementation of the change. Such authorization shall be kept on file on the employer's premises for the period during which the employee is employed by the employer and for six years after such employment ends. Notwithstanding the foregoing, employee authorization for deductions under this section may also be provided to the employer pursuant to the terms of a collective bargaining agreement. Such authorized deductions shall be limited to payments for:

(i) insurance premiums and prepaid legal plans;

(ii) pension or health and welfare benefits;

(iii) contributions to a bona fide charitable organization;

(iv) purchases made at events sponsored by a bona fide charitable organization affiliated with the employer where at least twenty percent of the profits from such event are being contributed to a bona fide charitable organization;

(v) United States bonds;

(vi) dues or assessments to a labor organization;

(vii) discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that entitle the employee to use mass transit;

(viii) fitness center, health club, and/or gym membership dues;

(ix) cafeteria and vending machine purchases made at the employer's place of business and purchases made at gift shops operated by the employer, where the employer is a hospital, college, or university;

(x) pharmacy purchases made at the employer's place of business;

(xi) tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions;

(xii) day care, before-school and after-school care expenses;

(xiii) payments for housing provided at no more than market rates by non-profit hospitals or affiliates thereof; and

(xiv) similar payments for the benefit of the employee.

c. are related to recovery of an overpayment of wages where such overpayment is due to a mathematical or other clerical error by the employer. In making such recoveries, the employer shall comply with regulations promulgated by the commissioner for this purpose, which regulations shall include, but not be limited to, provisions governing: the size of overpayments that may be covered by this section; the timing, frequency, duration, and method of such recovery; limitations on the periodic amount of such recovery; a requirement that notice be provided to the employee prior to the commencement of such recovery; a requirement that the employer implement a procedure for disputing the amount of such overpayment or seeking to delay commencement of such recovery; the terms and content of such a procedure and a requirement that notice of the procedure for disputing the overpayment or seeking to delay commencement of such recovery be provided to the employee prior to the commencement of such recovery.

d. repayment of advances of salary or wages made by the employer to the employee. Deductions to cover such repayments shall be made in accordance with regulations promulgated by the commissioner for this purpose, which regulations shall include, but not be limited to, provisions governing: the timing, frequency, duration, and method of such repayment; limitations on the periodic amount of such repayment; a requirement that notice be provided to the employee prior to the commencement of such repayment; a requirement that the employer implement a procedure for disputing the amount of such repayment or seeking to delay commencement of such repayment; the terms and content of such a procedure and a requirement that notice of the procedure for disputing the repayment or seeking to delay commencement of such repayment be provided to the employee at the time the loan is made.

2. Deductions made in conjunction with an employer sponsored pre-tax contribution plan approved by the IRS or other local taxing authority, including those falling within one or more of the categories set forth in paragraph b of subdivision one of this section, shall be considered to have been made in accordance with paragraph a of subdivision one of this section.

3. a. No employer shall make any charge against wages, or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section or is permitted or required under any provision of a current collective bargaining agreement.

b. Notwithstanding the existence of employee authorization to make deductions in accordance with subparagraphs (iv), (ix), and (x) of paragraph b of subdivision one of this section and deductions determined by the commissioner to be similar to such deductions in accordance with subparagraph (xiv) of paragraph b of subdivision one of this section, the total aggregate amount of such deductions for each pay period shall be subject to the following limitations: (i) such aggregate amount shall not exceed a maximum aggregate limit established by the employer for each pay period; (ii) such aggregate amount shall not exceed a maximum aggregate limit established by the employee, which limit may be for any amount (in ten dollar increments) up to the maximum amount established by the employer under subparagraph (i) of this paragraph; (iii) the employer shall not permit any purchases within these categories of deduction by the employee that exceed the aggregate limit established by the employee or, if no limit has been set by the employee, the limit set by the employer; (iv) the employee shall have access within the workplace to current account information detailing individual expenditures within these categories of deduction and a running total of the amount that will be deducted from the employee's pay during the next applicable pay period. Information shall be available in printed form or capable of being printed should the employee wish to obtain a listing. No employee may be charged any fee, directly or indirectly, for access to, or printing of, such account information.

c. With the exception of wage deductions required or authorized in a current existing collective bargaining agreement, an employee's authorization for any and all wage deductions may be revoked in writing at any time. The employer must cease the wage deduction for which the employee has revoked authorization as soon as practicable, and, in no event more than four pay periods or eight weeks after the authorization has been withdrawn, whichever is sooner.

4. Nothing in this section shall justify noncompliance with article three-A of the personal property law relating to assignment of earnings, with section two hundred twenty-one of this chapter relating to company stores or with any other law applicable to deductions from wages.

5. There is no exception to liability under this section for the unauthorized failure to pay wages, benefits or wage supplements.

Credits

(Added L.1966, c. 548, § 2. Amended L.1974, c. 160, § 1; L.2012, c. 451, §§ 1, 2, eff. Nov. 6, 2012; L.2021, c. 397, § 3, eff. Aug. 19, 2021.)

McKinney's Labor Law § 193, NY LABOR § 193

Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated Laws (Refs & Annos)
Article 6. Payment of Wages (Refs & Annos)

McKinney's Labor Law § 197

§ 197. Civil penalty

Effective: October 8, 2019
Currentness

Any employer who fails to pay the wages of his employees or shall differentiate in rate of pay because of protected class status, as provided in this article, shall forfeit to the people of the state the sum of five hundred dollars for each such failure, to be recovered by the commissioner in any legal action necessary, including administrative action or a civil action.

Credits
(Added L.1966, c. 548, § 2. Amended L.2002, c. 427, § 1, eff. Sept. 19, 2002; L.2010, c. 564, § 6, eff. April 9, 2011; L.2019, c. 93, § 2, eff. Oct. 8, 2019.)

McKinney's Labor Law § 197, NY LABOR § 197
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated Laws (Refs & Annos)
Article 6. Payment of Wages (Refs & Annos)

McKinney's Labor Law § 198

§ 198. Costs, remedies

Effective: August 19, 2021
Currentness

1. In any action instituted upon a wage claim by an employee or the commissioner in which the employee prevails, the court may allow such employee in addition to ordinary costs, a reasonable sum, not exceeding fifty dollars for expenses which may be taxed as costs. No assignee of a wage claim, except the commissioner, shall be benefited by this provision.

1-a. On behalf of any employee paid less than the wage to which he or she is entitled under the provisions of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim and as part of such legal action, in addition to any other remedies and penalties otherwise available under this article, the commissioner shall assess against the employer the full amount of any such underpayment, and an additional amount as liquidated damages, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law. Liquidated damages shall be calculated by the commissioner as no more than one hundred percent of the total amount of wages found to be due, except such liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article. In any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any underpayment, all reasonable attorney's fees, prejudgment interest as required under the civil practice law and rules, and, unless the employer proves a good faith basis to believe that its underpayment of wages was in compliance with the law, an additional amount as liquidated damages equal to one hundred percent of the total amount of the wages found to be due, except such liquidated damages may be up to three hundred percent of the total amount of the wages found to be due for a willful violation of section one hundred ninety-four of this article.

1-b. If any employee is not provided within ten business days of his or her first day of employment a notice as required by subdivision one of section one hundred ninety-five of this article, he or she may recover in a civil action damages of fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars, together with costs and reasonable attorney's fees. The court may also award other relief, including injunctive and declaratory relief, that the court in its discretion deems necessary or appropriate.

On behalf of any employee not provided a notice as required by subdivision one of section one hundred ninety-five of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim, and as part of such legal action, in addition to any other remedies and penalties otherwise available under this article, the commissioner may assess against the employer damages of fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars. In any action or administrative proceeding to recover damages for violation of paragraph (a) of subdivision one of section one hundred ninety-five of this article, it shall be an affirmative defense that (i) the employer made complete and timely payment of all wages due pursuant to this article or article nineteen or article nineteen-A of this chapter to the employee who was not provided notice as required by subdivision one of section one hundred ninety-

five of this article or (ii) the employer reasonably believed in good faith that it was not required to provide the employee with notice pursuant to subdivision one of section one hundred ninety-five of this article.

1-d. If any employee is not provided a statement or statements as required by subdivision three of section one hundred ninety-five of this article, he or she shall recover in a civil action damages of two hundred fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars, together with costs and reasonable attorney's fees. The court may also award other relief, including injunctive and declaratory relief, that the court in its discretion deems necessary or appropriate.

On behalf of any employee not provided a statement as required by subdivision three of section one hundred ninety-five of this article, the commissioner may bring any legal action necessary, including administrative action, to collect such claim, and as part of such legal action, in addition to any other remedies and penalties otherwise available under this article, the commissioner may assess against the employer damages of two hundred fifty dollars for each work day that the violations occurred or continue to occur, but not to exceed a total of five thousand dollars. In any action or administrative proceeding to recover damages for violation of subdivision three of section one hundred ninety-five of this article, it shall be an affirmative defense that (i) the employer made complete and timely payment of all wages due pursuant to this article or articles nineteen or nineteen-A of this chapter to the employee who was not provided statements as required by subdivision three of section one hundred ninety-five of this article or (ii) the employer reasonably believed in good faith that it was not required to provide the employee with statements pursuant to paragraph (e) of subdivision one of section one hundred ninety-five of this article.

2. The remedies provided by this article may be enforced simultaneously or consecutively so far as not inconsistent with each other.

3. Notwithstanding any other provision of law, an action to recover upon a liability imposed by this article must be commenced within six years. The statute of limitations shall be tolled from the date an employee files a complaint with the commissioner or the commissioner commences an investigation, whichever is earlier, until an order to comply issued by the commissioner becomes final, or where the commissioner does not issue an order, until the date on which the commissioner notifies the complainant that the investigation has concluded. Investigation by the commissioner shall not be a prerequisite to nor a bar against a person bringing a civil action under this section. All employees shall have the right to recover full wages, benefits and wage supplements and liquidated damages accrued during the six years previous to the commencing of such action, whether such action is instituted by the employee or by the commissioner. There is no exception to liability under this section for the unauthorized failure to pay wages, benefits or wage supplements.

4. In any civil action by an employee or by the commissioner, the employee or commissioner shall have the right to collect attorney's fees and costs incurred in enforcing any court judgment. Any judgment or court order awarding remedies under this section shall provide that if any amounts remain unpaid upon the expiration of ninety days following issuance of judgment, or ninety days after expiration of the time to appeal and no appeal is then pending, whichever is later, the total amount of judgment shall automatically increase by fifteen percent.

Credits

(Added L.1966, c. 548, § 2. Amended L.1967, c. 294, § 5; L.1967, c. 310, § 1; L.1997, c. 605, § 4, eff. Nov. 16, 1997; L.2009, c. 372, § 1, eff. Nov. 24, 2009; L.2010, c. 564, § 7, eff. April 9, 2011; L.2014, c. 537, §§ 2, 5, eff. Feb. 27, 2015; L.2015, c. 2, § 3, eff. Feb. 27, 2015; L.2015, c. 362, § 2, eff. Jan. 19, 2016; L.2021, c. 397, § 4, eff. Aug. 19, 2021.)

McKinney's Labor Law § 198, NY LABOR § 198

McKinney's Consolidated Laws of New York Annotated
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated Laws (Refs & Annos)
Article 6. Payment of Wages (Refs & Annos)

McKinney's Labor Law § 198-a

§ 198-a. Criminal penalties

Effective: April 9, 2011
Currentness

1. Every employer who does not pay the wages of all of his employees in accordance with the provisions of this chapter, and the officers and agents of any corporation, partnership, or limited liability company who knowingly permit the corporation, partnership, or limited liability company to violate this chapter by failing to pay the wages of any of its employees in accordance with the provisions thereof, shall be guilty of a misdemeanor for the first offense and upon conviction therefor shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year, and, in the event that any second or subsequent offense occurs within six years of the date of conviction for a prior offense, shall be guilty of a felony for the second or subsequent offense, and upon conviction therefor, shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year plus one day, or punished by both such fine and imprisonment, for each such offense. An indictment of a person or corporation operating a steam surface railroad for an offense specified in this section may be found and tried in any county within the state in which such railroad ran at the time of such offense.

2. Every employer who violates or fails to comply with the requirements of subdivision four of section one hundred ninety-five of this article, and the officers and agents of any corporation, partnership, or limited liability company who knowingly permit the corporation, partnership, or limited liability company to violate or fail to comply therewith, shall be guilty of a misdemeanor and upon conviction therefor shall be fined not less than five hundred nor more than five thousand dollars or imprisoned for not more than one year.

3. Every employer who knowingly violates or fails to comply with the requirements of subdivision four of section one hundred ninety-five of this article, and the officers and agents of any corporation, partnership, or limited liability company who knowingly permit the corporation, partnership, or limited liability company to violate or fail to comply therewith, shall be guilty of a felony where such employer, officer or agent has been convicted of a violation of such subdivision within the previous six years, and upon conviction therefor shall be fined not less than five hundred nor more than twenty thousand dollars or imprisoned for not more than one year plus one day, or punished by both such fine and imprisonment, for each such offense. In determining the penalty, the court shall consider the severity of the violation, the size of the employer, and the employer's good faith effort to comply with the requirements of subdivision four of section one hundred ninety-five of this article.

Credits

(Formerly § 199-d, added L.1965, c. 1031, § 134, renumbered § 198-a and amended L.1967, c. 390, § 1; L.1968, c. 209, § 2. Amended L.1997, c. 605, § 5, eff. Nov. 16, 1997; L.2002, c. 241, § 1, eff. Nov. 1, 2002; L.2010, c. 564, § 8, eff. April 9, 2011.)

McKinney's Labor Law § 198-a, NY LABOR § 198-a
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

McKinney's Consolidated Laws of New York Annotated
Labor Law (Refs & Annos)
Chapter 31. Of the Consolidated Laws (Refs & Annos)
Article 19. Minimum Wage Act (Refs & Annos)

McKinney's Labor Law § 650

§ 650. Statement of public policy

Currentness

There are persons employed in some occupations in the state of New York at wages insufficient to provide adequate maintenance for themselves and their families. Such employment impairs the health, efficiency, and well-being of the persons so employed, constitutes unfair competition against other employers and their employees, threatens the stability of industry, reduces the purchasing power of employees, and requires, in many instances, that wages be supplemented by the payment of public moneys for relief or other public and private assistance. Employment of persons at these insufficient rates of pay threatens the health and well-being of the people of this state and injures the overall economy.

Accordingly, it is the declared policy of the state of New York that such conditions be eliminated as rapidly as practicable without substantially curtailing opportunities for employment or earning power. To this end minimum wage standards shall be established and maintained.

Credits
(Added L.1960, c. 619, § 2. Amended L.1962, c. 439, § 1.)

McKinney's Labor Law § 650, NY LABOR § 650
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title G. Anticipatory Offenses
Article 100. Criminal Solicitation (Refs & Annos)

McKinney's Penal Law § 100.00

§ 100.00 Criminal solicitation in the fifth degree

Currentness

A person is guilty of criminal solicitation in the fifth degree when, with intent that another person engage in conduct constituting a crime, he solicits, requests, commands, importunes or otherwise attempts to cause such other person to engage in such conduct.

Criminal solicitation in the fifth degree is a violation.

Credits
(L.1965, c. 1930. Amended L.1978, c. 422, § 1.)

McKinney's Penal Law § 100.00, NY PENAL § 100.00
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title G. Anticipatory Offenses
Article 105. Conspiracy (Refs & Annos)

McKinney's Penal Law § 105.00

§ 105.00 Conspiracy in the sixth degree

Currentness

A person is guilty of conspiracy in the sixth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct.

Conspiracy in the sixth degree is a class B misdemeanor.

Credits
(Added L.1973, c. 1051, § 5. Amended L.1978, c. 422, § 6.)

McKinney's Penal Law § 105.00, NY PENAL § 105.00
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title G. Anticipatory Offenses
Article 105. Conspiracy (Refs & Annos)

McKinney's Penal Law § 105.20

§ 105.20 Conspiracy; pleading and proof; necessity of overt act

Currentness

A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy.

Credits
(L.1965, c. 1030.)

McKinney's Penal Law § 105.20, NY PENAL § 105.20
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title O. Offenses Against Marriage, the Family, and the Welfare of Children and Incompetents
Article 260. Offenses Relating to Children, Disabled Persons and Vulnerable Elderly Persons (Refs & Annos)

McKinney's Penal Law § 260.10

§ 260.10 Endangering the welfare of a child

Effective: August 30, 2010
Currentness

A person is guilty of endangering the welfare of a child when:

1. He or she knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his or her life or health; or

2. Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he or she fails or refuses to exercise reasonable diligence in the control of such child to prevent him or her from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten, three and seven of the family court act.

3. A person is not guilty of the provisions of this section when he or she engages in the conduct described in subdivision one of section 260.00 of this article: (a) with the intent to wholly abandon the child by relinquishing responsibility for and right to the care and custody of such child; (b) with the intent that the child be safe from physical injury and cared for in an appropriate manner; (c) the child is left with an appropriate person, or in a suitable location and the person who leaves the child promptly notifies an appropriate person of the child's location; and (d) the child is not more than thirty days old.

Endangering the welfare of a child is a class A misdemeanor.

Credits
(L.1965, c. 1030. Amended L.1967, c. 791, § 44; L.1970, c. 389, § 1; L.1970, c. 962, § 14; L.1982, c. 920, § 81; L.1990, c. 476, § 1; L.2010, c. 447, § 2, eff. Aug. 30, 2010.)

McKinney's Penal Law § 260.10, NY PENAL § 260.10
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document

McKinney's Consolidated Laws of New York Annotated
Penal Law (Refs & Annos)
Chapter 40. Of the Consolidated Laws (Refs & Annos)
Part Three. Specific Offenses
Title O. Offenses Against Marriage, the Family, and the Welfare of Children and Incompetents
Article 260. Offenses Relating to Children, Disabled Persons and Vulnerable Elderly Persons (Refs & Annos)

McKinney's Penal Law § 260.25

§ 260.25 Endangering the welfare of an incompetent or physically disabled person in the first degree

Effective: January 16, 2013
Currentness

A person is guilty of endangering the welfare of an incompetent or physically disabled person in the first degree when he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a person who is unable to care for himself or herself because of physical disability, mental disease or defect.

Endangering the welfare of an incompetent or physically disabled person in the first degree is a class E felony.

Credits
(L.1965, c. 1030. Amended L.1998, c. 381, § 2, eff. Nov. 1, 1998; L.2012, c. 501, pt. G, § 4, eff. Jan. 16, 2013.)

McKinney's Penal Law § 260.25, NY PENAL § 260.25
Current through L.2022, chapters 1 to 214. Some statute sections may be more current, see credits for details.

End of Document