

No. _____

07-854 DEC 19 2007

In The OFFICE OF THE CLERK
Supreme Court of the United States

—◆—
JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

vs.

THOMAS LEE GOLDSTEIN,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
PETITION FOR WRIT OF CERTIORARI

—◆—
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QUESTIONS PRESENTED

1) Where absolute immunity shields an individual prosecutor's decisions regarding the disclosure of informant information in compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) made in the course of preparing for the initiation of judicial proceedings or trial in any individual prosecution, may a plaintiff circumvent that immunity by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting policy with regard to the disclosure of such informant information for all cases prosecuted by his or her agency?

2) Are the decisions of a supervising prosecutor as chief advocate in directing policy concerning, and overseeing training and supervision of, individual prosecutors' compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) in the course of preparing for the initiation of judicial proceedings or trial for all cases prosecuted by his or her agency, actions which are "intimately associated with the judicial phase of the criminal process" and hence shielded from liability under *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)?

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CITATIONS FOR OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 481 F.3d 1170 (9th Cir. 2007). The decision of the district court denying the petitioners' motion to dismiss (Appendix B) and the order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for hearing *en banc* (Appendix C) were not reported.



BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on March 28, 2007 and amended it on April 4, 2007 to correct a typographical error. That Court denied the petitioners' petition for rehearing and rejected the suggestion for hearing *en banc* on September 20, 2007. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.



CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the respondent pursuant to **42 U.S.C. §1983**, which reads as follows:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

The respondent alleges that the petitioners violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution, the relevant parts of which read as follows:

Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fourteenth Amendment (Section 1): "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

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STATEMENT OF THE CASE

In his operative Second Amended Complaint, the respondent alleged that in 1980 he was convicted of murder “entirely on the perjured testimony of two witnesses suborned by the Long Beach [California] Police officers.” Appellants’ Excerpts of Record [AER] at page 14, lines 11-12. One of those witnesses was a jailhouse informant, Edward Fink. AER at 23, 26-27. During the course of his testimony, Fink denied having received any benefit for cooperating in the prosecution of the respondent. The complaint alleges that this denial was untrue. AER at 28-30. The respondent acknowledged that the deputy district attorneys who prosecuted him were never informed of the benefits Fink had received. AER at 32. In December, 2002 the respondent’s conviction was vacated by the United States District Court for the Central District of California, and the United States Court of Appeals for the Ninth Circuit affirmed that decision a year later. AER at 14-15.

The respondent filed this lawsuit in the United States District Court for the Central District of California on November 29, 2004. AER at 66. On December 29, 2005 the respondent filed his Second Amended Complaint, which for the first time named as defendants petitioners John Van de Kamp and Curt Livesay. AER at 13. Mr. Van de Kamp was the Los Angeles County District Attorney and Mr. Livesay was his chief deputy twenty-five years earlier when the respondent was prosecuted and convicted. AER at 51. The stated statutory basis for jurisdiction of the respondent's action in the district court was 28 U.S.C. §§1331 and 1343(4). AER at 14.

The respondent alleged that, “[p]rior, during and subsequent to the prosecution of Mr. Goldstein, the Los Angeles County District Attorney’s Office knew of abuses concerning jailhouse informants and of its own failure to record or disseminate that knowledge.” AER at 33. He further alleged that the defendants were personally aware of this information, AER at 33, but that they:

“purposefully or with deliberate indifference failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information, and failed to train Deputy District Attorneys to disseminate information pertaining to benefits provided to jailhouse informants and other impeachment information.”

AER at 34, lines 13-18.

The respondent asserted that because of these alleged actions by Mr. Van de Kamp and Mr. Livesay, “the Deputy District Attorneys on Mr. Goldstein’s case[] did not have access to any impeachment information including benefits provided to Fink prior to Mr. Goldstein’s conviction.” AER at 37, lines 25-27. The respondent asserted that Mr. Van de Kamp and Mr. Livesay thus violated his rights by:

“maintain[ing], enforc[ing], tolerat[ing], per-
mitt[ing], acquiesc[ing] in, and ratif[ying] the
administrative policy, practice and custom of
failing to disseminate impeachment informa-
tion, including the benefits jailhouse infor-
mants received in exchange for assistance
in securing convictions against criminal de-
fendants, and maintain[ing], enforc[ing], tol-
erat[ing], permitt[ing], acquiesc[ing] in, and
ratif[ying] an administrative policy, practice
and custom of using confessions obtained by
the jailhouse informants that were false and
fabricated.”

AER at 51, lines 9-15.

The respondent did not contend that either Mr. Van de Kamp or Mr. Livesay personally “knew about, condoned, or directed any specific trial decisions made by the deputy district attorneys prosecuting Goldstein’s criminal case.” *Goldstein v. City of Long Beach, et al.*, 481 F.3d 1170, 1174 (9th Cir. 2007).

(Since the underlying appeal was taken following the denial of a motion to dismiss, the petitioners have

not yet had an opportunity to contest, or even respond to, the allegations made by the respondent.)

On March 6, 2006, the district court denied the motion to dismiss brought by the petitioners on the ground of absolute prosecutorial immunity. AER at 55; also Appendix B. On April 5, 2006, the petitioners filed a Notice of Interlocutory Appeal from the district court's order. AER at 59. The statutory basis for jurisdiction of the Court of Appeals was 28 U.S.C. §1291, in that this was an appeal from a decision of the district court denying a claim for absolute immunity. See *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985).

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court in a published opinion filed on March 28, 2007. (Appendix A) That Court amended its opinion on April 4, 2007 to correct a typographical error. Thereafter, on September 20, 2007, that Court denied the petitioners' petition for rehearing and rejected the suggestion for hearing en banc. (Appendix C) "A judge requested a vote on whether to rehear this matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration." App. 23.

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REASONS FOR GRANTING CERTIORARI

The respondent asserts in his complaint that prosecutors did not disclose to his counsel that one of the witnesses against him had received benefits in

exchange for testifying at the respondent's criminal trial. However, there is no dispute that decisions made by an individual prosecutor regarding the disclosure of informant information are covered by the absolute prosecutorial immunity, even if those decisions violate the requirements of *Brady v. Maryland, supra*, 373 U.S. 83 (1963) and *Giglio v. United States, supra*, 405 U.S. 150 (1972).

So the respondent circumvented that immunity by instead suing the petitioners herein – the two senior officials in Los Angeles County District Attorney's office – in their individual capacities, alleging that in violation of *Giglio* they failed to establish a system within their agency to ensure that informant information was made available to all deputy district attorneys. The petitioners moved to dismiss on the ground of the absolute prosecutorial immunity, but both the district court and the Court of Appeals held that the petitioners' actions were administrative, not prosecutorial, and thus not subject to the immunity.

This case thus unambiguously presents basic questions about the extent to which supervisory personnel in public prosecutor's offices are entitled to invoke the absolute prosecutorial immunity:

- When the absolute immunity would shield the decisions of an individual prosecutor made in the course of an individual prosecution, may a plaintiff evade the bar of that immunity by instead suing that prosecutor's supervisors, claiming that the line prosecutor's actions were the result of policy decisions made by

those supervisors or a failure by those supervisors to adequately train and/or supervise the line prosecutor?

- Are the decisions of supervisory personnel in public prosecutor's offices concerning the development and implementation of office-wide policies relating to the manner in which all of the agency's cases are prosecuted by their subordinates, and concerning the training and supervision of those subordinates regarding how the agency's cases are to be prosecuted, acts which are undertaken by those supervising prosecutors "in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of [their] role as an advocate for the State", *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993), so as to make those actions subject to the absolute prosecutorial immunity?
- When supervising prosecutors' policy-making and training and supervision decisions affect the manner in which every prosecution handled by an agency are conducted, are those decisions "intimately associated with the judicial phase of the criminal process" and therefore shielded from liability under *Imbler v. Pachtman, supra*, 424 U.S. 409, 430 (1976)?

Circuit and district courts across the county have split in answering these questions, issuing conflicting decisions, with some courts granting immunity to supervising prosecutors in these situations, while

others (such as the Ninth Circuit in this case) have refused to do so.

If the absolute prosecutorial immunity is not available in situations such as that presented here, it will effectively eliminate the immunity, because virtually any claim that would otherwise be barred against a line prosecutor for his or her actions in regard to an individual prosecution can simply be restated as a claim against one or more supervising prosecutors, asserting that the line prosecutor's actions were the result of a policy decision by that supervisor or a failure on the part of that supervisor to adequately train and/or supervise the line prosecutor. Such claims would almost always have to be litigated at least through summary judgment, and often entirely through trial, to be resolved.

The policies underlying the absolute prosecutorial immunity – the “concern that harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust”, *Imbler, supra*, at 423 – apply just as strongly to supervising prosecutors as to their deputies. There is no more justification for permitting these types of lawsuits to be pursued against supervisors than there would be for entirely eliminating the immunity.

The uncertainty on this issue has lasted for many years, and has resulted in a number of conflicting

lower court decisions. It is time for this Court to step in and settle this important issue of federal law.

1. THE COURT OF APPEALS' OPINION IN THIS CASE ONLY PERMITS SUPERVISING PROSECUTORS TO INVOKE THE ABSOLUTE PROSECUTORIAL IMMUNITY IN THE NARROWEST OF CIRCUMSTANCES

The case that provides the theory underlying the respondent's claim against the petitioners is *Giglio v. United States*, 405 U.S. 150 (1972), in which a criminal defendant, having discovered that "the Government had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government", asked for a new trial. *Id.* at 150-151. The evidence indicated that the trial prosecutor was not aware of the promise. *Id.* at 152. This Court found that the failure to provide this information to the defendant violated his due process rights and required that he be granted a new trial. *Id.* at 154-155. This Court held that it was irrelevant that the prosecutor who had allegedly made the promise to the defendant had failed to inform his superiors or fellow prosecutors.

"[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this

places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.”

Id. at 154.

The petitioners in this case contended, both in the district court and the Court of Appeals, that regardless whether there was any truth to the respondent’s accusations, their supposed actions could not form the basis for liability against them because the alleged actions are subject to the absolute prosecutorial immunity. That immunity applies to actions which are “intimately associated with the judicial phase of the criminal process”, *Imbler, supra*, at 430, which the petitioners contended included any responsibilities imposed on prosecutors by this Court in *Giglio*.

As noted above, this Court held in *Giglio* that prosecutors have an obligation to disclose promises made to witnesses and that prosecuting agencies therefore have an obligation to make sure that that information is disseminated among their prosecutors. These petitioners argued that disseminating information from one set of prosecutors to another so that the second set will be able to fulfill their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) is clearly an “action[] that [is] connected with the prosecutor’s role in judicial proceedings”, *Burns v. Reed*, 500 U.S. 478, 494 (1991), and thus is within *Imbler*’s definition of actions protected by the absolute prosecutorial

immunity. The petitioners contended that they were entitled to the immunity even though what was at issue here were policy decisions allegedly made by Mr. Van de Kamp and Mr. Livesay, rather than decisions made in the context of an individual prosecution.

The respondent argued that the petitioners could not benefit from the immunity because their actions were administrative, not prosecutorial. The district court agreed, holding that the conduct in question was administrative in form, not prosecutorial, and therefore not subject to the prosecutorial immunity. The Court of Appeals affirmed the district court's decision, but on somewhat different grounds.

Even though the appellate court agreed with the petitioners' contention that its holding in *Roe v. City & County of San Francisco*, 109 F.3d 578 (9th Cir. 1997) "establishes that absolute immunity protects not only decisions made during an individual prosecution but may also apply to a policy decision", *Goldstein, supra*, at 1174, and that "it may be possible for an act to be prosecutorial in function but administrative in form", *id.* at 1175, the court nonetheless concluded that the respondent's specific allegations against Mr. Van de Kamp and Mr. Livesay were "administrative and not prosecutorial in function". *Ibid.*

The Court of Appeals offered no meaningful explanation for this finding. The opinion merely provides a brief discussion of several of this Court's

decisions on the issue of the application of the absolute prosecutorial immunity; lists some of the circumstances that have been found in various cases to either be, or not be, subject to that immunity; and then states its summary conclusion that:

“although the challenged conduct may . . . be ‘to some degree related to trial preparation,’ Van De Kamp and Livesay have failed to demonstrate the required ‘close association . . . [with] the judicial phase of [Goldstein’s] criminal trial,’ [citation], or to clearly established prosecutorial functions such as deciding whether to prosecute a particular case. . . . The allegations against Van De Kamp and Livesay, which involve their failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, ***bear a close connection only to how the District Attorney’s Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases.*** [Footnote omitted.] Consequently, the challenged conduct is not prosecutorial in function and does not warrant the protections of absolute immunity.”

Id. at 1176; emphasis added.

But what is at issue here has little to do with “how the District Attorney’s Office was managed” – at least in the day-to-day sense of managing any type of business office. The allegations made by the

respondent against the petitioners are simply not the functional equivalent of true administrative policies such as hiring procedures and compensation schedules. Rather, the sole purpose of enacting the sort of policy envisioned by this Court in *Giglio* is to ensure compliance with due process requirements as outlined in this Court's decision in *Brady*. As such, it involves a core prosecutorial function – the dissemination of exculpatory information to the defense. Despite that, the Court of Appeals held that what was at issue was “not prosecutorial in function” and thus “does not warrant the protections of absolute immunity.”

If the development of a policy involving a core prosecutorial function, one required by an explicit decision of the highest court in the land, is not one that “warrant[s] the protections of absolute immunity”, what would? The answer, of course, is virtually nothing.

The conclusion that necessarily must be drawn from the Ninth Circuit's opinion in this case is that supervising prosecutors will only be protected by the absolute prosecutorial immunity when they are personally involved in an individual prosecution. Indirect involvement – such as through enacting (or failing to enact) policies governing the manner in which cases are prosecuted by the office, or through the manner in which line prosecutors are trained and supervised – simply will never “warrant the protections of absolute immunity.” As the petitioners will show in the remainder of this petition, such an

extreme restriction on the application of the absolute prosecutorial immunity is not consistent with the case law or with the policies underlying the immunity. The entire issue is the subject of a split of opinion among the various circuit and district courts across the county.

If the Ninth Circuit's view of this issue is allowed to prevail, it will encourage a flood of lawsuits, cases that until now were universally agreed to be barred by the absolute prosecutorial immunity. That is one of the main concerns that led to the recognition of the immunity, and thus is why this Court should grant certiorari in this case.

2. THIS COURT'S DECISIONS HAVE CLARIFIED WHEN THE ABSOLUTE PROSECUTORIAL IMMUNITY IS APPLICABLE

A. Imbler v. Pachtman

The seminal case on the issue of the absolute prosecutorial immunity is *Imbler v. Pachtman*, 424 U.S. 409 (1976), in which the plaintiff, whose state murder conviction had been set aside through a federal habeas corpus proceeding, attempted, under the provisions of 42 U.S.C. §1983, to sue the deputy district attorney who had prosecuted him. *Id.* at 410-415. This Court affirmed the decisions of the district and circuit courts that the prosecutor had absolute immunity from such a suit. *Id.* at 410, 416.

In its opinion, this Court observed that it had held in *Tenney v. Brandhove*, 341 U.S. 367 (1951)

that, in enacting section 1983, Congress had not intended to abrogate “those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials.” *Imbler, supra*, at 417-418. This Court, noting that prosecutors enjoy absolute immunity for certain of their actions under the common law, concluded that prosecutors were therefore entitled to “the same absolute immunity under §1983 that the prosecutor enjoys at common law.” *Id.* at 427.

This Court explained that the considerations that underlie the common-law immunity of prosecutors “include concern that harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.” *Id.* at 423. This Court quoted with approval the observations of the California Court of Appeal on this issue.

“The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the

prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement.’”

Id. at 423-424, citing to *Pearson v. Reed*, 6 Cal.App.2d 277, 287, 44 P.2d 592, 597 (Cal. Ct. App. 1935).

In explaining why an absolute, rather than qualified, immunity was called for, this Court stated that:

“If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State’s advocate. [Citations.] Further, if the prosecutor could be made to answer in court

each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.”

Imbler, supra, at 424-425.

This Court then “delineate[d] the boundaries” of its holding. *Id.* at 430.

“We agree with the Court of Appeals that respondent’s activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor’s responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State’s case, the prosecutor is immune from a civil suit for damages under §1983.”

Id. at 430-431; footnotes omitted.

This Court did observe that “the duties of the prosecutor in his role as advocate for the State involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom.” *Id.* at 431 n.33. This Court further explained that “[a]t some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a

proper line between these functions may present difficult questions, but this case does not require us to anticipate them.” *Ibid.*

B. Subsequent Case Law Has Further Explained The Nature And Scope Of The Absolute Prosecutorial Immunity Recognized In *Imbler*

In *Burns v. Reed*, 500 U.S. 478, 481 (1991), this Court addressed the question of “whether a state prosecuting attorney is absolutely immune from liability for damages under 42 U.S.C. §1983 for giving legal advice to the police and for participating in a probable-cause hearing.” This Court found that “appearing at a probable-cause hearing is ‘intimately associated with the judicial phase of the criminal process’” and thus subject to the absolute prosecutorial immunity. *Id.* at 492, quoting from *Imbler, supra*, at 430. This Court took the opposite view regarding a prosecutor giving legal advice to the police, even though the giving of such legal advice may be “related to a prosecutor’s roles in screening cases for prosecution and in safeguarding the fairness of the criminal judicial process.” *Id.* at 495.

“Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive. Rather, as in *Imbler*, we inquire

whether the prosecutor's actions are closely associated with the judicial process."

Ibid.

In *Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993), this Court concluded that prosecutors could not claim the protection of the absolute prosecutorial immunity in response to allegations of "fabricating evidence during the preliminary investigation of a crime and making false statements at a press conference announcing the return of an indictment."

"In determining whether particular actions of government officials fit within a common-law tradition of absolute immunity, or only the more general standard of qualified immunity, we have applied a 'functional approach,' [citation], which looks to 'the nature of the function performed, not the identity of the actor who performed it,' [citation]."

Id. at 269.

This Court explained that while:

"[a] prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity . . . acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, **are** entitled to the protections of absolute immunity."

Id. at 273; emphasis added.

Specifically, this Court held that where a prosecutor “performs the investigative functions normally performed by a detective or police officer,” he or she is not entitled to absolute immunity for those actions. *Ibid.* Similarly, “[t]he conduct of a press conference does not involve the initiation of a prosecution, the presentation of the State’s case in court, or actions preparatory for these functions”, and thus is not an act subject to the absolute immunity. *Id.* at 278.

In *Kalina v. Fletcher*, 522 U.S. 118, 120 (1997), this Court held that a prosecutor could not claim the protection of the absolute prosecutorial immunity in response to a lawsuit alleging that she made “false statements of fact in an affidavit supporting an application for an arrest warrant”. In reaching that conclusion, this Court explained that:

“the absolute immunity that protects the prosecutor’s role as an advocate is not grounded in any special esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself. Thus, in determining immunity, we examine the nature of the function performed, not the identity of the actor who performed it.”

Id. at 127; citations and internal quotation marks omitted.

In *Kalina*, the petitioner had commenced a criminal proceeding against the respondent by filing three documents in the Superior Court. *Id.* at 120-121.

“[P]etitioner’s activities in connection with the preparation and filing of two of the three charging documents – the information and the motion for an arrest warrant – are protected by absolute immunity. Indeed, except for her act in personally attesting to the truth of the averments in the certification, it seems equally clear that the preparation and filing of the third document in the package was part of the advocate’s function as well. The critical question, however, is whether she was acting as a complaining witness rather than a lawyer when she executed the certification ‘under penalty of perjury.’”

Id. at 129.

The petitioner argued that “the execution of the certificate was just one incident in a presentation that, viewed as a whole, was the work of an advocate and was integral to the initiation of the prosecution.” *Id.* at 130.

“That characterization is appropriate for her drafting of the certification, her determination that the evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information and the motion to the court. Each of those matters involved the exercise of professional judgment; indeed, even the

selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate. But that judgment could not affect the truth or falsity of the factual statements themselves. Testifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required 'Oath or affirmation' is a lawyer, the only function that she performs in giving sworn testimony is that of a witness."

Id. at 130-131.

What can be gleaned from these cases is that the determination whether actions by a prosecutor are protected by the absolute prosecutorial immunity depends on whether those actions are "intimately associated with the judicial phase of the criminal process", *Imbler, supra*, at 430, rather than simply being in "some way related to the ultimate decision whether to prosecute". *Burns, supra*, at 495. Reviewing courts must "apply a 'functional approach,' which looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley, supra*, at 269; citations omitted.

Thus, "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for

trial, and which occur in the course of his [or her] role as an advocate for the State, are entitled to the protections of absolute immunity”, while “administrative duties and those investigatory functions that do not relate to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity”. *Id.* at 273.

In the present case, the Court of Appeals concluded that the actions of these petitioners were not “relate[d] to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings”. While there are circuit and district court cases that would appear to support the Ninth Circuit’s conclusion, there are just as many courts whose decisions indicate that they would come to the opposite conclusion. This split can only be resolved by this Court.

3. THE FEDERAL COURTS ARE SPLIT ON THE EXTENT TO WHICH SUPERVISING PROSECUTORS CAN CLAIM THE PROTECTION OF THE ABSOLUTE PROSECUTORIAL IMMUNITY

At issue in this action, as described by the Court of Appeals, is the petitioners’ alleged “failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject”. *Goldstein, supra*, at 1176. The court found that those actions “bear a close connection only to how the District Attorney’s Office was managed,

not to whether or how to prosecute a particular case or even a particular category of cases[, and therefore] the challenged conduct is not prosecutorial in function and does not warrant the protections of absolute immunity.” *Ibid.*

The court did not explain how it came to this conclusion, merely asserting that, “although the challenged conduct may . . . be ‘to some degree related to trial preparation,’ Van De Kamp and Livesay have failed to demonstrate the required ‘close association . . . [with] the judicial phase of [Goldstein’s] criminal trial,’ [citation], or to clearly established prosecutorial functions such as deciding whether to prosecute a particular case.” *Ibid.*

In reaching this conclusion the court did not rely on any factually similar precedents, and acknowledged that “[n]either the Supreme Court nor this Court has considered whether claims regarding failure to train, failure to supervise, or failure to develop an office-wide policy regarding a constitutional obligation, like the one set forth in *Giglio*, are subject to absolute immunity.” *Id.* at 1174. The court did mention in a footnote decisions from “the Courts of Appeals for the Second and Third Circuits [which] reached similar conclusions”. *Id.* at 1175 n.2. And indeed these are not the only opinions which are supportive of the decision reached by the Ninth Circuit here. But there are also a number of cases that are in conflict with the decision reached in this appeal.

On the issue of whether supervisory personnel in a prosecutor's office can invoke the absolute prosecutorial immunity in regard to their setting of general prosecutorial policies, the D.C. Circuit and a judge in the District of Massachusetts have held that they can. *Haynesworth v. Miller*, 820 F.2d 1245, 1271 (D.C. Cir. 1987); *Jones v. City of Boston*, 2004 U.S. Dist. LEXIS 12628, *11 (D. Mass. 2004) (affirmed on appeal as *Jones v. City of Boston*, 135 Fed.Appx. 439, 440 (1st Cir. 2005) without reaching the immunity issue). The Ninth Circuit (in the present case) and a judge in the Eastern District of New York, *Sheff v. City of New York*, 2004 U.S. Dist. LEXIS 4819, *20-*21 (EDNY 2004), have taken the opposite position.

On the issue of whether supervisory personnel in a prosecutor's office can invoke the absolute prosecutorial immunity in response to allegations of a failure to train and/or supervise, the Seventh Circuit and judges in the District of Louisiana and the Eastern District of New York (as well as the Ninth Circuit in an unpublished decision that predates the present case) have held that they can. *Hamilton v. Daley*, 777 F.2d 1207, 1213 n.5 (7th Cir. 1985); *Truvia v. Julien*, 2005 U.S. Dist. LEXIS 539, *4-*5 (D. La. 2005); *Eisenberg v. District Attorney*, 1994 U.S. Dist. LEXIS 21535, *6 (EDNY 1994); *Modahl v. County of Kern*, 61 Fed.Appx. 394, 397 (9th Cir. 2003). The Second and Third Circuits, as well as judges in the Northern District of Illinois, the District of Louisiana, the Eastern District of New York, and the District of Oregon (and the Ninth Circuit in the present case)

have held that they cannot. *Walker v. New York*, 974 F.2d 293, 300 (2d Cir. 1992); *Carter v. City of Philadelphia*, 181 F.3d 339, 353 (3d Cir. 1999); *Baloun v. Williams*, 2002 U.S. Dist. LEXIS 20663, *30-*31 (N.D. Ill. 2002); *Thompson v. Connick*, 2005 U.S. Dist. LEXIS 36499, *12-*13 (D. La. 2005); *Sheff, supra*; *Kleinman v. Multnomah County*, 2004 U.S. Dist. LEXIS 21466, *19 (D. Or. 2004); *Goldstein, supra*.

In addition to the split of authority described above, the First Circuit and the Ninth Circuit have issued opinions allowing prosecutors to invoke the absolute prosecutorial immunity in situations that appear to be at least as “administrative” as the actions at issue in the present case. In both *Harrington v. Almy*, 977 F.2d 37 (1st Cir. 1992) and *Roe v. City & County of San Francisco, supra*, 109 F.3d 578 (9th Cir. 1997) what was at issue was a decision by a prosecutor’s office to refuse to prosecute arrests made by a particular police officer. In both cases, the Courts of Appeals agreed that the absolute prosecutorial immunity could be invoked.

In *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 676 (9th Cir. 1984), the plaintiff was arrested after a shooting in his mobile home. On the orders of a deputy district attorney, Malloy, the mobile home was secured and preserved as evidence. Before the plaintiff was released on bail, Malloy authorized the release of the mobile home. Thereafter the plaintiff sued, claiming that Malloy and others “had violated his rights by moving his mobile home or by allowing others to tamper with it and his possessions.

[Footnote.] He claimed damage to the home and a loss of possessions.” *Id.* at 677. The Court of Appeals found that Malloy was entitled to absolute immunity, noting that “[i]n acting either to preserve or release evidence, the primary consideration, viewed objectively, is whether the prosecutor needs the evidence to prosecute.” *Id.* at 679.

Finally, judges in the Eastern District of New York and the Northern and Southern Districts of Texas have each held that where the actions of a line prosecutor are protected by the absolute immunity, then the supervising prosecuting attorneys are also covered by that immunity. *Pinaud v. County of Suffolk*, 798 F.Supp. 913, 918 (EDNY 1992); *Lomtevas v. Cardozo*, 2006 U.S. Dist. LEXIS 5820, *16-*17 (EDNY 2006); *Smith v. Francis*, 2001 U.S. Dist. LEXIS 13993, *12-*13 (N.D. Tex. 2001) (by the Magistrate Judge; recommendation adopted without change at *Smith v. Francis*, 2001 U.S. Dist. LEXIS 15169 (N.D. Tex. 2001)); *Wilson v. Barcella*, 2007 U.S. Dist. LEXIS 22934, *82-*84 (S.D. Tex. 2007).

There is thus a very substantial and significant split in the circuit and district courts regarding the extent to which supervising prosecutors are entitled to invoke the absolute prosecutorial immunity; specifically whether the supervisors’ acts of setting general prosecutorial policies, and of training and supervising their subordinates, are prosecutorial in nature (and thus subject to the immunity) or administrative (and thus not subject to the immunity). Only

this Court can resolve this long-standing split in the lower courts.

4. THE PETITIONERS' ALLEGED ACTIONS AT ISSUE HERE ARE THE TYPE OF ACTIONS INTENDED TO BE PROTECTED BY THE ABSOLUTE PROSECUTORIAL IMMUNITY

As noted earlier, the Court of Appeals did not explain how it came to its conclusion that the alleged actions of the petitioners were administrative rather than prosecutorial, simply asserting that finding rather than actually offering an analysis of the issue. If the Court had conducted such an analysis, it would have had a much harder time reaching the conclusion it did.

What is ultimately at issue here is the due process obligation, recognized by this Court in *Giglio*, that information relating to promises and other benefits offered by prosecutors to witnesses must be revealed to the defense. In *Imbler* itself this Court recognized that a prosecutor's failure to provide such information to the defense – or to provide *Brady* information in general – is not actionable, because it is subject to the absolute prosecutorial immunity. See *Imbler, supra*, at 431 n.34, citing explicitly to both *Brady* and *Giglio*.

So there can be no doubt that compliance with *Giglio* is an action “intimately associated with the judicial phase of the criminal process”. *Imbler, supra*, at 430. The obligation recognized by the Court in *Giglio* is one imposed explicitly, and exclusively, on

prosecutors, which is logical given that it is a due process requirement, and due process is, of course, the fundamental underpinning of the “*judicial* phase of the criminal process”.

Due process requires that *Giglio* information, like *Brady* information, be provided to the defendant in order to assist in the defendant’s preparation for and conduct of his or her defense at trial. Thus, the requirement of *Giglio* that the prosecutor locate that information necessarily makes it an “act[] undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial”. *Burns, supra*, at 495. And since the obligation is one imposed solely on prosecutors – because they are the agents of the state that conduct the defendant’s trial – the act of locating and then turning over *Giglio* information must be recognized as conduct “which occur[s] in the course of [the prosecutor’s] role as an advocate for the State”. *Ibid.* This is further confirmed by the fact that a failure to comply with the requirements of *Giglio* can negatively impact the prosecution itself, if the trial judge chooses to impose sanctions such as the suppression of the informant’s testimony, or even the outright dismissal of the case.

If the actions of a line prosecutor in regard to compliance with *Giglio* in an individual prosecution are subject to the absolute prosecutorial immunity, isn’t it logical to conclude that the obligation imposed by this Court on prosecutor’s offices as a whole – and thus on their supervisory personnel, such as the petitioners here – which obligation was imposed

solely to aid in the discovery of *Giglio* information so that it can then be delivered to defendants, should also be held to be subject to the absolute prosecutorial immunity? Applying a “functional approach” to the question yields just that result.

The key is to recognize just what we are looking at when we look to “the nature of the function performed”. *Buckley, supra*, at 269. The respondent and the Court of Appeals took a generalized view of this, describing “the nature of the function performed” as simply the promulgation of policies and the training and supervision of deputy district attorneys, *Goldstein, supra*, at 1176, ignoring the purpose for which the policy-making, training, and supervision was being done.

This Court has warned about the dangers of over-generalization in connection with the related issue of qualified immunity. “[T]he right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense: . . . (As we explained in *Anderson*, the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established).” *Saucier v. Katz*, 533 U.S. 194, 202 (2001), referencing *Anderson v. Creighton*, 483 U.S. 635 (1987); citations and internal quotation marks omitted.

The Court of Appeals, in its opinion in this case, committed the same error that this Court warned about in *Saucier*: failing to evaluate the issue before

it at an “appropriate level of specificity”. What is at issue here is not simply the promulgation of policies and the training and supervision of deputy district attorneys in the abstract. Rather, what is at issue is the promulgation of a specific policy, as ordered by this Court, to ensure the dissemination of *Giglio* information to the line prosecutors who might need to pass that information on to defendants in individual prosecutions, and training and supervision specifically intended to ensure compliance with *Giglio*. This is the true “nature of the function[s to be] performed” here. When described in this way, how can these acts not be said to be actions “intimately associated with the judicial phase of the criminal process”, acts which have to be undertaken by line and supervising prosecutors alike “in preparing for the initiation of judicial proceedings or for trial”? Accordingly, these actions should be held to be fully protected by the absolute prosecutorial immunity.

5. FAILURE TO IMMUNIZE THE ACTIONS AT ISSUE HERE WILL BRING ABOUT THE PROBLEMS THE ABSOLUTE PROSECUTORIAL IMMUNITY WAS INTENDED TO AVOID

If the conduct at issue in this action is not made subject to the absolute prosecutorial immunity, it will eviscerate the effectiveness of that immunity. If such immunity is routinely denied to supervising prosecutors, as the Court of Appeals’ opinion seems to require, then plaintiffs will simply shift their focus from line prosecutors to their supervisors, because it is a

simple matter to claim that the line prosecutor's actions were the result of a policy put into place by those supervisors, or the supervisors' failure to put into place a policy, or a failure to train or supervise on the part of the line prosecutors' supervisors.

The lawsuits that potential plaintiffs currently don't bother to file against line prosecutors – because they know that those cases will be dismissed almost immediately pursuant to the absolute prosecutorial immunity – can now be profitably filed, by the simple expedient of naming the supervisors as defendants rather than the line prosecutors. And the change in defendants ultimately won't help the line prosecutor, who will become a key witness in the ensuing lawsuit, thus creating the very “entanglement in vexatious litigation . . . that have been the primary wellsprings of absolute immunities.” *Mitchell, supra*, at 522. As this Court noted in *Imbler, supra*, at 424-425, without the absolute immunity “§1983 suits . . . could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate.”

Justice Kennedy, in his concurring and dissenting opinion in *Buckley, supra*, perceived the sort of problems that can be caused by an overly restrictive interpretation of the scope of the absolute prosecutorial immunity.

“There is a reason even more fundamental than that stated by the Court for rejecting Buckley’s argument that *Imbler* applies only to the commencement of a prosecution and to in-court conduct. This formulation of absolute prosecutorial immunity would convert what is now a substantial degree of protection for prosecutors into little more than a pleading rule. Almost all decisions to initiate prosecution are preceded by substantial and necessary out-of-court conduct by the prosecutor in evaluating the evidence and preparing for its introduction, just as almost every action taken in the courtroom requires some measure of out-of-court preparation. Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves. [Citations.] Allowing the avoidance of absolute immunity through that pleading mechanism would undermine in large part the protections that we found necessary in *Imbler* and would discourage trial preparation by prosecutors.”

Buckley, supra, at 283 (Kennedy, J., concurring and dissenting).

The problems identified by Justice Kennedy are the same problems that will be created if the Ninth Circuit’s opinion is allowed to become the rule in regard to the ability of supervising prosecutors to invoke the protections of the absolute prosecutorial immunity. Just as those problems could not be accepted in the circumstances at issue in *Buckley*, they

should not be found to be acceptable in the circumstances presented by this case.



CONCLUSION

The decision of the Ninth Circuit has opened the door to a potential flood of lawsuits against supervisory personnel in public prosecutor's offices. Only this Court can decide whether that door should remain open. Accordingly, the petitioners urge this Court to grant this petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: December 19, 2007

Respectfully submitted,

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