No. 09-

In the Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Prosecutors in the Orleans Parish District Attorney's Office hid exculpatory evidence, violating John Thompson's rights under *Brady v. Maryland*, 373 U.S. 83 (1963). Despite no history of similar violations, the office was found liable under § 1983 for failing to train prosecutors. Inadequate training may give rise to municipal liability if it shows "deliberate indifference" and actually causes a violation. *See City of Canton v. Harris*, 489 U.S. 658, 389-91 (1978); *Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403-07 (1997). A pattern of violations is usually necessary to show culpability and causation, but in rare cases one violation may suffice. *Bryan County*, 520 U.S., at 409. The Court has hypothesized only one example justifying single-incident liability: a failure to train police officers on using deadly force. *See Canton*, 489 U.S., at 390 n.10.

1.

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Bryan County*?

2.

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation undermine prosecutors' absolute immunity recognized in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the *en banc* United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The *en banc* decision in *Thompson v. Connick* (App. 1a-50a) is reported at 578 F.3d 293 (5th Cir. 2009). The panel opinion is reported at 553 F.3d 836 (5th Cir. 2008) (App. 51a-113a). The district court's order denying summary judgment (App. 114a-144a) is not reported but is available at 2005 WL 3541035 (E.D. La. Nov. 15, 2005).

JURISDICTION

The *en banc* Fifth Circuit entered judgment on August 10, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 42, section 1983, of the United States Code provides:

> 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.

STATEMENT OF THE CASE

A. Factual Background

On December 6, 1984, Raymond T. Liuzza Jr. ("Liuzza") was robbed, shot, and killed outside of his home in New Orleans. Approximately three weeks later, siblings Jay, Marie, and Michael LaGarde were the victims of an attempted armed robbery while in their car in New Orleans. Jay LaGarde fought off the perpetrator, and, in the struggle, some of the robber's blood stained the cuff of Jay's pants. As part of the police investigation, crime scene technicians took a swatch of the pants with the robber's blood on it. App. 53a.

In January 1985, John Thompson ("Thompson") and Kevin Freeman ("Freeman") were arrested for the Liuzza murder. The LaGardes saw Thompson's picture in the newspaper and believed it was Thompson who had attempted to rob them. They contacted the Orleans Parish District Attorney's Office ("District Attorney's Office") and identified Thompson. App. 53a-54a.

At that time, the Orleans Parish District Attorney was Harry Connick ("Connick"). During Connick's twenty-nine year tenure from 1974 to 2003, between thirty and ninety assistant district attorneys worked in the office, screening between 12,000 and 17,000 charges per year, and prosecuting about half of those. App. 54a, 131a.

The LaGardes' armed robbery case was screened for institution of prosecution by assistant district attorney Bruce Whittaker ("Whittaker"), who received the police report, approved the case for prosecution, and filled out a Screening Action Form

indicating that armed robbery charges should be brought. After noting that a technician had taken a bloody swatch of Jay LaGarde's pants, Whittaker wrote on the form that the state "[m]ay wish to do blood test." He also recommended that the case be handled by Eric Dubelier ("Dubelier") as a special prosecutor because it involved the same defendant (Thompson) as the Liuzza murder case, which Dubelier was already handling. App. 54a-55a.

In March 1985, assistant district attorney James Williams ("Williams") handled a suppression hearing in Thompson's armed robbery case. Noting the reference to a blood test on the Screening Action Form, Williams stated in open court that "it's the state's intention to file a motion to take a blood sample from the defendant, and we will file that motion—have a criminalist here on the 27th." The record does not reflect that Thompson's blood was ever tested by the District Attorney's Office. About one week before the armed robbery trial, however, the bloody pants swatch was sent for testing.[1] Two days before trial, Whittaker received a crime lab report showing that the armed robber's blood was type B. The report was never turned over to Thompson's attorneys. App. 55a.

Several days before trial, Dubelier had asked Williams to act as lead prosecutor. Accordingly, the armed robbery case was tried by Williams and assistant district attorney Gerry Deegan ("Deegan") on April 11 and 12, 1985. The Fifth Circuit panel

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[1] The record does not reveal who ordered the test. App. 55a, 35a.

described what happened as Thompson's armed robbery trial began:

> On the first day of trial, Deegan checked all of the evidence out of the police property room, including the bloody swatch from Jay LaGarde's pants. Deegan then checked the evidence into the court property room, but never checked in the pants swatch.

App. 56a. Williams did not mention the blood evidence at trial and relied primarily on eyewitness testimony. The jury found Thompson guilty of attempted armed robbery, and he was sentenced to forty-nine and one-half years in prison. App. 56a.

From May 6 to 8, 1985, Dubelier and Williams tried Thompson for the first-degree murder of Liuzza. The state sought the death penalty. At trial, Freeman testified that Thompson shot Liuzza. An acquaintance of Thompson testified that Thompson made incriminating statements about the Liuzza murder and that he had sold Thompson's gun for him. App. 56a-57a.

Thompson did not testify on his own behalf. Had he testified, the prosecution would have used his attempted armed robbery conviction to impeach him. The jury convicted Thompson of first-degree murder. During sentencing, Marie LaGarde testified about Thompson's attempt to rob her family and her brother's actions in fighting him off. Dubelier capitalized on this testimony in his closing argument, asserting that there easily could have been three more murders and that a death sentence was necessary to punish Thompson. Thompson was sentenced to death. App. 57a.

In the fourteen years after his murder conviction, Thompson exhausted all of his appeals. His execution was set for May 20, 1999. Then, in late April 1999, an investigator in Thompson's habeas proceedings discovered a microfiche copy of the lab report containing the blood type of the armed robbery perpetrator. Thompson was tested and found to be type O, making it impossible for him to have been the LaGardes' attacker. Thompson's attorneys presented this information to the District Attorney's Office, which then moved to stay Thompson's execution. App. 57a-58a.

The ensuing investigation uncovered that, "in 1994, Deegan [had] confessed to Michael Riehlmann ("Riehlmann"), a former assistant district attorney, that he had intentionally withheld the blood evidence." App. 58a. Deegan, who was suffering from terminal cancer, admitted this shortly after learning he had only months to live. Riehlmann did not tell anyone about Deegan's confession until the blood evidence was discovered in 1999. App. 58a.[2]

In 2001, Thompson applied for state post-conviction relief seeking vacatur of his murder conviction. The state district court resentenced him to life in prison. In 2002, the Louisiana Fourth Circuit Court of Appeal vacated Thompson's murder conviction, holding that the tainted attempted armed robbery conviction had

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[2] Riehlmann was sanctioned by the Louisiana Supreme Court for his failure to promptly report Deegan's misconduct. *See In Re Riehlmann*, 2004-0680 (La. 1/19/05); 891 So.2d 1239.

unconstitutionally deprived him of his right to testify in his own defense at his murder trial.[3] Thompson was retried for Liuzza's murder in 2003, and was found not guilty. App. 59a-60a.

B. Federal Proceedings

After his release, Thompson brought suit in the United States District Court for the Eastern District of Louisiana under 42 U.S.C. § 1983, alleging that the District Attorney's Office[4] violated his rights by failing to train prosecutors on their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963).[5] *See generally Monell v. Department of Social Services*, 436 U.S. 658 (1978). App. 60a-61a, 116a, 132a-142a.[6]

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[3] *See State v. Thompson*, 2002-0361, pp. 8-9 (La. App. 4 Cir. 7/17/02); 825 So.2d 552, 557-58.

[4] Thompson also sued, in their individual and official capacities, Connick, Williams, and Dubelier, as well as Eddie Jordan, who held the position of Orleans Parish District Attorney in 2003. App. 60a.

[5] Thompson's additional state and federal claims were dismissed at various stages. His state claims were dismissed on summary judgment. His § 1983 claim against Connick individually was dismissed before trial. After Thompson rested, the district court dismissed his § 1985(3) conspiracy claim. At the close of evidence, the court ruled that two of the prosecutors, Dubelier and Williams, were not "policymakers" and thus not liable. App. 61a, 142a-143a. The only claim that proceeded to trial was Thompson's § 1983 claim against the office. His official capacity claims against the prosecutors are identical to his claim against the office itself. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); App. 132a.

[6] Thompson also sued the State of Louisiana separately for wrongful conviction. *See* LA. REV. STAT. ANN. § 15:572.8

In denying petitioners' motion for summary judgment, App. 138a-142a, the district court reasoned that, even absent a pattern of *Brady* violations, a jury could infer from a single violation that office training showed "deliberate indifference" to Thompson's rights. App. 138a-139a.[7] The court ruled that the following evidence raised a triable issue on deliberate indifference:

- the office "knows that *Brady* issues are complex and ambiguous," and yet lacked formal training and a written policy regarding *Brady* compliance;
- there had been *Brady* violations in unrelated cases for which the office could not identify corrective measures taken;

(2007). The State has offered to settle that lawsuit for the maximum statutory compensation, $150,000, plus up to $40,000 for prospective claims such as job training, education, and medical expenses. *Id.* § 572.8(H). The wrongful conviction suit is based on a different legal standard from Thompson's *Monell* claim against the District Attorney's Office. *See, e.g.,* § 572.8(A) (requiring proof that conviction was reversed or vacated and that petitioner is "factually innocent of the crime").

[7] The court relied on *Bryan County*, 520 U.S., at 418, and *Canton*, 489 U.S., at 390 n.10, as well as the Fifth Circuit's decision in *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985), *abrogated on other grounds by Leatherman v. Tarrant County*, 507 U.S. 163, 167 (1993). App. 138a-139a. As discussed in Part I.C, *infra*, the court also relied on the Second Circuit's analysis in *Walker v. City of New York*, 974 F.2d 293, 300 (2nd Cir. 1992). App. 141a-142a.

- a judge had written a letter of concern to the office regarding *Brady* obligations;
- a later-written policy manual gave little guidance on *Brady* and mistakenly limited *Brady* to exculpatory evidence.

See generally App. 139a-140a (summarizing Plaintiff's summary judgment evidence).

Before trial, the parties stipulated that failure to disclose the lab report violated Thompson's rights under *Brady*. App. 61a n.7, 22a n.41. The jury found that, while the violation was not caused by any official policy, it was "substantially caused by the District Attorney's failure, through deliberate indifference, to establish policies and procedures" to avoid such violations. App. 61a-64a. The jury awarded Thompson $14 million, and the court added just over $1 million in attorneys' fees. App. 64a-65a.

On December 19, 2008, a panel of the United States Court of Appeals for the Fifth Circuit affirmed. App. 71a-113a. On March 11, 2009, the Fifth Circuit granted *en banc* rehearing and vacated the panel decision.[8] On March 18, 2009, the court asked counsel to brief a number of specific issues, including whether a single incident can give

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[8] Since the panel decision has been vacated, the judgment naming Connick, Dubelier, Williams and Jordan still remains. This Court's review should include correcting that glaring error by the district court. *See* App. 112a n.27 (explaining why the district court erred by including those defendants in the judgment). In this petition, Jordan's name has been substituted with that of the current Orleans Parish District Attorney, Leon Cannizzaro.

rise to failure-to-train liability, and whether a district attorney's culpability can be premised on a failure by independently-trained prosecutors to follow *Brady*. On August 10, 2009, an equally divided *en banc* court affirmed the verdict and damages. App. 2a. Two separate dissents, however, explained why the judgment should have been reversed. App. 2a-7a, 9a-44a.[9]

Writing for six members of the court, Judge Clement would have held that Thompson's evidence of a single *Brady* violation, accompanied only by "diffuse evidence of *Brady* misunderstanding among several assistant district attorneys," failed to meet the "heightened standards for culpability and causation" for failure-to-train liability. App. 13a-14a, 32a, 39a. Agreeing with Judge Clement, Judge Jones wrote separately to highlight "the troubling tension between this unprecedented multimillion dollar judgment against a major metropolitan District Attorney's office and the policies that underlie the shield of absolute prosecutorial immunity." App. 2a. Judge Jones urged this Court to address whether attaching liability to a district attorney's office undermined the policies that led the Court, last term, unanimously to reaffirm absolute immunity for prosecutors in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). App. 2a-3a.

Petitioners now seek a writ of certiorari from this Court.

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[9] Judge Prado wrote a concurrence for five judges explaining why the judgment should be affirmed. App. 45a-50a.

REASONS FOR GRANTING THE PETITION

In her *en banc* dissent, Judge Edith Brown Clement captured why this case merits review:

> We believe it is imperative to explain why the result in this case should not encourage the extension of single incident municipal liability under *Monell*.

App. 9a. Judge Clement's fears are well founded. This case erases the distinction between municipal and vicarious liability, a distinction on which *Monell* was founded. It also caps a progressive unraveling of the tight limits on municipal liability for failing to train employees. And it does so with respect to a single instance of deliberate prosecutorial misconduct, thus expanding district attorneys' liability for countless decisions their prosecutors make every day.

The exceedingly high bar for failure-to-train liability is premised on the idea that municipalities are not vicariously liable for employee wrongdoing. *See Monell*, 436 U.S., at 691. Not only must a municipality callously ignore an obvious need for employee training, but its flawed training must directly cause the violation. *Canton*, 489 U.S., at 388-91; *Bryan County*, 520 U.S., at 404. These rigorous standards typically demand a persisting pattern of employee wrongdoing. *Bryan County*, 520 U.S., at 409.

But a single instance of wrongdoing may suffice in rare circumstances. This Court has hypothesized only one: failure to train police officers on using deadly force. *See Canton*, 489 U.S., at 390 n.10. The Court has never expanded

that exception, nor applied it to *prosecutors*, who have historically enjoyed special protections from suit. *See, e.g., Van de Kamp*, 129 S. Ct., at 859-60. Circuit courts have applied the exception to prosecutors' *Brady* obligations, but in two decades they have failed to agree on a consistent approach.

The Fifth Circuit's evenly split *en banc* decision emerges from this persisting confusion. The court has affirmed a jury verdict that inferred from prosecutors' egregious *Brady* violation that the office itself callously ignored *Brady* training. But the evidence showed no history of violations flagging a need for training, nor did it link any training flaw to the deliberate violation in Thompson's case. Moreover, the "uncontradicted and unimpeached" testimony, App. 31a, proved that office policy was to turn over the kind of report at issue, regardless of whether prosecutors thought it fell under *Brady*.

The Fifth Circuit should have heeded the warning that "[a]llowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of *Monell*." *Canton*, 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part). That is precisely what happened. Once a jury heard Thompson's story—a story being made into a film[10]—the outcome was not surprising. It awarded

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[10] The film, currently in production, will be entitled "The Nine Lives of John Thompson," and will star Matt Damon and Ben Affleck as the attorneys who exonerated Thompson. *See* http://movies.nytimes.com/movie/446373/The-Nine-Lives-of-John-Thompson/details (last visited October 29, 2009).

Thompson compensation "roughly equal to [the] office's annual operating budget."[11]

The Court should dispel the confusion over how *Canton* applies to district attorney's offices. Reviewing this case will allow the Court to develop its failure-to-train case law—which consists only of *Canton* and *Bryan County*—and to explain *Canton*'s elusive single-incident theory. Unique problems arise when the municipality at issue is a district attorney's office—such as whether an office can culpably fail to train professionally educated criminal attorneys, and whether any training could prevent prosecutors from deliberately violating the law. More generally, the Court should use this case to confirm that a failure-to-train claim based on a single incident is still governed by the rigorous culpability and causation standards of *Canton* and *Bryan County*. Allowing liability here nullifies those safeguards and exposes district attorney's offices to vicarious liability for a wide range of prosecutorial misconduct.

This case dovetails with the attention given to prosecutorial immunity last term in *Van de Kamp* and this term in *Pottawattamie County v. McGhee*, 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (U.S. Apr. 20, 2009) (No. 08-1065). Indeed, the Court's continuing commitment to

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[11] Becky Bohrer, *Court upholds $14 million judgment against Orleans DA's office*, ASSOC. PRESS, Aug. 10, 2009. To prevent a crippling seizure of assets, the office has been forced to consider bankruptcy. *Financial Woes Could Halt Justice System*, WDSU.com, Jan. 7, 2009, http://www.wdsu.com/money/18426227/detail.html (last visited October 29, 2009).

individual prosecutors' absolute immunity highlights another compelling reason for review. Last term in *Van de Kamp*, this Court extended absolute prosecutorial immunity to precisely the kind of failure-to-train claims presented in this case. Allowing those claims against an office on the same theory works the same ill-effects on prosecutors' independence and judgment that *Van de Kamp* and its predecessors sought to avoid.

For both reasons, this Court should grant certiorari to review the judgment of the *en banc* Fifth Circuit.

I. THE COURT SHOULD CLARIFY WHEN DISTRICT ATTORNEY'S OFFICES MAY BE LIABLE FOR INDIVIDUAL PROSECUTORS' MISCONDUCT.

A. The Court's decisions narrowly limit failure-to-train liability for single incidents.

A municipality is not liable under section 1983 simply because it employs a tortfeasor, but only if a municipal policy or custom directly causes injury. *See, e.g., Bryan County*, 520 U.S., at 403; *Monell*, 436 U.S., at 690-94. When a policy is itself unconstitutional, or a policymaker orders unconstitutional action, proving fault and causation is straightforward. *See Bryan County*, 520 U.S., at 404; *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483-84 (1986). But "much more difficult problems of proof" arise when liability is premised, not on a municipality's action, but on its failure to act. *Bryan County*, 520 U.S., at 406. In such cases, "rigorous standards of culpability and causation must be applied to ensure that the

municipality is not held liable solely for the actions of its employee." *Id.*, at 405 (citing *Canton*, 489 U.S., at 391-92; *Oklahoma City v. Tuttle*, 471 U.S. 808, 824 (1985) (plurality opinion)).

Those rigorous standards govern claims alleging a municipality has inadequately trained its employees. It is not enough to show that an employee was poorly trained, that better training would have thwarted his bad act, or that "an otherwise sound program has occasionally been negligently administered." *Canton*, 489 U.S., at 390-91; *see also Bryan County*, 520 U.S., at 408. Rather, inadequate training must demonstrate a municipality's "deliberate indifference"—a callous and conscious disregard for rights. *Canton*, 489 U.S., at 388-89 & n.7; *Bryan County*, 520 U.S., at 407. Additionally, an identified flaw in training must "actually cause" the particular injury. *Canton*, 489 U.S, at 391; *Bryan County*, 520 U.S., at 404. "Where a court fails to adhere to rigorous requirements of causation and culpability, municipal liability collapses into *respondeat superior* liability." *Bryan County*, 520 U.S., at 415.

Failure-to-train liability ordinarily requires an underlying pattern of employee wrongdoing. *See, e.g., Bryan County*, 520 U.S., at 409. Without warning from a history of violations, a municipality's mere failure to adjust its training would not ordinarily show deliberate indifference, nor *directly* cause an employee's wrongdoing.[12] By

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[12] *See, e.g., Bryan County*, 520 U.S., at 407 (explaining that "[i]f a [training] program does not prevent constitutional violations, municipal decisionmakers *may eventually* be put

contrast, culpability and causation could be proven by a municipality's "continued adherence" to training whose flaws are exposed by repeated wrongdoing. *Id.*, at 407 (citing *Canton*, 489 U.S., at 390 n.10).[13]

In "a narrow range of circumstances," failure-to-train liability may be triggered by an employee's single violation. *Bryan County*, 520 U.S., at 409. The theory emerges from this language in *Canton*:

> For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officer with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

489 U.S., at 390 n.10 (citation omitted). Even in such a situation, *Canton* did not relax its stringent fault and causation requirements. *Id.*, at 391. Justice O'Connor's concurrence also cautioned against diluting those safeguards:

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on notice that a new program is called for") (emphasis added).

[13] *See, e.g., Bryan County*, 520 U.S., at 407-08 (observing that "the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training ... is the 'moving force' behind the plaintiff's injury") (citing *Canton*, 489 U.S, at 390-91).

> Without some form of notice to the city, and the opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory could completely engulf *Monell*, imposing liability without fault.

Id., at 395 (O'Connor, J., concurring in part and dissenting in part).

Justice O'Connor revisited this subject in *Bryan County*. *Canton*, she explained, left open the "possibility" that failure-to-train liability might flow from a single violation. *Bryan County*, 520 U.S., at 409 (citing *Canton*, 489 U.S., at 390 & n.10). In doing so, however, *Canton* "simply hypothesized that, in a narrow range of circumstances, a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations." *Bryan County*, 520 U.S., at 409.

The Court, then, has emphasized that plaintiffs suing a municipality for failure to train employees face an exceedingly high bar, especially in those rare situations where liability depends on a single incident. Furthermore, the only concrete example of such a situation is *Canton*'s hypothetical—which the Court has never since clarified—of a police department's failure to train officers about deadly force. As discussed in Parts I.B and I.C, *infra*, circuit courts have struggled to apply that hypothetical to cases like Thompson's.

B. In two decades, circuit courts have not developed a consistent approach to applying single-incident liability to *Brady* violations.

Federal circuit courts have recognized that single-incident liability is exceptional, and that failure-to-train usually demands a pattern of violations.[14] They confine single-incident liability largely to situations like *Canton*'s deadly force hypothetical.[15] In fact, until *Thompson*, the only time the Fifth Circuit had found single-incident liability was an excessive force case that closely tracked the *Canton* hypothetical. *See Brown v. Bryan County*, 219 F.3d 450 (5th Cir. 2000); App. 16a-18a (discussing *Brown*). But now four circuits, including the Fifth, have confronted single-incident liability based on an alleged failure to train prosecutors or officers on *Brady*. Although these courts have applied the same *Canton* hypothetical, they do not agree on the proper analysis and they reach inconsistent results.

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[14] *See, e.g., Doe v. Broderick*, 225 F.3d 440, 456 (4th Cir. 2000); *Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 874-75 (4th Cir. 1989); *Robles v. City of Fort Wayne*, 113 F.3d 732, 736 (7th Cir. 1997); *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 392-93 (8th Cir. 2007) (en banc); *McDade v. West*, 223 F.3d 1135, 1141-42 (9th Cir. 2000); *Gold v. City of Miami*, 151 F.3d 1346, 1351 (11th Cir. 1998).

[15] *See, e.g., Young v. City of Providence*, 404 F.3d 4, 28-29 (1st Cir. 2005); *Brown v. Gray*, 227 F.3d 1278, 1286-87 (10th Cir. 2000).

The earliest decision in this area is *Walker v. City of New York*, 974 F.2d 293 (2nd Cir. 1992).[16] Building on *Canton*, *Walker* developed a three-part test to analyze a failure-to-train claim based on a prosecutor's covering up impeachment evidence. *Id.* at 294-95, 296-97 (discussing *Canton*, 489 U.S., at 390 n.10).[17] Under that test, failure to train prosecutors on *Brady* in 1971 could constitute deliberate indifference, because: (1) a district attorney knows "to a moral certainty that ADAs will acquire *Brady* material"; (2) in 1971, *Brady* obligations were not so obvious as to require no training; and (3) withholding *Brady* material "will virtually always lead to a substantial violation of constitutional rights." *Id.* at 300.

Walker, however, limited itself to the time period and evidence at issue. *Brady* was relatively new in 1971—the time of the violation in *Walker*—and the Second Circuit took "no view as to whether ... a jury finding [on deliberate indifference] would be supportable in other time periods, or with

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[16] From the outset, *Walker* observed that municipal liability raised "elusive questions," such as whether "a single incident [can] constitute an unlawful policy." *Id.*, at 296; *see also Robles*, 113 F.3d, at 735 (describing *Canton*'s failure-to-train standard as "somewhat elusive") (citation omitted).

[17] Generally, the test requires showing that (1) a policymaker knows "to a moral certainty" that employees will confront a given situation; (2) the situation "either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation"; and (3) the employee's "wrong choice ... will frequently cause the deprivation of a citizen's constitutional rights." 972 F.2d, at 297-98.

respect to other kinds of exculpatory evidence." *Id.* Unlike disclosure of impeachment evidence, *Walker* suggested "there might have been no need in 1971 to train ADAs to disclose direct evidence that the accused was elsewhere at the time of the crime." *Id.* The Second Circuit has since re-affirmed *Walker*, while explaining that it is subject to the heightened culpability and causation standards emphasized by this Court in *Bryan County.*[18]

The Eighth Circuit recently confronted the same situation as *Walker*—failure-to-train based on a prosecutor's nondisclosure of impeachment material—but without mentioning *Walker*'s three-part test. *See Reasonover v. St. Louis County*, 447 F.3d 569, 583-84 (8th Cir. 2006). Instead, the court simply applied the stringent culpability and causation requirements from *Canton* and *Bryan County*. Thus, the court emphasized that allegedly inadequate training must not only show deliberate indifference, but also constitute "the moving force behind the constitutional violation." *Id.*, at 583 (quoting *Canton*, 489 U.S. at 388, 389). The evidence—that the prosecutor was aware of *Brady* obligations and that county policy was to disclose *Brady* material—failed to show that the particular violations "were the result of inadequate training or supervision." *Id.*, at 584. The court did not even

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[18] *See Amnesty America v. Town of West Hartford*, 361 F.3d 113, 130 n.10 (2nd Cir. 2004); *see also Aretakis v. Durivage*, No. 1:07-CV-1273, 2009 WL 249781, at *28-*30 (N.D.N.Y. Feb. 3, 2009) (slip op.) (applying *Walker* in light of heightened culpability and causation).

hint that a single *Brady* violation could underpin a failure-to-train claim.[19]

By contrast to the Eighth Circuit, the Sixth Circuit has, on two recent occasions, allowed failure-to-train claims based on single-incident *Brady* violations involving police officers. Both decisions implicitly held that a pattern of *Brady* violations was not required to establish failure-to-train liability. In neither case, however, did the court follow the Second Circuit's three-step approach in *Walker*.

For instance, in *Gregory v. City of Louisville*, the Sixth Circuit held that plaintiffs survive summary judgment "by showing that officer training failed to address the handling of exculpatory materials and that such a failure has a 'highly predictable consequence' of" causing *Brady* violations. 444 F.3d 725, 753 (6th Cir. 2006). The officers had received no *Brady* training and the chief of police "believed officers were confused" about *Brady*. *Id.*, at 753-54. The court reasoned that, because disclosure obligations are "a significant constitutional component of police duties with obvious consequences for criminal defendants," evidence of failure to train on those duties satisfies culpability and causation. *Id.*, at 754. The court recently confirmed *Gregory* in *Moldowan v. City of Warren*, 578 F.3d 351, 393 (6th

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[19] Indeed, in rejecting plaintiff's claim that the county had a custom of failing to document *Brady* material, the court remarked that the plaintiff "presents no evidence of a widespread practice of violating police and prosecutorial obligations under *Brady*." *Id.*, at 584.

Cir. 2009). *Moldowan* reasoned that, because police[20] had a duty to turn over exculpatory evidence, *Canton* "dictates that the City has a corresponding obligation to adequately train its officers in that regard." *Id.* *Moldowan* said nothing about heightened causation.

In sum, the Second, Eighth, and Sixth Circuits have failed to arrive at a consistent approach to failure-to-train claims involving *Brady* obligations. The Second Circuit's *Walker* analysis, now nearly two decades old, has not been adopted by either the Eighth or the Sixth Circuits. The Sixth Circuit agrees with the Second, however, that single *Brady* violations can support a failure-to-train claim, whereas the Eighth has reached a different conclusion. Furthermore, the Second[21] and the Eighth Circuits subject such failure-to-train claims to the rigorous culpability and causation standards of *Canton* and *Bryan County*, whereas the Sixth Circuit is more lenient. Finally, the Second Circuit's seminal *Walker* test is ambiguous on its own terms: it suggests that obvious or later-occurring *Brady* violations may not support failure-to-train liability against a district attorney's office. None of the other circuits have developed that critical aspect of *Walker*.

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[20] *Moldowan* expressly held that *Brady* obligations apply to police officers. 578 F.3d, at 376-81. But the court did not indicate that its failure-to-train analysis would apply any differently to prosecutors—indeed, it found police officers had *Brady* obligations by analogy to prosecutors. *Id.*

[21] *See* note 18, *supra*, and accompanying text.

This confusion has resulted from lower courts attempting to apply *Canton*'s single-incident hypothetical—involving police training on deadly force—to the very different matter of *Brady* obligations. The divergent approaches reveal not only inconsistency but stagnation: courts have not approached the same situations in a way that will sensibly elucidate, over time, how *Canton* should apply to prosecutors. The Fifth Circuit's approach in *Thompson*, *infra* Part I.C., adds to the confusion and also emerges from contradictory circuit precedent.

C. The Fifth Circuit's approach in *Thompson* deepens the confusion.

The Fifth Circuit demonstrates the deep confusion plaguing this area of municipal liability. Not only does the court's approach in *Thompson* add another layer of uncertainty to the other circuits, but the Fifth Circuit's own case law now contradicts itself on whether single *Brady* violations can support a failure-to-train claim. Indeed, the area is so murky that, four years before *Thompson*, a Fifth Circuit panel examined the record of the same district attorney's office and found no history of *Brady* violations showing deliberate indifference.

The Fifth Circuit's approach in this area resembles the Second Circuit's, at least superficially. Thompson's jury, for instance, was instructed under the three-part *Walker* test. App. 94a & n.20. The district court denied summary judgment based on the *Walker* analysis, App. 141a-142a, and the panel relied on *Walker* to support the

conclusion that "Thompson did not need to prove a pattern of *Brady* violations to demonstrate that the failure to train was deliberately indifferent." App. 80a (citing *Walker*, 974 F.2d, at 300); *see also generally* App. 72a-80a (discussing whether pattern of violations is necessary).

But there was no attempt to grapple, as *Walker* did, with the nuances of *Brady*—such as how deliberate indifference applies to a violation occurring long after *Brady* or concerning different *Brady* material. Thompson's violation occurred fourteen years after Walker's, and, since it involved exculpatory as opposed to impeachment evidence, it was an obvious breach. *Cf. Walker*, 974 F.2d at 300. Furthermore, Thompson presented evidence of diffuse disagreement about *Brady* not directly linked to the particular violation, *see infra* Part I.D, evidence that might satisfy Sixth Circuit but fail Eighth Circuit standards. *See supra* Part I.C. Such evidence, moreover, would likely fail in the Second Circuit, given its confirmation that the *Walker* test incorporates heightened culpability and causation. *See Amnesty America*, 361 F.3d at 130 n.10.[22]

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[22] *And cf. Babi-Ali v. City of New York*, 979 F.Supp. 268, 274 (S.D.N.Y. 1997) (finding *Walker* "still applies" to a claim raised "thirty-four years after the *Brady* decision," but in which plaintiff alleged "that the conduct of the Queens County District Attorney's Office indicates a history of mishandling *Brady* material"); *see also, e.g., Gausvik v. Perez*, 239 F.Supp.2d 1047, 1057 (E.D. Wash. 2002) (distinguishing *Walker* in part because "[p]laintiff was prosecuted in 1995, over thirty years after Brady was decided").

The Fifth Circuit's own case law mirrors the inter-circuit confusion. Until *Thompson*, the Fifth Circuit had "consistently rejected application of the single incident exception." *Gabriel v. City of Plano*, 202 F.3d 741, 745 (5th Cir. 2000); App. 16a.[23] Indeed, only four years before Thompson's federal trial, the Fifth Circuit had addressed *Brady* enforcement by Orleans Parish District Attorney Harry Connick—the *same* district attorney over the *same* office during the *same* time period. *See Cousin v. Small*, 325 F.3d 627, 637-38 (5th Cir. 2003). *Cousin* found that Connick's "enforcement of the [*Brady*] policy was not patently inadequate or likely to result in constitutional violations," and observed that:

> ... Connick's office handled tens of thousands of criminal cases over the relevant time period, and we agree with the [district] court's conclusion that citation to a small number of cases, out of thousands handled over twenty-five years, does not create a triable issue of fact with respect to Connick's

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[23] *See also Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 288 (5th Cir. 2002); *Snyder v. Trepagnier*, 142 F.3d 791, 798 (5th Cir. 1998) (rejecting single-incident liability); App. 16a n.24. The one exception was on remand in *Bryan County* itself, which featured inadequate training identical to the *Canton* hypothetical. *See Brown v. Bryan County*, 219 F.3d 450, 458-61 (5th Cir. 2000); App. 16a-17a (discussing *Brown*). Even so, one judge dissented in *Brown*, urging the panel had misapplied circuit precedent on single-incident liability and further arguing that this Court had *narrowed* the theory in *Bryan County*. *See Brown*, 219 F.3d at 474-77 (DeMoss, J., dissenting).

> deliberate indifference to violations of *Brady* rights.

Id.

Cousin thus considered—and approved—the same office's record of *Brady* enforcement during the time period covering Thompson's case. *Id.*, at 630, 637.[24] Furthermore, *Cousin* required a pattern of *Brady* violations: it did not even hint that one violation could suffice. *Id.*, at 637 (explaining that "[t]o satisfy the deliberate indifference prong, a plaintiff usually must demonstrate a pattern of violations").[25]

In sum, *Thompson* deepens persisting uncertainty, both inside and outside the Fifth Circuit, over when failure-to-train liability may attach to a single *Brady* violation. The issue having stagnated for the past two decades, *Thompson* signals the time is ripe for this Court's intervention. As the next section demonstrates,

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[24] Judge Prado's *Thompson* panel opinion distinguished *Cousin* on the ground that the plaintiff conceded that the office's *Brady* training was adequate in 1995, which "says nothing of the training, supervision, and monitoring that existed when the DA's Office tried Thompson in 1985." App. 88a-89a. But that misses *Cousin*'s significance. As Judge Clement explained, *Cousin* "sustained the district court's conclusion that twenty-five years of records involving this District Attorney's Office (covering the time period of Thompson's trial) reveal no pattern of *Brady* violations." App. 25a.

[25] *See also Burge v. St. Tammany Parish*, 336 F.3d 363, 372-73 (5th Cir. 2003) (declining plaintiff's "argument that the single-incident exception should be expanded based on the latent nature of a *Brady* claim").

infra Part I.D, *Thompson* collapses municipal and *respondeat superior* liability for a potentially wide range of prosecutorial misconduct and thus dramatizes the hazards of applying single-incident liability to a district attorney's office.

D. The Fifth Circuit has effectively imposed vicarious liability on a district attorney's office.

The work of district attorney's offices embraces countless judgments by individual prosecutors regarding evidence disclosure. With *Thompson*, the Fifth Circuit has essentially adopted a *per se* rule that offices failing to train adequately on *Brady* could be liable for every violation committed in their offices—regardless of how rarely or under what circumstances they occur. And this rule logically embraces any other violation involving a prosecutor's lapse of discretionary judgment. App. 27a. That rule cannot be right: it dilutes *Canton*'s "rigorous requirements of culpability and causation," *Bryan County*, 520 U.S., at 415, exposing district attorney's offices to vicarious liability. The Court should grant certiorari to temper *Canton*'s application to this fertile source of damaging municipal liability.

(1). Thompson failed to show culpability and causation.

Judge Clement's *en banc* dissent correctly explains that the culpability inquiry must focus on the kind of undisclosed evidence at issue, and whether there was an obvious need to train

prosecutors about it. App. 14a-18a, 22a-24a.[26] Thus, the question was not whether the office culpably failed to train about *Brady* generally, but whether it culpably "fail[ed] to train on how to handle specific types of evidence such as the crime report at issue." App. 24a.[27]

Thompson's evidence failed that standard. Principally, he could rely only on the single violation because he proved no pattern of similar incidents. App. 25a. In tens of thousands of cases handled by Connick's office in the previous decade, "only four convictions were overturned based on *Brady* violations ... and there was not a single instance involving the failure to disclose a crime lab report or other scientific evidence." App. 25a. Nor could Thompson identify any reported decision alerting Connick to train on this issue. After all, the Fifth Circuit had already found no pattern of *Brady* violations by his office during the relevant period. App. 26a; *see supra* Part I.C.

Against this, Thompson merely offered "generic generalizations" that "could ... support a deliberate indifference finding against any prosecutor's office for nearly any error that leads to a reversal of a conviction." App. 27a-28a. Evidence that *Brady* issues were common, or that prosecutors thought *Brady* had "gray areas," proved nothing. As Judge

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[26] *See, e.g., Canton*, 489 U.S., at 391 (requiring that "the identified deficiency in a city's training program must be closely related to the ultimate injury").

[27] *Cf. Walker*, 974 F.2d, at 300 (reserving question of how deliberate indifference applies "with respect to other kinds of exculpatory evidence").

Clement explained, such evidence would apply equally to any district attorney's office, and would implicate every discretionary issue prosecutors confront, including "*Brady*, search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." App. 26a-27a.

Prosecutors, moreover, are not just any municipal employees. They are "licensed attorneys ... personally responsible as professionals to know what *Brady* entails and ... to understand the 'gray areas.'" App. 29a. This is the last case where diffuse evidence of *Brady* confusion should show deliberate indifference by a district attorney, who is "entitled to assume that attorneys will abide by the standards of the profession." App. 29a. It would, moreover, be especially inappropriate where—despite theoretical disagreements over *Brady*—"every single witness who was asked stated that they would have disclosed the crime lab report had they known about it." App. 31a.

The evidence also failed heightened causation. As Judge Clement explained, Thompson was required to establish "by substantial evidence" that "unfamiliarity with *Brady* obligations with respect to this lab report was the *actual* cause—the *moving force*—of this constitutional violation." App. 33a (emphasis in original). Thompson did not meet that stringent standard.

Thompson's sole theory of causation was that one or more assistant district attorneys did not disclose the report because they misunderstood their obligation to produce it, and that *Brady*

training would have prevented that. App. 35a-36a. The evidence of what led to nondisclosure was murky, App. 33a, but at most Thompson showed some possible confusion about *Brady*'s application to impeachment evidence, and some disagreement about whether *Brady* reached potentially exculpatory lab reports. App. 37a-38a.

This evidence cannot show that failure to train on *Brady* was "the actual cause and moving force behind the constitutional violation." App. 38a. For instance, any confusion about *Brady*'s coverage of impeachment evidence was irrelevant: the lab report was exculpatory, not impeaching. App. 38a-39a. Furthermore, any disagreement about whether *Brady* reached the report could not overcome the uncontradicted evidence that office policy was to turn over *all* lab reports regardless. App. 31a. The same witness who testified that *Brady* did not reach every lab report also "stated unequivocally that *all* technical or scientific reports, like the lab report, were required to be turned over to a defendant." App. 38a (emphasis in original).

Ultimately, as Judge Clement explained, Thompson's causation argument boiled down to insisting that a jury could have rejected the theory that a "single rogue prosecutor" was solely responsible for hiding the evidence. App. 36a-37a. But regardless of whether one or more of the four prosecutors participated in the nondisclosure, Thompson had to prove a "direct causal link" between the nondisclosure and *office policy*. *Bryan*

County, 520 U.S., at 404.[28] It was not enough to show that absence of *Brady* training made this violation "more likely," *see id.*, at 410-11, nor "that an injury ... could have been avoided if [prosecutors] had had better or more training." *Canton*, 489 U.S., at 391. Rather, *Canton* requires that "the identified deficiency in a ... training program must be *closely related* to the ultimate injury," 489 U.S., at 391 (emphasis added). Thompson's proof failed that standard. App. 37a-39a.

(2). Applying "failure-to-train" to this single incident collapses municipal and vicarious liability.

Even as it allowed municipal liability under § 1983, this Court cautioned that "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, ... on a *respondeat superior* theory." *Monell*, 436 U.S., at 691 (emphasis in original). Both *Canton* and *Bryan County* reissued that warning. *See Canton*, 489 U.S., at 391-92; *Bryan County*, 520 U.S., at 415. Justice O'Connor even predicted that allowing certain inadequate training claims "to go to the jury based upon a single incident would only invite jury nullification of *Monell*." *Canton*, 489 U.S., at 399 (O'Connor, J., concurring in part and

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[28] *See, e.g.*, App. 37a (explaining that Thompson was required to prove that "the assistant district attorney (or attorneys) responsible for the constitutional violation did not understand *Brady*, that this lack of understanding caused the failure to produce the report, and that *Brady* training could have resolved this lack of understanding").

dissenting in part). Now *Thompson* has fulfilled Justice O'Connor's prediction. The *en banc* Fifth Circuit has allowed a jury—based solely on the single instance of deliberate prosecutorial misconduct—to impose liability on a district attorney's office, where the evidence failed to establish that the *office* was at fault.

The essence of vicarious liability is to make an employer answerable for an employee's wrongdoing simply by virtue of the employment relationship. That can be the only fair description of the basis for liability in this case. No history of similar violations should have alerted Connick that he needed training targeted to this sort of *Brady* problem. Nothing warned him not to rely on his professional prosecutors' independent training and judgment in obeying *Brady*. And nothing warned him that the existing office policy—to turn over *all* crime lab reports, regardless of whether they fell under *Brady*, App. 31a-32a, 38a—would not resolve exactly the situation presented in Thompson's case. In sum, no evidence showed that Connick or his office had the callous, conscious disregard *Canton* demands.

Nor did any evidence establish a tangible link between the office's lack of *Brady* training and the nondisclosure in Thompson's case. Instead, Thompson merely presented a haze of generalizations. The fact that certain prosecutors expressed doubts after the fact about their *Brady* obligations shed no light on what *actually* caused the violation in Thompson's case. And, again, no evidence overcame the fact that the office's actual policy was to turn over all crime lab reports,

regardless of *Brady*. App. 31a-32a, 38a. The jury, after all, affirmatively found that Thompson's violation was *not* caused by an actual office policy. App. 39a, 64a. The events that led to the deliberate nondisclosure in Thompson's case are now impossible to reconstruct, but one thing is clear: the office's *training policy* did not cause it.

What allowed the Fifth Circuit to dilute culpability and causation is *Canton*'s single-incident theory—*i.e.*, *Canton*'s suggestion that certain duties so obviously cry out for targeted training that a municipality's failure to do so creates liability, even absent a pattern of violations. *See* 489 U.S., at 390 & n.10. But whatever the breadth of single-incident liability, the Court should clarify that it has little application to this case. Absent a warning history of particular violations, there can be no obvious need to train prosecutors who are themselves professionally trained to understand and apply the law. Moreover, a district attorney's office cannot be culpable for, or the moving force behind, a single constitutional injury intentionally committed by prosecutors. No amount of training could prevent such flagrantly unlawful and unethical acts.

The time is long past due for the Court to revisit the subject of single-incident liability in failure-to-train cases. *Canton* embraced it in theory twenty years ago, but the Court has not clarified its scope since. The only guidance remains the single hypothetical in *Canton*'s footnote. But, in over two decades, the circuit courts have not managed to build from that hypothetical a coherent, consistent approach to the subject, particularly in situations

involving prosecutors. The inevitable result is *Thompson* itself: because the Fifth Circuit "fail[ed] to adhere to rigorous requirements of causation and culpability, municipal liability collapse[d] into *respondeat superior* liability." *Bryan County*, 520 U.S., at 415.

II. THE COURT SHOULD ALSO REVIEW WHETHER HOLDING A DISTRICT ATTORNEY'S OFFICE LIABLE UNDER *CANTON* EVISCERATES PROSECUTORS' ABSOLUTE IMMUNITY.

The Fifth Circuit's overextension of single-incident liability not only contravenes *Canton*, but also undermines the absolute immunity that shields individual prosecutors from failure-to-train claims. Chief Judge Jones' separate *en banc* dissent highlights this distinct and compelling reason for review. App. 2a-7a. Last term, this Court unanimously extended absolute immunity to claims that supervising prosecutors failed to train line prosecutors on their obligations to disclose impeachment evidence. *See Van de Kamp v. Goldstein*, 129 S. Ct. 855, 864-65 (2009). The Court should now decide whether holding the office itself liable on the same theory works the same ill-effects on prosecutors' independence and judgment that *Van de Kamp* and its predecessors sought to avoid.

Absolute immunity has long protected prosecutors from litigation attacking the exercise of their core public functions. *See generally Imbler v. Pachtman*, 424 U.S. 409 (1976). Without this barrier, harassing litigation risks squandering a prosecutor's limited resources and diluting his judgment. *See Van de Kamp*, 129 S.Ct., at 860

(describing policies underlying absolute immunity as avoiding "a deflection of the prosecutor's energies from his public duties" and "shad[ing] his decisions instead of exercising his independence of judgment required by the public trust"). *Van de Kamp* extended absolute immunity to prosecutors' duties to supervise the management and disclosure of impeachment evidence. *Id.*, at 861-64. Thus, individual prosecutors are immune from suits alleging failure "to adequately train and supervise deputy district attorneys" on disclosure obligations, and "fail[ure] to create any system" for managing impeachment evidence. *Id.*, at 861; *see also generally Giglio v. United States*, 405 U.S. 150 (1972) (establishing duty to disclose impeachment evidence).

Municipalities, of course, cannot claim personal immunities against § 1983 litigation, *see Kentucky v. Graham*, 473 U.S. 159, 167 (1985),[29] yet holding

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[29] Nor could the district attorney's office in this case claim Eleventh Amendment immunity. *See Hudson v. City of New Orleans*, 174 F.3d 677, 682-691 (5th Cir. 1999) (concluding that Orleans Parish District Attorney's Office is not an arm of the state and thus not entitled to Eleventh Amendment immunity). Since the issue depends on state structural and funding policies, the Eleventh Amendment immunity of district attorneys' offices varies considerably. *Compare Del Campo v. Kennedy*, 517 F.3d 1070, 1073 (9th Cir. 2008) (California district attorneys entitled to Eleventh Amendment immunity); *Brooks v. George County*, 84 F.3d 157, 168 (5th Cir. 1999) (Mississippi district attorneys); *Arnold v. McClain*, 926 F.2d 963, 965-66 (10th Cir. 1991) (Oklahoma district attorneys), *with Carter v. City of Philadelphia*, 181 F.3d 339, 355 (3rd Cir. 1999) (Pennsylvania district attorneys not entitled to Eleventh Amendment

an office liable on precisely the same claims from which prosecutors are absolutely immune sits uncomfortably with *Van de Kamp*. As Chief Judge Jones noted, "every reason advanced in *Van de Kamp* and *Imbler* for protecting the independence and integrity of prosecutors in trial-related actions and supervision suggests that holding a government entity liable in their stead for the same violations is simply untenable." App. 6a. The "office," after all, does not act: rather, a web of individual prosecutors acts on its behalf. A failure-to-train claim against the office will impose the same judgment-distorting burdens of litigation on the same prosecutors who are nominally protected from them by absolute immunity. *See* App. 4a (explaining that "[a]uthorizing Section 1983 liability against the office creates the same stress on the proper function of the office" as suing the individual prosecutors).

Van de Kamp stressed that the primary aim of absolute immunity was "the interest in protecting the proper functioning of the *office*, rather than the interest in protecting its occupant." 129 S.Ct., at 862 (quoting *Kalina v. Fletcher*, 522 U.S. 118, 125 (1997) (emphasis added)). In light of that rationale, this Court should resolve whether allowing failure-to-train liability against the office devalues the absolute immunity of individual prosecutors and their supervisors. *Van de Kamp*, for instance, held that absolute immunity barred suit against a line

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immunity); *Crane v. State of Texas*, 766 F.2d 193, 195 (5th Cir. 1985) (Texas district attorneys).

prosecutor for a *Giglio* violation *and also against* his supervisor for failure to train him on *Giglio*. The Court reasoned that "*Imbler*'s basic fear" was implicated in both situations, *i.e.* that "the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks." *Van de Kamp*, 129 S.Ct., at 862.

This case starkly illustrates the tension between *Van de Kamp*'s extension of absolute immunity to supervisory prosecutors, on the one hand, and holding prosecutorial offices liable for failure to train, on the other. That tension is only heightened by the fact that "the jury was permitted to infer Section 1983 deliberate indifference and causation based on a single incident of withheld *Brady* evidence." App. 5a. Even the prosecutors who intentionally withheld exculpatory evidence would have been shielded by absolute immunity. But—without any evidence of a pattern of similar wrongdoing, and without any evidence that the violation was actually caused by inadequate training—a jury has now been permitted to assess $14 million in damages against the office that employed the prosecutors. This Court should grant certiorari to consider whether that result is compatible with *Van de Kamp* and the absolute prosecutorial immunity it upheld.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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