No. 09-571

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

AMICUS CURIAE BRIEF OF THE ORLEANS PARISH ASSISTANT DISTRICT ATTORNEYS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

This *Amicus Curiae* Brief is filed in this Honorable Court on behalf of the ninety (as of filing) Assistant District Attorneys who daily represent the interests of the State of Louisiana in the various state and federal courts of Orleans Parish. These ninety *amici* have a profound interest in the continuing viability of the District Attorney's Office as a cornerstone of the maintenance of peace and order in the City of New Orleans. They represent the current generation of prosecutors dedicated to securing justice—zealously, faithfully, and ethically—on behalf of the citizens of the great city of New Orleans, and who receive that torch from the many generations that have taken the same Oath before them.

Amici now stand face-to-face with a $15,000,000 district court judgment against their Office that, as stands, likely threatens their careers as well as the very well-being of the city and people that they serve. Furthermore, they share a firm belief that the judgment in this case was improperly obtained under the controlling law, and, thus, that they are being

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than amicus or its counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), undersigned counsel avers that the instant *amicus* brief is being filed earlier than 10 days before the filing deadline, and that counsel for Respondent have received notice of such filing and have orally consented to it. Written consent and waiver forms will be sent to counsel for Respondent and filed in this Court once received. As such, no Motion for Leave to File accompanies this Brief.

unjustly deprived by the self-serving and intentional act of a single prosecutor whose actions did not, and do not, represent the prevailing culture of their Office, but rather defy those values. Accordingly, as those who would be most immediately affected by an adverse judgment—through staff reductions, seizure of Office assets, and harm to their professional reputations—*amici* seek a voice in the decision the consequences of which will reverberate for the rest of their careers.

Amici assert that the accompanying brief is both relevant and desirable to the disposition of this case. Significant issues exist regarding § 1983 municipal liability under *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 685 (1978), and its progeny. Specifically, *amici* seek to address the propriety of holding a municipal employer liable for a single constitutional violation where there is no pattern or practice of such violations and, most importantly, where the actions and words of the actor employee reasonably demonstrate that he acted in full awareness of both his duty and the violative nature of his conduct, such that the municipality cannot be held to have been "deliberately indifferent" to the need to train under this Honorable Court's established and stringent standards of liability.

SUMMARY OF THE ARGUMENT

In writing on behalf of six judges of the Fifth Circuit Court of Appeals in favor of reversal of the judgment, Judge Edith Brown Clement found it "imperative" to counsel that the result in the instant case risked encouraging the extension of single incident municipal liability beyond the "most limited

circumstances" under which the law of this Court has unequivocally held that it may be found.[2]

The danger posed by the Fifth Circuit's divided affirmance of the verdict in favor of Thompson is precisely the progressive unraveling of the tightly-woven standards for finding such liability based on a single incidence of a failure to train municipal employees. *Monnell* and *City of Canton* establish an exceedingly high bar for plaintiffs seeking to hold a municipality liable for the wrongs of its employees in such cases, the stringency of which has been emphasized repeatedly by this Court: municipalities may not be held liable on a *respondeat superior* theory; the need for training must be *obvious*; the municipality must be *deliberately* indifferent to the need to train; the failure to train must be the *driving force* behind the constitutional violation.

The situation confronting courts across the United States, as presented in this case, is ripe for certiorari by this Court precisely because its continued affirmance threatens to defang the strict standards above, and further blur the line between *Monell/City of Canton* liability and *respondeat superior* in factual scenarios, like the one here, where the very nature of a municipal employee's bad act reasonably demonstrates that: *no* amount of training could have prevented the constitutional violation; the need for training could *not* have been sufficiently obvious, and; no failure to train could have been the *driving force* behind the constitutional violation.

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[2] *See Thompson* v. *Connick*, 578 F.3d 293, 295-6 (5th Cir. 2009).

To hold municipalities liable in such situations works a grave and undeserved wrong and punishes them for acts of their employees that could not possibly have been prevented. Thus, the continued judicial approval of findings of liability on facts such as exist in the instant case—scenarios which confront not just prosecutor's offices, but sheriff's offices and police departments nationwide on a daily basis—will have a severe and negative impact on the criminal justice system as a whole.

As such, this Court should consider the issues presented herein in support of granting the pending Petition for Certiorari.

ARGUMENT

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FIRST IMPRESSION THAT DIRECTLY IMPLICATE THE STRINGENT STANDARDS IMPOSED UPON § 1983 PLAINTIFFS IN SUITS INVOLVING THE *INTENTIONAL AND KNOWING* VIOLATION OF A CONSTITUTIONAL RIGHT BY A MUNICIPAL EMPLOYEE.

A. The recent intersection of two lines of decisions by this Court—involving municipal liability and prosecutorial immunity—presents important and unanswered questions about the extent of municipal liability for the intentional and knowing acts of an employee.

This Court established in *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978), that a municipality cannot be held liable under § 1983 for the unconstitutional acts of its employees based merely on

its status as their employer. Furthermore, the *Monell* court established that some municipal policy or custom must in fact be the "moving force" behind the constitutional violation. 436 U.S. at 694; 98 S.Ct. at 2038. That is, "[a]t the very least there must be an affirmative link between the policy and the particular constitutional violation alleged." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436 (1985).

In *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989), this Court acknowledged that *Monell* liability could be based on a single incidence of a constitutional violation caused by a municipality's failure to train its employees where the potential for constitutional violation due to lack of training is so obvious that the municipality can be said to have been deliberately indifferent to the need to train. 489 U.S. at 390, n.10, 109 S. Ct. at 1205, no. 10. The *Harris* Court appropriately established an exacting standard for finding liability under a failure to train theory where there is no pattern of previous constitutional violations, which has been repeatedly reaffirmed by the federal courts. *See Estate of Davis v. City of N. Richland Hills*, 406 F.3d 375, 385-86 (5th Cir. 2005); *Pineda v. City of Houston*, 291 F.3d 325, 334-35 (5th Cir. 2002); *Burge v. St. Tammany Parish*, 187 F.3d 452, 471-72 (5th Cir. 1999); *Snyder v. Trepagnier*, 142 F.3d 792, 798-99 (5th Cir. 1998); *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 1388, 137 L. Ed. 2D 626 (1997). In fact, in only one case before the subject of the the instant petition has the Fifth Circuit upheld a finding of liability based on a single incident. See *Brown v. Bryant County*, 219 F.3d 450 (5th Cir. 2000).

Accordingly, there exists a well-established analytical framework for analyzing municipal failure to train claims based on a single constitutional violation: How obvious should the need to adequately train an employee have been to the municipality? Was the ensuing constitutional violation a highly predictable consequence of not training that employee? Was the failure to train the moving force that had a specific causal connection to the constitutional injury? In other words, does the evidence establish, under the "stringent standards" of this Court, "unmistakable culpability and clearly connected causation"? *Brown*, at 461 (citing *Board of County Com'rs of Bryan County v. Brown*, 520 U.S. 397, 117 S.Ct. 1382 (1997)).

Of the myriad cases exploring the issue of single-incident liability for failure to train, however, none explores specifically what, in light of the instant case, has come to the fore as a highly relevant issue: the *nature* of the offending employee's conduct—the relevant facts and circumstances that may reasonably demonstrate that an employee who violated a citizen's rights did so intentionally, with full knowledge of the unconstitutional or illegal nature of his acts. This is so even though this very Court has voiced its concerns over finding liability in such situations.

In fact, in *City of Canton*—the case in which the single-incident exception was first recognized—Justice O'Connor, concurring in part and dissenting in part, observed that "[t]he central vice of [§ 1983], as noted by the Court's opinion in *Monell*, was that it 'impose[d] a species of vicarious liability on municipalities since it could be construed to impose liability even if the municipality *did not know of an impending or ensuing riot or did not have the wherewithal to do anything*

about it.'" 489 U.S. at 395, 109 S.Ct. at 1208 (quoting *Monell*, 436 U.S., at 692, n. 57, 98 S.Ct., at 2036, n. 57) (emphasis added)).

Justice O'Connor's concern regarding a municipality's inability to control the acts of an employee whose actions and words reasonably demonstrate that he *intentionally* violated a citizen's constitutional rights is especially significant in light of this Court's reasoning that "[section] 1983 was intended not only to provide compensation to the victim's of past abuses, *but to serve as a deterrent against future constitutional deprivations* as well." See *Robertson v. Wegmann*, 436 U.S. 584, 590-91, 98 S.Ct. 1991, 1995 (1978) (emphasis added). A legitimate question exists, then, as to the value of § 1983's deterrent effect on a municipality in situations in which it has no ability to deter the unconstitutional actions of a particular employee.

Most recently, in *Van de Kamp v. Goldstein*, 129 S.Ct. 855 (2009), Justice Breyer, writing for a unanimous Court, further emphasized this Court's concerns over the potential negative systemic consequences of a municipal employee's intentional bad act. Although dealing directly with the issue of an individual supervisor's failure to train and monitor, the Court highlighted the office-wide "practical anomalies," see *Van de Kamp*, at 863, that allowing liability to attach in such situations could engender:

> A trial prosecutor would remain immune, even for *intentionally* failing to turn over, say *Giglio* material; but her supervisor might be liable for *negligent* training or supervision. Small prosecution offices where supervisors can

> personally participate in all of the cases would likewise remain immune from prosecution; but large offices, making use of more general office-wide supervision and training, would not. Most important, the ease with which a plaintiff could restyle a complaint charging a trial failure so that it becomes a complaint charging a failure of training or supervision would eviscerate *Imbler* [v. *Pachtman*,424 U.S. 409 (1976)].

Id. (emphasis in original).

Accordingly, with *Van de Kamp* this Court's jurisprudence has arrived at a crossroads between two lines of cases—one concerning municipal liability for the acts of employees, the other concerning the extent of prosecutorial immunity for trial-related acts. At the heart of the intersection between the two lie several unanswered questions suggested by Justice Breyer and presented in the instant petition: to what extent should a municipality be liable for the intentional wrongs of its employees under circumstances which reasonably demonstrate that the employee knew that his actions were wrong and yet performed them anyway? How much liability, if any, may be imputed to the municipality that "did not know of an impending or ensuing [act] or did not have the wherewithal to do anything about it?" What significance should be given to the difference between bad training and bad character?

B. Leaving these questions unresolved will have major implications for the criminal justice system nationwide.

The implications of leaving such an important question unresolved will have significant and immediate consequences for the entire criminal justice system nationwide—from street-level arrests to undercover investigations to prosecution. Police departments, sheriff's offices and prosecutors' offices across the country will be under constant threat of possibly crippling lawsuits due to the intentional and knowing actions of their employees which violate the rights of citizens, but over which the municipal entity has no control regardless of the level of training provided or even the need for training in the first place.

This fear is supported statistically by the sheer volume of activity logged by police, sheriff's and prosecutors' offices in a given year. For example, there were approximately 14,382,900 arrests made nationwide in 2006 alone.[3] On average, this results in over 39,000 situations *every day* in which a law enforcement officer had the opportunity to commit an intentional violation of an arrestee's constitutional rights, the facts and circumstances of which may reasonably have demonstrated that his or her municipal employer should not have known of the need

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[3] Source: Estimated arrests of all persons in the United States, 2000-2006, per FBI Arrest Statistics, Office of Juvenile Justice and Delinquency Prevention (OJJDP), Office of Justice Programs, U.S. Department of Justice; available at: http://ojjdp.ncjrs.org/ojstatbb/ezaucr/asp/ucr_display.asp (last accessed 9/14/2009).

to train or that no amount of training would have prevented the violation. New Orleans alone saw 53,382 arrests made in 2008—roughly 146 per day.[4]

On the prosecution side, the Orleans Parish District Attorney's Office accepted charges in 4,968 cases stemming from felony arrests in 2007, which led to 1,977 criminal convictions, or five-and-a-half each day.[5] In each of those cases, as in the instant case, the opportunity existed for an individual assistant district attorney to knowingly and willfully violate a defendant's constitutional rights in situations where the facts and circumstances may reasonably have demonstrated that the district attorney should not have known of the need to train or that no amount of training would have prevented the violation. As the instant case shows, even a *single* such violation can lead to the imposition of multi-million dollar liability upon an office which forms perhaps the keystone of the local justice system. Multiplied over a thousand times, that risk becomes almost incalculable.

C. This case presents an excellent vehicle for addressing the questions presented.

The factual scenario underlying the instant case presents an ideal platform for analyzing the issues relating to municipal liability acts of employees

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[4] Source: Orleans Parish Criminal Justice Accountability Report, Spring 2009, Metropolitan Crime Commission, Inc.; available at: http://www.metropolitancrimecommission.org/html/documents/NOCJSOversightProjectSpring2009Report.pdf (last accessed 9/14/2009).

[5] *Id.*

wherein the facts and circumstances surrounding the conduct reasonably demonstrate that the employee acted intentionally and knowingly, such that the municipality can not be held to have known of the need for training and such that it is unreasonable to presume that any training would have prevented the unconstitutional conduct.

The facts of the instant case reveal that Thompson was charged first with the murder of Raymond Liuzza and subsequently with the armed robbery of the Lagardes. However, prosecutors elected to try Thompson for the robbery first, knowing that a conviction on that charge could (1) prevent Thompson from testifying in his defense at the murder trial, and (2) be used as an aggravating factor in securing a death sentence following conviction for the murder.[6] It was in the armed robbery trial that the exculpatory blood evidence and lab report were intentionally suppressed.

Two days before Thompson's armed robbery trial began, the NOPD crime lab sent a report to Bruce Whittaker, the screening attorney, indicating that the perpetrator's blood, as determined from a sample he had left on Jay Lagarde's pant leg, was type 'B'[7] Whittaker stated that he placed the report on James Williams' desk—as Williams was the lead prosecutor in the armed robbery case—but Williams claimed never to have seen it.[8] On the morning of the first day

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[6] *Thompson v. Connick*, 553 F.3d 836, 843 (5th Cir. 2008).

[7] *Id.* at 844.

[8] *Id.*

of Thompson's armed robbery trial, Jerry Deegan checked the evidence—including the bloody swatch of pants leg—out of the NOPD evidence room; he then checked the evidence into the courthouse property room—with the glaring exception of the bloody swatch.[9]

At trial, Williams never mentioned any blood evidence and relied entirely on witness testimony in securing a conviction for attempted armed robbery against Thompson.[10] Due to this conviction, Thompson elected not to testify at his murder trial, and he was found guilty by the jury. During the penalty phase, Williams elicited testimony from the Lagardes about Thompson's attempt to rob them and Williams emphasized that fact in his closing argument as proof that Thompson merited the death penalty.[11] The jury sentenced Thompson to die.[12]

Nine years after Thompson's conviction, but before the exculpatory lab report was discovered, Deegan confessed to former fellow assistant district attorney Mike Riehlmann that he had intentionally withheld the exculpatory blood evidence in Thompson's armed robbery trial.[13] Upon the discovery of the missing lab report 1999, Riehlmann reported Deegan's confession

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 844-45.

[12] *Id.* at 845.

[13] *Id.*

and District Attorney Connick moved to vacate the armed robbery conviction and stay Thompson's execution.[14]

The facts also reflect that Deegan, Williams, and all other assistants in Connick's office received instruction on *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), in law school, prior to their employment; that office policy at the time of Deegan's withholding of the blood evidence dictated that all lab reports be turned over to the defendant; and that there had only been four confirmed *Brady* violations out of Connick's office in the ten years preceding Thompson's trial.[15]

Accordingly, the instant case contains sufficient facts on which this Court may conduct a through analysis of the issues presented. Deegan's presumptively suspicious actions—returning all but the exculpatory blood evidence to the property room after Thompson's armed robbery trial; maintaining that secret for another decade; revealing on his death bed that he *intentionally* withheld the exculpatory evidence—may reasonably demonstrate that he knew what his obligation under *Brady* was and that he was violating it. As such, and coupled with the severe dearth of previous *Brady* violations out of his office, it may be reasonably argued that Connick had no reason to suspect that additional *Brady* training was required. Williams' decision not to use the blood evidence that was available to him may also reasonably demonstrate that he was aware of its

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[14] *Id.*

[15] *See generally*, *Thompson v. Connick*, 578 F.3d at 303-306.

exculpatory nature as well. Finally, Connick's post-disclosure move to vacate Thompson's robbery conviction reasonably demonstrates that he was taken off guard by the above acts of intentional deception.

Thus, this Court is presented with an ideal opportunity to determine finally whether, under such factual circumstances, it comports with fundamental ideas of fairness to hold a municipality liable for intentional and knowing acts of employees that in themselves reasonably demonstrate that an employer "did not know of an impending or ensuing [act] or did not have the wherewithal to do anything about it." Moreover, this case presents a scenario in which the very functioning of a major metropolitan prosecutor's office has been endangered because of a single act of intentional wrongdoing by one or more individual prosecutors, which act could have major implications on such offices nationwide in jurisdictions where those offices do not currently enjoy sovereign immunity. This Court should grant certiorari to answer the question of whether that municipal employer should continue to be held liable on a theory of bad training for constitutional violations which reasonably show their cause to be an employee's bad character.

CONCLUSION

For these reasons, the Orleans Parish Assistant District Attorneys respectfully urge the Court to grant the petitioners' writ of certiorari.

Respectfully submitted,

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