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 NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONERS

EDWARD C. DAWSON
(Counsel of Record)
RICHARD B. FARRER
YETTER, WARDEN & COLEMAN, L.L.P.
221 West Sixth Street, Suite 750
Austin, Texas 78701
(512) 533-0150

Attorneys for Amicus Curiae National District Attorneys Association in Support of Petitioners

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INTEREST OF AMICUS CURIAE[1]

The National District Attorneys Association (NDAA) was formed in 1950 and is the oldest and largest professional organization in the world representing criminal prosecutors. The NDAA's members are responsible for prosecuting criminal violations in every state and territory of the United States, and they are found in the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors.

The NDAA was formed to provide a national perspective for issues arising in local prosecutors' offices and to advocate at a national level for prosecutors on those issues. The association also seeks to foster and maintain the honor and integrity of the prosecuting attorneys of the United States, improve and facilitate the administration of justice, and promote the study of law and the diffusion of knowledge of the law through the continuing education of prosecuting attorneys, lawyers, law enforcement personnel, and other members of the interested public.

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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 Rule 37.2(a), the parties were notified ten days prior to the due date of this brief of the intent to file. Pursuant to Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk.

The interests of the NDAA and its members are directly implicated by this case because it involves a $15 million judgment against a local district attorney's office for alleged violations committed by prosecutors found to have been inadequately trained in their obligations to disclose exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963). That judgment threatens to cripple the local district attorney's office and hamper its performance of its essential functions. The judgment will also constrain the office's future efforts to prevent violations, of whatever type, by diverting valuable funds and resources. And the alarming prospect for similar judgments in other offices across the country based on similar claims implicates the NDAA's national mission even more directly.

This case represents the latest development in a conflict in the circuit courts over the proper approach to failure-to-train claims seeking to hold municipal entities, like a district attorney's office, liable under 42 U.S.C. §1983 based on harms stemming from a single violation of a plaintiff's rights. As a national organization, the NDAA has a significant interest in seeing that conflict in the law resolved and a uniform approach to single-incident municipal-liability claims adopted that appropriately recognizes the need to retain heightened standards for imposing liability against municipal entities like district attorney's offices.

SUMMARY OF THE ARGUMENT

Since the Court first recognized that a single-incident may, in some limited circumstances, support holding municipal entities such as district attorney's offices liable for failing to adequately train employees, the Court has consistently stressed that plaintiffs must satisfy stringent culpability and causation requirements to prevail. Heightened culpability and causation ensures that municipalities are not held vicariously liable for employees' torts under *respondeat superior* liability, which would be constitutionally suspect as well as incompatible with the text of §1983.

Four circuits have addressed whether and when a failure-to-train theory may produce municipal liability for a single-incident involving a *Brady* violation by a prosecutor or police officer. Those circuits, including the Fifth Circuit in this case, have achieved inconsistent results using competing and conflicting analytical frameworks. Further, the Fifth Circuit's decision erroneously erodes the heightened culpability and causation standards that properly limit municipal liability. Indeed, the Fifth Circuit's ruling opens the way to *de facto respondeat superior* municipal liability, which defies the Court's clear precedent and will seriously and adversely affect the administration of justice. The Court should grant certiorari to clarify this confusion.

The issues presented by the Fifth Circuit's decision are of great concern to the NDAA. The

decision, which affirmed a $15 million judgment against the Orleans Parish District Attorney's Office that is roughly equal to the office's annual operating budget, threatens to bankrupt the office. And similar future decisions across the country, which would be authorized by the Fifth Circuit's ruling, could cripple the administration of justice across the country. Indeed, large judgments like the one in this case hamstring district attorney's offices' ability to implement training programs to prevent future violations just like the one complained of here.

ARGUMENT

I. THE COURT SHOULD PRESCRIBE A UNIFORM APPROACH FOR SINGLE-INCIDENT FAILURE-TO-TRAIN CLAIMS.

In three cases—*Monell* v. *N.Y. City Department of Social Services*, 436 U.S. 658 (1978), *Pembaur* v. *Cincinnati*, 475 U.S. 469, 481 (1986), and *Canton* v. *Harris*, 489 U.S. 378 (1989)—the Court addressed and expanded §1983 municipal liability. Each time, however, the Court reiterated that §1983 municipal liability must not permit holding a municipality liable on a theory of *respondeat superior*.

Since *Canton*, including after the Court's subsequent decision in *Board of Commissioners of Bryan County* v. *Brown*, 520 U.S. 397 (1997), lower courts have struggled to properly apply *Canton*'s holding and balance its expansion of municipal liability with

the bedrock requirement that municipal liability may not be eroded into *de facto respondeat superior* liability.

Single-incident failure-to-train claims involving *Brady* violations have presented a particularly difficult challenge. Four circuits have reached disparate results under conflicting analyses. The Fifth Circuit's decision in this case highlights and increases that conflict and confusion. It also culminates a steady erosion of heightened culpability and causation requirements, which effectively endorses the *de facto respondeat superior* liability against which this Court has previously clearly warned.

A. The Court Has Consistently Recognized That §1983 Municipal Liability Must Not Become *Respondeat Superior* Liability.

In *Monell* v. *N.Y. City Department of Social Services*, 436 U.S. 658 (1978), the Court allowed for municipal liability under §1983 in limited circumstances, when a municipal employee enforces an official municipal policy or custom that itself violates a plaintiff's federal right. *Id.,* at 694. But the Court emphasized that §1983 liability requires that the government policy cause the harm. *Id.*, at 694. "[A] municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory." *Id.*, at 691.

The Court's reasoning relied both on §1983's text, which requires a causal link between the alleged §1983 violation and an action attributable to the municipality, *id.*, at 692, and Congress's concern when it passed §1983 that it was not constitutionally authorized to oblige municipalities to control the illegal acts of others. *Id.*, at 655-683.

After *Monell*, in *Pembaur* v. *Cincinnati*, 475 U.S. 469, 481 (1986), the Court held that municipalities may be found liable under §1983 for federal-rights violations by official policymakers even absent an official policy. The Court, however, carefully preserved *Monell*'s causation requirement that distinguishes municipal liability from *respondeat superior* liability. *Ibid.*

The Court, next, in *Canton* v. *Harris*, 489 U.S. 378 (1989), permitted a plaintiff to sue for harms suffered at the hands of nonpolicymaking employees, when those harms resulted from a policymaker's failure to adequately train lower-level employees. *Id.*, at 387. At the same time, however, *Canton* recognized that failure-to-train cases present an increased danger that a municipality will wrongly be "held liable solely for the actions of its employee." *Board Of Commr's of Bryan County* v. *Brown*, 520 U.S. 397, 405 (1997); *Canton*, 489 U.S., at 387. Accordingly, the Court held that such cases require "rigorous standards of culpability and causation," under which a plaintiff must demonstrate a "direct causal link between the municipal action and the deprivation of federal rights." *Bryan County*, 520 U.S., at 404-405;

Canton, 489 U.S., at 385. Further, the policymaking official's failure to train must have resulted from deliberate indifference to the risk that a violation of a particular right would result. *Canton*, 489 U.S., at 388-392. Together, the required showings of deliberate indifference and direct causation of the plaintiff's alleged harm by the municipality's actions prevent municipal liability for failure to train from becoming forbidden *respondeat superior* liability. *Id.*, at 415.

The Court in *Canton* also posited that, in limited circumstances, a single constitutional violation might satisfy the stringent culpability and causation standards in a failure-to-train case. 489 U.S., at 390, n.10. But, in *Canton* and subsequently, the Court has made clear there is a particular need for rigorous culpability and causation standards in single-incident cases. *Bryan County*, 520 U.S., at 408. The Court has not revisited single-incident failure-to-train claims since *Canton*, coming closest in *Bryan County*, which involved a single-incident claim based on a failure to adequately screen an applicant for employment. *Id.*, at 404.

B. The Circuits Have Adopted Inconsistent Analytical Approaches to Single-Incident *Brady* Claims Asserted Under *Canton*.

In the almost three decades since *Canton*, the circuits courts have struggled and failed to adopt a consistent approach to single-incident failure-to-train

claims premised on a violation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Instead, four circuits' decisions applying this Court's precedents on heightened culpability and causation have reached inconsistent outcomes using different analytical approaches. The decision in this case, affirmed by a sharply divided en banc Fifth Circuit, only deepens the intercircuit uncertainty and conflict.[2]

The Eighth Circuit, in *Reasonover* v. *St. Louis County*, 447 F.3d 569 (CA8 2006), applied a strict standard of causation in affirming summary judgment for the defendant on single-incident claims for failure to train police and prosecutors on their duties under *Brady*. *Id.*, at 583-584. The court held that the plaintiff could not satisfy either the heightened culpability or causation requirements, because of undisputed evidence that the officer and prosecutor knew they had *Brady* obligations and that the policy of the prosecuting attorney's office was to disclose all *Brady* materials. *Id.*, at 583.

The Second Circuit's approach, in *Walker* v. *New York*, 974 F.2d 293, 300 (CA2 1992) and *Amnesty America* v. *Town of West Hartford*, 361 F.3d 113 (CA2 2004), contrasts with that of both the Eighth and Fifth Circuits. In *Amnesty America*, the Second Circuit applied a robust view of the heightened

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[2] The petition's more extended analysis of the conflict and confusion in the circuits is insightful, and the amicus agrees with it. See Pet. at 17-22.

causation requirement, in order to ensure that "a failure to train theory does not collapse into *respondeat superior* liability." 361 F.3d, at 130. The court stressed that "[i]t is impossible to prevail on a claim that the [ ] training program was inadequate without any evidence as to . . . how better or different training could have prevented the challenged conduct, or how 'a hypothetically well-trained officer would have acted under the circumstances.'" *Ibid.* Having failed to "rule out those causes" of the violation attributable to factors other than a lack of training—like "negligent or intentional disregard of [ ] training" or an existing policy—the plaintiff could not prevail on his claims. *Ibid.*

At the same time, however, *Amnesty America* reaffirmed the Second Circuit's prior holding in *Walker*, 974 F.2d, at 300, that a single *Brady* violation may support a finding of deliberate indifference against a district attorney's office in a failure-to-train case. *Amnesty America*, 361 F.3d, at 130, n.10. The Second Circuit's analytic framework for deliberate indifference in cases alleging prosecutorial *Brady* violations—a three-part test developed in *Walker*, 974 F.2d, at 294-295, 296-297—has not been followed by any other circuit. Further, the Second Circuit's *Walker* analysis is in tension with the Fifth Circuit's view, since *Walker* acknowledged that its test, developed in a case involving impeachment evidence, might not apply to exculpatory evidence like that at issue in this case. See *Walker*, 974 F.2d, at 300 ("[T]here 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.").

Finally, the Sixth Circuit, in two recent cases, has taken its own separate approach. With respect to heightened culpability, in both *Gregory* v. *Louisville*, 444 F.3d 725, 753 (CA6 2006), and *Moldowan* v. *Warren*, 578 F.3d 351, 393 (CA6 2009), the Sixth Circuit has recognized, like the Fifth Circuit, that a single *Brady* violation may support a finding of deliberate indifference in a failure-to-train case. The Eighth Circuit, however, declined to take that step in *Reasonover*.

The Sixth Circuit's stance on heightened causation, however, is far weaker than the Second or the Eighth Circuit's, while still being significantly more robust than the Fifth Circuit's. In *Gregory*, for instance, the court found heightened causation because there was no training at all regarding the handling of exculpatory *Brady* material and evidence showed that "officers were confused about their *Brady* obligations." 444 F.3d, at 754; but see, *Amnesty America*, 361 F.3d, at 130.

The Fifth Circuit's opinion in this case has merely complicated the lack of uniformity in the circuits. The Fifth Circuit's deliberate-indifference standard is in tension with the Second Circuit's *Walker* test and the Eighth Circuit's approach. And, the Fifth Circuit's approach to causation is out of step with the Eighth, Second, and even Sixth Circuit's views—under any of which, this case could easily

have had a different result. The Fifth Circuit upheld causation on a record that reflects, at most, diffuse disagreement in the district attorney's office about what *Brady* required and, in fact, is far more consistent with an intentional violation of known ethical and legal obligations, a classic employee intentional tort that no amount of training could prevent. See Pet. at 23, 26-30.

The Fifth Circuit's ruling deepens the confusion on the proper deliberate-indifference and causation analyses in single-incident failure-to-train cases of municipal liability, issues on which three other circuits have already staked out inconsistent positions. The Court's guidance is needed to clear up this confusion.

II. THE ISSUES RAISED BY THE PETITION ARE OF PARTICULAR CONCERN TO THE NDAA.

A. Large Jury Verdicts Against District Attorney's Offices Will Cripple Their Ability to Function and to Prevent Future Violations.

"[T]he resources of local government are not inexhaustible." *Canton*, 489 U.S., at 400 (O'Connor, J., concurring in part and dissenting in part). The jury's award in this case of $14 million in damages and a further $1 million in attorneys' fees will stagger the Orleans Parish District Attorney's Office, which has been forced to consider bankruptcy to prevent the

asset seizure that may result from enforcement of the judgment. See Financial Woes Could Halt Justice System, WDSU.com, Jan. 7, 2009, http://www.wdsu.com/money/18426227/detail.html. Beyond this case, district attorney's offices across the country face dire budgetary conditions for the foreseeable future. State budgets throughout the country are reeling in the wake of the recent financial crisis, and budget shortfalls are predicted to afflict 48 states in fiscal years 2010 and 2011. *E.g.*, McNichol & Johnson, Recession Continues to Batter State Budgets; State Responses Could Slow Recovery, Center on Budget and Policy Priorities, http://www.cbpp.org/cms/?fa=view&id=711 (last visited December 1, 2009). Similar shortfalls are predicted for 2012. *Ibid.*

The imposition of a judgment like the one in this case, based on single-incident conduct, threatens a district attorney's office's performance of its essential public functions and constrains its ability to take prophylactic steps to avoid future violations. The Orleans Parish District Attorney's office, for example, has an annual operating budget roughly on par with the amount of the judgment, leaving it scant room for anything other than satisfying the judgment. See Bohrer, Court Upholds $14 Million Judgment Against Orleans DA's Office, Assoc. Press, Aug. 11, 2009. As Justice O'Connor noted over 20 years ago, the "grave step" of prompting a shift in the allocation of scarce resources means that some "services will necessarily suffer, including those with far more direct implications for the protection of constitutional rights."

Canton, 489 U.S., at 400 (O'Connor, J., concurring in part and dissenting in part). It is important that the Court take up the questions presented by the petitioners to prevent the Fifth Circuit's decision from shifting resources away from prosecution and training and towards paying judgments for past single incidents of misconduct.

B. The Circuits' Continuing Confusion and the Advent of Municipal *Respondeat Superior* Liability Will Have Serious Adverse Consequences.

The NDAA is concerned by the circuits' ongoing confusion over the application of heightened culpability and causation requirements in single-incident failure-to-train cases, and especially concerned by the starkly divided en banc Fifth Circuit's approval of an erosion of those standards that effectively opens the door to *respondeat superior* liability for municipal prosecutors' offices. As a national association devoted to providing a nationwide perspective on issues affecting its members, including developing and implementing nationwide training programs, the NDAA strongly favors resolution of the conflicting standards for municipal liability that have emerged in the circuit courts. The NDAA also advocates eliminating the potential for differing outcomes in municipal-liability cases from circuit to circuit, which clarification from this Court would provide.

Moreover, the Fifth Circuit's complete deterioration of both the heightened causation and culpability requirements is of utmost concern to the NDAA, because it will have far-reaching consequences for the NDAA's members and their ability to perform their official functions. The Court has recognized that "adopt[ing] lesser standards of fault and causation would open municipalities to unprecedented liability," as it essentially will apply "*de facto respondeat superior* liability." *Canton*, 489 U.S., at 391-392. Under such loosened standards, the volume of failure-to-train suits will inevitably increase because in "virtually every instance where a person has had his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident." *Canton*, 489 U.S., at 391-392. Such suits would not be limited to claims stemming from *Brady* violations, as relaxed culpability and causation would permit liability "against any prosecutor's office for nearly any error that leads to a reversal of a conviction," including errors relating to "search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." *Thompson* v. *Connick*, 578 F.3d 293, 304 (CA5 2009) (en banc) (Clement, J., urging reversal).

Moreover, federal courts will be called to adjudicate those claims, forcing them to engage "in an endless exercise of second-guessing municipal employee-training programs." *Canton*, 489 U.S., at 391-392. That is "an exercise . . . the federal courts are ill

suited to undertake" and that implicates "serious questions of federalism." *Ibid.* Public perception of the criminal justice system will deteriorate as the frequency of collateral suits inevitably increases, as will the public's perception of the "independence of judgment exercised" in district attorney's offices that constantly face the threat of litigation. *Thompson*, 578 F.3d, at 294. (Jones, C.J., urging reversal).

Just as with suits against district attorneys in their individual capacities, suits against district attorney's offices will be brought years after the fact and place "unique and intolerable burdens" on those offices. *Imbler* v. *Pachtman*, 424 U.S. 409, 425-426 (1976). The Orleans Parish District Attorney's office, for instance, targeted a figure of almost 1,000 cases processed *each month* in 2009. City of New Orleans, Adopted 2009 Operating Budget, at 383, http://www.cityofno.com/Portals/Portal35/Resources/CNO_2009_Operating_Budget-Proposed1.pdf (last visited December 1, 2009). To add to that challenge the burden of defending against collateral suits arising out of long-distant past convictions will strain such offices' resources immensely.

Finally, and perhaps most importantly, the manner in which district attorneys and their assistants perform their official duties will also be affected. The threat of exposing the office to municipal liability will encourage district attorneys to act, and to instruct assistants to act, so as to avoid any potential litigation risks to the office. That, in turn, will affect the

manner in which they perform their duties. Prosecutors, after all, "inevitably make[ ] many decisions that could engender colorable claims of constitutional deprivation." *Van de Kamp* v. *Goldstein*, 129 S.Ct. 855, 860 (2009).

CONCLUSION

For these reasons, the NDAA urges the Court to grant the petitioners' writ of certiorari.

Respectfully submitted,

EDWARD C. DAWSON
(Counsel of Record)
RICHARD B. FARRER
YETTER, WARDEN & COLEMAN, L.L.P.
221 West Sixth Street, Suite 750
Austin, Texas 78701
(512) 533-0150

Attorneys for Amicus Curiae National District Attorneys Association in Support of Petitioners

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