No. 09-571 JAN 11 2010

In The
Supreme Court of the United States

HARRY F. CONNICK, District Attorney, et al.,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, viewed in the light most favorable to the jury's verdict in this municipal-liability case, there was sufficient evidence for a reasonable jury to conclude that the district attorney's deliberately indifferent failure to train, monitor or supervise his prosecutors regarding their obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), substantially caused the violation of respondent's constitutional rights.

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STATEMENT

Petitioners seek to overturn a civil jury verdict for respondent John Thompson in this municipal-liability case against the Orleans Parish District Attorney's Office, arising from eighteen years of wrongful imprisonment and numerous near executions for a murder he did not commit. After a unanimous panel of the Fifth Circuit affirmed the verdict in Thompson's favor, petitioners sought rehearing *en banc*, which was granted. The grant of rehearing vacated the unanimous panel opinion. Pet. App. 1a.

By reason of an equally divided 8-8 vote, the *en banc* court entered a *per curiam* order affirming the jury verdict. *Ibid.* That *per curiam* order is not precedential. Pet. App. 8a (Jolly, J., specially concurring) (observing that "there is no majority opinion, and that no opinion today will bind any court or future party in this circuit"). Moreover, a review of the principal separate opinions reveals, at most, divergent views of the specific evidence presented in this particular case. Petitioners nonetheless seek this Court's review. Because the questions presented are fact-bound, splitless, unlikely to recur, and essentially ask this Court to reweigh the evidence presented to the jury, the petition should be denied.

I. FACTUAL BACKGROUND

In December 1984, Raymond T. Liuzza, Jr., was killed outside his home in New Orleans. Three weeks later, a college student, Jay LaGarde, and his two

younger siblings were victims of an attempted armed robbery in their car.

In mid-January 1985, respondent John Thompson and a co-defendant, Kevin Freeman, were arrested and charged with Mr. Liuzza's murder. The next day, the New Orleans newspaper ran a front-page photograph of Thompson, identifying him as a suspect in the murder. The father of the LaGardes showed the photograph to two of his children, who said that Thompson might have been their attacker. The father contacted the district attorney's office, and Thompson was charged with the armed robbery in addition to the murder.

Eric Dubelier and James Williams were prosecutors in both the murder and robbery cases. According to the stipulated facts in this civil litigation, Dubelier and Williams "decided to use the armed robbery charge to the State's advantage in the murder case." See Single Listing of All Uncontested Material Facts ("Stip.") ¶ G. Dubelier "decided that a conviction of Thompson on the armed robbery charge would effectively preclude Mr. Thompson from taking the witness stand in his own defense at the murder trial, and that the armed robbery conviction could be used in the penalty phase of the murder trial to obtain a death sentence." *Ibid.* Dubelier and Williams "moved to reverse the order of the trials, so that the armed robbery trial would be held approximately three weeks before the murder trial." *Ibid.* Based solely on the purported eyewitness identifications, Thompson was tried on the armed robbery charge, convicted,

and sentenced to 49½ years in prison without the possibility of parole.

It is now known that shortly before the armed robbery trial, the prosecutors sent to the crime laboratory a bloody swatch from Jay LaGarde's pants containing the perpetrator's blood. A crime lab report addressed to prosecutor Bruce Whittaker revealed that the swatch contained type "B" blood. John Thompson has type "O" blood, although it is not clear whether or not the prosecutors knew Thompson's blood type at the time. Whittaker placed the crime lab report conspicuously on Williams's desk two days before the robbery trial. Williams has admitted that he knew there was blood evidence, and that he steered witnesses away from mentioning it at the armed robbery trial.

The existence of blood evidence was mentioned on the internal and unproduced screening form that Whittaker prepared in the armed robbery case. The form indicated that the prosecutors "may wish" to have respondent's blood tested. Blood evidence was also mentioned in the internal crime scene technician report that was prepared when the bloody swatch was cut from Jay LaGarde's pants. Although no fewer than four prosecutors—Dubelier, Williams, Whittaker and Gerald Deegan—knew of blood evidence, Thompson and his attorneys were never told about or provided with the blood evidence or any of the documents that referred to the collection or testing of that evidence. As a result, the defense was unaware

that the prosecutors had scientific evidence that exonerated Thompson of the armed robbery charge.

Thompson's attorneys submitted a pre-trial motion in the murder case to preclude prosecutors from using the armed robbery conviction while that conviction was on appeal. Because defense counsel did not know of the exonerating blood evidence at that time, the appeal focused on the process used to identify Thompson as the supposed armed robber. The trial court denied the motion, ruling that the state could use the conviction if respondent testified. According to the stipulated facts, "[a]s a result of his conviction three weeks earlier for attempted robbery and the denial of the motion to preclude the introduction of such evidence, Thompson did not take the stand and deny his guilt in the murder case." Stip. ¶ Q. The prosecutors thus achieved their first strategic goal of precluding Thompson from testifying.

During the sentencing phase at the murder trial, Marie LaGarde testified that she and her brothers were nearly killed by Thompson in the robbery. Dubelier argued to the jury that because respondent had already been sentenced to 49½ years without parole in the robbery case, the only way to punish him for the murder was to impose the death penalty. The jury sentenced Thompson to death, thus achieving the prosecutor's second objective for reversing the order of the trials.

Thompson spent most of the next 14 years on death row at the Louisiana State Penitentiary in

Angola, Louisiana, exhausting his post-conviction and habeas appeals. During those fourteen years, Thompson lived in solitary confinement in a six-by-nine foot cell. A final death warrant was issued in April 1999 after years of post-conviction proceedings.

Shortly before Thompson was to be executed, an investigator for Thompson's attorneys unearthed a copy of the 1985 crime lab report showing that the perpetrator of the armed robbery had type "B" blood. As previously noted, Thompson's blood is type "O," making it impossible for him to have been the robber. Given the obvious link between the murder and the robbery case, the execution was stayed. The district attorney moved to vacate the armed robbery conviction and did not retry Thompson for that crime.

After Thompson's investigator discovered the blood evidence in 1999, a former prosecutor, Michael Riehlmann, reported that in 1994, Deegan (who had been the junior prosecutor in the armed robbery case) said to Riehlmann that the prosecution had failed to turn over evidence that in some way may have exculpated Thompson. On the witness stand in this civil action, Riehlmann was unclear about precisely what Deegan had said about the blood evidence and could not say whether Deegan had mentioned the involvement of other prosecutors. Deegan reportedly made the statement to Riehlmann after being told he had only months to live as a result of cancer. Riehlmann did not tell anyone about Deegan's revelation until five years later, after the blood

evidence had been discovered by Thompson's investigator.

At the suggestion of prosecutor John Jerry Glas, the district attorney convened a grand jury in June 1999 to investigate "the conduct of his own office and the former [prosecutors] who were involved in the prosecution of Mr. Thompson in the armed robbery case." Stip. ¶ Z. Even though the same prosecutors were involved in both the armed robbery and murder cases—and it was stipulated that the armed robbery case was part of the strategy for the murder prosecution—the district attorney concluded that it was unnecessary to investigate possible *Brady* issues in the murder case. Before the grand jury had heard from all witnesses, Orleans Parish District Attorney Harry Connick ended the investigation and dismissed the grand jury, over Assistant District Attorney Glas's vehement objection. Glas resigned in protest over Connick's dismissal of the grand jury.

After extensive further factual investigation by Thompson's attorneys—including a review of the district attorney's files in the murder case—the state trial court held a hearing on Thompson's application for relief concerning the murder conviction. During the hearing, Thompson presented the court with extensive evidence that had not been revealed during the 1985 murder trial. Thompson further urged that the non-production of the blood evidence and use of the invalid armed robbery conviction had unconstitutionally deprived him of his right to testify in the murder case. The state trial court vacated

Thompson's death sentence but left the murder conviction intact.

The state appellate court reversed the murder conviction, ruling that Thompson "was denied his right to testify in his own behalf based upon the improper actions of the State in the [armed robbery] case." *State* v. *Thompson*, 825 So. 2d 552, 557 (La. App. 4th Cir.), *writ denied*, 829 So. 2d 427 (La. 2002). According to the state appellate court, the non-production of the blood evidence "led to Thompson's improper conviction in that case and his subsequent decision not to testify in the [murder] case." *Ibid.* Although Thompson had presented significant evidence demonstrating that the prosecutors had failed to produce other favorable evidence in the murder case, the state appellate court found it unnecessary to address whether the non-production of that other evidence provided additional grounds to vacate the murder conviction.

In May 2003, the district attorney's office retried Thompson for the Liuzza murder. Free of the robbery conviction, Thompson took the stand in his own defense. The jury heard and saw over a dozen pieces of evidence that prosecutors had not turned over during the first murder trial. That evidence included several police reports containing eyewitness descriptions of the murderer that did not match Thompson's description—reports that were not turned over despite Thompson's requests for all police reports containing descriptions inconsistent with Thompson's appearance.

The trial evidence also included photographs, statements attributed to Thompson's co-defendant, and information regarding the monetary reward given to a key witness for the state. (At the original trial, prosecutors had suggested that the witness was not going to receive reward money.) The jury heard the testimony of three critical eyewitnesses from the scene of the murder who were interviewed by police and listed in the undisclosed police reports, but who had not been disclosed to respondent at or before the 1985 trial.

The jury returned a verdict of not guilty in 35 minutes. Thompson was released from prison more than 18 years after his arrest.

II. PROCEEDINGS BELOW

A. Proceedings In The District Court

Less than one year after the state appellate court vacated the murder conviction, Thompson filed this civil rights action for damages arising from that conviction. The complaint alleged that under 42 U.S.C. § 1983, the district attorney had been deliberately indifferent to the need to train, monitor, and supervise prosecutors in his office as to their obligations under *Brady* and that this caused Thompson's conviction and wrongful imprisonment.

The week-long civil trial concerned municipal liability claims based on the policies of the district attorney as official policymaker, not personal liability

claims directed against individual prosecutors. The jury heard evidence demonstrating that the district attorney failed to train, supervise, and monitor the prosecutors in his office regarding *Brady*. Indeed, viewed in the light most favorable to Thompson, the jury heard that the district attorney's office had absolutely no *Brady* training at the time of Thompson's prosecutions. The district attorney stipulated that "[n]one of the district attorney witnesses recalled any specific training session concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson." Stip. ¶ UU (italics added). Dubelier, Williams, Whittaker, and Riehlmann all admitted they could not recall a single training session while in the district attorney's office, nor could they recall any training regarding *Brady*.

Although the district attorney and two of his former first assistants claimed there were regular training programs, not a single prosecutor from the hundreds who worked under them over the years testified about any training or instruction on *Brady* obligations during the relevant time period.

The jury also heard evidence of confusion among the prosecutors in the office concerning their *Brady* obligations. Although the district attorney stipulated that the crime lab report constituted *Brady* material and argued that any reasonable prosecutor would have recognized blood evidence as such, several of the district attorney's own witnesses—including the office's Rule 30(b)(6) designee—testified that the blood evidence was not *Brady* material in the absence

of knowledge of respondent's blood type. The jury also heard testimony that the district attorney and his first assistant had expressed that view at the time of the grand jury proceedings.

During the 2007 civil trial, both Dubelier and Williams displayed their fundamental misunderstanding of *Brady*. For example, Dubelier claimed that *Brady* did not require the production of eyewitnesses' descriptions of the perpetrator that were inconsistent with the accused's appearance if he could posit a theory why the accused may have changed his appearance at the time of the crime. Williams testified that he believed *Brady* did not require the production of impeachment material. Williams's misunderstanding of *Brady* was so fundamental that the district judge visibly registered surprise at Williams's testimony, prompting Williams to change his testimony before the jury.

Not only was *Brady* training in the district attorney's office non-existent, there was also no supervision or monitoring of "special" prosecutors, such as Dubelier and Williams, who were entirely exempt from supervision, even though they were only a few years out of law school.

The jury also heard undisputed evidence that there was no written policy manual in the district attorney's office when Thompson was prosecuted. According to the stipulated facts, the office did not have a policy manual until 1987, two years after Thompson's trial. The 1987 policy manual, which was

described by the district attorney's office as a supposed compilation of prior policies, included just four sentences devoted to *Brady*, and badly misstated the law in at least three important respects. Thompson's expert witness testified that the 1987 policy contained multiple errors of law; failed to communicate the importance of *Brady* compliance; and failed to give proper guidance to prosecutors in the office. He testified that not only did the policy incorrectly limit *Brady* to instances where a defense request had been made and the court ordered evidence to be produced, but it also incorrectly suggested that the legal requirement was limited to "exculpatory" evidence. On the witness stand, the designated witness of the district attorney's office, Val Solino, conceded that the four sentences in the manual about *Brady* were deficient and, if applied to the armed robbery case against Thompson, would not have required production of the crime lab report that was not produced to the defense.

The jury also heard evidence of district attorney Connick's knowledge of the need to train and supervise his prosecutors regarding *Brady*. In this regard, Connick conceded that, as district attorney, he knew prosecutors confronted difficult situations requiring decisions about their *Brady* obligations, that he knew it was not always easy to determine whether evidence was required to be produced under *Brady*, that he knew *Brady* was an evolving legal obligation, and that he knew constitutional harm would result if his prosecutors did not understand their *Brady*

obligations. Other former prosecutors from the office similarly noted the "gray" areas under *Brady* and the need for training to delineate the contours of the rule. Former first assistant, Timothy McElroy, for example, testified that *Brady* compliance is dependent upon the adequacy of the training provided, because it is sometimes difficult for a prosecutor to determine whether evidence is exculpatory.

The district attorney knew the danger of *Brady* violations was real, and that if prosecutors made wrong decisions under *Brady*, constitutional harm would result. He admitted that before the 1985 prosecutions against respondent, there were at least four cases leading to published opinions of the Louisiana Supreme Court finding *Brady* violations by prosecutors in his office. The district attorney also admitted that most *Brady* issues never lead to published opinions, and that *Brady* violations had occurred in other cases not described in published opinions. Nevertheless, no witness was able to identify a single, specific corrective measure taken in response to any *Brady* violation by prosecutors in the office.

The district attorney compounded the complete absence of *Brady* training by imposing a policy that strongly discouraged the production to the defense of police reports and witness statements; the prosecutors involved in respondent's trials stated they were following that policy when they did not produce the police reports to the defense in the murder case. And Connick admitted his policy of presumptive

non-disclosure made it particularly crucial for his prosecutors to understand *Brady* and make proper *Brady* determinations. Thus, despite Connick's actual awareness of the crucial need for training and supervision, the jury properly could have concluded that there was no *Brady* training at the time of Thompson's prosecutions.

The jury also heard evidence from which it could conclude that the non-production of the blood evidence was not the isolated act of a rogue prosecutor but rather that multiple prosecutors had been involved in the non-production of the blood evidence at Thompson's original trial. Whittaker testified he saw the crime lab report and placed it conspicuously on Williams's desk. Williams denied seeing the report, but admitted he knew of the blood evidence and that he deliberately avoided mentioning the blood evidence in his questioning of witnesses and argument at the armed robbery trial. Dubelier, too, was aware of blood evidence. None of those witnesses offered any credible explanation for why they did not produce the blood evidence to respondent. Moreover, the district attorney stipulated that numerous other pieces of evidence, including police reports and witness statements, were not turned over to Thompson during his murder trial.

At the close of the evidence in the civil trial, the district judge carefully instructed the jury regarding the elements of Thompson's cause of action and submitted a special verdict form. There were no

objections from the defendants on the critical points. The jury returned a $14 million verdict in respondent's favor. The district court entered judgment, denied petitioners' post-trial motions, and awarded attorneys' fees and costs.

B. Proceedings In The Court Of Appeals

On appeal, a unanimous panel of the Fifth Circuit upheld the judgment in all material respects. The panel's 48-page opinion exhaustively reviewed the evidence, determining among other things that the jury properly could have found: (1) that "Connick was aware that the attorneys in the DA's Office would be required to confront *Brady* issues on a regular basis and that failure to properly handle those issues would result in constitutional violations * * * "; (2) that "the need to train about *Brady* was obvious * * * "; (3) that there was "ample evidence that the attorneys [in the DA's Office] received no training on *Brady's* requirements * * * "; and (4) that there was "evidence from which the jury could have believed that others [besides Deegan] had a hand in failing to turn over the exculpatory evidence * * * * " See Pet. App. 20, 26 & 30. Applying this Court's precedents, the panel announced no new rule of law and found no basis to overturn the jury verdict or judgment.

Petitioners sought rehearing *en banc*, which was granted. The grant of rehearing vacated the unanimous panel opinion. Pet. App. 1a. By an equally divided 8-8 vote, the *en banc* court, without opinion,

affirmed the district court judgment entering the jury verdict in Thompson's favor. *Ibid.*

Chief Judge Jones (and joined by no other member of the court) wrote separately to express her view that imposing *Monell* liability under § 1983 on municipalities for program- or policy-based constitutional violations—even under the exacting standards set by this Court—is at odds with the absolute immunity afforded individual prosecutors from personal liability under *Imbler*. Pet. App. 2a-7a.

Judge Jolly specially concurred to observe that "[o]rdinarily, when an en banc case results in a tie vote, we affirm the district court without opinion," and to express his view that "[t]hat is the way I would prefer it today," given that "there is no majority opinion, and that no opinion today will bind any court or future party in this circuit * * * * " *Id.* at 8a.

Judge Clement, joined by five other judges, wrote separately to explain that she would overturn the jury verdict because the evidence in the instant case, in her view, was insufficient to establish municipal liability. Pet. App. 9a-43a.

Judge Prado, author of the now-vacated unanimous panel opinion, wrote separately on behalf of himself and four other judges to explain that Judge Clement's opinion "overlooks much of the evidence the jury heard and ignores the standard of review that we apply to jury verdicts." *Id.* at 45a-50a. Objecting to that attempt to "retry this case through the appellate process," Judge Prado observed that

"the fact that reasonable judges on this court view the evidence differently suggests that these factual disputes were for the jury to resolve." *Id.* at 49a. Allowing the judgment in this "extraordinary case" to stand will not, in Judge Prado's view, "subject municipalities to widespread liability, as a holding that the need for training was 'so obvious' and the lack of training 'so likely' to create a constitutional violation will apply only in the rare instance." *Id.* at 50a. "This is that rare case." *Ibid.* (Prado, J.).

The *per curiam* order of the *en banc* court is not precedential. Pet. App. 1a; see also *United States* v. *Mendoza-Gonzalez*, 318 F.3d 663, 667 n.5 (5th Cir. 2003). Petitioners did not request that the Fifth Circuit certify any question of law to this Court for review, nor did the Fifth Circuit do so on its own initiative—as it has recently done after dividing evenly in another *en banc* case. *United States* v. *Seale*, 577 F.3d 566 (5th Cir. 2009) (certifying question of law to this Court after the *en banc* court evenly divided), *question dismissed*, 130 S. Ct. 12 (2009).

REASONS FOR DENYING THE PETITION

Most fundamentally, the petition should be denied because there is no precedential decision for this Court to review. With the unanimous panel decision in Thompson's favor now vacated, and the *en banc* court of appeals having evenly divided, all that remains is the court of appeals' non-precedential *per*

curiam order affirming the district court's entry of a jury verdict in Thompson's favor. Moreover, the principal ground dividing most members of the *en banc* court involved different interpretations of the evidence adduced at trial. It is thus difficult to imagine a more fact-bound decision or limited outcome. Petitioners merely seek splitless, fact-bound review of a jury verdict. The petition should be denied.

I. THE PETITION DOES NOT PRESENT AN IMPORTANT LEGAL ISSUE ON WHICH THERE IS A DIVISION OF AUTHORITY

A. At Most, The Petition Seeks Review Of The Fact-Bound Application Of Settled Legal Principles

Over 20 years ago, this Court recognized that under *Monell* v. *Department of Soc. Servs.*, 436 U.S. 658 (1978), municipal liability may be imposed in certain, narrow circumstances for an official policymaker's failure to train, monitor, or supervise employees. *City of Canton* v. *Harris*, 489 U.S. 378, 388 (1989). A successful claimant must prove three elements: (1) a failure to train, monitor or supervise; (2) a causal connection between that failure and the constitutional violation suffered by the claimant; and (3) deliberate indifference to the claimant's constitutional rights. *Cousin* v. *Small*, 325 F.3d 627, 637 (5th Cir. 2003).

After being properly instructed on the law, the jury in this case reasonably found each element satisfied. The petition makes numerous arguments

why that verdict should be overturned. But those fact-bound arguments disregard the evidence actually before the jury and misapprehend settled, controlling law.

This Court has made clear that in a failure-to-train case, a plaintiff need not prove a pattern of similar violations where, as here, the need for the training is "obvious" and the violation of constitutional rights is the "highly predictable consequence" of the failure to train. *Bd. of County Comm'rs of Bryan County* v. *Brown*, 520 U.S. 397, 407-09 (1997); *Canton*, 489 U.S. at 390, n.10.

Utilizing the proper standard of review, the evidence in this case met those standards. The district attorney has admitted in this case that he was fully aware that: (1) his prosecutors frequently confronted decisions involving *Brady*; (2) it was crucial for his prosecutors to make proper *Brady* decisions; (3) *Brady* decisions can involve difficult and evolving legal principles; and (4) if prosecutors made wrong *Brady* decisions, constitutional harm would result. Viewed in the light most favorable to the jury's verdict, there was ample evidence that, despite the district attorney's actual awareness of the need for training, he nevertheless failed to provide any training or any clear message regarding *Brady*. Several prosecutors involved in the Thompson prosecution testified that they received no *Brady* training or instruction from anyone in the office, and the parties stipulated that "none of the district attorney witnesses recalled any specific training

session concerning *Brady* prior to or at the time of the 1985 prosecutions of Mr. Thompson." Stip. ¶ UU (italics added).

Deliberate indifference was evidenced not only by the district attorney's awareness and failure to provide any training, but also by the content of the *Brady* section of the policy manual created a mere two years after Thompson's prosecution. That section, consisting of a total of four sentences, reflected deliberate indifference by grossly understating and misstating the requirements of *Brady*, and by entirely failing to mention the rights of the accused (focusing instead on the expense and inconvenience to the office of mistrials and appeals resulting from *Brady* issues). The jury could properly find further evidence of deliberate indifference to *Brady*'s requirements from the treatment of *Brady* contained in the manual.

In addition, the jury was free to reject the district attorney's theory that a single "rogue prosecutor" (Deegan) acted alone in causing Thompson's injuries. The district judge correctly charged the jury, stating, among other things, that "the fault must be in the training program itself, not in a particular prosecutor." Pet. App. 93a-94a. At least three other prosecutors besides Deegan knew about the blood evidence, yet failed to produce it. Indeed, Deegan was the most junior member of the team, and the jury properly could have concluded that the most junior member would not have acted unilaterally to withhold evidence known to exist by more senior prosecutors in this high-profile case.

Moreover, in finding a causal connection between the district attorney's failure to train and Thompson's injuries, the jury properly considered the other *Brady* violations committed by Williams and Dubelier in the murder case, as well as the testimony demonstrating their failure to understand *Brady*'s requirements. The numerous *Brady* violations by multiple prosecutors in this case and their confusion about *Brady* further reflected the failure of the office to provide *Brady* training.

Contrary to petitioners' claim (supported only by a citation of Judge Clement's opinion, which provides no citation of the record) that the "'uncontroverted and unimpeached testimony' * * * proved that office policy was to turn over the kind of report at issue" (Pet. 11 (citing Pet. App. 31a) (Clement, J.)), the evidence actually demonstrated the contrary. In this regard, for example, both the district attorney's Rule 30(b)(6) designee and statements attributed to the district attorney himself disputed the constitutional obligation to produce the blood report if the prosecutors did not know Thompson's blood type. See Trial Transcript ("TT") 410, 986. Viewed properly, the evidence was sufficient to show both that the district attorney was deliberately indifferent to the need to train the prosecutors in his office as to their *Brady* obligations, and that his failure to train caused the violation of Thompson's constitutional rights.

The petition nowhere identifies a single statement of legal principle from any of the non-precedential decisions of the courts below with which it disagrees. Instead, the petition takes issue with the

application of those principles to the evidence presented to the jury in this case. But the application of properly stated and settled legal principles to the peculiar facts of an individual case is not the sort of issue that warrants this Court's review. See Sup. Ct. R. 10. Indeed, petitioners' own *amici*, Orleans Parish Assistant District Attorneys, concede that the "analytical framework for analyzing municipal failure to train claims based on a single constitutional violation" is "well-established." Br. of *Amici* 6. Here, moreover, review would be particularly inappropriate given that petitioners' arguments invoke *factual* disputes. See, e.g., Pet. 26-30 (arguing that Thompson "failed to show culpability and causation").

B. There Is No Division In Authority

Perhaps recognizing that the application of settled law to the "extraordinary facts" of this "extraordinary case" (Pet. App. 50a) (Prado, J.) is insufficient to warrant review by this Court, petitioners claim that "[i]n two decades," the courts of appeals "have not developed a consistent approach to applying single-incident liability to *Brady* violations." Pet. 17-26. Petitioners do not identify any actual or clear split of authority, nor could they, as the purported lack of "consistency" petitioners identify merely reflects at most the fact-bound application of settled legal rules in different settings. And "the absence of any conflict" among the lower courts "is plainly a sufficient reason for denying certiorari." *Singleton* v. *Comm'r of*

Internal Revenue, 439 U.S. 940, 945 (1978) (Stevens, J., respecting denial of certiorari).[1]

1. The Supposed "Divergent Approaches" Claimed By Petitioners Are Illusory

Petitioners claim that in the "two decades" since this Court acknowledged in *Canton* the prospect of so-called "single-incident" municipal liability for failure to train, "four circuits" (the Second, Fifth, Sixth, and Eighth) have confronted the issue and, although all four have applied *Canton*, they "do not agree on the proper analysis" and have "reach[ed] inconsistent results." Pet. 17. At most, however, the petition simply cites different outcomes in a handful of cases. And those different outcomes, far from reflecting a genuine conflict among the circuits, merely reflect inevitable differences in applying the same legal principles to a variety of different facts and circumstances.

Petitioners begin with the Second Circuit's decision in *Walker* v. *City of New York*, 974 F.2d 293 (2d Cir. 1992), but concede that *Walker* "limited itself to the time period and evidence at issue" in that particular case. Pet. 18. What is more, petitioners concede that the Second Circuit has stressed that in

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[1] Even if there were any conflict, which there is not, petitioners themselves repeatedly refer to it as "stagnant" (Pet. 22, 25), i.e., stale—providing yet another reason this Court's review is unwarranted.

failure-to-train cases like this one, courts must adhere to the "heightened culpability and causation standards emphasized by this Court in *Bryan County*." *Id.* at 19 (citing *Amnesty Am.* v. *Town of W. Hartford*, 361 F.3d 113 (2d Cir. 2004), and *Aretakis* v. *Durivage*, No. 1:07-CV-1273, 2009 WL 249781, at *1 (N.D.N.Y. Feb. 3, 2009)).

Petitioners similarly concede that in the Eighth Circuit case they cite, the court likewise "applied the stringent culpability and causation requirements from [this Court's decisions in] *Canton* and *Bryan County*." Pet. 19 (citing *Reasonover* v. *St. Louis County*, 447 F.3d 569, 583-84 (8th Cir. 2006)). There is thus no "inconsistency" between *Walker* and *Reasonover*. Rather, as petitioners themselves acknowledge, the "evidence" in *Reasonover*, unlike the evidence here or in *Walker*, simply failed to show that the "*particular* violations 'were the result of inadequate training or supervision.'" *Ibid.* (emphasis added) (quoting *Reasonover*, 447 F.3d at 584).

Citing two cases from the Sixth Circuit, petitioners insist that court has adopted a more "lenient" approach to municipal liability than the Eighth Circuit. Pet. 21. But even that claim of a shallow (and unacknowledged) conflict is unfounded. For instance, in *Gregory* v. *City of Louisville*, 444 F.3d 725, 754 (6th Cir. 2006), the police officers (like the prosecutors here) had received no *Brady* training, and even the chief of police in that case "believed that officers were confused" about *Brady*. Petitioners quibble that in *Moldowan* v. *City of Warren*, 578 F.3d 351 (6th Cir.

2009), the Sixth Circuit "said nothing about heightened causation," Pet. 21, but that is hardly surprising given that the issue in that interlocutory appeal was whether the plaintiff had presented sufficient evidence of an underlying violation of a constitutional right in the first instance. *Moldowan*, 578 F.3d at 393 ("the City * * * argues that Moldowan cannot establish municipal liability * * * because he cannot establish an underlying deprivation of a constitutional right"). Indeed, whether the plaintiff in *Moldowan* had "alleged facts sufficient to satisfy the elements of a claim for municipal liability" was "beyond the scope" of the limited interlocutory appeal in that case. *Id.* at 394 n.19.

Petitioners are left to argue that neither the Sixth nor the Eighth Circuit has "adopted" the Second Circuit's "*Walker* analysis." Pet. 21. But that is of no moment. Plaintiffs do not claim that under *Walker*'s analysis, any of those cases would have come out differently. Engaging in self-contradiction, petitioners first assert that the Fifth Circuit's approach "resembles the Second Circuit's, at least superficially" (and point out that the jury in this case was instructed "under the three-part *Walker* test"), *id.* at 22, but then speculate that the evidence in this case "would *likely* fail in the Second Circuit" and "*might* satisfy Sixth Circuit but fail Eighth Circuit standards." *Id.* at 23 (emphasis added). But far from showing that the Sixth Circuit applies a "lenient" standard while the Second and Eighth Circuits apply a more "stringent" one, petitioners' reliance on

Reasonover—like the other cases they cite—reflects the unsurprising fact that applying the same legal rule to different facts can yield different results commensurate with factual differences.

2. The Remaining Cases Upon Which Petitioners Rely Are Inapposite

Petitioners do no better in their effort to establish that the jury's verdict in Thompson's favor "deepens persisting uncertainty, both inside and outside the Fifth Circuit," concerning municipal liability based on so-called "single incident" liability for failure to train on *Brady*. See Pet. 25. Most fundamentally, petitioners simply ignore that the *per curiam* order of the evenly divided *en banc* court (not to mention the now-vacated panel opinion) affirming the jury verdict carries no precedential weight whatsoever—and thus is limited solely to the facts of this "extraordinary" and "rare" case. And even if one were to assume that an intra-Fifth Circuit conflict exists, it is well settled that such a conflict furnishes no basis for a grant of certiorari. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In any event, petitioners miss the point. The fact that the Fifth Circuit has affirmed the imposition of municipal liability for failure to train based on a "single incident" only twice (including in the case at bar) since *Canton* was decided over 20 years ago—while rejecting liability in numerous other cases

presenting different facts—merely confirms what this Court has already made plain: The heightened standard for liability under such circumstances is difficult to satisfy and, as the Fifth Circuit has itself made clear, a plaintiff *"usually"*—but not necessarily—"must demonstrate a pattern" of constitutional violations to establish the deliberate indifference necessary to impose municipal liability. *Cousin*, 325 F.3d at 637.

Petitioners seize on *Cousin* to argue that the Fifth Circuit has "considered—and approved—the same office's record of *Brady* enforcement during the time period covering Thompson's case." Pet. 25. Not so. For one thing, petitioners' reference to the "time period covering Thompson's case"—which petitioners identify on the previous page as Thompson's § 1983 case (Pet. 24) (filed in 2003), *not* his much earlier burglary or murder trials (conducted in 1985)—is irrelevant at best and misleading at worst. For another, petitioners neglect to mention that the plaintiff in *Cousin* *"concede[d]"* that the "policy and training program" at issue at the time of Cousin's prosecution was "adequate." 325 F.3d at 638 (emphasis added). Far from involving a concededly adequate training program, the record in this case revealed that the district attorney's office provided absolutely no training at the time of Thompson's prosecutions. Petitioners' selective reading of these cases—and failure to acknowledge the very different facts that undergird their different results—cannot create a conflict where none exists. There being no conflict, the petition should be denied.

II. PETITIONERS OFFER NO OTHER SOUND BASIS FOR FURTHER REVIEW

Unable to muster a true conflict, petitioners claim that the district court's decision entering the jury verdict is in tension with this Court's cases, and predict dire consequences if review is denied. Neither the claimed tension nor petitioners' Cassandra-like prophecies are well-founded, and neither justifies review in this Court.

A. The Jury's Verdict In Thompson's Favor Does Not Conflict With This Court's Decision In *Goldstein*

Contrary to petitioners' assertions (Pet. 33), this Court's decision last Term in *Van de Kamp* v. *Goldstein*, 129 S. Ct. 855 (2009), does not require a different conclusion. The only claims before the Court in *Goldstein* involved the personal liability of individual prosecutors. *Goldstein*, 129 S. Ct. at 858-59. The Court was not presented with municipal liability claims under *Monell*, as in this case. *Goldstein* thus addressed the entirely different issue of the immunity of *individuals*, not of *municipalities*.[2] This Court has long held that municipalities cannot claim the same

[2] The same distinction renders inapposite *Pottawattamie County* v. *McGhee*, 547 F.3d 922 (8th Cir. 2008), *cert. granted*, 129 S. Ct. 2002 (Apr. 20, 2009), *writ dismissed*, No. 08-1065, 2010 WL 6917, at *1 (Jan. 4, 2010), which involved personal liability of individual prosecutors for misconduct—not, as here, municipal liability for a wholesale failure to train.

immunities that shield individuals from damages liability under § 1983—and *Goldstein* did not alter that longstanding rule. Petitioners' implicit argument that *Goldstein* should be extended to such claims would effectively overrule *Monell* (not to mention *Bryan County*), and must be rejected for that reason alone.

What is more, the argument is meritless. The rationale for individual prosecutorial immunity simply does not apply to municipal liability. The "basic fear" underlying individual prosecutorial immunity is "that the threat of damages liability would affect the way in which individual prosecutors carried out their basic court-related tasks." *Goldstein*, 129 S. Ct. at 862. But that rationale loses its force when it is the municipality, in contrast to the individual, whose liability is at issue. This Court has explained in the analogous context of qualified immunity:

> [C]onsideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.

Owen v. *City of Independence*, 445 U.S. 622, 656 (1980). Thus, although this Court has indicated that individual prosecuting attorneys should not be

focused on personal liability, it is important for the official policymaker to consider just such matters.

In *Canton*, this Court recognized that in some municipal-liability cases, the need for training government employees so as to avoid the deprivation of citizens' constitutional rights is objectively obvious. 489 U.S. at 390. The threat of liability to the municipality for deliberate indifference to that need encourages public officials to proactively provide training on important constitutional principles, while at the same time ensuring that municipalities are not subjected to liability for isolated mistakes or held vicariously liable for their employees' torts. The potential for deliberate-indifference liability thus provides an incentive for training on difficult constitutional questions—and encouraging a proactive approach has the potential to ultimately decrease both the instance of constitutional violations and the number of § 1983 lawsuits.

Under petitioners' preferred approach, however, a municipality could be held liable under *Monell* only if its explicit policies cause constitutional injury. Such an approach is both at odds with this Court's precedent, and would also create perverse incentives by encouraging local officials to avoid altogether the creation of clear policies on difficult constitutional questions. What is more, if liability for deliberate indifference were limited—contrary to this Court's precedent—solely to circumstances in which the policymaker had actual knowledge of the need to train a particular employee, such a rule would

encourage policymakers to avoid knowledge of their employees' bad acts and to conduct training on an *ad hoc* basis rather than by developing sound constitutional policies. Such a regime would be directly contrary to the important interests this Court has carefully balanced in establishing the "deliberate indifference" standard for failure-to-train claims in the first place.

Similarly, if deliberate indifference liability is limited to cases in which a pattern of violations can be shown, as petitioners apparently would have it, the incentive for local officials to do the difficult work of constitutional policymaking would be severely diminished. This Court has left no doubt that, due to the difficult choices public employees must make and the frequency with which their incorrect choices can cause constitutional violations, training is obviously necessary in some situations. *Canton*, 489 U.S. at 390. Enforcement of that rule protects even the first victim of a non-trained employee by encouraging at least some training from the outset rather than waiting for a pattern of violations to emerge. That, in turn, would reduce the potential exposure of municipalities to § 1983 liability.[3]

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[3] See Transcript of Oral Argument at 54, *Herring* v. *United States*, 129 S. Ct. 695 (2009) (Deputy Solicitor General of the United States "suggesting that civil remedies will provide incentives to the police to avoid the bog of litigation by putting into place systems that will prevent this kind of error"); see also

(Continued on following page)

Moreover, this case involves a wholesale failure of the policymaker to provide *any* relevant training, not merely a deficient training program. Courts, including the Fifth Circuit, have consistently required proof of a pattern of violations where the policymaker has provided some relevant training, and where the training is allegedly inadequate. Compare *Snyder* v. *Trepagner*, 142 F.3d 791, 198-99 (5th Cir. 1998); *Thompkins* v. *Belt*, 828 F.2d 298, 304-05 (5th Cir. 1987) (requiring proof of a pattern because the attack was on the adequacy of existing training) to *Bd. of County Comm'rs of Bryan County*, 520 U.S. at 407-09 (distinguishing no-training cases from deficient training cases).

In our system of justice, the deference given to prosecutors is virtually unlimited—and properly so. Absolute immunity shields prosecutors in carrying out their duties so that fear of personal liability will not inhibit the performance of their critical role in maintaining law and order. Thus, when the constitutional rights of individuals are violated by prosecutorial misconduct, redress is generally available only through a suit against a government policymaker, such as a district attorney, in his official capacity. Even then, only the most extreme cases can satisfy the stringent requirements for liability. Nothing less than proof of the policymaker's deliberate

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Brief of Respondent United States at 29-31, *Herring*, 129 S. Ct. 695 (2009).

indifference to constitutional rights will suffice. Such cases will be rare. But this is such a case.

When deliberate indifference by the government comes to light, as it did in this case, public confidence in the integrity of the justice system is shaken. Congress has determined that, under appropriate circumstances, civil damage actions seeking redress for constitutional injuries caused by government misconduct have an important role to play in reinforcing the bedrock principle that we are a nation of laws, not men. Under the exceptional and unusual facts of this case, the jury's verdict vindicates that bedrock principle, reinforces the rule of law, and restores public confidence in the criminal justice system. Contrary to petitioners' arguments, it is faithful to this Court's precedent, consistent with its § 1983 jurisprudence, and respectful of the rule of law.

B. The Fact-Bound Decision To Affirm The Jury's Verdict Lacks Forward-Looking Significance

Petitioners assert hyperbolically that the jury's verdict in Thompson's favor will result in widespread municipal liability. Pet. 17. That speculation is unfounded. This Court decided *Canton* over 20 years ago, and during that time it has not resulted in widespread liability to municipalities because the standard itself is so exacting. Petitioners concede as much, asserting that the "[f]ederal circuit courts have recognized that single-incident liability is *exceptional*,"

that "failure-to-train *usually* demands a pattern of violations," and that the lower courts "confine single-incident liability *largely* to situations like *Canton*'s deadly force hypothetical." Pet. 17 (emphasis added). Indeed, petitioners concede that in the last 20 years, the Fifth Circuit has permitted single-incident liability only twice—including in this case. *Ibid.* (citing *Brown* v. *Bryan County*, 219 F.3d 450 (5th Cir. 2000)). Petitioners simply disagree with the fact-bound application of those settled legal principles to the extraordinary—indeed, potentially unique—facts of this case. See Pet. App. 50a (Prado, J.) (observing that "this is an extraordinary case, with extraordinary facts").

Although petitioners try to make much of Judge Clement's observation (Pet. App. 44a) that Thompson failed to satisfy the rigorous standards for causation and deliberate indifference in failure-to-train cases like this one, that analysis overlooks the actual evidence adduced at trial. See, e.g., Pet. App. 45a (Prado, J.). The fact remains that whether liability for deliberately indifferent failure to train is properly imposed under § 1983 is an issue to be determined on a case-by-case basis, based on what are unquestionably exacting standards. Absent a showing that the jury verdict here will impact a significant number of cases—a showing petitioners cannot make—petitioners' arguments reduce to a claim that the jury's allegedly erroneous weighing of the evidence (see, e.g., Pet. 26-30) is itself important. If the issue is truly important, it will recur in other courts and

crystallize into a clear legal question over time. But the jury's verdict in this "extraordinary" and fact-bound case—particularly in the absence of any precedential circuit court decision—certainly does not warrant review now.

For the same reason, the petition fails to show that the issue in this case has forward-looking significance. The district attorney's *amici*, Orleans Parish Assistant District Attorneys, express concern about the potential impact of the monetary judgment on the district attorney's office. That argument ignores not only the devastating impact of the injury to Thompson—who spent eighteen years in prison, fourteen of them in solitary confinement on death row, for crimes he did not commit—but also the district attorney's deliberately indifferent failure to fulfill his constitutional obligations. Moreover, Louisiana law requires district attorneys to maintain liability insurance (La. 42:1441.2(B)) for the purposes of satisfying such judgments. The district attorney here simply chose to ignore the statute. For that reason, too, the issue is fact-bound and unlikely to recur. For those reasons alone, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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