Supreme Court U.S.
JAN 25 2010
OFFICE OF THE CLERK

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

PETITIONERS' REPLY BRIEF

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REPLY BRIEF FOR PETITIONERS

The Court should grant certiorari in this case to police the outer boundaries of municipal liability and to resolve confusion caused by its own jurisprudence. Based on a single *Brady* violation, the *en banc* Fifth Circuit has affirmed a crippling failure-to-train award against the Orleans Parish District Attorney's Office. Only the strained extension of this Court's *Canton* decision allowed Thompson's case to avoid dismissal. *See City of Canton v. Harris*, 489 U.S. 378 (1989). Three circuits now follow that misguided approach. Pet. 17-26. Six dissenting judges thus accurately warned that the result in this case threatens to "encourage the extension of single incident liability," Pet. App. 9a, and erode the foundations of municipal liability law for district attorneys' offices across the nation.

ARGUMENT

THIS CASE CLEANLY POSES AN UNSETTLED QUESTION OF MUNICIPAL LIABILITY FOR PROSECUTORS NATIONWIDE.

Respondent John Thompson says these questions are "fact-bound, splitless, [and] unlikely to recur." Opp. 1. He is wrong. The only pertinent fact is undisputed: that Thompson was harmed by a single *Brady* violation.[1] The issue posed is

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[1] Thompson now attempts to obscure this by rearguing the evidence. *See* Opp. 9-13, 18-21. But his skewed depiction of the office's *Brady* record is beside the point: both the district court and the court of appeals treated the case as presenting a single *Brady* violation unconnected to any pattern of similar

whether that one violation can trigger failure-to-train liability for an entire prosecutorial office, absent a pattern of similar violations. The answer—on which four circuits have been unable to agree, Pet. 17-26—lies hidden in an elusive footnote in this Court's two-decades-old *Canton* opinion. *See Canton*, 489 U.S., at 390 n.10. Only this Court can provide that answer and clarify whether district attorneys' offices nationwide may be exposed to civil liability for countless decisions their prosecutors make every day.[2]

Thompson's "most fundamental" objection to review, however, has nothing to do with the merits. Opp. 16, 25. He deems the case unsuitable for certiorari because the evenly divided *en banc* court of appeals affirmed without controlling opinion. But that did not stop this Court from reviewing federal education law in *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81, 89 (2007); the constitutionality of a municipal picketing ordinance in *Frisby v. Schultz*, 487 U.S. 474, 478 (1988); remand standards for pendent

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violations. *See* Pet. 7 & n.7; Pet. App. 138a-142a (district court); Pet. App. 72a-80a (panel opinion).

[2] Thompson claims this case is "extraordinary" and "unique," in a transparent attempt to ward off review. *See* Opp. 16, 25, 32-34. Thompson's ordeal was certainly extraordinary, but the issue posed by this case is not. As Judge Clement explained, the Fifth Circuit's extension of *Canton* will expose district attorneys' offices to unprecedented liability based on prosecutors' decisions concerning "*Brady*, search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, [and] many more." Pet. App. 27a.

state claims in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 348 (1988); the constitutional assistance required for guilty pleas in *Hill v. Lockhart*, 474 U.S. 52, 55-56 (1985); or the standards for proving racial discrimination under § 1981 in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375, 382 (1982). Evenly split courts did not thwart review because—one would assume—disagreement among numerous circuit judges typically flags a certworthy issue. It does here.[3]

Far from "involv[ing] different interpretations of the evidence," Opp. 17, the competing opinions in this case (joined by eleven of sixteen judges) took irreconcilable views of this Court's jurisprudence. Judge Clement's six-judge dissent makes this clear. She thought municipal liability case law "clearly and emphatically" counseled dismissal "as a matter of law," because Thompson's single *Brady* violation failed the standards of *Monell*, *Canton*, and *Bryan County*. Pet. App. 43a-44a. Her dissent thus warned, in its first sentence, that the result "should not encourage the extension of single-incident liability under *Monell*." Pet. App. 9a; *see Monell v. Dep't of Social Serv's*, 436 U.S. 658 (1978). At stake

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[3] For the same reason, Thompson's argument that the *en banc* disposition is not "precedential" is beside the point. Opp. 16, 25. Ironically, however, one of the *en banc* opinions has already been cited in a subsequent failure-to-train case in the Fifth Circuit. *See Peterson v. City of Fort Worth*, 588 F.3d 838, 860 n.4 (CA5 2009) (Montalvo, J., dissenting) (citing *Thompson v. Connick*, 578 F.3d 293, 314 (CA5 2009) (en banc) (Prado, J., joining)).

are not competing facts, then, but divergent interpretations of municipal liability jurisprudence.

This shatters Thompson's major premise: *i.e.*, that Petitioners complain only about the "application of settled law." Opp. 16-18, 20-21. The law at issue, however, is neither *Monell* nor *Canton* generally, but a far more specific and unsettled aspect of those cases. As Thompson admits, the legal principle on which his case hinges is that, in *certain* failure-to-train cases,

> a plaintiff need not prove a pattern of similar violations where ... the need for the training is "obvious" and the violation of constitutional rights is the "highly predictable consequence" of the failure to train.

Opp. 18 (citing *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). If prosecutors' *Brady* obligations do not fall within that rule, Thompson's case would never have reached the jury.

That issue is not remotely "settled." *See* Pet. 13-26; Amicus Curiae Brief of National District Attorneys Association ("NDAA Amicus"), at 5-11. Failure-to-train claims ordinarily demand a pattern of employee wrongdoing. *See, e.g., Bryan County*, 520 U.S., at 405, 407-09; *Canton*, 489 U.S., at 391-92. Footnote dictum in *Canton* suggested that a single violation of certain, exceptional duties might substitute for a pattern. 489 U.S., at 390 n.10. But *Canton*'s sole example was police training on deadly force, which the Court has since called a

mere "hypothesis" meant for "a narrow range of circumstances." *Bryan County*, 520 U.S., at 409.

Training police to arrest criminals is a far cry from training lawyers to interpret the law. The Court has never suggested the two are analogous for failure-to-train claims, with good reason.[4] As Judge Clement observed, "[t]o hold a public employer liable for failing to train professionals in their profession is an awkward theory." Pet. App. 29a. That explains why the circuit courts[5] have stumbled in this area, as the Second Circuit's *Walker* decision best illustrates. *See* Pet. 18-19; NDAA Amicus 8-10 (discussing *Walker v. City of New York*, 974 F.2d 293 (CA2 1992)).

Walker's test for detecting single-incident situations goes well beyond the "narrow range" *Canton* envisioned. *See* 974 F.2d, at 297-98; Pet.

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[4] Indeed, in a similar context the Court has rejected the notion that legal malpractice can form the basis for a failure-to-train claim. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 701 (2004), rejected a court-made exception to federal tort immunity because the exception would have allowed barred claims—including legal malpractice—to be recast as "a failure to train, a failure to warn, the offering of bad advice, or the adoption of a negligent policy."

[5] Because Thompson ignores the unsettled state of the underlying legal rule, he misses the circuit confusion it has caused. Opp. 22-25. The Fifth Circuit has uncritically adopted the *Walker* approach for *Brady* violations. The Sixth Circuit has not adopted *Walker* but does recognize failure-to-train liability for single *Brady* violations. By contrast, the Eighth Circuit has neither adopted *Walker* nor approved single-incident *Brady* training claims. Petitioner and its amici explain the divergent circuit approaches at greater length elsewhere. *See* Pet. 17-26; NDAA Amicus 8-10.

18 n.17. For instance, *Walker* requires that a situation merely "present[] the employee with a difficult choice of the sort that training or supervision will make less difficult." 974 F.2d, at 297-98. Under that broad inquiry, virtually any employee misstep would expose municipalities to single-incident liability. For a district attorney's office, it would embrace not only *Brady* obligations, but also prosecutors' decisions on "search and seizure, *Miranda*, evidence of a defendant's other crimes, expert witnesses, sentencing, or many more." Pet. App. 27a. *Walker* thus converted an exceptional form of municipal liability into the norm, with particularly ruinous implications for prosecutorial offices.

Walker's flaws run yet deeper. The *Brady* violation there involved impeachment evidence and occurred shortly after *Brady* was decided. *Walker* suggested, however, that violations occurring later or involving exculpatory evidence would *not* qualify for single-incident liability. *See* Pet. 18-19; 974 F.2d, at 300. In addition to its inherent flaws, then, the *Walker* test does not even purport to reach all *Brady* violations.

Yet *Walker*'s confused extension of *Canton* has now bled into Thompson's case. Both the district court and the panel adopted *Walker* for the proposition that "Thompson did not need to prove a pattern of *Brady* violations." Pet. App. 80a (citing *Walker*, 974 F.2d, at 300); *see also* Pet. 22-23.[6]

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[6] Thompson misses *Walker*'s significance. The fact that the Second Circuit "limited" *Walker*'s test to certain *Brady* violations, *see* Opp. 22, underscores that the Fifth Circuit

This put Thompson's dramatic story before the jury, despite the fact that: (1) Thompson proved no pattern of similar violations; (2) Thompson's violation occurred fourteen years after *Walker*'s and involved exculpatory, not impeachment, evidence; and (3) the Fifth Circuit had recently found no pattern of *Brady* violations by the *same* district attorney's office during the period covering Thompson's robbery conviction. *See* Pet. 24-25 (discussing *Cousin v. Small*, 325 F.3d 627, 637-38 (CA5 2003)).[7]

This case thus presents a dispute, not over evidence, but over the legal principle that sent that evidence to a jury. That principle is not "settled, controlling law," Opp. 18, but rather the strained extension of single-incident liability to a scenario this Court never envisioned. Only because circuit courts have improperly interpreted this Court's jurisprudence—indeed, one footnote of it—did Thompson's claim survive dismissal. Pet. 17-26. Justice O'Connor predicted what would result from such an extension of *Canton*: "[a]llowing an inadequate training claim such as this one to go to the jury based upon a single incident ... only invite[s] jury nullification of *Monell*." *Canton*, 489 U.S., at 399 (O'Connor, J., concurring in part and dissenting in part).

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should not have applied the same test today to different *Brady* violations.

[7] Thompson is flatly wrong about *Cousin*. Opp. 26. That decision addressed the office's *Brady* record over a twenty-five year period that included Thompson's 1985 robbery conviction, as the Petitioners and Judge Clement carefully explained. *See* Pet. 24-25 & n.24; Pet. App. 25a.

The Court should thus grant certiorari to resolve the confusion fomented by its own case law. No matter how deep the circuit disagreement, the Court regularly takes cases to temper application of precedent.[8] That is particularly so where the extent of government liability is at stake. *See, e.g., Sosa*, 542 U.S., at 701 (rejecting circuit courts' exception to federal tort immunity that threatened to swallow a significant exemption). Since the Court's "precedents frame the question presented, but ... do not answer it," *Indiana v. Edwards*, 128 S. Ct. 2379, 2383, only this Court can settle the matter.

The Court's resources are well spent in clarifying the extent of municipal liability. The

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[8] *See, e.g., Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2638-39 (2009) (reviewing application by divided *en banc* circuit court of Court's fourth amendment and qualified immunity cases); *Bobby v. Bies*, 129 S. Ct. 2145, 2149 (2009) (rejecting circuit court's application of double jeopardy and issue preclusion law to *Atkins* claim); *District Attorney's Office v. Osborne*, 129 S. Ct. 2308, 2319 (2009) (overturning appellate court's extension of due process rights to postconviction DNA testing); *Washington State Grange v. Washington State Repub. Party*, 128 S. Ct. 1184, 1192 (2008) (reviewing circuit court's interpretation of Court's election law precedents); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (clarifying application of Court's first amendment jurisprudence to job-related public speech); *Brown v. Payton*, 544 U.S. 133, 140-41 (2005) (reversing divided *en banc* circuit court's application of *Boyde v. California*, 494 U.S. 370 (1990)); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 61 (2004) (reviewing circuit court's interpretation of federal environmental management statutes under the APA); *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 828-29 (2002) (resolving whether "arising under" language in 28 U.S.C. § 1331 encompassed counterclaims).

original *Monell* opinion found "no occasion to address ... what the full contours of municipal liability under § 1983 may be." 436 U.S., at 695. Concurring, Justice Powell forecast that "[d]ifficult questions remain for another day," such as "substantial line-drawing problems in determining when execution of a government's policy or custom can be said to inflict constitutional injury such that government as an entity is responsible under § 1983." *Id.*, at 713 (Powell, J., concurring) (quotations omitted). Twenty years later, three Justices in *Bryan County* lamented that *Monell* has "produced a body of law that is neither readily understandable nor easy to apply." 520 U.S., at 433 (Breyer, J., dissenting). Thus, it is no surprise that a knotty problem in the failure-to-train area has arisen and persisted, demanding this Court's attention.[9]

CONCLUSION

The time is ripe to revisit the contours of failure-to-train liability, which the Court last addressed in 1989. Even then, three concurring Justices cautioned that "the resources of local government are not inexhaustible," and therefore warned:

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[9] The Fifth Circuit's overextension of *Canton* also undermines the absolute immunity that shields prosecutors from failure-to-train claims, as Chief Judge Jones explained in her separate dissent. *See* Pet. 33-36; Pet. App. 2a-7a; *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009). Thompson offers no pertinent rejoinder to this related, but distinct, reason for granting certiorari. *See* Opp. 27-28.

> [t]he grave step of shifting those resources to particular areas where constitutional violations are likely to result through the deterrent power of § 1983 should certainly not be taken on the basis of an isolated incident.

Canton, 489 U.S., at 400 (O'Connor, J., concurring in part and dissenting in part). Yet that is precisely what this case and others like it have done. The unwarranted extension of single-incident liability to a *Brady* violation dissolves actual fault into vicarious fault and threatens the operation of district attorneys' offices across the nation.

The Court should grant certiorari.

Respectfully submitted,

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