No. 07-854

In The
Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,
Petitioners,

v.

THOMAS LEE GOLDSTEIN,
Respondent.

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

BRIEF IN OPPOSITION

MARILYN E. BEDNARSKI
Counsel of Record
KAYE, MCLANE, & BEDNARSKI, LLP
128 NORTH FAIR OAKS AVENUE
PASADENA, CA 91103
(626) 844-7660

Counsel for Respondent

March 3, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

1. Whether there are compelling reasons to grant review where the lower court's decision not to extend the extraordinary protection of absolute prosecutorial immunity to purely administrative conduct - - the Petitioners' failure to establish and train staff concerning an internal information management system that would ensure internal access to information concerning informants as mandated by *Giglio v. United States*, 405 U.S. 150, 154 (1972) - - is in line with Supreme Court precedent, consistent with other circuit authority, and does not present an important federal question to be settled by this Court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

Blank Page

SUMMARY OF ARGUMENT

Petitioners have presented no "compelling reasons" for granting *certiorari* in this case. *See* Sup. Ct. R. 10. In the case at bar, *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007), the Ninth Circuit held that supervisors in the Los Angeles County District Attorney's Office are not absolutely immune from suit for their administrative failure to either create an information management system within their office regarding informants as required by the Supreme Court in *Giglio v. United States*, 405 U.S. 150, 154 (1972) or to adequately train their staff to maintain and access such a system.

The petition for *certiorari* should not be granted because it is based on a fundamentally flawed premise: the questions presented by Petitioners focus on whether supervisors can be held liable for improper policies and training on the *disclosure* of *Brady*, (*Brady v. Maryland*, 373 U.S. 83 (1963)), information. (Cert. Pet. at i.) The questions presented, the purported conflict in authority, and the perceived importance of the case, all stem from this flawed premise of Petitioners. Simply put, Petitioners' perceived theory of liability is not the theory of liability pled in Mr. Goldstein's Second Amended Complaint nor the theory of liability resolved by the Ninth Circuit below.

In his Second Amended Complaint, Mr. Goldstein alleged that Petitioners are liable to him because they failed to set up an internal information management system for informant witnesses *within* the District Attorney's Office - - as directed by *Giglio*, decided seven years before Mr. Goldstein's prosecution - - and

to train staff regarding the maintenance of such a system. This administrative failure set in motion a causal chain of events that, to be sure, led to the improper non-disclosure of critical impeachment information in Mr. Goldstein's case concerning the benefits received by the informant who testified against Mr. Goldstein. The line prosecutor did not have access to this information to disclose to Mr. Goldstein's defense attorney because there was no internal information management system of informant information that he could access. As a result, Mr. Goldstein suffered an injury, a wrongful conviction in 1980 that was overturned 23 years later in 2003. But the fact that a subsequent lack of disclosure forms a link in the causal chain leading to Mr. Goldstein's ultimate injury does not alter the administrative nature of the conduct for which Mr. Goldstein seeks to hold Petitioners liable. *See, e.g., Buckley v. Fitzsimmons*, 509 U.S. 259, 275-76 (1993).

When Mr. Goldstein's cause of action is properly characterized, it is obvious that *Goldstein* is a mainstream decision that does not merit review by this Court. The decision in *Goldstein* follows directly from the Supreme Court decisions in *Burns v. Reed*, 500 U.S. 478 (1991) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), relied on extensively in *Goldstein,* which instruct a court in evaluating whether a prosecutor's conduct is immune from civil suit to look at the *function* of the act that allegedly violated the plaintiff's rights, not the effects or harm caused by the act. Viewing the creation of an information management system concerning informants for what it is, not the effect or harm caused by the failure to create such a system, the District Court held in this case, the

"policies and practices . . . are not only alleged to be 'administrative', but they clearly are administrative." (App. B at 19.) Since the Ninth Circuit decision flows from Supreme Court precedent, there is not an important federal question to be settled by this Court. Sup. Ct. R. 10(a).

Nor is there a split in authority between the holding in *Goldstein* and any other cases, let alone circuit cases, that would warrant granting *certiorari*. *See* Sup. Ct. R. 10(a). Indeed, *Goldstein* is the only circuit decision in the country addressing the unavailability of absolute immunity to heads of prosecutors' offices when they fail to fulfill their administrative obligations under *Giglio*. In any event, *Goldstein* is in line with circuit decisions around the country which have limited the special protection of absolute immunity to prosecutorial functions and refused to expand it to purely administrative failures, which are still shielded by qualified immunity.

Lastly, the argument by Petitioners and their *Amici* that review of *Goldstein* must be granted, because heads of prosecutor's offices will be subjected to innumerable "vexatious" lawsuits by "disgruntled" defendants, does not withstand scrutiny. (Cert. Pet. at 33; L.A.D.A. *Amicus* Br. at 11.) As a legal and practical matter, the import of *Goldstein* is limited to its particular facts. *Goldstein* stands for the very limited proposition that absolute immunity does not extend to heads of prosecutor's offices when they are sued by plaintiffs who, like Mr. Goldstein, (1) are actually innocent, (2) have had their convictions overturned, and (3) can demonstrate that their wrongful convictions are causally connected to

supervisory prosecutors' purely administrative failure to set up an information management system as required by *Giglio* twenty-five years ago, which presumably most prosecutors' offices have done by now. Even if these demanding criteria are met, supervisory prosecutors may still be protected by qualified immunity, an issue yet to be litigated, as this case comes to this Court by way of interlocutory appeal. Indeed, qualified immunity is likely to afford supervisory prosecutors protection for their administrative failures, as there are unlikely to be many instances outside of the *Goldstein* context where clearly established law sets forth administrative obligations of supervisory prosecutors that are willfully violated by those prosecutors. *See Saucier v. Katz*, 533 U.S. 194 (2001).

Petitioners have failed to meet their burden of demonstrating any compelling reasons for this Court to grant the Petition. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

In 1980, Thomas Goldstein, a military veteran honorably discharged from the United States Marine Corps, who had no prior criminal convictions, was wrongfully convicted of murder on the basis of

fabricated evidence and perjured testimony. (SAC at ¶¶ 4, 21, 52, 53; ER at 14, 17, 24.)[1] Mr. Goldstein was innocent of the charges. (SAC at ¶ 4; ER at 14.)

Mr. Goldstein's conviction depended upon the testimony of a jailhouse informant, Edward Floyd Fink, who falsely testified that Mr. Goldstein confessed to him while both were detained in the Long Beach City Jail, in Long Beach, California. *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1171 (9th Cir. 2007). Mr. Fink also falsely testified that he was not receiving any benefits for testifying against Mr. Goldstein and had never received any benefits for assisting law enforcement in the past. *Id.* "Fink had, in fact, been acting as an informant for the Long Beach Police Department for several years and had received multiple reduced sentences in return." *Id.* This information, although known to others in the Los Angeles County District Attorney's Office, was unknown to the individual prosecutor trying Mr. Goldstein, and consequently was never disclosed to counsel for Mr. Goldstein before or during trial. (SAC at ¶¶ 79, 80, 84; ER at 30, 32.)

---

[1] "SAC" refers to the Second Amended Complaint; "ER" refers to the Excerpts of Record before the Ninth Circuit; "Cert. Pet." refers to the petition for *certiorari*; and "App. A", "App. B", and "App. C", refer to the Ninth Circuit decision, the district court opinion, and the denial of the petition for rehearing and rehearing *en banc* attached to the petition for *certiorari*. "L.A.D.A. *Amicus* Br." refers to the *amicus* brief filed by the Los Angeles County District Attorney's Office, and "C.D.A.A. *Amicus* Br." refers to the *amicus* brief filed by the California District Attorneys Association, National Association of District Attorneys, and other district attorney group *Amici*.

In 2004, Mr. Goldstein was released, after 24 years of wrongful imprisonment, pursuant to a petition for *habeas corpus* that was granted by the federal district court and affirmed by the Ninth Circuit. *Goldstein,* 481 F.3d at 1171. Shortly thereafter, Mr. Goldstein filed a civil rights lawsuit seeking damages under 42 U.S.C. § 1983 based on his wrongful conviction. *Id.*

Mr. Goldstein filed suit against Petitioners John Van De Kamp and Curt Livesay, seeking to hold them liable for their activities as administrators of the Los Angeles County District Attorney's Office, not for their prosecutorial activities. *Id.* at 1172. Petitioners were the chief administrators and policymakers for the Los Angeles County District Attorney's Office at the time of Mr. Goldstein's wrongful conviction. (SAC at ¶ 91; ER at 33-34.) They were not directly involved in Mr. Goldstein's prosecution. (*See* SAC at ¶¶ 86-106; ER at 31-38.)

The theory of Mr. Goldstein's suit was that the heads of large prosecutors' offices, like the Los Angeles County District Attorney's Office, the largest district attorney's office in the country (L.A.D.A. *Amicus* Br. at 2), have administrative obligations to create an information management system about informants and an obligation to train staff about maintaining this information management system. These obligations arise from the Supreme Court's ruling in *Giglio v. United States*, 405 U.S. 150 (1972), which was decided seven years prior to the prosecution of Mr. Goldstein in 1979-80. (SAC at ¶ 37; ER at 32, 33.) *Giglio* mandated that large prosecution offices create "procedures and regulations . . . to insure communication of all relevant information on each case

[including promises to informants] to every lawyer [in the office] who deals with it." *Id.* at 154. (SAC at ¶ 87; ER at 32, 33.)

Mr. Goldstein specifically alleged in his Second Amended Complaint that the actionable conduct by Petitioners Van De Kamp and Livesay as heads of the Los Angeles County District Attorney's Office was their failure to fulfill these Supreme Court mandated administrative obligations. (SAC at ¶¶ 92, 152-54; ER at 34, 50-52.)

Mr. Goldstein's allegations that Petitioners failed to perform their administrative obligations were supported by a report issued by the Los Angeles County Grand Jury, which found that the Los Angeles County District Attorney's Office had failed in its responsibilities by its "deliberate and informed declination to take the action necessary to curtail the misuse of jail house informant testimony." (SAC at ¶ 103; ER at 37.) Among the criticisms was the failure by the District Attorney's Office to institute a system to track informant benefits and testimony, despite awareness of ongoing problems with informant perjury since at least the late 1970s, prior to Mr. Goldstein's criminal prosecution. (SAC at ¶¶ 89-98; ER at 33-35.)

As alleged in the Second Amended Complaint, Petitioner's failure to institute a management database concerning informants set in motion a causal chain of events that resulted in his wrongful conviction. Specifically, in the absence of this information management system, the trial prosecutor was ignorant of the benefits that informant Fink received over the years - - including for his testimony

in Mr. Goldstein's own case - - and thus was unable to evaluate if information about these benefits should be disclosed to the defense pursuant to *Brady* and *Giglio*. 481 F. 3d at 1171-72. (SAC at ¶¶ 78, 79, 151-55; ER 30, 50-52.) Mr. Goldstein's right to due process and a fair trial were ultimately compromised.

In lieu of filing an answer to Mr. Goldstein's Second Amended Complaint, Petitioners sought to dismiss Mr. Goldstein's claims on the basis of absolute prosecutorial immunity. After the Central District of California rejected this argument, Petitioners sought an interlocutory appeal to the Ninth Circuit. A unanimous Ninth Circuit panel affirmed the District Court's ruling. 481 F. 3d at 1176. (App. B, District Court opinion, at 16-21.) The Ninth Circuit subsequently denied rehearing and rehearing *en banc* (App. C at 22-23), and Petitioners now seek to pursue this interlocutory appeal in this Court.

REASONS FOR DENYING THE PETITION

I. THE ENTIRE PETITION IS PREMISED ON A MISCONSTRUCTION OF THE SECOND AMENDED COMPLAINT AND THE *GOLDSTEIN* OPINION, AND WHEN PROPERLY CONSTRUED, THE *GOLDSTEIN* OPINION IS AN UNEXCEPTIONAL APPLICATION OF SUPREME COURT PRECEDENT

A. Construed Correctly, the Ninth Circuit Ruled that the Second Amended Complaint's Allegations that the Failure to Create an Information Management Database Concerning Informants Was an Administrative Function.

The Petitioners misconstrue Mr. Goldstein's Second Amended Complaint and the *Goldstein* opinion in an effort to convince the Court to grant review. Petitioners allege that the cause of action has something to do with setting up policies for disclosure to criminal defendants of *Brady* information and training deputies on disclosure of *Brady* information to criminal defendants. (*See, e.g.,* Cert. Pet. at i, Question Presented, "may a plaintiff circumvent that immunity . . . with regard to the disclosure of such informant information"; Cert Pet. at i, Question Presented, "[a]re the decisions of a supervisory prosecutor . . . overseeing . . . individual prosecutor's compliance with *Brady* . . . and *Giglio* . . . in the course of preparing for the initiation of judicial proceedings or trial"; Cert. Pet. at 14, the policy at issue in this case "involves a core prosecutorial function - the

dissemination of exculpatory information to the defense"; Cert. Pet. at 32, "what is at issue is the promulgation of a specific policy, ordered by this Court, to ensure the dissemination . . . to line prosecutors who might need to pass that information on to defendants in individual prosecutions.")

This is incorrect. The Second Amended Complaint alleged that Petitioners failed to set up an internal information management system concerning informants and failed to train employees concerning that system,

> Defendant John Van De Kamp, Defendant Curt Livesay . . . in their role as administrators of the Los Angeles County District Attorney's Office, failed to create a system, failed to train and failed to supervise Deputy District Attorneys who handled jailhouse informants, to provide Deputy District Attorneys, including the Deputy District Attorneys who prosecuted Plaintiff, with information with regard to jailhouse informants, including the jailhouse informant who testified against Plaintiff, although required to do so by law. The impeachment information which the Defendant John Van De Kamp and Defendant Curt Livesay failed to instruct representatives of the Los Angeles County District Attorney's Office to disseminate throughout the office included the benefits the jailhouse informant was receiving for his cooperation against a criminal defendant, the jailhouse informant's history of cooperation with

> law enforcement, and other factors relating to the jailhouse informant's credibility . . . .

(SAC at ¶ 154; ER 39-40.)

The Ninth Circuit recognized that, "Goldstein rests his theory of liability on Van De Kamp and Livesay's alleged failure to develop a policy of sharing information regarding jailhouse informants *within* the District Attorney's Office and on their alleged failure to provide adequate training and supervision on this issue." *Goldstein,* 481 F.3d at 1174. (Emphasis added.)

It is critical to understand what was *not* alleged by Mr. Goldstein. Mr. Goldstein did not allege that anyone in the prosecutor's office *intentionally* suppressed exculpatory evidence in his case. Nor did he allege that Petitioners created a policy directing line district attorneys to suppress exculpatory evidence. Likewise, he did not allege that the Petitioners failed to provide adequate training and supervision to line district attorneys regarding their duties to disclose exculpatory evidence. In fact, he did not even allege that Petitioners established (or failed to establish) policies, supervision, or training that in any way governed how or whether deputy prosecutors carried out their duty to disclose exculpatory evidence to criminal defendants.

Instead, Mr. Goldstein alleged that Petitioners, responsible for the administration of the Los Angeles District Attorney's Office, failed to implement a data management system that would allow individuals within the District Attorney's Office - - be it line prosecutors, investigators, paralegals, or clerical staff -

- to share *with one another* information about the benefits informants had received in exchange for testifying, and informants' history of working with law enforcement. It was within the discretion of the line district attorney who worked on Mr. Goldstein's prosecution to decide which evidence should be turned over to Mr. Goldstein pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963) and which should not. This is not what is at issue here though. Unfortunately, the line district attorney in question never had the opportunity to exercise his prosecutorial discretion and make this decision because the Petitioners' administrative mismanagement deprived him of the necessary information, which was hidden away in the files of his colleagues. Ultimately, it is not a prosecutorial decision that is being challenged by Mr. Goldstein, it is an administrative decision that had the effect of eliminating prosecutorial decision-making by preventing individuals within the District Attorney's Office from effectively sharing information with each other.

It was this failure to create an information management system to share data on informants among employees in the prosecutor's office (and failure to train them to use this non-existent system) that the Ninth Circuit found to be un-immunized, administrative conduct: Petitioners' "failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, bear a close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or

even a particular category of cases." *Goldstein*, 481 F.3d at 1176.

B. Construed Correctly, the *Goldstein* Opinion Follows Settled Supreme Court Authority and thus Does Not Present an Important Question to be Decided by this Court.

The Ninth Circuit decision does not cut a wide swath into new territory, but rather applies established Supreme Court principles to the specific practices being challenged by Mr. Goldstein and concludes that these practices are administrative, not prosecutorial, and thus not entitled to absolute immunity. Accordingly, the case does not present an important question of federal law to be settled by this Court. As set forth in the *Goldstein* opinion,

> [a] prosecutor is entitled to absolute immunity under § 1983 for conduct that is "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430 [citation omitted] (1976), and "occur[s] in the course of his [or her] role as an advocate for the State," *Buckley*, [citation omitted]. However, conduct is not shielded by absolute immunity simply because it is performed by a prosecutor. *Id.* To the contrary, a prosecutor is entitled only to qualified immunity "if he or she is performing investigatory or administrative functions . . . . [citations omitted]."

Goldstein, 481 F.3d at 1173.

The Ninth Circuit's decision in this case follows directly from this Court's holdings in *Burns v. Reed*, 500 U.S. 478 (1991) and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), and directly relied on these Supreme Court precedents. *See Goldstein*, 481 F.3d at 1175-76.

In *Burns*, this Court held that a prosecutor was absolutely immune for his conduct while appearing before a court in a probable cause hearing, where the prosecutor presented evidence of a confession without informing the judge that this "confession" had been made under hypnosis. *Burns*, 500 U.S. at 491-92. Nonetheless, the prosecutor was held *not to be immune* for having advised the police that it was legally acceptable to hypnotize a criminal suspect to obtain this confession and then use this confession as a basis for arresting the suspect and establishing probable cause for a search warrant. *Id.* at 496. As with the instant case, where Petitioners' action led to an unfair trial that resulted in Mr. Goldstein being unjustly imprisoned, the harm that formed the basis of the claim in *Burns* occurred during an immunized proceeding - - a probable cause hearing. However, this Court clearly held that this fact did not immunize the conduct that had led to this harm (*i.e.*, giving improper legal advice to the police). *Id.* So too, the fact that the harm to Mr. Goldstein manifested in a judicial proceeding does not transmute Petitioners' un-immunized administrative conduct into immunized prosecutorial conduct.

In *Buckley,* this Court held that a prosecutor was not immune for conspiring to fabricate evidence that was presented to a grand jury and ultimately resulted in the plaintiff spending three years in custody.

Buckley, 509 U.S. at 275-76. Although the prosecutor was immune for presenting this evidence to the grand jury, he was not immune for helping to fabricate it; this was an investigatory act, not an act that could be considered intimately associated with the judicial process. *Id.* The only reason to fabricate evidence is in order to use it in an eventual prosecution - - either to establish probable cause to indict or as evidence at trial (and usually for both purposes). The mere act of fabricating the evidence, standing alone, would not have caused any harm to the plaintiff in *Buckley* - - it was the use of this evidence at a hearing to establish probable cause to incarcerate that caused harm to the plaintiff. Nonetheless, the prosecutor was not absolutely immune for this act of fabricating evidence. Similarly, the fact that Mr. Goldstein was harmed at trial by the Petitioners' administrative policies regarding the distribution of information and the training of line prosecutors on how to access this information "does not retroactively transform [the Petitioners' conduct] from the administrative into the prosecutorial." *Buckley*, 509 U.S. at 276.

As this Court made clear in *Buckley*, prosecutorial immunity analysis,

> focuses on the conduct for which immunity is claimed, not on the harm that conduct may have caused or the question whether it was lawful. The location of the injury may be relevant to the question whether a complaint has adequately alleged a cause of action for damages . . . . It is irrelevant, however, to the question whether the

> conduct of a prosecutor is protected by absolute immunity.

Buckley, 509 U.S. at 271-72.

The *Goldstein* decision cited to *Buckley*, stating that "[a]dministrative work cannot be 'retroactively transform[ed]' into the prosecutorial simply because 'the evidence this work produced' might affect whether a prosecutor decides to bring a case or, if a case is brought, how the evidence is presented at trial." *Goldstein*, 481 F.3d at 1176, *citing Buckley*, 509 U.S. at 275-76. Despite this clear instruction to focus on the activity performed, not the harm it is alleged to have caused, Petitioners and their *Amici* repeatedly attempt to shift the focus to the harm, the failure to disclose impeachment information about the informant that led to Goldstein's illegal conviction at trial. (Cert. Pet. at 14, 31; N.D.A.A. *Amicus* at 7, 10, 12.) This flies in the face of this Court's holdings in *Burns* and *Buckley*.

Nothing in the Ninth Circuit's opinion supports Petitioners' contention that the Ninth Circuit issued such a broad ruling that it would eliminate prosecutorial immunity for all of the training and supervision decisions made regarding line prosecutors. On the contrary, the Ninth Circuit cited with approval its ruling in *Genzler v. Longanbach,* 410 F.3d 630, 643-44 (9th Cir.), *cert. denied*, 546 U.S. 1031(2005), that a supervising prosecutor is absolutely immune for "conduct closely related to prosecutorial decisions in the trial phase of [the plaintiff's] case," including claims that supervisors knew about misconduct by prosecuting attorneys but failed to take action to remedy it. *Goldstein*, 481 F.3d at 1174.

This Court has been "quite sparing in [its] recognition of absolute immunity and [has] refused to extend it any further than its justification would warrant." *Burns v. Reed*, 500 U.S. at 478, 487 (1991) (internal quotation marks and citations omitted). Prosecutorial immunity from civil rights lawsuits was never intended to be an all-encompassing shield against misconduct by those who happen to be employed by prosecutors offices or have jobs that involve bringing criminal prosecutions. Rather, it has been understood to be a narrow exception to the literal reading of 42 U.S.C. § 1983 (which has no explicit exceptions) that was created for the functional necessity of protecting the judicial process. *See Buckley*, 509 U.S. at 268; *Imbler v. Pachtman,* 424 U.S. 409, 427-28 (1976).

Everything that a prosecutor's office does, including purely investigative or administrative activities, relates in some way to the prosecution of crimes. *See Burns,* 500 U.S. at 495. Prosecution of crimes is, after all, the ultimate purpose of the prosecutor's office. But this does not mean that everything done by a prosecutor is immune. *Id.* The type of reasoning advanced by Petitioners would allow what was intended to be a narrow exception to devour the rule. *See Burns,* 500 U.S. at 495.

In applying *Buckley* and *Burns,* the Ninth Circuit applied the functional test and found that the conduct alleged - - that the Petitioners failed to create an information management system so that line prosecutors could share information about informants with one another - - was an administrative activity.

C. Creation and Maintenance of an Information Management System Concerning Informants is Clearly Administrative.

The creation and maintenance of an inner-office information management system and training of employees on such a system is in fact an administrative function. Such information management systems are regularly developed by office managers in all types of offices, both governmental and non-governmental, including police departments and prisons, which track information on criminal history, witnesses, and potentially relevant evidence, but do not enjoy the special benefits of absolute immunity that Petitioners seek to utilize. *See*, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635 (1987) (police and law enforcement officials can only assert qualified immunity defense).

In his *amicus* brief, the Los Angeles District Attorney[2] explains that it has now implemented an informant information system and argues that the informant information system required great amounts of prosecutorial discretion to create. While Mr. Goldstein applauds the effort to create such a system, prosecutorial discretion is not necessary to fulfill the *Giglio* mandate. All that is required is to develop a list of objective information - - the informant names (and identifying information), the cases these informants

---

[2] Although Los Angeles County is a party to this suit for the acts of its District Attorney's Office, this same District Attorney's Office submitted an "*amicus*" brief.

testified in, the benefits or promises that had been made to them, and the informant's criminal record or "rap sheet." Such objective data can then be kept by clerical staff whose administrative function is to collect information from files and other records. It is a ministerial act. It is a management function totally unrelated to prosecutorial judgment in trying a case. Thus, the purposes behind absolute prosecutorial immunity would not be served by its unwarranted expansion to the instant conduct.

Contrary to the Los Angeles District Attorney's claim that the database requires credibility[3] analysis of informants to compile (L.A.D.A. *Amicus* Br. at 5-6), the database should be a vehicle for collecting objective information about informants, which then can later be used by line district attorneys, district attorney staff, including paralegals and investigators, and police officers for multiple purposes, including investigations. That a prosecutor's office may broaden the database beyond *Giglio's* mandate for its own uses does not transform an administrative function into a prosecutorial one.[4] While prosecutorial discretion is

---

[3] The Los Angeles District Attorney's Office attempts to turn the database obligation of *Giglio* into a prosecutorial function by morphing the database mandate into a use issue, *i.e.*, which informants the Office will use for trial proceedings. (L.A.D.A. *Amicus* Br. at 4-6.)

[4] Similarly, both *Amici* incorrectly claim that putting together such a system requires prosecutorial discretion. (L.A.D.A. *Amicus* Br. at 4, 5, and 12, 13; C.D.A.A. *Amicus* Br. at 11, 12.) The Los Angeles District Attorney's brief claims that management dissemination to filing deputies regarding "potential problems

incumbent in deciding what to disclose to defense counsel, what goes into a database and is shared within the office should be determined by uniform objective standards, not discretionary ones, in order to comply with *Giglio's* mandate. Indeed, prosecutorial analysis of the raw data being entered into an informant index is not only unnecessary and not required under *Giglio*, but may undermine the usefulness of the database to prosecutors seeking to extract objective information about informants. A prosecutor editing the information going into the

---

with a jailhouse informant" is a prosecutorial function (L.A.D.A. *Amicus* Br. at 12-13) and the California District Attorneys Association attempts to make the same point by listing a number of factors claimed to implicate prosecutorial discretion. (C.D.A.A. *Amicus* Br. at 11-12.) Many of the factors identified in the California District Attorney's *amicus* brief as necessary to the exercise of prosecutorial judgment arise in the context of deciding whether to grant benefits in exchange for testimony, the timing of disclosure of benefits, not how to collect and internally disseminate information about benefits granted. (C.D.A.A. *Amicus* Br. at 11-12.) Other relevant factors identified by the *amicus* brief relate to the decision about whether to disclose those benefits to defense counsel in compliance with a *Brady* obligation. *Id.* In fact, the only factors that resemble the collection and dissemination of information are those uniquely administrative, not prosecutorial in nature, including the kind of documentation to be used to share informant information and the office resources available to create a system of recording and sharing this information. If anything, sifting through the factors raised and allocating them to their relevant functions only reinforces the administrative character of the conduct that Mr. Goldstein challenges in this case - - that the Petitioners failed to institute any system to collect, maintain and disseminate in the District Attorney's Office informant information.

database based on a "credibility" determination may exclude information that should be in the database or include erroneous subjective judgments.

Petitioners argue that the obligation to share information within district attorney's offices, mandated by *Giglio*, applies only to prosecutors and exists solely for the purpose of facilitating compliance with *Brady* disclosure obligations, so it must be a prosecutorial function. (Cert. Pet. at 29-30.) First, this argument is a red herring. As discussed above, the fact that the prosecutor illegally advised the police to hypnotize a suspect so that the confession could be *used* in court, *Burns*, and the fact that the prosecutor fabricated evidence to be *used* before the grand jury, *Buckley*, did not convert investigatory functions into prosecutorial functions.

Further, although *Giglio* deals specifically with prosecutors offices, Petitioners are wrong that the obligation to share information for the purpose of facilitating *Brady* disclosures applies only to prosecutors. Police have the same duty to share potentially exculpatory information with prosecutors in order to facilitate prosecutors' compliance with *Brady* and cannot claim absolute immunity for their failure to do so. *See, e.g.*, *Newsome v. McCabe*, 256 F.3d 747, 752-53 (7th Cir. 2001) (under qualified immunity analysis, although investigators have no *Brady* obligation to turn over exculpatory information to the defense, *Brady* requires that they turn over such evidence to the prosecutor); *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (*en banc*) (police who deliberately withhold exculpatory evidence, and prevent prosecutors from complying with *Brady*,

violate due process clause). *See also, McMillian v. Johnson*, 88 F.3d 1554, 1567 (11th Cir. 1996); *Jones v. City of Chicago*, 856 F.2d 985, 995 (7th Cir. 1988).

Moreover, sharing potentially damaging information regarding informants among employees within district attorney's offices serves purposes other than fulfilling *Brady* disclosure obligations. Such a database has many uses - - while it may be used to assist prosecutors in fulfilling their *Brady* obligations, it may also assist prosecutors in their investigatory functions. Such information is relevant at the investigative stage before it has been determined whether there is probable cause to indict and can be used by investigators within district attorney's offices, and police agencies outside district attorney's offices working with district attorney's offices. The information can be used by district attorney's offices and police agencies to determine whether to investigate a case, how to investigate a case, and whether to use a particular informant in an investigation.

Accordingly, the Ninth Circuit's finding that the conduct in *Goldstein* was administrative in nature is the application of well-settled Supreme Court precedent and does not present an important question to be decided by this Court.

II. THE NINTH CIRCUIT OPINION DOES NOT CREATE A SPLIT IN AUTHORITY AND THE ONLY REASON THE PETITIONERS CONTEND THAT IT DOES IS BECAUSE THEY HAVE INCORRECTLY IDENTIFIED THE ISSUE IN THE CASE

There are no conflicts in lower court authority justifying review by this Court. The Petitioners' assertions (Cert. Pet. at 24-29) are simply wrong. There is no split on the issue presented in *Goldstein* because there are no other circuit cases in the country that address the administrative duty of prosecutor's offices to set up information management systems under *Giglio*. *Goldstein* is the only case dealing with this unique scenario, and as explained above, it is totally in keeping with general Supreme Court authority on prosecutorial absolute immunity.

In the absence of a split of authority, the Petitioners try to manufacture a split in a number of ways that do not withstand scrutiny. First, Petitioners cite to a variety of district court cases, published and unpublished, but purported conflicts between non-precedential trial court decisions do not warrant Supreme Court review. Supreme Court Rule 10(a) explicitly specifies that only a conflict in authority among cases in the "United States court of appeals" justifies review.[5]

---

[5] Even when they cite a district court case that supposedly establishes a split in authority, Petitioners get it wrong. For example, Petitioners cite *Eisenberg v. District Attorney,* 1994 U.S. Dist. LEXIS 21535, *6 (E.D.N.Y. 1994), for the proposition that

Second, Petitioners try to assert that there is a mature, clear split in authority, ripe for review, on whether absolute immunity extends to "general prosecutorial policies." (Cert. Pet. at 26.) The supposed split is really between two cases, *Goldstein* and a twenty-year old, partially overruled, case out the District of Columbia, *Haynesworth v. Miller,* 820 F.2d 1245 (D.C. Cir. 1987), *partially overruled on other grounds*, *Hartman v. Moore*, 574 U.S. 250, 256 (2006), hardly a vibrant, mature split of authority that requires the Court's immediate attention.

But regardless of the posture of the *Haynesworth* and *Goldstein* decisions, the supposed split is nonexistent. As this Court, the *Haynesworth* court, and the *Goldstein* court recognize, the availability of absolute immunity turns on a functional analysis. The

---

supervisory prosecutors can invoke absolute immunity for a failure to train or supervise. (Cert. Pet. at 26.) In truth, the court specifically held that a policy governing whether or not to file a charge is prosecutorial, and thus, supervision and training designed to implement this policy must be prosecutorial. However, the decision actually supports the *Goldstein* opinion, in that the court explicitly recognized that, "in other contexts, the training and supervision of employees might be characterized as administrative acts, not subject to the protection of absolute immunity." *Id.* at *6. Thus, this decision, like numerous others cited by Petitioners that deal with prosecutorial functions, such as filing or charging decisions, *see, e.g., Jones v. City of Boston,* 2004 U.S. Dist. LEXIS 12628, *11-*12 (D.Mass. 2004) and *Sheff v. City of New York*, 2004 U.S. Dist. LEXIS 4819, *18 (E.D.N.Y. 2004) (Cert. Pet. at 26), or disclosure of *Brady* material to defense counsel, *Truvia v. Julien* 2005 U.S. Dist. LEXIS 539, *4-*5 (D. LA. 2005) (Cert. Pet. at 26), are not at odds with the *Goldstein* opinion.

Ninth Circuit explicitly discusses *Haynesworth* in its opinion, explaining that the reason immunity existed in *Haynesworth* was because the challenged policy was a policy "regarding which cases to prosecute," meaning that it was necessarily a policy governing a prosecutorial function - - whether to file criminal charges. *Goldstein*, 481 F.3d at 1175. As the Ninth Circuit explained, while *Haynesworth* "demonstrate[s] that a policy decision *may* be protected by absolute immunity, the critical factor remains the nature of the challenged policy and whether it falls 'within a prosecutor's judicial function' or, instead, is part of a prosecutor's exercise of administrative or investigative functions." *Id.* (Emphasis in original.) Far from showing a split, *Goldstein*, which focuses on an information database concerning informants and not a filing decision, is a mainstream application of well-settled law.

Third, Petitioners try to assert that there is a mature, clear split of authority about whether absolute immunity extends to failure to train/supervise claims. (Cert. Pet. at 27.) Again, the split is imagined and hardly a subject of vibrant dispute among the circuits. The two cases Petitioners cite, one case also from the Ninth Circuit, *Modahl v. County of Kern*, 61 Fed.Appx. 394, 397 (9th Cir. 2003), and another twenty-two year old case from the Seventh Circuit, *Hamilton v. Daley*, 777 F.2d 1207, 1213 n.5 (7th Cir. 1985), do not conflict with *Goldstein*. *Goldstein* is in agreement with *Hamilton v. Daley,* which properly applied prosecutorial immunity for the supervision of line prosecutors in carrying out clearly prosecutorial activities - - subpoenaing witnesses who they knew would give false testimony. *Hamilton,* 777 F.2d at

1212-1213. Similarly, in *Modahl* - - a Ninth Circuit case[6] - - the court held that a district attorney was immune for managing line prosecutors on activities in preparation for a trial, *id.* at 397, clearly a prosecutorial duty, unlike the underlying activities at issue in *Goldstein* - - maintaining an index.

Petitioners cite two cases as siding with *Goldstein*, as providing evidence of a purported split in authority, *Walker v. New York,* 974 F.2d 293, 300 (2nd Cir. 1992) and *Carter v. City of Philadelphia,* 181 F.3d 339, 353 (3rd Cir. 1999). But these cases are factually distinguishable. *Walker* cannot be evidence of a split regarding the law of prosecutorial immunity because the case does not deal with absolute prosecutorial immunity, but instead addresses liability of a local government entity under *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). *See Walker*, 974 F.2d at 296, 300. Furthermore, *Walker* addresses failure to train regarding *Brady* disclosures, which, as discussed above, is not at issue here. 974 F.2d at 300. *Carter* involved supervising prosecutors' failure to train police officers from "procuring perjurious 'eyewitnesses' and . . . [to alert] assistant district attorneys to the falsity of such information and [to prevent] its introduction as evidence," 181 F.3d at 343, allegations which are also not at issue here. Thus, *Carter* involved an investigatory or administrative function - - prosecutors supervising police in the investigation of crime.

---

[6] Petitioners' citation to this case would seem to suggest they are claiming there is split of authority *within* the Ninth Circuit itself, an unusual basis for invoking review by this Court.

Even if the Court were to question *Walker* or *Carter* on their functional analysis,[7] the Ninth Circuit, far from relying on *Walker* and *Carter,* as the Los Angeles County District Attorney claims, merely references these cases in a footnote, noting that they arose "in a different context." *Goldstein*, 481 F.3d at 1176, n.2. The bottom line is that the well-reasoned decision in *Goldstein* is an improper vehicle for Petitioners to address concerns with *Walker* and *Carter*.

Fourth, the Petitioners claim that the "First and the Ninth Circuit" in three other cases, two out of the Ninth Circuit, *Roe v. City & County of San Francisco*, 109 F.3d 578 (9th Cir. 1997), and *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 676 (9th Cir. 1984), and one in the First Circuit, *Harrington v. Almy*, 977 F.2d 37 (1st Cir. 1992) have allowed prosecutors to claim the protections of absolute immunity in administrative actions equal to *Goldstein*. (Cert. Pet. at 27, 28.) Petitioners are simply wrong. *Roe* and *Harrington v. Almy* deal with prosecutors' decisions whether or not to file criminal charges, and *Ybarra* deals with the duty to preserve or release exculpatory evidence, all clearly implicating

---

[7] Notably, this Court denied *writs of certiorari* for review of *Carter* and *Walker*, *see Roe v. Carter*, 528 U.S. 1005 (1999); *Walker v. City of New York*, 507 U.S. 961 (1993); *City of New York v. Walker*, 507 U.S. 972 (1993), and it would make no sense to attempt to re-open review of these decisions through a review of *Goldstein's* much more conservative holding. However disagreeable the Los Angeles District Attorney finds these cases (L.A.D.A. *Amicus* Br. at 9-11) their holdings are not at issue in the instant case.

prosecutorial functions not in conflict with the *Goldstein* decision.[8]

All of the cases cited by the Petitioners, including *Goldstein,* are in agreement that prosecutors are immune for setting prosecutorial policies. Equally, none of the cases, including *Goldstein,* suggest that prosecutors have immunity for setting investigative or administrative policies. Essentially, Petitioners ask the wrong question. The relevant legal issue is not whether prosecutors are being sued for training and supervision but whether the training and supervision they are being sued for involve prosecutorial functions or investigative/administrative functions. Likewise, when prosecutors are sued for establishing general policies, the relevant issue is the type of policy being

---

[8] In its order dismissing Petitioners' original claim of absolute immunity, the District Court explained how *Roe* was consistent with *Goldstein*:

> Defendants argue that *Roe* establishes that prosecutors' decisions not to prosecute any case, or all cases, investigated by a given police officer are 'prosecutive,' not administrative, even though they involve multiple cases, not just an individual case. From that characterization, Defendants conclude that their alleged misconduct, claimed to be systemic, is therefore 'prosecutive.' Not so; Defendants have missed the point of *Roe.* The reason that the Ninth Circuit upheld the dismissal of that case on grounds of absolute immunity was that the whole issue, the sole conduct, of defendants was about whether to *prosecute.* Here, in contrast, the SAC alleges a host of practices and policies concerning personnel administration, supervision, and methods of investigation."

(App. B at 20, n.2.)

established. The policies, training and supervision at issue in *Goldstein* all governed transparently administrative activities - - entering information into and retrieving information from a data indexing system.

Accordingly, there is no split in authority between *Goldstein* and any other circuit cases that needs to be addressed by this Court.

III. BECAUSE THE NINTH CIRCUIT DECISION IS NOTHING MORE THAN THE APPLICATION OF SETTLED LAW, THE DECISION WILL NOT OPEN THE "FLOODGATES" OR LEAD TO "VEXATIOUS" LITIGATION

Once the Ninth Circuit's holding is properly understood, it is clear that this case cannot have the wide-ranging impact that Petitioners and their *Amici* suggest.

First, a review of the cases decided since *Goldstein* do not indicate that there will be a flood of lawsuits. A search for cases citing to the *Goldstein* decision reveals that only two cases have cited to *Goldstein* for holdings on prosecutorial immunity, both held that prosecutors are in fact immune for failure to disclose exculpatory information to the defense.[9] *Turner v. City & County of*

---

[9] There are two additional cases that cite to *Goldstein* in *dicta*: *Carter v. Clark County*, 2007 U.S.App. LEXIS 25665, *3, n.1 (9th Cir. 2007) (noting that *Goldstein* is not relevant because plaintiff had plead guilty before trial and therefore could not even claim he

Honolulu, 2007 U.S. Dist. LEXIS 32856, *13 (D.Haw. 2007); *Dillard v. Sanchez*, 2007 U.S. Dist. LEXIS 2623, *7-*8 (D.Or. 2007). In fact, *Turner* actually cites *Goldstein* for the rule that prosecutors are absolutely immune for "decisions to initiate a particular prosecution, to present knowingly false evidence at trial, and to suppress exculpatory evidence." 2007 U.S. Dist. LEXIS 32856 at *13. The courts are having no difficulty understanding the Ninth Circuit's holding in the instant case and the decision has not caused a flood of lawsuits to be filed against prosecutor's offices.

Second, Mr. Goldstein's case does not represent the type of "vexatious" lawsuit by a "disgruntled" defendant about which Petitioners and *Amici* claim they are concerned. (Cert. Pet. at 33; L.A.D.A. *Amicus* Br. at 11.) The undeniable facts establish that Mr. Goldstein spent 24 years in prison for a murder he did not commit. He is precisely the type of litigant who should have his day in court.

Third, *Goldstein* does not open the door to every supervisory lawsuit brought by any person connected to a crime against supervisors. In order to survive dismissal of a lawsuit, as a legal and a practical matter, a plaintiff would have to show that (1) he is

---

had been injured by the failure to obtain exculpatory evidence) and *Jay v. Harris*, 2007 U.S. Dist. LEXIS 49334, *14-*15 (N.D.Cal. 2007) (citing *Goldstein* in *dicta* for the proposition that a prosecutor's directive to police and medical examiners telling them which homicides should be investigated and which should be ignored would be an investigative policy, not a prosecutorial policy, but further explaining that this point is moot "because plaintiff lacks standing.")

actually innocent; (2) he had his conviction overturned; (3) that there is a causal connection between his wrongful conviction and action or inaction by supervisory prosecutors (if the line prosecutor suppressed *Brady* material, unlike this case, that might break the causal chain by the supervisor); and (4) that the action is, as here, purely administrative (and not part of a prosecutorial effort in that particular case). These are no small hurdles, leaving a small class of plaintiffs who could even allege a claim against which absolute immunity would not bar the way.

Fourth, the Petitioners and their *Amici* ignore the continued availability of a qualified immunity defense, as if absolute immunity is the only defense they can assert, and this case is an all or nothing proposition for supervisory prosecutors. As the *Goldstein* court pointed out, "Van De Kamp and Livesay failed to make an alternative argument in the district court that the claims against them should be dismissed based on qualified immunity." *Goldstein*, 481 F.3d at 1172-73. Indeed, because Petitioners have made the strategic choice not to litigate qualified immunity, it is premature on interlocutory appeal to review this case. The Court should wait for a case where the record is fully developed as to absolute and qualified immunity rather than allow Petitioners to present the Court with an all or nothing choice that does not exist in the real world.

Qualified immunity is a defense generally that is available to all government officials and will further limit the number of viable lawsuits. Even if a plaintiff can show a causal connection between the administrative failure by supervisory prosecutors,

those prosecutors will still be protected from suit unless the plaintiff can show their administrative failure "violate[d] 'clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). *Giglio* constitutes such clearly established authority in this instance and would have defeated a qualified immunity claim if one had been raised, but other administrative functions of supervisory prosecutors may not be governed by such clearly established law and will be subject to the protection of qualified immunity.[10]

In short, for practical reasons, the Ninth Circuit decision in *Goldstein* is limited to the facts of the case. It stands for the limited proposition that absolute immunity does not extend to supervisory prosecutors when they are sued by actually innocent, but wrongfully convicted, plaintiffs for their failure to set up an information management system of informant information as required by *Giglio* twenty-five years ago. Most prosecutors' offices have presumably complied with *Giglio*.

---

[10] Other hurdles include under *Heck v. Humphrey*, 512 U.S. 477 (1994), that a plaintiff would have to first invalidate his prior conviction before proceeding with a civil rights suit alleging the failure to keep an informant database caused the conviction. In Goldstein's case, it took 24 years before his *habeas* petition was granted. Further, the plaintiff would have to meet any statute of limitations bar, which in California is only two years. *See Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995) (*per curium*), Cal.Civ.Proc. § 340(3).

There is no reason for this Court to expend its resources to review this case. It is a straightforward application of Supreme Court precedent, and taking the case will not resolve any important questions of unsettled federal law.

CONCLUSION

For all the reasons stated above, Mr. Goldstein respectfully requests that this Court deny the petition for review.

Respectfully Submitted,

By:

MARILYN E. BEDNARSKI
Counsel of Record
KAYE, McLANE & BEDNARSKI, LLP

Attorneys for Respondent
THOMAS LEE GOLDSTEIN

Dated: March 3, 2008