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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

***AMICUS CURIAE* BRIEF OF THE CITY OF NEW YORK IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICUS CURIAE*

Pursuant to Rule 37.4, the City of New York (the "City") submits this *amicus curiae* brief in support of petitioners who seek reversal of the judgment in *Goldstein v. City of Long Beach*, 481 F.3d 1170 (9th Cir. 2007), *cert. granted sub nom. Van de Kamp v. Goldstein*, __U.S.__, 128 S. Ct. 1872 (2008).

The Ninth Circuit's decision erroneously fails to extend absolute immunity to the former District Attorney in Los Angeles County and a senior-level prosecutor for their actions in establishing office-wide policies for ensuring truthful testimony and for the dissemination of confidential informant information. Such policies, however, constitute substantive prosecutorial work which is intimately related to the judicial phase of criminal proceedings under *Imbler v. Pachtman*, 424 U.S. 409 (1976).

The Ninth Circuit relied on a precedent of the United States Court of Appeals for the Second Circuit, *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 961, 507 U.S. 972 (1993), which was wrongly decided. *Walker* created a legal fiction, purporting to distinguish a District Attorney's managerial functions, which circumvented absolute immunity in order to allow a plaintiff to sue for 42 U.S.C. § 1983 damages against the City. However, the City has no control over the prosecutorial work of the five District Attorney's offices within its borders.

In particular, the City of New York is a municipal corporation organized and existing under the laws of the State of New York. Michael R. Bloomberg is the Mayor and the City's chief executive officer. N.Y.C. Charter, §§ 3, 8.

The City stands in a unique position with respect to the five District Attorney's offices within its borders, although there is no question that the City has no control over the prosecutorial functions of the offices. Rather, the Governor and Attorney General have broad powers to remove, supervise

and supersede district attorneys' prosecutorial functions, but no county or City official has such powers.

Under New State law, the district attorney is a constitutional officer, chosen by the electors of each county (N.Y. Const., art. XIII, § 13[a]), charged by statute with the duty of conducting "all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected . . . ." N.Y. County Law, § 700(1) (McKinney 2004); *see also* N.Y. County Law, § 927 (McKinney 2004) (describing general duties of district attorneys).

Only the Governor of the State may remove a district attorney (N.Y. Const., art. XIII, § 13(a)) or appoint a replacement if there is a mid-term vacancy in the office. N.Y. County Law, § 926(2) (McKinney 2004). Indeed, although New York City has the authority to abolish the offices of most county officials, it has no such authority with respect to the District Attorney's Office. N.Y. Const., art. XIII, § 13(c).[1]

In addition, N.Y. Exec. Law, § 63(2) (McKinney 2008 Cum. Pkt. Part), gives the Governor the power to supersede a district attorney, stating that, whenever required by the

[1] *See also* N.Y. Pub. Off. Law § 31(1)(e) (Consol. 2005) (district attorney must submit resignation to the Governor); *id.*, § 34(2) (authorizes the Governor to direct a district attorney to assist in conducting an investigation and hearing in any proceeding for the removal of a public officer); *id.*, § 43 (permits the Governor to fill vacancies in the office of a district attorney until the next election).

Governor, the attorney general shall attend, manage and conduct criminal proceedings in any Supreme Court or before any grand jury. In that situation, the Attorney General "shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform," while "the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending." *See also Matter of Johnson v. Pataki*, 655 N.Y.S.2d 463 (N.Y. App. Div. 1997), *aff'd*, 691 N.E.2d 1002 (N.Y. 1997).

The district attorney alone is responsible for appointing and removing assistant district attorneys in his/her office. N.Y. County Law, § 930 (McKinney 2004).[2]

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[2] The New York County District Attorney's Office investigates and prosecutes approximately 100,000 criminal cases annually and employs close to 500 Assistant District Attorneys, making it one of the largest law firms, public or private, in the nation. http://manhattanda.org/officeoverview/ (last visited July 2, 2008). *See also* http://www.brooklynda.org/office/employment.htm (last visited July 2, 2008) (Kings County District Attorney's Office "is one of largest and busiest offices in the nation, serving over two million residents . . . ."); http://www.bronxda.net/frames.html (last visited July 2, 2008) (the Bronx County District Attorney's Office employs nearly 400 assistant district attorneys); http://www.queensda.org/career.html (last visited July 2, 2008) (Queens County District Attorney's Office employs approximately 300 Assistant District Attorneys); http://rcda.nyc.gov/ (last visited July 2, 2008) (describing office of the Richmond County (Staten Island) District Attorney).

For a few purposes not involving control or direction of the office, New York State law home rule provisions classify district attorneys as local rather than state officers, *see, e.g.*, *Kelly v. McGee*, 443 N.E.2d 908, 913 (N.Y. 1982); N.Y. Pub. Off. Law, § 2 (Consol. 2005) ("the term 'local officer' includes every other officer who is elected by the electors of a portion of the state, a subdivision or municipal corporation of the state and every officer limited in the execution of his functions only to a portion of the state."). The district attorneys' minimum annual salary is set by the legislature, N.Y. County Law § 928 (McKinney 2004), although the district attorneys are paid by the City (the five counties are geographical subdivisions of the City).

These provisions, however, do not change the City's total lack of control over the district attorneys' prosecutorial functions in fulfillment of their prosecutorial obligations.

Thus, New York law is clear that its cities cannot be held liable for the decisions and conduct of members of the District Attorney's Office in the furtherance of their duties as prosecutors. *See, e.g.*, *Brown v. City of New York*, 458 N.E.2d 1250, 1251 (N.Y. 1983) (where plaintiff sued the City for, *inter alia*, malicious prosecution, and moved for summary judgment, the New York Court of Appeals held that it was error to apply the doctrine of issue preclusion to the civil case, based on issues decided in the criminal case, because the City and the district attorney's office are separate entities and do not stand in sufficient relation to establish the key element of identity of the parties); *McGinley v. Hynes*, 412 N.E.2d 376, 380-81 (N.Y. 1980), *cert. denied*, 450 U.S. 918 (1981) (noting

distinct aspects of district attorneys' prosecutorial and other functions, and holding that when a prosecuting a criminal matter, district attorney acts on behalf of the State).[3]

Notwithstanding, a decision by the U.S. Court of Appeals for Second Circuit in 1992 created substantial confusion in this area which continues to this day. *See Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 507 U.S. 961, 507 U.S. 972 (1993) ("*Walker*"). *Walker* was one of the key precedents cited by the Ninth Circuit.

The City urges, as have other courts and commentators, that *Walker* was wrongly decided and created a legal fiction which allowed a plaintiff to sue for 42 U.S.C. § 1983 damages against the City when the City has no control over the five District Attorney's offices within its borders. Thus, in order to circumvent the absolute immunity afforded prosecutors in their prosecutorial functions, including prior to actual presence in the courtroom, the Second Circuit drew a purported distinction, for purposes of *Monell* liability, between policy, training and supervisory functions and prosecutorial functions. Specifically, the *Walker* Court found that allegations of a failure to train district attorneys to avoid withholding exculpatory *Brady* material, was a sufficient basis for the City to be a proper § 1983 defendant.

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[3] *See also Lee v. City of Mt. Vernon*, 407 N.E.2d 404, 404 (N.Y. 1980) (in suit against the city and various individuals for malicious prosecution, the Court of Appeals stated that "the decision [whether] to present the matter to the Grand Jury was that of the District Attorney, for whose acts the City *is not responsible* . . . . .") (emphasis added).

However, as discussed below, in *Goldstein*, as in *Walker*, the acts complained of are not simply administrative practices and procedures regarding such areas as personnel hiring or resource allocation, but rather the acts complained of involve primary prosecutorial decisions on how and what policies will govern and what training will be provided with respect to key prosecutorial functions. These include decisions concerning ensuring that testimony is truthful and the use of confidential informant information. Such decisions are ones which this Court has consistently found to require independent, apolitical judgment by prosecutors in order to pursue prosecutions on behalf of the State without fear of harassment and endless litigation over their decisions.

Affirmance of the Ninth Circuit's decision, which declined to extend absolute immunity to such decisions by prosecutors, will have serious adverse ramifications for the effective functioning of criminal prosecution systems, state and federal. It will send a strong signal that every case is open to second-guessing, even decades later, as in this case. In the worst case, the attraction to government service in the form of serving as an independent prosecutor will be dampened.

Furthermore, endorsing a rule which eviscerates absolute immunity based on a fiction which was created to circumvent the requirements of *Monell v. New York City Dept. of Social Services*, 436 US. 658, 694 (1978) ("*Monell*") is unwise. It will extend the negative ramifications of *Walker* throughout the country and adversely affect

municipalities which will be severely impacted fiscally for actions over which they have no control. To the extent that the Ninth Circuit's decision rests on a Second Circuit decision which has created a plethora of confused decision-making, it is also extremely important for the decision to be overturned.

Therefore, for all the above reasons, the outcome of this case is of vital importance to the City.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision is erroneous, resting on an incorrect analysis of the functions at issue and the governing legal principles. Senior level prosecutors' establishment of a policy for ensuring truthful testimony and dissemination of criminal informant information is an integral prosecutorial advocacy function. Pursuant to *Imbler v. Pachtman*, 424 U.S. 409 (1976), a prosecutor is entitled to absolute immunity under 42 U.S.C. § 1983 for conduct that is "intimately associated with the judicial phase of the criminal process," *id.* at 430, which "occur[s] in the course of his [or her] role as an advocate for the State," *Buckley v. Fitzsimmons*, 509 U.S. 259, 279 (1993).

Indeed, the primary legal underpinning of the Ninth Circuit's decision is a single case from the Second Circuit involving harsh facts which resulted in deeply-flawed reasoning, which defies both *Imbler* and the controlling requirements for municipal liability under 42 U.S.C. § 1983. *See Goldstein*, 481 F.3d at 1176 n.2, citing *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert.*

denied, 507 U.S. 961, 507 U.S. 972 (1993). *See also Carter v. City of Philadelphia*, 181 F.3d 339, 351-52 (3d Cir. 1999) (citing *Walker*), *cert. denied sub nom. Roe v. Carter*, 528 U.S. 1005 (1999). The City will demonstrate that, properly applying the principles of *Imbler* and progeny, *Walker* was wrongly decided, as evidenced by this Court's decision five years later in *McMillian v. Monroe County*, 520 U.S. 781 (1997).

Finally, the adverse consequences of failing to grant absolute immunity are self-evident, just as they were in *Imbler*. The desired independent judgment will be undermined if, at every corner, the district attorney and other supervisors face litigation over ongoing policy decisions, with respect to how to prepare and present cases in the courtroom, including training and supervision with respect thereto, on behalf of the people of the state.

ARGUMENT

A PROPER ANALYSIS OF THE FUNCTIONS OF DISTRICT ATTORNEYS IN ESTABLISHING OFFICE-WIDE POLICIES FOR THE PREPARATION, INITIATION AND PRESENTATION OF CASES IN THE COURTROOM, AND CORRESPONDING TRAINING AND SUPERVISION, DEMONSTRATES THAT THEY ARE ENTITLED TO ABSOLUTE IMMUNITY.

UNDER *IMBLER V. PACHTMAN*, 424 U.S. 409 (1976) AND *McMILLIAN V. MONROE COUNTY*, 520 U.S. 781 (1997), RELIANCE ON *WALKER V. CITY OF NEW YORK*, 974 F.2D 293 (2D CIR. 1992), *CERT. DENIED*, 507 U.S. 961, 507 U.S. 972 (1993), WAS MISPLACED, WHERE *WALKER* CREATED A LEGAL FICTION WHICH HELD THE CITY LIABLE FOR "MANAGERIAL" ACTIONS OF DISTRICT ATTORNEYS OVER WHICH IT HAS NO CONTROL.

A. Absolute prosecutorial immunity should be found for supervisory prosecutors who establish office-wide policies for use by prosecutors in their quasi-judicial functions.

This Court takes a functional approach to the question of whether prosecutors are absolutely immune from liability under 42 U.S.C. § 1983. "[C]onduct in 'initiating a prosecution and in presenting the State's case,' ... insofar as that conduct is 'intimately associated with the judicial phase of the criminal process'" is entitled to such immunity. *Imbler v. Pachtman*, 424 U.S. 409, 420, 423, 430-431 (1976).

The rationale for conferring absolute immunity is that "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Id*. at 424-25. *See post*, Sub. C. However, the *Imbler* Court had "no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." *Id*. at 430-31.

Using a functional analysis,[4] this Court has held that "A prosecutor's administrative duties and

[4] A reviewing court will look to "the nature of the function performed, not the identity of the actor who performed it, and the Court seeks to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester v. White*, 484 U.S. 219, 224 (1988). *See Burns v. Reed*, 500 U.S. 478, 484-86 (1991); *Malley v. Briggs*, 475 U.S. 335, 342-343 (1986); *Harlow v. Fitzgerald*, 457 U.S. 800, 807, 810-11 (1982).

those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 274-76, 278 (1993) (no absolute immunity for false statements in the public announcement of an indictment, or actions that are investigative in nature prior to a finding of probable cause to arrest because "[t]he conduct of a press conference does not involve the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory for these functions"). *See also Kalina v. Fletcher*, 522 U.S. 118 (1997) (making false statements in an affidavit asserting that certain facts are true for an arrest warrant falls on investigative side of prosecutor's functions); *Burns v. Reed*, 500 U.S. 478, 492, 496 (1991) (prosecutor had absolute immunity for going into court and requesting arrest warrant, but only qualified immunity for the investigative act of approving hypnosis).

The argument that absolute immunity is limited to what prosecutors literally do within the courtroom as a "trial prosecutor" is baseless. In *Buckley*, this Court rejected this "extreme position" as foreclosed by the plain language of *Imbler*, which stated that the duties of prosecutors in their role as advocates for the State involve "'actions apart from the courtroom.'" *Buckley*, 509 U.S. at 272 (quoting *Imbler*, 424 U.S. at 431 n.33). Thus, "Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the

professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Buckley*, 509 U.S. at 269.

In the instant case, pursuant to this Court's already signaled dividing line, the actions at issue are clearly on the prosecutorial advocacy side of the line, and not the police investigative side.

The particular functions — how and when to set substantive office-wide policies to ensure truthful testimony and use of confidential informant information — are core prosecutorial functions of the District Attorney and senior-level prosecutors. Such work goes hand-in-hand with training, monitoring and supervision of junior attorneys in their ongoing prosecutorial activities. Such conduct can fairly be characterized as closely associated with the conduct of litigation or potential litigation, *i.e.*, are intimately associated with the judicial phase of the criminal process. *Imbler*, 424 U.S. at 430.

In *Haynesworth v. Miller*, 820 F.2d 1245, 1269 (D.C. Cir. 1987) (*abrogated on unrelated point by Hartman v. Moore*, 547 U. S. 250 (2006)), the D.C. Circuit recognized that there is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application." "Both practices involve a balancing of myriad factors, including culpability, prosecutorial resources and public interests" and "both procedures culminate in initiation of criminal proceedings against particular defendants, and in

each it is the individual prosecution that begets the asserted deprivation of individual rights." *Id*. at 1269; *Roe v. City & County of San Francisco*, 109 F.3d 578, 583-84 (9th Cir. 1997) (quoting same).

In this case, the Ninth Circuit recognized the propriety of absolute immunity for certain "supervisory liability cases with respect to "conduct closely related to prosecutorial decisions in the trial phase of [the plaintiff's] case, *Goldstein*, 471 F.3d at 1174, but then artificially constructed a nexus test requiring application to a specific individual prosecution case to trigger the immunity. *Id*. at 1175-76.

Such an artificial construction is unreasonable and unworkable. The Ninth Circuit's insistence on a specific factual predicate -- a nexus between the policy and the plaintiff (*i.e.*, the former criminal defendant) -- does not reasonably recognize the manner in which a District Attorney makes prudent policy decisions. The Ninth Circuit unfairly characterized the 'informant' policy as having a close connection "only to how the ... Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases." *Id*. at 1176. The latter statement makes no sense because the challenged policy absolutely governs a substantive prosecutorial determination, and does not just a have a mere tangential effect such as a personnel policy would have.

As discussed below (*post*, Sub. C), moreover, as the elected official charged with representing the People, absolute immunity encourages a district attorney's prudent decision-making. It is of societal benefit, even if, for example, harsh consequences

ensue in an individual case where the desired foresight/planning does not anticipate every scenario.

While an office-wide policy can be characterized as "administrative," in the sense that it sets up a procedure, if the substantive component will affect a prosecution in a material way, then it falls within the contours of *Imbler*. Indeed, the *Goldstein* panel conceded that an act can be "prosecutorial in function but administrative in form," 481 F.3d at 1175, but improperly stopped the analysis there because the act at issue was not created in the specific context of a case. That was wrong: a policy (or non-policy) about sharing jailhouse informant information applies to every case in the office implicating such informants and thus is intimately associated with the judicial phase of the criminal process under *Imbler*. Furthermore, merely labeling the functions at issue "management" and "administrative" without addressing their unavoidably legal nature, was wrong. *Compare McMillian*, 520 U.S. at 786 (in separate context, cautioning against reliance on labels without further analysis).

If a decision is prosecutorial when made in connection with a specific case, it is no less so when made as part of a policy governing multiple cases.

In contrast to integral prosecutorial functions, commonly-denoted administrative functions include such areas as human resources, fiscal affairs, facilities management, procurement, management information and oversight of support staff. *Cf. Citizens for Responsibility & Ethics in Wash. v. Office of Admin.*, __ F.Supp.2d __, 2008

U.S. Dist. LEXIS 47333, ** 9-10, *42 (D.D.C. June 18, 2008). Such "administrative" acts are typically separated from the core work of a District Attorney's office, the core policies and actions which comprise the functions of initiating and presenting a criminal case. *See Forrester*, 484 U.S. at 227 (intelligible distinction between judicial actions and administrative acts which may occasionally need to be performed).

In sum, the functions involved are not simply the inherent administrative functions of any organization. Rather, they are inextricably linked to the prosecutorial advocacy courtroom functions in the judicial phase of the criminal process. To second-guess that independent prosecutorial decision-making, which will directly affect ongoing prosecutions, raises the same specter of liability that *Imbler* recognized would impede the vigorous and independent performance of the prosecutor's role. *See post*, Sub. C.

B. The Ninth Circuit's Reliance on *Walker v. City of New York* was Misplaced Because that Decision Employed Faulty Reasoning, Which is At Odds With *Imbler*, *Monell* and *McMillian v. Monroe County*, 520 U.S. 781 (1997).

In making its decision, the Ninth Circuit relied on the deeply-flawed *Walker* opinion, which defied not only *Imbler*, but also this Court's defining principles for municipal liability under 42 U.S.C. § 1983. *See Goldstein*, 481 F.3d at 1176 n.2 , citing *Walker*, as well as *Carter v. City of Philadelphia*, 181 F.3d 339, 356 (3d Cir. 1999)

(which also relied on *Walker*). The City urges that, to the extent that *Walker* rejected absolute immunity for prosecutors involved in making policy for the conduct of criminal prosecutions and training therefor, and held that the City could be liable for such actions of district attorneys over which it has no control, *Walker* was wrongly decided.

To prevail on a claim under *Monell v. New York City Dept. of Social Services*, 436 US. 658, 694 (1978), a plaintiff must identify a policy or custom "resulting from the decisions of . . . those officials whose acts may fairly be said to be those of the municipality." *Board of the County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403-404 (1997) ("*Bryan County*"). This Court has recognized that liability attaches *only* "when it can be fairly said that the city itself is the wrongdoer," *Collins v. City of Harker Heights*, 503 U.S. 115, 122 (1992), and not based on a theory of *respondeat superior* or vicarious liability. *City of Canton v. Harris*, 489 U.S. 378, 386-87 (1989). Where a plaintiff seeks to hold a municipality liable for constitutional torts committed by its agents, the plaintiff must "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Bryan County*, 520 U.S. at 404 (also detailing that "rigorous standards of culpability and causation must be applied").

In *Walker*, the Second Circuit held that the City of New York could be held liable under § 1983 for alleged failure to train assistant district attorneys to turn over exculpatory evidence to the defense and to avoid use of perjured testimony, even though the City has no control over the

District Attorney's offices in their prosecution of criminal cases. In brief, the extreme facts were that Walker had been convicted based upon police officers' and prosecutors' alleged cover-up of exculpatory evidence and perjury and he was imprisoned for nineteen years before he won his release by unearthing evidence that critically undermined the state's case against him. He then brought suit under § 1983, alleging that the City had failed to adequately train and supervise the assistant district attorneys to not suppress exculpatory evidence and that the City's failure to train constituted deliberate indifference to his constitutional rights, proximately causing his wrongful imprisonment.

Although the *Walker* Court correctly recognized that a district attorney in New York acts as a State officer when functioning as a prosecutor prosecuting crimes, *Walker v. City of New York*, 974 F.2d at 301 (citing *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988), *cert. den. sub nom. Baez v. County of Onondaga*, 448 U.S. 1014 (1989)), the *Walker* Court went astray when it concluded that district attorneys have a split identity with respect to that very prosecutorial function. If a District Attorney acts in a quasi-judicial capacity in prosecuting a criminal matter, and therefore represents the State, the same District Attorney necessarily does so when formulating managerial policies and establishing training with respect thereto which are necessarily utilized in prosecuting criminal matters.

In order to find for plaintiff, the *Walker* Court simply avoided this by creating a fiction that "where a district attorney acts as the manager of

the District attorney's office, the district attorney acts as a county policymaker." *Id.* at 301. *Walker* failed to reconcile how the City could be liable under *Monell* for such conduct, when the City indisputably had no control thereof. In drawing such an artificial distinction, *Walker* improperly fosters an unrealistic and unsound notion that district attorneys are not directly and contemporaneously responsible for their offices' policies and actions. This does not comport with New York law nor with good policy.[5]

The fallacy of the *Walker* rationale is particularly evident under this Court's subsequent decision in *McMillian v. Monroe County*, 520 U.S. 781 (1997). This Court's cogent reasoning and close scrutiny of the official functions of the Sheriff's

[5] The irony of the *Walker* decision is that, just a few years earlier in *Baez v. Hennessy*, the Second Circuit correctly held that prosecutorial acts of an elected district attorney in New York State "may not 'fairly be said to represent official policy' of the county" and, therefore, may not support a claim for § 1983 liability against the county. *Id.*, 853 F.2d at 76. The Court found that is "well established in New York that the district attorney, and the district attorney alone, should decide when *and in what manner* to prosecute a suspected offender." *Id.* at 77 (emphasis added). Similar to *McMillian*'s later analysis, the Court reviewed both the historical origins and current functions of prosecutors in New York State, and cited the following as the most decisive factors: the Governor may require the State Attorney General to take over the prosecution of any local criminal actions or proceedings; county residents may not remove a district attorney from office; the Governor may remove a district attorney from office and is also permitted to fill vacancies in the office by appointment; the Legislature sets the district attorney's salary; and a county has no right to establish a policy concerning how a district attorney should prosecute violations of State law. *Id.* at 76-77.

Office at issue in *McMillian*, renders the superficial artificial analysis rendered in *Walker* a nullity.

In particular, the petitioner in *McMillian* sued Monroe County, Alabama, for allegedly unconstitutional actions by the county sheriff leading to the petitioner's arrest, prosecution, conviction and incarceration. Agreeing that the sheriff was a policymaker under § 1983, the parties disputed only whether he played that role for Monroe County or the State of Alabama. *Id.*, 520 U.S. at 785. Rejecting a categorical approach, this Court held that, to determine whether an official acts in a State or local function, the courts should "ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue," an inquiry dependent on a functional analysis of state law. *Id.* at 785. The analysis focused on control of the subject official, comparing the amount granted to the state with the amount granted to local authorities. *Id.* at 786-93.

McMillian's conclusion that the sheriff was a state official in the context at bar did not rest on a finding of complete control by state or local officials. Rather, examining Alabama law, the *McMillian* Court found (520 U.S. at 787-93):

- Alabama's constitution lists sheriffs as officials in the executive department;

- the governor may order impeachment proceedings against a sheriff, and sheriffs may be impeached by the Alabama supreme court;

•sheriffs must obey the orders of state courts;

•the county treasurers, unlike the state courts, have no authority to direct sheriffs to take specific actions;

•sheriffs are given complete authority to enforce the state criminal law in their counties;

•the county commissions have no authority to instruct sheriffs in how to perform their duties, whereas the governor and the attorney general can direct the sheriff to investigate any alleged violation; and

•the salaries of all sheriffs are set by the state legislature and not by the county commissions.

While finding several countervailing provisions, including the counties' payment of sheriffs' salaries, this Court found them insufficient to tip the balance (520 U.S. at 791):

> The county's payment of the sheriff's salary does not translate into control over him, since the county neither has the authority to change his salary nor the discretion to refuse payment completely.

As *McMillian* recognized, the key issues are direction and control. Despite the lack of such by the City, *Walker* created a fiction which does not accord with state law nor the functions that the District Attorneys are performing at the time. Distinguishing legal liability for acts performed in

an actual prosecution from a district attorney's policy-making for initiating and presenting prosecutions is both artificial and impossible. District attorneys' actions in training or supervision that relate directly to prosecutorial acts are inextricably intertwined with those acts, from both practical and logical perspectives (*see ante*, Sub. A), such that no different liability rule should pertain. Indeed, the decisions at issue are intimately related to the prosecutorial functions which, under *Imbler*, are shielded by absolute immunity in order to, *inter alia*, shield prosecutors from outside political influences. Thus, prosecutors are not municipal policymakers in the area of training, supervision and policy decisions.[6]

C. The Faulty Analysis in *Goldstein*, relying on *Walker*, Impedes the Effective Functioning of District Attorney's Offices.

The critical purposes served by absolute immunity will be served by reversal here. These purposes include removing the substantial threat of harassment by the overhanging cloud of litigation and interference with the independent functioning of the management of the district attorney's office

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[6] In *Pitts v. County of Kern*, 949 P.2d 920 (Cal. 1998), following the *McMillian* guidelines and rejecting the *Walker* analysis, the Supreme Court of California held that the California District Attorneys represent the state, not the county, when preparing and prosecuting criminal offenses, and when establishing policy and training employees in these areas. *Id*. at 935-36. The *Pitts* Court found that "no meaningful analytical distinction can be made" between a district attorney's preparation and prosecution of criminal offenses and in training and developing policy in that area. *Id*. at 935.

and with the capacity to perform the duties the voters elected them to do.

As stressed in *Imbler*,

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case . . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and would have moved away from the desired objective of stricter and fairer law enforcement.

Id. at 423-24 (quotation, citation omitted). *See also Harlow*, 457 U.S. at 814 ("There is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public

officials], in the unflinching discharge of the duties.'" (citation omitted)); *Kalina*, 522 U.S. at 494; s*ee ante*, p. 11.

Compare Garcetti v. Ceballos, 547 U.S. 410, 423 (2006) (in separate context of public employee speech by a supervising deputy district attorney in the course of his official responsibilities, this Court recognized that sufficient discretion must be afforded employers to manage their operations; Court rejected permanent intrusive role for federal and state courts of mandated judicial oversight and displacement of managerial discretion); *Engquist v. Oregon Dept. of Agriculture*, 128 S. Ct. 2146 (2008) (expressing disinclination for governments to be forced to defend a multitude of equal protection class-of-one claims holding that the Equal Protection clause does not require "[t]his type of managerial discretion by judicial supervision" (citing *Garcetti*)).

Furthermore, prosecutors are government attorneys who act under the additional safeguards of rules of professional conduct and constitutional obligations. *See Garcetti*, 547 U.S. at 425-26 ("[T]hese imperatives, as well obligations arising from any other constitutional provisions and mandates of criminal and civil laws, . . . provide checks on supervisors who would order unlawful or otherwise inappropriate actions.").

Indeed, rather than devise an elaborate fiction, as was done in *Walker*, to circumvent the fact that the deputy district attorney engaged in criminal conduct, but could not be sued under 42 U.S.C. § 1983, the remedy would be a reversal of the conviction. *Cf. Giglio v. United States*, 405 U.S.

150, 154 (1972) (in reversing conviction for failure to turn over material evidence and ordering a new trial, this Court recognized that "the prosecutor's office is an entity" which acts on behalf of Government, *i.e.*, the State for which it pursues its prosecutorial duties). Other additional remedies include the potential of prosecuting for criminal conduct and pursuing professional licensing discipline mechanisms.[7]

[7] In some instances, there are other potential remedies for deserving plaintiffs under state law. *See, e.g.*, N.Y. Ct. Cl. Act § 8-b (Consol. 2008) (claims for unjust conviction and imprisonment: creating a cause of action against the State of New York for those who can demonstrate, by clear and convincing evidence, that they were convicted and imprisoned for one or more felonies or misdemeanors, that their conviction was reversed and that the claimant did not commit the acts for which he was charged).

D. Summary.

For all the above reasons, the City respectfully urges reversal of the Ninth Circuit's judgment and dismissal of the action on grounds of absolute prosecutorial immunity.

CONCLUSION

THE NINTH CIRCUIT'S JUDGMENT SHOULD BE REVERSED.

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