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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Respondent Thomas Goldstein was wrongly convicted on the basis of perjured testimony from a jailhouse informant. Mr. Goldstein sued Petitioners, the chief administrators of the District Attorney's Office, for deciding not to establish any system by which line prosecutors could learn of internal information about jailhouse informants that they were constitutionally obligated to turn over to the defense. Petitioners are not shielded by absolute immunity unless they can prove that this information management function was intimate to their role as courtroom advocates, and was not administrative in nature.

The question presented is whether the Court of Appeals was correct in concluding that Petitioners' information management decision was administrative, and therefore subject only to qualified immunity, where the decision, made years before Mr. Goldstein's prosecution, was not about trial tactics or what information would actually be turned over to the defense in any particular case or class of cases?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Statute

Other Authorities

STATEMENT OF THE CASE

Respondent Thomas Goldstein has endured an unimaginable nightmare: He spent a quarter of a century in prison for a murder he did not commit. He won his freedom after proving that the Los Angeles County District Attorney's Office violated his constitutional rights. At trial, a jailhouse informant falsely testified that Mr. Goldstein confessed the crime to him and falsely swore that the District Attorney's Office had promised him nothing in return for his testimony. The trial deputy did not know, and therefore could not disclose to the defense, that this was a lie. The deputy was in the dark for one reason: Petitioners John Van de Kamp and Curt Livesay—the chief administrators of the District Attorney's Office—had decided not to institute even the most rudimentary system for tracking information about the benefits that handlers were granting informants in return for incriminating testimony.

Mr. Goldstein now seeks to hold Petitioners accountable for their role in his wrongful conviction. There is no question that Petitioners have immunity. Even if Mr. Goldstein prevails here, Petitioners enjoy *qualified* immunity, which would shield them from liability unless they either were "plainly incompetent" or "knowingly violate[d] the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The question before this Court is whether these officials are *absolutely* immune from civil suit for their decision, even if Mr. Goldstein can prove that Petitioners purposely fostered an information vacuum with the specific intent to prevent line prosecutors from learning exculpatory

information so they would not share it with innocent defendants.

Everyone agrees that Petitioners have the heavy burden of proving that they are entitled to this exceptional form of immunity. Everyone agrees that Petitioners cannot prevail unless they prove that the specific function challenged here was an advocacy function intimate to a judicial proceeding, and not administrative in nature. Petitioners cannot carry their burden. The duty Mr. Goldstein seeks to enforce—to establish an internal, office-wide information repository to be maintained by administrative personnel—is administrative in nature.

Mr. Goldstein Is Wrongfully Convicted

Mr. Goldstein was a Marine Corps veteran and an engineering student when the Long Beach Police Department arrested him for the shooting of John McGinest, in 1979. J.A. 21. Mr. Goldstein had no criminal record and no history of violence. *Id*. There was no evidence he owned a firearm, J.A. 21, 35, or that he had ever had any contact with the victim, J.A. 23. Five eyewitnesses described the possible perpetrator; none of the descriptions bore any resemblance to Mr. Goldstein. J.A. 24, 34. Summing up the evidence against Mr. Goldstein, one prosecutor lamented: "Note: this case was filed in great haste. Filing officers assure me that it will get stronger." J.A. 29.

The filing officers did not disappoint. They began by recruiting an "eyewitness" to identify Mr. Goldstein, even though, it turned out, the

witness was never able to recognize him.[1] Then, once they had Mr. Goldstein in custody, they enlisted the services of a jailhouse informant named Eddie Fink. A heroin addict and career felon, Fink had an uncanny knack for extracting confessions from cellmates. Time and again he testified to jailhouse confessions in return for favorable dispositions of his own redoubtable list of criminal charges. J.A. 30, 37-39.

The police purposely placed Fink in Mr. Goldstein's cell in the Long Beach jail to work his magic. J.A. 30. By evening, Fink returned with the goods: He reported to the police the next day that he had extracted a murder confession from Mr. Goldstein, a complete stranger, who had told everyone else that he was innocent. J.A. 29.

Fink testified to the confession both at Mr. Goldstein's preliminary hearing, J.A. 32, and at his trial, J.A. 35. Fink also swore that the Los Angeles District Attorney had not traded any benefits for his testimony against Mr. Goldstein and that he had never received any such benefits in the past. J.A. 37-38. These were both lies. Fink had struck numerous deals over the course of a decade with the Long Beach Police and the Los Angeles District Attorney in exchange for his tes-

[1] The witness, who identified Mr. Goldstein at trial as well, would later testify at a habeas corpus hearing that he identified Mr. Goldstein at trial only because he was "intimidated" by the police, who had assured him that Mr. Goldstein was the murderer, falsely describing an avalanche of fictitious evidence against him. J.A. 26, 32-33. The Magistrate Judge who heard the habeas testimony concluded that the witness never in fact recognized Mr. Goldstein as the perpetrator. J.A. 52.

timony. J.A. 38; Pet. App. 4. More to the point, the District Attorney's Office had secured Fink's testimony against Mr. Goldstein, specifically, with a promise to slash Fink's sentence on a pending theft charge from 16 months to less than two months. J.A. 38-39; *see* J.A. 42-43.

Mr. Goldstein's trial counsel could not expose Fink as a liar because the prosecution did not disclose the deals. And the only reason the trial deputy did not disclose the truth was that he had no idea that his office had ever cut any deal with Fink in this case or any other.

In 1980, Mr. Goldstein was convicted and sentenced to life in prison. J.A. 37, 45. He spent the next 24 years facing the horrors of maximum-security prison, fighting to regain the life stolen from him. J.A. 22.

Petitioners' Information Management Decision

There is no dispute that the District Attorney's Office was constitutionally obligated—under *Brady v. Maryland*, 373 U.S. 83, 87 (1963)—to disclose to Mr. Goldstein any deal it made with Fink. Under *Giglio v. United States*, 405 U.S. 150, 154 (1972), the obligation attached so long as *someone* in the office knew about it. As this Court put it in *Giglio*: "A promise made by one attorney" to an informant "must be attributed . . . to the Government." *Id.* But the trial deputy handling Mr. Goldstein's case never fulfilled the obligation to disclose that exculpatory information, because Petitioners, as chief administrators of the office, had decided not to install any repository of informa-

tion where handlers could memorialize the deals they struck with jailhouse informants. J.A. 45.

According to the complaint—which must be taken as true for present purposes—Petitioners knew that this was a fiasco waiting to happen. J.A. 44. Petitioners knew that police officers and prosecutors were relying on testimony from career felons who, like Fink, trafficked in false jailhouse confessions in return for sentence reductions. *Id.* They knew that prosecutors were coaching informants on the art of fabricating jailhouse confessions for trial. J.A. 44, 46. They knew that this Court in 1972 had put the onus on chief prosecutors, particularly in "large prosecution offices," to establish "procedures and regulations . . . to insure communications of all relevant information on each case to every lawyer that deals with it." *Giglio*, 405 U.S. at 154. Well before the events leading to Mr. Goldstein's wrongful conviction, Petitioners had considered fulfilling this obligation by developing a system to track the benefits that handlers conferred on jailhouse informants in exchange for their testimony. J.A. 46. But they made the deliberate decision not to, because they preferred a system guaranteed to "prevent" trial deputies from learning exculpatory information that they would have to disclose to the defense. *Id.*

It was not until a decade after Mr. Goldstein's trial that the jailhouse informant scandal broke. As the complaint recounts, a Los Angeles County civil grand jury condemned Petitioners' dereliction of duty in a scathing report. *See* J.A. 49-50 (discussing *Report of the 1989-1990 Los Angeles*

County Grand Jury at 97-99 (*"Grand Jury Report"*)). The grand jury documented how the Los Angeles District Attorney's Office and various police departments within its jurisdiction routinely coached jailhouse informants to fabricate confessions from criminal defendants. J.A. 49. The practice began well before Mr. Goldstein's arrest—the grand jury documented abuses as early as 1976—and continued over the course of the ensuing decade. *Id*. The grand jury criticized Petitioners' affirmative decision not to install any "central index containing" basic information about informants, *Grand Jury Report* at 74, condemning management's behavior overall as a "deliberate and informed declination to take action necessary to curtail the misuse of jail house informant testimony." J.A. 50.

By the time the grand jury issued its report, an administrator in the District Attorney's Office had done what Petitioners should have done. Observing that "[w]e must eliminate from the People's case the risk of perjured testimony by a jailhouse informant," J.A. 48, he issued a directive establishing, for the first time, "a central jailhouse informant index," tracking pertinent information about informants, including deals struck in exchange for testimony. J.A. 49. Both the grand jury report and the information management system came a decade too late to protect Mr. Goldstein.

Mr. Goldstein Exposes the Constitutional Violation and Is Released

Another 14 years would pass before Mr. Goldstein would win his release on the ground that his

conviction was tainted by the practices the grand jury had condemned. His vindication came in the context of a federal habeas corpus proceeding. The Magistrate Judge concluded that Fink had perjured himself when he denied having received any benefits for testifying against Mr. Goldstein—or anyone else. J.A. 53-54. He rejected Fink's account of the jailhouse confession because Fink "fits the profile of the dishonest jailhouse informant that the Grand Jury Report found to be highly active in Los Angeles County at the time of [Mr. Goldstein's] conviction." J.A. 54. The District Court adopted these findings and ordered the District Attorney either to retry Mr. Goldstein or release him. *Id*. In 2003, the Court of Appeals for the Ninth Circuit affirmed. J.A. 55.

The District Attorney's Office eventually dropped the charges against Mr. Goldstein, acknowledging that it had no reliable evidence against him. J.A. 58-60. In April 2004, Mr. Goldstein walked out of the prison gates. He was 54, and had no occupation, family, or home. J.A. 60.

Mr. Goldstein Files this § 1983 Suit

Upon release from prison, Mr. Goldstein filed this lawsuit under 42 U.S.C. § 1983 seeking redress for his wrongful conviction. His complaint named Petitioners, as well as the Long Beach Police Department and several police officers. J.A. 68-70.

The complaint alleges that Petitioners had a constitutional obligation to establish "'procedures and regulations . . . to insure communications of all relevant information on each case to every

lawyer'" in the office. J.A. 43-44 (quoting *Giglio*, 405 U.S. at 154). As relevant here, the crux of the complaint is that Petitioners deliberately decided not "to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants," J.A. 45, and they did so "in order to prevent Deputy District Attorneys . . . from having access to impeachment information," J.A. 46; *see* J.A. 51, 69-70.

The District Court Rejects Absolute Immunity, and the Court of Appeals Affirms

Petitioners moved to dismiss the claims against them, asserting absolute prosecutorial immunity. Pet. App. 16. The District Court denied the motion. It concluded that their decision not to create any sort of information repository was "clearly" administrative in nature, and thus not entitled to the exceptional protection of absolute immunity, Pet. App. 19-20, which applies only to a prosecutor who is "'serving as an advocate in judicial proceedings,'" *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (citation omitted). Petitioners filed an interlocutory appeal. Pet. App. 5.

A unanimous panel of the Ninth Circuit affirmed. Pet. App. 2-15. The Court of Appeals agreed that the challenged conduct was administrative in nature, and not prosecutorial. Pet. App. 15. The panel found that Petitioners' decision not to implement any internal system to memorialize and share information about informants bore "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." *Id.* Accordingly, Petitioners' conduct was not protected by absolute immunity. *Id.* The court subsequently denied rehearing en banc. Pet. App. 22.

SUMMARY OF ARGUMENT

A. Petitioners seek an exceptional form of immunity that would deprive Mr. Goldstein of a remedy even if he could prove that they purposely and maliciously set out to foment a wholesale violation of constitutional rights. There is a "presumption" against this extreme form of immunity, in favor of the robust qualified immunity that most public officials enjoy. *Burns v. Reed*, 500 U.S. 478, 486 (1991).

Under this Court's "functional approach," absolute immunity shields a prosecutor only for activities he performs "when serving as an advocate in judicial proceedings." *Kalina*, 522 U.S. at 125. Only tasks or decisions that are "intimately associated with the judicial phase of the criminal process," *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), such as decisions to initiate a prosecution and decisions on how to try a case, fall within the narrow scope of absolute immunity. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 278 (1993).

B. In its effort to overcome the presumption, Petitioners' brief suffers from a fundamental disconnect. The complaint repeatedly emphasizes that Mr. Goldstein is suing Petitioners for their own decision not to develop an information management system for internal tracking of deals that handlers make with jailhouse informants. The result, the complaint alleges, was an information

vacuum that prevented line prosecutors from learning the truth about informants.

Petitioners, however, focus almost entirely on a different theory, which Mr. Goldstein has explicitly rejected: They mischaracterize Mr. Goldstein's theory as revolving around supervisors' policies and training that dictate the decisions line prosecutors make at trial. This case is not about the adequacy of training or supervision of trial conduct. So far as the trial deputy in this case knew, there was no information to disclose, and therefore no decision to make.

C. Under this Court's precedents, the information management decision challenged here is administrative, not advocacy and not intimate to any judicial proceeding.

First, when Petitioners decided not to implement an information management system, they were not involving themselves in "the initiation of a prosecution," "the presentation of the state's case in court," or in any other substantive aspect of a prosecution. *Id.* at 278. They were not even setting standards on whether, and under what circumstances, line prosecutors should share information *with the defense*. They were deciding whether to memorialize and disseminate internally information employees need to do their jobs. Managers of any government agency or business enterprise grapple with those sorts of information-dissemination questions every day. *Second*, there is nothing inherently *prosecutorial* about a system to manage information about informants. Law enforcement agencies of all sorts perform the same function. *Third*, the information management de-

cision challenged here predated the prosecution by several years.

D. Petitioners' bid for absolute immunity fails for a separate and independent reason: They have not even tried to prove, as they must, a tradition of immunity for the sort of information management function challenged here. When Congress passed § 1983, there was not a single case that extended absolute immunity to record-keeping functions, whether for prosecutors or for judges. Numerous cases declined to extend absolute immunity to judges when they were accused of errors in paper-work or recording information.

E. Petitioners' bid for absolute immunity fails also because they have not proven, as they must, yet a third point: that policy considerations support absolute immunity. Allowing Mr. Goldstein's claim to proceed will not invite a tidal wave of vexatious litigation, for the claim he presents would be available in the rarest of circumstances. Nor would defense of a lawsuit like this require a retrial of the criminal case or delve into a line prosecutor's state of mind, because the theory of this claim does not depend upon any of the *trial deputy's* decisions.

Finally, civil liability is the only meaningful device by which to hold chief administrators accountable for making systemic decisions that prevent line prosecutors from honoring constitutional rights on a grand scale. A lone judge overseeing individual collateral attacks on a specific conviction has no power to remedy a systemic scandal like the one that injured Mr. Goldstein. And neither disciplinary authorities, criminal penalties,

nor the electorate is likely to punish a prosecutor for bad management, no matter how grievous the consequences.

ARGUMENT

PETITIONERS HAVE FAILED TO CARRY THEIR HEAVY BURDEN OF PROVING THAT ADMINISTRATORS OF PROSECUTION OFFICES ARE ENTITLED TO THE EXCEPTIONAL PROTECTION OF ABSOLUTE IMMUNITY FOR DECIDING NOT TO IMPLEMENT AN INFORMATION MANAGEMENT SYSTEM.

The central issue in this case is how to characterize the challenged conduct. Was Petitioners' conduct "administrative" (in which case it deserves only to qualified immunity) or was it advocacy "intimately associated with the judicial phase of the criminal process" (in which case absolute immunity might be available)? *Kalina*, 522 U.S. at 125. *See infra* Point A.

The starting point of the analysis must be a clear understanding of what conduct Mr. Goldstein is challenging. His claim concerns Petitioners' role as managers of information, and not (as Petitioners portray it) their supervisory role of promulgating policies or training lawyers about whom to charge, how to try cases, or what information to disclose to the defense. *See infra* Point B.

As every judge to consider this case has ruled, this information management function falls on the administrative side of the line. *See infra* Point C. Moreover, Petitioners cannot prevail because they have failed to sustain their burden on two other

points that they also must establish. First, they have not even tried to prove a common law tradition of absolute immunity for this sort of information management function. *See infra* Point D. Second, they have not demonstrated that granting absolute immunity to information management decisions of this sort is necessary to advance the policy considerations underlying the protection. *See infra* Point E.

A. Absolute Prosecutorial Immunity Is the Exception, Reserved for Highly Limited Circumstances.

Section 1983, the statute authorizing this lawsuit, does not specify any immunities. *See* Pet'r 2 (quoting statute). Nevertheless, this Court has engrafted immunities onto the cause of action, based on the premise that Congress intended to preserve common law immunities that were settled in 1871, when it enacted § 1983. *See*, *e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

Back then, *qualified* immunity was the norm for executive officials, just as it is the "general rule" now in § 1983 cases. *Butz v. Economou*, 438 U.S. 478, 508 (1978); *see Malley*, 475 U.S. at 340. Qualified immunity is a robust protection that bars any lawsuit against a public official unless the official "'violate[d] clearly established . . . constitutional rights of which a reasonable person would have known.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citation omitted); *accord Buckley*, 509 U.S. at 268. "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties" while holding them ac-

countable for egregious misconduct. *Burns*, 500 U.S. at 486.

Only rarely has this Court concluded that tradition and policy require exceptional treatment in the form of absolute immunity, which shields an official from suit even if he intentionally and maliciously violated the law. The prosecutor "'seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.'" *Buckley*, 509 U.S. at 269 (quoting *Burns*, 500 U.S. at 486); *see* Pet'r 23 (acknowledging burden). This exception to the rule of qualified immunity is narrow. *Burns*, 500 U.S. at 495; *Buckley,* 509 U.S. at 269.

No one gets absolute immunity just by virtue of his job title. *See, e.g.*, *Imbler*, 424 U.S. at 421. This Court takes a "functional approach," which focuses on the "nature of the function performed, not the identity of the actor who performed it." *Buckley*, 509 U.S. at 269 (citations and internal quotation marks omitted). Absolute immunity shields a prosecutor only for a specific set of functions—activities he performs "when serving as an advocate in judicial proceedings." *Kalina*, 522 U.S. at 125; *see Buckley*, 509 U.S. at 273. This encompasses only decisions "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, such as decisions to initiate a prosecution and decisions on how to try a case, *see Buckley*, 509 U.S. at 578. For any other function, including the functions a prosecutor performs "'in the role of an administrator or investigative officer,'" the default rule of qualified immunity applies. *Burns*, 500 U.S. at 491 (quoting *Im-*

bler, 424 U.S. at 431). In short, absolute immunity is not available unless "'any lesser degree of immunity could impair the *judicial process* itself.'" *Kalina*, 522 U.S. at 127 (quoting *Malley*, 475 U.S. at 342) (emphasis added).

In order to prevail, Petitioners have to prove more than just that the conduct falls on the advocacy side of the line, and that the very existence of a lawsuit would "impair the judicial process." *Id.* Petitioners also must prove two further propositions. First, they must demonstrate "a tradition of immunity comparable to the common-law immunity from malicious prosecution, which formed the basis for" the Court's decision to grant absolute immunity to a prosecutor's charging decisions and courtroom tactics. *Burns*, 500 U.S. at 493; *see Imbler*, 424 U.S. at 421; *Buckley*, 509 U.S. at 268-69. Second, they must also prove that the policy concerns underlying absolute immunity justify its application to the specific conduct challenged. *See Buckley*, 509 U.S. at 269; *Tower v. Glover*, 467 U.S. 914, 920 (1984). Petitioners strike out on all three points. But before demonstrating why, we address Petitioners' confusion over what conduct is being challenged.

B. The Claim Against Petitioners Concerns the Function of Implementing an Information Management System to Track Past Informant History, Not the Function of Training About What *Brady* Information to Turn Over to the Defense.

Petitioners' brief suffers from a disconnect so fundamental that it makes almost everything they say irrelevant. Their entire brief responds to an

imagined theory of liability that Mr. Goldstein has never pressed, and directs scarcely a word at the theory that he is pressing.

Mr. Goldstein is not trying to hold Petitioners vicariously liable for the trial tactics of the deputy who prosecuted him. He is not, for example, suing Petitioners because a line prosecutor made an informed *trial decision* not to turn over *Brady* information to the defense. Rather, Mr. Goldstein is suing Petitioners—managers, not line prosecutors—for their own decision not to develop any system for tracking deals with jailhouse informants and making that information available office-wide, a decision that meant that the trial deputy was never in a position to make the trial decision to disclose the exculpatory information to the defense.

The complaint repeatedly emphasizes that Petitioners decided *not "to create any system"* that would allow "the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants." J.A. 45 (emphasis added); J.A. 69. It focuses on the *internal* distribution of information. J.A. 70; *see also* J.A. 51. This decision about internal distribution is the predicate for Mr. Goldstein's constitutional claim against Petitioners: that Petitioners had a constitutional obligation under *Giglio*, as chief administrators of the District Attorney's Office, to establish "procedures and regulations . . . to insure communications of all relevant information on each case to

every lawyer that deals with it." *Giglio*, 405 U.S. at 154.[2]

Mr. Goldstein has pressed this theory throughout the litigation. The first sentence of argument in his Court of Appeals brief, for example, frames the case as revolving around a claim "that [Petitioners] ran the District Attorney's Office in a way that prevented deputy district attorneys from accessing information about jailhouse informants." Resp. CA Br. 9. Petitioners were not confused about this below. They correctly characterized Mr. Goldstein's position (in the first sentence of their Summary of Argument, for example) as an accusation that Petitioners "*fail[ed] to set up a system* to disseminate to deputy district attorneys information about plea deals and other assistance being offered to" informants. Pet'r CA Br. 6 (emphasis added).

Before this Court, however, Petitioners present with an acute case of claim amnesia. One can scour Petitioners' brief and find nary a reference to "information management," "dissemination of information," or any other phrase that accu-

[2] The Government invites "the Court [to] resolve the case" by deciding whether *Giglio* articulates a constitutionally enforceable obligation. *See* U.S. Br. 18 & n.2. As Petitioners acknowledge, that would be inappropriate. *See* Pet'r 23. At this juncture, the Court must assume "that [the plaintiff's] allegations . . . allege constitutional violations for which § 1983 provides a remedy." *Buckley*, 509 U.S. at 261; *id.* at 274 n.5. This Court should reject the Government's invitation to address the merits of the underlying claim, when Petitioners have not yet raised the issue, the courts below did not address it, and Petitioners did not present the issue in their cert. petition or their merits brief. *See* Pet. App. 6.

rately reflects the correct theory of liability. Instead, at every turn, Petitioners mischaracterize Mr. Goldstein's theory as revolving around the "actions of a chief advocate or supervising prosecutor in making decisions concerning *policies and training* that dictate *the manner in which prosecutors comply with Brady*" at trial. Pet'r 11 (emphasis added). Virtually all Petitioners' amici follow suit.

Short of displaying the point in neon, Mr. Goldstein could not have been clearer that the claim in this case is not about the adequacy of training as to "the *manner in which individual prosecutors comply* with [*Brady*] obligations" in the course of prosecutions, Pet'r 26 (emphasis added), and has nothing to do with decisions any trial deputy or supervisor makes about "the manner in which cases will be prosecuted," Pet'r 11. *See* Cert. Opp. 9-12 (correcting Petitioners' mischaracterization). Indeed, training on *Brady* disclosures has no bearing on the claim asserted here. As far as the trial deputy who prosecuted Mr. Goldstein knew, there was no information to disclose. Petitioners could have enlisted Yale Kamisar to devise a state of the art *Brady* disclosure training—and recruited Alan Dershowitz to teach it and police compliance—and it still would not have affected the line prosecutor's conduct. The whole point of this claim is that the trial deputy was an unwitting accessory to a constitutional violation because his superiors did not establish an internal system that would *enable him to know* key information. Only the chief administrators were in a position to install a system to ensure that he did have the necessary information.

For simplicity, we refer to this central theory as the failure to install an "information management system." The alternative is to repeat the complaint's wordier formulation, that Petitioners "failed to create a *system*, failed to train and failed to supervise Deputy District Attorneys, *to provide Deputy District Attorneys . . . with information with regard to jailhouse informants*," and "failed to instruct [them] *to disseminate* [such information] *throughout the office*." J.A. 69-70 (emphasis added). Petitioners will protest that the shorthand "does not appear in the . . . complaint" or in the briefs quoted above. Cert. Reply 2. But what matters is the substance of the complaint—with its indisputable focus on an office-wide system for internal distribution of information—not the label used to describe it.

True, the complaint's more verbose locution faults Petitioners not just for "fail[ing] to install such a system" to manage information, but also for "fail[ing] to train Deputy District Attorneys to disseminate impeachment information" internally. J.A. 70. But the reference to training merely acknowledges that an information management system is useless unless the handlers who make the deals are directed to *enter historical information into it* and are trained on the mechanics of how to enter the information. That is nowhere near the same as the more expansive claim of faulty training and supervision on *trial tactics* that Petitioners attribute to Mr. Goldstein.[3]

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[3] The Court of Appeals understood the distinction. It correctly characterized the claim as premised on Petitioners' "obli-

In any event, "[p]laintiffs are masters of their complaints and remain so at the appellate stage of a litigation." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 512-13 (1989). Lest there be any further confusion, we explicitly disclaim any theory of liability premised on whether Petitioners adequately trained and supervised line prosecutors on their obligations to disclose *Brady* material to the defense—or any other trial decision. The theory of liability in this case is limited to an administrator's failure to establish (or, here, more specifically, the affirmative decision not to establish) even the most rudimentary system to record and disseminate *internally* handlers' deals with informants.

C. Under this Court's Precedents, a Managing Prosecutor's Information Management Function Is Administrative.

With the proper focus on the conduct challenged, the conclusion is evident: When the chief administrator of a prosecution office decides not to establish a repository of information for internal use, he is not advocating in court. He is directing an administrative function.

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gation of ensuring that information regarding jailhouse informants *was shared among prosecutors in their office*," Pet. App. 2 (emphasis added); *see also* Pet. App. 14, 15, and distinguished this claim from a claim about policies or training "regarding how to prosecute a particular category of cases," Pet. App. 15 n.3; *see id.* at 11-13.

1. This Court has never granted a prosecutor absolute immunity, except for charging decisions or trial judgments.

This Court's precedents furnish clear guidance on how to distinguish between an advocacy function and an administrative one. The paradigmatic example of an advocacy function that is covered by absolute immunity is the conduct challenged in *Imbler*, where this Court first addressed the notion of prosecutorial absolute immunity. The Court there held that a prosecutor was immune from a suit challenging three strategic decisions that the prosecutor made in the course of a case: (1) to initiate a prosecution; (2) to introduce false testimony at trial; and (3) to withhold exculpatory evidence from the defense throughout trial. 424 U.S. at 416.

Since *Imbler*, this Court has never granted a prosecutor absolute immunity for conduct other than "the initiation of a prosecution, the presentation of the state's case in court, or actions preparatory to these functions." *Buckley*, 509 U.S. at 278. It has held that any "duties . . . 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." *Id.* at 273. That is because the purpose of prosecutorial immunity is to ensure that a prosecutor will "exercise his best judgment both in deciding which suits to bring and in *conducting them in court*." *Imbler*, 424 U.S. at 424 (emphasis added); *see Butz*, 438 U.S. at 516-17. Lawsuits about conduct that does not relate directly to charging decisions,

courtroom presentations, or trial tactics do not implicate this concern, and do not "'impair the judicial process itself.'" *Kalina*, 522 U.S. at 127 (citation omitted).

A trio of cases—*Burns*, *Buckley*, and *Kalina*—illustrate how strictly this Court has delimited the class of prosecutorial conduct that qualifies as "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430.

The first case to etch the line was *Burns*. There the plaintiff challenged a function that prosecutors routinely perform and that they are especially qualified to perform: The prosecutor gave the police legal advice about interrogations. 500 U.S. at 482. Specifically, the advice was to interrogate a shooting suspect under hypnosis. *Id.* In a hypnotic state, the suspect confessed to the shooting. During a subsequent probable cause hearing, the prosecutor elicited testimony about the confession, but did not elicit testimony about the hypnosis. *Id.* at 482-83. The suspect filed a suit challenging both the prosecutor's legal advice and his courtroom presentation. *Id.* at 487.

This Court separately addressed each challenged activity. On the one hand, this Court held that the prosecutor's courtroom decision to elicit misleading testimony at a probable cause hearing was entitled to absolute immunity. Presenting testimony "clearly involves the prosecutor's 'role as an advocate for the State,' rather than his role as 'administrator or investigative officer.'" *Id.* at 491. On the other hand, the Court unanimously held, the prosecutor was not entitled to absolute immunity for his legal advice to the police. Even

though the challenged conduct yielded evidence that found its way into court, this Court held that giving the advice was not part of the prosecutor's function *as courtroom advocate*, and, therefore, was not "intimately associated with the judicial phase of the criminal process." *Id.* at 493.

This Court further chiseled the line between advocacy and other functions in *Buckley*. There, a plaintiff sued prosecutors for: (1) fabricating evidence in the course of a murder investigation, specifically, shopping around for expert testimony linking a boot-print at the crime scene to the plaintiff; and (2) making false statements at a news conference in order to "seriously impair[] the fairness of the judicial proceedings against an innocent man." 509 U.S. at 262.

This Court rejected absolute immunity for both functions. The prosecutors' efforts to secure a compliant expert "during the period before they convened a special grand jury," the Court held, did not "relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Id.* at 273. Even though the prosecutor did present the evidence to the grand jury, and would most certainly have presented it to a jury, the Court held, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 274. Because the plaintiff "was not arrested . . . until 10 months after the grand jury . . . had finally indicted him," the Court held, "the prosecutors' conduct occurred well before they could properly claim to be acting as advocates." *Id.* at 275.

The Court unanimously reached the same conclusion about the prosecutor's press statements. *Id.* at 278. The Court acknowledged that "[s]tatements to the press may be an integral part of a prosecutor's job and they may serve a vital public function," and it took at face value the allegation that the prosecutor made those statements to enhance the prospects of winning before a jury. *Id.* But the Court rejected absolute immunity, because the function itself—holding a press conference—was not inherent to the prosecutor's conduct *as an advocate* before *the court*. *Id.*

The most recent case in the trio is *Kalina*. The plaintiff there sued a prosecutor for documents she filed to initiate a criminal prosecution against him. Two of those documents—an information charging the plaintiff with the crime and a motion for an arrest warrant—were unsworn. 522 U.S. at 129. The third—a "certification for determination of probable cause"—was a sworn statement presenting facts in support of the arrest warrant. *Id.*

This Court held that the filing of the two unsworn charging documents was protected by absolute immunity because that decision "involved the exercise of professional judgment" as an "advocate and was integral to the initiation of the prosecution." *Id.* at 130. However, the prosecutor's sworn statement attesting to facts to support those documents was not protected by absolute immunity. In so ruling, the Court acknowledged that this sworn document was intimate to a judicial proceeding. *Id.* at 130-31. In fact, the Court noted that "even the selection of the particular

facts to include in the certification . . . required the exercise of the judgment of the advocate." *Id.* at 130. But, the Court unanimously held, that was not enough, because "[t]estifying about facts is the function of the witness, not the lawyer." *Id.*

To summarize, distinguishing charging decisions and trial tactics from all other prosecutorial decisions, this Court has rejected absolute immunity where: (1) the conduct is not intimately connected to the prosecutor's function as a courtroom advocate; (2) the function (however intimate to a judicial proceeding) could have been performed by a non-prosecutor; or (3) the conduct preceded the initiation of criminal proceedings.

2. Establishing an information management system is an administrative function, not advocacy intimately connected to judicial proceedings.

The conduct challenged here—the decision not to establish an internal information management system and populate it with facts about informants—fails on all three grounds.

Remoteness from judicial proceeding. When Petitioners decided to forego implementing an information management system, they were not involving themselves in "the initiation of a prosecution," "the presentation of the state's case in court," or any other substantive aspect of a prosecution. *Buckley*, 509 U.S. at 278. They were not deciding whether to prosecute a case or series of cases. They were not engaged in the "professional evaluation of the evidence assembled by the police [or] appropriate preparation for its presentation at trial." *Id.* at 273. They were not even

setting standards on whether, and under what circumstances, line prosecutors should share information *with the defense*. *Compare Imbler*, 424 U.S. at 416; *see* Pet. App. 11. Just the opposite, they deprived trial deputies of the information they would need to make that legitimate trial judgment. Simply put, the decision challenged here was not advocacy and was certainly not "*intimately* associated with the judicial phase" of any particular criminal case. *Imbler*, 424 U.S. at 430 (emphasis added).

As the District Court and a unanimous panel of the Court of Appeals understood, the conduct challenged here was a judgment about whether to memorialize and disseminate internally the information employees need to do their jobs—and specifically, the information they need to comply with legal obligations. Managers of every sort of government agency or business enterprise grapple with those sorts of internal information-dissemination and compliance questions every day. Like ground-level decisionmakers in any government agency or business, line prosecutors have certain compliance obligations, such as the obligation to turn over to the defense exculpatory information about informants. Like any line decisionmaker, line prosecutors make independent judgments as to how to comply with these obligations. As in any other context, their decision is only as good as the information that is available to them. As in any business, the managers are the only ones who can make fundamental decisions as to how best to memorialize the information and make it available to those who need it. That is why agencies and businesses—including prosecu-

tors' offices—routinely appoint chief *information* officers, or at least specify who on the management team bears responsibility for information management tasks. *See* U.S. Br. 16 (noting that the *U.S. Attorney's Manual* requires managers to appoint a liaison to law enforcement agencies to ensure that *Brady* information flows properly). That internal *function* is administrative, whether the business is publishing or prosecution, and whether the information is *ultimately* used in service of advertising or advocacy.

The information management function here is less "intimate[]" to "the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, than was the prosecutor's advice in *Burns* about how to extract a confession for use in court; the prosecutor's decision in *Buckley* to shop around for the best expert to use in court and to taint the jury pool with public statements; and the prosecutor's attestation to facts in court papers in *Kalina*. Since these activities did not qualify for absolute immunity, the same must be doubly true of the establishment of an information system for internal use within a prosecutor's office.

Who can track. The only difference between the information management systems used in agencies or businesses and the system that Petitioners opted not to install is one of content—what information is being tracked. Even on that score, there is nothing inherently *prosecutorial*—and certainly nothing inherently *advocacy*-oriented—about a system to manage information about informants. For one thing, prosecutors can use such a repository of information for purposes unrelated

to advocating in court—for example, as part of their investigative evaluation of the strength of the evidence against prime suspects.

More importantly, law enforcement agencies of all sorts perform the same function. An apt illustration comes from an organization that Petitioner Van de Kamp himself heads: As Chair of the California Commission on the Fair Administration of Justice (CCFAJ), Mr. Van de Kamp presided over the issuance of a report that urges "*all police and other investigative agencies* [to] formulate policies and procedures to systematically collect any potential *Brady* material and . . . promptly deliver it to prosecutors." CCFAJ, *Report and Recommendations on Compliance with the Prosecutorial Duty to Disclose Exculpatory Evidence* at 16-17 (Mar. 6, 2008), *available at* http://www.ccfaj.org/rr-pros-official.html (emphasis added).

That police and other investigative agencies can, and do, develop the same sorts of information management systems demolishes Petitioners' bid for absolute immunity. This Court has repeatedly emphasized that an activity cannot qualify as a prosecutorial advocacy function if non-prosecutors can perform the same function. The theme was central, for example, when this Court denied absolute immunity both to a prosecutor's fabrication of evidence and to a prosecutor's submission of sworn testimony in a court document. As to the former context, this Court reasoned that "[w]hen a prosecutor performs the investigative functions normally performed by a detective or police officer," the prosecutor cannot get the benefit of absolute immunity that the police officer would not enjoy.

Buckley, 509 U.S. at 273-74. And as to the latter, the Court held that the prosecutor "performed an act that any competent witness might have performed." *Kalina*, 522 U.S. at 129-30.

The Government only underscores the point when it proclaims that it is "not aware of any United States Attorney's Office in the country that has established the database contemplated by" Mr. Goldstein. U.S. Br. 22. If all 90 of these chief prosecutors do not administer their own informant databases, it is not because they have all decided to roll the dice on *Brady* obligations; it is because the Department of Justice (unlike Petitioners here) has made the considered judgment to delegate the responsibility to *law enforcement* agencies—such as the FBI and the DEA—under its direct control. Executive Office for the U.S. Attorneys, U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-5.100 (2006) (directing all "investigative agencies" to "ensure that prosecutors receive sufficient information to meet their obligations under *Giglio*," including "designat[ing] an appropriate official(s) to serve as the point(s) of contact" to guarantee the dissemination of *Brady* material to prosecutors); ACLU Br. § IV.A. (documenting extent of FBI record-keeping on informants). The FBI, for example, has devised (and hired scores of employees to maintain) a sophisticated automated database to track and assess "the accuracy, credibility, and reliability of" 15,000 informants. FBI, FY 2008 Authorization and Budget Request to Congress 4-22 to 4-25 (2007), *available at* http://www.usdoj.gov/jmd/2008justification/office/33_01_justification.doc.

Timing. As a temporal matter, the information management decision challenged here was independent of any strategic decision in Mr. Goldstein's prosecution, and, indeed, predated the prosecution—and even the crime—by several years. The administrators of prosecution offices have been aware of their line prosecutors' *Brady* obligations since at least 1963. And at least since 1972, larger offices were aware of this Court's direction to establish "procedures and regulations . . . to insure communications of all relevant information" about informants. *Giglio*, 405 U.S. at 154. The grand jury that investigated Petitioners' management decisions found abuses dating back at least to 1976, three years before the crime that was pinned on Mr. Goldstein, J.A. 49, and Petitioners were fully aware of the abuses, J.A. 44.

If, as this Court held in *Buckley*, a prosecutor's decision to fabricate evidence was not immunized, because it was made long "before [prosecutors] ha[d] probable cause to have anyone arrested," then the same must be true here. 509 U.S. at 274. The time lag here was seven years, compared to the 10 months that was dispositive in *Buckley*. Here, as there, the challenged decision was "well before [Petitioners] could properly claim to be acting as advocates." *Id.* at 275.

To be sure, this Court has also held that absolute immunity can apply to decisions that are "preliminary to the initiation of prosecution and actions apart from the courtroom." *Id.* at 272 (citation and internal quotations omitted). But contrary to Petitioners' assertion, this Court was not suggesting that it does "no[t] . . . matter that the[]

[challenged] decisions are made . . . in advance of any particular prosecution." Pet'r 27.

The reference to "preliminary" activities is simply a shorthand for what the Court referred to as "*an advocate's preparation* for . . . judicial proceedings." *Buckley*, 509 U.S. at 273 (emphasis added). It was an acknowledgment that "almost every action taken in the courtroom requires some measure of out-of-court preparation." *Id.* at 283 (Kennedy, J., concurring in part and dissenting in part); *see Burns*, 500 U.S. at 495. As this Court has explained, this preparation "include[s] questions of whether to present a case to a grand jury, whether to file an information, whether and when to prosecute, whether to dismiss an indictment against particular defendants, which witnesses to call, and what other evidence to present." *Imbler*, 424 U.S. at 431 n.22. To qualify for absolute immunity, the "preparation" must still be "intimately associated with the judicial phase of the criminal process, *id.* at 430, as each of the foregoing preparatory acts are. The reference to "preparation" is not a license to "retrospectively describe[]" all conduct "as 'preparation' for a possible trial," *Buckley*, 509 U.S. at 276, and it surely did not override the holding, in the same case, that a decision that occurs "well before" the prosecution is not sufficiently intimate to the judicial function, *id.* at 275.

3. Petitioners' main effort to characterize the challenged conduct as advocacy fails, because Petitioners address the wrong conduct.

Petitioners offer almost no argument as to why the *development of an information management system* should be characterized as advocacy rather than an administrative function.

Instead, in keeping with their misplaced focus on the theory Mr. Goldstein has disclaimed, *see supra* at 15, Petitioners argue that an administrator's conduct in training, supervising, or promulgating policies *about how prosecutors behave in the courtroom* must be treated as advocacy. That is Petitioners' focus when they insist that a prosecutors' "policies" are "nothing more than a substitute for the personal involvement of a chief advocate or a supervising attorney *in each individual prosecution*." Pet'r 27 (emphasis added); *see also* U.S. Br. 21 (making same point). That is the theory they target when they liken "the actions of a chief advocate . . . in making decisions concerning policies and training that dictate the manner in which prosecutors comply with *Brady*" to an individual prosecutor's willful failure to comply with *Brady*. Pet'r 11.

Lower courts have wrestled with claims that a supervisor failed adequately to "supervise" or "train" line prosecutors about courtroom behavior or to promulgate policies about charging decisions or trial tactics.[4] Should this Court review such a

[4] *Compare Carter v. City of Philadelphia*, 181 F.3d 339, 356-57 (3d Cir. 1999) (rejecting absolute immunity for claim alleg-

case, it will need to confront the argument Petitioners present here. But this is not such a case. Mr. Goldstein's claim is not that the managers failed to "train" trial deputies to comply with their obligation to turn over exculpatory evidence to the defense, but that their administrative decision made it impossible for even the most well trained and conscientious trial deputy to *know about* the exculpatory information they were obliged to turn over. Petitioners' hypothesized claim focuses directly on tactical decisions made at trial; the claim presented here does not.

4. Petitioners' remaining arguments for why the challenged conduct is advocacy also fail.

Because Petitioners train their sights on the wrong theory of liability, they almost never address whether decisions about information management should be immunized. The best we can

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ing "failure as administrators to establish training, supervision and discipline policies" on how to detect and discourage police perjury), *and Walker v. City of New York*, 974 F.2d 293, 301 (2d Cir. 1992) (sustaining claim that "district attorney[] [failed] to supervise or train [line prosecutors] on *Brady* and perjury issues," because the claim related to "management of the office" and not to the "quasi-judicial function" of "prosecuting a criminal matter"), *with Haynesworth v. Miller*, 820 F.2d 1245, 1268-70 (D.C. Cir. 1987) (a supervising prosecutor's general policy about whom to charge is as immune as a specific charging decision), *abrogated on other grounds*, *Hartman v. Moore*, 547 U.S. 250 (2006), *and Hamilton v. Daley*, 777 F.2d 1207, 1213 n.5 (7th Cir. 1985) ("Since absolute immunity protects prosecutorial decisions, supervision of the prosecutors who make these decisions is similarly immune.").

do is try to adapt a few of their misdirected arguments. Even as adapted, the arguments fail.

Impact on criminal cases. Petitioners' lead argument is that absolute immunity is warranted because the challenged "decisions . . . directly impact the prosecution of criminal cases," Pet'r 28, and any duty that was violated "arises *only* in the context of prosecution," Pet'r 26.

This Court long ago rejected the argument that prosecutors "are entitled to immunity because the injuries suffered by [the plaintiff] occurred during criminal proceedings." *Buckley*, 509 U.S. at 271. The Court explained that "the *Imbler* approach focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused." *Id.* "The location of the injury . . . is irrelevant . . . to the question whether the conduct of a prosecutor is protected by absolute immunity." *Id.* at 272.

Thus, for example, in *Kalina*, the prosecutor executed the challenged certification for the explicit purpose of advocating to the court to issue an arrest warrant and begin the criminal prosecution. 522 U.S. at 120-21, 129-31. The Court even went out of its way to acknowledge that the prosecutor would have been within her advocacy function if she had simply "draft[ed] the certification" for *someone else's* signature. *Id.* at 130. Similarly, when a prosecutor fabricates evidence (as in *Buckley*) or gives legal advice on how to elicit a confession (as in *Burns*), the evidence could—and often will—ultimately "directly impact" the ensuing judicial proceeding. But in each of these cases, the ultimate impact on the trial did not

transform the conduct into advocacy. *See Buckley*, 509 U.S. at 262-63; *Burns*, 500 U.S. at 493-94; *Kalina*, 522 U.S. at 129-31. Nor did the fact that in each of these cases the duty violated "arises only in the context of prosecution" (which is true in most cases involving *prosecutorial* immunity). Pet'r 26.

Petitioners have conceded that "[i]t is easy to argue that an obligation to create and maintain an 'information management system', divorced from any discussion of when and how the information managed by that system is to be used, is nothing more than an administrative task, one that can be performed even by 'clerical staff.'" Cert. Reply 3. We could not agree more. But the embedded caveat does not hedge Petitioners' concession, for the point of this Court's functional approach is that analysis of the function *is supposed to be* "divorced from any discussion of when and how" the harm is inflicted or why the function is being performed.

Prosecutorial expertise. In their only argument that relates specifically to information management, Petitioners assert that the design of any information management system "requires an advocate's review and application of the governing law in the context of a criminal prosecution." Pet'r 29. A rudimentary tabulation of an informant's name, address, record, and deals is not an especially nuanced exercise. *See Grand Jury Report* at 113 (describing proposal for "recording only the minimum information, i.e., the informant's name, the Deputy District Attorney's name and the number of the case affected"). A workable system need not be any more complicated than the

rap sheet designed and maintained by police agencies without prosecutorial assistance. It does not take prosecutorial expertise to record this basic information. It requires the sort of organization and record-keeping skill that is within the bailiwick of any competent paralegal.

But even if a prosecutorial consult is required, that still does not make the conduct any more intimate to judicial proceedings. As an initial matter, Mr. Goldstein is not suing Petitioners for designing a database *improperly*. He is suing them for having no information management system at all—not an Oracle database, not an Excel spreadsheet, not a central ledger with hand-written entries, not even a Filofax of dog-eared Post-It Notes collected by Perry the paralegal . . . nothing. It does not require any special expertise as an advocate to appreciate that an office of over a thousand lawyers cannot comply with the obligation to turn over information about informants, unless *some* sort of system is in place to memorialize that information and make it available to end-users.

More to the point, it is not enough to say (as the Government does) that the design of a database requires "prosecutorial judgments," U.S. Br. 22, or that "the claims against petitioners 'arose only because of their roles as prosecutors,'" *id.* at 20 (quoting Pet. App. 14). By definition, any prosecutorial immunity case arises because of the defendant's role as a prosecutor, and much of what a prosecutor does requires "prosecutorial judgments." Even conduct that is "an integral part of a prosecutor's job," and that "serve[s] a vital function," *Buckley*, 509 U.S. at 278, can still

fall outside the limited rubric of "advocacy" that is "intimately associated with the judicial phase of the criminal process," *Imbler*, 424 U.S. at 430.

A prosecutor ordinarily is best suited to give legal advice to police about the permissibility of certain interrogation techniques. There is no disputing that the advice "requires application of the governing law in the context of a criminal prosecution." Pet'r 29. Yet, as this Court has held, the prosecutor is still not acting as an advocate when he performs that function. *See Burns*, 500 U.S. at 482-83, 496.

So, too, for information management. In any business, information management systems are typically designed by Information Technology specialists who consult with the substantive experts to understand the sorts of decisions that end-users will make in reliance on the information stored. A law firm cannot design a conflicts database, for example, without a practitioner's understanding of how lawyers use it to make critical decisions, and Amway's IT department would never design a database for tracking customer preferences without consulting management about how the sales staff will use the information. But just as no one would suggest that the administrator who oversees the conflicts database is practicing law, or that the administrator who devises the Amway database is selling face cream, it is wrong to say that the administrator who applies his prosecutorial expertise to the design of an informant database is engaged in advocacy.

Meaningful standards. Petitioners also protest that there is no "meaningful definition . . . nor

precise standards" for determining which "policies and training are necessarily 'administrative.'" Pet'r 31. When this Court decides how to deal with training and the promulgation of policies *for trial behavior*, it may well have to draw fine lines distinguishing policies and training on some subjects from policies and training on others. But here, there are no lines to draw. Management-level decisions on how to keep records and whether to create an internal system accessible to line prosecutors are *all* administrative.

Even if it were not as simple as that, Petitioners' argument about line-drawing difficulties only undermines their legal position. Petitioners seem to forget that it is their burden to prove that they are entitled to the exceptional protection of absolute immunity. *See Burns*, 500 U.S. at 486. "[I]f application of the principle is unclear the defendant simply loses," because absolute immunity must be rejected in favor of qualified immunity. *Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

In any event, Petitioners only prove how workable this Court's advocacy/administrative line is with their examples of "clerical" conduct. Pet'r 32. "[M]aking witness lists" is obviously "preparatory to" trial and integral to the advocacy function. That conclusion does not change just because that activity—like many functions that are preludes to a courtroom presentation—can be characterized as "clerical," tedious, or dull. What about "taking notes"? Pet'r 32. That might be advocacy-related or not, depending upon the subject. If the prosecutor is taking notes of witness interviews in preparation for trial or scribbling down

quotes from a witness's trial testimony, she is obviously engaged in an advocacy function. But not if she is engaged in the investigative function of taking notes at the scene of an unsolved murder or of an interview with a job applicant.

Which brings us full circle to "keeping track of material subject to *Brady* disclosure." *Id.* That, too, is either advocacy-related or administrative, depending on who is doing the tracking, when, and why. It is clearly an advocacy function when the trial deputy, on the eve of trial, is "keeping track of" what information he has learned about his witnesses, with a view toward deciding what disclosures he is legally obliged to make. It is not an advocacy function when management, outside the context of any particular prosecution, creates a system to collect historical information on all informants for future reference in investigations and perhaps in some later prosecution that may or may not ever materialize. The two functions are as different from each other as Amway's corporate decision to track past customer choices is from a salesperson's decision of which customer to call next and what product to pitch.

Administrative conduct as advocacy. Finally, Petitioners launch a full frontal assault on this Court's precedent, when they argue that "even assuming [Petitioners'] conduct can be described as 'administrative,'" "there's no indication in this Court's decisions that . . . it necessarily falls outside the scope of absolute immunity." Pet'r 31. That is exactly what this Court's taxonomy means when it says that "[a] prosecutor's administrative duties . . . are not entitled to abso-

lute immunity." *Buckley*, 509 U.S. at 273. To hypothesize, as Petitioners do, "'administrative duties' that *do* 'relate to an advocate's preparation for the initiation of a prosecution for judicial proceedings,'" Pet'r 32 (emphasis in original), is like positing invertebrates that *do* have backbones. There is no such animal. By definition, it can be one or the other, but never both.

D. Petitioners Fail to Carry Their Burden of Establishing a Common Law Analog to Absolute Immunity for Information Management.

Petitioners do not deny that their bid for absolute immunity for their information management function must fail unless they prove "a tradition of immunity [for that conduct] comparable to the common-law immunity from malicious prosecution, which formed the basis for the decision in *Imbler*." *Burns*, 500 U.S. at 493; *see Malley*, 475 U.S. at 342 (stating that this Court has been unwilling to "read into [§ 1983] an absolute immunity for conduct which was only accorded qualified immunity in 1871"); *Burns*, 500 U.S. at 497 (Scalia, J., concurring in part and dissenting in part) ("While we have not thought a common-law tradition (as of 1871) to be a *sufficient* condition for absolute immunity under § 1983, we have thought it to be a *necessary* one.") (internal citations omitted; emphasis in original). Yet, they do not even try to ground their defense in common law precedents. That is because common law knew no immunity expansive enough to cover a decision on how to manage information.

Pre-1871 judicial immunity cases. The point of reference for discerning a common law tradition is the state of immunity law in 1871, when Congress passed § 1983. *See, e.g., Kalina*, 522 U.S. at 123; *Buckley*, 509 U.S. at 268. At the time, there was no immunity for prosecutors. *See Kalina*, 522 U.S. at 124 n.11. Most prosecutors were private practitioners hired by victims and their families. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. Rev. 53, 108 (2005). Lawsuits against these prosecutors were ubiquitous. *See* Law Profs. Br. § IV (listing numerous cases). Public prosecutors, like private ones, enjoyed no immunity from suits for malicious prosecution, at least so far as appears from the scant opinions on the subject. *See Kalina*, 522 U.S. at 132 (Scalia, J., concurring); *Parker v. Huntington*, 68 Mass. (2 Gray) 124, 128 (1854). There was not a single decision on the books in 1871 that granted a prosecutor absolute immunity. *Burns*, 500 U.S. at 499 (Scalia, J., concurring in part and dissenting in part).

That is why, in conferring absolute immunity on prosecutors, this Court has analogized to other ancient forms of immunity. *See Imbler*, 424 U.S. at 422-23. Judicial immunity, in particular, is instructive here, because the limiting principle on judicial immunity in common law was the same as the limiting principle that controls this case. Judicial immunity was available only where a judge was "act[ing] judicially" when he performed the challenged act. *Tompkins v. Sands*, 8 Wend. 462,

469 (N.Y. 1832).[5] That inquiry is identical to the limiting principle in this case—the notion of being "intimately associated with judicial phase of the criminal process." *Imbler*, 434 U.S. at 430. So any limit on what it means to "act judicially" should limit the scope of prosecutorial immunity as well.

Common law courts in 1871 would not have stretched the concept of "acting judicially" to embrace the sort of record-keeping function involved in this case. Courts held that a judge "acts judicially" only "[w]hen the parties appear before him, and the cause is heard, [and] he renders judgment." *Tompkins*, 8 Wend. at 466. "[T]he touchstone" for determining whether an act was "judicial" "was the performance of the *function of resolving disputes between parties, or of authoritatively adjudicating private rights*." *Burns*, 500 U.S. at 500 (Scalia, J., concurring) (emphasis added) (citing WEEKS, *supra*, at 214).[6]

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[5] *See Bradley v. Fisher*, 80 U.S. 335, 347 (1871) (common law "exempt[ed] judges . . . from liability in a civil action" only "for acts done by them" only "in the exercise of their *judicial functions*") (emphasis added); *Forrester v. White*, 484 U.S. 219, 227 (1988) (same); *Noxon v. Hill*, 84 Mass. (2 Allen) 215, 216-17 (1861); FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS 9 (1890); EDWARD P. WEEKS, THE DOCTRINE OF DAMNUM ABSQUE INJURIA 209-10 (1879).

[6] *See Butz*, 438 U.S. at 514 (absolute immunity is limited to those "performing adjudicatory functions"); *Forrester*, 484 U.S. at 227 ("resolving disputes between parties who have invoked the jurisdiction of a court" is "the paradigmatic judicial act"); *Supreme Court of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731 (1980) (judicial immunity attaches only to an "act of adjudication").

In keeping with this limited definition of "acting judicially," the common law was replete with cases rejecting judicial immunity for claims that were about bad paperwork, faulty maintenance of information, and similar tasks. Cases found that judges could be held liable, for example, for "carelessness . . . in making out and issuing an execution [of judgment] which was irregular and invalid," *Noxon*, 84 Mass. at 216-17; entering a judgment earlier than allowed by statute, *see Briggs v. Wardell*, 10 Mass. 356, 358 (1813); altering the court's docket, *Garfield v. Douglass*, 22 Ill. 100, 102 (1859) (dictum); and failing to keep "accounts . . . in such manner as to show to what estates or parties the fund . . . belongs," *Disbrow v. Mills*, 62 N.Y. 604, 609 (1875). *See generally* Law Profs. Br. § III.C. In some cases, courts, including this Court, rejected immunity even for acts that, by today's standards, seem quite judicial indeed.[7] As this Court has pointed out, many acts by judges "have not . . . been regarded as judicial acts" "even though they may be essential to the very functioning of the courts." *Forrester*, 484 U.S. at 228.

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[7] *See, e.g., Ex Parte Virginia*, 100 U.S. 339 (1879) (rejecting absolute immunity against a claim that that a judge excluded African-American jurors); *Tompkins*, 8 Wend. at 467 (no immunity for a judge who "unjustly . . . prevented the plaintiff from appealing" a judgment by improperly refusing to approve the surety for an appeal bond); WEEKS, *supra*, at 219 (judges "[we]re liable," under common law, "if they refuse[d] to issue a summons to a person who lawfully demands it, or an execution on a judgment they have rendered, or to enter up a judgment rendered," or "to take security on issuing a writ of replevin, or security on appeal, or issuing an attachment without the statutory requisites") (citing numerous cases).

We have found not a single case before 1871 that applied absolute immunity outside a judge's core function of adjudicating disputes, much less to a function that looked anything like the record-keeping function at issue here.[8] But even if Petitioners could characterize some case that way, they still could not prove, as they must, that there was an established tradition of immunizing judges for such functions. *See Butz*, 438 U.S. at 508 (calling for evidence of "settled doctrine").

Since the sorts of record-keeping functions at issue here would not have been considered "acting judicially" when performed by judges, those same functions should not be considered "intimately associated with judicial phase of the criminal process," when performed by prosecutors. *Imbler*, 434 U.S. at 430.

Post-1871 prosecutorial immunity cases. In discerning the scope of prosecutorial immunity, this Court has also consulted cases that were decided in the several decades after 1871. *See id.* at 421. This body of common law provides even less support to Petitioners' position. "[T]he first case extending *any* form of prosecutorial immunity was decided some 25 years after the enactment of

[8] A couple of *post*-1871 cases seem to apply immunity beyond a judge's core adjudicatory functions, though still not to information management functions. *See, e.g., Paulding County v. Scoggins*, 23 S.E. 845, 845 (Ga. 1895) (holding that where a judge has authority to make bridges and roads, he could not be held liable for gross errors in the contracts); *Kress v. State*, 65 Ind. 106, 106 (1878) (affording absolute immunity for the recording of a judgment). These outliers do not negate the settled rule, much less establish the opposite tradition.

§ 1983." *Burns*, 500 U.S. at 499 (Scalia, J., concurring); *see Imbler*, 424 U.S. at 409 (citing *Griffith v. Slinkard*, 44 N.E. 1001 (Ind. 1896), as the "first American case to address the question"). Well into the 1920s, the courts split over whether the immunity should be absolute or qualified. *See* Johns, *supra*, at 114-15.[9]

The courts that did grant prosecutors absolute immunity kept it limited. *E.g., Yaselli v. Goff*, 12 F.2d 396, 406 (2d Cir. 1926), *summarily aff'd*, 275 U.S. 503 (1927). In the first half of the 20th century, courts never extended prosecutorial absolute immunity to a prosecutor for anything other than malicious prosecution or courtroom behavior.[10] We have not found any case in that time frame that so much as suggests that absolute immunity could extend to a chief prosecutor's management function, much less to decisions about how to keep and disseminate information internally.

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[9] *Compare Leong Yau v. Carden*, 23 Haw. 362, 369 (1916) (holding that prosecutor is entitled only to qualified immunity), *and Buhner v. Reusse*, 175 N.W. 1005, 1006 (Minn. 1920) (holding no immunity where prosecutor acted with malice and without probable cause), *with Smith v. Parman*, 165 P. 663, 663 (Kan. 1917) (holding that prosecutor is entitled to absolute immunity), *and Kittler v. Kelsch*, 216 N.W. 898, 905 (N.D. 1927) (same).

[10] *Compare Yaselli*, 12 F.2d at 406 (absolute immunity for malicious prosecution); *Smith,* 165 P. at 663 (same); *Kittler*, 216 N.W. at 898 (same); *Watts v. Gerking*, 228 P. 135, 141 (Or. 1924) (on rehearing) (same); *and Griffith,* 44 N.E. at 1002 (absolute immunity for falsification of grand jury documents), *with Schneider v. Shepard*, 192 Mich. 82, 87-89 (1916) (no absolute immunity for authorizing a raid on a house).

E. Petitioners Fail to Carry Their Burden of Proving That Policy Considerations Demand Absolute Immunity for Information Management Functions.

With almost nothing to say about the information management claim in this case, and nothing at all to say about any common law basis for absolute immunity, Petitioners lavish most of their attention on various policy "considerations." Pet'r 16, 33-37. Petitioners seem to acknowledge that they cannot prevail without proving that policy considerations support absolute immunity. *See Butz*, 438 U.S. at 506. But they never acknowledge that these policy considerations, though necessary conditions, are not sufficient to establish absolute immunity. *See Buckley*, 509 U.S. at 278. As the Court has observed, "'we do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy.'" *Id.* (quoting *Tower*, 467 U.S. at 922-23).

Even if the Court did have such license, Petitioners' policy analysis fails. Their dire predictions will never materialize. And they are incorrect in asserting that mechanisms other than civil liability adequately deter the sorts of systemic misdeeds that are challenged here. *See generally* Innocence Project Br. § III (providing a thorough discussion of both sides of the policy balance).

1. Qualified immunity adequately protects chief administrators from suit for the conduct at issue here.

Assessing the potential dangers of denying absolute immunity here must begin with "'[t]he pre-

sumption . . . that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties.'" *Buckley*, 509 U.S. at 278 (quoting *Burns*, 500 U.S. at 486-87). The presumption is fair, because, "'[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'" *Burns*, 500 U.S. at 494-95 (quoting *Malley*, 475 U.S. at 341). Especially as fortified in the years since this Court decided *Imbler*, the protection of qualified immunity is "specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.'" *Malley*, 475 U.S. at 341 (quoting *Harlow*, 457 U.S. at 818)); *see Burns,* 500 U.S. at 494 ("[T]he qualified immunity standard is today more protective of officials than it was at the time that *Imbler* was decided.").

This Court immunized prosecutors from claims of malicious prosecution and trial misconduct, because it feared that every prosecutor in any case could be a target of a suit for every charging decision and trial tactic. *See Imbler*, 424 U.S. at 424-25. But this Court has since made clear that the concern about litigation catnip is not some shibboleth that justifies absolute immunity whenever a criminal defendant sues a prosecutor. The dire predictions of a litigation frenzy did not carry the day, for example, when this Court weighed policy considerations in *Burns* and *Buckley*, with respect to a prosecutor's function of giving legal advice to police, *see Burns*, 500 U.S. at 495, and a prosecutor's fabrication of evidence and tainting of the jury pool, *see Buckley*, 509 U.S. at 278.

History has vindicated this Court's conclusion in those cases, for the predicted litigation frenzy never materialized. Petitioners' equally alarmist predictions are even less plausible here. One could easily imagine a flood of vexatious litigation challenging a prosecutor's public statements, and most any defendant could devise a theory that the prosecutor shopped around for the best evidence against him. But contrary to Petitioners' assertion, it is highly unlikely that allowing this lawsuit to proceed will invite "a flood of lawsuits" by criminal defendants challenging a manager's faulty information management decisions. Pet'r 37.

Unlike the sorts of claims that concerned this Court in *Imbler* (and even the sorts that did *not* concern the Court in *Buckley* and *Burns*), a lawsuit like this one could not be brought by just anyone with a complaint about being falsely accused (but never tried) or by just anyone who was tried and acquitted. Under the theory pressed in this case, a criminal defendant would not be able to bring a suit over a manager's information management function unless the stars align to satisfy all the following conditions: (1) the criminal defendant went to trial and was convicted; (2) that conviction was based largely on a specific informant's testimony; (3) the conviction was tainted by a trial deputy's failure to turn over *Brady* information tending to undermine the informant's testimony; (4) the trial deputy did not know that the *Brady* information existed; (5) the reason he did not know is that the chief administrator did not create any sort of information management system to get the relevant information in the trial

deputy's hands when he needed it; and (6) the *Brady* information was potentially dispositive. What is more, the lawsuit will be thrown out, unless the quondam criminal defendant (now plaintiff) can satisfy the further high threshold of demonstrating that (7) his conviction has been overturned; (8) he was not successfully retried and convicted; and (9) the wrongful conviction was caused by the chief prosecutor's information management decision. *See Heck v. Humphrey,* 512 U.S. 477, 484 (1994). It is hard to imagine any other scenario in which an information management decision like the one challenged here could lead to a lawsuit against a chief prosecutor.

Petitioners do not even try to conjure up other scenarios. The only way they can depict this case as presenting a "pervasive threat of vexatious and retaliatory suits" is by resorting to their mischaracterization of the claim, as a bid to hold chief administrators accountable for every sort of "alleged prosecutorial misconduct" at trial. Pet'r 33-34. But because the theory here is not about inadequate training or supervision of trial tactics, a denial of absolute immunity here will not mean (as Petitioners and the Government warn) that plaintiffs will be able to "simply retool their claims" against the trial deputies for garden-variety instances of prosecutorial misconduct "and assert that the alleged prosecutorial misconduct was the result of improper policy or training on the part of the chief advocate or a supervising prosecutor." Pet'r 34; *see* U.S. Br. 25.

For similar reasons, a lawsuit of this sort will not require "the courtroom prosecutors . . . to tes-

tify as to the nature and circumstances of the underlying prosecution and their various decisions in order to determine whether their actions were the result of policy or training." Pet'r 34. Since the theory of this claim does not depend upon any of the *trial deputy's* "decisions"—but only on the indisputable fact that he had no information to turn over—there is no danger that his thought process will be dissected in a trial proceeding. To be sure, the habeas corpus proceeding in which the wrongly convicted defendant establishes the *Brady* violation could entail consideration of the weight of the evidence in the original trial. But the § 1983 action cannot arise until after the violation is established, and the defendant is exonerated—at which point the specifics of the underlying prosecution are largely immaterial. *See Heck,* 512 U.S. at 484.

In any event, in its more recent cases, this Court has emphasized that the point of absolute immunity is not to advance "the interest in protecting the prosecutor from harassing litigation that would divert his time and attention from his official duties." *Kalina*, 522 U.S. at 125. The point is only to advance "the interest in enabling him to exercise independent judgment when 'deciding which suits to bring and in conducting them in court.'" *Id.* (citations omitted).

Petitioners are also wrong in assessing this latter point. "The specter of even defending such . . . lawsuits would" not, as they warn, "chill the prosecutorial discretion and judgment of chief prosecutors in making decisions about the manner in which cases are prosecuted," Pet'r 35, or other-

wise "impair vigorous enforcement of the law," Pet'r 12. That is, again, because the focus of this claim is not on "the manner in which cases are prosecuted"—and not even on the decision whether to turn information over to the defense.

Petitioners have failed even to hypothesize—and it is hard to fathom—the unwelcome chilling effect that could result from a rule that requires a manager to make more information available internally to trial deputies. The possibility that chief administrators, fearing civil liability, will require prosecutors to record "too much" *Brady* information in a database? The possibility that they might make the database too user-friendly or share the data too widely among line prosecutors? Maybe a prosecutor bent on securing unjust convictions at any cost will view these prospects as evils, but these are not the sorts of evils that absolute immunity is supposed to protect against.

"Absolute immunity . . . is strong medicine, justified only when the danger of officials' being deflected from the effective performance of their duties is very great." *Forrester*, 484 U.S. at 230 (internal quotation marks, brackets, and citation omitted). Petitioners have not demonstrated any such danger, much less that "'any lesser degree of immunity could impair the judicial process itself.'" *Kalina*, 522 U.S. at 127 (citation omitted).

2. A civil lawsuit is the only way to hold managers accountable for the sorts of conduct at issue here.

A central purpose of § 1983 is to "create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on

the side of protecting citizens' constitutional rights." *Owen v. City of Independence*, 445 U.S. 622, 651-52 (1980); *see Hudson v. Michigan*, 547 U.S. 586, 596-98 (2006) (in declining to suppress evidence, Court notes that civil remedies suffice to hold prosecutors accountable). Many administrators at the helm of prosecution offices take their constitutional obligations seriously, and would honor these obligations even without the added threat of civil liability. But § 1983, as limited by qualified immunity, is not concerned with the scrupulous official, but with the one who is corrupt or "plainly incompetent." *Burns*, 500 U.S. at 494-95; *see Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985). The concern is especially pronounced when it comes to chief prosecutors. They can inflict far more constitutional harm with a single systemic rule or decision—such as a decision that makes it impossible for line prosecutors to meet their constitutional obligations—than any rogue prosecutor can inflict in an individual case.

Petitioners' position gives the corrupt prosecutor carte blanche to subvert one of the most fundamental guarantees of fairness in the criminal trial—duping not just defense counsel, but judges, juries, and line prosecutors themselves—and to do so on a grand scale. Their position is that the chief administrators can never be held liable for any misconduct with respect to the management of information about informants—however egregious. Under Petitioners' rule, the head of an office would not be accountable for directing a functionary to destroy all records of informant deals because, "Trial deputies can't disclose what they can't find," or decreeing, "Any handler who shares

exculpatory information with a trial deputy will be fired."[11] *See* U.S. Br. 15-16 (arguing that such a direction should be immunized); Innocence Project Br. § III (listing other examples).

The ramifications for innocent criminal defendants are potentially pervasive and disastrous—far more disastrous than the misdeed of an isolated prosecutor in a particular case. We will never know how many other Thomas Goldsteins fell victim to Petitioners' deliberate decision to keep line prosecutors in the dark. Some never learned the truth about the invalidity of their convictions, possibly because they lacked Mr. Goldstein's perseverance and intellect. The only effective way to guard against this sort of pervasive injustice is to hold the public officials who make such egregiously wrong and far-reaching systemic decisions accountable for the consequences of those decisions, on the rare occasions when they are caught. And the only effective way to do that is to preserve a civil remedy for victims of such misconduct.

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[11] The conduct alleged in this case is not far from these devious statements. The complaint contemplates that Mr. Goldstein could prove that Petitioners "purposely . . . failed to install [an information management] system . . . *in order to prevent* Deputy District Attorneys . . . from having access to impeachment information." J.A. 46 (emphasis added). Discovery could uncover explicit statements by Petitioners of antipathy toward the prospect of turning over *Brady* information. In fact, the complaint recounts that the grand jury investigating the jailhouse informant scandal had documented how this sort of antipathy to constitutional rights did motivate administrators in the Los Angeles District Attorney's Office. J.A. 49-50.

Contrary to Petitioners' assertion, there are no other "checks" that "provide ample deterrence" for the sort of conduct challenged here. Pet'r 36-37. First, "the criminal justice system itself" is no effective deterrent. Pet'r 36. The very nature of the decision alleged here—the decision not to create any repository of information about informant deals—makes it unlikely that evidence of a *Brady* violation will ever materialize. *See Mitchell*, 472 U.S. at 522 (denying absolute immunity to attorney general for national security decisions, in part because "it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation"). But when the stray violation does come to light, a lone judge considering a collateral attack on a specific conviction has neither the power nor the perspective to remedy the systemic problem.

Second, "professional regulation, and . . . criminal liability" will not be effective deterrents. Pet'r 36. The decision not to set up an information management system—as grievous as it may be—is not a criminal act. And if a chief administrator's bad management is a violation of the Code of Ethics (a questionable proposition), it is not one that any disciplinary authority is likely to punish.

Finally, the only entity that is even less likely to deter a chief administrator from making the sort of decision Petitioners made here is the electorate. Pet'r 36. Petitioners do not cite a single instance in which voters have ever punished a prosecutor at the polls for being too zealous in putting criminals behind bars, much less for failing to keep the sorts of records that might better

enable a defense attorney to put an accused criminal back on the streets.

Like the attorney general engaged in secret national security activities, the chief prosecutor engaged in the sorts of sub rosa decisions challenged here is subject to no "built-in restraints." *Mitchell*, 472 U.S. at 523 & n.7 ("criminal prosecution and impeachment . . . would be of dubious value for deterring all but the most flagrant constitutional violations" by the attorney general). This case illustrates just how ineffective any of these purported deterrents are. Mr. Goldstein spent 24 years in prison. His habeas corpus petition restored his freedom, but did not compensate him for the years he lost. The managers who made the systemic decisions that put an innocent man behind bars—and risked the same fate for countless others—were fully aware of the abuses and deliberately made an administrative decision that would let the abuses thrive. They were undeterred by the prospect of disciplinary action or a voter uprising, and have not been held to account in any other way. Civil liability is the only way to hold these officials accountable or to deter others who knowingly and systematically violate the rights of innocent defendants in the same way.

CONCLUSION

For the foregoing reasons, this Court should affirm the order denying Petitioners' motion to dismiss.

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August 29, 2008

CERTIFICATION

As required by Supreme Court Rule 33.1(h), I certify that the document contains 13,871 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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