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 OF THE INNOCENCE NETWORK AND THE INNOCENCE PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Should absolute immunity be extended to cover a District Attorney who, in a purely administrative and managerial capacity, intentionally or with deliberate indifference declines to establish any internal system or procedures whatsoever to ensure that prosecutors have access to impeachment information concerning informants, in disregard of the mandate of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), and despite knowing of prior repeated *Brady* and *Giglio* violations that resulted from not having such a system or procedure?

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INTEREST OF *AMICI CURIAE*[1]

The Innocence Network (the Network) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post conviction can provide conclusive proof of innocence. The forty-nine current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand. The Innocence Network and its members[2] are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

Its affiliate, the Innocence Project, is an organization dedicated primarily to providing pro bono legal and related investigative services to indigent prisoners whose actual innocence may be established through post-conviction evidence. It has

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[1] The parties have consented to the filing of this amicus brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than amici and their members, has made a monetary contribution to the preparation or submission of this brief.

[2] The member entities are listed in the appendix.

a specific focus on exonerating long-incarcerated individuals through use of DNA evidence, including newly-developed DNA testing methods. It also seeks to prevent future wrongful convictions by researching their causes and pursuing legislative and administrative reform initiatives designed to enhance the truth-seeking functions of the criminal justice system—including identifying those who actually committed crimes for which others were wrongfully convicted. Because wrongful convictions destroy lives and allow the actual perpetrators to remain free, the Innocence Project's objectives both serve as an important check on the awesome power of the state over criminal defendants and help ensure a safer and more just society. As perhaps the Nation's leading authority on wrongful convictions, the Innocence Project and its founders, Barry Scheck and Peter Neufeld (both of whom are members of New York State's Commission on Forensic Science, charged with regulating state and local crime laboratories) are regularly consulted by officials at the state, local and federal levels.

In this case, the Innocence Network and Innocence Project seek to present a broad perspective on the issues presented in the hope that the risk of future wrongful convictions will be minimized.

The experience of the Innocence Network and the Innocence Project has demonstrated the unfortunate but substantial role that lying informants play in wrongful convictions. Indeed, in some fifteen percent of the cases in which post-conviction DNA evidence has been used to demonstrate the actual innocence of the person convicted, there had been testimony at trial by an

informant who obviously had been lying.[3] For example, Dennis Fritz and Ron Williamson served eleven years in prison for murder due to the testimony of such informants: one snitch came forward the day before prosecutors would have had to drop charges against Fritz with the claim that Fritz had confessed to him while they shared a jail cell,[4] and another claimed that she had heard Williamson allude to his role in the crime.[5] Only after DNA testing exonerated Fritz and Williamson (and incriminated another government witness as the true perpetrator) were both men released.

Such cases highlight the degree to which perjured testimony from government informants can corrupt our system of justice, and the concomitant necessity of subjecting such testimony to the scrutiny this Court has recognized to be essential. Expanding absolute immunity to those who are

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[3] Innocence Project, *Understanding the Causes*, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Aug. 29, 2008); Northwestern University School of Law Center on Wrongful Convictions, *The Snitch System*, http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf (Winter 2004-2005) (last visited Aug. 29, 2008).

[4] Innocence Project, Profile of Dennis Fritz, http://www.innocenceproject.org/Content/152.php (last visited Aug. 29, 2008).

[5] Innocence Project, Profile of Ron Williamson, http://www.innocenceproject.org/Content/295.php (last visited Aug. 29, 2008).

responsible for the administration of a District Attorney's office but who disregard this Court's rulings on the constitutional right to *Brady* and *Giglio* material by intentionally or with deliberate indifference refusing to establish even minimal administrative procedures to effectuate such rulings will only exacerbate the problem of wrongful convictions based on perjured snitch testimony. Indeed, expanding absolute immunity to administrative functions would also exacerbate a host of related problems of wrongful convictions based on slipshod or even deliberate mishandling of evidence, procurement of known-to-be-unreliable experts, and other wrongdoing known to or recklessly disregarded by prosecutorial offices.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

In the interest of brevity, *amicus curiae* adopts by reference the statement of facts set forth in Respondent's Brief. Certain salient facts, however, stand out.

As set forth in the Second Amended Complaint ("SAC"),[6] Mr. Goldstein's murder conviction was based solely upon exceedingly flimsy and contradictory identification testimony, SAC at 9, and the perjured testimony of the aptly-named Edward Fink, a classic, conniving, jailhouse snitch who falsely claimed that Mr. Goldstein, while in custody, had openly discussed committing the crime. *Id.* at 11. Fink, who had an established and long-standing relationship with the government and who had traded testimony for favors before, was promised leniency on unrelated charges in exchange for his testimony against Mr. Goldstein. While on the witness stand at Mr. Goldstein's trial, however, Fink perjuriously denied the existence of any such deal or favors. *Id.* at 11, 16-19.

Unfortunately, the government withheld from the defense all of the information concerning both Fink's deal and the government's prior favors for Fink, completely depriving Mr. Goldstein of any

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[6] Inasmuch as this case comes to this Court on review of a motion to dismiss the complaint, all well-pleaded allegations of the SAC must be accepted as true. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Berkovitz v. United States*, 486 U.S. 531, 540 (1988).

meaningful ability to cross-examine Fink's devastating testimony. SAC at 20.

Withholding this crucial information was not the fault of the prosecutor on Mr. Goldstein's case, who was, like Mr. Goldstein's counsel, ignorant of it. SAC at 20. (Mr. Goldstein seeks no relief against the line prosecutor.) Rather, it was squarely Petitioners' fault, because they, as the people in charge of the management and administration of the District Attorney's office, utterly failed to establish even a rudimentary system or procedure—manual (e.g., index cards), documentary (e.g., a handwritten log or list), computer-based, or otherwise—for ensuring that line prosecutors learn of information concerning informants necessary for compliance with their obligations to defendants under *Brady* and *Giglio*. SAC at 22.

The decision not to create or implement any such system was made at the highest level—not by the individual attorneys involved in Mr. Goldstein's prosecution—and affected all cases in the office in which government informants testified. *Id.* The District Attorney's office was aware, prior to Mr. Goldstein's case, that this abject failure had already resulted in repeated violations of its obligations under *Brady* and *Giglio*. *Id.* at 21. Yet it nevertheless continued, intentionally or with deliberate indifference, to operate without adopting any information management system or other procedure to address these problems. *Id.* Only after a grand jury investigation revealed the vast scope of the problem did Petitioners endeavor to bring their office into compliance with *Giglio*'s mandate. *Id.* at 25.

Without the information to which it was entitled about Mr. Fink's pattern of behavior and the benefits he received in exchange for testifying against Mr. Goldstein, SAC at 19-20, the defense could not effectively cross-examine him. Had this critical impeachment evidence been provided to the defense for use in cross-examination, it would have been obvious to a jury that Mr. Fink could not be credited as a reliable witness and that there was otherwise no legitimate basis for conviction. SAC at 16-19.

As the proximate consequence of Petitioners' administrative failure to establish procedures for compliance with this Court's rulings in *Brady* and *Giglio*, Mr. Goldstein, an innocent man, was imprisoned and ultimately served twenty-four years for a crime he did not commit. SAC at 32. Mr. Goldstein's eventual release on habeas corpus, while vindicating him in principle and providing him at least with prospective relief, did not and could not adequately remedy the grave injustice done to him. By pursuing this lawsuit, Mr. Goldstein has at least a chance to obtain partial justice from those whose blatant misconduct deprived him of his liberty for twenty-four years.

SUMMARY OF ARGUMENT

Absolute immunity for government officials is the exception not the rule. Although this Court has ruled that prosecutors and judges are entitled to absolute immunity while engaged in conduct that is "intimately associated with the judicial phase" of a criminal proceeding, *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), it has specifically cautioned that the scope of this form of immunity is to be "quite

sparing," *Burns v. Reed*, 500 U.S. 478, 487 (1991) (quoting *Forrester v. White*, 484 U.S. 219, 224 (1988), and that the burden of showing entitlement to absolute immunity is on the person claiming it. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993).

By and large, the circumstances in which this Court has held that prosecutors have absolute immunity are either those in which a neutral, third-party decision-maker is in place to ensure a level playing field or those that pertain to strategic decisions made regarding a particular case. *See Burns*, 500 U.S., at 489-93; *Imbler*, 424 U.S., at 430-31. The Court has stressed that, absent such limited circumstances, a defendant is entitled to only the quite substantial protections of qualified immunity in a suit brought under 42 U.S.C. §1983 (2000). *See Buckley*, 509 U.S., at 271-74.

The hurdles for filing, much less prevailing, in a suit such as the instant case are many and high. Even where the defendant is not cloaked with absolute immunity, a §1983 plaintiff shoulders substantial burdens. Overcoming the qualified immunity defense, given its breadth, is a daunting undertaking. But, in addition, the §1983 plaintiff must surmount the often difficult hurdles in proving all of the elements of a constitutional violation as well as legal causation of injury. *See City of Canton v. Harris*, 489 U.S. 378, 389-91 (1989); *West v. Atkins*, 487 U.S. 42, 48-50 (1988); *Martinez v. California*, 444 U.S. 277 (1980).

This Court's jurisprudence has consistently emphasized that absolute immunity is a limited shield that does not apply to administrative or other

decisions that do not bear directly on particular individual cases and that do not concern the prosecutor's role as an advocate. Administrative decisions relating to agency-wide policies or practices are protected only by qualified immunity. The case law reflects a cautious and thoughtful balancing of the need to preserve a sphere of uninhibited discretion for prosecutors acting as State advocates against the necessity of providing a modicum of fair and practical redress for the victims of inexcusable constitutional violations. *Buckley*, 509 U.S., at 269 (quoting *Burns*, 500 U.S., at 487).

The Ninth Circuit's decision that, based on the facts pleaded, Petitioners lacked absolute immunity for the conduct alleged in this case fits squarely within this Court's precedents. Petitioners' failure to establish even a rudimentary form of information clearinghouse or other practical means of complying with *Brady* and *Giglio* was clearly administrative in nature. It related to no particular case, did not fall within an adversarial role, and had no close association with trial preparation.

To use this case to leapfrog over this Court's precedent that even a prosecutor's submission of an affidavit in support of an arrest warrant in a particular case is not entitled to absolute immunity—and instead to expand absolute immunity to insulate individuals who are not involved at all in a particular case, but rather are being sued because they are responsible for broad administrative failures that led ineluctably to predictable violations of criminal defendants' previously recognized constitutional rights—would only compound the tragedy of the wrongful conviction. The potential for municipal liability

under *Monell v. City of New York Dep't. of Soc. Servs.*, 436 U.S. 658 (1978), does not provide adequate protection from these violations. Nor does the possibility of media attention, as the lack of transparency regarding internal decision-making in prosecutors' offices and political realities make it impossible to count on any meaningful deterrence from public opinion.

When a wrongfully convicted individual can show that someone in the government—who is not a prosecutor acting in an adversarial role—has violated a known constitutional right, which proximately deprived that individual of his liberty, it would be grotesquely unjust to deprive him of any ability to obtain practical redress against that governmental official.

An expansion of absolute immunity to cover governmental officials in these circumstances would shield precisely those actions whose cavalier disregard of constitutional rights and judicial decisions are most harmful to the justice system and yet, ironically, are the most easily preventable. There is no good justification for preempting a lawsuit through blanket immunity where the government actor was not in the heat of an adversary proceeding and where there was adequate time to consider which minimally sufficient steps must be taken to comply with clearly established constitutional obligations. To rule otherwise would be to remove an incentive to comply with the Constitution where such incentive would be most efficacious. And there is no reason to believe that the justice system would be threatened by giving an incentive to chief prosecutors to abide by clearly

established law. *Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985).

ARGUMENT

Perhaps the best way to approach Petitioners' arguments is to see how they would play out in the real world. If absolute immunity is granted to prosecutors for their administrative and managerial decisions—including decisions not to comply with judicially-recognized constitutional rights—none of the following individuals could be held liable for the described constitutional violations:

- A chief prosecutor who sets an office-wide policy that *Giglio* material simply is not to be disclosed.[7]

- A chief prosecutor who sets a policy establishing that deals (promises of lesser sentences in pending cases, promises not to indict, promises of financial reward, etc.) with co-operating witnesses should all be done orally (and never memorialized internally by a writing), for the purpose of making deals less likely to be discovered by either the defense or even other line prosecutors who have *Brady* obligations.

- A chief prosecutor or senior deputy who terminates an existing rule

[7] This scenario is taken from actual events in North Carolina.

requiring line deputies to keep track of deals with or benefits paid to informants and issues a new order mandating that no written records be maintained.

- A District Attorney who instructs his lab's criminalists to write reports only when there is an inculpatory match to the defendant, and to refrain from issuing a report when the data supports a finding of "exclusion." In the alternative, he could instruct the lab to report exclusions as "inconclusive."[8]

- A District Attorney who instructs his deputies always to retain a particular forensic scientist because the chief prosecutor knows she is corrupt and that she will reach whatever conclusion the prosecution wants in every case notwithstanding the objective evidence.[9]

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[8] Similar events occurred recently in California.

[9] *See, e.g., McCarty v. State*, 114 P.3d 1089 (Ok. Ct. Crim. App. 2005) (reversing a conviction based on false testimony from a police chemist who the prosecution was aware had previously given improper and negligently developed testimony).

The patent injustice and absurdity of allowing administrators to disregard constitutionally mandated obligations and rights and to issue blanket policies that blatantly infringe all defendants' rights flouts any civilized notion of due process and demonstrates the vacuity of Petitioners' plea to be extended the impenetrable shield of absolute immunity. Precedent and the horrific experience of the unfortunates in our society who have been victimized by unjust conviction—including Mr. Goldstein, who spent a quarter of a century in prison—demand a different result.

I. The Ambit of Absolute Immunity Under This Court's Decisions Is Limited.

Absolute immunity exists to allow the free exercise of judgment in the prosecution of a case. This Court ruled that a certain amount of discretion in charging decisions and "in the conduct of the trial and presentation of evidence" is necessary for the effective operation of the justice system. *Imbler*, 424 U.S., at 426. The Court has expressed particular concern about the decision to initiate a prosecution and choices regarding the presentation of witness testimony, noting that prosecutors might feel constrained to drop charges in a close case or to refrain from calling particular witnesses to the stand if those choices could later be second-guessed on pain of personal civil liability. *Id.* The fear was that the justice system would be disrupted by retrospective litigation over every aspect of a defendant's trial, and that prosecutors would be inhibited from vigorously and fearlessly pursuing their roles as advocates. *Id.* at 428.

The advocate's role has been central to the concept of absolute prosecutorial immunity as developed in *Imbler* and its progeny. Although prosecutors are entitled to absolute immunity while engaged in conduct that is "intimately associated with the judicial phase," *Imbler,* 424 U.S., at 430, this Court has specifically cautioned that provision of this form of immunity is to be "quite sparing," *Burns*, 500 U.S., at 487 (quoting *Forrester*, 484 U.S., 224). This is at least in part based upon the historical tradition of providing absolute immunity only for prosecutorial decisions that are "intimately associated with the judicial process." *Imbler*, 424 U.S., at 424. Such a historical tradition of immunity for a particular function is "necessary" for a finding of absolute immunity. *Burns*, 500 U.S., at 497-499 (Scalia, J., concurring in the judgment in part and dissenting in part). To the extent that a decision falls outside that ambit, the Court has declined to grant absolute immunity. *Kalina v. Fletcher*, 522 U.S. 118 (1998) (no absolute immunity for statements made in affidavit in support of arrest warrant because prosecutor acted as a witness, not an advocate); *Buckley*, 509 U.S., 269 (no absolute immunity for prosecutors' statements to the press or investigations prior to probable cause determination).

This Court has repeatedly emphasized the exceedingly limited scope of absolute immunity. In *Burns v. Reed*, the Court clearly distinguished between acts intrinsically related to the judicial process and administrative or investigative actions that fall outside absolute immunity's reach. 500 U.S., at 492-93. The conduct of a probable cause hearing, because it involves "appearing before a judge and presenting evidence," and the need for

discretion by the advocate, warrants absolute immunity. *Id.* But providing legal advice to police during the investigative phase of a case does not, partly because there is no history of absolute immunity in such circumstances, and also because there is little danger of "harassment and intimidation" stemming from "vexatious litigation" over legal advice given to investigating officers. *Id.* at 494. By the same token, prosecutors who act as investigators prior to probable cause determinations or who make statements to the public do not act in an advocacy role and thus do not have absolute immunity in such circumstances. *Buckley*, 509 U.S., at 259.

Of course, even when acting outside their role as advocate for the State, prosecutors nonetheless have substantial protection from liability for their actions in the form of qualified immunity. This is anything but a paper tiger. The qualified immunity defense, which provides immunity except "where an official could be expected to know that his conduct would violate statutory or constitutional rights," *Burns*, 500 U.S., at 495 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982)), has been characterized by this Court as granting immunity for "all but the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

And even where a §1983 plaintiff can overcome the daunting threshold barrier of qualified immunity, she must then carry the often difficult burdens of proving all of the elements of the constitutional violation in question, as well as proving that such violation was the legal or proximate cause of the plaintiff's damages. *See City*

of Canton, 489 U.S., at 389-91; *West*, 487 U.S., at 48-50; *Martinez*, 444 U.S., at 277. In this case, for example, one can anticipate Petitioners raising questions as to (1) whether Petitioners' failure to set up an information clearinghouse or other procedure to ensure all line prosecutors' access to impeachment material concerning informant witnesses itself amounts to a violation of what was then a well-established constitutional requirement, (2) whether the failure to do so was intentional, deliberately indifferent, or merely negligent, and (3) whether, as a factual matter, any such violation was the proximate or legal cause of Mr. Goldstein's wrongful conviction and incarceration. Such issues as these (depending on the facts) may provide legitimate grounds for contention and a fair basis for litigation. But we submit that to pretermit Mr. Goldstein's opportunity even to present his proof (including that based on a grand jury investigation of Petitioners' office) through application of absolute immunity would be inconsistent with this Court's cases, unjust, and unwise.

II. The Court Below Correctly Held That Petitioners' Failure To Comply With *Giglio*'s Mandate Was Fundamentally Administrative In Nature and Beyond the Scope of Absolute Immunity.

Every trial attorney knows that impeachment information is absolutely essential to an effective cross-examination in a criminal trial and to the ultimate goal of arriving at a just result. This Court has previously recognized the importance of cross-examining a witness who has cooperated with the government in exchange for leniency because of the substantial danger of false testimony. *Bruton v.*

United States, 391 U.S. 123, 136 (1968). However, false testimony cannot be effectively challenged, much less corrected, if defense counsel is deprived of evidence bearing on the witness's credibility. *Giglio*, 405 U.S., at 154. For the State to allow false evidence to go uncorrected has the same result as an intentional presentation of false evidence. *Id.,* at 153-54. Failure by the government to disclose impeachment evidence is therefore "incompatible with 'rudimentary demands of justice.'" *Id.,* at 153 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). Without relevant information about a witness's biases or interest, the defense cannot cross-examine that witness in the manner that our justice system presupposes.

This Court has recognized the significance of this type of evidence and the concomitant importance of the prosecution's duty to disclose it to the defense. As this Court stated in *Giglio*, this obligation falls not just upon individual attorneys, but upon the office as a whole:

> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.

405 U.S., at 154 (citations omitted).

Petitioners intentionally or with deliberate indifference failed to establish even the simplest and most basic administrative safeguards—a file box of index cards, or a handwritten log of informants and their deals—required to comply with *Giglio*, which had issued more than a decade prior to Mr. Goldstein's trial. Even if individual prosecutors strove to the utmost to comply with their obligation to turn over impeachment evidence to the defense, they were hampered by the lack of a central clearinghouse from which to obtain such information. Such a clearinghouse could have been established only by or at the direction of the high-level administrators in the office. But in the case of the Los Angeles County District Attorney's office, the problem was, with deliberate indifference, simply ignored for years, as was the *Giglio* decision itself. Meanwhile, criminal defendants, including demonstrably innocent individuals like Mr. Goldstein, were deprived of vital impeachment information about the government informants who testified against them.

The court below correctly classified Petitioners' failure as administrative action that did not qualify for absolute immunity. The failure to establish any internal system or procedures to ensure access to impeachment information concerning informants, in disregard of this Court's precedents, is not the sort of decision for which prosecutorial discretion must be protected at all costs.[10] It was not "intimately associated with the

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[10] Contrary to Petitioners' office's suggestion, Los Angeles County District Attorney Amicus Br. 6, this is not a case in which a criminal defendant challenges a decision, based on an individualized

judicial phase," *Imbler*, 424 U.S., at 430, or undertaken "in the course of [Petitioners'] role as an advocate for the State." *Buckley,* 509 U.S., at 273. The test for absolute immunity requires that the Court "evaluate the effect that exposure to particular forms of liability would likely have on the exercise of [the relevant] functions," and the party seeking absolute immunity must prove that "overriding considerations of public policy" justify the shield. *Forrester* , 484 U.S., at 224.

The establishment and implementation of a prosecutorial office's internal information sharing system occurs outside the courtroom before the trial, indeed even before the investigative phase, which, as *Buckley* notes, is itself too distant a sphere to warrant absolute immunity. 509 U.S., at 276. No particular case is at issue, for the existence of such information record-keeping predates any particular crime, and there is no entwinement with the advocate's role. Indeed, the function as to whether and how to set up information sharing procedures could be performed by a non-attorney administrator. *See id.,* at 228 (quoting *Ex parte Virginia*, 100 U.S. 339, 348 (1880)(refusing to grant absolute immunity to a judge who discriminated in jury selection because "[t]he duty of selecting jurors might as well have been committed to a private person.")). There is no judge, neutral third party, or adversarial counsel to monitor such administrative decisions,

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assessment of the case, to exclude certain impeachment information from a particular informant's file. Here, Mr. Goldstein has challenged the administrative failure to have no filing system for informant impeachment information at all.

unlike choices about presentation of evidence at trial. There is little danger that hordes of individual defendants would disrupt the justice system by second-guessing this type of prosecutorial conduct if only qualified immunity is granted; very few defendants ever even find out about such impeachment evidence, much less how the inner workings of the district attorney's office affected their ability to obtain that information at trial, and an even smaller percentage would also have invalidated convictions, as is required to bring a cognizable §1983 claim. *Heck v. Humphrey*, 512 U.S. 477 (1994). No "overriding considerations" exist to justify an extension of absolute immunity to cover administrative decisions on whether to bring internal operations into compliance with Supreme Court mandates for disseminating information.

In contrast, the potential (however remote) for individual liability should encourage district attorneys to consider and heed this Court's rulings when making administrative decisions that have global effects but do not interfere with decisions about the strategy or conduct of particular individual cases. Yet, even then, the availability of qualified immunity still protects reasonable, good-faith administrative actions. As this Court has noted, "where an official could be expected to know that his conduct would violate statutory or constitutional rights, he *should* be made to hesitate." *Id.* (quoting *Harlow*, 457 U.S., at 819). If this Court affirms the decision below, only those officials who are "plainly incompetent or knowingly violate the law" would be exposed to any potential liability. *Burns*, 500 U.S., at 495 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

III. Adopting Petitioners' Theory Of Absolute Immunity Would Allow The Worst Of The Worst To Commit Constitutional Violations With Impunity.

Strangely, Petitioners assert that there is "no meaningful difference" between actions of individual prosecutors with respect to *Brady* and the actions of a chief prosecutor concerning policies and training on how all prosecutors in the office should comply with *Brady*. "Setting prosecutorial guidelines in advance through blanket policy or specific training," they say, "is no different in effect than making such decisions in a particular case." Petitioners' Brief at 11. Nothing could be further from the truth.

Petitioners' arguments overlook the obvious and critical point that office-wide policies and training—or decisions to have no policies or training whatsoever—cover many *Brady* and *Giglio* cases, but the actions of a line prosecutor or her direct supervisor deal with only one case. This makes an enormous difference. This Court's precedents establish that balanced public policy should provide absolute immunity to line prosecutors and supervisors for their actions in individual cases but only qualified immunity to chief prosecutors whose decisions affect every prosecutor and every case. That distinction is especially appropriate where, as here, those chief prosecutors knowingly and deliberately adopt, and then maintain, policies that will cause (and already had caused) line prosecutors and supervisors to violate *Brady* and *Giglio* obligations in many cases.

To expand absolute immunity to cover administrative actions would benefit incompetent

chief prosecutors or, worse, those who through apathy or malice establish or tolerate administrative procedures that deprive defendants of constitutional rights recognized by this Court. Their more skilled or less malevolent colleagues are already shielded from liability for administrative acts by qualified immunity. To afford administrators the shield of absolute immunity would be an invitation to disaster. A malevolent, apathetic, or politically ambitious head of a prosecutor's office (or one who wants to enhance the office's conviction rate) could, with impunity, effectively deprive defendants of their liberty through administrative expedients and fiat that are not directed at the conduct of any particular trial or adversarial process, but that in purpose and effect could taint countless trials and the justice system as a whole and wrongly deprive countless defendants (like Mr. Goldstein) of their freedom for decades or their lives.

For example, a district attorney could establish an office-wide mandate requiring the routine, wholesale post-trial destruction of physical evidence that might exculpate criminal defendants with the objective of making it more difficult for innocent defendants to overturn convictions through the use of later-developed scientific or analytic tools. Or an office head might mandate the office-wide use of known, incompetent, corrupt, or malleable medical examiners to conduct autopsies during investigations, with the aim of routinely establishing findings "helpful" to the government. While such individuals might nonetheless escape civil liability under a qualified immunity standard, or on the basis that their conduct was too remote from any particular defendant's loss of liberty to warrant liability, an expansion of absolute immunity to cover

such conduct would grant a dangerous carte blanche. Absolute immunity would shield officials who deliberately or recklessly disregard or flout clear precedents of this Court that established protections for defendants' constitutional rights. If Petitioners' argument is adopted, even a District Attorney who establishes an office-wide policy of denying all impeachment information about government informants to defense counsel would be absolutely immune from suit.

Petitioners, in effect, seek to establish absolute immunity from litigation for conduct which, ironically, most warrants personal liability: that brought by a person who has been wrongfully convicted against the worst of the worst offenders—top executive officials who abuse office-wide authority to ignore and extinguish constitutional rights on a systematic basis.

The abuses exposed in the Los Angeles grand jury report in the 1990s are remarkable, considering their scope and the enormity of the harm caused to the entire criminal justice system. The failure to have any system in place led to the wholesale deception by witnesses of not only defense counsel and judges, but also individual prosecutors. The gravamen of this suit is that such abuses, foretold by *Giglio*, were present when Mr. Goldstein was wrongly convicted precisely because top officials were deliberately indifferent.

Petitioners and their amici suggest that this sort of rampant abuse, even if real and deliberate, should be protected through expansion of absolute immunity. They seek refuge in *Imbler*, but none is there to be found. *Imbler* extended a quasi-judicial,

absolute immunity to line prosecutors. It was thought that such immunity would advance justice so that the honest prosecutor could act fearlessly in advocating and not fear reprisal. Here, we are not speaking of the line prosecutor or the concerns of making decisions in the litigation of a particular case. Rather, we are speaking of top-level, executive officials who make office-wide decisions in deliberate or reckless derogation of constitutional rights.

Most importantly, granting blanket immunity to these executive decisions would have grave consequences for the administration of justice. The scandal in the Los Angeles County prosecutor's office was not the sort of rare, isolated harm contemplated by *Imbler*: a rogue prosecutor deliberately violating the rights of the accused during his trial. Rather, it was the product of a county-wide deception that affected defense counsel, judges and line prosecutors—and defendants—alike. The inaction and disregard from top officials undermined the very foundations of the justice system.

The typical justification for indemnity of line prosecutors, the furtherance of justice, is turned on its head when one speaks of indemnifying the worst of the worst through absolute immunity. The prosecutors (as amici) contend that absolute immunity should even be extended to a chief prosecutor who deliberately and willfully creates such a disruption in the justice system by issuing a directive not to disclose *Giglio* material in any cases and covering up violations that occur. *See, e.g.,* National District Attorneys Association Amicus Br. at 13. It is not clear how the honest prosecutor can act to meet the ends of justice at all in such an environment—irrespective of whether that

disruption is the product of willfulness or deliberately indifference. The corrupt, however, would prosper. Surely, qualified immunity provides more than ample protection in such circumstances.

Imbler is consistent with checks on such rogue prosecutors. The judge in the courtroom maintains order, and the constitution mandates a public trial. For the individually wronged defendant, there are the remedial powers of the trial court and appellate tribunals for redress. For top executive officials, whose decision-making is removed from individual proceedings and tribunals, no such transparency exists. The typical defendant does not understand the inner workings of prosecutors' offices; neither does the public or the media. The necessarily secret nature of how decisions are made in any prosecutor's office—good or bad—means that they are not ordinarily subject to public view. The remedial powers of courts are thus generally unavailable, unlike the context contemplated by *Imbler*. Indeed, the Los Angeles County prosecutor's office itself claims that it could not have known of the abuses taking place in its own office until 1987, although prosecutors within that office were the ones securing the confidential informants. *See* Amicus Curiae Brief in Support of Petitioners by the Los Angeles County District Attorney 5. The County's concession that the lack of controls in the 1990s led to the deception of judges underscores that the administrative decisions of top-level executives lack transparency and cannot be solved simply through criminal trials or related appellate proceedings. *Id.* Neither can they be resolved through discipline from

the state bar.[11] Absolute immunity from civil suits

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[11] Ironically, the most powerful proof that bar discipline is not an adequately effective tool to deter prosecutors from engaging in misconduct, particularly the suppression of *Brady* material, comes from studies recently completed by the California Commission on the Fair Administration of Justice (C.C.F.A.J.), a commission chaired by Petitioner John Van De Kamp.

Examining judicial decisions over the last ten years, the Commission's Prosecutorial Misconduct Report found that there had been 443 reported decisions where courts cited prosecutors for misconduct. In 53 of these cases, convictions were vacated; the remaining cases were generally affirmed on the grounds of "harmless error." Out of those 53 cases where convictions were reversed, and where California judges were therefore required, by law, to refer the prosecutors to the State Bar for discipline, judges did not refer one single case. Of no less importance, a comparison of the misconduct in the harmless error cases and the reversal cases showed that there was no significant difference in the nature of the egregious prosecutorial behavior, primarily suppression of exculpatory evidence and improper arguments. Finally, a review of all the prosecutorial misconduct cases based upon the names of the prosecutors involved showed some of the offending prosecutors had been cited by the courts for engaging in the same misconduct more than once without any bar disciplinary review being commenced. *See* C.C.F.A.J., *Reports and Recommendations*, available at http://www.ccfaj.org/reports.html. (last visited Aug. 29, 2008).

would remove a limited but necessary forum for public scrutiny of constitutional violations. The robust protection of qualified immunity conferred on executive-branch government officials would limit such claims to all but the most egregious violations. And where there are egregious violations, there *should* be liability both to provide a measure of justice and a modicum of deterrence.

IV. Potential *Monell* Liability For A District Attorney's Office Is Not A Sufficient Remedy Or Deterrent For Administrators Who Simply Ignore *Brady* and *Giglio* Or Who Knowingly And Deliberately Adopt Policies And Procedures That Will Systematically Suppress *Brady* and *Giglio* Material.

Some amici argue that absolute immunity should be extended to chief prosecutors because the existence of *Monell* liability (i.e., recourse against the municipality) in some jurisdictions is a sufficient remedy or deterrent. *See* Amicus Curiae Brief of the States 21. The first and best answer is that many District Attorneys' offices and all offices of Attorneys General have absolute, sovereign immunity under the Eleventh Amendment: there can be no *Monell* claims against them. [12] On the other hand, a chief prosecutor or Attorney General who knowingly and deliberately adopts the kind of flagrantly unconstitutional policies described above can be sued

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[12] For example, District Attorneys such as Petitioners are state officials; the City and County of Los Angeles are not liable for their actions. *Pitts v. County of Kern*, 949 P.2d 920 (1998); *Weiner v. San Diego County*, 210 F.3d 1025, 1030 (9th Cir. 2000).

in his or her individual capacity. In non-*Monell* situations, this is the only remedy for a defendant who was wrongly convicted as a direct result of policies that would obviously result in widespread *Brady* and *Giglio* violations. Even if *Monell* were available, the possibility that a municipality would have to pay for customs, policies, or practices of a chief prosecutor does not necessarily serve as much of a deterrent to the individual administrators. It is the municipality, after all, that pays. The money need not even come out of the office's budget.

For top executive officials who are deliberately indifferent to the Constitution or who act willfully to destroy individuals' rights, it is unlikely that *Monell* claims will provide any deterrence at all. Many District Attorneys are elected and hold considerable independent political power. Their tenure in office and political strength is independent of other elected officials and, indeed, often exceeds them. To suggest that claims against New York City, for example, would deter a chief prosecutor—himself a powerful executive officer—misapprehends the political landscape, particularly in New York where each of the city's district attorneys has enjoyed a far longer tenure than its Mayors and has had his own political power base. This type of constitutional violation is likely to fall disproportionately upon discrete and insular minorities with relatively little electoral power. More importantly, the vagaries of the political landscape cannot reliably determine when a high-ranking executive official will be held answerable for constitutional violations.

Equally vacuous is the argument that public censure will prevent such abuse. This argument, of course, defies experience and common sense, for it

presumes that each time there is a constitutional violation in an individual defendant's case, there will be some remarkable interest by the press in covering it, or that the public will care (as opposed to congratulating and reelecting the "overly aggressive" prosecutor). Most errors are not front page news, nor are most lawsuits. But the weakness of the argument lies not only with the mercurial nature of the press and what, from day to day, interests its readers. It ignores the harm caused by absolute immunity itself. Unanswerable to any suits at law, an official may claim with impunity, "I did nothing wrong." Even prosecutors who commit the gravest violations make that assertion, and indeed it echoes in the very proceeding before this Court. If head officials need not appear in court to explain the worst constitutional violations, it is doubtful that the press would ever learn about these problems. Indeed, if prosecutors are deliberately indifferent to this Court's mandates and the laws of the country that they are sworn to uphold, the prospect of a beat reporter showing up at the door will have little effect. An expansion of absolute immunity will only make it more likely that the press will be unable to uncover such abuses.

Civil suits against high-ranking prosecutors (who will still enjoy the exceedingly broad protection of qualified immunity) can afford some means to protect these rights. Even the few suits like Mr. Goldstein's will help assure that the closed-chambered patterns of abuse of by top-level decision-makers will not render *Giglio*'s mandates nugatory.

V. This Court Should Decline To Extend Absolute Immunity To Cover Decisions About Departmental Information Management Policy.

There is no justification for removing entirely any individual incentive for chief prosecutors to provide defendants with due process and a fair trial. Effective incentivization requires retaining at least the possibility—even if seldom invoked at all, much less successfully—that individual government officials could be held personally liable for blatant constitutional violations. To expand absolute immunity to insulate those individuals who are responsible for administrative failures that lead ineluctably to predictable violations of criminal defendants' constitutional rights under *Brady* and *Giglio* would be to compound the tragedy of a wrongful conviction by depriving the victim of a meaningful opportunity to obtain redress from those responsible. Where an individual can show that someone in the government—who is not a prosecutor acting in an adversarial role—has violated or flouted a known constitutional right and thereby deprived that individual of his liberty, it would be grotesquely unjust to deprive that individual of the ability to obtain compensation. An expansion of absolute immunity to cover such government actors in such circumstances would be to shield precisely those actions that are both most harmful to the justice system and also the most preventable. To grant absolute immunity would remove the incentive to comply with the Constitution where such an incentive would be most efficacious.

The policies a chief prosecutor chooses to adopt with respect to *Brady* and *Giglio* obligations

are not made in the heat of litigation of any one particular case, but rather as overall, considered judgments about what the customs, policies, and practices of an office ought to be. They are made with time to reflect and with the knowledge that they will cover every case and the behavior of all prosecutors as well as investigators working for the office or even crime laboratory personnel.[13] Consequently, the knowing adoption of, or failure to adopt, policies, customs, and practices by the chief prosecutor that will obviously result in constitutional violations is an extremely serious matter, far more damaging to the overall functioning of the criminal justice system than an improper decision in a particular case by a line prosecutor.[14]

It must be emphasized that by its very nature a federal civil rights case like this one necessarily involves a plaintiff who has already proven that he or she was wrongfully convicted based upon a *Brady* or *Giglio* violation and seeks to demonstrate further that the chief prosecutor was deliberately indifferent to customs, policies, or practices in the office that gave rise to such constitutional violations. This is not, as Petitioner and a number of the amici seem to believe, a situation where a chief prosecutor can be

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[13] Some District Attorney's offices oversee their own regional crime labs. *See* n.8.

[14] *Cf. Canton*, 489 U.S., at 390 (finding *Monell* liability where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need").

held liable for merely negligent conduct—recovery is not available under those circumstances. Rather, there must be deliberate indifference or recklessness by prosecutors, and even then they could be covered by qualified immunity if there was no showing of bad faith conduct that would obviously result in recurring constitutional violations.

Amici contend that if absolute immunity is not expanded, prosecutors will be unable to enforce the law or even will be unable to follow it. They claim that the prospect of lawsuits against top-level officials will inhibit line prosecutors, who enjoy absolute immunity, from making clear-headed decisions and disclosures concerning the constitutional rights of the accused and inhibit them from reporting errors as well as wrongful conduct. Were that the case, the solution would be simple: hire honest advocates. Extending absolute immunity beyond that necessary for litigation of the particular case and for heat of the moment decisions does not promote justice, but devalues the integrity of the system. It must be assumed that those who prosecute crime can make decisions that are not deliberately indifferent to or intentionally violative of constitutional protections, or are, for that matter, criminal. Protecting the decisions made by those actively engaged in litigation is one thing. But extending that protection to others more distant from the judicial process would logically lead to granting absolute immunity to an unending number of people. Police officers investigating the case, a person giving a statement, a lab analyst performing a scientific test all would now need to be granted the invincibility of absolute immunity so that the prosecutor could feel comfortable reporting their errors, or even malfeasance. Such an expansion

would be as unwarranted as it would be unhealthy for our justice system.

Petitioners and amici also raise the specter of mass disruption of prosecutors' offices due to a flood of litigants similarly situated to Mr. Goldstein. As an office dedicated to freeing the wrongly convicted, the Innocence Project is quite curious about Petitioners' and amici's concern that there will be a "flood." We note that their concern about a flood of litigation seems not to be matched by an admission that there has been a "flood" of wrongful convictions. And if there has been no flood of wrongful convictions, there certainly can be no flood of attendant civil suits under §1983.

In fact, Mr. Goldstein's path in this litigation is quite unusual and not easily replicated. He was not only wrongly accused, but wrongly convicted by a jury of his peers. His appeals failed and he remained in prison for twenty-four years. He was eventually able to prove that he was wrongly convicted and released from prison. This arduous ordeal fulfilled only the basic prerequisite for filing a claim. Claims for wrongful conviction, or derivatives of such suits, may ordinarily be filed only after one establishes the invalidity of the underlying conviction. *Heck*, 512 U.S., at 487.

Vindication of trial-based rights through vacatur and dismissal of the original conviction is only the beginning of what must be satisfied in order to prevail. The mere assertion of a constitutional violation is not enough. A wrongfully convicted individual must plead and ultimately prove the deliberate indifference to or intentional violations of established constitutional rights. But even this is

not sufficient, because he must prove that such intent or deliberate indifference came not from the line prosecutor who convicted him or even from an immediate supervisor with whom the line prosecutor consulted. Rather, as here, it must be related to an *administrative* policy that was deliberately indifferent to—or intentionally attacked—a clearly established constitutional right. And that is simply the beginning of the basis to assess whether one has a colorable claim.

Though reflexively latching onto language in *Imbler* that is to their liking, suggesting an open torrent of claims, Petitioners' and amici's argument is illusory. Careful review of the trial record could reveal no underlying constitutional violation whatsoever. Indeed, this is often the case in DNA exonerations. The wrongly convicted often have no practical means of obtaining redress except for legislatively created no-fault remedies where they exist. *See, e.g.,* 18 U.S.C. §3600A (2004).

The Innocence Project's experiences have highlighted an additional obstacle as well: in most cases, wrongful convictions cannot be revealed through DNA testing. The Innocence Project receives thousands of letters each year. Of these, only a small portion of cases can be researched to see whether DNA testing can be dispositive of innocence or guilt. Only about two percent of these cases receive assistance from the Innocence Project. For many, the evidence has been lost or destroyed, so no testing can be done at all. For others, results range from inconclusive to inclusive to exculpatory. The number of cases where wrongful conviction can be established is rather limited. For those who were convicted but nevertheless were factually innocent,

attempting to prove their innocence without the gold standard of DNA, vacatur and dismissal is much more difficult to achieve.

For those claims stemming from acquittal at trial, it becomes harder still to imagine a viable lawsuit. In addition to proving that a senior member of the prosecutor's office promulgated an order or failed to implement a policy that either intentionally or with deliberate indifference violated a known constitutional right, one would also have to establish harm. Precisely because he was found not guilty, the acquitted claimant would have an exceedingly difficult time showing that the failure to disclose *Giglio* material proximately caused the harm necessary to sustain the §1983 claim.

Mr. Goldstein's case provides a truly rare example in which all of these requirements for suit are met. The link between his wrongful conviction and the chief prosecutor's failure to establish a system for sharing *Giglio* material is obvious, and the simple solution that could have saved him even more so.

CONCLUSION

For the foregoing reasons, and those presented by the Respondent, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

The Innocence Network member organizations include the Alaska Innocence Project, Arizona Justice Project, Association in the Defence of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington, D.C., Maryland, Virginia), Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the

Public Defender, State of Delaware, Ohio Innocence Project, Pace Post Conviction Project (New York), Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandeis Innocence Project (Massachusetts), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), and the Wisconsin Innocence Project.