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 PETITIONERS

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QUESTIONS PRESENTED

1. Where absolute immunity shields an individual prosecutor's decisions regarding the disclosure of informant information in compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) made in the course of preparing for the initiation of judicial proceedings or trial in any individual prosecution, may a plaintiff circumvent that immunity by suing one or more supervising prosecutors for purportedly improperly training, supervising, or setting policy with regard to the disclosure of such information for all cases prosecuted by his or her agency?

2. Are the decisions of a supervising prosecutor as chief advocate in directing policy concerning, and overseeing training and supervision of, individual prosecutors' compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) in the course of preparing for the initiation of judicial proceedings or trial for all cases prosecuted by his or her agency, actions which are "intimately associated with the judicial phase of the criminal process" and hence shielded from liability under *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellants below): John Van de Kamp and Curt Livesay.

Respondent (plaintiff and appellee below): Thomas Lee Goldstein.

Additional defendants below (not parties to the appellate proceedings): William Collette, City of Long Beach, California; Logan Wren; County of Los Angeles; William MacLyman; and John Henry Miller.

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The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 481 F.3d 1170 (9th Cir. 2007) and is reproduced in the Appendix to the Petition for Writ of Certiorari ("App.") at 1-15. The decision of the district court denying the petitioners' motion to dismiss and the order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing en banc are unpublished and reproduced in Appendix B (App. 16-21) and Appendix C (App. 22-23) to the Petition for Writ of Certiorari.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion on March 28, 2007 and amended it on April 4, 2007 to correct a typographical error. The court denied the petitioners' petition for rehearing and rejected the suggestion for rehearing en banc on September 20, 2007. Petitioners timely filed a Petition for Writ of Certiorari in this Court on December 19, 2007 and jurisdiction is proper in this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Respondent brought the underlying action pursuant to 42 U.S.C. § 1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Respondent alleges that petitioners violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution which provide, respectively as follows:

> ***Fourth Amendment*:**
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall

not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

***Fourteenth Amendment (Section 1)*:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. The Initial Complaint.

This action arose from plaintiff and respondent Thomas Goldstein's conviction for murder in 1980 – a conviction that was vacated on federal writ of habeas corpus after Mr. Goldstein served 23 years in prison. On November 29, 2004, Mr. Goldstein filed this action in the United States District Court for the Central District of California. Trial Record ("TR") 1.[1]

[1] References to the Trial Record denote the docket entry number assigned by the district court, with internal page citations of the original document.

The central allegation of the complaint was that plaintiff had been wrongfully arrested by Long Beach police officers based upon their engineering an improper eyewitness identification and then subsequently wrongfully convicted upon that improper evidence as well as the perjurious testimony of a jailhouse informant – Edward Fink. Fink testified that plaintiff had confessed the murder to him while the two were cellmates in jail. TR 1 at 14. Plaintiff further alleged that although Fink testified at trial that he had not received any benefit for cooperating in the prosecution, that in fact Fink received a lighter sentence in other criminal proceedings based upon his providing testimony. TR 1 at 16-17.

Named as defendants were the City of Long Beach and individual police officers and detectives, as well as the County of Los Angeles. TR 1 at 1. Plaintiff contended, *inter alia*, that the County maintained a policy, custom or practice of allowing its district attorneys to use perjurious jailhouse informants to testify at trial and failing to comply with this Court's decisions in *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) mandating that a witness's receipt of a benefit for testifying be disclosed to a criminal defendant. TR 1 at 32-33; TR 14 at 19. Also named as defendants were two Los Angeles County Deputy District Attorneys whom plaintiff contended had improperly prolonged his custody by refiling criminal charges after the federal courts had granted his habeas corpus petition. TR 1 at 3, 33-34.

B. The Second Amended Complaint And Allegations Concerning Mr. Van de Kamp And Mr. Livesay.

On December 29, 2005, Mr. Goldstein filed a Second Amended Complaint, for the first time naming as defendants petitioners John Van de Kamp and Curt Livesay. Joint Appendix ("JA") 15; TR 71 at 38; Appellant's Excerpt of Record ("AER") 13. Mr. Van de Kamp was the Los Angeles County District Attorney, and Mr. Livesay his Chief Deputy, at the time Mr. Goldstein was prosecuted and convicted. JA 19-20; TR 71 at 38-39; AER 50-51. The Second Amended Complaint repeated plaintiff's general allegations concerning Fink's perjurious testimony and the failure of the deputy district attorneys at trial to discern and disclose the fact that Fink had received favorable treatment for cooperating in the prosecution.

Specifically, Mr. Goldstein alleged that two weeks prior to his own preliminary hearing, the deputy district attorney prosecuting Fink in another matter was aware that Fink would be provided with a beneficial plea bargain in the event he provided assistance with Goldstein's prosecution and that indeed, Fink's sentencing was delayed until after he was to testify at Mr. Goldstein's preliminary hearing. JA 41-42; TR 71 at 19; AER 31.

Mr. Goldstein further alleged that consistent with the "policy, practice, and custom of the Los Angeles County District Attorney's Office," the district attorney prosecuting Fink's case failed to provide

"impeachment information," i.e., the benefits Fink had been promised, to the deputy district attorneys handling Mr. Goldstein's case or to "disseminate such information regarding Fink in a manner that would inform all deputy district attorneys using Fink as an informant." JA 42; TR 71 at 20; AER 32. These failures were then repeated by a second deputy district attorney who handled Fink's sentencing and secured a reduced sentence based upon Fink's testimony in the Goldstein criminal case. JA 42-43; TR 71 at 20; AER 32. He too, failed to disclose this information to the deputy district attorneys prosecuting Mr. Goldstein, or to generally disseminate the information in a manner that would inform all deputy district attorneys who might use Fink as an informant. *Id*.

These failures were the purported result of the failure of Mr. Van de Kamp and Mr. Livesay as "primary policymakers who would make the administrative decisions of [the District Attorney's] office, including "the training of Deputy District Attorneys throughout the office as a whole." JA 45; TR 71 at 22; AER 34. Thus, plaintiff alleged that Mr. Van de Kamp and Mr. Livesay were aware of the "pervasive use of jailhouse informants within the County of Los Angeles" and had "substantial notice that false testimony by informants had occurred repeatedly" but that they had "purposefully or with deliberate indifference failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information, and

failed to train Deputy District Attorneys to disseminate information pertaining to benefits provided to jailhouse informants and other impeachment information." JA 45-46; TR 71 at 22; AER 34.

Mr. Goldstein further alleged that prior to his prosecution, Mr. Van de Kamp and Mr. Livesay had "considered the creation of a system to track the benefits provided to jailhouse informants and other impeachment information, but no such system was instituted." JA 46; TR 71 at 22-23; AER 34-35. Thus, according to plaintiff, Mr. Van de Kamp and Mr. Livesay:

> [F]ailed to create a system, failed to train and failed to supervise Deputy District Attorneys who handled jailhouse informants, to provide Deputy District Attorneys, including the Deputy District Attorneys who prosecuted Plaintiff, with information with regard to jailhouse informants, including the jailhouse informant who testified against Plaintiff, although required to do so by law.

JA 69-70; TR 71 at 39; AER 51.

Plaintiff specifically identified the "impeachment information which the defendant John Van de Kamp and defendant Curt Livesay failed to instruct representatives of the Los Angeles County District Attorney's Office to disseminate throughout the office" as including:

1. "[T]he benefits the jailhouse informant was receiving for his cooperation against a criminal defendant";

2. "[T]he jailhouse informant's history of cooperation with law enforcement"; and

3. "[O]ther factors relating to the jailhouse informant's credibility." JA 70; TR 71 at 39-40; AER 51-52.

Finally, Mr. Goldstein alleged that Mr. Van de Kamp and Mr. Livesay as the "administrators and policymakers of the Los Angeles County District Attorney's Office, were aware of the obvious risks of not creating such a system and of not training Deputy District Attorneys to disseminate this impeachment information on jailhouse informants and of the wrongful convictions that occurred as a result thereof." JA 70; TR 71 at 40; AER 52.

C. Petitioners File A Motion To Dismiss The Second Amended Complaint.

On February 1, 2006, Mr. Van de Kamp and Mr. Livesay filed a motion to dismiss the Second Amended Complaint. TR 79. They argued that the defendants' purported decisions concerning policies and training of deputy district attorneys regarding the obligation to disclose exculpatory information under *Brady* and *Giglio* were intimately related to the judicial phase of prosecution and hence were absolutely immune under this Court's decision in

Imbler v. Pachtman, 424 U.S. 409, 430 (1976). TR 79 at 7-15.

On February 17, 2006, plaintiff filed opposition, arguing that the alleged actions of Mr. Van de Kamp and Mr. Livesay were "administrative" in nature and not prosecutorial, and hence fell outside of absolute immunity. TR 80 at 3-17. The defendants filed a reply (TR 82), and on March 6, 2006, the district court entered its order denying the motion to dismiss. TR 83-84; App. 21.

Pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985), on April 5, 2006 Mr. Van de Kamp and Mr. Livesay timely filed a notice of interlocutory appeal from the district court's order. TR 85; AER 59.

D. The Ninth Circuit's Decision Affirming The Judgment.

Following briefing and oral argument, on March 28, 2007 the Ninth Circuit issued its published opinion affirming the order of the district court, subsequently amending its opinion on April 4, 2007 to correct a typographical error. App. 1-15.

The Ninth Circuit acknowledged that it had previously held that supervising prosecutors were absolutely immune from liability arising from decisions concerning whether to prosecute a particular category of cases. App. at 12; *see Roe v. City and County of San Francisco*, 109 F.3d 578, 583-84 (9th Cir. 1997). The Ninth Circuit also noted that "it may

be possible for an act to be prosecutorial in function but administrative in form," but concluded it need not decide the issue. App. at 13. This was because the court concluded that the conduct attributed to Mr. Van de Kamp and Mr. Livesay – the alleged "failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject" – was not prosecutorial, but simply "administrative." App. at 15.

The Ninth Circuit did not analyze the nature of the policies or training at issue nor the need for prosecutorial knowledge and judgment in formulating them. Instead, the court focused on the number of cases subject to such decisions, suggesting that the broader the impact of any decision the more likely it was administrative. According to the court, petitioners' alleged actions were therefore administrative because they "bear a close relationship 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." App. at 15, footnote omitted.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision is squarely at odds with the "functional approach" this Court has used in *Imbler v. Pachtman*, 424 U.S. 409 (1976), and its progeny in analyzing absolute immunity as applied to the actions of prosecutors. Under this Court's

precedents the decisions of a chief prosecutor such as a District Attorney or other supervising district attorneys concerning compliance with *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972) are necessarily closely related to the judicial process and taken squarely as a result of their responsibility as prosecutors.

First, this Court has expressly held that absolute immunity shields individual prosecutors from civil rights claims arising from the alleged failure to comply with the obligation to provide a defendant with exculpatory information under *Brady*. *Imbler*, 424 U.S. at 431 n.34. There is no meaningful basis to distinguish between actions of an individual prosecutor with respect to compliance with *Brady* and the actions of a chief advocate or supervising prosecutor in making decisions concerning polices and training that dictate the manner in which prosecutors comply with *Brady*, including disclosing impeachment information under *Giglio*.

A chief advocate such as former District Attorney Van de Kamp, or a supervising advocate such as his former assistant Mr. Livesay, inherently acts in a prosecutorial role in dictating the manner in which cases will be prosecuted through the formulation of policies and practices as well as specifying the training of their prosecutors. Setting prosecutorial guidelines in advance through blanket policy or specific training is no different in effect than making such decisions in a particular case. It requires professional knowledge and prosecutorial judgment. By necessity,

a chief prosecutor must channel his or her prosecutorial decisions through the formulation of policies and training, but the decisions nonetheless remain prosecutorial in nature.

Second, the same compelling policies that necessitate recognition of absolute immunity for individual frontline prosecutors, similarly require application of absolute immunity to bar claims against chief advocates and supervising prosecutors for decisions concerning implementation of polices and training regarding *Brady* and *Giglio*.

In granting individual prosecutors absolute immunity for actions closely related to the judicial process this Court has recognized that prosecutors are inevitably the target of retaliatory and vexatious claims. The danger of being dragged into protracted litigation is exponentially multiplied for chief advocates and supervising prosecutors whose agencies may prosecute hundreds or even thousands of cases a year. The specter of even defending such burdensome claims may deter chief advocates from exercising independent prosecutorial judgment and impair vigorous enforcement of the law.

Moreover, individual frontline prosecutors, even if immune from liability for their conduct, will invariably be dragged into such litigation against their supervisors since their testimony will be necessary to establish what occurred in the prosecution and the reasons for their actions. This is the very sort of time-intensive judicial inquiry and entanglement in litigation that *Imbler* sought to foreclose. Failure to

afford chief advocates and supervisory prosecutors absolute immunity for decisions concerning policy and training regarding prosecutorial duties, including the duty to disclose exculpatory evidence under *Brady* and *Giglio*, will spawn a flood of litigation ensnaring prosecutors at every level, to the detriment of all in performing their vital duties.

For these reasons, the judgment of the Ninth Circuit must be reversed with directions to dismiss the action as to Mr. Van de Kamp and Mr. Livesay based on absolute immunity.

ARGUMENT

CHIEF ADVOCATES AND SUPERVISING PROSECUTORS ACT AS ADVOCATES OF THE STATE AND PERFORM A PROSECUTORIAL FUNCTION CLOSELY RELATED TO THE JUDICIAL PROCESS IN MAKING DECISIONS ON POLICY AND TRAINING CONCERNING THE MANNER IN WHICH PROSECUTORS IN ALL CASES COMPLY WITH THE OBLIGATION TO PROVIDE EXCULPATORY EVIDENCE UNDER *BRADY V. MARYLAND* AND *GIGLIO V. UNITED STATES*.

A. Prosecutors Are Entitled To Absolute Immunity When They Perform Functions That Are Closely Related To The Judicial Process.

1. *Imbler v. Pachtman*.

In *Imbler v. Pachtman*, 424 U.S. 409 (1976), this Court held that a state prosecutor was entitled to

absolute immunity from a suit by a former criminal defendant under 42 U.S.C. § 1983 alleging that the prosecutor had knowingly used false testimony and had allowed a defense expert to suppress exculpatory evidence. 424 U.S. at 427. The Court observed that under American common law, prosecutors were immune from liability for malicious prosecution based on considerations of public policy stemming from the fear that the availability of a potential tort claim arising from any unsuccessful prosecution might deter prosecutors in the independent and vigorous performance of their duties. *Id*. at 423. The Court then concluded that the "same considerations of public policy that underlie the common-law rule" similarly supported absolute immunity for prosecutorial actions under § 1983. *Id*. at 423-25. The Court held:

> If a prosecutor had only a qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the

> State's advocate. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Id. at 424-25 (citations omitted).

The Court found that qualified immunity would not afford sufficient protection in the context of claims arising from the prosecutorial process. This is because the number and complexity of potential issues that arise in a typical criminal proceeding such as "possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and – ultimately in every case – the likelihood that prosecutorial misconduct so infected a trial as to deny due process" would necessarily "require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury." *Id*. at 425. The result is that "the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials." *Id*.

Finally, the Court observed that although the rule of absolute immunity leaves "the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," providing a prosecutor with lesser, qualified immunity "would prevent the vigorous and fearless performance of the prosecutor's duty

that is essential to the proper functioning of the criminal justice system." 424 U.S. at 427-28. Moreover, the Court noted that the absence of civil liability for such conduct does not leave the public "powerless to deter misconduct or to punish that which occurs," since prosecutors would remain subject to criminal liability as well as "unique, among officials whose acts could deprive persons of constitutional rights," subject to "professional discipline by an association of his peers." *Id*. at 429.

2. The Court has uniformly applied *Imbler's* "functional approach" to claims of absolute immunity.

The considerations identified by *Imbler* as relevant to determining whether a particular function performed by prosecutors necessitates the broad protection of absolute immunity – the likelihood of vexatious, retaliatory claims, the availability of judicial process to discern and correct transgressions and the presence of other restraints on the actor in question – have been repeatedly reaffirmed by the Court.

In *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985), the Court found that the Attorney General was not entitled to absolute immunity from liability arising from his authorization of a warrantless wiretap for the purposes of gathering intelligence regarding the activities of a radical group that purportedly threatened national security. The Court reaffirmed *Imbler*

in observing that the Attorney General would be immune for acts taken in a prosecutorial capacity, but concluded that performing the "national security function" did not implicate the same policy considerations and was, hence, subject solely to qualified immunity. *Id*. at 520-21.

In so holding, the Court noted that "the performance of national security functions does not subject an official to the same obvious risks of entanglement in vexatious litigation as does the carrying out of the judicial or 'quasi-judicial' tasks that have been the primary wellsprings of absolute immunities." *Id*. at 521. This is because the "judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser," and "[i]t is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict." *Id*. at 521-22. In contrast, the national security tasks "are carried out in secret; open conflict and overt winners and losers are rare. Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation." *Id*. at 522.

The Court further observed that unlike the prosecutorial forum where "the judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results" there were no "built-in restraints on the Attorney

General's activities in the name of national security. . . . " *Id*. at 522-23.

In *Burns v. Reed*, 500 U.S. 478 (1991), the Court held that a State prosecutor's actions in "appearing before a judge and presenting evidence in support of a motion for a search warrant – clearly involve[d] the prosecutor's 'role as advocate for the State,' rather than his role as 'administrator or investigative officer. . . . '" *Id*. at 491. These sorts of "pretrial court appearances by the prosecutor in support of taking criminal action against a suspect present a substantial likelihood of vexatious litigation that might have an untoward effect on the independence of the prosecutor." *Id*. at 492. Hence, "absolute immunity for this function serves the policy of protecting the judicial process, which underlies much of the Court's decision in *Imbler*." *Id*. Moreover, as in *Imbler*, "the judicial process is available as a check on prosecutorial actions at a probable-cause hearing" and such "'safeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct.'" *Id*. at 492 (quoting *Butz v. Economou*, 438 U.S. 478, 512 (1978)).

In contrast, the Court found that the prosecutor's act of providing legal advice to the police was not shielded by absolute immunity at common law (*Id*.), and that "[a]dvising the police in the investigative phase of a criminal case was not so 'intimately associated with the judicial phase of the criminal process' that it qualifies for absolute prosecutorial immunity."

Id. at 493 (citation omitted). The Court noted that the risk of vexatious litigation arising from providing such legal advice was substantially less than prosecution of criminal charges. This is because a prosecutor appearing in court or filing a pleading is a conspicuous target, but a suspect or criminal defendant is less likely to be aware of a prosecutor's role in providing investigative advice to the police. 500 U.S. at 494. In addition, the Court observed that the judicial process would not act as a check on "out-of-court activities by a prosecutor that occurr[ed] prior to the initiation of a prosecution, such as providing legal advice to the police," particularly where a criminal suspect is not eventually prosecuted. *Id*. at 496.

In *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Court reaffirmed its "functional approach" to absolute immunity in holding that a state prosecuting attorney was not absolutely immune from liability under section 1983 arising from the prosecutor's alleged participation in a scheme to fabricate evidence implicating the plaintiff during the investigation of potential criminal charges, as well as liability arising from statements the prosecutor made when subsequently announcing an indictment. In so holding, the Court rejected the plaintiff's contention that absolute immunity attached solely to the initiation of a prosecution in presenting the State's case in court. *Id*. at 272. Citing *Imbler* and *Burns*, the Court observed:

> We expressly stated that "the duties of the prosecutor in his role as advocate for the

> State involve actions preliminary to the initiation of a prosecution and actions apart from the court room," and are nonetheless entitled to absolute immunity. We noted in particular that an out-of-court "effort to control the presentation of [a] witness' testimony" was entitled to absolute immunity because it was "fairly within [the prosecutor's] function as an advocate." To be sure, *Burns* made explicit the point we had reserved in *Imbler*: A prosecutor's administrative duties and those investigatory functions *that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings* are not entitled to absolute immunity. We have not retreated, however, from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity. Those acts must include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made.

Id. at 272-73 (emphasis added, citations omitted).

The Court thus drew a distinction between the prosecutor's role as an advocate in evaluating evidence and interviewing witnesses in preparation for trial and the actions of a prosecutor working with, or in place of, the police "in searching for the clues and

corroboration that might give him probable cause to recommend that a suspect be arrested. . . . " *Id*. at 273. With respect to the remarks at the press conference, the Court found they fell outside of absolute immunity because they "have no functional tie to the judicial process just because they are made by a prosecutor." *Id*. at 277. As the Court emphasized, the "press conference does not involve the initiation of a prosecution, the presentation of the State's case in court, or actions preparatory for these functions." *Id*. at 278.

In *Kalina v. Fletcher*, 522 U.S. 118 (1997), the Court held that a State prosecutor was absolutely immune from section 1983 liability arising from the preparation and filing of a charging document and motion for arrest warrant, finding that the actions fit squarely within *Imbler*. 522 U.S. at 130-31. However, the Court held that the prosecutor was entitled to only qualified immunity for purportedly making false statements as a complaining witness in a supporting affidavit since "[t]estifying about facts is the function of the witness, not of the lawyer." *Id*. at 130. The risk of vexatious litigation was minimal, because attorneys were not required to serve as complaining witnesses, and could avoid liability by simply allowing others to fulfill this role. *Id*. at 129-31.

The Court has also applied the "functional approach" in analyzing absolute immunity claims outside the context of State criminal prosecutors. *See Butz v. Economou*, 438 U.S. 478, 515 (1978) (agency counsel prosecuting administrative proceedings were

entitled to absolute immunity under *Imbler* since such proceedings were functionally equivalent to criminal prosecution); *Briscoe v. Lahue*, 460 U.S. 325, 341-43, 345-46 (1983) (witness entitled to immunity for performing key function of the judicial process in providing testimony at trial); *Harlow v. Fitzgerald*, 457 U.S. 800, 806-13 (1982) (function of presidential assistants in providing advice to president does not justify absolute immunity); *Forrester v. White*, 484 U.S. 219, 229 (1988) (judge not entitled to absolute immunity from section 1983 claim by probation officer who asserted judge demoted and discharged her on account of gender because in making basic employment decisions a judge functions no differently than any other executive officer).

As we discuss, application of this Court's "functional approach" to absolute immunity makes it clear that Mr. Van de Kamp and Mr. Livesay are entitled to absolute immunity in this action.

B. The Decisions Of Chief Advocates And Supervising Prosecutors In Directing The Manner In Which Cases Are Prosecuted, Including Compliance With *Brady* And *Giglio* Through Setting Policies And Training, Are Prosecutorial In Nature, Closely Related To The Judicial Process And Therefore Subject To Absolute Immunity.

It is presumed that qualified immunity is ordinarily sufficient to protect government employees from unwarranted litigation arising from performance of

their duties, and a defendant bears the burden of establishing that he or she is entitled to absolute immunity. *Forrester*, 484 U.S. at 224; *Burns*, 500 U.S. at 486; *Butz*, 438 U.S. at 506. Although the Court has been "quite sparing" in applying absolute immunity to various functions, *Forrester*, 484 U.S. at 224, *Burns*, 500 U.S. at 487, nonetheless, as noted above, the Court has repeatedly reaffirmed that the actions of government attorneys in undertaking tasks intimately related to the prosecution of cases are closely related to the judicial process and hence common-law based policy considerations compel application of absolute immunity. The actions plaintiff attributes to Mr. Van de Kamp and Mr. Livesay in this case squarely fall within the prosecutorial function, are closely related to the judicial process and the defendants are therefore protected from liability by absolute immunity.

1. Prosecutorial decisions concerning compliance with *Brady* and *Giglio* are subject to absolute immunity.

Although defendants vigorously dispute both the factual and legal basis for Mr. Goldstein's underlying claims against them, nonetheless they acknowledge that for purposes of the absolute immunity analysis the Court must make "two important assumptions about the case: first, that petitioners['] allegations are entirely true; and, second, that they allege constitutional violations for which § 1983 provides a remedy."

Buckley, 509 U.S. at 261; *see also Kalina*, 522 U.S. at 122.

To that end, Mr. Goldstein alleges that Mr. Van de Kamp, as District Attorney, and Mr. Livesay, as his assistant, were policymakers for the Los Angeles County District Attorney's Office prior to and at the time Mr. Goldstein was prosecuted. JA 68-71; AER 50-52; TR 71 at 38-40. He asserts that these two defendants were responsible for implementing policy and training to assure that Deputy District Attorneys were able to comply with the general obligation to disclose its exculpatory information pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and more particularly, to disclose information as to whether a prosecution witness had received consideration for providing testimony in a criminal proceeding under *Giglio v. United States*, 405 U.S. 150 (1972). JA 68-71; AER 50-52; TR 71 at 38-40. According to Mr. Goldstein, because defendants decided not to enact particular policies or provide particular training, the prosecutor in his case never learned that Fink, the jailhouse informant, had been promised, and had received, beneficial sentencing in exchange for providing testimony against Mr. Goldstein. JA 71; AER 52; TR 71 at 40. As a result, Mr. Goldstein was improperly convicted in violation of due process. JA 68-69; AER 50-51; TR 71 at 38-39.

In *Giglio*, this Court held that the failure of the prosecution to disclose information bearing on the credibility of a prosecution witness violated due process so as to necessitate a new trial. 405 U.S. at

154-55. The requirement that the prosecution disclose such impeachment evidence stems from this Court's decision in *Brady* concerning the obligation of the prosecution to disclose evidence that is favorable to the accused and material to either guilt or punishment. *Id*. at 154; *Brady*, 373 U.S. at 87; *United States v. Bagley*, 473 U.S. 667, 674-76 (1985).

In *Imbler*, this Court held that claims arising from an individual prosecutor's alleged failure to disclose exculpatory information under *Brady* was simply the flip side of a claim that the prosecutor suppressed evidence, and hence was shielded from absolute immunity since the conduct arose in the course of presenting the prosecution's case. 424 U.S. at 431 n.34. In subsequent cases, the Court has reaffirmed the scope of *Imbler* as encompassing "a charge that false testimony ha[s] been offered as well as a charge that exculpatory evidence ha[s] been suppressed." *Kalina*, 522 U.S. at 124; *see also Burns*, 500 U.S. at 486 ("*Imbler* involved . . . the alleged knowing use of false testimony at trial and the alleged deliberate suppression of exculpatory evidence.") Consistent with *Imbler* and its progeny, the circuit courts have also found that claims against an individual prosecutor based upon a failure to comply with *Brady* are subject to absolute immunity. *See*, *e.g.*, *Moore v. Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995); *Reid v. New Hampshire*, 56 F.3d 332, 336 (1st Cir. 1995); *Hill v. City of New York*, 45 F.3d 653, 661-62 (2d Cir. 1995); *Carter v. Burch*, 34 F.3d 257, 262-63 (4th Cir. 1994); *Broam v. Bogan*, 320 F.3d 1023, 1030

(9th Cir. 2003); *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999); *Buckley v. Fitzsimmons*, 20 F.3d 789, 794 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995) (noting plaintiff "does not allege concealment [of impeachment evidence under *Giglio*] at trial, which would in any event be comfortably within the scope of absolute prosecutorial immunity under *Imbler v. Pachtman*" (citation)).

2. Decisions concerning policy and training governing disclosure of exculpatory information under *Brady* and *Giglio* are functionally indistinguishable from decisions made by an individual prosecutor with respect to those obligations.

In its opinion, the Ninth Circuit offers no principled basis for distinguishing between an individual prosecutor's failure to disclose exculpatory information under *Brady* and *Giglio*, and the action of chief advocates and supervising prosecutors such as Mr. Van de Kamp and Mr. Livesay in purportedly failing to properly direct the manner in which individual prosecutors comply with these obligations through implementation of policies and training. First, the court ignores the fact that the very policies and training at issue are necessarily "closely related" to the prosecutorial and judicial process. The duty to disclose exculpatory information under *Brady* and *Giglio* arises *only* in the context of prosecution. Thus, decisions regarding the alleged policies and training are not matters simply "'to *some* degree related to

trial preparation. . . . '" App. at 14 (emphasis added). Rather they are *directly* related to such preparation – the entire focus of any such policies or training is the prosecutorial phase of criminal proceedings.

For example, in addressing any perceived problems with the use of jailhouse informants a chief advocate or supervising prosecutor could simply enact a blanket policy prohibiting use of such witnesses. It is difficult to conceive of an act more directly related to a criminal prosecution, than dictating the witnesses that may be called in support of the State's case. That is what advocates do. Decisions concerning policies and training as to other aspects of prosecution, such as compliance with *Brady* and *Giglio*, are no less prosecutorial in nature.

Policies and training are nothing more than a substitute for the personal involvement of a chief advocate or a supervising attorney in each individual prosecution. Logistics in most prosecutorial offices, particularly large prosecutorial agencies, make it virtually impossible for a chief prosecutor or even higher level supervising prosecutors to be involved in every single case at every moment on a personal basis. However, setting policy and training standards allow them to impose their prosecutorial judgment in all of the cases prosecuted within their office.

Nor does it matter that these decisions are made, via policy and training, in advance of any particular prosecution. As the Court emphasized in *Buckley*, the *Imbler* Court recognized that "'the duties of the

prosecutor in his role as advocate for the State involve actions preliminary to the initiation of prosecution and actions apart from the courtroom,'" and that such actions are subject to absolute immunity. *Buckley*, 509 U.S. at 272 (quoting *Imbler*, 424 U.S. at 431 n.33).

The Ninth Circuit also offers no reason why it makes a difference whether a chief advocate or supervising prosecutor makes a decision with respect to one case or many cases. As this Court has made clear, the focus is always on the nature of the function performed by the defendant seeking immunity. Here, Mr. Van de Kamp and Mr. Livesay are taken to task for decisions made with respect to setting policy and training standards that directly impact the prosecution of criminal cases. It is not incidental that they are the individuals making those decisions – they make those decisions as prosecutors and as advocates on behalf of the State in the course of criminal proceedings. Setting of prosecutorial standards and training within a particular office, is not a task normally performed by someone else. *Buckley*, 509 U.S. at 273-74 (prosecutor only had a qualified immunity for "investigative functions normally performed by a detective or police officer"); *Kalina*, 522 U.S. at 130-31 (prosecutor did not have absolute immunity for executing an affidavit in support of a probable cause determination because "[t]estifying about facts is the function of the witness, not of the lawyer"); *Forrester*, 484 U.S. at 228-29 (hiring of probation officer was not a judicial act for purposes of

absolute immunity, since in hiring and firing a judge is no different than any other "Executive Branch official who is responsible for making such employment decisions").

Moreover, the creation of such policies and training standards requires the "exercise of the judgment of the advocate." *Kalina*, 522 U.S. at 130. Although the Ninth Circuit characterizes defendants' alleged transgression as a failure to "develop a policy of sharing information regarding jailhouse informants" and failure to "provide adequate training and supervision on this issue" (App. at 11), it ignores the fact that creating such polices and training standards requires an understanding of the applicable law and its impact on the manner in which cases are prosecuted. Indeed, while plaintiff alleged that petitioners failed to assure that information concerning an informant's past cooperation with law enforcement or receipt of benefits for testifying be shared within the office, plaintiff also asserts that defendants failed to provide information concerning "*other* factors relating to the jailhouse informant's credibility." JA 69-70; TR 71 at 39-40; AER 51-52 (emphasis added). Yet, determining what these "other" factors may be necessarily requires an advocate's review and application of the governing law in the context of a criminal prosecution.

In finding the actions of Mr. Van de Kamp and Mr. Livesay to be "administrative," the Ninth Circuit suggested that the broader the application of any prosecutorial policy or training, the more likely that

it would be "administrative" in nature and hence not fall within absolute immunity. Consistent with its prior decisions, the court suggested (but did not decide) that in contrast, a chief prosecutor's decisions made with respect to a particular category of cases might still fall within absolute immunity. App. at 13. But as noted, the mere fact that a chief prosecutor makes decisions in advance with respect to prosecution of all cases does not make his or her actions any less prosecutorial in nature. Indeed, it is difficult to envision how a line can be meaningfully drawn between a policy or training decision directing the manner of prosecution in every case within an office, and those with respect to prosecution of a particular case or even group of cases.

Nor does the Ninth Circuit's decision articulate any standard as to when a supervising prosecutor's actions become administrative as opposed to prosecutorial in nature. A complex criminal prosecution may involve a lead prosecutor and numerous deputies. Under *Imbler*, it must follow that the lead prosecutor would be absolutely immune from any liability based upon his purportedly assigning particular tasks to particular attorneys or failure to supervise or train those attorneys with respect to that particular prosecution. Similarly, it is common for large prosecutorial offices to create task forces to prosecute a particular category of cases. At what point, based on what number of cases within his or her supervisory authority, does the lead prosecutor of a task force make the transition from prosecutor to an "administrator"

whose actions fall outside the scope of absolute immunity?

Neither the Ninth Circuit nor the cases that it cites in support of its conclusion that decisions concerning policies and training are necessarily "administrative," offers any meaningful definition of the term nor precise standards for it application. *Walker v. City of New York*, 974 F.2d 293, 295-96 (2d Cir. 1992), did not involve a claim of absolute immunity, but rather municipal liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), and hence had no reason to, and did not consider, the factors pertinent to this Court's "functional approach" to absolute immunity. *Carter v. City of Philadelphia*, 181 F.3d 339 (3d Cir. 1999), focused largely on whether the prosecuting agency constituted an arm of the State for purposes of the Eleventh Amendment, and its analysis of absolute immunity and the question of whether particular acts are administrative or prosecutorial is conclusory and without analysis.

The absence of any meaningful standards for determining when conduct is "administrative" for purposes of falling outside the protection of absolute immunity underscores the fact that the Ninth Circuit has essentially used the term as shorthand to describe conduct that falls outside of the immunity. Yet, there's no indication in this Court's decisions that even assuming conduct can be described as "administrative" that it necessarily falls outside the scope of absolute immunity. In the course of prosecuting

individual cases an attorney may undertake numerous tasks that could be described as administrative, indeed clerical in form, such as making witness lists, keeping track of material subject to *Brady* disclosure, or taking notes, that are nonetheless directly related to prosecution of the case and hence subject to absolute immunity. *Cf. Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435 (1993) ("We do not doubt that judicial notetaking as it is commonly practiced is protected by absolute immunity, because it involves the kind of discretionary decisionmaking that the doctrine of judicial immunity is designed to protect").

In fact, the Court has carefully stated only that: "A prosecutor's administrative duties and those investigatory functions *that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings* are not entitled to absolute immunity." *Buckley*, 509 U.S. at 273 (emphasis added). Accordingly, "administrative duties" that *do* "relate to an advocate's preparation for the initiation of a prosecution for judicial proceedings" would still be subject to absolute immunity.

At the end of the day, under the "functional approach" to absolute immunity applied by this Court, the key question is whether the decisions attributed to Mr. Van de Kamp and Mr. Livesay are "closely" or "intimately" related to the judicial process. The alleged decisions concerning policies and training directing the manner in which prosecutors within their office would comply with their obligations under *Brady* and *Giglio* – obligations that arise

solely in the context of the prosecution of cases – are necessarily closely related to the judicial process and taken in their role as advocates for the State. Hence, plaintiff's action against Mr. Van de Kamp and Mr. Livesay is barred by absolute immunity.

C. The Proper Functioning Of The Judicial Process And Independent And Vigorous Exercise Of Prosecutorial Judgment Requires Application Of Absolute Immunity To Chief Advocates And Supervising Attorneys.

1. Prosecutors at every level – both front-line and supervisory – would be entangled in litigation if chief advocates and supervising attorneys are not afforded absolute immunity for decisions concerning prosecutorial policy and training.

The same common law based policy considerations that underlie the Court's recognition of absolute immunity for individual prosecutors in carrying out their prosecutorial functions equally compel application of the immunity to chief advocates and other supervising attorneys with respect to decisions directing the manner in which cases are prosecuted through creation and implementation of policy and training. As the Court has repeatedly observed, because of the adversarial nature of criminal proceedings, with clear-cut winners and losers, prosecutors are an inevitable target for retaliation. *Imbler*, 424 U.S. at 424-25; *Mitchell*, 472 U.S. at 521-22. It is this concrete, pervasive threat of vexatious and retaliatory suits

that serves as the common law rationale for absolute immunity. *Imbler*, 424 U.S. at 422-23; *Forrester*, 484 U.S. at 225-26.

This exposure is even greater for chief advocates such as a District Attorney, Attorney General, or United States Attorney whose office prosecutes hundreds, and in some cases thousands of cases each year. Litigants foreclosed from suing courtroom prosecutors for alleged misconduct will simply retool their claims 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.

Nor would qualified immunity afford an appropriate degree of protection since, as this Court has recognized, assertion of that defense in the context of a criminal proceeding typically requires an intensive factual rehashing of the underlying criminal proceedings. *Imbler*, 424 U.S. at 425. Indeed, allowing an end-run around absolute prosecutorial immunity by simply suing a chief advocate or supervising attorney subjects not only those prosecutors but frontline courtroom prosecutors to participation in follow-on litigation. Regardless of whether they themselves may be held liable, the courtroom prosecutors would, after all, still have to testify 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. This is the very entanglement in litigation that absolute immunity was intended to foreclose.

The specter of such lawsuits would improperly chill the prosecutorial discretion and judgment of chief prosecutors and supervisors in making decisions concerning the manner in which cases are prosecuted through creation and implementation of policy and training. Fear of being the target of protracted litigation arising from cases involving particular types of witnesses, whether they be jailhouse informants or anyone with a criminal record that might create greater exposure to potential *Brady* and *Giglio* claims would inevitably tempt even the most conscientious prosecutorial officials to simply bar use of such witnesses as a general matter, regardless of the value of such witnesses in a particular case. Indeed, as the D.C. Circuit noted in *Haynesworth v. Miller*, 820 F.2d 1245 (D.C. Cir. 1987), *abrogated on unrelated point by Hartman v. Moore*, 547 U.S. 250, 256, 265-66 (2006), the "very real" threat of potential liability "indubitably would inhibit the performance of prosecutorial duties" by making chief advocates and supervising attorneys "timid about formulating policy" and perhaps causing them to "forego policy making altogether." 820 F.2d at 1270 n.199.

Similarly, the prospect of frequent entanglement in "policy and training" claims against their supervisors will inevitably impact the decision making and actions of frontline prosecutors as well. As this Court has recognized, the specter of such suits improperly chills independent prosecutorial judgment and deters vigorous prosecution of the laws. *Imbler*, 424 U.S. at

427-28. This unacceptable burden on the judicial process mandates recognition of absolute immunity.

2. Mechanisms other than suits for damages provide a sufficient check on the decision making of chief advocates and supervising attorneys concerning prosecutorial policy and training.

The absence of a potential damage remedy against chief advocates or supervising attorneys under section 1983 does not mean that the conduct of chief advocates or supervising attorneys in performing the sort of prosecutorial functions alleged here would be insulated from review or correction. As this Court has observed, the criminal justice system itself provides multiple procedures and avenues of review to discern and correct errors or improprieties that may have led to an improper conviction. *Mitchell*, 472 U.S. at 522-23. Further, chief advocates and supervising prosecutors, like all other prosecutors, are subject to professional regulation, and in cases of egregious misconduct, even criminal liability. *Imbler*, 424 U.S. at 429. In addition, many chief advocates are selected by the electorate, and hence are accountable to the voters for their performance of their prosecutorial duties thus adding another level of scrutiny and accountability. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) (accountability to electorate checks legislative abuse and ameliorates harsh effect of absolute immunity of legislators); *Mitchell*, 472 U.S. at 522-23 (noting the lack of accountability or

"built-in restraints" on Attorney General's national security activities militates against grant of absolute immunity for such actions).

Whatever harsh result may obtain in individual cases, on balance these checks on potential misconduct provide ample deterrence. The alternative of exposing chief advocates and supervising prosecutors to potential liability for decisions concerning the manner in which cases are prosecuted through the formulation of policies and training, threatens prosecutorial independence and guarantees a flood of lawsuits ensnaring prosecutors at every step of the organizational ladder. As this Court has recognized, these are precisely the circumstances necessitating absolute immunity.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the judgment of the United States Court of Appeals for the Ninth Circuit be reversed with directions to reverse the order denying Mr. Van de Kamp and Mr. Livesay's motion to dismiss and to enter an order dismissing the action.

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Respectfully submitted,

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