No. 07-854

IN THE

Supreme Court of the United States

JOHN VAN DE KAMP, ET AL.,
Petitioners,

v.

THOMAS LEE GOLDSTEIN,
Respondent.

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

BRIEF FOR THE STATES OF KANSAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING & THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether supervising prosecutors are entitled to absolute immunity from money damages in a suit under 42 U.S.C. § 1983 when the trial prosecutors they are supervising have absolute immunity?

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INTEREST OF THE *AMICI* STATES

The States have a paramount interest in whether supervisory prosecutors—a group that includes the Attorneys General of the fifty States, the District of Columbia, and several U.S. territories—are protected by absolute prosecutorial immunity when the trial attorneys they supervise allegedly commit constitutional errors or violations in circumstances where the trial attorneys themselves have absolute prosecutorial immunity.

The question whether supervising prosecutors share the same absolute immunity as the trial prosecutors they supervise is of great practical importance to the Attorneys General. To the best *Amici* can determine, *every* Attorney General's office has the power to handle criminal prosecutions in at least some circumstances. Furthermore, it appears that *every* Attorney General's office actually handles criminal prosecutions, at least occasionally, and many do so on a daily basis.

Not surprisingly, the Attorneys General offices are organized in multiple ways, with varying responsibilities for criminal prosecutions. In some, the Attorney General's office handles *all or virtually all* criminal prosecutions, examples being Alaska, Delaware, and Rhode Island, as well as some U.S. territories such as American Samoa, the Northern Mariana Islands, and the U.S. Virgin Islands. *State Attorneys General Powers and Responsibilities*, Ch. 17 ("Criminal Justice"), at 5 (Emily Myers & Lynne Ross eds., National Association of Attorneys General 2d ed. 2007) (hereinafter "*Attorneys General Powers*"). Most, if not all, states authorize the Attorney General to handle a criminal prosecution

when a local prosecutor has a conflict of interest, *id.* at 6, or specifically requests the assistance of the Attorney General, for example in a complex case. *Id.* Many states give their Attorneys General jurisdiction to prosecute violations of specific areas of the law such as antitrust, consumer fraud, environment, health care fraud, and securities fraud. *Id.* at 5-6. And some states give their Attorneys General jurisdiction over serious crimes such as murder and major felonies. *Id.* at 5.

Although the prosecutorial models for Attorneys General offices vary, two indisputable facts emerge from a review of the States. **First**, *all* Attorneys General appear to have the authority to handle criminal prosecutions in at least some circumstances. **Second**, considered cumulatively, the Attorneys General are actively prosecuting hundreds, if not thousands, of criminal cases on a daily basis.

Thus, the question whether supervisory prosecutors will be accorded the same absolute immunity as the trial prosecutors they oversee is of considerable practical importance to the Attorneys General and other supervisory prosecutors in their offices, such as division chiefs, high-ranking deputies, and task force leaders. Adopting the Ninth Circuit's approach in this case would open all high-ranking state prosecutors to significant new potential liability, a result both unfair and unwarranted. Indeed, the Ninth Circuit's holding invites vexatious, harassing litigation by criminal defendants against supervisory prosecutors. Simply put, the Attorneys General and other supervisory state prosecutors are likely—indeed, probable—targets for Section 1983

litigation if the Ninth Circuit's decision in this case is not reversed.

SUMMARY OF THE ARGUMENT

1. The absolute immunity of prosecutors in suits under 42 U.S.C. § 1983 is derived in large part from absolute judicial immunity. *Imbler v. Pachtman*, 424 U.S. 409 (1976). Like the judges who preside, *Pierson v. Ray*, 386 U.S. 547 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978), and the witnesses who testify, *Briscoe v. LaHue*, 460 U.S. 325 (1983), in judicial proceedings, prosecutors receive absolute immunity for their participation in the judicial phase of the criminal process. *Imbler*. The reasons for this absolute immunity are several, but primary among them is the protection of the judicial process by precluding vexatious and retaliatory civil lawsuits against those participating in that process, including judges, witnesses, and prosecutors. Absolute prosecutorial immunity is just as important to the public and the criminal justice system as it is to the individual prosecutors who may be the targets of vexatious and retaliatory civil litigation by criminal defendants.

2. For situations such as this case, the Court should articulate two bright-line rules. These rules are faithful both to the common law immunity tradition the Court has adopted in Section 1983 actions and to the policies further justifying absolute prosecutorial immunity. **First**, when a Section 1983 plaintiff alleges that a trial prosecutor committed a constitutional violation that affected the integrity, accuracy, or fairness of a criminal trial, the trial prosecutor is entitled to absolute immunity because

such claims necessarily are "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. **Second**, supervisory prosecutors must be accorded at least the same level of immunity as the trial prosecutors they oversee.

a. The first rule is effectively stated and applied in all of the Court's prior prosecutorial immunity cases. That said, making it clear to the lower courts that there is such a bright-line rule would avoid unnecessary litigation and ensure that absolute prosecutorial immunity is given its proper scope. Any claim that necessarily calls into question the fairness or accuracy of the plaintiff's previous criminal prosecution also necessarily implicates the "judicial phase" of the criminal process. This rule would complement and operate much like the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), which precludes the use of Section 1983 to bring claims that necessarily implicate the validity of a criminal conviction or sentence, unless and until the conviction or sentence has been invalidated or called into question in some other forum.

b. The second rule follows from the first—indeed, the Ninth Circuit's decision in this case is inherently illogical in light of the first rule. It makes no sense to grant absolute immunity to a street-level official who could even act with malice in violating constitutional rights, while simultaneously granting that person's supervisor—or someone only indirectly supervising through one or more layers of mid-level supervisors—a lesser immunity. Paradoxically, the Ninth Circuit acknowledged that a supervisory prosecutor is entitled to absolute immunity if that person participates directly in the challenged actions of the

trial prosecutor. *See Goldstein v. City of Long Beach*, 481 F.3d 1170, 1174 (9th Cir. 2007). That being the case, it is both illogical and unfair to then adopt a rule giving *less* immunity to a supervisory prosecutor whose only "fault" may have consisted of ignorance, inattention or negligence.

If a Section 1983 plaintiff alleges a constitutional violation sufficiently connected to the judicial phase of the criminal process to justify granting absolute immunity to the trial prosecutor, then that same connection to the judicial phase of the criminal process automatically should accord the same immunity to supervisory prosecutors. Thus, the correct analysis really boils down to a single step: if the alleged constitutional violation is intimately associated with the judicial phase of the criminal process, then *any and all* prosecutors either *directly or indirectly* involved in the situation are entitled to absolute prosecutorial immunity.

c. Beginning with *Imbler*, the Court consistently has recognized that there are more appropriate remedial measures if and when prosecutors commit constitutional mistakes or violations, including post-trial motions, direct appeal of a wrongful conviction, post-conviction proceedings challenging a wrongful conviction, the prospect of attorney disciplinary proceedings against prosecutors who fail to live up to high ethical standards, and—in an egregious case—perhaps even the possibility of criminal charges against a prosecutor who has violated a defendant's constitutional rights. The answer is not a civil suit for money damages against supervisory prosecutors.

3. Finally, Respondent's claim in this case—that Petitioners failed to adopt a policy that would have prevented potential *Giglio* violations—should fail as a matter of law, even apart from the question of absolute prosecutorial immunity.

a. First, nothing in the Court's opinion in *Giglio v. United States*, 405 U.S. 150 (1972), declares or suggests that the Court was imposing a constitutional duty on supervising prosecutors to adopt policies or provide training to line prosecutors regarding potential *Giglio* violations. Instead, *Giglio*, like its ancestor, *Brady v. Maryland*, 373 U.S. 83 (1963), recognizes a trial right, a violation of which is held against the state itself, not against various individual prosecutors who may have some level of involvement in a particular case.

b. Second, the Court has never declared that "supervisory liability" even exists under Section 1983. Many Circuits have allowed such liability, but the Circuits generally have done so in cases involving officials who have only *qualified immunity*, such as police and public school officials. The situation in which a supervisor oversees officials who have absolute immunity presents different considerations, and those considerations cut against imposing supervisory liability on prosecutors.

Vicarious liability is not permitted in Section 1983 actions, nor has the Court ever recognized negligence as a basis for Section 1983 liability. Thus, a negligent failure to adopt a policy to prevent *Giglio* violations, or a negligent failure to provide training to trial prosecutors regarding *Giglio* violations, could not be a constitutional violation. Yet, negligence

appears to be the very essence of Respondent's claim against Petitioners. Moreover, if a supervisory prosecutor is a "final policymaker" for a county or city, the municipal entity itself may be liable for the prosecutor's actions, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), making supervisory liability duplicative and unnecessarily expansive.

ARGUMENT

I. ABSOLUTE PROSECUTORIAL IMMUNITY APPLIES IN THIS CASE

A. The Court's Prior Decisions Establish That Prosecutors Are Entitled To Absolute Immunity For All Functions "Intimately Associated With The Judicial Phase Of The Criminal Process"

The text of Section 1983 does not speak to immunities. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (Section 1983 "creates a species of tort liability that on its face admits of no immunities"); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) ("Section 1983, on its face admits of no defense of official immunity.") Nonetheless, the Court has assumed that Congress did not intend to abrogate immunities that government defendants enjoyed under the common law when Section 1983 was enacted in 1871. *E.g., Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (Congress did not intend to abrogate immunities "well grounded in history and reason"); *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (Section 1983 not meant "to abolish wholesale all common-law immunities"); *Burns v. Reed*, 500 U.S. 478, 484 (1991) (same). Thus, the Court has looked to 19th

century common law to determine the immunities of Section 1983 defendants. *E.g., Tenney*, *supra*; *Pierson*, *supra*; *Kalina v. Fletcher*, 522 U.S. 118 (1997).

In Section 1983 cases against prosecutors, the Court has recognized that two common law absolute immunities—judicial immunity and defamation immunity—apply to prosecutorial functions. *See*, *e.g.*, *Imbler*, 424 U.S. at 421-23, *Burns*, 500 U.S. at 499-501 (Scalia, J., concurring in part and dissenting in part). In particular, though, the Court's prosecutorial immunity cases make clear that absolute prosecutorial immunity has a close and significant connection to—indeed, essentially derives from—the well-recognized absolute judicial immunity of the common law.

In *Imbler* the Court held that prosecutors have absolute immunity for all functions "intimately associated with the judicial phase of the criminal process." 424 U.S. at 430. Thus, prosecutors acting as advocates in court proceedings necessarily take on the established common law absolute judicial and defamation immunities. *Burns*, *supra*; *Kalina*, *supra*. The Court's subsequent prosecutorial immunity cases all apply the *Imbler* absolute immunity standard.

But in *Imbler* the Court expressly declined to address the question whether prosecutors are entitled to absolute immunity for functions either "investigative" or "administrative" in nature. *Kalina*, 522 U.S. at 125 (in *Imbler*, the Court "put to one side 'those aspects of the prosecutor's responsibilities that cast him in the role of an administrator or investigative officer rather than that of advocate'")

(quoting *Imbler*, 424 U.S. at 430-31). Subsequent cases have addressed prosecutor immunity in the context of "investigative" functions, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Burns*, *supra*, *Buckley*, *supra*, *Kalina*, *supra*, but no decision of the Court has squarely addressed how to draw a line between prosecutorial functions "intimately associated with the judicial phase of the criminal process" and those that are instead only "administrative" in nature.

By virtue of Respondent's creative efforts to evade the absolute immunity accorded the trial prosecutor here, this case squarely presents the question of what constitutes an "administrative" function in the prosecutorial context. That question can only be answered by reference to the fundamental proposition *Imbler* established: "administrative" prosecutorial functions cannot include any function "intimately associated with the judicial phase of the criminal process." As explained below, absolute prosecutorial immunity is both necessary and appropriate here for the very same reasons the Court first recognized such immunity in *Imbler*.

B. Office Policies Addressing The Conduct Of Criminal Cases, As Well As The Training Of Trial Prosecutors Regarding The Conduct Of Criminal Cases, Necessarily Are Intimately Related To The Judicial Phase Of The Criminal Process

1. The Court's "Functional" Approach To Section 1983 Immunities Makes Clear That Absolute Prosecutorial Immunity Applies Here

The Court consistently utilizes a "functional" approach in determining individual immunities in Section 1983 cases. *See, e.g.*, *Forrester v. White*, 484 U.S. 219, 224 (1988) ("Running through our cases, with fair consistency, is a 'functional' approach to immunity questions"); *Kalina*, 522 U.S. at 122, 124-31; *Buckley*, 509 U.S. at 268-78; *Imbler*, 424 U.S. at 430-31. Under this approach, "[the Court] examine[s] the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and [the Court] seek[s] to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Forrester*, 484 U.S. at 224.

The functional approach eschews simplistic characterization of prosecutor activities as "prosecutorial" or "administrative" in an abstract or general sense. Instead, the Court's focus is on whether the activity is likely to give rise to vexatious and harassing litigation by criminal defendants if prosecutors are not protected by absolute immunity. Thus, a critical reference point in determining the "function" a prosecutor is performing is the potential

effect that *not* providing absolute immunity may have on a prosecutor's freedom to make decisions regarding matters such as whether to commence a prosecution, what charges to bring, and the evidence to use at trial. *Imbler*, 424 U.S. at 423-31.

Importantly, the functional approach does not examine the prosecutor's activity in the abstract. Rather, the focus properly and necessarily is on the precise subject matter to which the activity relates, the purpose of the prosecutor's activity, and the activity's significance when viewed in the overall context of the criminal justice system. *Imbler* is an illustration. There, the Court evaluated whether a prosecutor's request that police refrain from questioning a witness until after the witness testified at trial was "investigation" or "advocacy." 424 U.S. at 430 n.32. The Court did not simplistically focus on the prosecutor's action as "a direction to police officers engaged in the investigation of the crime" *id.*, but instead explained that, "[s]een in its proper light . . . [the prosecutor's] request was an effort to control the presentation of his witness' testimony, a task fairly within his function as an advocate." *Id.*

Proper application of the Court's functional approach in this case compels the conclusion that the Petitioners should be afforded absolute prosecutorial immunity. Petitioners' alleged activity should not be viewed only in abstract terms as general "administrative" tasks of supervision, policymaking, and training. At the highest level of generality, it would be relatively easy to label many, if not most, supervisory prosecutor activities "administrative." But the Court has made clear that Section 1983 immunity determinations cannot be made at such

abstract and high levels of generality. *See, e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987).

Rather, Petitioners' alleged failings in this case must be examined more carefully and in context. Here, Respondent complains about the handling of potential impeachment evidence that he has a constitutional right to obtain. With that focus in mind, the Court must consider both the role that such evidence plays in the criminal justice system and whether the threat of litigation concerning prosecutors' involvement in potential *Giglio* violations would impair the ability of prosecutors to perform their duties with the freedom and courage that the judicial system requires. As described below in Part III.A., *Giglio* is essentially a trial right, and thus policies or training regarding such rights necessarily are intimately related to the judicial phase of the criminal process. A threat of vexatious civil litigation by criminal defendants over such a trial right could create timidity on the part of prosecutors in regard to the handling and disclosure of impeachment and exculpatory evidence, ultimately compromising our adversarial system.

The Ninth Circuit erred in large part because that court applied the functional approach at a high level of generality. The Ninth Circuit failed to evaluate the supervision, policymaking, and training at issue in light of both the subject matter involved and the relationship of those activities to the larger context of criminal prosecutions. *Goldstein*, 481 F.3d at 1175-76. The Ninth Circuit also failed to evaluate the Petitioners' alleged activities in light of the question whether civil litigation arising from such activities could impair prosecutorial decision-making. *Id.*

Instead, the Ninth Circuit placed heavy weight on the mere fact that the "policy" at issue was not related to a specific prosecution, erroneously concluding that Respondent's claim had "a close connection only to how the District Attorney's Office was managed . . . ." *Id.*

The Ninth Circuit in effect adopted a rule that making general policy or providing training, unlike decisions in particular criminal prosecutions, is *per se* an "administrative" function protected only by qualified immunity. The reality is that drawing such a line between "prosecutorial" and "administrative" functions is both artificial and ill-advised. Instead, supervisory prosecutors often are involved in activities that have both "prosecutorial" and "administrative" aspects, just like judges are frequently involved in activities that are both "judicial" and "administrative" in a general sense. The D.C. Circuit, unlike the Ninth Circuit, recognizes that there is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as policy for general application." *Haynesworth v. Miller*, 820 F.2d 1245, 1269 (D.C. Cir. 1987) (footnotes omitted), *abrogated on other grounds by Hartman v. Moore*, 547 U.S. 250 (2006).

The inevitable uncertainty of Section 1983 litigation against supervisory prosecutors would frustrate a primary goal of absolute prosecutorial immunity, which is to permit prosecutors to execute their public duties without fear of vexatious and retaliatory civil litigation over their decisions. *Imbler*, 424 U.S. at 423-31; *Haynesworth*, 820 F.2d at 1269-70 ("The threat of litigation [for the policy

maker] is very real, and indubitably would inhibit the performance of prosecutorial duties."). Under the Ninth Circuit's approach, supervisory prosecutors could face vexatious and retaliatory Section 1983 litigation no matter what they do in terms of adopting policies and providing training. "If supervisory officials understand that they could invite litigation by their attempts to cabin prosecutorial zeal through the issuance of policy statements, they might well opt to leave individual prosecutors without clear guidance or control." *Haynesworth*, 820 F.2d at 1270 n.199. On the other hand, if supervisors do not adopt policies and provide extensive training on every aspect of criminal prosecutions, they also may be sued. Such results are neither necessary nor desirable.

2. The Ninth Circuit Incorrectly Defined "Administrative" Functions In The Prosecutorial Immunity Context

For purposes of Section 1983 absolute immunities, "administrative" functions must be limited to those that do not directly or indirectly relate to the substantive duties and responsibilities of the government defendant. Thus, when a judge demotes or dismisses staff, the judge is engaged in "administrative" functions rather than a "judicial" act, because such conduct is not directly or even indirectly related to the judge's decisions in pending cases. *See Forrester*, 484 U.S. at 224. But if a judge orders an officer to bring the attorney in a pending case before the judge, such activity is necessarily related to the judicial process, cloaking the judge with absolute immunity. *Mireles v. Waco*, 502 U.S. 9 (1991) (*per curiam*).

The same analysis should apply to prosecutors. Policies, procedures, and training regarding the conduct of criminal prosecutions necessarily implicate the core substantive duty of prosecutors—to enforce the laws through the criminal justice system. In effect, the adoption of policies and the provision of training are a substitute for the personal involvement of supervisory prosecutors in each and every criminal case. In jurisdictions of any size, it is impossible for supervisory prosecutors to be personally involved in every case.

It is no answer to say that absolute immunity protects only the actual withholding or presentation of evidence at trial in violation of a constitutional rule. Such an approach, which the Ninth Circuit effectively adopted here, makes it far too easy to circumvent absolute prosecutorial immunity. *Cf. Buckley*, 509 U.S. at 283 (1993) (Kennedy, J., concurring in part and dissenting in part) ("Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves."); *id.* at 284 ("Just as *Imbler* requires that the decision to use a witness must be insulated from liability, it requires as well that the steps leading to that decision must be free of the distortive effects of potential liability, at least to the extent the prosecutor is engaged in trial preparation.")

Ultimately, the conclusion is inescapable that Petitioners' alleged failings in this case are on the same side of the absolute immunity line as the judge's conduct in *Mireles v. Waco* (ordering officer to bring an attorney before the judge), but on the

opposite side of the line as the judge's conduct in *Forrester v. White* (demoting and dismissing a staff member). The adoption of policies regarding criminal prosecutions, as well as the training of prosecutors handling cases, are simply not "administrative" functions in the meaning of this Court's prior immunity decisions. Instead, such functions are intimately associated with the judicial phase of the criminal process, and thus protected by absolute prosecutorial immunity.

II. APPLYING LESS THAN ABSOLUTE PROSECUTORIAL IMMUNITY IN THIS CONTEXT WILL LEAD TO ILLOGICAL RESULTS AND ADVERSE EFFECTS ON THE CRIMINAL JUSTICE SYSTEM

A. Supervisory Prosecutors Must Be Accorded At Least The Same Level Of Immunity As The Trial Prosecutors They Oversee

As a strong general rule, the Court has accorded Section 1983 defendants the same immunity when they are performing the same function. This is a natural result of the Court's focus on "function," not status, supra, Part I.B.1, in individual immunity cases. Thus, police and prosecutors both receive qualified immunity when performing "investigative" functions. *See, e.g.*, *Burns*, *supra*; *Buckley*, *supra*. And witnesses receive the same immunity they would have received at common law—absolute immunity for "testifying" witnesses and qualified immunity for "complaining" witnesses—irrespective of whether the witness is a prosecutor, police officer, other government official, or a private citizen. *See, e.g.*, *Kalina, supra*; *Briscoe*, *supra*.

The same equality of immunity should operate here. Respondent complains of a *Giglio* violation. Necessarily, whoever commits or contributes to a *Giglio* violation, a trial right, is engaged in the same function. It makes no sense to hold that a trial prosecutor who fails to disclose impeachment evidence receives absolute immunity—a proposition that no one disputes in this case—while a supervisor who may be ignorant, inattentive, or at worst negligent, receives a lesser immunity.

Because *Giglio* and *Brady* violations involve trial rights, they necessarily are intimately associated with the judicial phase of the criminal process. Indeed, *Imbler* itself involved a *Brady* claim, and the Court applied absolute immunity to that claim. 424 U.S. at 409, 431 n.34; *see also*, *Buckley v. Fitzsimmons*, 20 F.3d 789, 794 (7th Cir. 1994), *cert. denied*, 513 U.S. 1085 (1995) (a *Giglio* violation "would in any event be comfortably within the scope of absolute prosecutorial immunity under *Imbler*"). Any claim that necessarily calls into question the fairness or accuracy of the plaintiff's previous criminal prosecution also necessarily implicates the "judicial phase" of the criminal process. This rule would complement and operate much like the rule of *Heck v. Humphrey*, 512 U.S. 477 (1994), which precludes the use of Section 1983 to bring claims that necessarily implicate the validity of a criminal conviction or sentence, unless and until the conviction or sentence has been invalidated or called into question in some other forum.

A *Brady* or *Giglio* violation is intimately associated with the judicial phase of the criminal process no matter whom the Section 1983 plaintiff may sue, nor

precisely how the violation occurred. Ultimately, there is only one constitutional violation attributable to the government, not several violations committed by several different individual prosecutors. As a result, all prosecutors the plaintiff might sue as Section 1983 defendants must be accorded at least the same immunity as the trial prosecutor who handled the criminal case.

B. The Ninth Circuit's Approach Leads To Illogical Results And Invites Vexatious, Retaliatory Litigation

The anomalous potential result of the Ninth Circuit's holding is that a supervisor who actively and even maliciously participates in the violation of a criminal defendant's trial rights is entitled to absolute immunity. But a supervisor who fails to adopt an office policy, adopts an inadequate policy, fails to train trial prosecutors about a potential violation, or inadequately trains them, has only qualified immunity. That result is backwards.

The appropriate rule in this context is to accord the supervising prosecutor at least the same level of immunity as the trial prosecutor. Otherwise, any alleged violation by trial prosecutors can be turned into a claim against supervisors, necessarily leading to vexatious and retaliatory litigation. The ironic and illogical result of the Ninth Circuit's rule is that it is possible, if not probable, that a less culpable actor—*e.g.*, a supervisor who may have no actual knowledge of a trial prosecutor's conduct—will have less immunity than the more culpable trial prosecutor who willfully or even maliciously violates a criminal defendant's trial rights. Indeed, the Ninth Circuit

conceded that a supervisory prosecutor who actively participates in a constitutional violation has absolute immunity, *Goldstein*, 481 F.3d. at 1174, but nonetheless reached the illogical conclusion that a supervisor whose fault may be ignorance, inattention, or negligence only has qualified immunity.

Opening the door to "failure to supervise or train" claims against supervising prosecutors will lead to harassing and unfounded litigation. The targets of such suits will be not just local district attorneys, but also state Attorneys General, the Attorney General of the United States, and the many deputies and division chiefs assisting those individuals.

Unlike absolute immunity, qualified immunity cannot always be resolved easily and early in the litigation process. Facts, and factual disputes, become much more important in the qualified immunity context, at a minimum making discovery much more likely in such cases, and in some cases requiring a trial for final resolution. The Court long has emphasized that much of the value and substance of absolute immunity is lost if a Section 1983 defendant who is entitled to such immunity is compelled to go through discovery and even trial, irrespective of whether the defendant ultimately prevails. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("absolute immunity . . . is effectively lost if a case is erroneously permitted to go to trial"); *Imbler*, 424 U.S. at 419 n.13 ("absolute immunity defeats a suit at the outset"). Those consequences need not and should not be imposed on supervisory prosecutors in cases such as this one.

C. Significant Measures Remain To Remedy And Deter Prosecutor Mistakes And Misconduct

Going back to *Imbler*, the Court has recognized that absolute immunity is appropriate for prosecutor activities intimately associated with the judicial phase of the criminal process in part because significant other measures remain available to remedy and deter prosecutor errors or misconduct. Section 1983 suits against prosecutors for money damages are not the answer. "The ultimate fairness of the operation of the [judicial] system itself could be weakened by subjecting prosecutors to § 1983 liability." *Imbler*, 424 U.S. at 427.

The Court has recognized that there are many other ways to deal with prosecutor error and misconduct, all more appropriate than permitting civil suits for money damages against participants in the judicial process. In particular, *Imbler* identified five such measures: (1) the remedial powers of the criminal trial judge; (2) direct appeal of criminal convictions; (3) post-conviction proceedings, both state and federal; (4) disciplinary measures against prosecutors for violations of any ethical rules; and (5) in an extreme case, potential criminal prosecution of a prosecutor under statutes such as 18 U.S.C. § 241 and 18 U.S.C. § 242. *See* 424 U.S. at 427, 429.

Further, though not specifically identified in *Imbler*, injunctive claims against prosecutors may sometimes be appropriate. Absolute immunity only protects prosecutors against claims for money damages. It is not a defense, for example, to injunctive claims seeking to restrain enforcement of an unconstitutional law or rule. *See*, *e.g.*, *Ex Parte*

Young, 209 U.S. 123 (1908); *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719 (1980).

Also available is the possibility of municipal liability. Since *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), cities and counties have been subject to suit under Section 1983 as "persons" within the meaning of the statute. Though municipalities cannot be held liable on a *respondeat superior* basis, they can be liable when an "official policy or custom" causes a constitutional deprivation. Unlike individual officials, municipal entities have *no immunity* from suit, either personal, *Owen v. City of Independence*, 445 U.S. 622 (1980), or constitutional, *Lincoln County v. Luning*, 133 U.S. 529 (1890).

Thus, if a supervisory prosecutor is a "final policymaker" for a municipality, *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988), then that official's decisions may create policy that results in constitutional harm for which the municipality is liable under Section 1983. (Of course, if the supervisory prosecutor is considered a "state"—rather than municipal—official, then no municipal liability arises. *McMillian v. Monroe County*, 520 U.S. 781 (1997)). Such a "policy" may include the "failure to train or supervise" municipal employees. *City of Canton v. Harris*, 489 U.S. 378 (1989). The point is that a municipality itself may sometimes be subject to the remedies of Section 1983, providing yet another reason not to expand Section 1983 liability to include individual supervisory prosecutors.

"[S]afeguards built into the judicial system tend to reduce the need for private damages actions as a means of controlling unconstitutional conduct." *Butz*

v. Economou, 438 U.S. 478, 512 (1978). Moreover, the judicial system and the public have substantial interests at stake here. "The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system." *Imbler*, 424 U.S. at 426.

Thus, because of absolute immunity, litigants may not sue the judge who presided over their trial or other judicial proceeding, *Pierson v. Ray*, 386 U.S. 547 (1967), *Stump v. Sparkman*, 435 U.S. 349 (1978), the prosecutor who presented the government's case, *Imbler*, the witnesses who testified in those proceedings, *Briscoe v. LaHue*, 460 U.S. 325 (1983), the grand jurors who indicted them, *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047, 1050-51 (8th Cir. 1992), nor, on a somewhat different basis, the public defenders who represented them. *Polk County v. Dodson*, 454 U.S. 312 (1981). The same justifications for such absolute immunities apply with at least as much force in this case.

III. "SUPERVISORY LIABILITY" IS NOT APPROPRIATE HERE

Respondent's claim in this case—that the Petitioners failed to adopt a policy that would have prevented potential *Giglio* violations should fail as a matter of law for two reasons independent of the question of prosecutorial immunity.

A. *Giglio v. United States*, 405 U.S. 150 (1972), Does Not Impose A Constitutional Duty On Supervisory Prosecutors To Create Policies Or Provide Training

Giglio v. United States, like its foundation, *Brady v. Maryland*, 373 U.S. 83 (1963), effectively creates a

trial right—the right to examine and use evidence in the government's possession that may impeach government witnesses. A *Giglio* violation occurs when the trial prosecutor fails to disclose such evidence at the appropriate time. But, it is the state itself which commits the violation, not an individual official. *Giglio*, 405 U.S. at 154 ("The prosecutor's office is an entity and as such it is the spokesman for the Government.")

Nothing in *Giglio* declares or suggests that the Court was imposing a constitutional duty on supervising prosecutors to adopt policies or to train trial prosecutors regarding potential *Giglio* violations. *See*, *e.g.*, 405 U.S. at 154 (noting only that large prosecution offices "can" establish procedures and regulations to ensure compliance if they choose). Rather, it is the very withholding of the evidence that is the constitutional wrong. And that wrong is attributed to the government as a whole for purposes of reversing a defendant's conviction. *Giglio*, 405 U.S. at 154 (the act of any individual prosecutor "must be attributed, for these purposes, to the Government"). Because there necessarily is only a single constitutional violation, it is not clear that a supervisory prosecutor who does not personally withhold nor order the withholding of evidence even can commit a *Giglio* violation.

B. Section 1983 "Supervisory Liability" Should Not Apply When Those Being Supervised Have Absolute Immunity

The Court has never addressed the question whether "supervisory liability" is a basis for Section 1983 liability. (Indeed, the question here is like the

second question presented in *Ashcroft v. Iqbal*, No. 07-1015, *cert. granted*, 76 U.S.L.W. 3654 (U.S. June 16, 2008), a *Bivens* suit against high-ranking federal law enforcement officials, including the nation's former chief prosecutor).

Perhaps the only case even to implicate such a claim was *Rizzo v. Goode*, 423 U.S. 362 (1976), in which plaintiffs sued various supervisory city officials for alleged police misconduct. The Court was highly skeptical of the plaintiffs' claims. In particular, the Court observed that the district court made findings of fact regarding instances of misconduct by individual police officers, but "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisory city officials] express or otherwise showing their authorization or approval of such misconduct." *Id.* at 371. Reversing a grant of injunctive relief, the Court continued, "[i]nstead, the sole causal connection . . . was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur . . . ." *Id.* at 371. Reversing a grant of injunctive relief, the Court observed that a "heated dispute between individual citizens and certain policemen has evolved into an attempt by the federal judiciary to resolve a 'controversy' . . . over what steps might, in the Court of Appeals' words, '(appear) to have the potential for prevention of future police misconduct." *Id.* (quoting *Goode v. Rizzo*, 506 F.2d 542, 548 (3d Cir. 1974)).

It appears that most of the Circuits have read *Rizzo* to allow "supervisory liability" in at least some Section 1983 cases. Typically, though, "supervisory

liability" cases in the lower courts have involved claims about the supervision of police or public school officials who themselves have only *qualified immunity*. *See, e.g.*, Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation*, Vol. 1B, Claims and Defenses § 7.19 ("Supervisory Liability") at 124-31 (John Wiley & Sons 3d ed. 1997) (collecting cases).

Prosecutors present a very different situation than police and school officials. Indeed prosecutor "supervisory liability" cases are rare in the Circuits, with good reason. Unlike prosecutors, police officers and public school officials—whether street level or the very top executive—have only qualified immunity. It is one thing to hold that the supervisor of a police officer or school official who only has qualified immunity also receives only qualified immunity. There is a parity in such a conclusion that is at least arguably consistent with the Court's focus on "function" in immunity cases, and supervisory liability in such cases does not necessarily lead to illogical results.

But the very notion of "supervisory liability" makes little sense when the supervisor is overseeing street-level officials who themselves have absolute immunity. Such a rule defies the Court's general rule of equality of immunity based on equality of function. Further, such a rule would invite the evasion of the street-level officials' absolute immunity by the simple expedient of naming supervisors as Section 1983 defendants and arguing that their failure to "supervise" or "train" is protected only by qualified immunity. For these reasons and others, Respondent's "supervisory liability" claim should fail

as a matter of law independent of the prosecutorial immunity determination.

Furthermore, allowing the imposition of supervisory liability in Section 1983 cases against prosecutors raises difficult but critical questions regarding the standards for such liability. One problem is a state of mind requirement. The Court's cases cannot be more clear or emphatic, ever since *Monell*, *supra*, that *respondeat superior* is not a basis for imposing liability under Section 1983. Thus, in Section 1983 cases, supervisory prosecutors cannot be held vicariously liable for the constitutional mistakes or violations of the trial prosecutors they supervise, nor can they be held liable simply because they had the authority to control those prosecutors.

Likewise, the Fourteenth Amendment's Due Process Clause cannot be violated by merely negligent conduct. *Daniels v. Williams*, 474 U.S. 327 (1986). So a negligent failure to adopt a policy to prevent *Giglio* violations, or a negligent failure to train trial prosecutors regarding *Giglio* violations, could not be a due process violation. Indeed, the Court has rejected negligence as a sufficient basis for imposing liability under Section 1983 on a municipal entity for "failure to train" employees. *See, e.g.*, *City of Canton v. Harris*, 489 U.S. 378 (1989); *cf. Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997) (no "negligent hiring" claims under § 1983). Moreover, although the Court has held that "deliberate indifference" is sufficient for "failure to train" liability against municipal entities, the Court at the same time has declined to decide whether deliberate indifference or recklessness would establish a due process violation. *See, e.g.*, *Daniels v.*

Williams, 474 U.S. 327, 334 n.3 (1986); *Davidson v. Cannon*, 474 U.S. 344, 349 (1986) (Brennan, J., dissenting); *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202 n.10 (1989).

In any event, the Court faces a similar question in *Ashcroft v. Iqbal*, No. 07-1015, *cert. granted*, June 16, 2008, with the difference that *Iqbal* is a *Bivens* suit against a former federal Attorney General, rather than a Section 1983 suit. That said, the Court long has held that the immunities available to individual defendants are the same in Section 1983 and *Bivens* suits, *Butz v. Economou*, 438 U.S. 478, 500 (1978), with the exception of the President alone, who generally has absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (unlike state governors, *Scheuer v. Rhodes*, 416 U.S. 232 (1974)). Thus, a decision that the suit in *Iqbal* cannot be maintained may have some bearing on the supervisory liability aspect of this case.

Rather than opening the door to "supervisory" liability for prosecutors, which necessarily will lead to vexatious and retaliatory litigation, the Court should apply absolute prosecutorial immunity here.

CONCLUSION

The Ninth Circuit's decision threatens supervisory prosecutors, including the Attorneys General, their deputies, and their division chiefs, with the prospect of vexatious and retaliatory civil litigation brought by criminal defendants. For the reasons set forth above, the judgment should be reversed.

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