No. 07-854

IN THE

Supreme Court of the United States

JOHN VAN DE KAMP and CURT LIVESAY,

Petitioners,

- against -

THOMAS LEE GOLDSTEIN,

Respondent.

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

BRIEF OF THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS VAN DE KAMP AND LIVESAY

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES

Cases:

INTEREST OF AMICUS CURIAE[1]

The New York State District Attorneys Association ("NYSDAA") is a state wide organization composed of elected county District Attorneys from throughout New York State, as well as assistant district attorneys, a membership body that is approximately 2,000 prosecutors. Members of the NYSDAA are from some of the largest prosecutor offices, i.e., New York County, which employs hundreds of prosecutors, and some of the smallest, which may have only a single prosecutor. Many of these offices are staffed, in some by a significant number, by career prosecutors who serve as supervisors responsible for office wide training, establishment of policies, and supervision of trial prosecutors.

If affirmed, the decision in *Goldstein v. City of Long Beach et al.*, 481 F.3d 1170 (9th Cir. 2007) ("*Goldstein*"), to strip supervising prosecutors of absolute immunity in a civil suit under 42 U.S.C. § 1983 (2002) ("§1983") for an alleged failure to train, set policy or supervise with regard to the disclosure obligations of a trial prosecutor under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972) ("*Brady-Giglio*"), will negatively affect the daily work of many NYSDAA members. Many of them have prosecutorial duties that involve the supervision and implementation of

[1] The parties have consented to the filing of this *amicus curiae* brief. Further, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons or entities other than *amicus curiae* made any monetary contribution to the preparation or submission of this brief.

training and policy that directly impact past and current criminal trials and prosecutions.

SUMMARY OF ARGUMENT

The modern supervising prosecutor has many responsibilities from hiring and firing, budgeting, advising police and supervising their investigations, and directing and supervising the initiation and conduct of criminal cases in court. In *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976), this Court, using a functional approach, required absolute immunity for prosecutorial advocatory conduct that is "intimately associated with the judicial phase of the criminal process . . . ."

When through training and promulgation of rules and regulations the supervising prosecutor directs the initiation and pursuit of criminal cases throughout an office, he or she is performing a role as intimately associated with the advocacy function as the conduct of the trial prosecutor directed by such rules and who, under *Imbler*, is accorded absolute immunity. Thus, this role of the supervising prosecutor is equally clothed with absolute immunity. Indeed, unless pertaining to personnel or budget, or to "investigation" or supervising one, the supervising prosecutor's role in an office is devoted exclusively to advocacy. While *Goldstein* properly recognized *Imbler's* functional approach, it completely misapplied it in concluding that the prosecutorial conduct at issue, the establishment of regulations and training for office compliance with its *Brady-Giglio* obligations in all its cases, did not possess absolute immunity from civil suit.

No prosecutorial action is more intimately related to the advocatory function and the judicial process than the fulfillment of the *Brady-Giglio* obligation by the American prosecutor. That obligation reflects the prosecutor's unique role as advocate and minister of justice, and facilitates the truth seeking role of the criminal trial. Indeed, this principle was recognized in *Giglio*, 405 U.S. at 154, where the promulgation of "procedures and regulations" was viewed as an essential precondition for a prosecutor's compliance with the disclosure obligation in court.

The compelling reasons that mandate absolute immunity for the prosecutor under *Imbler* apply with equal force to the supervising prosecutor, or chief advocate, who by training, procedures and regulations, directs advocatory conduct in hundreds, and in some offices, thousands of criminal cases annually. *Imbler's* multiple objectives--to avoid vexatious litigation, facilitate the effective performance of the prosecutor's job as advocate, encourage the disclosure of exculpatory evidence, even after conviction, and achieve the accurate judicial resolution of criminal cases at trial, on appeal, and collaterally, unaffected by the specter of civil liability on the errant prosecutor--equally justify absolute immunity for the supervising prosecutor in the performance of conduct intimately associated with the advocacy function. *See Imbler,* 424 U.S. at 425-31, and n.25 at 427.

Yet, *Goldstein* permits easy circumvention of *Imbler* by permitting defendants to attack the advocatory conduct of the trial prosecutor through pleading a §1983 suit against the supervising

prosecutor for failure to train or supervise. The negative consequences to the effective performance of the advocatory function that *Imbler* sought to prevent by barring direct suits against the trial prosecutor will be a reality if *Goldstein* remains effective precedent. Further, under *Goldstein*, the incongruous result is achieved that the supervisor in the small office who actually makes the advocatory decision (and who handles the prosecution) receives absolute immunity, while his or her counterpart in the larger office who generally through training and policy makes and directs the advocatory conduct in all cases does not. But, the intimate association between the advocacy function and the supervisor's conduct is the same in both instances.

Both sets of prosecutorial action on the supervisory and line levels, therefore, must be accorded absolute immunity from §1983 personal civil liability to preserve the continued efficacy of *Imbler*.

ARGUMENT

AS SUPERVISING PROSECUTORS, PETITIONERS VAN DE KAMP'S AND LIVESAY'S ALLEGED FAILURE TO TRAIN AND SET OFFICE-WIDE POLICY FOR PROSECUTORS TO COMPLY WITH THEIR *BRADY-GIGLIO* OBLIGATIONS IN THE INITIATION AND CONDUCT OF CRIMINAL CASES IS CONDUCT INTIMATELY RELATED TO THE PROSECUTOR'S ADVOCATORY FUNCTION. AS SUCH, PETITIONERS' ACTS ARE ENTITLED TO ABSOLUTE IMMUNITY.

a) The Functional Approach: A Prosecutor's Conduct That Is Intimately Related To The Advocacy Function Acquires Absolute Immunity.

In *Imbler*, this Court concluded that a state prosecuting attorney is absolutely immune from a civil damage suit under §1983 for acts "within the scope of his duties in initiating and pursuing a criminal prosecution." *Id.* at 410. Pachtman, a Deputy District Attorney in Los Angeles County, who had prosecuted Imbler, had allegedly failed to disclose exculpatory evidence and knowingly used false testimony at Imbler's trial. *Id.* at 412-416. Imbler, who was not retried following the vacation of his conviction, subsequently sued Pachtman in his personal capacity, as well as other law enforcement officials, under §1983 for damages stemming from the alleged misconduct. *Id.*

This Court held that Pachtman's conduct at trial was absolutely immune from civil suit as falling within the advocacy actions of a state prosecutor in initiating and conducting criminal cases, conduct that is "intimately associated with the judicial phase of the criminal process . . . ." *Id.* at 430. In effect, the state prosecutor when exercising the duties of the prosecution function is acting in a quasi-judicial capacity.

Absolute immunity was required for several excellent reasons. First, recognizing that "§ 1983 is to be read in harmony with general principles of tort immunities and defenses . . .," *id.* at 418, and "the immunity historically accorded the relevant official . . .," *id.* at 421, the Court reasoned that conferring a state prosecutor with absolute immunity for this

conduct was consistent with the historical common-law immunity afforded prosecutors against tort actions for malicious prosecution. *Id.* at 421-24.

Second, the Court concluded that "considerations of public policy . . .," *id.* at 424, compel absolute immunity. A prosecutor's potential personal civil liability to past defendants for actions performed within the scope of a prosecutor's responsibilities would inhibit the exercise of professional judgment in determining what cases to bring and how to conduct them. *Id.* at 424-25. Conferring qualified immunity would result in subjecting prosecutors to vexatious litigation from former criminal defendants, and subject "even the honest prosecutor . . .," *id.* at 425, to the danger of liability. Such litigation concerning decisions made "often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Id.* at 425-26.

Third, absolute immunity promotes the truth seeking function of the criminal justice process in several ways. It affords the prosecution the "wide discretion in the conduct of the trial and the presentation of the evidence . . . ." *Id.* at 426. A prosecutor's professional judgment whether to use a witness should be freely exercised without fear of personal civil liability, for otherwise prosecutors would tip the balance in favor of nonuse and "triers of fact in criminal cases would often be denied relevant evidence." *Id.* Absolute immunity, furthermore, promotes the "ultimate fairness of the operation of the system itself . . .," *id.* at 427, as judges upon review of the conviction will not be "blurred by even

the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's [personal liability] . . . ." *Id.*

And, pivotally, absolute immunity *facilitates*, both during a trial and after conviction, "the prosecutor's exercise of his duty to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation." *Id.* at 424 n.25. The "possibility of personal liability . . .," the Court noted, "could dampen . . ." the exercise of that prosecution duty. *Id.* In fact, the prosecutor in *Imbler* had disclosed the evidence after Imbler's conviction and after the conviction had been affirmed on direct appeal. *See id.* at 412-13.

For sound reasons, therefore, absolute immunity attaches to a prosecutor's advocatory conduct; yet the question remains how broadly does *Imbler's* sound immunity rule reach given the broad spectrum of activities covered by the modern supervising prosecutor. While *Imbler* refused to delineate the boundaries of a prosecutor's duties beyond which absolute immunity would not extend, the Court emphasized that immunity was not limited to the prosecution function performed inside the courthouse door: "We recognize 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 courtroom." *Id.* at 431 n.33.

Subsequent decisions of the Court have reaffirmed *Imbler's* functional approach, sustaining absolute immunity for a prosecutor when performing an advocatory function, but disallowing it when the

conduct is divorced from, or only tangentially linked, to that function. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985) (noting Attorney General denied absolute immunity for allegedly authorizing illegal wiretapping in furtherance of national security); *Burns v. Reed*, 500 U.S. 478 (1991) (concluding absolute immunity applied to a prosecutor's conduct of a probable cause hearing but not when giving legal advice to the police prior to arrest); *Buckley v. Fitzsimmons et al.*, 509 U.S. 259 (1993) (holding absolute immunity denied to prosecutor who allegedly fabricated evidence during investigation well before grand jury and arrest, and made statements in press conference after indictment); *Kalina v. Fletcher*, 522 U.S. 118 (1997) (noting absolute immunity denied to prosecutor who acted as witness, not advocate, by certifying affidavit in support of search warrant).

Under *Imbler*, therefore, the question in *Goldstein* is whether the conduct of the supervising prosecutors is intimately related to the advocacy function, and thus, the judicial process. If the positive effects of immunity articulated in *Imbler* are not to be undone, the answer to that question is unmistakably clear: absolute immunity applies to Petitioners' advocatory conduct as supervising prosecutors. *Imbler's* functional approach dictates that a prosecutor's conduct outside the courtroom is equally advocatory when preparatory to the commencement of criminal cases and to their pursuit in the judicial process. *See Imbler*, 424 U.S. at 431 n.33.

As more fully explained in sections b. and c. below, the establishment of training and policy by supervising prosecutors concerning office

dissemination of discoverable evidence and identification and evaluation of evidence under *Brady-Giglio* is inextricably intertwined with the advocacy function performed in the commencement and pursuit of all criminal cases by a prosecutor's office.

First, it serves an exclusively advocatory purpose: for prosecutors to meet their constitutional obligations to disclose such evidence during the initiation and the conduct of criminal cases.

> Merely because a certain defendant's role was that of supervisor or trainer should not necessarily affect the immunity question. Instead, when a defendant is sought to be held liable because of his supervising/training action or inaction, we think the appropriate questions are: Supervising what? Training to do what? If the 'what' is a prosecutorial function, absolute immunity should attach.

Pitts et al. v. County of Kern, 49 Cal. App. 4th 1430, 1451 (Cal. Ct. App., 5th App. Dist. 1996) (noting DA as supervising prosecutor absolutely immune against claim of failing to supervise and train trial prosecutors who allegedly coerced witnesses to testify, suppressed evidence and failed to reveal exculpatory evidence), *rev'd on other grds*, 17 Cal. 4th 340 (1998) (explaining prosecutor is a State officer immune from suit under the Eleventh Amendment).

Second, such training and policy address issues that arise daily in the performance of the prosecutor's advocatory function, such as whether to file a charge and when, whether to use and disclose a

particular piece of evidence or witness, and compliance with discovery issues. Indeed, the supervisory training and policy constitutes a direction as to how prosecutors are to conduct their job in the courtroom. And in the smaller office, the disclosure decision itself is made by the supervisor in the particular case, a decision that *Imbler* clothes with absolute immunity. The nature of that decision does not change from advocacy simply because the office is large and the supervisor makes a more general direction that will be applied and followed in many cases. There is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecution formulated as policies for general application." *Haynesworth v. Miller*, 820 F.2d 1245, 1269 (D.C. Cir. 1987), *overruled on other grd in Hartman v. Moore*, 547 U.S. 250 (2006). Indeed, allowing suits against prosecutors who train and supervise other prosecutors in the advocacy function makes no more sense than allowing such suits against judges who train and supervise other judges. Clearly, judicial immunity could not be overcome by filing a lawsuit against a supervising judge rather than the trial judge; nor should prosecutorial immunity. Rather, decision making by both supervisory and line personnel integral to the advocacy function are entitled to absolute immunity to preserve and foster the effective performance of the prosecutor's job, and the judicial process.

Further, *Goldstein*, if allowed to stand as precedent, permits for easy circumvention of *Imbler's* absolute immunity bar against trial prosecutors by allowing a §1983 claim under the rubric of a failure to train by the supervising prosecutor. By this

simple pleading mechanism the negative effects *Imbler* sought to avoid are back in full force in §1983 suits. The sounder principle is that trial and supervising prosecutors both possess absolute immunity for acts performed that are integral to the advocacy function. As to the supervisory conduct involved in this case, the nature of the *Brady-Giglio* obligation and its relationship to the role of the prosecutor in the criminal justice system demonstrates that the supervising prosecutor's policy and training in this area falls squarely within *Imbler*.

b) Under The Functional Approach A Supervising Prosecutor's Training And Policy Making For Office-Wide Compliance With The *Brady-Giglio* Doctrine In All Criminal Cases Initiated And Conducted By A Prosecutor's Office Is Intimately Related To The Advocacy Function And Has Absolute Immunity.

The training and promulgation of office policy by a supervising prosecutor as to how subordinate trial prosecutors are to implement their *Brady-Giglio* obligations and to disseminate discoverable evidence is a prosecution function that is inherently advocatory. The *Brady-Giglio* obligation arises, and exists, only upon the commencement and prosecution of criminal cases. Further, through training and rules and regulations, the supervising prosecutor is directing how that prosecution function will be carried out by subordinate attorneys in cases initiated and pursued by his or her office. Consequently, the supervisor's conduct is as intimately related to the prosecution function under *Imbler* as the conduct of the prosecutor-advocate who carries out that direction in a single case. The courts

of appeals have on numerous occasions determined that the supervisor is also entitled to absolute immunity for those advocatory decisions. *See Hamilton v. Daley*, 777 F.2d 1207, 1213 n.5 (7th Cir. 1985) ("Since absolute immunity protects prosecutorial decisions, supervision of the prosecutors who make these decisions is similarly immune."); *Haynesworth v. Miller*, 820 F.2d at 1268-1271 (noting supervising prosecutor's policy on the initiation of prosecutions against persons who refuse to waive civil suits for false arrests absolutely immune); *Roe v. City & County of San Francisco*, 109 F.3d 578 (9th Cir. 1997) (conferring absolute immunity for supervisor's decision not to prosecute any of an officer's unwitnessed arrests); *Modahl v. County of Kern,* No. 01-16098, 61 Fed. Appx. 394, 2003 U.S. App. LEXIS 6929 (9th Cir. 2003) (unpublished) (noting DA absolutely immune against failure to train and supervise that results in *Brady* violation and unreliable testimony of child witnesses); *Genzler v. Longanbach*, 410 F.3d 630, 644 (9th Cir. 2005), *cert. denied*, 546 U.S. 1031 (2005) (concluding absolute immunity attaches to supervising prosecutor whose conduct is intimately associated with judicial process); *But see Carter v. City of Philadelphia*, 181 F.3d 339, 356-357 (3d Cir. 1999), *cert. denied,* 528 U.S. 1005 (1999) (concluding no absolute immunity for DA supervisor's failure to set police and DA policy and training to discourage police perjury and procurement of false eyewitness testimony and to discipline offenders).

Several district courts have reached the same result. *See Stoval v. Staroff et al.*, No. 83-8066, 1984 U.S. Dist. LEXIS 22804, at *6-7 (S.D.N.Y. 1984) (noting DA absolutely immune for setting policy

governing initiation of entire class of cases); *Pinaud v. County of Suffolk*, 798 F. Supp. 913, 918 (E.D.N.Y. 1992) (concluding supervising prosecutor obtains absolute immunity against claim of failure to train prosecutors in activity latter possesses absolute immunity), *aff'd in part and rev'd in part,* 52 F.3d 1139 (2d Cir. 1995) (concluding supervisor absolutely immune except for claim he kept defendant in jail after case dismissed); *Eisenberg v. District Attorney et al.*, No. 93-1647, 1994 U.S. Dist. LEXIS 21535, at *4-7 (E.D.N.Y. 1994) (concluding that DA with respect to training and supervision on prosecution of sex crimes is absolutely immune as policies are prosecutorial in nature); *Jones v. City of Boston*, No. 03-12130, 2004 U.S. Dist. LEXIS 12628, at *10-12 (D.Mass. 2004) ("supervisor who sets general prosecutorial policies governing the actions of front-line prosecutors . . ." also gets absolute immunity), *aff'd on other grds*, 135 Fed. Appx. 439, 440, 2005 U.S. App. LEXIS 11180 (1st Cir. 2005) (unpublished); *Bodie v. Morgenthau,* 342 F.Supp.2d 193, 205 (S.D.N.Y. 2004) (same as *Jones*); *Sivadel v. City of New York*, No. 04-2113, 2004 U.S. Dist. LEXIS 15190, at *9 (S.D.N.Y. 2004) (same as *Bodie*); *Sheff v. City of New York,* No. 03-708, 2004 U.S. Dist. LEXIS 4819 (S.D.N.Y. 2004) (same as *Jones*); *Truvia v. Julien, Jr. et. al.,* No. 04-0680, 2005 U.S. Dist. LEXIS 539, at *5 (E.D.La. 2005) (concluding absolute immunity in *Brady* context), *aff'd on other grds per curiam*, 187 Fed. Appx. 346, 2006 U.S. App. LEXIS 14378 (5th Cir. 2006) (unpublished) (supervisor absolutely immune based on own acts without deciding if it attaches in role of supervisor only); *Lomtevas v. Cardozo,* No. 05-2779, 2006 U.S. Dist. LEXIS 5820 (E.D.N.Y. 2006) (same as *Jones*); *Wilson v. Barcella*, No. 05-3646,

2007 U.S. Dist. LEXIS 22934, at *82-83 (D.Texas, N.Div. 2007) (noting supervising prosecutors absolutely immune in *Brady* context); *But see McClendon v. Martin,* 37 F.Supp.2d 1371 (S.D.Ga. 1999) (concluding supervising prosecutor's failure to train prosecutors on secrecy of grand jury deliberations is administrative function), *aff'd without opinion*, 212 F.3d 599 (11th Cir. 2000); *Baloun v. Williams,* No. 00-7584, 2002 U.S. Dist. LEXIS 20663 (N.D.Ill. 2002) (same); *Kleinman v. Multnomah County,* No. 03-1723, 2004 U.S. Dist. LEXIS 21466 (D.Oregon 2004) (concluding the same as *Baloun* in context of *Brady*); *Thompson v. Connick et. al.*, No. 03-2045, 2005 U.S. Dist. LEXIS 36499, at *11-17, and n.1 at 14 (E.D. La. 2005) (concluding that generally DA supervisor's office training and supervision is administrative).

Similarly, several state courts likewise have concluded that supervising prosecutors possess absolute immunity for training and policy on advocatory conduct. *See Pitts v. County of Kern*, 49 Cal. App. 4th at 1450-1452; *Beck v. Phillips*, 685 N.W.2d 637, 644-645 (Iowa 2004).

The close link between the role of the supervising prosecutor in this area and the advocatory function was recognized in *Giglio*. There the Court observed that although the trial prosecutor's constitutional obligation to disclose impeachment material will place "a burden on the large prosecution offices, *procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it*." *Giglio*, 405 U.S. at 154 (italics supplied). Such "procedures" are

necessary because the duty to disclose extends to an entire prosecutor's office, as well as assisting police agencies; the knowledge of a single prosecutor or officer is imputed to all for the purpose of disclosure *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("The individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police."). Hence, in *Kyles*, the Court rejected the State's argument that the prosecutors were not responsible for exculpatory evidence only known to the police; and rejected the argument that imputation of such knowledge to the State prosecutors would be too burdensome, quoting *Giglio's* reference to the establishment of office "procedures and regulations" to ensure dissemination of all discoverable evidence to the appropriate prosecutor. *See Kyles*, 514 U.S. at 438 (quoting *Giglio*, 405 U.S. at 154).

Giglio, then, acknowledges that the supervising prosecutor is to serve and implement a key aspect of the prosecutor's advocacy function: to disclose exculpatory evidence in a criminal prosecution. The making of policy and training in this area exists only because of that function; and a §1983 claim predicated on a failure to train or to supervise lies only if a failure to disclose occurred at trial. The supervising prosecutor thus serves the same function as the subordinate prosecutor representing the State at trial: to determine "as an officer of the court charged to do justice . . .," *Ybarra v. Reno Thunderbird Mobile Home Village et al.,* 723 F.2d 675, 679 (9th Cir. 1984), whether disclosure should be made.

This Court's precedent interpreting *Brady-Giglio* further demonstrates the intimate relationship between the supervisor's role and the prosecutor's advocacy function. Under *Imbler,* a prosecutor's failure to disclose exculpatory evidence affects the truth-seeking function of the criminal proceeding, and as a result is prosecutorial conduct intimately associated with the judicial process. *See Imbler*, 424 U.S. at 430-431; *See also United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule . . . .") (citation omitted); *Kyles v. Whitley*, 514 U.S. at 433 (noting in *Bagely* "the court disavowed any difference between exculpatory and impeachment evidence for *Brady* purposes . . . ."); *Banks v. Dretke*, 540 U.S. 668, 690 n.11 (2004) (same principle).

More broadly, *Imbler* acknowledges what this Court has recognized generally about the prosecutor's *Brady-Giglio* obligation: that it derives from the prosecutor's unique function as an advocate of the State and as a minister of justice. *See, e.g., Strickler v. Greene*, 527 U.S. 263, 281 (1999) (explaining *Brady* and progeny "illustrate the special role played by the American prosecutor in the search for truth in criminal trials."); *Banks v. Dretke,* 540 U.S. at 696 ("We have several times underscored the special role played by the American prosecutor in the search for truth in criminal trials.") (citations and internal quotation marks omitted); *United States v. Agurs*, 427 U.S. 97, 111 (1976) (noting the duty of the prosecutor to disclose arises from his role to prosecute the "accused with earnestness and vigor . . .," but yet be "faithful to his client's overriding interest that justice shall be done.") (quoting from

Berger v. United States, 295 U.S. 78, 88 (1935) (internal quotation marks omitted)); *United States v. Bagley,* 473 U.S. at 678 (the inquiry for materiality to reverse a conviction for a *Brady-Giglio* violation must be guided by "our overriding concern with the justice of the finding of guilt . . . ."") (internal quotation marks and citation omitted); *Giglio v. United States*, 405 U.S. at 155 (holding prosecutor's suppression of impeachment material that affects reliability of main prosecution witness violates Due Process); *Brady v. Maryland*, 373 U.S. at 88 (concluding that prosecutorial suppression of evidence requested by and favorable to the accused, "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . ."). Thus, there is no reciprocal duty on the criminal defense attorney, who is not constitutionally obliged to disclose inculpatory evidence, as the defense attorney's responsibility, unlike the prosecutor's, is exclusively unitary—owed only to the client.

The dualistic role of the prosecutor-advocate has, in other contexts, been recognized as an essential component of a prosecutor competently and ethically performing the duties of the prosecution function in court. *See A.B.A. Standards for Criminal Justice Prosecution Function*, §3-3.11 (a)-(c) ("Disclosure of Evidence by the Prosecutor"), at 81 (3d ed. 1993) *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf (June 25, 2008) ("*A.B.A Standards*"); National District Attorneys Association, *National Prosecution Standards*, §53.5 (Limits of Discoverable Information"), at 164 (2d ed. 1991) *available at* http://www.ndaa.org/pdf/ndaa_natl_prosecution_standards_2.pdf (June 25, 2008); *See also A.B.A. Model*

Rules of Professional Conduct §3.8 (d), (g) ("Special Responsibilities of a Prosecutor") (1983) *available at* http://www.abnet.org/cpr/mrpc/mrpc_toc.html (June 25, 2008).

Supervisory training and policy-setting under *Brady-Giglio* ensures that prosecutors within an office fulfill this aspect of their advocatory function ethically and competently. Such decision making also reduces the risk of infecting multiple criminal cases with errors that potentially compromise the reliability of the results. If absolute immunity is warranted for a prosecutor's conduct in a *single* case to protect the judicial process, as *Imbler* holds, then absolute immunity is justified for a supervising prosecutor's conduct that affects the initiation and conduct of *hundreds* of cases annually. In the latter case, as in the former, absolute immunity is necessary to facilitate the truth-seeking function. *See Imbler*, 424 U.S. at 430-431. It would be "incongruous" indeed for absolute immunity to shield the supervising prosecutor in the small office who makes the actual decision whether to disclose, but to deny it to the supervising prosecutor in the large office who makes the general decision by training and regulations applied and followed in many cases. In both instances, the intimate connection of the supervising prosecutor's decision making with the performance of advocacy conduct remains the same.

Thus an alleged failure to comply with *Brady-Giglio* either by the supervising prosecutor or the trial attorney implicates the prosecutor in the performance of that official's unique advocacy role. Whether occasioned by a supervising prosecutor's alleged failure to train or set office-wide policy, or by

the specific trial prosecutor's alleged conduct at trial, a §1983 civil action against the supervising prosecutor, no less than the same civil claim against the trial prosecutor, seeks personal redress for action performed within the scope of the advocacy function: A failure to disclose evidence at trial which potentially impairs the judicial process. *See Roe v. City & County of San Francisco*, 109 F.3d at 583-584 (noting no distinction between prosecution in a particular case and prosecution formulated as policy, as "both procedures culminate in initiation of criminal proceedings against particular individuals, and in each it is the individual prosecution that begats the asserted deprivation of constitutional rights.") (quoting from *Haynesworth v. Miller*, 820 F.2d at 1269) (internal quotation marks omitted).

Indeed, the supervising prosecutor's role in the promulgation of rules and regulations, and training in the area of *Brady-Giglio*, reflects the more general role the supervising prosecutor plays in supervising and directing office-wide training and policy integrally related to all advocacy conducted by an office, and to which supervisory decisions *Imbler's* absolute immunity must apply. Every day a supervising prosecutor directs subordinate attorneys in a wide range of subjects in the preparation, and in the pursuit of criminal prosecutions, i.e., what charges to file, when to immunize witnesses, how and when to make deals with witnesses, how to comply with discovery, what plea deals to offer, and in what cases, that directly impact the initiation and conduct of criminal cases. Although these advocatory activities are performed by the trial prosecutor, he or she has been directed to do so by the supervising prosecutor through training, and the formulation of

rules and regulations. And as in the area of *Brady-Giglio*, so too in these other advocatory areas is absolute immunity for the supervising prosecutor necessary to preserve and foster the uninhibited professional exercise of prosecution advocacy which *Imbler* seeks to achieve. Included within the administrative umbrella would be only supervisory decisions on hiring, discharging and promoting personnel, and determining budget, areas that are not intimately associated with the advocacy function. *See Forrester v. White*, 484 U.S. 219, 229 (1981) ("Judge White was acting in an administrative capacity when he demoted and discharged Forrester . . . . The decision[] at issue . . . [was] not . . . [itself] judicial or adjudicative . . . . a judge who hires and fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys . . . ."); *See also, e.g., Ceballos v. Garcetti,* 361 F.3d 1168, 1184-1185 (9th Cir. 2004) (noting District Attorney's decision concerning prosecutor's promotion, demotion and transfer fell within District Attorney's "administrative function," whereas removal of prosecutor from murder case was conduct concerning the prosecutorial function under *Imbler*), *rev'd on other grds*, 547 U.S. 410 (2006) (explaining First Amendment does not shield prosecutor from discipline by DA employer for employee's speech made pursuant to professional duties).

A bright-line rule establishing that "administrative" actions by a supervising prosecutor to which absolute immunity will not attach are limited to personnel and budget serves several beneficial purposes. At a minimum, the Court should hold that when, as in the present case, the

supervising prosecutor through training and policy directs the conduct of the prosecutor in the courtroom absolute immunity attaches to the supervisor's conduct. First, a clear rule conforms to the modern day reality in prosecutor's offices that other than in the subjects of personnel and budget, or investigatory activities, the supervising prosecutor performs an exclusive advocacy function, directing subordinates in all aspects of the initiation and pursuit of criminal prosecutions. Second, such a rule will prevent aberrant circuit court decisions, such as *Goldstein*, that misconstrue *Imbler's* purpose, allowing for its easy circumvention by defendants through pleading charges against supervising prosecutors and thus permitting the very dangers to the prosecution function *Imbler* seeks to avoid. Third, and related to the second, clearly defining the "administrative" exception will deter further circumvention of *Imbler*, and its continued erosion, by defendants who charge a supervising prosecutor for failure to train or supervise for activity outside the *Brady-Giglio* context that is also plainly advocatory in nature. *See, e.g., Haynesworth v. Miller*, 820 F.2d at 1268-1271. Fourth, continued uncertainty as to the scope of the "administrative" exception will be removed, thereby promoting the uninhibited and robust exercise of professional judgment by the supervising prosecutor in all phases of his or her advocatory role, achieving the purpose of *Imbler*, and preventing lower court decisions, such as *Goldstein*, that threaten that function.

c. *Goldstein's* Misapplication Of *Imbler's* Functional Approach To Determining Petitioner's Absolute Immunity From Civil Suit

Requires Reversal Of The Circuit Court's Decision.

Goldstein correctly articulated the proper standard and starting point of analysis for determining the immunity question: "the critical factor remains the *nature* of the challenged policy and whether it falls within the prosecutor's judicial function . . . ." *Goldstein*, 481 F.3d at 1175 (italics supplied). But, the Circuit Court incorrectly assessed the nature of that function. With little discussion, and virtually no analysis of the *Giglio* decision itself, the Court concluded that the establishment of training and policy in a prosecutor's office to comply with *Brady-Giglio* is an "administrative" function because it only "to some degree related to trial preparation . . .," *Goldstein*, 481 F.3d at 1176 (quoting from *Burns v. Reed*, 500 U.S. at 495) (internal quotation marks omitted), and was more concerned with "how the District Attorney's Office was managed." *Id.* Consequently, the court deemed the supervising prosecutor's conduct as managerial, not advocatory, similar to other administrative exercises as hiring, demoting, and discharging prosecutors, holding press conferences, and making budgetary decisions.

As explained in section b., however, *Goldstein's* reasoning is flawed because it misperceived the advocatory function of the training and policy-making involved (the implementation of the *Brady-Giglio* obligation), and thus its relationship to the prosecution function that *Imbler* reserves for absolute immunity.

More fundamentally, *Goldstein* eviscerates *Imbler* as controlling precedent, for a defendant who wants to sue a prosecutor for conduct in his or her advocatory role knows that the circuit court will permit the suit if it is pleaded as one involving a failure to train or supervise. Yet, permitting only qualified immunity to attach to the actions of the supervisor realizes the very dangers to the effective performance of the advocatory function *Imbler* deemed absolute immunity necessary to avoid. *See Imbler,* 424 U.S. at 425-427, and 427 n.25.

First, qualified as opposed to absolute immunity poses the same danger of harassing lawsuits that *Imbler* found inimical to effective prosecution advocacy. Every §1983 suit against a prosecutor in the initiation of a criminal case and the conduct of it that is normally barred at the outset under *Imbler* is metamorphosed into a viable civil claim through charging a failure to train, supervise, or, as in the present case, to set adequate policy by the supervising prosecutors. *See, e.g., Lawson v. City of New York*, No. 00-2704, 2002 U.S. Dist. LEXIS 10705, at *6 (S.D.N.Y. 2002) (concluding failure to train claim against DA supervisor is improper circumvention of absolute immunity bar under *Imbler*); *Gil v. County of Suffolk*, No. 06-1683, 2007 U.S. Dist. LEXIS 49645, at *9 (E.D.N.Y. 2007) (same as *Lawson*).[2]

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[2] As this Court has observed, such litigation is particularly dangerous in this area:

> "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. It is inevitable that many of those will pin

(continued…)

The danger of personal liability for "even the honest prosecutor . . .," *Imbler*, 424 U.S. at 425, is great since often, as in the present case, such civil claims challenge conduct that occurred years ago when the constitutional right may not have been as clearly established as it is today, but yet when viewed under a more modern judicial prism reflects a right clearly established to supplant qualified immunity. *See generally Harlow v. Fitzgerald*, 457 U.S. 800, 816 and 818 (1982) (defining qualified immunity as shielding "government officials performing discretionary functions . . ." from civil liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). What a prosecutor failed to train on and set policy for twenty years ago may, from today's vantage point, seem far more shocking.

Civil lawsuits against supervising prosecutors will equally divert, if not more so (because they affect so many more cases and are directed against officials who have many responsibilities), the prosecuting office's "energy and attention . . . from the pressing duty of enforcing the criminal law," *Imbler*, 424 U.S. at 425, as civil lawsuits against line prosecutors. *Cf. Buckley v. Fitzsimmons*, 509 U.S. at 283 ("Allowing the avoidance of absolute immunity through that pleading mechanism would undermine in large part

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> the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict."

Mitchell v. Forsyth, 472 U.S. at 521-522 (citation omitted).

the protections that we found necessary in Imbler . . . .") (Kennedy, White, Souter, J.J., and Rehnquist, C.J., concurring in part and dissenting in part).

Supervising prosecutors must possess the appropriate latitude to exercise professional judgment in determining those policies, procedures, and training they deem necessary to effectively implement the *Brady-Giglio* obligation in light of their particular experience, the needs of their office, and the law enforcement community the office serves. *See Imbler,* 424 U.S. at 424-25 ("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."); *Haynesworth v. Miller*, 820 F.2d at 1270 n.199 (according qualified immunity "to promulgation of standards of prosecution . . . would deter formulation of policy, thereby jeopardizing individual defendants and the criminal justice system as a whole.").

Uninhibited decision making in this area of the prosecution function is important because the supervising prosecutor's training and policy-making role is inextricably interwoven with the advocacy function in all phases of criminal prosecution, and hence, in the judicial process. In the context of *Brady*, the supervising prosecutor's professional judgment manifests itself in determining such advocatory decisions as whether evidence falls within *Brady,* its affect on potential, pending or completed criminal cases, whether to use informants as witnesses and under what circumstances, and how to ensure that all relevant *Brady-Giglio* evidence, when informants are utilized, is collected and disseminated

intra-office. These determinations are often based upon interpretation of sometimes complex case law and other legal rules; for instance, the law governing what *Brady* and its progeny require to be disclosed has evolved considerably over the years. Attaching personal civil liability to career prosecutors for an alleged previous failure to train or to set policy, sometimes made years before, thus necessarily involves them in complex and potentially unfair litigation that will chill the exercise of their best professional judgment. On the other hand, absolute immunity facilitates the exercise of that judgment objectively and dispassionately, uncolored by fear of personal civil liability.

Nor is any concrete benefit gained by bestowing qualified immunity to the supervisor in the large office for failing to train or set policy, or doing so adequately, while attaching absolute immunity to his or her counterpart in the small office who actually made the decision to disclose in a particular case. That result is "incongruous," *Burns v. Reed*, 500 U.S. at 495; *Cf. also Buckley v. Fitzsimmons,* 509 U.S. at 275. Further, some courts have recognized a defendant's civil redress against the municipality under §1983 for prosecutorial misconduct, *see e.g.*, *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1993), *cert. denied*, 507 U.S. 961 (1993), a remedy that supplies a deterrent notwithstanding absolute immunity for personal civil liability of the trial and supervising prosecutors. *Cf. generally Bogan v. Scott-Harris*, 523 U.S. 44, 53 (1998) ("certain deterrents to legislative abuse may be greater at the local level ... [m]unicipalities themselves can be held liable for constitutional violations . . . .")(citing *Monell v. Department of Social Services*, 436 U.S. 658 (1978)).

Other checks on abuse moreover exist on the errant prosecutors: the judiciary reviews of the criminal proceedings on direct appeal and collaterally, and in the egregious case, the attorney is subject to professional discipline or criminal sanction. *See Imbler,* 424 U.S. at 429-30.

Second, absolute immunity for the supervising prosecutor's policy formulation and training on the advocacy function *facilitates*, and *promotes*, disclosure of all discoverable evidence, which, in turn, promotes the truth-seeking aspect of the judicial process. *See Imbler,* 424 U.S. at 424, 427 and n.25. In this regard, the supervising prosecutor's impact on the judicial process is magnified many times compared to the role of the prosecutor in the single case. Yet, *Imbler* protects the latter; but for the same compelling reasons it must also protect the former who directs the advocatory conduct. Absolute immunity for the supervising prosecutor derives "not from an exaggerated esteem for those who perform [that job], and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." *Malley v. Briggs*, 475 U.S. 335, 342 (1986) (concluding that police officer presenting arrest warrant application is entitled to qualified immunity, as act is unlike prosecutor who obtains indictment which starts the judicial phase of criminal proceedings) (citation omitted).

That the decisions of the supervising prosecutor impacts many criminal cases does not alter the advocatory nature of the decision itself, which remains unchanged whether exercised in a single case or many. *See, e.g., Haynesworth v. Miller*,

820 F.2d at 1269; *Beck v. Phillips*, 685 N.W.2d at 644 ("the mere fact a prosecutor makes his or her decision with respect to a class of cases—present and future—as opposed to merely a present case is immaterial, and does not render the action 'administrative' as opposed to 'quasi-judicial,' i.e. absolutely immune.") (citations omitted). Indeed, the intimate relationship between the advocacy function and the supervising prosecutor's policy making and training role has been more generally recognized. *See A.B.A. Standards* at §3-2.5 (a[i]-[ii])-(b) ("Prosecutor's Handbook; Policy Guidelines and Procedures"), at 30 *available at* htpp://www.abanet.org/crimjust/standards/prosecutionfunction.pdf. (June 25, 2008). Absolute immunity will encourage it.

But, according only qualified immunity to supervisory personnel with its greater risk for personal liability will inhibit training and policy formulation in so far as trainers will insist on total disclosure where the law does not require it, at the possible expense of witness safety and the efficient prosecution of cases, as prosecutors will fail to exercise their discretion from fear of incurring civil liability. *Cf. Haynesworth v. Miller*, 820 F.2d at 1270 n.199 (rejecting a civil defendant's challenge to absolute immunity for a supervising prosecutor for allegedly promulgating an office policy of retaliatory prosecution of individuals who refused to waive civil suits against arresting officers; "[t]he dynamics of the situation suggest that prosecutors will not only be timid about formulating policy-making, but also that they may forego policy-making altogether.").

Third, and equally as significant as the other reasons for absolute immunity, it will encourage the

exercise of the prosecutor's duty "to bring to the attention of the court or of proper officials all significant evidence suggestive of innocence or mitigation." *Imbler*, 424 U.S. at 427 n.25. The exercise of that duty may be "dampene[d]" if it poses "substantial danger of liability . . .," *id.* at 425, to his or her supervising prosecutor, the chief assistant, or the District Attorney for their failure to train, or to do so adequately, or for poor policy making. Absolute immunity removes that deterrence. *See id.* at 424 U.S. at 427 (noting Judges' decision "should not be blurred by even the subconscious knowledge . . ." that a result against the prosecutor would result in liability).

Absolute immunity will also allow prosecutors' offices to retain their most experienced and skillful personnel. *See A.B.A. Standards* at §3-2.3 (a)-(e) ("Assuring High Standards of Professional Skill"), at 24 (3d ed. 1993) (public prosecution needs promoting "continuity of service and broad experience in all phases of the prosecution function.") *available at* http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf (June 25, 2008). The risk of civil liability will discourage the most talented and experienced prosecutors from assuming supervisory positions. Seasoned prosecutors will either leave an office or remain as a line prosecutor, while less qualified individuals attain supervisory positions whose ascension would otherwise have been blocked. Such is inimical to the efficient and competent performance of the prosecution function that *Imbler* seeks to promote and preserve. *See Imbler,* 424 U.S. at 424-425; *Bogan v. Scott-Harris*, 523 U.S. at 52 (according absolute immunity to local legislatures, in

part, because "threat of liability may significantly deter service in local government . . . .").

CONCLUSION

A supervising prosecutor's, or chief advocate's office-wide training, policy-making and supervision to ensure compliance with the *Brady-Giglio* rule is, in light of the nature of that constitutional obligation and its intimate association with the advocacy function, conduct that is inextricably involved with a prosecutor's office's "initiation of a prosecution, the presentation of [its] case in court [and] actions preparatory for those functions." *Buckley v. Fitzsimmons*, 509 U.S. at 278. As such, the conduct is within the scope of the prosecutor's duties as advocate that justifies absolute immunity. The nature of this conduct is unlike those supervisory decisions on hiring, promoting and firing or on formulating budget, ones that in form and substance are "administrative," or on activities of police and prosecutors well before arrest and probable cause, ones that fall within the investigative line. A supervising prosecutor's decisions through policy and training that direct the preparation, initiation and the pursuit of criminal cases in the courtroom, as in the development of rules and procedures for office-wide implementation of *Brady-Giglio*, must be clothed with absolute immunity to avoid impairment of both the prosecutor's advocacy function and the judicial process.

Respectfully submitted,

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