No. 07-854

In the Supreme Court of the United States

JOHN VAN DE KAMP, ET AL., PETITIONERS

v.

THOMAS LEE GOLDSTEIN

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

GREGORY G. GARRE
Acting Solicitor General
Counsel of Record
GREGORY G. KATSAS
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LISA S. BLATT
Assistant to the Solicitor General
BARBARA L. HERWIG
MARK W. PENNAK
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether supervisory prosecutors are entitled to absolute prosecutorial immunity from suits for damages alleging that they violated *Giglio* v. *United States*, 405 U.S. 150 (1972), by failing to develop policies to ensure information sharing among prosecutors concerning jailhouse informants and failing to provide adequate supervision and training concerning *Giglio* obligations.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statute, and rule:

In the Supreme Court of the United States

No. 07-854

JOHN VAN DE KAMP, ET AL., PETITIONERS

v.

THOMAS LEE GOLDSTEIN

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE UNITED STATES

The United States employs more than 4500 Assistant United States Attorneys, who in Fiscal Year 2007 filed criminal charges in more than 59,000 cases against more than 80,000 defendants. Executive Office for U.S. Attorneys, U.S. Department of Justice, *United States Attorneys Annual Statistical Report: Fiscal Year 2007*, at 3 (Overview Chart 1), 9. Those prosecutors are supervised by 93 United States Attorneys (*id.* at 1), 175 First Assistants or Criminal Chiefs, and numerous Supervisory Assistant United States Attorneys. In addition, federal prosecutors in the litigating Divisions of the Department of Justice are supervised by Chiefs and Deputy Chiefs in their Divisions.

Although federal officers are not subject to suit under 42 U.S.C. 1983, they may be sued for damages for violations of constitutional rights under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The immunity granted to federal officers in *Bivens* generally parallels the immunity that state officers enjoy in suits under Section 1983. See, *e.g.*, *Antoine* v. *Byers & Anderson, Inc.*, 508 U.S. 429, 433 n.5 (1993); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982); *Butz* v. *Economou*, 438 U.S. 478, 504 (1978). Thus, the disposition of the immunity issue in this case could significantly affect federal prosecutors and the broader interest of the United States in ensuring "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Imbler* v. *Pachtman*, 424 U.S. 409, 427-428 (1976).

STATEMENT

1. In 1980, respondent was prosecuted for murder by Los Angeles County deputy district attorneys who were then under the general supervisory control of petitioners, the former Los Angeles County District Attorney and his chief deputy. During petitioner's trial, the prosecution relied on the testimony of a jailhouse informant, Edward Floyd Fink, who testified that respondent had confessed to the murder while both were being detained at the Long Beach City Jail and that Fink had received no favors or benefits from the State for his testimony. Respondent served 24 years of his prison term, but in April 2004 he was released after securing habeas relief. Pet. App. 3-5.

After his release, respondent brought suit under Section 1983 against petitioners as well as the City of Long

Beach, the County of Los Angeles, and four officers of the Long Beach Police Department. The complaint alleges that Fink falsely testified that respondent confessed to the murder and that Fink had not received any benefits for testifying against respondent. The complaint further alleges that, in fact, Fink had acted as an informant for several years and had received multiple reduced sentences in return. Pet. App. 3-4. The complaint alleges that other deputy district attorneys under the supervisory control of petitioners were aware of those benefits, but that such information was never shared with the deputy district attorneys who prosecuted respondent during the 1980 murder trial. *Id.* at 4.

The complaint alleges that this Court's decision in *Giglio* v. *United States*, 405 U.S. 150 (1972), imposed "an administrative duty" on petitioners "to create a system in which information pertaining to jailhouse informants would be disseminated" to deputy district attorneys. J.A. 50 (¶ 104). The complaint further alleges that petitioners

> purposefully or with deliberate indifference failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information, and failed to train Deputy District Attorneys to disseminate information pertaining to benefits provided to jailhouse informants and other impeachment information.

J.A. 45 (¶ 92); see J.A. (¶¶ 105, 106), 68-70 (¶¶ 152, 154). The suit alleges that based on petitioners' failure to create such a system, and their failure to train and to supervise their subordinates in such a system, the prosecu-

tors who handled respondent's case did not have access to impeachment information concerning Fink, such that the information was not shared with defense counsel, in violation of *Giglio*. Pet. App. 4-5.

2. Petitioners moved to dismiss the claims against them on the ground that the claims were barred by absolute immunity. The district court denied the motion, holding that petitioners were not entitled to absolute immunity because the nature of the challenged alleged conduct was "administrative." Pet. App. 18-20.

3. On interlocutory appeal, the court of appeals affirmed. Pet. App. 1-15. The court of appeals stated that it would "assume without deciding that [respondent] has alleged a deprivation of a constitutional right under § 1983" and that "[w]hether the alleged conduct is sufficient to state a claim for liability under § 1983 is therefore not before the [c]ourt." *Id.* at 6 (quoting *Genzler* v. *Longanbach*, 410 F.3d 630, 644 (9th Cir.), cert. denied, 546 U.S. 1031 (2005)).

Turning to the issue of immunity, the court explained that absolute immunity applies to "conduct that is 'intimately associated with the judicial phase of the criminal process'" and "occur[s] in the course of his [or her] role as an advocate for the State." Pet. App. 7 (quoting *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976), and *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 273 (1993)). The court observed, however, that a prosecutor is entitled to only qualified immunity "if he or she is performing investigatory or administrative functions, or is essentially functioning as a police officer or detective." *Ibid.* (quoting *Broam* v. *Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003)). The court accordingly stated that "when determining whether absolute immunity applies, courts must examine 'the nature of the function performed, not the iden-

tity of the actor who performed it." *Id.* at 8 (quoting *Forrester* v. *White*, 484 U.S. 219, 229 (1988)).

Applying that functional inquiry, the court of appeals held that the alleged conduct was "administrative and not prosecutorial in function." Pet. App. 13. The court acknowledged that "the specific duty to share information regarding jailhouse informants arose only because of [petitioners'] roles as prosecutors." *Id.* at 14. But the court reasoned that petitioners' alleged "failure to promulgate policies regarding the sharing of information relating to informants and their failure to adequately train and supervise deputy district attorneys on that subject, bear a close connection only to how the District Attorney's Office was managed, not to whether or how to prosecute a particular case or even a particular category of cases." *Id.* at 15.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that supervisory prosecutors lack absolute immunity from suits seeking damages alleging that they violated *Giglio* v. *United States*, 405 U.S. 150 (1972), by failing to develop policies to ensure information sharing among prosecutors concerning jailhouse informants and failing to provide adequate supervision and training concerning *Giglio* obligations.

A. In *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976), this Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under [Section] 1983." In that case, the prosecutor had been sued for knowingly presenting false testimony at trial and deliberately suppressing exculpatory evidence. The Court explained that those activities were "intimately associated with the

judicial phase of the criminal process" and thus claims arising out of those activities were barred by absolute immunity. *Id.* at 416, 430. The Court reached that result because of a "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

Subsequent cases have confirmed that a functional approach governs what actions by prosecutors are entitled to absolute immunity. *Burns* v. *Reed*, 500 U.S. 478, 486 (1991). A prosecutor is therefore absolutely immune for carrying out prosecutorial duties as an advocate for the government in judicial criminal proceedings. *Kalina* v. *Fletcher*, 522 U.S. 118, 128-129 (1997); *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 272 (1976); *Burns*, 500 U.S. at 491. Conversely, a prosecutor is entitled to only qualified immunity when carrying out "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Buckley*, 509 U.S. at 273.

B. The duty to disclose material impeachment evidence under *Giglio*, like the duty to disclose materially exculpatory evidence under *Brady* v. *Maryland*, 373 U.S. 83 (1963), implicates the core prosecutorial function to seek justice and the truth in the prosecution of criminal cases. See, *e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 439 (1995). But nothing in *Giglio* or any other decision of this Court creates a free-standing constitutional obligation for supervisory prosecutors to establish particular policies or procedures or to train and supervise line prosecutors, in order to ensure compliance with *Giglio.*

Rather, the Constitution imposes a duty of disclosure of material evidence in a particular criminal case. *Kyles*, 514 U.S. at 438; *Giglio*, 405 U.S. at 154. The allegations that petitioners failed to establish certain procedures or to train or supervise line prosecutors in those procedures do not state a violation of that duty.

In any event, even assuming (as did the courts below) that supervisory prosecutors do have a duty under *Giglio* to establish a particular set of procedures and to train and supervise their subordinates in those procedures, claims alleging violations of that duty would be barred by absolute immunity. *Imbler*, *supra*. Respondent cannot circumvent the doctrine of absolute prosecutorial immunity by characterizing policy formation, training, and supervision as *administrative* in nature or, as did the Ninth Circuit, as involving a *managerial* function. Pet. App. 15. Whether a supervisor directs a line prosecutor how to comply with *Giglio* in a particular case, or whether the supervisor reduces her guidance on *Giglio* compliance to a written policy that governs all prosecutions, the supervisor is carrying out the core prosecutorial function of *Giglio* compliance. There is no basis for Ninth Circuit's anomalous rule that would afford prosecutorial immunity to a supervisor who *intentionally* directs a line prosecutor to violate *Giglio* but that would deny the same immunity to a supervisor whose policies, training, and supervision on *Giglio* compliance (or lack thereof) cause an *inadvertent* violation by a line prosecutor.

C. All of the policy justifications for extending absolute immunity to a line prosecutor who violates *Giglio* apply with equal or greater force to a supervisory prosecutor who allegedly failed to establish policies and to provide adequate training and supervision about *Gig-*

lio compliance. Denying absolute immunity for policy formation, training, and supervision by supervisory prosecutors would permit hundreds if not thousands of suits for damages against supervisors who are responsible for setting policies and providing prosecutorial guidance to their subordinates.

Such suits would severely disrupt the functioning of the office of the prosecutor in a multitude of ways. Prosecutors would be faced with defending their decisions to set policies, or not to set policies, on *Giglio* compliance. They also could have to re-litigate issues involved in the underlying criminal trial of the defendant, such as whether there was a non-disclosure, the materiality of the evidence, and the cause of the *Giglio* violation. That litigation would intrude on sensitive prosecutorial deliberations as well as open the door to burdensome discovery. The criminal justice system as well would be adversely affected by such suits, because courts faced with collateral challenges to criminal convictions could be influenced by concerns about exposing supervisory prosecutors to suits for damages.

At the same time, extending absolute immunity to supervisory prosecutors does not leave the public powerless to deter and punish prosecutorial misconduct. *Imbler*, 424 U.S. at 429. Supervisory prosecutors are subject to a variety of sanctions that ensure that prosecutors fulfill their ethical duties and special role in the criminal justice system. *Giglio* itself imposes a strong incentive to establish robust policies favoring disclosure of material evidence because, *inter alia*, the failure to abide by *Giglio* can result in the forfeiture of a criminal conviction. Supervisory prosecutors are also subject to professional discipline, public disapproval, and even criminal penalties for wilful misconduct.

ARGUMENT

SUPERVISORY PROSECUTORS ARE ABSOLUTELY IMMUNE FROM DAMAGES BASED ON THEIR CONDUCT IN ESTABLISHING (OR IN FAILING TO ESTABLISH) POLICIES ON COMPLIANCE WITH *GIGLIO* AND IN TRAINING AND SUPERVISING SUBORDINATES ON A PROSECUTOR'S *GIGLIO* OBLIGATIONS

This case was decided by the courts below on the assumption that a supervisory prosecutor may violate the constitutional right recognized in *Giglio*, *supra*, by failing to adopt procedures designed to avoid *Giglio* violations, or by failing to train or supervise line prosecutors in those procedures. Pet. App. 4, 6. That assumption is unfounded. *Giglio* recognizes a constitutional protection consisting of a duty to disclose material impeachment evidence *in a particular case*. It does not impose a free-standing procedural obligation on supervisory prosecutors to adopt procedures or to train or supervise line prosecutors to reduce the risk of *Giglio* violations across the board. It may be advisable for supervisory prosecutors to devise such policies or provide such training to reduce the risk that individual prosecutions will not be compromised. But *Giglio* does not impose that kind of wholesale obligation on supervisory prosecutors. In any event, even assuming the existence of a *Giglio* violation in these circumstances, the court of appeals erred in holding that petitioners do not enjoy absolute immunity from such *Giglio* claims.

Absolute immunity protects prosecutors from the burdens and distractions of having to defend claims for personal damages liability for actions undertaken in the prosecutorial role. Contrary to the Ninth Circuit's view, the claim that petitioners failed to establish policies and procedures for sharing *Giglio* information and their al-

leged failure to provide proper training and supervision of prosecuting attorneys on the sharing of that information implicates all of the policies that justify absolute immunity. A prosecutor's duty to disclose impeachment information in compliance with *Giglio* is "intimately associated with the judicial phase of the criminal process" (*Imbler*, 424 U.S. at 430) and involves the prosecutor's unique role in the criminal justice system. A line prosecutor who fails to make such a disclosure is entitled to absolute prosecutorial immunity. Assuming *Giglio* applies in the circumstances here, a supervisory prosecutor sued for damages in failing to establish policies, institute training, or supervise those who failed to make the disclosure is entitled to no less.

A. Prosecutors Are Entitled To Absolute Immunity For Carrying Out Their Prosecutorial Functions

1. In *Imbler*, this Court held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under [Section] 1983." 424 U.S. at 431. Thus, the Court decided, the state prosecutor in that case was absolutely immune from charges that he knowingly presented false testimony at trial and deliberately withheld exculpatory evidence from the defense. *Id.* at 416, 431 & n.34. In so holding, the Court concluded that such activities were "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force." *Id.* at 430.

Those reasons "include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exer-

cising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423. Such suits, the Court added, "could be expected with some frequency," and would require an enormous diversion of energy to defend. *Id.* at 425. The Court concluded that extending only qualified immunity to a prosecutor "would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Id.* at 427-428.

The Court also observed that although absolute immunity "does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty," such immunity "does not leave the public powerless to deter misconduct or to punish that which occurs." *Imbler*, 424 U.S. at 427, 429. A prosecutor is subject to the criminal law for his willful acts, the Court explained, and he "stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Id.* at 429.

Imbler recognized that the scope of absolute prosecutorial immunity extended beyond in-court conduct because "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." 424 U.S. at 431 n.33. The Court did not, however, decide whether absolute immunity extended to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate," *id.* at 430-431, or precisely how to distinguish those roles, *id.* at 431 n.33.

2. Subsequent cases have confirmed that the Court takes a "functional approach" in determining which actions by a prosecutor are subject to absolute immunity. *Burns*, 500 U.S. at 486. That approach "looks to 'the nature of the function performed, not the identity of the actor who performed it.'" *Buckley*, 509 U.S. at 269 (quoting *Forrester* v. *White*, 484 U.S. 219, 229 (1988)). Absolute immunity extends to claims challenging not only the decision to initiate a prosecution and the filing of charging documents with the court, *Kalina*, 522 U.S. at 128-129, but also any "'duties of the prosecutor in his role as advocate for the State,'" *Buckley*, 509 U.S. at 272 (quoting *Imbler*, 424 U.S. at 431 n.33).

Those duties often will "involve actions preliminary to the initiation of a prosecution and actions apart from the courtroom" and "include the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." *Buckley*, 509 U.S. at 272, 273 (citation omitted). For instance, absolute immunity extends to claims challenging a prosecutor's appearance as a lawyer in a probable cause hearing in examining a witness and seeking a search warrant. *Burns*, 500 U.S. at 487-492. Immunity applies in those situations because the duties "involve the prosecutor's 'role as advocate for the State'" and "are connected with the prosecutor's role in judicial proceedings." *Id.* at 491 (quoting *Imbler*, 424 U.S. at 431 n.33), 494; accord *Buckley*, 509 U.S. at 271.

Absolute immunity is not available to "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Buckley*, 509 U.S. at 273. Prosecutorial immunity thus does not ex-

tend to acts by a prosecutor in giving legal advice to police officers about the use of hypnosis and the existence of probable cause to arrest a suspect, *Burns*, 500 U.S. at 492-496, or to investigative work performed before probable cause to arrest a suspect has been established, *Buckley*, 509 U.S. at 274-275. In those instances, the prosecutor "performs the investigative functions normally performed by a detective or police officer." *Id.* at 273; see *Kalina*, 522 U.S. at 126.

Absolute immunity also does not extend to a prosecutor's statements to the press because "[c]omments to the media have no functional tie to the judicial process just because they are made by a prosecutor." *Buckley*, 509 U.S. at 277. Similarly, qualified, rather than absolute, immunity applies to personnel actions brought by employees. *Ceballos* v. *Garcetti*, 361 F.3d 1168, 1170, 1184 (9th Cir. 2004) (prosecuting attorney brought First Amendment retaliation claim against his supervisors), rev'd on other grounds, 547 U.S. 410 (2006); cf. *Forrester*, 484 U.S. at 229 (Judge "was acting in an administrative capacity when he demoted and discharged" a court employee and thus was not entitled to absolute immunity.). Likewise, absolute immunity does not apply to a prosecutor's sworn statements attesting to the factual grounds for an arrest warrant because "the only function she performs in giving sworn testimony is that of a witness," not of a lawyer. *Kalina*, 522 U.S. at 131.

B. Absolute Immunity Bars All Claims Challenging A Supervisory Prosecutor's Role In Complying With *Giglio*

1. The Due Process Clause imposes on the prosecution in a criminal trial an "affirmative duty to disclose evidence favorable to a defendant." *Kyles*, 514 U.S. at 432. That duty is "most prominently associated with this

Court's decision in *Brady*." *Ibid.* *Brady* held "that the suppression by the prosecution of evidence favorable to an accused * * * violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87.

In *Giglio*, the Court held that the due process rule of *Brady* was violated when the government failed to disclose impeachment evidence consisting of a prosecutor's promise to a key government witness that he would not be prosecuted in exchange for grand jury and trial testimony. 405 U.S. at 152-154. The Court explained that "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor" to communicate to the defense promises made to a witness by the prosecutor's office. *Id.* at 154. Thus, "[i]mpeachment evidence, * * * as well as exculpatory evidence, falls within the *Brady* rule." *United States* v. *Bagley*, 473 U.S. 667, 676 (1985); see *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999); *Kyles*, 514 U.S. at 433-434.

The prosecution's duty to disclose material exculpatory evidence "illustrate[s] the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler*, 527 U.S. at 281. A prosecutor is "the representative * * * of a sovereignty * * * whose interest * * * in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935); see *Strickler*, 527 U.S. at 281; *Kyles*, 514 U.S. at 439; *United States* v. *Agurs*, 427 U.S. 97, 111 (1976); see also *Bagley*, 473 U.S. at 675 n.6 ("By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model."). The prosecutor's responsibility under *Brady* and *Giglio* is

vital "to preserve the criminal trial * * * as the chosen forum for ascertaining the truth about criminal accusations." *Kyles*, 514 U.S. at 440; *Bagley*, 473 U.S. at 675 (disclosure ensures that a "miscarriage of justice does not occur"); *Agurs*, 427 U.S. at 104 (non-disclosure involves a "corruption of the truth-seeking function of the trial process").

2. Under the foregoing principles, claims challenging a prosecutor's failure to comply with *Brady* or *Giglio* implicate a core prosecutorial function, and such claims are therefore barred by absolute immunity. As discussed, the Court in *Imbler* held that a prosecutor was entitled to absolute immunity from claims that he deliberately suppressed exculpatory evidence. The Court explained that "[d]enying absolute immunity from suppression claims could * * * eviscerate, in many situations, the absolute immunity from claims of using perjured testimony." 424 U.S. at 432 n.34; see *Kalina*, 522 U.S. at 124 (observing that *Imbler* extended absolute immunity to suppression claims even though those claims were "broader than any specific common-law antecedent").[1]

Absolute immunity applies with equal force to a claim that a *supervisory* prosecutor directed a *Brady* or *Gig-*

[1] The courts of appeals have accordingly held that a prosecuting attorney is entitled to absolute immunity for alleged *Brady* violations. See *Broam* v. *Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003); *Long* v. *Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999) (per curiam); *Moore* v. *Valder*, 65 F.3d 189, 194 (D.C. Cir. 1995), cert. denied, 519 U.S. 820 (1996); *Reid* v. *New Hampshire*, 56 F.3d 332, 336 (1st Cir. 1995); *Carter* v. *Burch*, 34 F.3d 257, 262-263 (4th Cir. 1994), cert. denied, 513 U.S. 1150 (1995); *Buckley* v. *Fitzsimmons*, 20 F.3d 789, 794 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995); *Prince* v. *Wallace*, 568 F.2d 1176, 1178 (5th Cir. 1978) (per curiam); *Hilliard* v. *Williams*, 540 F.2d 220, 221 (6th Cir. 1976) (per curiam).

lio violation in a particular case, such as a claim that a supervisor directed his subordinates not to share impeachment information with other prosecutors. A supervisory prosecutor's participation in the non-disclosure of *Brady* or *Giglio* information implicates a core duty of the prosecution. See, *e.g.*, Executive Office for U.S. Attorneys, U.S. Dep't of Justice, *United States Attorneys' Manual* § 9.5100(3) (Dec. 2006) (*U.S. Attorneys' Manual*) (requiring each prosecuting office to designate a senior official to communicate with investigative agencies about *Giglio* material). As the Ninth Circuit has correctly observed, "if [the plaintiff's] allegation is to be understood to mean that [the supervisor] was directly involved in the decision not to [disclose evidence], he too would enjoy the same absolute prosecutorial immunity which shields [the prosecuting attorney]." *Ybarra* v. *Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 680 (9th Cir. 1984); *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."). In short, a supervisor is no less functioning as a prosecutor by virtue of being a supervisor.

3. Those principles dictate that absolute immunity applies to the claims against petitioners in this case. Those claims involve petitioners' responsibility as prosecutors, *i.e.*, their duties in their "role as advocate for the State." *Imbler*, 424 U.S. at 431 n.33. The claims here are brought by a defendant in a criminal case, arising out of the non-disclosure of *Giglio* information that allegedly led to his criminal conviction. Respondent also does not allege that petitioners were functioning as investigators. He alleges that county prosecutors, including petitioners, allegedly violated duties mandated by

this Court's decision in *Giglio*. Because those allegations are "intimately associated with the judicial phase of the criminal process," *id.* at 430, 431 n.33, respondent's challenge is barred by prosecutorial immunity.

Respondent seeks to avoid the doctrine of absolute immunity by alleging that *Giglio* created "an *administrative duty* to create a system in which information pertaining to jailhouse informants * * * would be disseminated" among prosecuting attorneys in the District Attorney's Office, J.A. 50 (¶ 104) (emphasis added), and that petitioners purposefully, or with deliberate indifference, violated that duty and failed to train and supervise prosecuting attorneys in such a system, J.A. 45-46 (¶ 92), 50-51 (¶¶ 104-106), 68-70 (¶¶ 152, 154); see Br. in Opp. 6 (stating that "[t]he theory of [respondent's] suit [i]s that [petitioners] have administrative obligations to create an information management system about informants and an obligation to train staff about maintaining this information management system" and that "[t]hese obligations arise from [*Giglio*]"). The court of appeals, in characterizing respondent's allegations, similarly stated that "prosecutors' offices have a constitutional obligation to establish 'procedures and regulations . . . to insure communication of all relevant information on each case * * * to every lawyer who deals with it.'" Pet. App. 4 (quoting *Giglio*, 405 U.S. at 154). That effort to circumvent the bar against suing prosecutorial officials for prosecutorial actions fails.

As an initial matter, the above theory does not allege a valid constitutional claim and that provides an independent basis for reversing the decision below. Neither *Giglio* nor any other decision of this Court creates a free-floating constitutional duty for supervisory prosecutors to establish procedures, regulations, or a system

for the dissemination of impeachment evidence among prosecutors within the office, much less a specific "information management system about informants." Br. in Opp. 6. Nor is the due process principle recognized in *Brady* and applied in *Giglio* violated simply by a failure to train or supervise line prosecutors. To be sure, it may be advisable for supervisory prosecutors to develop such policies or provide such training or supervision to reduce the risk that *Giglio* violations will be committed in particular prosecutions, but the Constitution does not mandate the adoption of such policies or practices.[2]

The Constitution imposes an affirmative prosecutorial duty of disclosure of material evidence in a particular criminal case. That duty exists to protect the defendant's right to a fair trial. Accordingly, this Court has held that a defendant's conviction must be reversed upon non-disclosure of material evidence, even where impeachment evidence is not known to the individual prosecutor on the case but is "known to the others acting on the government's behalf in the case, including the

---

[2] The Ninth Circuit expressly did not determine whether respondent alleged a valid constitutional claim against petitioners but assumed the validity of the claim in resolving the immunity issue. Pet. App. 6. This Court took a similar approach in *Buckley*, 509 U.S. at 261, and *Kalina*, 522 U.S. at 122; cf. *Saucier* v. *Katz*, 533 U.S. 194 (2001) (establishing a different framework for considering qualified immunity claims). While the Court has not considered itself obligated to address the underlying constitutional claim in resolving absolute immunity claims, it could resolve the case by holding that the novel constitutional duty that the complaint invokes has no basis in the Due Process Clause or any other constitutional provision. At a minimum, however, if the Court decides this case based on the assumption made by the courts below, it should make clear that it is doing so solely for purposes of resolving the immunity issue decided below and that it is not embracing the novel constitutional duty on which respondent's *Giglio* claims rest.

police." *Kyles*, 514 U.S. at 437-438; *Giglio*, 405 U.S. at 154; *U.S. Attorneys' Manual* § 9-5.000(B)(2) (Dec. 2006) (federal prosecutors, "in preparing for trial," must seek all exculpatory and impeachment information from "federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant").[3]

In that respect, the "*individual prosecutor* has a duty to learn of any favorable evidence known to the others acting on the government's behalf." *Kyles*, 514 U.S. at 437 (emphasis added); *Strickler*, 527 U.S. at 281. In *Giglio*, the Court explained that information in the possession of the prosecutor's office is charged to the prosecuting attorney and commented that "[t]o the extent that this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio*, 405 U.S. at 154; *Kyles*, 514 U.S. at 438. Far from imposing a constitutional obligation on supervisory prosecutors to establish precise policies and procedures or any information management system in particular, the Court's statement in *Giglio* observed only that compliance with its rule was feasible as a practical matter: "the prosecutor has the *means* to discharge the government's *Brady* responsibility" by establishing appropriate procedures. *Ibid.* (emphasis added).

---

[3] The lower courts have similarly held that prosecutors do not have a duty to learn of information possessed by other jurisdictions or other government agencies with no involvement in the investigation or prosecution at issue. See, *e.g.*, *United States* v. *Morris*, 80 F.3d 1151, 1169 (7th Cir.), cert. denied, 519 U.S. 868 (1996); *United States* v. *Meros*, 866 F.2d 1304, 1309 (11th Cir.), cert. denied, 493 U.S. 932 (1989).

The Court did *not* hold that supervisory prosecutors violate the Constitution by failing to establish such procedures. Accordingly, *Giglio* does not support the claim made against petitioners in this case, and the theory of *Giglio* affords no basis for positing that the Due Process Clause requires particular internal management structures or procedures.

4. In any event, respondent's purported constitutional claim is barred by absolute immunity. While supervisors are under no constitutional duty to establish certain procedures for *Giglio* compliance, when they do so they are functioning as prosecutors and exercising discretion in the conduct of criminal cases.[4] Accordingly, even if *Giglio* could be read to impose a duty to establish information-sharing procedures, that duty would arise only by virtue of petitioners' status as essential participants in the prosecutorial process—*i.e.*, as supervisory prosecutors. As respondent acknowledges, his suit is based on a theory that this Court in *Giglio* "directed" and "mandated" supervisory prosecutors to establish an information management system. Br. in Opp. 1, 6. And the court of appeals likewise concluded that the claims against petitioners "arose only because of their roles as prosecutors." Pet. App. 14. If that were so, the absolute immunity doctrine of *Imbler* would govern and defeat respondent's *Giglio* claims.

---

[4] Supervisory prosecutors establish a range of policies for line prosecutors that are not required by the Constitution, but which still constitute core prosecutorial acts. For example, the government has established a policy generally restricting successive prosecutions (the "Petite policy"), which is not constitutionally compelled (see *Petite* v. *United States*, 361 U.S. 529 (1960) (per curiam); *U.S. Attorneys' Manual* § 9-2.031 (Oct. 2007)), but which would constitute a core exercise of prosecutorial discretion that would be protected by absolute immunity.

The Ninth Circuit reasoned that the allegations against petitioners concerning the establishment of policies and a training and supervision program "bear a close connection *only* to how the District Attorney's Office was managed." Pet. App. 15 (emphasis added). That attempt to treat the supervisory prosecutors' actions here as managerial rather than prosecutorial is fundamentally mistaken. Just as the prosecutorial function includes any acts taken by a supervisory prosecutor to comply with *Giglio* in a given case, see pp. 16-17, *supra*, the prosecutorial function includes decisions on whether to establish procedures to comply with *Giglio*, the content of any such procedures, and any training and supervision concerning such procedures. There is "no meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as policies for general application." *Haynesworth* v. *Miller*, 820 F.2d 1245, 1269 (D.C. Cir. 1987); accord *Roe* v. *City & County of San Francisco*, 109 F.3d 578, 583 (9th Cir. 1997).

For purposes of absolute immunity, there is accordingly no meaningful distinction between a supervisor's guidance, supervision, and training in a specific case on how to comply with *Giglio* and the promulgation of *general* policy on how to comply with *Giglio* in *all cases*. Suppose, for example, that a new prosecutor seeks out an experienced prosecutor for advice about how to comply with *Giglio,* and the supervisor instructs him on the sources of information to contact. That advice would indisputably be characterized as "prosecutorial." The characterization does not change if the supervisor decides to reduce her advice to a written manual that all of the prosecutors in the office can use to coordinate the office's compliance with *Giglio.* In both instances, the

supervisor functions as a prosecutor in her unique role to ensure fairness in the judicial process. Similarly, in both instances, the supervisor must make "judgment calls" and exercise "discretion" (*Kyles*, 514 U.S. at 437, 439) in particular cases involving such issues as materiality and what constitutes exculpatory and impeachment evidence. See, *e.g.*, *U.S. Attorneys' Manual* § 9-5.001 (Dec. 2006) (purposes of *Giglio* policy are "to promote regularity in disclosure practices, through the reasoned and guided exercise of prosecutorial judgment and discretion by attorneys for the government" and "to seek a just result in every case").

The same reasoning applies to an alleged failure by a supervisor "to create an information management system about informants" and "to train staff about maintaining this information system." Br. in Opp. 6. Whether such a system is appropriate for a particular office, and what training would be necessary, requires the exercise of professional judgment on how to fulfill the prosecution's duty of disclosure. Those decisions require "a balancing of myriad factors," including whether "prosecutorial resources" (*Haynesworth*, 820 F.2d at 1269) are best spent by creating, compiling, and maintaining an "informant information system" (Br. in Opp. 18). Indeed, we are not aware of any United States Attorney's Office in the country that has established the database contemplated by respondent. *Id.* at 18-19. And contrary to respondent's suggestion (*ibid.*), in order to establish such a system, prosecutorial judgments would have to be made concerning, *inter alia*, whether and why a system should be limited to informants (as opposed to other types of witnesses), how a system could compile and track cases in which an informant has testified (and what jurisdictions would be included), whether such sen-

sitive law-enforcement information should be maintained by the prosecution or investigators, and what would constitute a "benefit[] or promise[]" made to an informant (*id.* at 19).

In any event, as discussed, a supervisor's actions in setting policies on those topics would occur only in the supervisor's role as a prosecutor. Again, there is no meaningful difference between a supervisory prosecutor who establishes an informant-information system for general application; a supervisory prosecutor who gives particular guidance and training on how to use such a system in a particular case; and indeed a line attorney who develops and utilizes such a system in retrieving informant information for disclosure to the defense. All of those actions would occur within the larger framework of the truth-seeking function of the judicial process and would be intimately bound up with the role of the prosecutor as an advocate for the government. As such, absolute immunity bars all claims challenging those actions.

5. The Ninth Circuit's dichotomy between "administrative" and "prosecutorial" functions (Pet. App. 13) is also flawed conceptually. Some conduct that is actually "administrative" is also integrally bound up with carrying out the prosecutorial function, and thus the conduct is protected by absolute immunity.[5] For example, a line

---

[5] The Ninth Circuit purported to leave open the question whether "it may be possible for an act to be prosecutorial in function but administrative in form," because it mistakenly characterized policy formation, training, and supervision of *Giglio* issues to be "administrative." Pet. App. 13. In fact, it does not matter how policy formation and the other supervisory tasks are described *in the abstract*; the performance (or alleged nonfeasance) of the core prosecutorial task of complying with

prosecutor may violate *Giglio* through her negligence involving misdelivery of the information to the wrong party, accidental destruction of the information, or the misentry of a informant's name in a hypothetical informant database. The prosecutor would be absolutely immune from claims involving those situations because the claims arise out of her role as a prosecutor. Immunity would not be lost simply because the specific acts causing the *Brady* violation could be said to be "clerical," "ministerial," or "administrative" or not to have involved the exercise of professional judgment. Br. in Opp. 19.

Absolute immunity would apply to those instances because the acts are intimately bound up with a core prosecutorial function—the duty to disclose *Giglio* information. Absolute immunity does not apply to "[a] prosecutor's administrative duties * * * *that do not relate* to an advocate's preparation * * * for judicial proceedings." *Buckley*, 509 U.S. at 273 (emphasis added).[6] This Court has "not retreated, however, from the principle that acts undertaken by a prosecutor in preparing * * * for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity." *Ibid.* Because the supervisory duty alleged to be violated here *does* "relate to an advocate's preparation * * * for judicial proceedings," absolute immunity bars all claims challenging acts alleged to be in violation of that duty, even if in some sense it partakes of an "administrative" nature. *Ibid.*

Giglio is itself prosecutorial whether carried out at retail by the line prosecutor or at wholesale by his supervisor.

[6] See p. 13, *supra*. This case is thus far removed, for example, from a personnel action brought by an employee against a supervisor.

Similarly, if a *Giglio* violation results from the negligence of a prosecutor's subordinate, such as a secretary, the prosecutor does not lose absolute immunity simply because the complaint charges the prosecutor with deliberate indifference to the proper supervision of the secretary or to the management of his office. The same is true here. Respondent did not sue the individual prosecutors who allegedly violated respondent's *Giglio* rights by their non-disclosure of prosecutorial promises made to Fink. Instead, respondent sued supervisors who had no direct role in the violation but who are nonetheless alleged to be personally liable because they caused the violation in their capacities as managers and supervisors over the District Attorney's Office as a whole. Acceptance of that theory would permit a plaintiff to circumvent a prosecuting attorney's absolute immunity by suing his supervisor for negligent supervision. "Allowing the avoidance of absolute immunity through that pleading mechanism would undermine in large part the protections that [the Court] found necessary in *Imbler*." *Buckley*, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part).

C. Absolute Immunity For Supervisory Prosecutors Is Necessary For The Proper Functioning Of The Office Of The Prosecutor And The Judicial Process

The reasons identified by this Court in *Imbler* for extending absolute immunity to claims that a prosecuting attorney deliberately withheld exculpatory information in violation of *Brady* apply with equal or greater force to claims that a supervisory prosecutor deliberately failed to establish procedures and to provide training that would have prevented a violation of a defendant's constitutional rights. Indeed, there is no justifi-

cation for a rule that affords absolute immunity to a prosecuting attorney who *intentionally* withholds impeachment information and to a supervisor who *intentionally* directs such a violation, but that would deny such immunity to a high-level supervisor who establishes a policy that caused an *inadvertent* violation of *Giglio* to occur. Supervisory prosecutors must be accorded wide latitude to tailor how their offices will comply with the duties imposed by *Brady* and *Giglio*, free of the threat that policy judgments will be second-guessed in suits seeking to impose personal liability. Thus, absolute immunity is necessary to ensure "the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system." *Imbler*, 424 U.S. at 427-428.

1. Denying absolute immunity to supervisory prosecutors for policies they set and their supervision and training concerning *Brady* and *Giglio* compliance would "present a substantial likelihood of vexatious litigation that might have an untoward effect on the independence of the prosecutor" and "[t]herefore[] absolute immunity of that function serves the policy of protecting the judicial process." *Burns*, 500 U.S. at 492; accord *Mitchell* v. *Forsyth*, 472 U.S. 511, 521-522 (1985); *Imbler*, 424 U.S. at 426. As the District of Columbia Circuit has explained, if this Court were

> to decline to insulate prosecutorial policymaking, an abundance of vexatious litigation would result. * * * Indeed, the threat to the policymaker may be amplified; he or she, as policymaker, faces the risk of recrimination from the potentially larger number of parties prosecuted in accordance with the agency directive. The threat of litigation is very real, and

> indubitably would inhibit the performance of prosecutorial duties.

Haynesworth, 820 F.2d at 1269-1270.[7]

The threat of a large number of lawsuits concerning a supervisor's role in a *Giglio* violation presents a direct and substantial risk of disrupting the functioning of the office of the prosecutor. "The presentation of such issues in a § 1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury." *Imbler*, 424 U.S. at 425. For instance, respondent would be required to prove that the failure to create procedures and regulations and to supervise and train in their use caused a non-disclosure of material evidence. See, *e.g.*, *Hartman* v. *Moore*, 547 U.S. 250, 260 (2006); *Crawford-El* v. *Britton*, 523 U.S. 574, 593 (1998); see also *Coyne* v. *Taber Partners I*, 53 F.3d 454, 460 (1st Cir. 1995) ("causation questions are both factbound and case-specific").

One causation issue, for example, that could routinely arise in a case challenging *Brady* or *Giglio* policies is whether a given prosecuting attorney's non-disclosure was based on his own prosecutorial judgments in the case, the lack of adequate supervision, or the absence of adequate policies or procedures. The rule adopted by the court of appeals would place line prosecutors in an untenable position vis-a-vis their supervisors. If the line prosecutor, who presumably would be immune in all events, admitted that he made an actual judgment not to

---

[7] The threat of such lawsuits would, of course, be magnified if the court of appeals' decision were extended to suits challenging other prosecutorial policies, such as the handling of capital prosecutions, witnesses, grand juries, indictments, and plea negotiations. See generally *U.S. Attorneys' Manual* tit. 9 (June 2008).

disclose, that would foreclose any claim against the supervisors because of a lack of causation between the supervisors' alleged omissions and the non-disclosure. Such a concession, however, would potentially subject the line prosecutor to professional sanctions by the court or his licensing bar. Supervisors, on the other hand, would have substantial litigation and institutional interests in establishing that their existing policies and procedures are fully adequate and appropriate. Such potential conflicts of interest would be enormously disruptive to prosecutors' offices and prosecutors thus could be "hampered in exercising their judgment * * * by concern about resulting personal liability." *Imbler*, 424 U.S. at 426.

Suits such as respondent's would interfere with the office of the prosecutor in other ways. Those suits could involve "[t]he prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, * * * [and] the likelihood that prosecutorial misconduct so infected a trial as to deny due process." *Imbler*, 424 U.S. at 425. Respondent's claims would also involve prosecutorial deliberations made by the District Attorney, his chief deputy, other prosecutors in the District Attorney's Office who had dealings with Fink, as well as the attorneys who prosecuted respondent and who unquestionably are entitled to absolute immunity. "Defending these decisions, 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 425-426.

Even if a case against a supervisor does not proceed to trial, the burdens of discovery, including the produc-

tion of documents and potential depositions of prosecutors, would significantly disrupt the function of the office of the prosecutor. *E.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982) ("burdens of broad-reaching discovery" are "peculiarly disruptive of effective government"). And if supervisory prosecutors lost absolute immunity whenever the acts of prosecutors were allegedly traceable to their actions (or inactions), few prosecutors would willingly accept a job as a supervisor. Cf. *Robertson* v. *Sichel*, 127 U.S. 507, 515 (1888) ("Competent persons could not be found to fill [supervisory] positions * * * if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person.").

"The affording of only qualified immunity to the [supervisory] prosecutor also could have an adverse effect upon the functioning of the criminal justice system." *Imbler*, 424 U.S. at 426. As this Court explained in *Imbler*, collateral proceedings brought by a defendant challenging his conviction should be "focused primarily on whether there was a fair trial under law." *Id.* at 427. "This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor's being called upon to respond in damages for his error or mistaken judgment." *Ibid.* "The possibility of personal liability also could dampen 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 427 n.25. Those principles apply with special force in a case like this. Respondent successfully

collaterally attacked his conviction by establishing that he was wrongfully convicted. The criminal justice system would not have been well-served if those collateral proceedings had been influenced by concerns about exposure of prosecutors to personal liability.

2. Qualified immunity is not an adequate substitute for absolute immunity for a supervisory prosecutor, and nothing justifies protecting line prosecutors absolutely, while exposing their supervisors to a greater hazard of liability. The defense of absolute immunity "defeats a suit at the outset," *Imbler*, 424 U.S. at 419 n.13, without regard to whether the law was "clearly established" at the time of the challenged conduct. *Harlow*, 457 U.S. at 818. Qualified immunity can also be denied or delayed if there are disputed questions of fact. See, *e.g.*, *Johnson* v. *Jones*, 515 U.S. 304, 319-320 (1995). Such delay and litigation does not occur in cases involving absolute immunity because such suits are dismissed at the outset when the complaint alleges that the prosecutor violated his duties as a prosecutor.

Absolute immunity thus discourages suits from being brought and effectively brings to a rapid conclusion those suits that are brought. The prophylactic effect from defeating such suits at the outset goes to the heart of the rationale for absolute immunity, which seeks to avoid "harassment" and "a deflection of the prosecutor's energies." *Imbler*, 424 U.S. at 423 (quoting *Pearson* v. *Reed*, 44 P.2d 592, 597 (Cal. Dist. Ct. App. 1935)). "If a prosecutor had only qualified immunity, the threat of § 1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution." *Id*. at 424. Thus, "the alterna-

tive of qualifying a prosecutor's immunity would disserve the broader public interest." *Id.* at 427.

A rule that denies supervisory prosecutors absolute immunity from claims that they allegedly violated a constitutional duty, like the disclosure obligation in *Giglio* that applies in all criminal cases, would have enormous adverse repercussions. Supervisors, such as petitioners in this case, are charged with the establishment of policies for the prosecution of all criminal cases in their offices. That essential prosecutorial function would be hamstrung by subjecting supervisors to what could be a barrage of personal damages actions over prosecutorial policies and judgments.

3. Absolute immunity from personal damages liability does not leave supervisory prosecutors immune from other sanctions that deter prosecutorial misconduct and punish wrongdoers. As an initial matter, *Giglio* itself provides a strong incentive to establish robust policies favoring disclosure. As discussed, although the prosecution does not have a duty to establish any particular system for storing or sharing of impeachment information within an office, a prosecutor who fails to gather and disclose material impeachment information in the hands of other prosecutors for whose knowledge he is accountable violates *Giglio* and the conviction will be reversed as a result. Supervisory prosecutors thus have every incentive to establish policies and procedures that ensure that prosecuting attorneys comply with the dictates of *Giglio*. Moreover, as is the case with a line prosecutor, supervisory "prosecutors are subject to professional discipline, public censure, and perhaps even criminal penalties for unsavory acts." *Haynesworth*, 820 F.2d at 1270; accord *Imbler*, 424 U.S. at 429.

Prosecutorial offices also often have their own internal mechanisms to address prosecutorial misconduct and ensure that prosecutors, including supervisors, meet the highest standards of ethical misconduct. In the federal system, for instance, the Office of Professional Responsibility (OPR) within the Department of Justice reviews and investigates allegations of prosecutorial misconduct, see *United States* v. *Hasting*, 461 U.S. 499, 506 n.5 (1983), often including alleged violations of *Brady*, *Giglio*, or discovery obligations under Rule 16 of the Federal Rules of Criminal Procedure. Office of Professional Responsibility, U.S. Dep't of Justice, *Fiscal Year 2004 Annual Report* 1 (*OPR Annual Report*) <http://www.usdoj.gov/opr/annualreport2004.htm>; see, *e.g.*, *United States* v. *Derrick*, 163 F.3d 799, 803 (4th Cir. 1998).

OPR has jurisdiction over all Department of Justice attorneys. Where investigation substantiates an allegation of professional misconduct, OPR recommends a range of disciplinary action appropriate to the conduct. *OPR Annual Report* 2. Supervisory prosecutors, from first line supervisors through Criminal Chiefs and First Assistants, are subject to the full range of disciplinary actions available under the law, from reprimand through suspension and removal. *U.S. Attorneys' Manual* § 3-4.752 (Nov. 2007).

Furthermore, once a disciplinary action is final, OPR notifies the bar counsel in each jurisdiction in which an attorney found to have committed professional misconduct is licensed. The bar referral policy includes findings of intentional professional misconduct, as well as findings that an attorney acted in reckless disregard of a professional obligation or standard. *OPR Annual Re-*

port 2-3. Accordingly, a wide range of sanctions ensures that supervisory prosecutors fulfill their ethical duties and special role in the criminal justice system.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

GREGORY G. GARRE
Acting Solicitor General
GREGORY G. KATSAS
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
LISA S. BLATT
Assistant to the Solicitor General
BARBARA L. HERWIG
MARK W. PENNAK
Attorneys

JULY 2008