No. 07-854

IN THE

# Supreme Court of the United States

JOHN VAN DE KAMP, *et al.*,

*Petitioners*,

—v.—

THOMAS LEE GOLDSTEIN,

*Respondent.*

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

## BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF SOUTHERN CALIFORNIA, THE ACLU OF NORTHERN CALIFORNIA AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil-rights laws. The ACLU of Northern California and the ACLU of Southern California are regional affiliates of the National ACLU. Since its founding in 1920, the protection of due process rights and the vindication of constitutional rights more generally have been the central concern of the ACLU, which has appeared before this Court in numerous cases implicating these rights and the fairness of the criminal justice system, both as direct counsel and as *amicus curiae*. Proper resolution of the legal issues raised by this case is therefore a matter of substantial concern to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit organization with more than 12,000 direct members and 35,000 affiliate members from all 50 states. Founded in 1958, NACDL promotes research in the field of criminal law, disseminates and advances knowledge relevant to that field, and encourages integrity, independence, and expertise in criminal defense

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[1] Pursuant to Rule 37.3, letters of consent from the parties have been submitted to the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that 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 person other than *amici*, their members or their counsel made a monetary contribution to its preparation or submission.

practice. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL routinely files amicus briefs on various issues, including the prosecutorial duty to disclose exculpatory information, in this Court and other courts.

## STATEMENT OF THE CASE

### *Goldstein's Arrest and Wrongful Conviction*

On November 16, 1979, Respondent Thomas Lee Goldstein, a 30-year-old Marine Corps veteran and engineering student living in Long Beach, California, was arrested for the shooting death of John McGinest. J.A. 21, 27-28. There was no forensic or physical evidence linking Goldstein to the shooting, nor any evidence that Goldstein had ever had contact with McGinest. J.A. 23. None of the eyewitnesses' descriptions of the shooter matched Goldstein. J.A. 24.

What the police did have were two dubious pieces of evidence. The first was a purported identification that the police elicited from Loran Campbell, an eyewitness, by suggestion and intimidation. J.A. 26, 52.

The second—and much more damning—piece of evidence was the testimony of Edward Fink, a heroin addict, recidivist, and jailhouse informant. J.A. 29. Fink had worked as an informant for the Long Beach Police Department for the previous ten years, giving police the concocted "confessions" of others and receiving benefits in exchange. Knowing Fink's tendency to hear confessions from his

cellmates, Long Beach police officers purposely transferred him to Goldstein's jail cell. J.A. 30. After a single night alone with Goldstein, Fink told the police that Goldstein had confessed the murder to him. J.A. 30-31. The police knew that Fink had simply made the confession up. J.A. 31.

The prosecution nonetheless allowed Fink to testify—without correction—that he had heard Goldstein confess to the crime. J.A. 32, 35. Fink also testified that he had received no benefit for testifying against Goldstein and had never received any benefits in the past for cooperating with law enforcement. J.A. 37. Fink perjured himself. The truth was that he had received numerous benefits during his decade-long stint as an informant, and in exchange for his false testimony against Goldstein had received a very nice deal: three years of probation with only two months of incarceration for grand theft, J.A. 38, 42, plus the dismissal of another theft charge, J.A. 39-40. Goldstein was convicted of murder.

***Administrative Recklessness in the District Attorney's Office***

Fink was allowed to commit perjury because the Deputy District Attorney handling Goldstein's prosecution did not know—*could not* know—of the benefits Fink had received for his testimony. Petitioners, who were then the District Attorney and Chief Deputy District Attorney of Los Angeles County and the administrative chiefs of the office, had put no system in place by which line prosecutors could learn of the deals struck with informants. J.A. 45-46. This, despite knowing that the introduction of

perjurious testimony by jailhouse informants was a significant systemic problem for the office. J.A. 44. In fact, even before Goldstein's prosecution Petitioners had considered creating a system to keep track of the benefits given to informants, but never did so. J.A. 46. Ten years later, when a Los Angeles County grand jury issued a report on the misuse of jailhouse informant testimony, it concluded that the District Attorney's Office had been guilty of a "deliberate and informed disinclination to take the action necessary to curtail the misuse." J.A. 50.

***Goldstein Wins Release and Initiates This Action***

Throughout his imprisonment, Goldstein maintained his innocence and challenged his conviction. J.A. 22. Finally, in May 2002, during an evidentiary hearing in federal district court on his petition for habeas corpus, Goldstein had an opportunity to present evidence and testimony showing that Fink had perjured himself during his trial and had received benefits for his assistance. J.A. 52-53. The district court granted the writ, and the court of appeals affirmed. J.A. 54, 55.

Despite all that had been revealed, the District Attorney's Office attempted to retry Goldstein. Unsuccessful, the State finally released him more than 24 years after his arrest. J.A. 58-60.

In December 2005, Goldstein filed this civil rights action against Petitioners, among others. J.A. 15-16. Petitioners claimed they were entitled to absolute immunity and moved for dismissal on that ground alone. Pet. App. 18. The district court, however, concluded that their failure to create any

information-sharing system about informants to which line prosecutors could have access was a derogation of administrative, not prosecutorial duties. Petitioners were therefore not entitled to absolute immunity. Pet. App. 18-20. On appeal, the Ninth Circuit affirmed. Pet. App. 15. Rehearing *en banc* was denied, Pet. App. 23, Petitioners petitioned for *certiorari*, and this Court granted the petition, 128 S. Ct. 1872 (2008).

## SUMMARY OF ARGUMENT

Thomas Goldstein's wrongful conviction and 24-year incarceration expose a disturbing but little-recognized aspect of the American criminal justice system: its substantial, largely unregulated reliance on informants. The primary guarantor of due process—and the central check against wrongful conviction at the hands of lying informants—is the prosecutorial obligation to collect and disclose impeachment material about them. *See Giglio v. United States*, 405 U.S. 150 (1972). But the Deputy District Attorneys who prosecuted Goldstein could not fulfill their *Giglio* duties because their office had no system whatsoever to record potential impeachment information about jailhouse informants and disseminate it to line prosecutors. Respondent's merits brief persuasively explains why Petitioners' deliberate and informed refusal to create even the most rudimentary information management system for informant impeachment material was an administrative, rather than prosecutorial, decision, and so is not entitled to absolute immunity. *Amici* will not repeat those points here. This brief will instead refute Petitioners' public-policy arguments

and demonstrate that the information-management system that could have averted Goldstein's 24-year nightmare is a crucial piece of a larger institutional commitment to the fairness and integrity of the criminal justice system.

1. Contrary to Petitioners' arguments, *see, e.g.*, Pet. Br. 33-37, the public-policy concerns that led this Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976), to adopt absolute immunity for prosecutorial functions militate against absolute immunity in this case. Petitioners' deliberate refusal to institute *any* information-management system *at all* for informant impeachment material exhibits an indifference to *Giglio* obligations far beyond the pale. Expanding absolute immunity to encompass such a complete derogation of this important administrative duty would significantly impede the fair operation of the criminal justice system.

2. Although informants pervade criminal prosecutions, their unreliability, their incentives to lie, and indeed their very existence commonly evade documentation, regulation, discovery, and judicial scrutiny.

3. Because due process disclosure requirements are the primary structural mechanism to regulate the use of informants, the integrity of the criminal justice system depends upon prosecutors' obtaining, recording, and disclosing informant impeachment material.

4. The significance of Petitioners' administrative dereliction here must be understood in the context of the pervasive structural obstacles faced by a defendant seeking *Giglio* material. Much police

and prosecution interaction with informants is never revealed. While Goldstein's administrative-duty claim would be unavailable to defendants suffering typical *Giglio* violations, these additional systemic impediments illustrate why the remedy Goldstein seeks here—though available only in very limited circumstances—is critical to the integrity of the criminal justice system.

5. Given the many structural barriers to discovery and judicial scrutiny, remedies for nondisclosure of *Giglio* material are all the more important. Yet such remedies as do exist are difficult to obtain and necessarily affect the outcome of only the immediate defendant's case. They are therefore insufficient to motivate or deter the actors—like Petitioners here—singularly able to create at least some sort of office-wide information-management system to handle informant material.

6. Allowing only qualified rather than absolute immunity for the administrative function at issue here will not open the floodgates to vexatious litigation. Claims like Goldstein's, while important because of the critical structural interests at stake, will lie only in the rarest circumstances.

7. Finally, this Court should decline the invitations of Petitioners' *amici* to decide issues not raised or ruled upon below. Deciding the municipal-liability question would be particularly inappropriate given that the municipal defendants are not even parties before this Court.

## ARGUMENT

### I. GRANTING ABSOLUTE IMMUNITY HERE WOULD UNDERMINE THE INTEGRITY AND FAIRNESS OF THE CRIMINAL JUSTICE SYSTEM.

The immunities available under 42 U.S.C. § 1983 are grounded upon those historically accorded at common law and the public-policy rationales underlying them. *Imbler v. Pachtman*, 424 U.S. 409, 420. Petitioners bear the heavy burden of showing that public policy requires extending absolute immunity to these circumstances. *Butz v. Economou*, 438 U.S. 478, 506 (1978). It is the "'judicial process itself,'" not "any special 'esteem for those who perform [prosecutorial] functions,'" that provides the basis for absolute prosecutorial immunity. *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).

This Court's concern for the integrity of the criminal adjudicatory process has driven prosecutorial-immunity jurisprudence since its inception in *Imbler*. Because the threat of potential personal civil liability for prosecutors acting in their role as advocate creates incentives at odds with a fair adjudicatory process, "[t]he ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to section 1983 liability." *Imbler*, 424 U.S. at 427; *see also id.* at 423 (specifying the need to avoid "an adverse effect upon the functioning of the criminal justice system" and obstruction of "the system's goal of accurately determining guilt or innocence"); *id.* at 427 n.25 (expressing concern that § 1983 doctrine not

"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 427-28 (seeking to protect the performance of the prosecutorial duty, which is "essential to the proper functioning of the criminal justice system"). These policy concerns, though, have quite different implications for Petitioners' deliberate inaction here.

The office-wide administrative decision at issue in this case is significantly attenuated from any litigation decision prosecutors, acting as advocates, make in individual cases. Line prosecutors will not be deterred from zealous advocacy by the knowledge that chief administrators—their supervisors—can be held liable for failing to provide them with a basic component of office infrastructure.

At the same time, Petitioners' bid for absolute immunity has dangerous implications for the integrity of the criminal justice system. This is true *not* because chief administrators commonly refuse to create at least some sort of information-management system for informant material—indeed, the kind of derogation present here is undoubtedly rare—but rather because Petitioners' dereliction strikes at the very heart of due process protections. While informants pervade the criminal justice system, their use is largely undocumented, unregulated and free from judicial oversight. *Giglio*'s disclosure requirement is virtually the only systemic check against constitutional abuses of this nature. And yet line prosecutors unable to know themselves whether impeachment material exists cannot determine what ought be disclosed to defendants. Nor can those

defendants—absent exceptional luck, resources, and perseverance—hope independently to discover the existence of such material and avail themselves of mid-trial sanctions or post-conviction remedies. In short, when chief administrators exhibit the deliberate and informed indifference to *Giglio* obligations apparent here, the structure for ensuring due process breaks down.

The threat of potential personal civil liability against chief administrators under these remarkable circumstances is one of the very few structural checks that can deter and correct this devastating administrative omission and the rarely discovered due process violations that will inevitably result.

## II. THE USE OF INFORMANTS PERVADES THE CRIMINAL JUSTICE SYSTEM.

Informants play a central role at virtually every stage of the criminal process. They are used to investigate suspects surreptitiously, generate arrests, obtain warrants, gain entry into homes without warrants, and conduct electronic surveillance at the discretion of police in lieu of court-sanctioned surveillance. *See Illinois v. Gates*, 462 U.S. 213, 243-45 (1983) (informant tip constituted sufficient basis for issuance of warrant); *United States v. White*, 401 U.S. 745, 752-53 (1971) (wired informant could be sent into defendant's home to conduct electronic surveillance without a warrant); *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966) (police informant permitted to enter and collect information in private hotel room although police would have needed warrant to do so); *Draper*

*v. United States*, 358 U.S. 307, 312-13 (1958) (informant tip formed adequate basis for arrest).

Informants also testify as witnesses at hearings and trials. Their unreliability in this capacity is notorious. A recent study by the Northwestern University School of Law's Center on Wrongful Convictions disclosed that 45.9% of all wrongful capital convictions in the United States resulted from the lying testimony of an informant, making "snitches the leading cause of wrongful convictions in U.S. capital cases." Rob Warden, Ctr. on Wrongful Convictions, N.W. Univ. Sch. of Law, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004). University of Michigan Law School Professor Samuel Gross's study on exonerations likewise reports that nearly fifty percent of wrongful murder convictions involved perjury by someone such as a "jailhouse snitch or another witness who stood to gain from the false testimony." Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 543-44 (2005); *see also* Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 108 (2006) ("The usual protections against false evidence, particularly prosecutorial ethics and discovery, may thus be unavailing to protect the system from informant falsehoods precisely because prosecutors themselves have limited means and incentives to ferret out the truth.").

Informing has become an increasingly important aspect of plea negotiations and

sentencing, as more and more defendants choose to become informants rather than face the full consequences of their actions. Cooperation agreements have become a routine aspect of—or even a substitute for—plea agreements, though lacking many safeguards traditionally accompanying the plea process. Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 Vand. L. Rev. 1, 3 (1992) ("Cooperation agreements are exotic plants that can survive only in an environment from which some of the familiar features of the criminal procedure landscape have been expunged.").

Federal criminal law is expressly designed to create informants. Under 18 U.S.C. § 3553(e), a government motion stating that a defendant has provided "substantial assistance" is, in virtually all cases, the sole basis upon which a court can impose a sentence below the statutory mandatory minimum. *See, e.g.*, *Wade v. United States*, 504 U.S. 181, 185-86 (1992) (government's refusal to file motion under § 3553(e) reviewable only if based on unconstitutional motive such as race); *see also* U.S.S.G. § 5C1.2 (permitting sentence below statutory minimum in rare cases). Similarly, under the U.S. Sentencing Guidelines, the "substantial assistance" provision of U.S.S.G. § 5K1.1 is the single largest source of departures from the guidelines. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2006 tbl. 5.36.2006 (2007) (hereinafter Bureau of Justice Statistics, Sourcebook 2006), *available at* http://www.albany.edu/sourcebook/pdf/t5362006.pdf. This deliberate feature of criminal procedure has made the creation of informants a driving force in federal criminal law

enforcement over the past two decades. *See* Ian Weinstein, *Regulating the Market for Snitches*, 47 Buff. L. Rev. 563, 573 (1999).

No one knows with certainty how many informants are in the system at any given time, because police and prosecutors are not obligated to keep track. But countless wiretaps and search warrants are issued every year based on information from informants. *See*, *e.g.*, Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 Cal. West. L. Rev. 221, 239 (2000). In 2006, fifteen percent of all federal defendants received cooperation credit for providing information about others, Bureau of Justice Statistics, Sourcebook 2006, *supra*, tbl. 5.36.2006, and it has been estimated that more than twice that number actually provide information although they may receive no documented reward, Linda Drazga Maxfield & John H. Kramer, U.S. SENTENCING COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 9-10 (1998). Particularly in drug enforcement—an arena constituting the lion's share of both federal and state dockets—the use of criminal informants is ubiquitous. Bureau of Justice Statistics, Sourcebook 2006, *supra*, tbl. 5.36.2006; Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2004 tbls. 5.44.2004 & 5.45.2004 (2005), *available at* http://www.albany.edu/sourcebook/tost_5.html. As U.S. District Judge Marvin Shoob once noted, "I can't tell you the last time I heard a drug case of any substance in which the government did not have at

least one informant. Most of the time, there are two or three informants, and sometimes they are worse criminals than the defendant on trial." Mark Curriden, *The Informant Trap: Secret Threat to Justice*, Nat'l L.J., Feb. 20, 1995, at A1.

In sum, rewarding criminals in exchange for information or testimony is an important feature of the American criminal process, from investigations to arrests to trial to sentencing. *See* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. Cin. L. Rev. 645, 645-46 (2004) ("The use of criminal informants in the U.S. justice system has become a flourishing socio-legal institution unto itself."). The administrative mechanisms by which this practice is documented, regulated, and disclosed to defendants and to courts are thus critically important to the integrity of the criminal justice system.

## III. *GIGLIO* DISCLOSURE REQUIREMENTS ARE THE PRIMARY STRUCTURAL MECHANISM BY WHICH THE CRIMINAL JUSTICE SYSTEM MONITORS AND REGULATES THE USE OF INFORMANTS.

In *Giglio v. United States*, 405 U.S. 150 (1972), this Court held that defendants are constitutionally entitled, as a matter of due process, to know of any inducements for informants to testify against them, since this information can be critical to impeaching the informants' testimony. The prosecution in *Giglio* "failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government." *Id.* at 151. This Court

explained that "nondisclosure of evidence affecting credibility" falls under the rule of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), requiring disclosure to the defense. Because the informant's "credibility as a witness was . . . an important issue in the case, . . . evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Giglio*, 405 U.S. at 154-55. *Giglio* and *Brady* recognize that without disclosure of the processes by which the government creates informant witnesses, and especially the inducements provided to them, the adversarial process is unfairly one-sided and opaque: without disclosure, defendants cannot adequately protect themselves against, and be sure juries and courts know about, informants' biases and misrepresentations.

Moreover, as this Court made clear in *Kyles v. Whitley*, 514 U.S. 419 (1995), the obligations established in *Giglio* are the means by which the criminal justice system ensures that prosecutors disclose to the defense all material information the police possess, not just information actually and personally known by the trial prosecutor:

> The prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.

*Id*. at 437-38; *see also Banks v. Dretke*, 540 U.S. 668, 693 (2004) (reaffirming this duty as articulated in *Kyles*); *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (same). Criminal informants are typically managed by police officers or investigative agents. These officers control access to and communication with informants and have the most information about them. Defendants' constitutional rights to obtain exculpatory information concerning informants depend entirely upon prosecutorial diligence in acquiring this information from the police. Moreover, the requirement that prosecutors "gauge the likely net effect of all such evidence" presupposes that they have some mechanism for gathering it. Prosecutorial office-wide systems for memorializing and sharing this information are thus the primary safeguard not only against prosecutorial non-disclosure, but police non-disclosure as well.

This Court recognized the symbiotic relationship between constitutionally mandated disclosure and the legitimacy of informant use in *Hoffa v. United States*, 385 U.S. 293 (1966). In rejecting a due process challenge to the practice of compensating informant witnesses, this Court explicitly based its holding on the understanding that the informant would eventually be cross-examined in front of a properly instructed jury. *Id.* at 311 ("The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury."). *Hoffa*'s holding presupposes that defendants will receive all exculpatory impeachment evidence concerning informants, and that juries will

hear full cross-examinations of informants based upon that information. *Hoffa* upheld the constitutionality of using and rewarding informant witnesses, but only given the assumption that prosecutorial offices have mechanisms for collecting and providing the *Brady*/*Giglio* material necessary to a proper cross-examination. Without such safeguards, the very use of informant witnesses fundamentally threatens due process. *See Banks*, 540 U.S. at 701 (noting that this Court "has long recognized the 'serious questions of credibility' informers pose," and reversing denial of habeas relief in part because "[t]he jury . . . did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants" (quoting *On Lee v. United States*, 343 U.S. 747, 757 (1952))).

In this as in other areas, the criminal procedure system of checks is backwards-looking. Courts impose the exclusionary rule after the fact to induce police to comply with the Fourth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Likewise, courts enforce *Brady*/*Giglio* disclosure obligations after the fact—often long after the interactions of informants with police and prosecutors have taken place—to encourage and compel the lawful and responsible creation and handling of informant witnesses. Because police are not otherwise required to disclose their negotiations with informants, *Brady*/*Giglio* compliance is the central mechanism to ensure that the government collects and discloses information about how it uses and rewards informants. The system thus relies on the disclosure associated with the adversarial trial process to check

the accuracy and integrity of the police investigative process and prosecutorial negotiations about information. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Cal. L. Rev. 1585, 1588-89 (2005). The investigative process of creating informants is itself almost completely unregulated. The threat of eventual disclosure, however, serves as one of the few structural inducements to law enforcement to strive for reliability. Without at least some sort of information-management system in place for the prosecutorial collection and disclosure of this material, the entire process breaks down.

## IV. DESPITE CONSTITUTIONAL REQUIREMENTS, *GIGLIO* INFORMATION FREQUENTLY REMAINS UNDOCUMENTED AND UNDISCLOSED.

The significance of Petitioners' administrative dereliction must be understood in the context of the pervasive structural obstacles facing a defendant who seeks *Giglio* material. This broader context includes the all-too-frequent failure by police as well as prosecutors to record and disseminate information about their interactions with informants. While Goldstein's administrative-duty claim would be unavailable to defendants aggrieved by these more typical failures, their widespread existence illustrates why the remedy Goldstein seeks—though available only in very limited circumstances—is nonetheless critical to the integrity of the criminal justice system.

### A. *Giglio* Information Concerning Police Interaction and Communication with Informants Is Often Unrecorded or Withheld from Prosecutors.

The U.S. Department of Justice and the FBI—taken together, comprising one of the nation's largest handlers of informants—have long recognized that the collection of information about informants by law enforcement is crucial to their use. The Attorney General has imposed comprehensive guidelines that regulate the FBI's recruitment, reward, and monitoring of its 15,000 informants. *See* U.S. Dep't of Justice, Attorney General's Guidelines Regarding the Use of FBI Confidential Human Sources (Dec. 13, 2006), *available at* http://fas.org/irp/agency/doj/fbi/chs-guidelines.pdf.

For example, before recruiting a new informant, FBI agents are required to "document [the informant's] motivation for providing information or assistance, including any consideration sought from the government for this assistance," and "any promises or benefits, and the terms of such promises or benefits, that are given a Confidential Human Source by the FBI, [prosecutor] or any other law enforcement agency (if known, after exercising reasonable efforts)." *Id.* at 13. The agent must forward that documentation to a supervisor. *Id.* Agents must also document all payments made to informants, *id.* at 29, any crimes that informants are authorized to commit in the course of their cooperation, and make written findings justifying that authorization, *id.* at 30-32. *See also id.* at 37

(requiring documentation any time an agent has reason to believe that an informant has violated the authorization). Every informant file must be reviewed annually. *Id.* at 17. [2]

In its budgetary request for fiscal year 2008, the FBI sought $13 million to create a new monitoring database for its informants, asserting that such close monitoring was necessary to the integrity of the information process, because "without the personnel necessary to oversee the [monitoring system], the FBI will be unable to effectively ensure the accuracy, credibility, and reliability of information provided by more than 15,000 [informants]." Fed. Bureau of Investigation, FY 2008 Authorization and Budget Request to Congress 4-24 (2007), *available at* http://www.usdoj.gov/jmd/2008justification/office/33_01_justification.doc. By its own admission, then, the United States apparently believes that the responsible use of informants in criminal cases requires system-wide recordkeeping and that such

[2] The United States tells only part of the story in its assertion that it is "not aware of any United States Attorney's Office in the country that has established the database contemplated by respondent." Br. of Amicus United States at 22. The Attorney General, functionally equivalent to Petitioners here in his administrative responsibility for implementing office-wide systems, *has* imposed record-keeping obligations on the FBI so that individual subordinate U.S. Attorneys can meet their *Brady* obligations. *See* U.S. Dep't of Justice, United States Attorneys' Criminal Resource Manual § 9-2052, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02052.htm.

recordkeeping is not inherently "prosecutorial" but may be delegated to investigative agencies.

Unfortunately, many state and local police departments lack the systems and procedures of the FBI, making the maintenance of information about informants highly localized and contingent. Whereas the FBI keeps extensive files and records regarding its informants, local police precincts may keep none at all, and may not share information about informants' previous criminality. *See*, *e.g.*, Letter of Am. Civ. Liberties Union of N. Cal. to John Van De Kamp, Chair of the California Commission on the Fair Administration of Justice 4-6 (Sept. 19, 2006), *available at* http://ccfaj.org/documents/reports/jailhouse/expert/ACLU%20Letter%20re%20Informants.pdf (documenting findings of survey of 111 law enforcement agencies across the state).

When a police officer confronts a potential suspect, the decision to negotiate over arrest and liability, the conversations that influence a suspect to provide information, the kinds of information discussed, and the implicit promises or representations made during those conversations typically remain unrecorded. *See* Jerome Skolnick, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY 133 (1966) ("[Police reports] will not, if possible, reveal that an informant was used at all."); Randall Coyne, *Dead Wrong in Oklahoma*, 42 Tulsa L. Rev. 209, 215 n.76 (2006) ("More often than not, the key to a defense victory lies not in what appears in a police report but what is omitted from a police report. Police investigators have no legal duty to put all information they gather into written reports.").

This unchecked discretion and lack of documentation continues through the relationship between police handlers and their informants, influencing not only the kinds of promises that are made but also the kinds of information elicited. *See, e.g.*, Rhonda Cook, *Chain of Lies Led to Botched Raid*, Atlanta J.-Const., Apr. 27, 2007, at D1 (police relied on bad tip from drug dealer to raid home of innocent 92-year-old Kathryn Johnston who was killed during raid); *see also Joint Oversight Hearing on Law Enforcement Confidential Informant Practices Before the Subcomms. on Crime, Terrorism, and Homeland Sec. and on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong., 1st Sess. 4-5 (2007), *available at* 2007 WL 2084166 (statement of Rep. Robert C. Scott, Chairman of Subcomm.). Once this information is created, it is very difficult to trace it back to its origins or check its accuracy. As one prosecutor put it, "the black hole of corroboration is the time that cooperators and agents spend alone." Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Fordham L. Rev. 917, 936 (1999).

Even informants who are used to obtain search warrants evade documentation. A typical warrant application will not disclose the identity of the information source, but will state that a "confidential informant" has provided the basis for probable cause. Benner & Samarkos, *supra*, at 239. Courts have come to accept this secrecy as legitimate protection for informants' identities, *see, e.g.*, *McCray v. Illinois*, 386 U.S. 300 (1967), and courts rarely require informants to appear in person to

substantiate their information, *see* Benner & Samarkos, *supra*, at 239; *see also United States v. Harris*, 403 U.S. 573, 584-85 (1971). As a result, the untold thousands of criminal informants who provide information to law enforcement and to the courts every year do so largely in secrecy and without public documentation.

All too often, police agencies fail to convey information regarding their informants to prosecutors. *See, e.g., Smith v. Sec'y of N.M. Dep't of Corr.*, 50 F.3d 801, 828 (10th Cir. 1995) (acknowledging likelihood of "circumstances where the prosecution possesses, either actually or constructively, *Brady* information that for some reason is not in the 'file,' such as material in a police officer's file (but not in the prosecutor's file) or material learned orally and not memorialized in writing"). This can happen for any number of reasons: police reluctance to reveal an informant's additional crimes, fear of losing a useful source, or even simple distrust of prosecutors. *See, e.g.*, Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 Colum. L. Rev. 749, 789 (2003). Given the prevalence of informants in so many arenas of law enforcement, such omissions significantly affect the availability of constitutionally mandated disclosures throughout the criminal process. For this reason, the ability of prosecutors' offices to collect and disseminate information from police is essential to the criminal justice system's institutional commitment to due process and *Giglio*'s promise that defendants are entitled to exculpatory impeachment information about the informants used to prosecute them.

### B. Prosecutors' Communications with Informants Frequently Remain Undocumented and Prosecutors Themselves Often Resist Disclosure.

Prosecutors' negotiations with informants, like negotiations between informants and police, are rarely public. When a prosecutor orally promises not to file charges in exchange for information, that exchange will usually be known to only the prosecutor, the case agent, the cooperating informant, and his attorney. Daniel C. Richman, *Cooperating Clients*, 56 Ohio State L.J. 69, 119 (1995). Prosecutors may even have reduced incentives to collect and maintain *Giglio* information in the first place, because under *United States v. Ruiz*, 536 U.S. 622, 633 (2002), prosecutors are not constitutionally obligated to disclose such material in the more than 95% of criminal cases that are resolved by a guilty plea.[3]

Not only do the processes by which informants are created remain undocumented, but prosecutors also affirmatively deploy their discretion to hide the existence and identities of informants. *See, e.g.*, *Banks v. Dretke*, 540 U.S. 668, 676-77 (2004) (defense

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[3] In 2007, more than 96% of the convictions in federal court were by plea rather than trial. In 2004, approximately 95% of the convictions in state court were obtained the same way. Admin. Office of the U.S. Courts, 2007 Annual Report of the Director: Judicial Business of the United States Courts tbl. D-7 (2008), *available at* http://www.uscourts.gov/judbus2007/appendices/D07Sep07.pdf; Matthew R. Durose & Patrick A. Langan, U.S. Dep't of Justice, *Felony Sentences in State Courts, 2004*, Bureau of Justice Statistics Bull., July 2007, at 1, 2, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc04.pdf.

counsel sought information about a confidential informant, State resisted, and trial court refused to order information provided). Prosecutors may offer defendants advantageous plea deals, or even drop cases or permit their dismissal, in order to avoid disclosing the identity of an informant. *See, e.g.*, *People v. Borunda*, 522 P.2d 1 (Cal. 1974); *People v. Hulland*, 2 Cal. Rptr. 3d 919, 923 n.1 (Cal. Ct. App. 2003); *State v. Simmons*, 944 So. 2d 1122 (Fla. Dist. Ct. App. 2006); *State v. Clovis*, 807 P.2d 127 (Kan. 1991); *see also* Skolnick, *supra*, at 132-33. One state prosecutor in Illinois went so far as to retaliate against a motion to discover the identity of a confidential informant by refusing to negotiate any plea bargains in a series of cases involving other defendants and other defense attorneys; an appellate court permitted the practice. *See People v. Moore*, 804 N.E.2d 595, 597-98, 600 (Ill. App. Ct. 2003).

Whether impeachment information about an informant will be revealed to a defendant in Goldstein's position depends largely on the practices of individual prosecutors, who are not always as scrupulous as one might hope. For example, in *Banks*, this Court reversed the denial of a habeas petition where prosecutors

> withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. The State did not disclose that one of those witnesses was a paid police informant, nor did it disclose a pretrial transcript revealing that the other witness' trial testimony had been intensively coached by prosecutors and law enforcement officers.

540 U.S. at 675. The informant "asserted emphatically [at trial] that police officers had not promised him anything" for his testimony and that he had not spoken with police until a few days before trial. "These answers were untrue but the state did not correct them." *Id.* at 678. Only during federal habeas proceedings nineteen years later did the informant publicly reveal that he "set [the defendant] up" in order to help a police officer whom the informant feared would otherwise arrest him and from whom the informant received $200 for his help with the case. *Id.* Absolute immunity, of course, would protect the prosecutors in *Banks*.

When prosecutors fail to disclose informant information only the most tenacious and fortunate defendants can succeed in unearthing the information by other means, *see, e.g.*, *Bennett v. DEA*, 55 F. Supp. 2d 36 (D.D.C. 1999) (requiring release of information about informant only after Freedom of Information Act request), and sometimes not even then, *see, e.g.*, *Hidalgo v. FBI*, 541 F. Supp. 2d 250, 251 (D.D.C. 2008) (in inmate's FOIA suit for information about paid informant whose evidence helped convict requester, court noted that FBI "repeatedly rebuffed" the requester and "harried him from pillar to post"; court held that much of the information sought was nonetheless protected by FOIA exemptions), *appeal dismissed*, No. 08-5180, 2008 WL 2683861 (D.C. Cir. July 01, 2008).

Together, these dynamics mean that the bulk of the creation and handling of informants will evade discovery and judicial scrutiny. The police decision to arrest is almost never subject to judicial review, *see, e.g.*, *Town of Castle Rock v. Gonzales*, 545 U.S.

748, 760-61 (2005) (because of longstanding tradition of police discretion in arrests, police retained discretion even where statute's plain language made arrest mandatory). Nor is the prosecutorial decision to drop or levy charges. *See, e.g.*, *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" (quoting *Bordenkicher v. Hayes*, 434 U.S. 357, 364 (1978))). Because these processes of creating and negotiating with informants are discretionary, they are typically not subject to public or judicial scrutiny or to litigation.

To be sure, this case is not about the concealment of informants' identities because of plea deals, the misconduct of line prosecutors, or police or prosecutorial discretion. But the very existence of so many circumstances in which *Giglio* information slips through the cracks of the criminal justice system underscores the importance of information-sharing systems to promote disclosure. The variety and nature of the circumstances in which information about informants is concealed means that the creation and handling of informants will come to light only under the narrow circumstances where the government seeks to use the informant at trial—and sometimes not even then, if the information is not properly shared within the system. Because defendants have extremely limited opportunities to discover this essential information, information-management systems are all the more

vital. And, because absolute prosecutorial immunity shields nearly every *other* type of failure to disclose *Giglio* material, the concern for systemic fairness that justifies prosecutorial immunity *precludes* the extension of absolute immunity to Petitioners. *See also* Point I, *supra.*

## V. THE POSSIBILITY OF § 1983 LIABILITY FOR CHIEF ADMINISTRATORS IS THE ONLY MEANINGFUL SAFEGUARD AGAINST STRUCTURAL FAILURES TO COMPLY WITH *GIGLIO* DUE PROCESS REQUIREMENTS.

The existence of non-litigatory safeguards against constitutional violations is a crucial consideration in this Court's absolute-immunity jurisprudence. For example, underlying this Court's carefully tailored decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976), was the recognition that willful prosecutorial misconduct of the type implicated by Imbler's suit was subject to correction by means other than § 1983 lawsuits. Because prosecutors are subject to professional discipline and criminal sanctions for intentional violations of defendants' rights, the decision to grant prosecutors absolute immunity under certain circumstances "[did] not leave the public powerless to deter misconduct or to punish that which occurs." *Id.* at 429; *see also Butz v. Economou*, 438 U.S. 478, 513-16 (1978) (extending absolute immunity to federal administrative law judges because agency proceedings provide "many of the same safeguards as are available in the judicial process," such as adversary proceedings, a trier of fact insulated from political pressure, the right to

present evidence, and the right to agency or judicial review); *cf. Cleavinger v. Saxner*, 474 U.S. 193, 202, 204-06 (1985) (refusing to extend absolute immunity to members of a prison's discipline committee due to absence of "safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct").

The types of safeguard that this Court has found sufficient to allow for absolute immunity in previous cases are glaringly absent here. Petitioners mechanistically invoke the types of deterrent sanctions discussed in *Imbler*, *see* Pet. Br. at 36, but unlike an intentional conspiracy to convict an innocent man, *see Imbler*, 424 U.S. at 415-16 (describing the plaintiff's allegations), the misconduct alleged here—the failure to develop any information-sharing system at all regarding jailhouse informants—does not subject Petitioners to professional or criminal sanctions. Bar disciplinary systems rarely call prosecutors to task even when courts overturn convictions for *specific acts* of willful misconduct in high-profile cases, *see* Letter of Am. Civ. Liberties Union of N. Cal. to John Van De Kamp, *supra,* so the chance of a district attorney's being disciplined years afterward for his office's failure to establish a *Giglio* compliance *system* is necessarily even more remote. In fact, it appears that neither Petitioners nor anyone else was ever disciplined for the scandalous state of affairs that led to Goldstein's wrongful conviction and 24-year incarceration, despite the 1990 conclusion of a civil grand jury that the "Los Angeles County District Attorney's Office failed to fulfill the ethical responsibilities of a public prosecutor by its

deliberate and informed declination to take the action necessary to curtail the misuse of jailhouse informant testimony." *Report of the 1989-90 Los Angeles County Grand Jury* at 6. Nor will this type of failure subject a prosecutor to criminal liability under the federal and California statutes discussed in *Imbler*, 424 U.S. at 429 & nn. 28, 29.[4]

Nor can the mere possibility that a few cases may be overturned for *Giglio* error in the far-distant future provide any meaningful incentive for a chief administrator to implement a *Giglio* system today, particularly since *Giglio* errors, unlike trial errors that are often apparent in the courtroom, *e.g.*, *Griffin v. California*, 380 U.S. 609, 615 (1965) (prosecutor cannot draw negative inference from accused's silence), may not be uncovered until many years after the fact. *See Imbler*, 424 U.S. at 443-44 (White, J., concurring) ("Unlike constitutional violations committed in the courtroom . . ., the judicial process has no way to prevent or correct the constitutional violation of suppressing evidence. The judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface."); *see also, e.g.*,

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[4] Because the *Giglio* error asserted here results from a structural problem in the prosecutor's office, rather than individual misconduct, it is virtually certain that no one would be guilty of "willfully subject[ing]" a person to a deprivation of constitutional rights under 18 U.S.C. § 242. *Compare.* 42 U.S.C. § 1983 (liability for one who "subjects, or causes to be subjected"). Nor would prohibitions on the subornation of perjury such as the California Penal Code provision cited in *Imbler* apply. *See* Cal. Penal Code § 127 (criminalizing only the willful procurement of perjury); *see also People v. Brown*, 16 P. 1, 3 (Cal. 1887).

*Banks v. Dretke*, 540 U.S. 668, 682-86 (2004) (defendant could not substantiate *Brady* claim until nineteen years after his trial); Warden, *supra*, at 3, 4, 6, 8, 10, 12 (listing years spent in prison before exoneration by each of 47 people wrongfully convicted because of dishonest informants; 32 of the listed individuals spent more than five years in prison). In Goldstein's case, by the time he obtained habeas relief, more than two decades after his wrongful conviction, Petitioner Van de Kamp had left the District Attorney's Office, served two terms as California Attorney General, and entered private practice.

Additionally, any individual or group asking a federal court for an injunction to require a prosecutor's office to institute an information-sharing system will face significant obstacles under this Court's justiciability and abstention doctrines. *See, e.g.*, *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974); *Younger v. Harris*, 401 U.S. 37, 41 (1971). Finally, Petitioners' suggestion that the electoral process provides a meaningful check against elected prosecutors' administrative failings with respect to their *Giglio* obligations, Pet. Br. at 36, is purely fanciful, given the Herculean efforts and extended length of time typically necessary for *Giglio* violations to come to light and the likelihood that the officeholders responsible for the violations will, like Petitioner Van de Kamp, be long out of office by that time. For this reason alone, Petitioners' citation to *Tenney v. Brandhove*, 341 U.S. 367, 370-71 (1951) (absolute immunity for legislators' actions at public hearing), is inapposite. The other case Petitioners cite, *Mitchell v. Forsyth*, 472 U.S. 511 (1985),

actually distinguishes *Tenney* on precisely the ground urged here: whereas "[l]egislators are accountable to their constituents, and the judicial process is largely self-correcting" via "procedural rules, appeals, and the possibility of collateral challenges," there are no "[s]imilar built-in restraints" for the constitutional failings alleged in the instant case. *Id.* at 522-23 (citation omitted).

Given the importance of *Giglio* to the integrity of a criminal justice system deeply reliant on informant testimony, this Court should not grant absolute immunity and remove this singularly meaningful safeguard to enforce *Giglio* compliance.

## VI. RESPONDENT'S CLAIM WILL NOT OPEN THE FLOODGATES TO VEXATIOUS LITIGATION BECAUSE IT WILL BE AVAILABLE ONLY IN RARE CIRCUMSTANCES.

Petitioners argue that, if this Court affirms the decision below, the threat of vexatious litigation would so chill prosecutors' conduct as to tempt them to forego the use of informants altogether. Pet. Br. 33-36. As Respondent's brief persuasively demonstrates, this concern is unfounded because Goldstein's claim is so narrow that "[i]t is hard to imagine any other scenario in which an information management decision like the one challenged here could lead to a lawsuit against a chief prosecutor." Resp. Br. 49. *See also* Resp. Br. 48-49 (listing *nine* conditions that must obtain for suit under Goldstein's theory to survive). And of course, *qualified* immunity will still be available to prosecutors acting in an administrative capacity.

Equally important, Petitioners' generalized invocation of *Imbler v. Pachtman*, 424 U.S. 409 (1976) masks the ill fit between the concerns reflected in that opinion and the realistic effects of permitting Goldstein's limited claim here—as Respondent notes, he does not allege that Petitioners designed an information-management system improperly, but rather that they refused to create *any* system *at all*. Resp. Br. 36.

*Imbler* held that absolute immunity was required because of the "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. Neither of these dangers is presented by Goldstein's suit. First, because of the extremely limited nature of the circumstances in which suits on his theory could be maintained, prosecutors would rarely have to answer such suits, and thus would suffer no distraction from their duties. Second, *Imbler* made clear that the "independence of judgment" to which it was referring concerned the judgment "both in deciding which suits to bring and in conducting them in court," *id.* at 424, and this is not at all the judgment that is implicated by Goldstein's suit.

Liability here implicates neither decisions about *which* cases are brought nor decisions about *how* they are brought. *Imbler*'s concern for the independence of prosecutors "[f]requently acting under serious constraints of time and even information," *id.* at 425, underscores this Court's appropriate focus on case-specific prosecutorial

decisions made in the heat of battle, as opposed to the type of generalized office-wide administrative decision at issue here. Petitioners' speculations about the chilling effect of Goldstein's lawsuit are not only far removed from this Court's rationale in *Imbler*, but they provide no basis to stretch that rationale to cover the instant case.

Finally, though *Imbler* rejected the qualified immunity alternative as insufficiently protective of prosecutorial functions, this Court has noted in the intervening years that "the qualified immunity standard is today more protective of officials than it was at the time that *Imbler* was decided. 'As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'" *Burns v. Reed*, 500 U.S. 478, 494-95 (1991) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (footnote omitted). Given the narrowness of Goldstein's theory of relief, and its significant attenuation from the day-to-day decisions concerning which cases to prosecute and how to prosecute them, qualified immunity is protection enough from meritless suits.

## VII. THIS COURT SHOULD NOT ADDRESS ISSUES NOT RAISED OR RULED UPON BELOW, OR ISSUES CONCERNING PARTIES NOT BEFORE THIS COURT.

Finally, this Court should resist the suggestions of various *amici* to dispose of this case by deciding questions never addressed below. The United States urges the question whether Goldstein's complaint states a claim on the merits. *See* Br. of Amicus United States 9 (acknowledging

that courts below assumed rather than decided that Goldstein stated a claim for a constitutional violation, but arguing nonetheless that *Giglio* imposes no "wholesale obligation" on supervisory prosecutors to develop appropriate procedures). Similarly, the City of New York asks this Court to rule on the question whether municipalities can be liable for the type of constitutional violation Goldstein alleges. *See* Br. of Amicus City of New York 16-22 (urging this Court to disapprove a sixteen-year-old decision on municipal liability, *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), cited only in a footnote in the decision below).

The decision under review here addressed only the immunity issue and neither of the other issues pressed by *amici*. *See* 481 F.3d at 1172. This Court, as usual, need not reach out to decide these issues.[5] Rather, as it has before, this Court should decide the immunity question under the assumption that the complaint states a claim. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 261 (1993).

New York City's suggestion that this Court rule on municipal liability is especially strained, because the parties who would be directly implicated by such a ruling—the municipal defendants Goldstein sued—are not among the Petitioners before the Court. Finally, New York's substantive position that a prosecutor's various functions cannot be separated, *see* Br. of Amicus New York City 21-22

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[5] *See, e.g.*, *Whitman v. Dep't of Transp.*, 547 U.S. 512, 514-15 (2006); *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168-69 (2004); *Lee v. Kemna*, 534 U.S. 362, 387-88 (2002); *Glover v. United States*, 531 U.S. 198, 205 (2001).

("Distinguishing legal liability for acts performed in an actual prosecution from a district attorney's policy-making for initiating and presenting prosecutions is both artificial and impossible."), completely ignores this Court's functional approach to the absolute immunity question, *see, e.g.*, *Buckley*, 509 U.S. at 269, and its explicit recognition that prosecutors *can* be policy-making officials whose unconstitutional actions subject a municipality to liability, *see Pembaur v. City of Cincinnati*, 469, 473, 484-85 (1986) (holding municipality subject to liability for unconstitutional conduct directed by a county prosecutor). This Court should not address the issue at all, much less upset its own precedent in order to resolve what is apparently New York City's private grievance with a decision not under review.

## CONCLUSION

The integrity of the criminal process demands that prosecutors collect and disclose the history of jailhouse informants, their relationship with the government, and in particular the promises and rewards that influence the information they provide. The criminal justice system's institutional commitment to due process is fundamentally undermined when prosecutors' offices lack any system at all to collect and disclose this information. *Amici* respectfully ask the Court to affirm the judgment below.

Respectfully submitted,

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