No. 09-571

IN THE
Supreme Court of the United States

HARRY F. CONNICK, District Attorney, *et al.*,
Petitioners,

- against -

JOHN THOMPSON,
Respondent.

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

BRIEF OF THE DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS HARRY F. CONNICK, *ET AL.*

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INTEREST OF *AMICUS CURIAE*[1]

The District Attorneys Association of the State of New York ("DAASNY" or "association") is a state wide organization composed of elected county District Attorneys from throughout New York State, as well as assistant district attorneys, a membership body that is approximately 2,000 prosecutors. Members of the DAASNY are from some of the largest prosecutor offices, i.e., New York County, which employs hundreds of prosecutors, and some of the smallest, which may have only a single prosecutor. In their work as prosecutors, the association's members continually confront how best to exercise their advocacy function in fulfilling their constitutional disclosure obligation under *Brady v. Maryland*, 373 U.S. 83 (1963) ("*Brady*").

The staggering multi-million dollar judgment against the Orleans Parish District Attorney's Office ("the district attorney's office") for that office's failure to train on *Brady*, upheld in *Thompson v. Connick,* 553 F.3d 836 (5th Cir. 2008) ("*Connick I*"), *aff'd en banc by equally divided court*, 578 F.3d 293 (5th Cir. 2009) ("*Connick II*"), if affirmed, threatens the very financial existence of public prosecutor offices nationwide. The *Connick* decision makes district attorney offices financially liable merely for the misconduct of its employee-prosecutors, not for the misconduct of the entity itself, solely as a result of

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

that employment relationship, thus greatly expanding municipal liability contrary to this Court's precedent. The lower court's ruling, therefore, presents a grave threat to the financial existence or stability of many of the association's members.

SUMMARY OF ARGUMENT

Liability of a municipal entity under 42 U.S.C. § 1983 ("§ 1983") for inadequate training is confined to the "limited circumstances . . .," *City of Canton v. Harris*, 489 U.S. 378, 387 (1989), of a municipality's deliberate indifference to the need for employee training on a particular aspect of their duties and when the specific inadequacy "actually caused" the constitutional injury. *See id.* at 391; *See Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694 (1978).

This Court has never applied the "failure to train" rubric of *City of Canton* to sustain liability against a district attorney's office as a culpable municipal actor for a violation of *Brady* by assistant prosecutors in a single case. A district attorney's office is different from other municipal entities, such as police departments, when it fulfills its advocacy function through its individual assistant prosecutors, a difference recognized by this Court when considering an individual prosecutor's absolute immunity from suit for conduct done in his or her advocacy function, such as a failure to disclose *Brady* at trial. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409 (1976). Yet, the public policy considerations that underlie the recognition that a public prosecutor is indeed different from other municipal actors, as in the immunity context, warrants the conclusion that a

district attorney's office itself is not liable under the kind of failure-to-train claim asserted and sustained by the lower courts in *Connick I and II*. The nature of the assistant prosecutor's role and the complexity of his or her constitutional obligation under *Brady*, in a particular case, preclude application of the failure-to-train rubric to a district attorney's office itself based on a single episode. The constitutional obligation to disclose is different for every case, determined by the nature of the particular evidence in question and the overall proof in evaluating whether non-disclosure would create (or did create) a "reasonable probability" of a different result were disclosure to occur. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 437 (1995). Because the nature of a prosecutor's *Brady* obligation is defined by a particular case, therefore, the "moving force" for such a violation in a single case is necessarily the individual prosecutor(s), not the office itself. A failure-to-train claim against a public prosecutor's office based upon a violation of *Brady* in a single case is thus inimical to the accepted proposition that the municipality by its own culpable conduct be the direct cause of the injury as a predicate to liability.

ARGUMENT

A § 1983 FAILURE-TO-TRAIN CLAIM AGAINST A DISTRICT ATTORNEY'S OFFICE ITSELF BASED ON A SINGLE VIOLATION OF *BRADY* BY ASSISTANT PROSECUTORS OF THE OFFICE IS NOT SUSTAINABLE UNDER *MONELL*.

The Role of The Prosecuting Attorney And The Nature of The Individual Prosecutor's Function Under *Brady* Negates Imposition of Liability on The Prosecuting Entity Itself For a Single Violation of *Brady*.

The necessary predicate for municipal liability under § 1983 is that the governmental body's "*deliberate* conduct," *Bd of Comm'rs of Bryan Co. v. Brown*, 520 U.S. 397, 404 (1997) (italics in original), was the "moving force [behind] the constitutional violation." *City of Canton*, 489 U.S. at 389 (brackets in original) (quoting from *Monell*, 436 U.S. at 694 and *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)). The high evidentiary threshold, which is required before governmental liability is reached pursuant to *Monell*, ensures that the municipality is held accountable not simply on the employer-employee relationship, but, instead, on the entity's own conduct committed with "the requisite degree of culpability . . ." and with "a direct causal link between the municipal action and the deprivation of federal rights." *Bryan Co.*, 520 U.S. at 404.

The risk of imposing municipal liability on a *respondeat superior* basis is the greatest when, as in the *Connick* case, the municipality is faced with the "thoroughly nebulous . . ." 1983 claim that a

particular injury was caused by a municipality's inadequate training or supervision. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) (plurality opinion). This is particularly so when, again as in *Connick*, a plaintiff seeks redress based on a single incident. *See id.* at 824 ("But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault . . . and the causal connection between policy and the constitutional deprivation"); *See also, e.g., City of Canton,* 489 U.S. at 399-400 (concurring opinion in part and dissenting opinion in part of O'Connor, Scalia and Kennedy, JJ.) ("Allowing an inadequate training claim such as this one to go to the jury based upon a single incident would only invite jury nullification of Monell.").

Before a municipality's failure-to-train will result in liability, stringent proof of culpability and causation are required: First, the municipality must have failed to act with deliberate indifference, which requires notice to the municipality's final policymaker that training was needed to avoid further constitutional violations, and yet, no action was taken; and, second, the specific inadequacy in training had a direct causal link to the constitutional violation. *See, e.g., Bryan Co.*, 520 U.S. at 404; *City of Canton*, 489 U.S. at 391 and 395.

Notably, however, the unique role of the individual prosecutor as a municipal actor, and the individualized and case-specific nature of the *Brady* determination, militate against imposition of liability on a district attorney's office under *Monell* for a failure-to-train claim based on a single episode of a

violation of the constitutional disclosure duty in a particular case.

The prosecutor's determination of what to disclose, and when, under *Brady,* is one of the essential components of the prosecutor's advocacy function. This determination necessarily comprises the exercise of prosecutorial judgment and experience applied to a specific set of facts: the evaluation of specific evidence and of the overall proof in a particular case, a duty exclusively assigned to the prosecutor. In this regard, the prosecutor, in his or her advocacy role, is markedly unlike other municipal actors, such as, for example, the police officer. As observed in another context, but applicable here:

> "The prosecutor must ask such lawyer's questions as whether an item of evidence has exculpatory or impeachment value and whether such evidence is material. It would be inappropriate to charge police with answering these same questions, for their job of gathering evidence is quite different from the prosecution's task of evaluating it. This is especially true because the prosecutor can view the evidence from the perspective of the case as a whole while police officers, who are often involved in only one portion of the case, may lack necessary context."

Jean v. Collins, 221 F.3d 656, 660 (4th Cir. 2000) (en banc) (per curiam) (Wilkinson, C.J., concurring in judgment) (internal quotation marks omitted).

The importance of this prosecution function has already been recognized by the Court through the

conferral of absolute immunity when a prosecutor, or his or her supervisor, including the ultimate policymaker, the district attorney, is sued in their personal capacity in a § 1983 suit for violating *Brady* in a particular prosecution. *See, e.g., Imbler,* 424 U.S. at 424-427; *Van de Kamp v. Goldstein*, 555 U.S. ____, 129 S.Ct. 855 (2009). True, a district attorney's office itself may not enjoy similar immunity for its culpable conduct. *See Owen v. City of Independence, Mo.,* 445 U.S. 622 (1980). But, the principle which underlies *Imbler*, that a prosecutor's decision whether to disclose evidence is an essential component of the adversary system that rests on "the legitimate exercise of prosecutorial discretion . . .," *Imbler,* 424 U.S. at 431 n.34, requiring its exercise unimpeded and without distraction by the fear of civil lawsuits, applies as well to the inapplicability of failure-to-train liability for the district attorney's office itself for the same conduct based on a single violation of *Brady*.

In other words, *Imbler* recognized that less than absolute immunity for the exercise of a prosecutor's discretion in deciding what evidence falls within *Brady* in a particular case would result in "full disclosure . . .," *Imbler,* 424 U.S. at 431 n.34, which would impose a "duty exceeding the disclosure requirements of *Brady* . . ." and "weaken the adversary system . . . ." *Id.* Notably, the result reached by the Fifth Circuit in *Connick I* and *II* effectively achieves the same result under *Monell.* Sustaining municipal liability in this case based on a single episode of a *Brady* violation will deter, not facilitate, the exercise of the prosecutor's discretionary disclosure determination and effectively require training (necessarily involving the federal courts to define its content) as district attorney offices

seek to avoid the risk of incurring huge financial judgments not for their own culpable conduct, but for that of their employee prosecutors.

This case exemplifies the danger of allowing municipal liability to flow from a single episode of a *Brady* violation. The plaintiff's theory at trial was that since the district attorney's office did not have a policy of open file discovery in 1985, the office should have had a *Brady* policy and training program of sufficient specificity (but which content was never proven) to prevent the violation in plaintiff's case. *See, e.g.,* App. 255-256 (relevant portion of trial testimony). Indeed, this was the heart of the testimony from plaintiff's expert at trial. *See, e.g.,* App. 250-271 (trial testimony of Joseph Lawless, Esq.). However, plaintiff's evidence never proved at trial what *specific aspect* of the training in the district attorney's office in 1985 was deficient and how that identified deficiency in municipal training, rather than the misconduct of the individual prosecutors, caused the violation of plaintiff's constitutional rights; put another way, the plaintiff never proved the content the district attorney office's training in 1985 should have included that would have prevented the prosecutors' misconduct and plaintiff's injury. Instead, and fatally to his claim, plaintiff argued that the district attorney's office's training could have been better, but only in the most general terms by including more formal training sessions and codified rules. *See, e.g.*, App. 255-257 (relevant excerpt of trial testimony); *See City of Canton*, 489 U.S. at 391 ("Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training . . . . Such a claim could be made about almost any encounter resulting in injury,

yet not condemn the adequacy of the program . . .").
Vague and generalized assertions of inadequacies in a municipal training program, however, if allowed to sustain liability will fundamentally alter the *Monell* legal landscape, for such a claim can be asserted in every failure-to-train lawsuit against a district attorney's office. *Cf. Van de Kamp*, 555 U.S. at ___, 129 S.Ct. at 863 ("because better training or supervision might prevent most, if not all, prosecutorial errors at trial, permission to bring such a suit here would grant permission to criminal defendants to bring claims in other similar instances, in effect claiming damages for (trial-related) training or supervisory failings.").

The fundamental legal flaw in plaintiff's argument is that, as *Imbler* and this Court's *Brady* cases recognize, a *Brady* determination in a single case, whether rightly or wrongly made, is a function of individual prosecutorial discretion based on a complex set of evidentiary factors unique to that case. Thus, a policy or practice of a district attorney's office through inadequate training (unless the policy was itself illegal) cannot "actually cause[]," *City of Canton*, 489 U.S. at 391, a *Brady* violation in a single episode. Nor can it be proven under those circumstances (since a single episode is involved) that an office made "a deliberate or conscious choice," *id.* at 389 (internal quotation marks omitted), to do so.

As previously noted, public prosecutors acting in their advocacy function are different governmental actors from police officers (*see, e.g., City of Canton,* 489 U.S. at 389-391) or local legislators (*see, e.g., Owen,* 445 U.S. at 622 (1980)), a difference recognized by this Court (*see, e.g., Imbler,* 424 U.S. at 427-431; *see also Pembaur v. Cincinnati*, 475 U.S. 469 (1986)

(in another context, district attorney's illegal decision directing sheriff to forcefully enter office to execute warrant for third party witnesses, which violated Pembaur's Fourth Amendment right, was illegal municipal policy that caused injury for liability under *Monell*); and revealed in their individual role under *Brady* that makes each assistant prosecutor when determining what to disclose, and when, an independent actor from the district attorney's office, as final policymaker, at least in respect to a single episode of a *Brady* violation, negating the necessary causation between the alleged failure to train and the injury.

First, "a prosecutor 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." *Imbler,* 424 U.S. at 429. A prosecutor today undergoes extensive educational training as a prelude to practicing law and afterwards is subject to continuing ethical duties, one of which is the obligation to disclose *Brady*. *See, e.g., New York Rules of Professional Conduct*, Rule 3.8 (b) (entitled "Special Responsibilities of Prosecutors and Other Government Lawyers") (effective April 1, 2009) available at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf (accessed May 5, 2010); *see also, e.g., Imbler*, 424 U.S. at 427 n.25 (duty of disclosure at trial enforced by due process; after conviction "the prosecutor also is bound by the ethics of his office . . ." to disclose evidence or information "that casts doubt upon the correctness of the conviction."). The obligation to follow *Brady* requires the individual prosecutor to know the rule in

its current form today independent of office training. *See, e.g., Connick II*, 578 F.3d at 304 ("Because this case concerns the actions of licensed attorneys who have independent professional obligations to know and uphold the law, there is even more reason than in *City of Canton*. . . not to rely on generalized statements about lack of training.").

A district attorney, the relevant final municipal policymaker in this context, can reasonably suppose that in light of their educational training and ethical obligation, his or her assistants will follow the law of *Brady* in a particular case. *Cf., e.g., City of St. Louis v. Praprotnik,* 485 U.S. 112, 130 (1988) (plurality opinion) ("Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy. *It is equally consistent with a presumption that the subordinates are faithfully attempting to comply with the policies that are supposed to guide them.*") (italics supplied). That the policymaker's assistants are licensed professionals ethically required to follow *Brady* strongly militates against a finding that a district attorney was deliberately indifferent to the rights of an accused under *Brady* or caused the injury based on a single *Brady* violation in a particular prosecution.

Indeed, the prosecutors' unique role in each prosecution as minister of justice, *see, e.g., Strickler v. Greene*, 527 U.S. 263, 281 (1999) (*Brady* "illustrate[s] the special role played by the American prosecutor in the search for truth in criminal trials."), exemplified by their constitutional and ethical duty to disclose, in certain circumstances, favorable evidence distinguishes, as municipal actors, the prosecutor from the police officer. The latter's use of deadly

physical force in a single incident, the Court surmised, may result in municipal liability based on inadequate training for a single episode of such illegal use. *See City of Canton*, 489 U.S. at 390 and n.10. In this respect, the Court in *City of Canton* "simply hypothesized . . . a narrow range of circumstances," *Bryan Co.*, 520 U.S. at 409, from which a single episode could give rise to municipal liability, not necessarily that a plaintiff could "succeed in carrying a failure-to-train claim without showing a pattern of constitutional violations . . . ." *Id.* Notably, however, each prosecutor has an individual obligation to know, and properly fulfill, the *Brady* rule in each case independent of office training, an obligation that distinguishes the police officer who has no such similar ethical obligation. Consequently, an assistant prosecutor's violation of *Brady* in a single case can result in professional discipline, on-the-job discipline or termination, and reversal of the conviction. *See, e.g., Imbler*, 424 U.S. at 429.

Second, the nature of the prosecutor's *Brady* determination also makes municipal liability against a prosecutor's office, on a failure-to-train claim for a single *Brady* violation, unsustainable. The plaintiff in such a suit "must . . . prove that the deficiency in training actually caused the [prosecutor's] indifference to the [accused]." *City of Canton*, 489 U.S. at 391. But a single violation by an individual assistant cannot result from an office policy, practice or custom when a prosecutor's *Brady* determination flows from a complex evaluation of evidence unique, and thus different, to each case. In that instance, the fault, if any, flowing from that advocacy determination necessarily lies with the individual

prosecutor who possesses the obligation to determine what, and when, to disclose.

This duty derives from the prosecutor's essential role as advocate and minister of justice in a particular prosecution, *see, e.g., Strickler*, 527 U.S. at 281, and thus, is a vital component of a prosecutor competently and ethically performing the responsibilities of his or her prosecution function. *See, e.g., A.B.A. Standards for Criminal Justice Prosecution Function*, § 3-3.11 (a)-(c) ("Disclosure of Evidence by the Prosecutor"), at 81 (3d ed. 1993) available at http://www.abanet.org/crimjust/standards/prosecutionfunction.pdf (accessed June 1, 2010). Yet, this disclosure determination is manifestly different for each case, requiring the exercise of prosecutorial judgment in the context of each case.

This is because the constitutional duty encompasses disclosure not of all evidence helpful to the defense (although ethically and in practice such evidence should be disclosed), but only that evidence which would *materially* affect the outcome. "[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Strickler*, 527 U.S. at 281; *See also, e.g., Kyles,* 514 U.S. at 437 ("We have never held that the Constitution demands an open file policy . . . ."); *United States v. Bagley,* 473 U.S. 667, 678 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."). When non-disclosed evidence is material, however, necessarily varies with the fact pattern of each case. The case-specific nature of this constitutional

obligation was captured in *Kyles,* 514 U.S. at 437, as follows:

> "While the definition of . . . materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But 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."

That this "reasonable probability" determination is faced by virtually every prosecutor, and certainly those who remain career prosecutors, does not render the "need for more or different training . . . so obvious," *City of Canton*, 489 U.S. at 390, as to require training in all district attorney offices nationwide to avoid catastrophic municipal liability predicated on a single violation. As noted, a public prosecutor is different in this respect from other municipal actors: each is ethically obligated to follow *Brady* and its current progeny interpreting that decision. Nor is the need for training "obvious" to a district attorney as

policymaker based on misconduct in a single prosecution, as occurred here, when his or her assistant prosecutors not only are presumed to follow and apply the law, but when the decision itself is different in every case, complex and, at times, difficult. Indeed, this Court in viewing a case retrospectively has not, at times, been able to unanimously agree whether the reasonable probability standard has been satisfied by non-disclosure in a particular case. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 706 (2004) (concurring opinion in part and dissenting opinion in part of Thomas and Scalia, JJ.); *Kyles*, 514 U.S. at 456 (dissenting opinion of Scalia, Kennedy and Thomas, JJ., and Rehnquist, C.J.). This merely highlights the proposition that a district attorney's office itself should not be held financially accountable on a *Monell* failure-to-train claim based on a single *Brady* violation.

Consequently, that members of a particular district attorney's office view *Brady* determinations as, at times, "gray" or disagree whether a particular kind of evidence falls within the disclosure obligation, as plaintiff has highlighted in this case, cannot prove that a violation by one or more members of the office in a single case, although regrettable and wrong, was thus caused by an office policy of inadequate training. This is especially so when the stated policy of the district attorney's office in 1985 was to follow the law on disclosure, a policy implemented, not by formal training sessions, but on-the-job training between trial supervisors and assistants handling a particular case. Plaintiff has simply failed to show that the single violation in his case was in fact caused by a policy of inadequate training from a deliberately indifferent district attorney as final municipal policymaker.

CONCLUSION

Imbler and decisions such as *Bagley* recognize that the prosecutor's exercise of the *constitutional* obligation to disclose *material* exculpatory evidence necessarily allows the prosecutor the advocatory decision (subject to court review) to determine when specific evidence in a particular case reaches the point of materiality. Further, this Court has not constitutionally required training to fulfill this obligation, instead leaving that question to the province of individual prosecuting offices throughout the nation. *See Giglio v. United States,* 405 U.S. 150, 154 (1972) ("To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden . . . .") Ensuring that *Monell's* liability for a failure-to-train claim against a prosecuting office for violating *Brady* occurs only in limited circumstances under stringent evidentiary requirements—that the entity was the culpable moving force behind the injury as a result of office policy or custom, as opposed to the single-case misconduct of its assistants, allows the prosecutor's case-specific discretionary determination under *Brady* to continue undeterred by incurring huge entity liability if wrong in a given case; and continues to leave the scope and content of office training of prosecutors to the individual prosecuting offices themselves, not the federal courts.

Respectfully submitted,

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