NO. 09-571

In the

Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney, ET AL.,

Petitioners,

v.

JOHN THOMPSON,

Respondent.

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

BRIEF FOR *AMICI CURIAE* FORMER FEDERAL CIVIL RIGHTS OFFICIALS AND PROSECUTORS WAN J. KIM, BILL LANN LEE, GRACE CHUNG BECKER, WILLIAM YEOMANS, JOHN R. DUNNE, STEPHEN J. POLLAK, J. STANLEY POTTINGER, JAMES P. TURNER, EDWARD S.G. DENNIS, JR., DAVID W. MARSTON, MATTHEW D. ORWIG, JOHN RATCLIFFE, AND UTTAM DHILLON IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does imposing failure-to-train liability on a district attorney's office for a single *Brady* violation contravene the rigorous culpability and causation standards of *Canton* and *Bryan County*?

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INTEREST OF *AMICI CURIAE*[1]

Amici are a broad, bipartisan coalition of former heads of the Civil Rights Division of the Department of Justice ("DOJ") and other senior federal prosecutors. *See* Appendix, *infra*. *Amici* include former Assistant Attorneys General and Acting Assistant Attorneys General for the Civil Rights Division Wan J. Kim, Bill Lann Lee, Grace Chung Becker, William Yeomans, John R. Dunne, Stephen J. Pollak, J. Stanley Pottinger, and James P. Turner; Assistant Attorney General for the Criminal Division Edward S.G. Dennis, Jr.; United States Attorneys David W. Marston, Matthew D. Orwig, and John Ratcliffe; and Associate Deputy Attorney General Uttam Dhillon. *Amici* have extensive experience in making the difficult judgments required of prosecutors by *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). They recognize the important role that section 1983 claims play in encouraging all public officials, including prosecutors, to remain cognizant of their obligations to discharge the authority of the State in a way that respects the constitutional freedoms of the citizens they serve.

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[1] The parties have consented to the filing of this brief by filing consent letters with the Clerk. Pursuant to Sup. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Based on their experience at DOJ in bringing and supervising federal prosecutions, *amici* have a deep respect for *Brady* and its contribution to public confidence in the fairness of our criminal justice system. *Amici* also understand that complying with *Brady* and its progeny is not always simple or self-evident. *Amici* know first-hand that prosecutors are professionals who take their duties seriously, but that does not eliminate the need for training on how to comply with *Brady*.

Amici's interest is in ensuring that section 1983 realizes its promise as a remedy for conduct that causes constitutional violations and that the balance of interests carefully struck by this Court's precedents is preserved. The Court's precedent with respect to section 1983 failure-to-train claims promotes respect for the rule of law by holding municipal entities to account when they demonstrate deliberate indifference to constitutional rights and cause constitutional violations. Although successful failure-to-train claims are, and should be, rare, their continued availability strengthens public respect for the criminal justice system, particularly against criticism that the system is indifferent (if not hostile) to the rights of those charged, especially those wrongly charged, with criminal acts.

INTRODUCTION AND SUMMARY OF ARGUMENT

If compliance with *Brady* and its progeny were simple and universal, perhaps there would be no need for either training or failure-to-train liability. Compliance, however, is neither simple nor

universal. Compliance often entails difficult judgment calls about what evidence is exculpatory or material, and the resource constraints, time pressures, and other stresses often felt by prosecutors in the real world add to the difficulty. Those judgment calls require informed judgment. *Brady* compliance is too much at risk, and too fundamental to the fairness of our criminal justice system, to be taken for granted.

DOJ has long had formal policies to ensure *Brady* compliance. Nonetheless, federal prosecutors recently have been involved in several high-profile *Brady* violations. In response, DOJ has redoubled its efforts to ensure compliance. It has undertaken a wholesale revision and enhancement of its training on *Brady* compliance. DOJ's recent actions demonstrate that it understands the importance of such training. It certainly demonstrates beyond doubt that *Brady* compliance is not something that can simply be taken for granted or be substantially achieved without training. Because States and municipalities have the same constitutional obligations, they surely have no less a need to provide guidance to their prosecutors to meet those obligations. It is simple common sense to recognize that, under some circumstances, the need for some form of training on complying with *Brady* may be obvious. While a small district attorney's office may not have the need or financial wherewithal to replicate DOJ's more extensive training, some guidance is necessary. It need not be expensive or elaborate, but *Brady* is too important to be left to the untutored instincts of new prosecutors. Where

a district attorney's office disregards such an obvious need, it is guilty of deliberate indifference and thus meets the standard of culpability that this Court has set for municipal liability. And where a deliberately indifferent failure to train actually causes a *Brady* violation in a particular case, there is no basis in the text of section 1983 to let the municipality escape liability.

Respondent has a statutory cause of action. Congress created his section 1983 claim against petitioners for "caus[ing]" the deprivation of his liberty. Upholding that claim does not require recognizing any new or expanded constitutional right or species of liability. It simply requires applying the plain text that Congress enacted and adhering to settled and unchallenged precedents governing the deliberate indifference standard and the requirement of actual causation. There is no basis in law or logic for petitioners' suggested rule that there can be no deliberate indifference or causation absent a history of past violations, and the Court should decline to adopt any such artificial and atextual rule.

District attorney's offices may adopt widely varying approaches to *Brady* compliance—including approaches that are far from ideal—without descending into deliberate indifference. And particular *Brady* violations may turn out to be attributable to factors other than a lack of training. But respondent proved his claim under this Court's standards.

ARGUMENT

I. DOJ's Experience Shows The Need To Maintain Meaningful Recourse Where Municipalities Improperly Fail To Train Prosecutors To Comply With *Brady*.

Brady compliance is a recurrent issue at every level of government. Federal prosecutors frequently face *Brady* issues as part of the numerous criminal prosecutions conducted by DOJ every year. For that reason DOJ has long had formal criminal discovery policies and training on *Brady* compliance. Federal prosecutors are justly thought of as the "gold standard" of prosecutorial professionalism, and yet lapses occur. Recent high-profile *Brady* violations by federal prosecutors have caused DOJ to redouble its efforts to provide adequate *Brady* training and guidance. On January 4, 2010, DOJ released three memoranda detailing those efforts.[2] The federal experience—and DOJ's swift response to enhance its training—should inform the issues in this case where

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[2] *See* Memorandum from David W. Ogden, Deputy Attorney General, to Department Prosecutors (Jan. 4, 2010), *available at* http://www.justice.gov/dag/dag-memo.html ("Summary Memo"); Memorandum from David W. Ogden, Deputy Attorney General, to Heads of Department Litigating Components Handling Criminal Matters, All United States Attorneys (Jan. 4, 2010), *available at* http://www.justice.gov/dag/dag-to-usas-component-heads.html ("Policy Memo"); Memorandum from David W. Ogden, Deputy Attorney General, to Department Prosecutors (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.html ("Guidance Memo").

constitutional violations resulted from petitioners' abject failure to train prosecutors at all.

A. DOJ's Experience Shows That *Brady* Compliance Requires Training And That Failing To Provide Appropriate Training Causes Violations.

1. DOJ has long recognized that understanding and complying with *Brady* obligations are not easy tasks, and the appropriate way to resolve *Brady* issues is not always self-evident. As a result, DOJ has recognized the need for official guidance on *Brady* compliance. For example, in December 1996, the Attorney General announced a policy regarding the "Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ('*Giglio* Policy')." U.S. Attorney's Manual § 9-5.100. That policy set forth detailed procedures for identifying and disclosing impeachment information.

In 2006, the Attorney General amended the *Giglio* policy to reflect DOJ's proactive approach to the disclosure of exculpatory and impeachment information. The United States Attorney's Manual ("USAM") now requires federal prosecutors to go beyond their *Brady* and *Giglio* obligations to "take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." *Id.* § 9-5.001(B)(1) (updated Oct. 2008). The revision also reflects DOJ's belief that training in this area is important: it encouraged prosecutors "to undertake periodic training concerning the government's disclosure obligation and the

emerging case law surrounding that obligation." *Id.* § 9-5.001(E) (2006).

Of course, the USAM reflects only some of the guidance and training provided to federal prosecutors. Local United States Attorney's Offices ("USAOs") bear much of the burden to ensure compliance with discovery obligations in particular cases. Indeed, even before the changes adopted in January 2010, 90 percent of USAOs had their own standardized discovery policies and practices, some of which went well beyond *Brady*. Policy Memo 2; *see also United States v. Muehlbauer*, 892 F.2d 664, 669 (7th Cir. 1990) (noting "the 'open file' policy followed by the United States Attorney's office in the Eastern District of Wisconsin").

2. Despite the fact that DOJ has formally addressed compliance with *Brady* for many years, *Brady* violations have still occurred. In 2009 alone, federal courts confronted several notable instances. *See United States v. Shaygan*, 661 F. Supp. 2d 1289 (S.D. Fla. 2009); *United States v. W.R. Grace*, No. 05-CR-07, slip op. at 6-7 (D. Mont. Apr. 28, 2009); *United States v. Stevens*, No. 08-231 (D.D.C. April 7, 2009) (Dkt. No. 374); *United States v. Jones*, 620 F. Supp. 2d 163, 183 (D. Mass. 2009) ("*Jones I*"). These "[r]ecent, prominent examples of cases involving *Brady* violations" have served as a stark reminder that compliance cannot be taken for granted and training remains critical. *United States v. Jones*, 686 F. Supp. 2d 147, 151 n.2 (D. Mass. 2010).

Several judges tied these violations to the need for more training. At the American Bar

Association's 2009 Annual Meeting, Judge Paul Friedman of the District Court of the District of Columbia bluntly stated, "I don't think prosecutors understand their *Brady* obligations." Barbara Grzincic, *Corruption Trials, Chicago-style*, The Daily Record (July 30, 2009), *available at* http://mddailyrecord.com/ontherecord/2009/07/30/corruption-trials-chicago-style/ (last visited Aug. 5, 2010). Chief Judge Mark Wolf of the District of Massachusetts wrote that the training provided to one federal prosecutor who had violated *Brady* was, "at least with regard to discovery . . . obviously inadequate to serve its intended purpose." *Jones I*, 620 F. Supp. 2d at 183. Stating that "it is insufficient to rely on Department of Justice training programs for prosecutors," Chief Judge Wolf announced that his court would "have a program presented on discovery in criminal cases involving judges, defense lawyers, and prosecutors." *Id.* at 167.

Federal prosecutors also admitted *Brady* violations in the prosecution of the late U.S. Senator Ted Stevens. Those violations captured the public spotlight, and the Attorney General took the extraordinary step of requesting dismissal of the case after a conviction had been obtained. Judge Emmet Sullivan appointed an independent investigator to determine the full extent of misfeasance. Speaking from the bench, Judge Sullivan "encourage[d] the Attorney General, for whom I have the highest regard, to require *Brady* training for new and veteran, experienced prosecutors throughout the country . . . ." *Stevens*, No. 08-231 (D.D.C. April 7, 2009) (Dkt. No. 374).

3. These concerns prompted an immediate response from Attorney General Eric Holder. In a televised interview, just one day after Judge Sullivan's remarks, the Attorney General stated that "I'll make sure that the people of this department are adequately trained. That they have adequate resources. And try to make sure that we return to the traditions that have made this department great—and will make it great again."[3] The Attorney General issued a press release days later stating that DOJ would "[p]rovid[e] supplemental training to federal prosecutors throughout the Department on their discovery obligations in criminal cases." Press Release, Department of Justice (Apr. 14, 2009), *available at* http://www.justice.gov/opa/pr/2009/April/09-opa-338.html. The press release also announced a working group to study discovery practices and related training efforts.

The January 2010 memoranda revealed the results of the working group's efforts. Signed by Deputy Attorney General David Ogden, the memoranda set forth a comprehensive, multi-part approach designed to provide federal prosecutors with tools to address their discovery obligations. The new guidance was "intended to establish a methodical approach to consideration of discovery obligations that prosecutors should follow in every case to avoid lapses that can result in consequences

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[3] *CBS Evening News with Katie Couric* (CBS television broadcast, April 8, 2009), *available at* http://www.cbsnews.com/stories/2009/04/08/eveningnews/main4930388_page4.shtml.

adverse to the Department's pursuit of justice." Guidance Memo 1. To that end, the third memorandum set forth 11 pages of criminal discovery guidance for federal prosecutors. *See generally* Guidance Memo.

The memoranda also announced new training and tools. Building on its pre-existing training program, DOJ now requires mandatory *Brady* training for new Assistant United States Attorneys ("AUSAs"). USAM § 9-5.001(E). Veteran AUSAs must participate in annual training thereafter. *Id.* Paralegals and law enforcement agents will also undergo a training program. Summary Memo 3.

In reality, though, training occurs continuously. The new policy requires USAOs to appoint an expert on criminal discovery for purposes of advising prosecutors on individual cases. *Id.* Even before the January 2010 memoranda, these discovery coordinators attended a "Train the Trainer" conference in October 2009. *Id.* The discovery coordinators will not only provide annual training but will also be available on-location throughout the year to advise fellow prosecutors. *Id.* At DOJ headquarters, a new position will be created to oversee all of these efforts. *Id.* at 4.

Every USAO must also adopt or update formal criminal discovery policies. *Id.* The policies must be comprehensive and address recurring discovery issues:

> the timing of disclosures; disclosure of reports of interview for testifying or non-testifying witnesses; providing disclosure beyond the

> requirements of Fed. R. Crim. P. 16 and 26.2, *Brady*, *Giglio*, the Jencks Act, and USAM §9-5.001; the scope of the 'prosecution team' in national security cases or cases involving regulatory agencies, parallel proceedings, or task force investigations; storing and reviewing substantive, case-related communications such as email; obtaining *Giglio* information from local law enforcement officers; disclosure questions related to trial preparation witness interviews; disclosure of agent notes; and maintaining a record of disclosures. Policy Memo 2.

In addition to all this training, DOJ plans to create an online directory of discovery resources and a "Handbook on Discovery and Case Management" to be used as "a one-stop resource that addresses various topics relating to discovery obligations." Summary Memo 3. DOJ also plans to address new ways to catalog electronically stored information obtained and used in criminal investigations. *Id.* at 4. And finally, it will create a pilot case management project to address best practices in managing a case, including discovery issues. *Id.*

B. The Emphasis On Training At The Federal Level Underscores The Need For Training At The State And Local Level.

Courts are plainly concerned that inadequate training has caused and will continue to cause *Brady* violations. DOJ has shown that it takes those concerns seriously and believes comprehensive training and guidance is needed.

The efforts by DOJ underscore the importance of similar training for state and local prosecutors. While few local prosecutors have the resources to replicate all of DOJ's efforts, DOJ's extensive efforts with already highly trained federal prosecutors demonstrates beyond cavil that some guidance is necessary. *Brady* compliance is not something that any law school graduate can simply intuit. Training, guidance, and the office's general attitudes toward *Brady* obligations play a critical role in ensuring compliance with constitutional obligations.

1. Federal prosecutor jobs are prestigious and typically attract lawyers who are highly capable. Federal prosecutors also have the benefit of a high degree of uniformity in their approach to prosecutions because of the relatively centralized nature of DOJ. And most federal prosecutors are experienced practitioners even before they become federal prosecutors. Despite these advantages, *Brady* violations sometimes occur. Indeed, the serious violations in the *Stevens* case demonstrate that training remains necessary even for the elite federal prosecutors who specialize in public integrity matters.

States and municipalities undoubtedly attract high-quality lawyers as well, but they lack some of the resources and advantages of DOJ. For example, no central agency sets minimal training standards for local prosecutors across the nation. No centralized authority provides the kind of written guidance and practical resources that DOJ offers. And there is no centralized authority for local district attorney's offices that has power to

adopt the sweeping changes made by DOJ. Of course, the lack of these centralized resources means that local offices cannot be expected to replicate DOJ's extensive training efforts. But they equally underscore the if-anything greater need for some training and some guidance with respect to *Brady* obligations. Moreover, the availability of training videotapes and internet resources makes clear that training need not be expensive and that the resource-constraint objection is a red herring.

Petitioners' suggestion that no training is necessary because prosecutors are educated professionals blinks reality. Federal prosecutors too "must have graduated law school, passed a rigorous bar exam, and satisfied exacting character and fitness standards." Pet. Br. 27-28. That has not kept *Brady* violations in federal cases from becoming high-profile national news. And DOJ's response was not to tighten hiring standards and hope for the best, or to ask law schools or state bars to deal with the problem. Rather, it was to undertake a top-to-bottom re-evaluation of the training and guidance necessary to aid prosecutors in meeting their *Brady* obligations.

It was simple common sense for DOJ to recognize that its prosecutors were committing *Brady* violations and it was incumbent on DOJ to do something about it—not to close its eyes to the problem or hope that someone else would take care of it. And it is simple logic to recognize that, where a municipality knows that its prosecutors need training to comply with *Brady*, the municipality may be culpable if it closes its eyes to the problem.

2. To be sure, no uniform approach to *Brady* training or uniform system to ensure *Brady* compliance is required by the Constitution. Indeed, strictly speaking the Constitution does not require *Brady* training in any form. *See* pp. 21-22, *infra*. Nor is there a one-size-fits-all approach appropriate to the varied conditions in local prosecutors' offices around the nation.[4] Even individual USAOs must adapt DOJ's policies to comport with local practice. Policy Memo 2. And *Brady* training need not be as elaborate as DOJ's to provide meaningful guidance that can help to reduce, if not eliminate, *Brady* violations.

Although the varied conditions in prosecutors' offices around the nation make it inappropriate to elevate a particular approach to ensuring compliance with *Brady*, no variance in conditions can obscure the fundamental point that compliance with *Brady* is a constitutional requirement that every district attorney's office must acknowledge. The federal system allows localities to be laboratories for the best ways to achieve compliance with *Brady*. But section 1983 provides a remedy for constitutional violations that occur in

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[4] Local conditions may make the need for *Brady* training particularly acute. For examples, prosecutors in a district where the police officers may be affirmatively suppressing exculpatory evidence or doctoring police files, as reportedly is the case in New Orleans, may need specialized guidance. *See* Campbell Robertson, *New Orleans Asks U.S. To Help Police Department*, N.Y. Times (May 5, 2010) (quoting New Orleans Mayor Mitch Landrieu as stating "'We have a systemic failure'" and "inviting the [U.S.] Justice Department to help restructure the troubled New Orleans Police Department").

municipalities that are deliberately indifferent to such compliance. The demanding nature of the deliberate indifference standard may mean that such cases will be rare. The need to prove that the municipality's deliberate indifference caused the violation in a particular case may mean that it is rarer still for a municipality to be liable under section 1983. But where a municipality provides absolutely no guidance on *Brady* compliance, under circumstances where that failure reflects deliberate indifference to the rights of the accused, liability is appropriate. Section 1983 was enacted to ensure that local variation did not become the cause of unremedied constitutional violations. The existence of failure-to-train liability under section 1983 in appropriate cases plays a key role in encouraging localities to adopt and refine practices designed to produce compliance. Abolishing such liability would encourage municipalities to give short shrift to *Brady* compliance—or worse.

II. The Potential For Prosecutions Under 18 U.S.C. § 242 Does Not Obviate The Need For Training To Comply With *Brady*.

Municipal liability for failure to train is an essential bulwark for encouraging *Brady* compliance. Prosecutors themselves are immune from suit for *Brady* violations under section 1983 and the Court's absolute immunity precedents. They are not similarly immune from prosecution under 18 U.S.C. § 242, which authorizes fines and imprisonment for anyone who "willfully subjects any person" to a deprivation of any constitutional rights. Practice shows, however, that charges are rarely brought against prosecutors under that

statute—and almost never for *Brady* violations. To ensure careful compliance with *Brady*, there is thus no substitute for municipal liability, including for failure to train when that failure reflects deliberate indifference and causes a constitutional violation.

Even though prosecutors may have absolute immunity from civil liability for acts within their role as advocate, that immunity does not "place them beyond the reach of the criminal law." *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976). In their roles as federal prosecutors or high-level officials in the Civil Rights Division, which has enforcement responsibility for criminal civil rights violations, many *amici* had responsibility for prosecutions under 18 U.S.C. § 242, "the criminal analog of § 1983." *Imbler*, 424 U.S. at 429. Accordingly, *amici* have first-hand knowledge that while section 242 is a critically important part of the federal civil rights enforcement arsenal, it is hardly a sufficient mechanism to ensure that prosecutors comply with *Brady*.

Charges against prosecutors under section 242 are extremely rare. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. Rev. 53, 71 (suggesting that only one prosecutor has ever been convicted under section 242). They are rarer still for *Brady* violations. Indeed, it appears that only one prosecutor has ever been charged under the statute for a *Brady* violation. Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1, 81 n.291 (2002) (citation omitted).

The infrequency of section 242 charges alone suggests that it is not a promising vehicle for addressing *Brady* violations. More fundamentally, the small number of prosecutions is a function of the statute's narrow ambit: section 242 applies only to *intentional* constitutional infractions. Prosecutors who knowingly violate *Brady* may face a risk of potential prosecution (even if the evidence of section 242's historical use suggests that such a risk is more theoretical than real). But section 242 is categorically inapplicable to *Brady* violations that are caused by prosecutors' failure to understand their obligations or to pay sufficient attention to them.

Section 242 is thus incapable of addressing the root of the problem recently identified by DOJ and emphasized by many judges: many prosecutors do not fully understand their obligations under *Brady* or do not pay sufficient heed to compliance. Prosecutors who misapply *Brady* in ignorance or who make an incorrect judgment call in a gray area cannot be prosecuted under section 242. Even prosecutors who put a low priority on compliance and violate *Brady* because of an excess of prosecutorial zeal cannot be prosecuted under section 242. Evil-minded prosecutors who commit willful *Brady* violations are thankfully rare indeed. The vast majority of *Brady* violations are inadvertent, not willful, and training and guidance on how to comply are the natural way for prosecutors' offices to prevent such violations. Unlike section 242, the failure-to-train cause of action cuts directly to the heart of the problem and can help remedy it.

Preserving the possibility of municipal liability is especially important because there is no other remedy that could provide the proper incentives to train prosecutors to avoid *Brady* violations. With section 242 almost entirely inapplicable and prosecutors personally immune from individual-capacity civil suit, *see Imbler*, 424 U.S. at 427, prosecutors face no threat of legal consequences for depriving criminal defendants of their rights under *Brady*. Even the States previously recognized that municipal liability was the one remaining backstop. Brief for the States of Kansas *et al.*, at 20-22, *Van de Kamp v. Goldstein*, No. 07-854 (U.S. July 7, 2008). Eliminating that last remaining backstop cannot help but foster unhealthy incentives, and will make *Brady* violations against the innocent the one constitutional violation without an effective remedy. Nothing in the text of section 1983, enacted by Congress under the Fourteenth Amendment's Enforcement Clause authority, reflects any intent to allow *Brady* violations to go completely unremedied in the civil system.

The point, of course, is not to find creative ways to punish prosecutors. It is to ensure that appropriate incentives exist to encourage training that produces *Brady* compliance and to prevent violations, such as the one in this case that almost cost an innocent man his life. It is critical that the law give district attorney's offices an incentive to see to it that their prosecutors understand and comply with *Brady*.

III. A Proper Focus On The Text Of Section 1983 Supports The Judgment Below.

1. Even though section 1983 is familiar, its text bears quoting because this case at bottom involves statutory interpretation, and section 1983's text speaks directly to the question presented. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or *causes to be subjected*, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . . 42 U.S.C. § 1983 (emphasis added).

a. This statutory text makes crystal clear that a person, which includes a municipality, *see Monell v. Dep't of Social Servs. of the City of New York*, 436 U.S. 658, 692 (1978), who causes someone to be subjected to a constitutional violation is liable for the injury that the person caused. To be sure, the causation required by section 1983 is demanding. Municipalities are not liable where they "cause[]" a citizen to be subjected to a deprivation of his rights only in the attenuated sense of employing a person who commits the deprivation. Instead of the sweeping vicarious liability imposed by ordinary state common law, municipalities are liable under section 1983 for "caus[ing]" a deprivation only where the municipality itself acts culpably. *See City of Canton v. Harris*, 489 U.S. 378, 387 (1989). But it is equally settled that, as section 1983's text makes clear, liability extends to policies that cause

constitutional violations, even though the "policy" itself is *not* unconstitutional. *Id.* at 386-87. That theory of municipal liability, moreover, has been expressly applied to a claim that the municipality caused a deprivation by failing to train its employees. *Id.* at 387. Although the text of section 1983 does not specify a standard of scienter, the municipality's "degree of fault" required before a failure to train may support liability has been set at "deliberate indifference." *Id.* at 388. Finally, it is common ground that, to take advantage of section 1983's claim for "caus[ing]" a deprivation, a plaintiff must prove that a municipality's failure to train "actually caused" the particular deprivation that injured him. *Id.* at 391; *see also Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1997) (plaintiff "must demonstrate a direct causal link between the municipal action and the deprivation of federal rights").

All of this is now black-letter law that no party asks this Court to revisit. Nor is there any dispute that respondent was "subjected . . . to the deprivation of [a] right[] . . . secured by the Constitution," 42 U.S.C. § 1983, namely, the right to receive material exculpatory evidence in the prosecution's possession so that he would not be deprived of his liberty without due process of law. Because the underlying *Brady* violation is undisputed, this case does not present any question about the scope of the *Brady* right. Given the jury's finding of causation, the statutory case for liability seems clear, and does not turn on the nature or scope of the underlying constitutional violation.

b. Indeed, this case does not present any constitutional question at all. As the case comes to this Court, there is no claim that the district attorney's office had an unconstitutional policy of refusing to comply with *Brady*. *Thompson v. Connick*, 553 F.3d 836, 847 (5th Cir. 2008). There is no claim that the office's failure to train its prosecutors was itself unconstitutional or that there is any such thing as a freestanding constitutional obligation to provide *Brady* training. But that does not mean that Congress was indifferent to municipalities that cause *Brady* violations. This Court has already explained that a municipality's liability poses a statutory question that is distinct from whether there has been an underlying constitutional violation: "the proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines when such wrongs have occurred." *City of Canton*, 489 U.S. at 389 n.8. That, in turn, is simply a function of the fact that Congress chose, in a classic use of its Enforcement Clause authority, to go beyond imposing liability on persons who commit actual constitutional violations to extend liability also to persons who cause other persons to do so.

Accordingly, the Court need not fear that affirming the judgment below will entail or lead to the recognition of a new constitutional right to *Brady* training (or any other new or expanded constitutional right). And as Justice O'Connor, joined by Justice Scalia and Justice Kennedy, explained in *City of Canton*, the requirements of

deliberate indifference and actual causation will ensure that courts do not "impose 'prophylactic' duties on municipal governments only *remotely* connected to underlying constitutional requirements themselves." *Id.* at 395 (opinion concurring in part and dissenting in part) (emphasis added). But while neither the Constitution nor section 1983 requires *Brady* training, section 1983 does provide compensation for someone who can prove that an improper failure to provide *Brady* training or guidance caused constitutional injury. Section 1983 makes that much clear.

2. As explained above, the basic principles governing municipal liability, failure-to-train claims, and the reach of section 1983 are settled, and petitioners do not ask the Court to revisit them—at least not openly. Instead of arguing that deliberate indifference is an insufficiently high "degree of fault" for a failure-to-train claim and shouldering the burden of asking the Court to overrule *City of Canton*, petitioners seek a rule that a municipality can never be deliberately indifferent to the need to train its prosecutors to comply with *Brady* unless its own prosecutors have a history of violating *Brady*. Petitioners' suggested rule has no basis in the text of section 1983, common sense, or sound policy.[5]

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[5] It is also unclear how petitioners' proposed rule would aid their cause. As respondent has noted, petitioners did have a history of *Brady* violations. Resp. Br. 15-16, 37.

a. Fidelity to the statute that Congress enacted, and to this Court's precedents, precludes creation of a bright-line rule about how many *Brady* violations must have occurred to support a finding of municipal liability for causing a constitutional violation. Section 1983 asks whether a municipality caused the *Brady* violation in the case at hand. Whether the municipality itself caused a particular violation may depend on the nature of the violation, the identity of the person or persons who directly committed it, and the reasons why they committed it. But the causation question does not depend on whether there is a history of prior violations. As for the deliberate indifference requirement adopted by this Court, this Court has never adopted the kind of bright-line test requiring prior violations that petitioners propose, and indeed *City of Canton* is to the contrary. *See* pp. 27-28, *infra*. To be sure, a history of *Brady* violations that went unaddressed would be powerful circumstantial evidence of deliberate indifference for failing to provide training. But it is just that: one particular form of circumstantial evidence of deliberate indifference. It is not the exclusive means of proving deliberate indifference. And certainly the text of the statute provides no basis for a stand-alone requirement of proving prior violations.

There are any number of circumstances in which deliberate indifference could be shown without resort to evidence of prior violations within the particular municipality. To begin with only the most obvious example, there could be a case where there is direct evidence of deliberate indifference to

Brady violations, such as a chief prosecutor who proclaimed that *Brady* was an issue for the courts and no concern of the prosecutor.

But even absent hopefully rare direct evidence, there are a number of other circumstances in which deliberate indifference could be proven without a pattern. Take, for example, an office governed by a policy of disclosing *Brady* materials and not a scintilla more. Such a policy, if backed by a complete lack of training about *Brady* and a clear indication that the only way a line prosecutor could get in trouble is by overdisclosing, could prove deliberate indifference.

Consider as another alternative a district attorney's office that previously followed an open-file policy that provided more disclosure than required by *Brady* (either broadly or as to a particular kind of evidence). Such a policy could both avoid *Brady* violations and obviate the need for training on compliance with *Brady*.[6] If the office then abandons the open-file policy, its prosecutors will need to start complying with *Brady* itself. But they may not know how to do so because the old policy made it unnecessary to focus on what *Brady* requires. Those circumstances may make it sufficiently clear that *Brady* training is needed that the district attorney could be guilty of deliberate

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[6] Petitioners argued below that the district attorney's office had just such a policy, under which all lab reports were produced regardless of whether disclosure was technically required by *Brady*. The jury found that petitioners did not have such a policy. *See, e.g.*, *Thompson v. Connick*, 578 F.3d 293, 312 (5th Cir. 2009) (opinion of Prado, J.).

indifference if he opts not to provide any such training.

Or consider an office that avoided violations in the past by staffing cases so that new prosecutors untrained in *Brady* compliance worked closely with well-trained prosecutors. The untrained prosecutors might have come close to committing *Brady* violations only to be rescued by the supervisory prosecutors before any actual violations occurred. If the district attorney knows about those near-misses, he may be deliberately indifferent if he changes the office's staffing so that the untrained prosecutors work alone on prosecutions and he provides them no training to enable them to comply on their own.

Conversely, there may not be an obvious need to provide *Brady* training, or the kind of *Brady* training whose absence caused the violation at issue, even where there *is* a history of violations. For example, if the past violations concerned *Giglio* issues, the district attorney may not be guilty of deliberate indifference if he opts not to provide training on non-*Giglio* aspects of compliance. Similarly, a history of violations in the distant past may not make it obvious that there is a present need for training.

The point is that whether a given failure to train reflects deliberate indifference is a fact-intensive question that will depend on many varied factors. The number of past *Brady* violations may be relevant circumstantial evidence, but it is certainly not dispositive. There may be other, more probative circumstantial or even direct evidence of

deliberate indifference. It would be highly anomalous for the law to permit reliance on circumstantial evidence only, but that would be the effect of petitioners' suggested rule that deliberate indifference can be shown only through an inference based on the fact of past violations. The Court has moved away from requirements of proffering direct evidence because of the general fungibility of direct and circumstantial evidence. *Cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) ("juries are routinely instructed that '[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence'" (citation omitted)). But it would be a perverse rule indeed that elevated a particular form of circumstantial evidence over all other means of proving deliberate indifference.

In short, because there is no one exclusive way to demonstrate "deliberate indifference," petitioners' proposed rule cannot be understood as a mere gloss on this Court's precedents. To the contrary, what petitioners seek is an atextual requirement of showing a past violation to be grafted onto section 1983. But section 1983 provides a remedy for conduct that is either unconstitutional or caused a constitutional violation. Its focus is on the constitutional violation that caused the plaintiff's injury, not on past violations that may have injured absent third parties. In the end, the surest guide to the correct answer in this section 1983 case is the text of section 1983. That text provides no support for petitioners' novel requirement that a current victim prove a past violation to a different person before

recovery is permitted. In fact, when Congress wants to create causes of action that depend on showing a pattern-and-practice, it knows how to do so and does it expressly. *See* 42 U.S.C. § 14141.

b. Petitioners' position that a history of past violations is necessary is also contrary to *City of Canton* and certainly draws no support from that decision. The opinion of the Court in *City of Canton* did not suggest any such requirement. To the contrary, the Court explained that a city "can reasonably be said to have been deliberately indifferent to the need" for training if it assigns employees duties that raise an obvious risk of constitutional violations, with an obvious need for training to mitigate that risk, and does not provide proper training. 489 U.S. at 390. Far from suggesting that deliberate indifference requires a past violation, the Court cited an example that did *not* involve a past violation: a city's arming its police officers so they can arrest fleeing felons, but without training the officers "in the constitutional limitations on the use of deadly force." *Id.* at 390 n.10. The Court certainly did not suggest that a city could not be found deliberately indifferent unless one of its own armed-but-untrained officers had previously improperly shot a suspect.

Petitioners rely heavily on Justice O'Connor's separate opinion in *Canton*, suggesting that Justice O'Connor rejected single-incident failure-to-train liability. *See* Pet. Br. 21, 41, 47 n.22, 60. Petitioners are wrong. Justice O'Connor's concurrence expressly identified two different bases for a finding that a municipality was deliberately indifferent in failing to train. *City of Canton*, 489

U.S. at 396 ("In my view, it could be shown that the need for training was obvious in one of two ways.").[7] The second of those two ways—the one petitioners cite, Pet. Br. 47 n.22—involves a "pattern" of violations, but the first does not. "First," Justice O'Connor explained, "a municipality could fail to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face." 489 U.S. at 396. Justice O'Connor's juxtaposition of this basis with her second alternative makes crystal clear that the concurrence does not support a rigid rule that past violations are required. *See id.* at 397 ("Second, I think municipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice . . . .").[8]

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[7] Justice O'Connor concurred in the Court's adoption and articulation of the deliberate indifference standard for failure-to-train liability and its conclusion that the respondent had not satisfied that standard. Justice O'Connor's opinion dissented only on the question whether the respondent should be given a new opportunity on remand to try to satisfy that standard. *See id.* at 394.

[8] Petitioners fare no better in their heavy reliance on *Bryan County*. Petitioners never acknowledge that this Court limited its consideration of *Bryan County* to the question of liability for the hiring of the deputy sheriff, in express distinction to the question of liability for deliberate

c. The rule sought by petitioners is foreclosed by the statutory text and this Court's precedents. It is also profoundly unattractive as a matter of policy. Petitioners' position amounts to the contention that a municipality should get one free *Brady* violation before section 1983 liability can be considered. *Cf. Batson v. Kentucky*, 476 U.S. 79, 92, 95 (1986) (rejecting any requirement for establishing an equal protection violation that defendants provide "proof of repeated striking of blacks over a number of cases" in favor of rule permitting a defendant to "make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*" (emphasis in the original)). *Brady* is too important to the fair administration of the criminal justice system—and to public confidence in the fairness of that system—to write off violations in such a manner.

Moreover, the "one free violation" approach would threaten to mean multiple free violations in practice. The nature of a *Brady* violation is that the defendant is unaware that exculpatory information has not been disclosed. Sometimes the

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indifference to the need for training. The jury had found the county liable on both grounds, but the court of appeals "did not address the jury's determination of county liability based on inadequate training," and so this Court stated that it would not address that issue either. *See* 520 U.S. at 402. Rather than imposing new limits on failure-to-train cases, the Court distinguished the inadequate screening claim before it from failure-to-train claims: "The proffered analogy between failure-to-train cases and inadequate screening cases is not persuasive." *Id.* at 409.

violation eventually comes to light, whether shortly after trial as in the Senator Stevens prosecution, many years later as in last Term's *Pottawattamie County v. McGhee*, 130 S. Ct. 1047 (2010) (No. 08-1065), or just in time to save an innocent man's life as in this case. But in other instances, a *Brady* violation may never come to light. The *Brady* violations that become public may well represent only a fraction of the number of actual *Brady* violations. This Court did not suggest in *City of Canton* that a city should be allowed one free shooting before the need to ensure that its police officers are trained in the constitutional use of deadly force could be recognized. *See* 489 U.S. at 390 & n.10. It would be equally wrong to accept petitioners' request for one free *Brady* violation.

Petitioners' proposed rule is just as unattractive when viewed from the perspective of the section 1983 plaintiff. Petitioners would eventually require a current victim of a constitutional violation to prove that some absent third party suffered a prior constitutional violation. Such a requirement invites questions of the proper division of labor between judge and jury, how the prior *Brady* violation is to be proved, and whether there are temporal or subject-matter limits on prior violations. Does it matter, for example, if the predicate violation occurred under the prior administration or was committed by a line prosecutor who has moved on? Needless to say, courts would need to confront those difficult questions without the barest hint of guidance from the statutory text. A general requirement of demonstrating deliberate indifference ameliorates

these questions or avoids them entirely. And precisely because petitioners' proposed rule would deny compensation to victims of *Brady* violations until a pattern has been established, no individual would have an incentive to file suit to establish the predicate violation in the first place.

3. Ultimately, artificial rules about past violations distract from the question posed by Congress in section 1983: did a municipality's failure to train its prosecutors to comply with *Brady* cause the violation at issue? If so, and if the municipality's failure to train reflected deliberate indifference to defendants' constitutional rights under the circumstances, then the cause of action provided by Congress applies. It may be difficult to prove the elements of a failure-to-train claim based on a single violation. Indeed, in light of recent case law, it may be difficult even to plead such a claim sufficiently. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). But where a plaintiff can do so, this Court has no warrant to abolish this statutory cause of action as petitioners seek.

The jury permissibly found deliberate indifference and causation here. At the time Thompson was convicted, the district attorney's office had failed to train its prosecutors at all regarding *Brady*. *See* JA27. Maybe the absence of formal, classroom-type training could have been excused if the office had instead implemented practice-based safeguards such as having knowledgeable supervisors—with a proper *Brady* understanding—monitor or supervise prosecutors with respect to *Brady* compliance. But the office did not do that either, given the testimony

revealing the senior lawyers' flawed understanding of *Brady*. Maybe even the absence of such case-focused practical safeguards would not have mattered if the office's prosecutors had been knowledgeable and experienced individually about how to comply with *Brady*, but many were just out of law school. *See* JA172. Maybe none of this would have been a problem if the office had distributed effective written guidance and directed prosecutors to study and implement it, but the office did not have an accurate printed manual that prosecutors could turn to for self-training. Indeed, the only evidence even offered by petitioners was that any *Brady* guidance had been "codified" in the office's remarkably inaccurate 1987 office handbook. *See* JA704. Finally, maybe even the complete lack of mechanisms to ensure compliance with *Brady* would not have supported liability if the office had adopted an open-file policy that sidestepped *Brady* gray areas by voluntarily providing more disclosure than constitutionally required. But the office did not do that either. To the contrary, the office had a policy of presumptive non-disclosure, which left its untrained prosecutors not only to fend for themselves in trying to ascertain their *Brady* obligations, but to do so against the backdrop of a policy that disfavored disclosure.

Petitioners devote much of their brief to rearguing the evidence on these points, but they provide no basis for this Court to second-guess the jury's resolution of evidentiary disputes. Under the applicable standard of review, it is no exaggeration to say that the district attorney's office did *nothing*

to attempt to ensure that its prosecutors complied with *Brady*. Yet the district attorney obviously knew that the office's prosecutors would face situations that would require understanding and complying with *Brady*. On this remarkable record, it should be uncontroversial to reiterate that a failure to train can rise to the level of deliberate indifference to an obvious risk of constitutional deprivations.

Nor is there a proper basis for this Court to set aside the jury's resolution of the causation question. Petitioners seemingly argue that the jury was required to find that the *Brady* violation here was intentional and malicious and thus to infer that no type or amount of training would have prevented it. Neither step in this argument is correct. First, there were evidentiary disputes about the circumstances surrounding the *Brady* violation, including which prosecutors possessed, saw, or knew about the suppressed lab report or its significance. Even if the jury were required to accept the hearsay account that Deegan willfully suppressed the report, it would not follow that the jury also had to find that the other prosecutors conspired with Deegan.

In any event, even assuming *arguendo* that the violation was intentional on the part of all the prosecutors, it would not follow that the violation could not have been caused by a failure to train. Training on *Brady* compliance aims to do more than simply inform prosecutors about what evidence is material and exculpatory under what circumstances so that prosecutors can make the sometimes-difficult substantive judgments required

by *Brady*. Training may also aim to impress upon prosecutors that it is important to comply with *Brady* because it is the law and because it is necessary to the fundamental fairness of the criminal justice system—and, if that is not sufficient, also because the office will find out if a prosecutor fails to comply and will take appropriate action. Because of the district attorney's office's abject failure to take any steps, in any manner, to ensure compliance with *Brady*, the jury could find that individual prosecutors believed they could get away with violating *Brady*. Instituting training or other compliance mechanisms would have sent the opposite message and thus deterred violations.

In short, the jury was entitled to conclude that petitioners knew that prosecutors needed training to comply with *Brady*, that petitioners improperly failed to provide any type or degree of such training, and that that failure caused the *Brady* violation in Thompson's case. Section 1983 was designed to target that root *cause* of the constitutional deprivation to which Thompson was subjected. This case fits comfortably into the text of section 1983 and this Court's precedents.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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APPENDIX

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