No. 09-571

IN THE
Supreme Court of the United States

HARRY F. CONNICK, in his official capacity as District Attorney; ERIC DUBELIER, in his official capacity as Assistant District Attorney; JAMES WILLIAMS, in his official capacity as Assistant District Attorney; LEON A. CANNIZZARO, JR., in his official capacity as District Attorney; ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE,
Petitioners,

v.

JOHN THOMPSON,
Respondent.

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

BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF LOUISIANA, AND THE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

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 Louisiana is a state affiliate 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 those rights and the fairness of the criminal justice system, both as direct counsel and as amicus curiae.

The Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization dedicated to seeking justice for the most vulnerable members of society. Although SPLC's work is concentrated in the South, its attorneys appear in courts throughout the United States to advocate for the enforcement of civil rights under federal and state law.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. Pursuant to Rule 37 of the Rules of the Supreme Court, the parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk of the Court.

Proper resolution of the legal issues raised by this case is therefore a matter of substantial concern to both organizations.

INTRODUCTION

The respondent in this case, John Thompson, suffered a shocking and grievous constitutional injury. Because multiple prosecutors in the Orleans Parish District Attorney's Office withheld exculpatory evidence in contravention of *Brady v. Maryland*, 373 U.S. 83 (1963), Thompson was convicted and incarcerated for eighteen years, fourteen of which were on death row. Pet. App. 9a-10a, 59a. When these *Brady* violations became known, Thompson was subsequently retried and acquitted. He then filed this suit against the District Attorney and other senior officials in their official capacity and the office itself under 42 U.S.C. § 1983. A Louisiana jury found that Thompson's constitutional rights were violated because the office failed to provide adequate training to its prosecutors. *Id.* at 62a-64a.

The question presented before this Court is whether a jury may ever conclude that a single *Brady* violation may reflect a municipality's deliberate indifference to the need to provide adequate training. Pet. Br. i. In the course of urging this Court to answer that question in the negative, petitioners suggest that a municipal prosecutor's office may never be held accountable for the actions of its prosecutors, except in apparently limited or narrow circumstances that petitioners fail to

delineate. Pet. Br. 19, 24-25, 27, 29-31. Petitioners also argue that a municipal prosecutor's office cannot be deliberately indifferent to the need to provide adequate training in the safeguard of constitutional rights, including *Brady* obligations, because prosecutors graduated from law school and are required by codes of ethics to keep pace with current law. Pet. Br. 25, 27, 30, 37.

Even were those issues properly before this Court, petitioners' contentions are fundamentally unsound. There is no basis to carve out from Section 1983 certain types of municipal bodies (*i.e.*, the office of the prosecutor), certain types of employees (*i.e.*, attorneys), or the types of constitutional violations that may form the basis for liability based on inadequate training (*Brady* violations). And as to the actual question presented, a jury could certainly conclude from a single *Brady* violation that a municipal prosecutor's office was deliberately indifferent to the need for adequate training. The need for *Brady* training is glaringly obvious and there is an exceedingly high risk that constitutional harm will result if prosecutors do not receive adequate training. Thus, particularly when a *Brady* violation results from the collective failure of multiple prosecutors to comply with their *Brady* obligations, a jury properly may find that a municipal prosecutor's office acted with deliberate indifference to the need to safeguard a suspect's rights.

SUMMARY OF ARGUMENT

I. Under this Court's established Section 1983 jurisprudence, a municipal body is liable under Section 1983 if a constitutional violation is the direct result of its deliberate indifference to the need to provide its employees adequate training. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 407 (1997). This Court has also held that the qualified immunity conferred on individual public employees does not extend to their municipal employers. *Owen v. City of Independence*, 445 U.S. 622, 650 (1980). Thus, a municipal prosecutor's office, like any other municipal body, is liable if a plaintiff shows that a prosecutor violated his constitutional rights based on inadequate training or supervision and the municipal prosecutor's office acted with deliberate indifference to the need to provide adequate training and supervision.

This Court accordingly should reject petitioners' request to extend to a municipal prosecutor's office the absolute immunity conferred on individual prosecutors. "The knowledge that a municipality will be liable for all of its injurious conduct . . . should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S. at 651-52. Moreover, "owing to the . . . immunity enjoyed by [individual prosecutors], many victims of municipal malfeasance would be left remediless," *id.* at 651 (internal citation omitted), if the municipality

were not held accountable for injury traceable to its actions or inactions. That result would clearly render Section 1983 an ineffective tool to deter and redress violations of constitutional rights.

This Court should also reject petitioners' invitation to create a special rule of liability for municipal prosecutor's offices. A prosecutor's status as a professional provides no justification for absolving the local government that employs him from the government's own independent duty to comply with the Constitution.

That conclusion is particularly warranted in the *Brady* context. The office of the prosecutor has a special responsibility in our criminal justice system to preserve the truth-seeking function of the criminal trial and to avoid a grave miscarriage of justice. An individual prosecutor thus acts not to advance his or her own interests or to seek a conviction. He rather acts as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935).

This Court's precedents provide no basis for relieving a municipal prosecutor's office from liability where the office's failure to provide an individual prosecutor with adequate training is the direct cause of a *Brady* violation. Innocent victims would have no remedy whatsoever, even if they are injured as a direct result of an office's failure to provide adequate training. *Brady* violations are

inherently difficult or impossible to detect, and Section 1983 liability is critical to providing a remedy when the violation results in a wrongful conviction and incarceration, and to deterring a prosecutor's office from ignoring its independent duty to comply with the Constitution.

Moreover, a *Brady* violation will frequently result from the collective failure of multiple prosecutors to follow the law based on an office's custom of non-compliance or based on the office's failure to provide adequate training. This case well illustrates the point. The jury heard extensive evidence that at least four prosecutors knew about the exculpatory evidence, and none of them disclosed it to Mr. Thompson. A jury could readily conclude that such collective inaction demonstrated a systemic breakdown by the office in *Brady* compliance.

II. This Court in *City of Canton* and *Bryan County* left open the possibility that a jury could conclude from evidence of a single constitutional violation that the violation was caused by a municipality's deliberate indifference to the need for adequate training. Those decisions explained that a finding of deliberate indifference could be justified in certain recurring situations, like an officer's use of deadly force, where the need for training was obvious and the likelihood was high that a government official lacking adequate training will violate a citizen's constitutional rights. *City of Canton*, 489 U.S. at 390 n.10; *Bryan County*, 520 U.S. at 409.

A *Brady* violation comfortably fits within that scenario. A *Brady* violation often results in calamitous consequences, as this case demonstrates. If a prosecutor is not adequately trained with the skills to comply with *Brady*, the risk is exceedingly high that the prosecutor will commit a serious constitutional violation. A jury thus could well be justified in finding that, even absent a pattern of *Brady* violations, a violation was caused by the deliberate indifference of a municipal prosecutor's office to the need to provide adequate training to prosecutors.

The above conclusion does not eviscerate the requirement that the plaintiff must prove causation or the requisite deliberate indifference on the part of a District Attorney's office. This case illustrates that there may be ample evidence from which a jury could conclude that an office did not provide adequate training in *Brady* compliance. *See* Pet. App. 46a-48a, 72a-80a. A jury therefore would be entitled to conclude that the lack of training caused a *Brady* violation and that, given the obvious need to train and the high risk of constitutional error absent adequate training, the District Attorney's office acted with deliberate indifference.

ARGUMENT

I. A MUNICIPAL PROSECUTOR'S OFFICE IS SUBJECT TO SECTION 1983 LIABILITY FOR *BRADY* VIOLATIONS CAUSED BY ITS DELIBERATE INDIFFERENCE TO THE NEED TO PROVIDE ADEQUATE TRAINING

In *Monell v. Department of Social Services of New York*, 436 U.S. 658, 690-92 (1978), this Court held that municipalities and other local government bodies are "persons" subject to liability under 42 U.S.C. § 1983 for causing the violation of a plaintiff's constitutional rights by virtue of a municipal policy or custom. And in *City of Canton v. Harris*, 489 U.S. 378, 388 (1989), and *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 407 (1997), the Court held that a municipal body may be liable under Section 1983 if a constitutional violation is caused by the municipality's deliberate indifference to the need to provide adequate training to its employees.

This Court has never distinguished among types of municipal entities for purposes of Section 1983 liability. *See generally Monell,* 436 U.S. at 658; *Owen v. City of Independence*, 445 U.S. 622 (1980). Indeed, Section 1983's "language is absolute and unqualified." *Owen*, 445 U.S. at 635. Moreover, "there is no tradition of immunity for municipal corporations" that might give rise to distinctions among types of municipal bodies. *Id.* at 638. Thus, a municipal prosecutor's office—like any other

municipal body—is liable under Section 1983 if it causes a constitutional violation as a result of the office's deliberate indifference to the need to provide adequate training to individual prosecutors. *City of Canton*, 489 U.S. at 388; *Bryan County*, 520 U.S. at 407.

The above conclusion results from a straightforward application of settled law. Petitioners nonetheless suggest (Pet. Br. at 19, 24-25, 27, 29-31, 37-39) that a municipal prosecutor's office should not be subject to the same rules applicable to all other municipal offices, and thus should not be held liable for failure to provide adequate training. That result—which would extend the absolute immunity enjoyed by individual prosecutors to the municipalities that employ them—is contrary to this Court's precedents and the remedial purpose of Section 1983.

A. Section 1983 Does Not Provide a Basis for Treating a District Attorney's Office Differently From Other Municipal Bodies

1. This Court has steadfastly refused to carve out special exceptions to Section 1983 liability for municipal entities. Municipalities "have no immunity from damages liability flowing from their constitutional violations." *Owen*, 445 U.S. at 657; *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit—

either absolute or qualified—under § 1983."). "[T]here is no tradition of immunity for municipal corporations" nor any policy reason to extend immunity to municipal entities. *Owen*, 445 U.S. at 638. For those reasons, *Owen* rejected the notion that the qualified immunity under § 1983 for *individuals* who do not violate clearly established constitutional rights should extend to *municipalities*. *Id.* at 657.

The reasoning underlying the Court's decision in *Owen* compels the rejection of petitioners' suggestion that municipal prosecutor's offices—alone and distinct from all other municipal bodies—should be exempt from liability if a constitutional violation is caused by the failure to provide prosecutors with adequate training. That result would improperly extend to municipalities the absolute immunity conferred on individual prosecutors. Petitioners do not point to any common-law tradition of absolute immunity for some types of municipalities but not others. *Compare Owen*, 445 U.S. at 650. Similarly, as in *Owen*, it is fairer to require the public at large, which reaps the benefits of the services performed by the prosecutor's office, to bear the costs of the office's activities than to impose the loss flowing from a constitutional violation solely on the victim of that violation. *Id.* at 654-55, 657.

And as in *Owen*, treating the office of the prosecutor like all other municipal bodies provides an important incentive for compliance with constitutional obligations. Unlike personal liability, which may distort the judgment of prosecutors and

distract them from their duties, the Court has explained that municipal liability has largely positive effects. *Owen*, 445 U.S. at 655-56. "[C]onsideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials," and "a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury." *Id.* at 656. "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247 (1959); *Amato* v. *City of Saratoga Springs*, 170 F.3d 311, 317-18 (2d Cir. 1999) (explaining that municipal liability "can encourage the municipality to reform the patterns and practices that led to constitutional violations").

2. It would also grossly frustrate the remedial purposes of Section 1983 if a prosecutor's office were exempt from the general rule that municipalities are liable for constitutional violations caused by deliberate indifference to the need to provide adequate training. No one would be accountable for constitutional violations caused by the failure of a municipal prosecutor's office to provide adequate training to prosecutors. Innocent citizens who have been wrongfully convicted and incarcerated would have no remedy even if the constitutional error resulted from the conscious decision by senior policymakers in the prosecutor's

office not to establish a policy in *Brady* compliance, not to train their lawyers regarding their *Brady* obligations, nor to supervise or otherwise monitor their attorneys regarding their obligations, or otherwise to ignore known constitutional violations.

In affirming the unqualified liability of municipalities under § 1983, *Owen* balanced the "costs among the three principals in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity." 445 U.S. at 657. The Court explained that "a damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." *Id.* at 651. By providing a cause of action against the municipality, "[t]he innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury." *Id.* at 657.

Owen also recognized that immunized officials may go about their business "secure in the knowledge that . . . immunity will protect [them] from personal liability for damages." *Id.* "And the public will be forced to bear only the costs of injury inflicted by . . . acts . . . fairly said to represent official policy." *Id.*

All of those principles are relevant here. Relieving a District Attorney's office from any liability for constitutional violations caused by its failure to train—allowing them "to assume that attorneys will abide by the standards of the profession" and thus comply with the law, Pet. Br. at 31—upsets this balance and leaves no one to answer for even an egregious miscarriage of justice. Accepting petitioners' position would thus defeat a core purpose of Section 1983, which is to provide a damages remedy for a constitutional violation caused by a municipality's actions.

B. The *Brady* Context Makes It Particularly Appropriate to Hold a Municipal Prosecutor's Office Liable If It Causes a *Brady* Violation Through Its Deliberate Indifference to the Need to Provide Adequate Training

1. Absolving a municipal prosecutor's office of liability for a *Brady* violation is inconsistent with the unique duty of the prosecution to disclose material exculpatory evidence to the defense. *Brady* "illustrate[s] the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler v. Greene*, 527 U.S. 263, 281 (1999). "By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model." *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

The individual prosecutor accordingly does not act to further his individual interests or to secure a

conviction. Rather, the prosecutor acts as "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935); *see Strickler*, 527 U.S. at 281; *Kyles v. Whitley*, 514 U.S. 419, 440 (1995) (*Brady* is vital "to preserve the criminal trial . . . as the chosen forum for ascertaining the truth about criminal accusations"); *Bagley*, 473 U.S. at 675 (disclosure ensures that a "miscarriage of justice does not occur"); *United States v. Agurs*, 427 U.S. 97, 104 (1976) (non-disclosure involves a "corruption of the truth-seeking function of the trial process").

Accordingly, the prosecutor's office as a municipal sovereign bears full responsibility for a *Brady* violation. Thus, a defendant's conviction must be reversed upon non-disclosure of material evidence, even where *Brady* evidence is not known to the individual prosecutor on the case but is known to other prosecutors in the office. *Kyles*, 514 U.S. at 437-438; *Giglio v. United States*, 405 U.S. 150, 154 (1972).

To be sure, this Court has reserved the question whether the Constitution imposes a free-standing obligation on a prosecutor's office to establish policies and to provide adequate training to individual prosecutors. *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 861 (2009); *see* Pet. App. 79a n.12 ("We do not hold as a matter of law that *Brady* training is always required. Our decision is based on the specific facts of this case that demonstrated that,

at least in the Orleans Parish DA's Office in 1985, *Brady* training was needed."). But where a constitutional violation *has been proven* to have resulted from an office's deliberate indifference to the need to provide adequate training, there is no basis for distinguishing a *Brady* violation from the other types of violations that may form the basis of a failure-to-train claim.

To the contrary, placing liability on the office for harm it directly causes is proper when the sovereign itself—not an individual prosecutor—is the party responsible for preserving the integrity and truth-seeking function of the criminal trial. To accept petitioners' premise not only would absolve the government of any liability whatsoever for *Brady* violations; it also would gut significant incentives for a municipal prosecutor's office to establish clear policies and provide adequate training and supervision to individual prosecutors.

2. Two other features of a *Brady* violation reinforce the need to hold a municipality accountable when its deliberate action causes harms. First, the withholding of evidence, by its nature, is extremely difficult or impossible to detect, and *Brady* violations often remain undetected for many years after a conviction. The inherent difficulties in discovering a *Brady* violation also can result in calamitous consequences, including subjecting innocent or wrongfully convicted citizens to protracted periods of incarceration. *See, e.g.*, Pet. App. 9a-10a (18 years of incarceration, 14 years on death row); *Van de Kamp*, 129 S. Ct. at 859 (24 years of incarceration); *Walker*

v. City of New York, 974 F.2d 293, 294 (2d Cir. 1992) (19 years of incarceration). Accordingly, in the rare instance when a violation *is* detected, holding the municipal body accountable for its actions is essential to deter unconstitutional conduct.

Second, *Brady* violations will frequently represent *collective failures* by a prosecutor's office, and accordingly, liability is appropriately placed on the office when a violation is caused by its deliberate indifference to the need to provide adequate training. In almost any conceivable criminal case involving the handling and withholding of exculpatory evidence by a prosecutor, more than one individual within the prosecutor's office and the police department will be aware of (a) the evidence, (b) the exculpatory potential of the evidence, and (c) the need to disclose the evidence to the defense.

This case well illustrates the point. At least four separate prosecutors (the line prosecutors, James Williams and Gerry Deegan, the screening prosecutor Bruce Whittaker, and the supervising prosecutor Eric Dubelier) knew about the exculpatory blood evidence and not one of them acted to ensure its disclosure. Pet. App. 54a-56a. A fifth prosecutor (Michael Riehlmann) learned of the intentional concealment of exculpatory evidence following the trial and also did nothing. *Id.* at 58a. A collective failure to adhere to a suspect's basic constitutional rights is highly likely to reflect a systemic breakdown in the safeguarding of constitutional rights that is properly attributable to the office itself. And it is the type of "'systemic'

injur[y] . . . result[ing] . . . from the interactive behavior of several government officials," that Section 1983 municipal liability is meant to deter. *Owen*, 445 U.S. at 652.

C. A Prosecutor's Status as a Professional Does Not Warrant Excepting a Municipal Prosecutor's Office From Section 1983 Liability

Petitioners argue that because a prosecutor is a professional, his employer cannot readily be deliberately indifferent to the need to provide him adequate training. Pet. Br. at 19, 27-31. Petitioners reason that prosecutors, "[s]imply to become attorneys . . . must have graduated law school, passed a rigorous bar exam, and satisfied exacting character and fitness standards," and they must comply with "continuing-education requirements" and the ethical standards of the profession. Pet. Br. 27-28; *accord* 38 ("By definition, a prosecutor is a licensed professional already equipped to assess what to do with potential *Brady* material."). *Brady*, however, is a fundamental precept of our criminal justice system, and has been the subject of extensive and evolving jurisprudence by this Court. *Infra*, pp. 21-22. It would be passing strange were this Court to hold that *Brady* compliance is the duty solely of individual prosecutors and not the sovereign on whose behalf those prosecutors act.

In any event, a lawyer's professional obligations are not duties that individual attorneys bear alone. Rather, state codes of professional

conduct uniformly impose special obligations upon *associations of lawyers* to monitor and train the attorneys they employ. ABA Model Rule 5.1, a requirement of practice broadly embraced by almost all United States jurisdictions, provides that:

> [a] partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

The rule further provides that an individual lawyer with supervisory authority over a particular subordinate attorney "shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." *Id.* Holding legal employers responsible for the professional competence and integrity of their employees reflects a judgment that "the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules." Model Rules of Prof'l Conduct R. 5.1 cmt. (2010).

Accordingly, codes of professional conduct explicitly contemplate that associations of attorneys and supervising lawyers will play an active role to ensure that lawyers under their control meet their professional obligations. These obligations apply to

associations of prosecutors no less than other associations of attorneys. *See* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 Vand. L. Rev. 381, 394 (2002) (noting that "most [state] professional codes barely distinguish between prosecutors and other lawyers," and "[n]one specifically exempt prosecutors from otherwise applicable rules").

Municipal prosecutor's offices, like any other organization of lawyers, have a responsibility to foster an atmosphere of ethical practice and adherence to law. Indeed, given the critical function that prosecutors play in administering constitutional rules of criminal procedure, municipal prosecutor's offices have special responsibilities to ensure that their professional employees understand and follow the law.

II. A SINGLE *BRADY* VIOLATION MAY FORM THE BASIS OF A FAILURE-TO-TRAIN CLAIM

A. This Court's Precedents Contemplate That a Single Constitutional Violation May Reflect a Municipality's Deliberate Indifference to the Need for Adequate Training

This Court in *City of Canton* left open the possibility that evidence of a single violation of constitutional rights may trigger municipal liability if the violation was traceable to the municipality's deliberate indifference to the need for adequate

training in the safeguard of constitutional rights. 489 U.S. at 390. The Court explained that "it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.*; *Bryan County*, 520 U.S. at 409.

City of Canton provided the example of the "obvious" need to train police officers on the proper use of firearms issued to them:

> [C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

489 U.S. at 390 n.10. In *Bryan County*, a case involving the use of excessive force during an arrest, this Court similarly explained that:

> [t]he likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle

> that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right.

520 U.S. at 409.

B. A *Brady* Violation Falls Within the Parameters Contemplated in *City of Canton* and *Bryan County*

A *Brady* violation comfortably fits the circumstances contemplated by this Court. Where a jury hears evidence that a *Brady* violation was directly caused by an individual prosecutor's lack of adequate training, the remaining questions for municipal liability under Section 1983 are whether his employer acted with the requisite deliberate indifference and whether the violation is directly linked to the employer's actions. Under the reasoning of *City of Canton* and *Bryan County*, a jury may infer deliberate indifference given the nature of the underlying *Brady* violation.

An individual prosecutor exercises enormous power and discretion to prosecute. The need for training in *Brady* compliance with respect to the full range of exculpatory evidence is obvious: *Brady* and its extensive progeny are hardly intuitive. Thus, while prosecutors may be presumed to be aware of a

duty to disclose "direct evidence that the accused was elsewhere at the time of the crime," training is obviously needed in "the intricacies of *Brady*." *Walker*, 974 F.2d at 300. *See, e.g.*, *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 129 S. Ct. 2308, 2320 (2009) (*Brady* obligation does not apply post-conviction); *United States v. Ruiz*, 536 U.S. 622, 629-33 (2002) (*Brady* does not apply to plea agreements); *Kyles*, 514 U.S. at 437 ("[T]he 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."); *Bagley*, 473 U.S. at 682 (defining materiality under *Brady*); *Giglio*, 405 U.S. at 154-155 (*Brady* includes impeachment evidence known by anyone within prosecutor's office).

Moreover, the prosecutor's office knows that a prosecutor's error in judgment in disclosing exculpatory evidence or applying this Court's *Brady* jurisprudence will frequently result in a constitutional violation. *Walker*, 974 F.2d at 300 ("[W]ithholding *Brady* material will virtually always lead to a substantial violation of constitutional rights."). If a jury finds that a prosecutor's lack of training caused a *Brady* violation, under the reasoning of *City of Canton*, a jury could also properly find that the employer's failure to provide adequate training reflects the employer's deliberate indifference to the violation. *See Bryan County*, 520 U.S. at 409-10.

Petitioners thus err in asserting that injury from a *Brady* violation, absent a history of repeated

violations, can *never* be the result of deliberate indifference on the part of a municipality. Pet. Br. 19, 25-41. The Court in *Bryan County* recognized that "the risk [of constitutional injury] from a particular glaring omission in a training regimen" may be highly obvious. 520 U.S. at 410. Applying that principle here, a jury could readily find—and, indeed, did find—that the nature of a *Brady* violation "would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision [not to train] would be the deprivation of a third party's federally protected right" and thus find that the policymaker acted with "deliberate indifference." *Id.* at 411.

This Court similarly should reject petitioners' sweeping argument that "a lack of training" can almost never directly cause a *Brady* violation because "what actually causes a violation is the prosecutor's own lapse, not a district attorney's failure to train the prosecutor on what he was already equipped to know and do." Pet. Br. 19; *accord* 37. That unfounded assertion improperly assumes prosecutors whose actions violate the Constitution invariably act in bad faith, as opposed to mere negligence or simple ignorance (resulting from the lack of training) about the full scope of the *Brady* obligation.

There is thus no good reason for categorically foreclosing the jury from inferring from a single *Brady* violation that the violation was caused by the office's failure to provide adequate training and supervision. After all, there may be significant

evidence, like in this case, that the office was indifferent to the need for training in the intricacies of *Brady* and that had the prosecution team received adequate training, it would have complied with its constitutional obligations. That conclusion is particularly warranted if, as in this case, the violation results from the actions of multiple prosecutors. *Supra*, p. 16. A single violation in which multiple actors took part makes it exceedingly unlikely that the violation resulted from bad faith alone (much less bad faith from a single rogue prosecutor as petitioners contend, Pet. Br. 19). The more plausible explanation is that the office as a whole lacked clear policies or there was a systemic breakdown in training and monitoring by the office.

C. Holding Prosecutor's Offices Liable for Brady Violations Would Not Unreasonably Expose Prosecutor's Offices to Municipal Liability for Virtually Any Constitutional Violation

Petitioners argue that allowing a jury to infer deliberate indifference from a single *Brady* violation would extend *City of Canton* beyond *Brady* to a litany of other decisions by a prosecutor. Pet. Br. 35. That assertion, too, lacks merit.

1. As discussed, *Brady* violations are unique in that they are rarely discovered before or during trial. By contrast, defense counsel can inquire of their client, for example, about whether *Miranda* warnings were properly given or about the police conduct during a search, and defense counsel

can object to the prosecution's improper attempt to introduce evidence. Any proven violation of these issues thus can be remedied before or during the trial.

The existence of potentially exculpatory evidence, on the other hand, is known solely to the prosecution. Typically, defense counsel has no recourse beyond asking the prosecutor to determine whether the government has potentially exculpatory material or information. If the prosecutor fails to disclose the information, in all probability, it will never become known to the defense. Accordingly, *Brady* violations may never be detected without self-disclosure by the prosecution. *See supra*, pp. 15-16.

"It is all the more important, then, to deter such violations by permitting damage actions under 42 U.S.C. § 1983 to be maintained in instances where violations do surface." *Imbler v. Pachtman*, 424 U.S. 409, 444 (1976) (White, J., concurring). And given the centrality of *Brady* to the special role of the prosecutor and the calamitous consequences that are likely to result from errors in judgment, the need for clear policies and adequate training is particularly obvious. A jury therefore could properly conclude that a single violation was the result of a municipality's deliberate indifference to the need for training.

Contrary to petitioners' assertions, Pet. Br. 39-40, the above principles do not permit a jury to conclude that a police officer's rape of a detainee was caused by a municipality's inadequate sexual

harassment policy. The nature of rape, of course, is that the perpetrator intended to commit violence. By contrast, a *Brady* violation, just like an officer's improper use of deadly force, may result either from an individual's misconduct *or* errors in judgment due to lack of adequate training. *But cf.* Pet. Br. 54 ("The evidence may have permitted, at most, the inference that there were four bad apples in Connick's office instead of one."). As long as the facts support either inference, the jury is entitled to choose which scenario it believes is more plausible.

2. Contrary to petitioners' alarmist argument that affirming the decision below would have "particularly ruinous implications for prosecutorial offices," Pet. Br. 36, the lower courts have been cautious in applying *City of Canton* to the circumstances indentified by this Court.

For example, "a policymaker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events." *Walker*, 974 F.2d at 297. Several courts thus have dismissed claims because the need for training was deemed not obvious.

In *Beard v. Whitmore Lake School District*, 244 F. App'x 607 (6th Cir. 2007), the court dismissed a Section 1983 suit by high school students against the school district for the actions of teachers who had subjected the students to strip searches. *Id.* at 607-08. Although the school district had a policy on student searches, the plaintiff had complained that the school district should have provided training

beyond making the policies publicly available. *Id.* at 610. Contrasting the case with the circumstances in *City of Canton*, the court reasoned that it was not "obvious" that the school district needed to provide additional training to avoid violations by teachers of the students' Fourth Amendment rights. *Id.* at 611. Here, however, the jury properly concluded that the need for *Brady* training was obvious. Pet. App. 62a-64a.

Similarly in *Gray v. Bostic*, 458 F.3d 1295 (11th Cir. 2006), the court dismissed an elementary school student's Section 1983 suit against a county sheriff in his official capacity after a deputy sheriff, serving as a school resource officer, had detained and handcuffed the student. The student asserted that the deputy received no training on how to detain students. *Id.* at 1308. Reasoning that the need for specific training on detaining students is not as obvious as the *City of Canton* example, the Eleventh Circuit held that the sheriff was entitled to summary judgment because the failure to provide the specific training at issue was not so likely to result in the violation of Fourth Amendment rights that the sheriff could be said to have been deliberately indifferent. *Id.* at 1309. By contrast, as explained above, the need to train prosecutors is as obvious as the need for training police on the use of firearms.

In *Zhao v. City of New York*, 656 F. Supp. 2d 375 (S.D.N.Y. 2009), the plaintiff challenged a police training manual that instructed police, before asking if a suspect is willing to waive *Miranda* rights, to tell the suspect that if he does not agree to talk "[he]

won't get to tell [his] side of the story." *Id.* at 393. In rejecting that claim, the court noted that to meet the "demanding" standard set forth in *City of Canton*, a plaintiff must show, *inter alia*, that an error in judgment by the police will frequently violate the suspect's constitutional rights. *Id.* The court accordingly held that the plaintiff failed to prove that suspects would frequently waive their right to silence based on the statement in the training manual. *Id.* at 393-94. Again by contrast, a failure to train prosecutors on how to comply with *Brady* and its progeny is overwhelmingly likely to result frequently in the violation of *Brady*.

In *Buchanan v. Maine*, 417 F. Supp. 2d 45 (D. Me. 2006), the court dismissed the claim of a mentally ill person killed by county sheriff deputies during a warrantless entry into his home. The court rejected the notion that the county's failure to adequately train its officers in dealing with mentally ill persons was the cause of the plaintiff's injury. *Id.* at 65-66. The district court reasoned the plaintiff provided "no evidence that when [the deputies] were hired there was a need for increased training in proper methods for . . . engaging mentally ill and potentially combative persons." *Id.* at 66. Again, in this case, the jury heard more than ample evidence to find that the need for additional training was obvious. Resp. Br. 37-44.

Moreover, there is no liability if the failure to provide adequate training was not the direct cause of the constitutional violation. Thus, in *Causey v. City of Bay City*, 353 F. Supp. 2d 864, 867 (E.D. Mich.

2005), *rev'd on other grounds*, 442 F.3d 524 (6th Cir. 2006), the court dismissed a complaint alleging that a city failed to train its officers adequately in proper entry and searches of "personal residences." The court relied on extensive evidence that the officers received regular training on searches and seizures. *Id.* at 876. The court also concluded that "the mere fact that these officers could have been better trained, or more prepared for *this particular incident* . . . does not establish deliberate indifference toward training" by the city. *Id.* (emphasis added). Here, by contrast, there was ample evidence of inadequate training and that a systemic breakdown in training by multiple prosecutors caused the violation that occurred in this case.

CONCLUSION

For the reasons set forth herein, *amici* respectfully request that the Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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