No. 09-571

IN THE

Supreme Court of the United States

HARRY F. CONNICK, 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 OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STEPHEN B. KINNAIRD
ALEXANDER M.R. LYON
COLIN E. KELLEY
JOHN J. O'KANE IV
PAUL, HASTINGS, JANOFSKY & WALKER LLP
875 15th Street, N.W.
Washington, DC 20005
(202) 551-1700

STEPHANOS BIBAS
UNIVERSITY OF PENNSYLVANIA LAW SCHOOL SUPREME COURT CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297

RICHARD RUDA *
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 309
Washington, D.C. 20001
(202) 434-4845
rruda@sso.org

* Counsel of Record for *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether a municipality can be held liable under section 1983 for a failure to train, where the plaintiff's injury was caused by prosecutors' criminal suppression of evidence and violation of professional ethical standards, absent evidence of a past pattern of similar violations.

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INTEREST OF *AMICI CURIAE*

Amici are national organizations of city and county governments and their members throughout the United States.[1] *Amici* have a strong interest in the development of section 1983 jurisprudence because it affects the manner in which millions of municipal employees, including lawyers and law enforcement officers, carry out their work. Equally important to *amici* is the scope of municipal liability for wrongful and criminal conduct by public employees.

Amici do not dispute that respondent John Thompson suffered grievous harm as a result of criminal acts and other wrongful conduct by prosecutors in the armed-robbery trial that laid the foundation for his conviction for first-degree murder and his capital sentence. Nor do *amici* dispute that he may be entitled to damages under state law. *See Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 768-69 & n.15 (2005). The scope of relief available to him under Louisiana law is in the hands of the State's citizens and its judiciary. *See id.* at 768-69; *see also DeShaney* v. *Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 203 (1989).

Amici do, however, oppose altering foundational rules of section 1983 jurisprudence to make a

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), letters consenting to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae,* their members, or their counsel made a monetary contribution to its preparation or submission.

municipality liable in damages for single incidents of wrongful conduct by individual municipal employees. "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell* v. *Dept. of Soc. Servs.,* 436 U.S. 658, 691 (1978). That rule is as pertinent to tragic cases as it is to mundane ones.

The judgment of the court of appeals in this case directly contradicts the affirmative act requirement that is the basis for municipal liability under section 1983. Because of the importance of that principle to *amici* and their members, they respectfully submit this brief to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

Section 1983 of Title 42 of the U.S. Code permits liability only for a municipality's own policy choices. It forbids vicarious liability for city employees' unauthorized wrongful acts. Cities can thus be held liable for a failure to train only where that failure reflects deliberate indifference to constitutional rights. Deliberate indifference requires much more than negligence or even gross negligence. It is not enough to show that city policymakers could have or should have known of a danger. Plaintiffs must prove that a city actually knew of a danger and then ignored it.

Professions regulate their members, such as physicians, attorneys, and accountants, by imposing ethical and legal requirements on them. Municipalities must hire and rely on professional employees and are entitled to presume that they will

follow the law and professional standards. Here, prosecutors not only failed to turn over a lab report during Thompson's robbery case, but also destroyed exculpatory blood evidence. By doing so, they committed a crime and violated ethical standards fundamental to the legal profession, including those imposed by *Brady* v. *Maryland,* 373 U.S. 83 (1963). Furthermore, there was no evidence of a history of such conduct.

Thompson was nevertheless permitted to recover on the theory that the District Attorney disregarded a need to train prosecutors to comply with these ethical and legal obligations. The judgment below effectively required district attorneys to presume that their credentialed, screened, and supervised prosecutors will flout the law and the legal profession's ethical standards. By doing so, it contradicted this Court's precedents and allowed vicarious liability without any affirmative municipal act or policy. On the contrary, cities should be entitled to rely on a presumption of legality and professionalism. They should be able to presume that professional employees will obey the law and professional standards until a pattern of conduct demonstrates that presumption is unwarranted.

To show a municipal policy of failing to train employees, plaintiffs must prove a pattern of violations sufficient to make cities aware of the problem. Cities can thus monitor and respond to patterns of violations with training and other programs, or be held liable if they do not. A pattern requirement would be clear, predictable, and allow cities to intelligently deploy their training resources.

In contrast, the courts below allowed liability for a single incident because the need to train was supposedly "obvious," "recurring," and involved "gray areas." These amorphous standards are broad and subjective, so cities cannot predict when they might be blamed in hindsight for failing to train. Liability for a single incident based on an obvious need should be confined to the extreme case of failing to train armed police officers on when they may use deadly force. At the very least, cities should not face liability for failing to train lawyers on their *Brady* obligations. Otherwise, the obviousness test would authorize "one-strike-and-you're-out" liability, emphasizing plaintiffs' injuries rather than municipalities' deliberate policy choices.

ARGUMENT

I. Municipalities Cannot Be Held Liable Under Section 1983 for Omissions Absent Notice of a Need to Act

Under section 1983, a municipality can be held liable only where its own affirmative conduct causes a constitutional injury. Where the conduct is a failure to act, the plaintiff must prove that the municipality knew the action was necessary to avert the injury, but chose not to act. Notice of a need to act is thus essential to any failure-to-act claim, including a failure-to-train claim.

Even as this Court authorized municipal liability under section 1983, it strictly limited its scope. A city may be liable for its *own* conduct, but not vicariously for the conduct *of others*. Liability requires "action pursuant to official municipal policy," not liability

"*solely* because [a city] employs a tortfeasor." *Monell,* 436 U.S. at 691 (emphasis in original). *Monell's* "'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur* v. *City of Cincinnati,* 475 U.S. 469, 479 (1986); *see also City of Oklahoma City* v. *Tuttle,* 471 U.S. 808, 823-24 (1985) (reversing judgment where instructions allowed the jury to impose municipal liability by inferring a policy of inadequate training from a particularly egregious incident).

Thus, municipalities cannot be held liable for mere errors or oversights. Policymakers must be aware of problems and affirmatively choose to disregard them. "[A] showing of simple or even heightened negligence will not suffice" to prove an actionable municipal policy. *Bd. of County Comm'rs of Bryan County* v. *Brown,* 520 U.S. 397, 407 (1997). "Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as city 'policy or custom' that is actionable under § 1983." *City of Canton* v. *Harris,* 489 U.S. 378, 389 (1989).

In other words, a municipality can be indifferent to the need for a particular action only if it *knows* of the need. It is not enough that the city *could have* known or *should have* known of that need. Thus, the deliberate indifference standard requires clear notice of a need to train. The plaintiff's constitutional injury must be "a known or obvious consequence" or

"highly predictable consequence" of inaction. *Bryan County,* 520 U.S. at 409-10.

The importance of notice is apparent from *Canton*'s hypothetical examples of failure-to-train liability. *Canton* gave two examples of notice: First, a city would be liable if it gave police officers guns without training them in the constitutional limits on when to use deadly force because it must have known that constitutional violations would follow from a failure to train. Second, a city would be liable if its "police . . . so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are 'deliberately indifferent' to the need." *Canton,* 489 U.S. at 390 n.10. Notice is central to both examples. In the latter, a past pattern of constitutional violations gives notice of the need to train. In the former, notice arises because the city must have recognized the need for training.

Notice is crucial to prevent municipal liability from collapsing into impermissible *respondeat superior* liability. As Justice O'Connor explained, "Without some form of notice to the city, and an opportunity to conform to constitutional dictates both what it does and what it chooses not to do, the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault." *Canton*, 489 U.S. at 395 (O'Connor, J., concurring in relevant part and dissenting in part).

This case does not present the second of the two *Canton* theories of liability. "Thompson does not argue that there was evidence of a pattern." Pet. App. at 72a. "[T]here was not a single instance

involving the failure to disclose a crime lab report or other scientific evidence." Pet. App. at 25a. Indeed, "twenty-five years of records involving this District Attorney's Office (covering the time period of Thompson's trial) revealed no pattern of *Brady* violations." *Id*.

Instead, Thompson argued that the city had notice of a need to train regarding *Brady* obligations because the need was inherently obvious.[2] He sought to establish that *Brady* issues recur and involve "gray areas." *See* Joint Appendix ("J.A.") at 171. Thus, he contended, the need to train prosecutors to navigate those situations was inherently obvious.[3] *See* J.A. at 827-28.

As Part II explains, however, Thompson cannot establish notice on this basis. Absent a pattern of violations, the District Attorney need not presume that his employees will violate their ethical and legal obligations as attorneys.

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[2] Thompson asserted, in the alternative, that the *Brady* violations in this case stemmed from an official policy of the District Attorney's office, but the jury rejected that theory. *See* Pet. App. at 39a, 64a.

[3] Of course, Thompson would also have to satisfy *Canton's* heightened causation requirement, which insists that "the identified deficiency in a city's training program must be closely related to the ultimate injury." *Canton,* 489 U.S. at 391. But-for causation is inadequate to establish liability in such cases. *Bryan County*, 520 U.S. at 410 ("To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.").

II. In the Absence of a History of Similar Injuries the District Attorney Cannot Be Held Liable for Thompson's Injury Because It Was Caused by a Criminal Act and the Violation of Professional Standards

When cities hire professionals, they are entitled to rely on them to obey the law and professional ethical obligations. Cities need not presume that professional employees will break the law or breach their ethical duties. To prove notice, therefore, a plaintiff must prove that the municipality knew of a past pattern of violations and failed to correct it. This standard precludes a finding of liability in this case and mandates reversal.

A. A Municipality Is Entitled to Presume That Its Professionals Will Obey the Law and the Ethical Standards of Their Professions

Professions such as medicine, law, and accountancy require members to obey rigorous professional, ethical, and often legal standards. A person or municipality who hires professionals is entitled to presume that they will observe those standards. Indeed, professionals who violate those standards are liable in tort. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 48 (2000).

The Court has repeatedly presumed that prosecutors will observe their professional, ethical, and legal duties. "[P]rosecutors must be assumed to exercise their charging duties properly '[a]bsent facts to the contrary.'" *McCleskey* v. *Kemp,* 481 U.S. 279,

338 (1987) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 225 (1976)); *see also United States* v. *Chemical Found.,* 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). Indeed, "tradition and experience justify our belief that the great majority of prosecutors will be faithful to their duty." *Town of Newton* v. *Rumery,* 480 U.S. 386, 397 (1987).

It is illogical to presume that a municipal employee will violate the standards that govern his profession. As Judge Clement observed in dissent below: "A public employer is entitled to assume that attorneys will abide by the standards of the profession, which include both ethical and practical requirements." Pet. App. at 29a; *see also Pembaur,* 475 U.S. at 486 (White, J., concurring) (observing that acts contrary to local law, even by municipal policymakers, cannot logically be presumed to embody the municipality's policy).

Cities may thus presume that their employees, especially professionals, will behave lawfully and ethically. To overcome this strong presumption, a plaintiff must prove that the breach and injury were "a known or obvious" or "highly predictable consequence" of failing to train on the applicable professional standard. *Bryan County,* 520 U.S. at 409-10. Only a pattern of similar ethical or legal violations by its professional employees will suffice to make this risk known, obvious, or highly predictable.

Here, the prosecutors' actions violated criminal statutes as well as professional standards. As there

had been no pattern of similar violations, there was no notice.

B. Petitioners Could Not Anticipate the Criminal Suppression of Evidence That Occurred

When Thompson was tried for armed robbery in April 1985, Assistant District Attorney Gerry Deegan secretly concealed or destroyed a blood-stained swatch of clothing that would have established Thompson's innocence. J.A. 367; Pet. App. at 58a. Given that fact, the *Brady* violation in Thompson's case largely stemmed, not just from bad judgment, but from a crime.[4]

Louisiana, like many other States and the Federal Government, makes destruction of evidence during armed-robbery and homicide proceedings a felony. *See* La. Rev. Stat. 14:130.1(A) (2009); 18 U.S.C. § 1512(c) (2009).[5] Under Louisiana's current obstruction-of-justice statute, which was in force in 1985, concealing or destroying evidence is at the top of the list of enumerated offenses. *See* La. Rev. Stat. 14:130.1(A)(1). This provision criminalizes precisely the conduct to which Assistant DA Deegan confessed: "Tampering with evidence with the specific intent of distorting the results of any criminal investigation or

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[4] Although Respondent argued that other materials were improperly withheld, his *Brady* claim focused primarily on the pants swatch and related lab report. J.A. at 20.

[5] *See also, e.g.,* Alaska Stat. § 11.56.610(a)(1) (2010); Conn. Code § 53a-155 (2009); 11 Del. Code § 1269 (2009); Idaho Code § 18-2603 (2010); Ohio Rev. Code § 2921.12 (2009); Utah Code § 76-8-510 (2009).

proceeding . . . ." *Id.* §14:130.1(A)(1)(b). Such conduct can occur either at the crime scene or "[a]t the location of storage, transfer, or place of review of any such evidence." *Id.*

Louisiana law recognizes that evidence tampering is particularly harmful in "criminal proceeding[s] in which a sentence of death or life imprisonment may be imposed," allowing for imposition of a prison term of "not more than forty years at hard labor" in such cases. *Id.* §4:130.1(B)(1).

Deegan was deceased by the time the disappearance of the pants swatch came to light in 1999. Had he lived, however, he could have been convicted under Louisiana's obstruction of justice statute. On the first day of trial, he checked out all of the armed robbery evidence from the police property room. But he omitted the pants swatch when he checked the rest of the evidence into the court property room. Pet. App. at 56a. Deegan later confessed to fellow prosecutor Michael Riehlmann "that he had intentionally suppressed [exculpatory] blood evidence in [Thompson's] armed robbery trial." J.A. 367; Pet. App. at 58a. That testimony alone would have sufficed to convict Deegan of a felony.

Deegan's actions were shocking and unforeseeable. As a prosecutor he was obligated – and as the Court has recognized, presumed – to seek only those convictions that were just. Yet, without warning he did the complete opposite and himself committed a felony to secure Thompson's conviction.

It defies common sense to suggest, as the decision below does, that Deegan's actions were a known or obvious consequence of not providing training on the

proper interpretation of *Brady*. Without a history of similar acts, the District Attorney had no reason to expect that criminal suppression of evidence was likely to occur inside his department. And without notice, it cannot be said that the District Attorney's office made a deliberate choice to ignore such a risk.

The Eighth Circuit applied this common sense insight in *Andrews* v. *Fowler,* 98 F.3d 1069 (8th Cir. 1996), a case in some respects similar to Thompson's. In *Andrews,* a police officer raped a young woman while on duty. *Id.* at 1073. The woman subsequently sued the city on the theory that it had provided the officer with inadequate training. *Id.* at 1073-74. The Eighth Circuit rejected the claim due in part to a lack of notice to the city, holding, "we cannot conclude that there was a patently obvious need for the city to specifically train officers not to rape young women." *Id.* at 1077.[6]

Here, as in *Andrews,* a violation of the plaintiff's civil rights was caused not by confusion or poor judgment, but by an employee's intentional crime. To hold the city liable absent a pattern of past similar

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[6] The Eighth Circuit also pointed to the absence of the necessary causal link between the training and the officer's crime. *Andrews,* 98 F.3d at 1077 (Andrews "simply cannot demonstrate the close relationship necessary to conclude that the city's failure to properly train Fowler caused him to rape Andrews or even raises a fact as to causation."); *see also Carr* v. *Castle,* 337 F.3d 1221, 1232 (10th Cir. 2003) ("[Police officers] were not trained by the City to shoot Randall repeatedly in the back after he no longer posed a threat. In sum, even if some inadequacy in training had been shown, Carr cannot demonstrate how it was a direct cause of the Officers' actions and of Randall's consequent death.").

acts requires cities to presume that their employees will intentionally break the law. Yet, as discussed above, cities are entitled to presume just the opposite.

C. The Failure to Turn Over the Lab Report and Blood Evidence Violated Ethical and Professional Rules

The District Attorney had good reason to believe that prosecutors would disclose lab reports and blood evidence even without *Brady*-specific training: because ethical obligations generally applicable to lawyers and those specially applicable to prosecutors required disclosure. Given these obligations, the District Attorney could not have foreseen, let alone known, that failing to offer training on *Brady* would lead prosecutors to withhold evidence in Thompson's case.

1. The Louisiana Rules of Professional Responsibility Required Disclosure

Several provisions of the Louisiana Code of Professional Responsibility obligated the prosecutors to disclose the lab report to Thompson. Disciplinary Rule 7-103(B) of the Louisiana Code of Professional Responsibility (effective July 1970) provided that prosecutors "shall make timely disclosure to counsel for the defendant . . . of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment."[7]

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[7] The parties stipulated that this rule applied at the time of Thompson's criminal trials. *See* J.A. at 26. The Louisiana Rules

Likewise, Disciplinary Rule 1-102(A)(5) prohibited lawyers from "[e]ngag[ing] in conduct that is prejudicial to the administration of justice."

Here these Rules required prosecutors to produce the lab report and blood evidence to Thompson. The Rules also forbade them to destroy the blood evidence.

2. The ABA Standards for Criminal Justice Required Disclosure

The ABA Standards for Criminal Justice represent a second source of professional obligations for prosecutors. Prosecutors have a duty "to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction." American Bar Association, *ABA Standards for Criminal Justice, Prosecution Function*, Standard 3-1.2(e) (3rd ed. 1993). Prosecutors thus bear a *personal* responsibility, independent of a municipality's obligation to provide training. And, like Disciplinary Rule 7-103(B), the Standards of Criminal Justice identify prosecutors' ethical obligation to comply with *Brady* by disclosing exculpatory material to the defense. *Id.* at Standard 3-3.11(a).

As applied to the conduct at issue here, the Standards for Criminal Justice would have required the prosecutors to be familiar with and obey at least

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of Professional Conduct currently impose substantially similar ethical rules. *See* La. R. Prof'l Conduct 3.8(d), 8.4 (2010).

the Disciplinary Rules and *Brady*. They also would have required prosecutors to disclose the lab report and blood evidence.

Given the independent ethical and professional obligations mandating disclosure, the District Attorney could have reasonably presumed that disclosure would occur. Cities need not presume that their employees might take actions that put their professional careers in jeopardy or that could lead to severe criminal punishments.[8] Indeed, this approach has been rejected in other cases. *See Floyd* v. *Waiters*, 133 F.3d 786, 796 (11th Cir. 1998), *vacated* 525 U.S. 802 (1998), *reinstated* 171 F.3d 1264 (11th Cir. 1999) ("Without notice to the contrary, the [municipality] was entitled to rely on the common sense of its employees not to engage in wicked and criminal conduct."); *Andrews*, 98 F.3d at 1077 ("we cannot conclude that there was a patently obvious need for the city to specifically train [police] officers not to rape young women").

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[8] Under the current ABA Standards for Imposing Lawyer Sanctions, upon which Louisiana courts rely (*see In re Riehlmann*, 891 So. 2d 1239, 1249 (La. 2005)), the intentional misconduct at issue warranted disbarment. *See, e.g.,* American Bar Association, *ABA Standard for Imposing Lawyer Sanctions* 6.11 (1992) ("Disbarment is generally appropriate when a lawyer, with the intent to deceive the court . . . improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.").

D. The Fact That *Brady* Issues Recur and Involve Gray Areas Did Not Put Petitioners on Notice of a Need to Train

To identify a deliberately indifferent refusal to train, Thompson had to show that the District Attorney had notice of a need for *Brady* training. Because the prosecutor's failure to turn over a plainly exculpatory lab report violated multiple ethical and legal standards, there was no such notice here.

Thompson sought to supply notice by drawing an analogy to the obvious need to train armed police officers. Like the use of deadly force against fleeing suspects, Thompson contended, *Brady* compliance was a recurring situation that presented "gray areas." *See* J.A. 171, 827-28; *see also Walker* v. *City of New York*, 974 F.2d 293, 298-99 (2d Cir. 1992). It is doubtful that the recurring "gray area" standard could ever give a municipality enough notice to make a failure obvious. Even if it could provide notice in some cases, it failed to do so here.

A prosecutor "'inevitably makes many decisions that could engender colorable claims of constitutional deprivation.'" *Van de Kamp* v. *Goldstein,* 129 S. Ct. 855 (2009) (quoting *Imbler* v. *Pachtman,* 424 U.S. 409 (1976)). Predicating notice on that basis alone would require district attorneys to train on everything.

Here, however, the evidence available to the District Attorney actively dispelled any notion that *Brady* training was needed. Connick had implemented careful systems of case screening, staffing, and supervision. *See* J.A. 425-26; Ronald Wright & Marc Miller, *The Screening/Bargaining*

Tradeoff, 55 Stan. L. Rev. 29, 60-66 (2002). In the *Brady* context, those systems appeared to work: only four convictions obtained by the District Attorney's office were overturned for *Brady* violations in the decade before Thompson's conviction. *See* Pet. App. at 25a. Not a single one of these cases "involve[ed] the failure to disclose a crime lab report or other scientific evidence." *Id.* Thompson, as noted, presented no evidence of a history of similar violations. *See* Pet. App. at 72a, 76a.

"[I]f violations were the 'highly predictable consequence' of a failure to train, then we would expect to see more than just one violation in hundreds or thousands of cases." Pet. App. at 30a. Logically, the plaintiff would have to explain why there is no pattern if they assert that the need is obvious.

Moreover, Thompson had to show more than just notice to prevail. He also had to show a deliberately indifferent refusal to train in the face of notice and that the lack of training was the cause, the "moving force," behind his injury. *See Bryan County*, 520 U.S. at 400. Had Thompson established notice of a need to train with respect to the "gray areas" in *Brady*, his case would have undoubtedly foundered on the causation element. There was no evidence that the prosecutors failed to turn over the lab report because it fell into a *Brady* "gray area" that training might have elucidated. On the contrary, the violation here flowed not from ignorance, but from an intentional act that no training could have prevented.

III. Recognizing a Presumption that Municipal Employees Will Obey the Law and Professional Standards Respects *Monell*

Recognizing that municipalities are entitled to rely on the professionalism of their employees respects *Monell* because it requires notice of a problem before liability can be imposed. By contrast, under the Fifth Circuit's conception of the "obviousness" rule, single incident failure-to-train cases devolve into vicarious liability simply for employing a tortfeasor.

A. The Obviousness Test Threatens to Collapse Municipal Liability into Vicarious Liability

The court of appeals accepted the notion that there can be an obvious need to train employees not to commit crimes or violate professional standards. That reasoning threatens to undermine the important distinction between municipal liability for official policies and vicarious liability for employees' torts and crimes. Like *respondeat superior* liability, it allows a single act by a municipal employee to form the basis for municipal liability. Notice is critical to the distinction between these two approaches. Absent notice to the municipality indicating that training is needed, "the failure to train theory of liability could completely engulf *Monell*, imposing liability without regard to fault." *See Canton*, 489 U.S. at 395 (O'Connor, J., concurring in relevant part and dissenting in part).

"[A] suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging that a supervisor trained and supervised inadequately on the other, would seem very much alike." *Van de Kamp,* 129 S. Ct. at 863. With omission-based liability, there is always a risk that a failure-to-train claim will devolve into a trial over a plaintiff's injury.

B. A Pattern-Based Approach to Municipal Liability Is More Predictable

Making municipal liability more predictable would allow municipalities to intelligently allocate training resources. To cause this desirable end, the Court should decline to apply the obviousness test outside the narrow firearm-training example identified in *Canton*. At a minimum, it should hold that the need for *Brady* training was not obvious here given prosecutors' many ethical and legal obligations. Instead, it should insist on a pattern of violations as a prerequisite for municipal liability.

The key to the pattern test is that it relies on a clear, measurable form of notice. Cities can count, track, and analyze past constitutional violations. They would have incentives to avoid liability by monitoring and addressing violations. These measures would, in turn, help prevent constitutional violations in the first instance. Conversely, if a training program fails to stanch violations, a city will be "on notice that a new program is called for." *Bryan County*, 520 U.S. at 407. The notice provided by a pattern would focus liability on the

municipality's actions or inactions, rather than on the actions of its employees.

A pattern-based test is also simple to apply. Courts need not ponder what is and is not obvious. A pattern of actual past violations, coupled with inaction, would predictably support an inference that a city "deliberate[ly] cho[se] to follow a course of action . . . from among various alternatives," *Pembaur*, 475 U.S. at 483. Conversely, a city that began a training program to address constitutional violations could rest assured that it could not be held liable for an employee's isolated wrongful act.

In stark contrast, expert opinion and similar indirect evidence are unreliable guides to whether a municipality has ignored an "obvious" danger. The obviousness test therefore risks becoming a "one-strike-and-you're-out" approach. As occurred in this case, a court can determine in hindsight that the need for training must have been obvious, leaving municipalities to be held liable without being given any opportunity to implement training that would prevent future violations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

STEPHEN B. KINNAIRD
ALEXANDER M.R. LYON
COLIN E. KELLEY
JOHN J. O'KANE IV
PAUL, HASTINGS,
JANOFSKY & WALKER LLP
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700
stephenkinnaird@
paulhastings.com

RICHARD RUDA*
Chief Counsel
STATE AND LOCAL LEGAL
CENTER
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700
rruda@sso.org
*Counsel of Record for
Amici Curiae

STEPHANOS BIBAS
UNIVERSITY OF
PENNSYLVANIA LAW
SCHOOL SUPREME COURT
CLINIC
3400 Chestnut Street
Philadelphia, PA 19104
(215) 746-2297
sbibas@law.upenn.edu

*Attorneys for Amici
Curiae*

June 2010