

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOHN VAN DE KAMP, ET AL., :

4 Petitioners :

5 v. : No. 07-854

6 THOMAS LEE GOLDSTEIN. :

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8 Washington, D.C.

9 Wednesday, November 5, 2008

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:06 a.m.

14 APPEARANCES:

15 TIMOTHY T. COATES, ESQ., Los Angeles, Cal.; on behalf of
16 the Petitioners.

17 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the United States, as amicus curiae, supporting the
20 Petitioners.

21 E. JOSHUA ROSENKRANZ, ESQ., New York, N.Y.; on behalf of
22 the Respondent.

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4	On behalf of the Petitioners
5	MICHAEL R. DREEBEN, ESQ.
6	On behalf of the United States, as amicus
7	curiae, supporting the Petitioners
8	E. JOSHUA ROSENKRANZ, ESQ.
9	On behalf of the Respondent
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11	TIMOTHY T. COATES, ESQ.
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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 07-854, Van De Kamp v. Goldstein.

Mr. Coates.

ORAL ARGUMENT OF TIMOTHY T. COATES

ON BEHALF OF THE PETITIONERS

MR. COATES: Mr. Chief Justice, and may it please the Court:

This case arises from a Ninth Circuit opinion that essentially creates an exception to absolute prosecutorial immunity for chief advocates and supervising advocates. The court's decision in the Ninth Circuit essentially held that prosecutorial policies that apply to an entire body of cases in a trial office do not qualify for absolute immunity.

We submit that this is inconsistent with this Court's decision in *Imbler v. Pachtman* and its progeny, applying the functional approach to absolute immunity. There is essentially no distinction between a chief advocate or supervising prosecutor implementing a policy directing that cases be handled in a particular manner and that particular chief advocate or supervising advocate actually participating in the courtroom.

1 Because of the size of the prosecutorial
2 agencies, it's not feasible that a chief advocate or
3 supervisor can be in a courtroom in every single case.
4 But they can put their prosecutorial stamp on each case
5 through the implementation of policy, through training,
6 or through other means.

7 Here the policy at issue concerns compliance
8 with the obligation to disclose exculpatory information
9 under Brady v. Maryland and also Giglio v. United
10 States.

11 In Imbler versus Pachtman, the Court
12 recognized that those obligations are core prosecutorial
13 obligations that are part of the prosecution's intimate
14 relationship to the fairness of the trial proceedings.
15 And we submit that that duty, that function, is the same
16 whether it's performed in the courtroom or whether it's
17 performed by a chief advocate or supervising advocate in
18 terms of formulating policy or when making particular
19 policy decisions.

20 Imbler recognized that these core decisions
21 had to be insulated. Otherwise, it would spawn
22 litigation that would burden the judicial process. And
23 it might cause them to hesitate to produce particular
24 exculpatory information. It might create a burden of
25 having them involved in more lawsuits than actually

1 performing their function and prosecuting the criminal
2 law.

3 JUSTICE KENNEDY: Was -- was there an
4 element in Imbler of the fact that you have to
5 make tactical and strategic decisions at -- at the
6 moment that are difficult, that call for judgment that
7 has to be exercised on the spur of the moment?

8 This is somewhat different. This is -- this
9 is a long-term commitment or a long-term policy that the
10 Respondents are arguing for. It seems to me somewhat
11 different than the dynamics that inform the Imbler
12 decision.

13 MR. COATES: Well, the court in Imbler did
14 mention a time frame in which decisions have to be made
15 -- quickly made by individual prosecutors. It also
16 noted the sheer number of decisions that are often made
17 in the context of a criminal prosecution.

18 I would say, with respect to chief advocates
19 and -- and supervisors, the number of those types of
20 decisions is the same. They have the same complexity in
21 determining what is going to come up in every single
22 case as an individual prosecutor does in a -- in a
23 single case.

24 Moreover, there is a multitude more that
25 they have to consider because they are considering the

1 possibility of its impact on thousands of cases within
2 the office. I will note, though, in *Butz v. Economou*,
3 where the Court extended absolute immunity to
4 individuals prosecuting agency actions, that same point
5 was raised. But some of the conduct there was a bit
6 more drawn-out in terms of the investigative manner --
7 not the investigative manner, but the -- the
8 prosecutorial process used by the administrative agency.
9 And the court didn't find that -- that longer time frame
10 to be dispositive.

11 Going back to *Imbler*, it again looked at
12 what the basic function was in the administrative agency
13 proceeding and found, yes, it is akin to prosecutorial
14 conduct.

15 JUSTICE STEVENS: May I ask you kind of
16 perhaps a farfetched hypothetical question just so I get
17 the case law in mind? Supposing a prosecutor wanted to
18 develop a policy which would keep -- which would create
19 a bifurcated regime within the office where the people
20 who interrogate prisoners are entirely separate from the
21 people who prosecute trials, so that they don't have the
22 malicious purpose that your adversary says is involved
23 in this case. And supposing the prosecutor then hired
24 some expert layman who had no trial experience at all to
25 develop such a program, and the program, itself, is

1 desirable from the prosecution's point of view but --
2 but presumably unconstitutional. Would the person who
3 developed that program be entitled to immunity --

4 MR. COATES: The --

5 JUSTICE STEVENS: -- in my example?

6 MR. COATES: The lay person --

7 JUSTICE STEVENS: Yes.

8 MR. COATES: The layperson, as a private
9 actor, I think would not be. I think the prosecutor
10 that developed the policy would be. It would be like
11 delegating it to a staff member. It might depend also
12 on how close the relationship is. The Court has noted
13 in some of the judicial immunity cases that sometimes
14 court clerks can perform functions that are essentially
15 judicial functions.

16 In that case, though, under the Court's
17 jurisprudence with private actors, they might have only
18 qualified immunity, the private actors. But the
19 decision to use them would be prosecutorial.

20 JUSTICE STEVENS: Well, why -- why is it
21 qualified immunity if a separate person does it, but not
22 qualified immunity if precisely the same task is
23 performed by somebody who happens also to be a
24 prosecutor?

25 MR. COATES: Because it's not so much the

1 physical task of doing it. It's carrying out the
2 obligation of performing that particular function. The
3 function is compliance with Giglio and Brady. That is
4 always a prosecutorial function. Whether the data is
5 kept with a police department or an investigative
6 agency, the buck stops with the prosecutor.

7 JUSTICE STEVENS: And in my hypothetical is
8 it or is it not a prosecutorial -- does the layperson
9 perform or not perform a prosecutorial function?

10 MR. COATES: If he is just collating data,
11 then that is -- that's -- that's a task. Our point is
12 that this isn't about just collating data. It's about
13 the policy that data must be collated and used. That is
14 the Brady-Giglio obligation. You can't divorce the --
15 the information from the purpose for which, why it's
16 supposed to be used.

17 JUSTICE STEVENS: No, but I'm trying to
18 divorce the information in the particular case from
19 developing the program.

20 MR. COATES: Well, I --perhaps I
21 misunderstood the question. It sounds to me that the
22 prosecutor has made a decision that he is going to put
23 this thing in place, this process in place. That's
24 their way that they satisfy or don't satisfy Giglio or
25 Brady.

1 Maybe they don't satisfy. Maybe it's a
2 terrible decision. But I think that decision ends up
3 being prosecutorial in nature.

4 JUSTICE STEVENS: Even if it's made by a
5 layman?

6 MR. COATES: Setting up the program, no.
7 But the -- I think the buck stops with the prosecutor as
8 to whether that's a valid process or not. I mean, the
9 person may adequately perform their function, or they
10 may not. But the person at the end of the day who is
11 responsible for it ends up being the prosecutor.

12 And he may inevitably -- the person may
13 inevitably perform something, but at the end of the day
14 the prosecutor is the one that -- that has the task
15 under Giglio and Brady of ensuring the accuracy of the
16 information.

17 I think that kind of underscores here the
18 approach the Respondent has taken is to kind of say,
19 well, this is just a collection of data here, this is
20 just bookkeeping. But it's not. The core of the
21 constitutional claim here is that there is an obligation
22 under Brady and Giglio somehow to collect this
23 information, to disseminate this information.

24 And that's the obligation that we are being
25 sued for, and that's the sort of thing that prosecutors

1 do. And you can you hire someone to do it, but somebody
2 is the gatekeeper. Someone has to basically decide what
3 goes in or what doesn't go in and whether it's
4 sufficient or insufficient at the end of the day to
5 comply with -- with Brady and Giglio. And so that can't
6 be distinguished from the -- the prosecutorial role,
7 whether it's conducted by a -- a chief advocate or by a
8 supervising advocate.

9 JUSTICE KENNEDY: Well, I -- I suppose that
10 is why the Petitioners seemed to change their theory.
11 They -- they -- they were -- they were concerned about
12 prosecutorial immunity, so they take it to the higher
13 level of policy.

14 When -- when they do that, I suppose they
15 might have the stronger argument if they could show
16 deliberate indifference. Are there cases that help them
17 on the "deliberate indifference"? What's -- what's the
18 best case for them on deliberate indifference?

19 MR. COATES: I couldn't say what the best
20 case is for them. I could not say what the best case is
21 for them on -- on "deliberate indifference." We have
22 not pushed on the merits part of this case. It was not
23 briefed down below, and it is not --

24 JUSTICE KENNEDY: That is why the case is
25 hard, and I -- I almost have to see what the violation

1 would be before I could determine the qualified immunity
2 aspect of the case.

3 MR. COATES: Well, indeed. I mean, several
4 amici has raise the question of whether there is the
5 constitutional violation at all, but it has not been
6 raised below. And of course, under this Court's
7 decision in Buckley we have to assume the existence of a
8 constitutional violation.

9 JUSTICE KENNEDY: That's what we are
10 deciding in sort of in a vacuum. It's a little
11 difficult.

12 MR. COATES: Precisely. But I think our
13 point is that -- that if you buy their theory of a
14 constitutional claim, whatever constitutional claim that
15 is is a -- a prosecutorial function-related claim,
16 because that's the nature of the Giglio and Brady
17 obligation. They are trial obligations. They don't
18 have any meaning outside the context of an actual
19 prosecution.

20 And so, again we submit that there is really
21 no difference to the chief advocate or supervising
22 advocate formulating this particular policy for all the
23 cases in the office -- this is what we do -- then there
24 is the individual actions of a particular trial attorney
25 in a given case or even if it were possible for a

1 supervising attorney or chief advocate to participate in
2 everything. They could accomplish the same thing, I
3 suppose, by every time a case is filed sending out an
4 e-mail saying: Comply with our policies.

5 JUSTICE KENNEDY: The Monell case -- does
6 the Monell case rest on the assumption that there can be
7 instances where a policy makes the policy of those who
8 adopted the policy liable?

9 MR. COATES: I think that's right. Reading
10 the Monell allegations of the complaint against the
11 County of Los Angeles, I think that that is what it is,
12 that the deputy -- that the district attorney rather,
13 acts as a county officer and would be the policymaker
14 for those policies and customs and practices.

15 That obviously is not at issue here.
16 Petitioners are being sued as individuals for their acts
17 as supervisors and as the chief advocate in formulating
18 a particular policy concerning compliance with Brady and
19 Giglio.

20 These sort of cases, opening this door
21 particularly for the broad claim that plaintiffs are now
22 trying to assert, which is this kind of notion of
23 information management, can spawn all sorts of claims.
24 Virtually any time that you can't reach the individual
25 trial attorney, all you need do is attribute whatever

1 you think that person did to the failure to develop a
2 policy or provide training or to have adequate data
3 management to allow them to do the job.

4 This kind of end-run under Imbler will
5 create the multitude of litigation and drag chief
6 advocates in, as well as supervising advocates, that
7 Imbler was designed to avoid. And it has the worse
8 collateral effect that it's also going to end up pulling
9 in the individual attorneys, the individual trial
10 attorneys in a given case, because maybe they don't have
11 individual liability, but they are certainly going to
12 come in; they are going to testify as witnesses.

13 So, it's the worst of both worlds, which is
14 you are burdening the chief advocate with this sort of
15 litigation which may impact the way they formulate
16 policy, and you are burdening the individual line deputy
17 attorney, and that's the attorney that Imbler sought to
18 protect as well.

19 Those adverse consequences on the judicial
20 process are what led this Court in Imbler to recognize
21 the importance of absolute immunity for prosecutors. We
22 submit that it's even more important that that immunity
23 be logically applied to chief advocates and to
24 supervisors. Otherwise, I think Imbler will be
25 eviscerated and we will have the very evils that Imbler

1 was designed to avoid.

2 If the Court has no further questions, I
3 will reserve the remainder of my time for rebuttal.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.
5 Coates.

6 Oh, excuse me. Sorry about that.

7 Mr. Dreeben.

8 ORAL ARGUMENT OF MICHAEL R. DREEBEN

9 ON BEHALF OF THE UNITED STATES,

10 AS AMICUS CURIAE,

11 SUPPORTING THE PETITIONERS

12 MR. DREEBEN: Thank you, Mr. Chief Justice,
13 and may it please the Court:

14 This Court recognized absolute prosecutorial
15 immunity for line prosecutors who are charged with
16 violating an obligation that falls uniquely on
17 prosecutors, namely the obligation to disclose
18 exculpatory evidence. The Respondents in this case are
19 seeking to circumvent that absolute prosecutorial
20 immunity by reformulating the claim as one against
21 supervisors who allegedly failed to fulfill duties under
22 the Constitution to collect information that would
23 enable the line prosecutors to comply with the core duty
24 under Giglio and Brady.

25 CHIEF JUSTICE ROBERTS: Is there such a

1 constitutional obligation?

2 MR. DREEBEN: Not in our view,
3 Mr. Chief Justice. In our view the Brady obligation is
4 one that falls on the Government. Giglio is an
5 extension of Brady with respect to impeachment
6 information. It's designed to ensure the fairness of
7 the trial. It is violated only when the Government has
8 suppressed material exculpatory evidence, that is,
9 evidence that can undermine the fairness of the trial.

10 It's intimately linked in a way that really
11 nothing else in the adversary system is to preserving
12 the fairness of the trial. It's an obligation on the
13 prosecutor to go beyond the normal role of an advocate
14 to zealously advocate for his cause, and it puts the
15 advocate in the position of supplying the judicial
16 system with information needed to be submitted in order
17 to have a fair proceeding.

18 CHIEF JUSTICE ROBERTS: I think you have the
19 flip side of the same problem your friend has. In other
20 words, the further it is removed from the constitutional
21 violation or an allegation of a constitutional
22 violation, the less need there is for immunity. The
23 closer it is or the closer we must assume it is to a
24 constitutional violation, then the immunity argument is
25 stronger.

1 MR. DREEBEN: Well, it certainly is true
2 that if there were a constitutional obligation under
3 Giglio and Brady, it would be one that is intimately
4 tied to the judicial process, and it should receive
5 absolute prosecutorial immunity.

6 JUSTICE KENNEDY: In the broad ethical
7 scheme of things, apart from liability under this
8 statute, it seems to me that a newly elected district
9 attorney would take seriously the obligation to make
10 sure that everybody was following Brady.

11 MR. DREEBEN: Absolutely, Justice Kennedy,
12 and I think that a formulation of policies to achieve
13 that, whether or not required by the Constitution, is
14 something that relates directly and intimately to the
15 prosecutor's duties to assure --

16 JUSTICE KENNEDY: Well, that's the next
17 point. If I were a prosecutor, I would say: This is my
18 constitutional duty to say it, in the broad sense of --
19 of my ethical obligations of my duties to the public.

20 MR. DREEBEN: Only in the sense, I think,
21 that -- that a supervisor who has the power to cause or
22 prevent constitutional violations may be under some
23 obligation not to cause constitutional violations. But
24 the claim here is --

25 JUSTICE KENNEDY: Well, I think it's more

1 than that. He can't be indifferent to sloppy practices
2 in the office --

3 MR. DREEBEN: You certainly should not.

4 JUSTICE KENNEDY: -- consistent with his or
5 her obligations to perform their duties.

6 MR. DREEBEN: But I think that the
7 deliberated indifference question that you raise,
8 Justice Kennedy, is really a direct counterpart of the
9 absolute immunity argument that we are making here. We
10 are making here the argument that supervisory
11 prosecutors should not be subject to suit based on broad
12 policies that they have adopted that will directly have
13 impact on individual cases in the way that Brady and
14 Giglio obligations are fulfilled.

15 JUSTICE STEVENS: Mr. Dreeben, what do you
16 do with my hypothetical? Do you remember it?

17 MR. DREEBEN: I remember it,
18 Justice Stevens, and I think that the -- I agree with
19 Mr. Coates on this one. The supervisory prosecutor who
20 formulates the policy is the only one who has the unique
21 --

22 JUSTICE STEVENS: No, I'm -- my hypothetical
23 is they hire a layman --

24 MR. DREEBEN: Yes.

25 JUSTICE STEVENS: -- to develop a policy

1 that will keep separate from prosecutors information
2 about the way witnesses are developed. And the policy I
3 think is highly improbable, I agree with you, but the
4 policy is designed to avoid the obligation imposed by
5 Giglio and Brady.

6 MR. DREEBEN: That's the allegation, of
7 course. And the first thing that I want to say is that
8 if you allow suits based on allegations that you think
9 are really bad, you open the door to allegations that
10 will have to be sorted out throughout the judicial
11 system.

12 JUSTICE STEVENS: But that's true even
13 without -- without an immunity.

14 MR. DREEBEN: But I think that the point is
15 that the immunity prevents the prosecutors from having
16 to fear that they will be subject to those kind of
17 suits.

18 But to answer your question directly, the
19 layperson, if he causes a constitutional violation,
20 isn't shielded by the constitutional -- excuse me -- by
21 the prosecutorial immunity that attaches only to
22 prosecutors. And that's because if you go back to the
23 roots in Imbler, what you see is that prosecutorial
24 immunity is really --

25 JUSTICE STEVENS: Of course, the next

1 question is, if that's true, and if there is -- you can
2 compartmentalize the prosecutor's work in the office and
3 he develops a separate chapter of his own duty to just
4 do that performance, why is that trial-related?

5 MR. DREEBEN: I think the flaw in
6 Respondent's theory is the attempt to bifurcate what the
7 prosecutor is doing into an administrative function and
8 a prosecutorial function. And that's the same, I think,
9 maneuver in your hypothetical, to say that the
10 prosecutor is really doing something administrative and
11 Imbler said administrative things are non-prosecutorial;
12 therefore, we can sue him.

13 I think the problem with that is illustrated
14 by a hypothetical about judicial immunity. Suppose --
15 judges of course have immunity from sitting on cases,
16 and if a judge sat on a case that involved a conflict of
17 interest he could not be sued or she could not be sued
18 for having done so, even if it violated the
19 Constitution. Suppose that the litigant reformulated
20 the suit and said: Well, the judge should have had a
21 policy to ensure a check of conflicts in all the cases
22 that the judge sat on. And that would have been an
23 administrative duty, set up some notebook that has all
24 the judge's investments and direct some underling to
25 ensure that no party in any case has an interest where

1 the judge has an investment. That was purely
2 administrative, so we ought to be able to sue. The
3 judge for that. And I think that obviously should fail.
4 It would end-run all of the policy reasons for being
5 able to assert absolute judicial immunity; and I think
6 that that is identical in form to what the Respondents
7 are trying to do here. They are trying to divorce the
8 role of the office in maintaining some sort of a system
9 to ensure that information is available to prosecutors
10 to disclose under Giglio from the obligation under
11 Giglio to ensure the fairness of the judicial process,
12 which is an obligation that falls uniquely on the
13 prosecutor and which Imbler makes clear is subject to
14 absolute immunity.

15 And you just can't do that. If you do that,
16 you end up exposing the supervisory prosecutors to evils
17 that cannot occur to the line prosecutor himself. And
18 it produces anomalies. The line prosecutor, even if he
19 intentionally violates Giglio, cannot be sued, but under
20 Respondent's theory the supervisory prosecutor, even if
21 what he did is no more than deliberately indifferent or
22 perhaps even negligent, could be sued.

23 The line prosecutor who handles a certain
24 number of cases cannot be sued, in part because it would
25 ensure a distraction of the duties of the prosecutor and

1 would divert him from performing his role of enforcing
2 the criminal law. The supervisor, who is responsible
3 for far more cases and is subject to far more
4 disappointed litigants who would like to sue him, that
5 person can be sued. And it would have an even more
6 disruptive effect on an office if supervisory
7 prosecutors, who have the responsibility, as
8 Justice Kennedy pointed out, of trying to come up with
9 policies that will prevent constitutional violations,
10 and that will ensure that the office functions in an
11 efficient and an effective manner, they will be the ones
12 who are most deterred -- most deterred from acting,
13 because they will suffer the possibility of thinking of
14 their own individual liability rather than focusing on
15 what they are supposed to do, the public interest, both
16 disclosing information that needs to be disclosed,
17 bringing suits that need to be brought, and using
18 witnesses regardless of fears that someone later on is
19 going to discover information that should have been
20 disclosed and sue the supervisor, saying, "We know we
21 can't sue the individual prosecutor, but you,
22 supervisor, failed to develop effective policies to get
23 that information to the court." That kind of
24 circumvention of Imbler plays no role of fulfilling the
25 policies that absolute prosecutorial immunity is

1 designed to fulfill.

2 If the Court has no further questions --

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.

4 Dreeben.

5 Mr. Rosenkranz.

6 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

7 ON BEHALF OF THE RESPONDENT

8 MR. ROSENKRANZ: Mr. Chief Justice, and may

9 it please the Court:

10 This case is not about whether a chief D.A.
11 can set policies about trial strategy. We could
12 stipulate that this chief D.A. would be immune from
13 those sorts of suits and it would not affect our case at
14 all.

15 This case is about the function of deciding
16 on an officewide basis whether to track important
17 historical facts and disseminate them internally within
18 an office to employees who need to know those facts.
19 This case is about gathering and preserving information,
20 certain categories of raw data, that may or may not ever
21 get into the courtroom, not about how to use those
22 specific pieces of data once you actually have a
23 prosecution materializing.

24 This claim is no different from a claim
25 against a chief of police, for example, for

1 systematically destroying 911 tapes, thereby depriving
2 defendants of exculpatory information.

3 CHIEF JUSTICE ROBERTS: Why isn't --

4 JUSTICE GINSBURG: This is creating -- this
5 is creating a database. And what was the year of this
6 prosecution?

7 MR. ROSENKRANZ: The prosecution, Your
8 Honor, was in 1979, it began. That was the crime; the
9 prosecution was in '80.

10 JUSTICE GINSBURG: And back in 1979 we did
11 not have the information-gathering electronic capability
12 that we now have. So what are we talking about? What
13 kind of database? How would it operate? Would you --

14 MR. ROSENKRANZ: Well, Your Honor, so that's
15 getting to the merits of the actual claim. It could be
16 as simple as a file cabinet or 3 by 5 cards on which you
17 list the name of the informant and his prior record of
18 collaboration.

19 In the U.S. Attorney's offices that do this,
20 completely apart from this enormous FBI database, they
21 do it very simply, the ones that I know about. They
22 appoint a Giglio czar in each bureau and they say that
23 when there is contact with the prosecutor's office and
24 an informant, you make sure you tell this person, "send
25 an e-mail," and he keeps it all in a file.

1 CHIEF JUSTICE ROBERTS: Well, but that goes
2 to the merits, doesn't it? I mean, if -- I -- you could
3 develop and make the same point, saying U.S. attorneys
4 are instructed in complying with Giglio and Brady in
5 this way. But if there is a decision not to -- I mean,
6 immunity is only necessary when you assume some -- there
7 has been some violation. And so the fact that somebody
8 else avoids a violation, it seems to me, is not a good
9 argument to deprive other people of immunity.

10 MR. ROSENKRANZ: Well, Your Honor, this
11 Court has said as clearly as it can possibly say that
12 the location of the injury is irrelevant. I am quoting
13 now from Buckley. In Kalina, the prosecutor executed
14 the challenged certification probably the morning before
15 the morning she walked into court, and it was held to be
16 not immune because that was not the function of a
17 prosecutor. She - with the charging document.

18 CHIEF JUSTICE ROBERTS: You drew a
19 distinction earlier on between a determination by a
20 prosecutor not to turn over certain material, which is
21 absolutely immune, and said this was different. But
22 what if the purpose of the policy is to not provide
23 prosecutors with material so they can't turn it over?
24 Why doesn't that go into the same prosecutorial core
25 function?

1 MR. ROSENKRANZ: Well, Your Honor, the
2 answer is quite simple. That is the alleged motive in
3 this case, in fact. It was intentional or with
4 deliberate indifference, so the allegation is, the
5 intention was to cut the flow of information to the line
6 prosecutor. And the reason that's different is because
7 while Petitioners say compliance with Brady, our answer
8 is compliance with Brady comprises at least two
9 functions.

10 There is the front line function of the
11 prosecutor, the advocate, making the decision, "Do I
12 turn this information over to the defense?" This case
13 has nothing to do with that front line function. This
14 case has to do with the back room function. The
15 function of --

16 CHIEF JUSTICE ROBERTS: Why isn't that the
17 same as the determination by the supervisor that, don't
18 turn this information over. Here's all -- we are not
19 going to share informant information because we don't
20 think that should be turned over to comply with Giglio.
21 The individual prosecutor they have says I'm not going
22 to turn it over. Why isn't it exactly the same?

23 MR. ROSENKRANZ: Well, Your Honor, if the
24 decree comes from on high, "we don't turn over Giglio
25 information here," which has actually happened in some

1 cases, that would be a different case, because that is
2 the chief administrator directing trial tactics.

3 Here it's the chief administrator looking
4 entirely inward and saying, like any administrator in
5 any major agency or business does, how do we get
6 information from the people who know it to the people
7 who need it at the front line?

8 JUSTICE SCALIA: That is certainly -- you
9 know, that's an interesting theory, but it's certainly
10 not the theory on which the decision below was based.
11 The decision below says "Neither" -- speaking of Imbler
12 and prior cases -- "Neither the Supreme Court nor this
13 Court has considered whether claims regarding failure to
14 train, failure to supervise or failure to develop an
15 officewide policy regarding a Constitutional obligation
16 like the one set forth in Giglio are subject to absolute
17 immunity."

18 And I could quote portions of the opinion
19 they are.

20 MR. ROSENKRANZ: That's what --

21 JUSTICE SCALIA: They are talking about
22 supervising prosecutors. They are talking about
23 training prosecutors and having an officewide policy
24 regarding what you do with -- with Giglio information.

25 MR. ROSENKRANZ: Your Honor, the passage you

1 read from was the broad passage that the court was
2 referring to when it said this sets up a bunch of hard
3 questions. This case becomes an easy case, the court
4 said, because we were not dealing with the prosecutor,
5 the chief D.A. setting trial tactics for the line
6 prosecutors; we are dealing -- the court says this on
7 page 5 of the petition -- excuse me, the petition
8 appendix.

9 JUSTICE SCALIA: Page 5?

10 MR. ROSENKRANZ: Page 5 of the petition
11 appendix at the top. It lays out the theories. Number
12 one theory is exactly the theory we are presenting here.
13 At the very top line, "They violated his constitutional
14 rights by purposely or with deliberate indifference
15 failing to create a system that would satisfy the Giglio
16 obligation."

17 JUSTICE SCALIA: They are not talking about
18 just collecting information.

19 MR. ROSENKRANZ: Your Honor --

20 JUSTICE SCALIA: They are talking about, as
21 they clarify later on, a -- a system in which they train
22 and supervise and develop an officewide policy regarding
23 the Giglio obligations.

24 MR. ROSENKRANZ: Your Honor, no, they -- the
25 court was very clear that it was talking about

1 supervising and training, about the internal function of
2 circulation of information within the D.A.'s office.

3 Not --

4 JUSTICE SOUTER: Let's assume that's --
5 that's what they did mean. I have to say I read it as
6 broadly as Justice Scalia did, but let's -- let's narrow
7 down the -- the Court's opinion to -- to -- to the claim
8 that you are making right now.

9 Let me go back to the Chief Justice's
10 hypothetical and add one minor detail.

11 Let's assume that in a given department they
12 put into effect exactly the policy that you want. They
13 have a fine system of -- of data collection, far more
14 sophisticated than three by five cards, and the -- the
15 boss D.A. says everybody in this office ought to know
16 what kind of deals are being made and offered at all
17 times. And they have such a system.

18 And the boss D.A. also says and don't you
19 disclose one word of it ever in any case. We are going
20 to defy Giglio.

21 If he made that or gave that order so that
22 in every case there would be a defiance of Giglio, even
23 though the facts were known, would he have absolute
24 immunity?

25 MR. ROSENKRANZ: And he's directing that

1 order to trial lawyers?

2 JUSTICE SOUTER: That's right.

3 MR. ROSENKRANZ: Yes, Your Honor. The
4 answer is I don't know. I could imagine a theory, a
5 very strong one --

6 JUSTICE SOUTER: Well, you know if in a
7 given case, if they had this system, and the lawyer
8 comes to him and says, okay, I've consulted our system
9 and I realize we that have got a Giglio obligation. And
10 the boss D.A. says: Forget it. Don't tell him a word.

11 There would be absolute immunity, wouldn't
12 there?

13 MR. ROSENKRANZ: There absolutely would,
14 Your Honor.

15 JUSTICE SOUTER: Okay.

16 MR. ROSENKRANZ: And my point is --

17 JUSTICE SOUTER: Why would the -- why would
18 the answer be any different if he says don't bother me
19 with particular cases? I am telling you right now what
20 the answer is going to be in every case in which we have
21 a Giglio obligation and that is, bury it.

22 Presumably there would be absolute immunity,
23 wouldn't there?

24 MR. ROSENKRANZ: Your Honor, I can imagine
25 an argument on either side. I can imagine the Plaintiff

1 making the argument --

2 JUSTICE SOUTER: What's your answer?

3 MR. ROSENKRANZ: I don't have an answer to
4 that hypothetical because it's so different from our
5 case.

6 JUSTICE SOUTER: The trouble is if you don't
7 have an answer to that hypothetical, then we got to
8 leave open the possibilities as far as your case is
9 concerned that he would have absolute immunity in that
10 case. And if he would have absolute immunity in that
11 case, then the -- the -- the reason for allowing
12 anything less than absolute immunity with respect to
13 this data collection obligation reduces down to
14 something like an almost a silly point.

15 MR. ROSENKRANZ: If --

16 JUSTICE SOUTER: If you can get everything
17 you want, and all the prosecutor has got to say is:
18 Keep it under your hat and there is going to be absolute
19 immunity and nobody gets anything. What is -- what is
20 to be gained by that?

21 MR. ROSENKRANZ: Well, Your Honor, that may
22 well be a consequence of Imbler. But when Imbler talks
23 about the function, Imbler is very clear that there is a
24 distinction between trial tactics and strategy on the
25 one hand in the cases under Imbler, and the sort of

1 backroom functions about the flow of information on the
2 other --

3 JUSTICE SOUTER: But if the backroom
4 function is reduced to an absolute nullity by an
5 immunized decision to -- to bury the Giglio information
6 in every case, then I don't see the point of saying
7 there's no immunity for the supposed backroom function,
8 because nothing will be accomplished even if there is no
9 absolute immunity.

10 MR. ROSENKRANZ: Sure, Your Honor. We
11 can -- if we imagine a corrupt district attorney who
12 wants to make sure that constitutional rights are
13 violated and evades the edict of this Court, sure, that
14 is the consequence of Imbler.

15 But my point in -- in not answering the
16 question about the theory under that case, is that the
17 argument of the plaintiff in that case is so different
18 from the argument that we are making here. The
19 plaintiff in that case would be arguing, well, it is
20 removed in time from the -- the actual prosecution which
21 is an argument that we, too, can make. The conduct was
22 before the initiation of criminal proceedings. It's
23 not -- you know, you could not say it's not unique to
24 prosecutors.

25 Here, our argument is that there is nothing

1 unique to prosecutors or to lawyers about the
2 information management function, about the function of
3 tracking information. And by the way, this is not an
4 exotic theory. This is exactly the line that this Court
5 has been following in distinguishing between --

6 JUSTICE ALITO: Can't you say anything about
7 training subordinates in any office. There is nothing
8 unique about training or not training subordinates in a
9 prosecutor's office as opposed to any other government
10 office or, I would suppose, an office in the private
11 sector. So does your argument extend to any failure to
12 provided adequate training or any instance where there
13 is a deliberate indifference as to the training that is
14 provided?

15 MR. ROSENKRANZ: I can see the plaintiff in
16 a case using our argument to advance that point. But my
17 point here is we don't even need to get to that argument
18 because --

19 JUSTICE ALITO: So a plaintiff could say
20 that it could sue a -- a district attorney for failing
21 to have adequate training as to subordinates before
22 you -- they are sent in to deliver a summation so that
23 they know they are not supposed to comment on the
24 failure of a defendant to take the stand --

25 MR. ROSENKRANZ: As I said --

1 JUSTICE ALITO: They are not supposed to
2 vouch for witnesses, that would be a viable theory in
3 your opinion?

4 MR. ROSENKRANZ: I -- I believe that there
5 is an argument. It's not the argument that I am making.
6 The argument that I am making it matters what the D.A.
7 is training on. If the D.A. is training on trial
8 tactics, that's one thing. But here the D.A. is
9 training on how to use a database, and he's not training
10 the lawyers who are going to be using it.

11 JUSTICE GINSBURG: Mr. Rosenkranz, you have,
12 it seems to me, a theory of this case that is not the
13 theory that the Ninth Circuit went on. I mean, the
14 Ninth Circuit talks about training and supervising
15 deputy district attorneys. And why do we train them?
16 Because we want to ensure that they share information.

17 Now you are cutting out the training and
18 supervision, and you are saying the obligation of the
19 supervising attorney is to have this information bank,
20 which the deputy attorneys can then -- then consult,
21 which, may be a very sound policy. But is it an element
22 of due process that the supervising attorney has to
23 devise a system to share information? Where is there
24 anything -- anything that the Court has held that
25 suggests that there is a data collection function

1 required by due process?

2 MR. ROSENKRANZ: So, Your Honor, let me
3 ask -- let me answer the first half first, which is
4 about what the Ninth Circuit held. And first, I should
5 say what it is that we argued to the Ninth Circuit.

6 It's on -- it's in our brief, very clearly
7 we've presented on page -- excuse me -- on page 17 of
8 our brief, that big paragraph, the only full paragraph,
9 we present both what we argued to the Ninth Circuit,
10 which was about the creation of a database, and what
11 Petitioners argued to the Ninth Circuit, which reflected
12 exactly what we were saying. So petitioners were not
13 confused. They attributed to us the argument that they,
14 quote, failed to set up a system to disseminate to
15 deputy district attorneys information about plea deals
16 and other assistance being offered to informants.

17 That was -- and that was directly out of our
18 brief. That was the first line of their brief, and the
19 first line of our brief also referred to that.

20 I agree, the Ninth Circuit spoke more about
21 training than about this information database. But the
22 Ninth Circuit was also speaking only about --

23 JUSTICE GINSBURG: And there is nothing in
24 the Ninth Circuit -- there was nothing that was
25 presented to the Ninth Circuit by Mr. Goldstein that had

1 to do with this talk about training?

2 MR. ROSENKRANZ: There was, Your Honor. In
3 our complaint we had two what might be called
4 information management theories.

5 One -- and you can see it on page 45 of our
6 complaint of the joint appendix, and so while the Court
7 is orienting itself -- there were -- there's a theory of
8 information management that is the most prominent theory
9 in the complaint. If you look at the bottom of page 45,
10 about seven lines up from the bottom, you see two
11 distinct kind of subtheories.

12 The first is -- so it starts -- the line
13 starts purposely or with a deliberate indifference --
14 theory 1-A, that petitioners failed to create any system
15 for the deputy district attorneys handling criminal
16 cases to access information, about informants, of
17 course.

18 Theory B, two lines from the bottom, "that
19 they failed to train deputy district attorneys to
20 disseminate information pertaining to the benefits
21 provided to jailhouse informants." That's also about
22 disseminating it internally. If one turns to page 69,
23 the specific allegations against Petitioners, you see
24 paragraph 154, repeatedly talking about this information
25 system, this information sharing system, both as a

1 system to create and as a failure to train. But, again,
2 train on what? Train on the need, when you don't have
3 the system, to inform the other guy that you've just
4 made a deal with the informant.

5 JUSTICE BREYER: But I would like to follow
6 that up a bit by saying, one, I'm not sure what this
7 difference between what you are arguing now and what you
8 are arguing then matters. I don't understand it,
9 frankly. I don't actually understand it, because I
10 agree, when you were in the Ninth Circuit, with what you
11 said: It's a failure to disseminate information. And
12 then you said: And it's a failure to train and
13 supervise. You did say that. Now, why that matters, I
14 don't know, because the problem that -- maybe it does
15 matter, maybe it doesn't. So I have to say I don't
16 understand it. Now, help my understanding.

17 MR. ROSENKRANZ: I don't think it does
18 matter.

19 JUSTICE BREYER: All right. I know you
20 don't, but I'm not worried about that. I'm worried
21 about my understanding of your argument, and that's what
22 I am trying to get to. Answer this question, please,
23 because it will help me: The obvious response is the
24 response the Government made. You can take any -- which
25 is what Justice Alito said. So I would just like to you

1 elaborate on it. You can take anything that the D.A.
2 does that is wrong in the case, you know, some horrible
3 thing he did. And maybe he shouldn't be immune, but he
4 is, okay? Or maybe he should be. There we are.

5 So, here I know I can't bring this suit, but
6 here's what I claim: You failed to have a system that
7 did... and now we fill in the blank. And whatever that
8 blank is, it's going to be something that would have
9 stopped him from doing this bad thing. In your case, it
10 happens to be an information dissemination system. In
11 other case, it would be some other kind of system that
12 would have the effect of stopping this bad thing. So,
13 their point is that, if you can go ahead with yours, so
14 can anybody else go ahead with theirs, and that is the
15 end of immunity. Okay?

16 Now, what is your response? That's what I
17 want to know.

18 MR. ROSENKRANZ: Your Honor, my response to
19 that is very simple: I don't know of any other trial
20 right -- prosecutorial misconduct, that can be
21 controlled -- excuse me, where you can evade immunity
22 under our theory the way you can with a theory that is
23 based on the management --

24 JUSTICE BREYER: Sure, it's easy. What the
25 prosecutor does is he makes the most horrendous

1 prejudicial argument you'd ever see. So we say: What
2 you need in the D.A.'s office, since this happens all
3 the time, are classes, or what you need is a special
4 section of the library where they have horrible
5 arguments underlined, okay?

6 (Laughter.)

7 JUSTICE BREYER: And so, I can do that. So
8 can you. You are very good at it. And any good lawyer
9 can do that. And that's their point. So, if your only
10 response, that's your response, your point is that a
11 good lawyer, while he can do yours, couldn't do others,
12 I understand the response. I'm not sure I agree with
13 it.

14 MR. ROSENKRANZ: No, Your Honor, and I was
15 beginning to say before that there is nothing at all
16 exotic about the theory. The same lines are being drawn
17 by this Court all the time. For example, in Kalina, a
18 very fine line between the prosecutor who is creating
19 charging documents on the one hand, writing them,
20 submitting them to the Court, and then on the other
21 hand, signing them. Or, in the investigative cases, the
22 line between the process of gathering information, the
23 raw data, on the one hand; and on the other hand, the
24 assessment of that data for trial.

25 And so, when you are talking about a

1 prosecutor and trying to hold the district attorney
2 vicariously liable for decisions of a trial lawyer, that
3 is just very different from trying to hold the district
4 attorney liable for the process of managing data, raw
5 information, that may or may not ever make its way into
6 a courtroom.

7 JUSTICE ALITO: Your theory applies to any
8 system of data dissemination. Is that -- would that be
9 correct?

10 MR. ROSENKRANZ: Any one that is
11 constitutionally based, Your Honor. I mean, one where
12 you could imagine a prosecution on the other end with a
13 constitutional right that is violated.

14 JUSTICE ALITO: If the prosecutor has the
15 policy of failing to distribute to the line attorneys
16 the latest Ninth Circuit decision or the latest
17 decisions of this Court on important issues of criminal
18 constitutional procedure, because they just don't like
19 the way the law is developing in these areas. So they
20 like the law the way it existed at sometime in the past,
21 and they are just not going to distribute any of that.
22 Would that be a theory?

23 MR. ROSENKRANZ: Well, you have to imagine a
24 world in which the district attorney is depriving people
25 of the tools of their trade so that they can't get it

1 elsewhere. There is actually a real case that I -- that
2 I've heard about where, you know, the district attorney
3 decided way back when to stop buying supplements for
4 statutory -- for statute books, and so district
5 attorneys, line prosecutors were charging under the
6 wrong statutes.

7 That, to me Your Honor, is a commissary
8 function. It is a function of an administrator trying
9 -- making decisions about how to arm the trial lawyer.

10 JUSTICE STEVENS: Can I ask you this
11 question? I know we have an immunity case, but your
12 underlying cause of action, the one you just described,
13 the policy there of not filing supplements, or say you
14 had a policy of training lawyers how to evade the Batson
15 issue. There are all sorts of troublesome policies that
16 might be developed. Are you aware of any case in which
17 the court has held that such a policy can be challenged
18 in the abstract, in the -- as, sort of, on its face,
19 rather than as applied?

20 MR. ROSENKRANZ: You are asking whether the
21 policy --

22 JUSTICE STEVENS: The policy when they --
23 when they deny someone his Giglio rights or so on and so
24 on. Have you had any cases like this one in which a
25 court has held that such a cause of action is available

1 against an office policy?

2 MR. ROSENKRANZ: That such a cause of
3 action --

4 JUSTICE STEVENS: Can be brought under 1983
5 for such a general policy?

6 MR. ROSENKRANZ: In the absence of a
7 constitutional injury?

8 JUSTICE STEVENS: That it will produce on a
9 regular basis constitutional --

10 MR. ROSENKRANZ: No, Your Honor, I am aware
11 of any such case, but I will say --

12 JUSTICE STEVENS: Then it seems to me that
13 in this case the absolute immunity question is harder
14 than the question that you present on the merits.

15 MR. ROSENKRANZ: Your Honor, it's actually
16 not, and I will tell you why. Our -- we do not have to
17 allege, for a 1983 case, that the conduct complained of
18 was unconstitutional. All we have to allege was that
19 the conduct caused a constitutional violation. So, for
20 1983 purposes, this case is a case -- most clearly, most
21 prominently our theory would be that this case is a case
22 in which the district attorney was aware of this market
23 bazaar atmosphere of trading in illegal -- excuse me --
24 in perjured jailhouse confessions and did nothing to
25 intervene. It's sort of a classic Hanton claim.

1 JUSTICE GINSBURG: But the bottom line would
2 be, if you are right, that every district attorney in
3 the country, large or small office, would have to have a
4 data bank that can be shared by all prosecutors,
5 informants that are used. That would be the
6 constitutional requirement for every supervising
7 prosecutor in the land.

8 MR. ROSENKRANZ: Not necessarily, Your
9 Honor. First of all, Giglio imposes the -- or puts the
10 district attorneys on notice as to what they ought to be
11 doing. But the constitutional requirement would be when
12 you were aware of strong warnings of this bizarre
13 atmosphere in which jailhouse confessions are being used
14 in this way, and you are aware that lawyers on one side
15 of the office don't know what lawyers on the other side
16 of the office are doing, then, yes, you are deliberately
17 indifferent to the constitutional violations.

18 CHIEF JUSTICE ROBERTS: I was surprised by
19 your answer to Justice Stevens's hypothetical, because I
20 thought it undermines your case. You said that you
21 don't have to show that the data system is
22 unconstitutional. You just have to show that it caused
23 a constitutional violation. But it would cause a
24 constitutional violation as applied in a particular
25 case. And you would object to it in that case, and

1 perhaps all this data sharing information system would
2 be very good evidence in that case. Look, he didn't
3 turn over this document. The reason he didn't turn it
4 over is because they've got a policy of not giving them
5 the document. But your objection would have to be based
6 in a particular case. And we have already held that in
7 that case there is absolute immunity.

8 MR. ROSENKRANZ: Yes, Your Honor, and that
9 is true of almost every prosecutorial immunity case.
10 The injury almost always happens when the lapse
11 materializes in injury in the courtroom.

12 CHIEF JUSTICE ROBERTS: Exactly. Now,
13 doesn't that just confirm the concern that has been
14 expressed that all you're doing is circumventing the
15 absolute immunity we recognized at trial.

16 MR. ROSENKRANZ: No, Your Honor, not any
17 more --

18 CHIEF JUSTICE ROBERTS: Even though the data
19 system, as you've said, doesn't cause a constitutional
20 violation. It's the application of it at trial. Now, I
21 know that's immune. You say, well, I'm going to get
22 around it.

23 MR. ROSENKRANZ: Well, not any more, Your
24 Honor, than Buckley or Burns were circumnavigating
25 around Imbler. I mean in those cases, the

1 constitutional violations -- excuse me -- the acts that
2 were being challenged were fabricating evidence. Why?
3 The only purpose for fabricating the evidence was to
4 produce it in the courtroom. Giving legal advice to
5 extract a confession in a particular way. Why? The
6 only purpose was to use that in the courtroom.

7 CHIEF JUSTICE ROBERTS: But you began this
8 dialogue by suggesting that you don't -- I am saying --
9 you don't have to prove that what you are complaining
10 about causes a -- is a constitutional violation. You
11 just have to prove that it causes a Constitutional
12 violation.

13 MR. ROSENKRANZ: Right, Your Honor.

14 CHIEF JUSTICE ROBERTS: In all the examples
15 you just gave me, it seems to me the allegation would be
16 that --

17 MR. ROSENKRANZ: No, not -- under Cedank,
18 Your Honor, it was not -- it would not be a
19 constitutional violation to extract a confession from
20 someone until that confession is used in the courtroom.

21 CHIEF JUSTICE ROBERTS: Well, but that gets
22 -- it seems to me a fundamental tension in your case.
23 When you are talking about the conduct, you need to link
24 it to a particular constitutional violation. The data
25 system has to be linked. But when you are talking about

1 immunity, you want to say, oh, it has got nothing to do
2 with the constitutional violation. It's just shuffling
3 paper.

4 MR. ROSENKRANZ: Well, Your Honor, that's
5 exactly right. It is because the functional approach --
6 for purposes of a functional approach, you never look at
7 the case through the lens of a constitutional violation.
8 You look at it through the lens of the conduct that's
9 being challenged. So that's what, for example, this
10 Court did in Kalina. The constitutional violation
11 occurred in the courtroom, but the lens that the Court
12 looked at it through was the specific conduct where this
13 Court said --

14 JUSTICE STEVENS: But your client's standing
15 to challenge this whole policy is the fact that he was
16 the victim of the -- of the use of the policy in a
17 particular case for which the prosecutor has
18 absolute immunity.

19 MR. ROSENKRANZ: Yes, Your Honor, and that
20 is always true in an immunity case. It is always true
21 that the -- that the injury materializes in the
22 courtroom. And this Court said in Buckley and in Burns
23 it is utterly irrelevant where the injury materializes.
24 What is relevant is whether you have a --

25 JUSTICE STEVENS: But I think you told me

1 earlier that there are no prior cases in which such -- a
2 person who suffered such an injury can bring an
3 independent 1983 case challenging the policy at large.

4 MR. ROSENKRANZ: Well, that's correct, Your
5 Honor, but it's a rare event that gets discovered.

6 Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Now, Mr. Coates, you have eight minutes
9 remaining.

10 REBUTTAL ARGUMENT OF TIMOTHY T. COATES

11 ON BEHALF OF THE PETITIONERS

12 MR. COATES: Thank you, Mr. Chief Justice.

13 I think some of the Court's comments have
14 underscored the tension in this case that the nature of
15 the constitutional claim here: That the rights that
16 were actually violated are the Giglio and Brady rights.
17 But the function we are talking about is the function of
18 complying with Brady and Giglio.

19 You can do it in various fashions. Maybe
20 it's a data base. Maybe it's something else. Maybe in
21 some cases it's even foreclosing particular witnesses
22 from testifying because you don't trust them. That is
23 essentially what the district attorney's policy is now.
24 It -- it forecloses deputy district attorneys from just,
25 willy-nilly, using jailhouse informants. They have

1 severe restrictions on what they can do.

2 It's hard to imagine a -- a policy that is
3 more directed to courtroom behavior than something
4 that's caveating the discretion of a particular line
5 prosecutor as to which witnesses they can use.

6 I think what we have here is a
7 constitutional claim that the tighter they try and draw
8 not just the causation, but the nature of the obligation
9 itself is tied to the prosecutorial function. Because
10 it's part of the prosecutorial function to assure the
11 disclosure of exculpatory information under Brady and --
12 and Giglio.

13 And so I would submit that under Imbler this
14 Court has already held that that conduct by an
15 individual prosecutor falls squarely within immunity.
16 And I submit that there is -- there is simply no
17 distinction for that kind of conduct when it's done in
18 the courtroom and that kind of conduct when it's done in
19 advance in all cases by a supervising prosecutor or by a
20 chief advocate. If the Court has no further questions
21 --

22 JUSTICE BREYER: I suppose the distinction
23 he's trying to make maybe -- I'm not sure I've got it
24 right, but you see there are certain kinds of systems
25 that maybe administratively an office ought to have.

1 And where it turns out that this is really an
2 administrative system, a lot of offices do have it, some
3 don't, but where it was negligent not to have it and the
4 very presence of it would have prevented the -- the
5 individual in the courtroom from behaving the way he
6 did, well, that's a separate kind of a claim. That's an
7 administrative claim.

8 Just as if, for example, suppose you had no
9 secretary or assistants. He says, look, everybody
10 should have secretarial assistance. And if only you had
11 secretarial assistance, these people would not have
12 misread everything the way they did or would have gotten
13 the phone calls or would have done something like that.
14 That's the kind of line -- so he's trying to draw a line
15 there between something that is pretty purely
16 administrative and -- and something that is really
17 supervisory and training. And he is not saying
18 supervisory and training. He is saying that was a
19 separate claim.

20 MR. COATES: Well, I think it's hard for him
21 to get away from the manner in which he is trying to
22 characterize it as being just administrative because
23 it's not information just sitting there in a vacuum.
24 The key thing is the policy that --

25 JUSTICE BREYER: Training in today's world

1 or he wants to say in that day's world, whatever it was.
2 They have information systems. They existed, and every
3 office ought to have them. And now he says I might lose
4 on that claim; but, nonetheless, it's not the kind of
5 claim that falls within Imbler. I think that's his
6 point. I'm not positive. He doesn't have to take my --

7 MR. COATES: I think that is -- that is the
8 point. But I think our point is that trying to
9 characterize that as an administrative system strips it
10 of the -- the meaning for which you are collecting the
11 data. I mean, according to them, the reason we have the
12 obligation is because of the prosecutorial obligation
13 under Giglio and Brady to make sure that exculpatory
14 information gets out there. So it's -- it's not just
15 administrative.

16 And I -- I assume if you look at the Ninth
17 Circuit decision -- and I -- and one of the main focuses
18 of the Ninth Circuit's decision in the case was not so
19 much that it was merely ministerial. It kind of
20 reached that conclusion on this notion that decisions
21 about all cases are different than decisions about a
22 particular case.

23 And I think our point is that, in looking at
24 the -- at the function performed here, you can't make
25 that distinction. That it really -- there really isn't

1 a distinction. That if you are making a decision for
2 all cases, then you are making a decision for that
3 particular case.

4 There is no difference from making a policy
5 in advance and saying everybody has to follow it. And
6 then, as I mentioned before, the criminal complaint is
7 filed, and you send out an e-mail saying comply with
8 Brady, or this is how you comply with Brady. There is
9 no real difference there.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.

12 (Whereupon, at 12:01 p.m., the case was
13 submitted.)

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