No. 13-415

In The
Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

v.

THOMAS LEE GOLDSTEIN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties.*

* CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

AMICUS CURIAE SUBMIT THIS BRIEF IN SUPPORT OF PETITIONER 1

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A CALIFORNIA DISTRICT ATTORNEY IS NOT A COUNTY POLICYMAKER IN PROSECUTORIAL MATTERS 3

II. COUNTIES SHOULD NOT BE LIABLE UNDER § 1983 FOR FAILURES OF STATE POLICYMAKERS 5

III. THE NINTH CIRCUIT'S PERCEIVED "CALIFORNIA TREND" IS AT ODDS WITH STATE COURT INTERPRETATIONS OF CALIFORNIA LAW 11

IV. IN MOST STATES, PROSECUTING ATTORNEYS ARE STATE (NOT COUNTY) ACTORS IN MATTERS RELATED TO STATE PROSECUTIONS 14

V. A CALIFORNIA DISTRICT ATTORNEY SETS PROSECUTORIAL POLICIES ON BEHALF OF THE STATE 18

VI. THE STATE ALREADY COMPENSATES WRONGLY-CONVICTED PRISONERS 22

TABLE OF CONTENTS – Continued

Page

VII. NO MEANINGFUL DISTINCTION EXISTS BETWEEN THE FACTS OF THE PRESENT CASE AND THE FACTS UNDERLYING THE *PITTS* OPINION..... 23

VIII. THE OPINION ERRONEOUSLY RELIES ON AN IRRELEVANT CALIFORNIA STATUTE..... 24

IX. THE OPINION MISCHARACTERIZES THE CALIFORNIA ATTORNEY GENERAL'S PROSECUTORIAL POWERS..... 24

X. THE OPINION ERRONEOUSLY ATTRIBUTES STATEWIDE ACTION TO COUNTIES..... 25

XI. THE OPINION IS INCONSISTENT WITH THIS COURT'S REVERSAL OF THE EARLIER NINTH CIRCUIT OPINION IN THIS CASE 26

CONCLUSION..... 27

TABLE OF AUTHORITIES

Page

CASES

Arnold v. McClain, 926 F.2d 963 (10th Cir. 1991) 16

Baez v. Hennessy, 853 F.2d 73 (2d Cir. 1988) 15

Bd. of Regents v. Roth, 408 U.S. 564 (1972) 8

Bethea v. Plusch, 2011 WL 5967180 (D. Vt. 2011) 16

Bishop Paiute Tribe v. County of Inyo, 291 F.3d 549 (9th Cir. 2002), rev'd on other grounds by *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003).....10

Blazier v. Larson, 2011 WL 776208 (D. Utah 2011) 17

Board of Cnty. Comm'rs v. Brown, 520 U.S. 397 (1997).....19

Boone v. Kentucky, 72 Fed. Appx. 306 (6th Cir. 2003) 15

Botello v. Gammick, 413 F.3d 971 (9th Cir. 2005) 17

Bradshaw v. Richey, 546 U.S. 74 (2005).....9

Byrd v. Chesterfield County, 2007 WL 3046707 (D. S.C. 2007) 16

Cady v. Arenac County, 574 F.3d 334 (6th Cir. 2009) 15

Cheek v. Garrett, 2011 WL 1085785 (D. Utah. 2011) 17

TABLE OF AUTHORITIES – Continued

Page

Chrissy F. by Medley v. Mississippi DPW, 925 F.2d 844 (5th Cir. 1991) 15

City of St. Louis v. Praprotnik, 485 U.S. 112 (1988) 8

Coleman v. State, 553 P.2d 40 (Ak. 1976) 16

Connick v. Thompson, 131 S.Ct. 1350 (2011) 18

County of Modoc v. Spencer & Raker, 103 Cal. 498 (1894) 7

Cram v. Oregon, 2010 WL 1062555 (D. Or. 2010) 16

Doe v. City of Bridgeport, 2006 WL 905361 (D. Conn. 2006) 14

Emerson v. Cleveland, 2011 WL 1103243 (D. N.D. 2011).....16

Esteves v. Brock, 106 F.3d 674 (5th Cir. 1997).....16

Freeman v. Kincade, 2006 WL 1236674 (W.D. Ark. 2000).....14

Gillette v. Delmore, 979 F.2d 1342 (9th Cir. 1992) 20

Gobel v. Maricopa County, 867 F.2d 1201 (9th Cir. 1989) 17

Goldstein v. City of Long Beach, 715 F.3d 750 (9th Cir. 2013) .....*passim*

Goldstein v. City of Long Beach, 481 F.3d 1170 (9th Cir. 2007) 26

TABLE OF AUTHORITIES – Continued

Page

Gordon v. Maine, 2008 WL 2433196 (D. Me. 2008) 15

Hafer v. Melo, 502 U.S. 21 (1991) 19

Harrington v. Willes, 670 F. Supp.2d 958 (S.D. Iowa 2009) 15

Harris v. Falls, 920 F. Supp.2d 1247 (N.D. Ala. 2013) 14

Hudson v. City of New Orleans, 174 F.3d 677 (5th Cir. 1999) 17

Hyatt v. County of Passaic, 340 Fed. Appx. 833 (3d Cir. 2009) 15

Imbler v. Pachtman, 424 U.S. 409 (1976) 27

Jean v. Nelson, 472 U.S. 846 (1985) 10

Kentucky v. Graham, 473 U.S. 159 (1985) 19

Loveland v. Centinario, 2010 WL 4103008 (E.D. Wis. 2010) 16

Marsh v. County of San Diego, 680 F.3d 1148 (9th Cir. 2012) 27

Mathis v. Town of Waynesville, N.C., 2009 WL 6067335 (W.D. N.C. 2009) 16

McGrath v. Gillis, 44 F.3d 567 (7th Cir. 1995) 15

McMillian v. Monroe County, 520 U.S. 781 (1997) 11

Miller v. City of Boston, 297 F. Supp.2d 361 (D. Mass. 2003) 15

TABLE OF AUTHORITIES – Continued

Page

Minch v. California Highway Patrol, 140 Cal.App.4th 895 (2006) 12

Nielander v. Board of County Comm'rs of County of Republic, Kan., 582 F.3d 1151 (10th Cir. 2009) 15

Owens v. Fulton County, 877 F.2d 947 (11th Cir. 1989) 15

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 18

Peterson v. City of Long Beach, 24 Cal.3d 238 (1979) 12

Pitts v. County of Kern, 17 Cal.4th 340 (1998)....*passim*

Plumeau v. School Dist. No. 40 County of Yamhill, 130 F.3d 432 (9th Cir. 1997) 19

Pusey v. City of Youngstown, 11 F.3d 652 (6th Cir. 1993) 16

Ramsay v. McCormick, 1999 WL 814366 (D. N.H. 1999) 15

Range v. Brubaker, 2008 WL 1818494 (N.D. Ind. 2008) 15

Rivero v. Superior Court, 54 Cal.App.4th 1048 (1997) 13

Rodriguez v. Stevenson, 243 F. Supp.2d 58 (D. Del. 2002) 14

Romano v. Doe 1, 2013 WL 1729226 (M.D. Fla. 2013) 14

TABLE OF AUTHORITIES – Continued

Page

Rozek v. Topolnicki, 865 F.2d 1154 (10th Cir. 1989) 14

Siler v. Louisville & Nashville Railroad Co., 213 U.S. 175 (1909) 9

Sommer v. United States, 713 F. Supp.2d 1191 (S.D. Cal. 2010) 27

St. James v. City of Minneapolis, MN, 2006 WL 2591016 (D. Minn. 2006) 15

Stagemeyer v. County of Dawson, 192 F. Supp.2d 998 (D. Neb. 2002) 17

State ex rel. Porter v. District Court of First Judicial District, 124 Mont. 249 (1950) 16

Strickland v. Carrol County Md., 2012 WL 401075 (D. Md. 2012) 15

Teats v. Johnson, 2012 WL 4481449 (M.D. Tenn. 2012) 16

Tennison v. California Victim Comp. & Government Claims Bd., 152 Cal.App.4th 1164 (2007) 3, 23

Trantham v. Henry County Sheriff's Office, 2011 WL 863498 (W.D. Va. 2011) 16

Trinkle v. California State Lottery, 71 Cal.App.4th 1198 (1999) 13

Van de Kamp v. Goldstein, 555 U.S. 335 (2009) 21, 26

Venegas v. County of Los Angeles, 32 Cal.4th 820 (2004) 12

TABLE OF AUTHORITIES – Continued

Page

Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765 (2000).....13

Wainwright v. Goode, 464 U.S. 78 (1983) 9

Whatcom County v. State, 999 Wash. App. 137 (2000).....17

Whifield v. City of Pennsylvania, 587 F. Supp.2d 657 (E.D. Pa. 2008).....16

White v. Smith, 2009 WL 3335967 (D. Neb. 2009).....17

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).....14, 20

Ysais v. Richardson, 2008 WL 4861697 (D. N.M. 2008).....15

UNITED STATES CONSTITUTION

U.S. Const. amend. XI.....14, 20

STATUTES

California Evidence Code
§ 669.1.....12

California Government Code
§ 815.2.....20
§ 821.6.....21
§ 825 20
§ 825(a) 22
§ 3073.....2, 5
§ 25303.....1, 2, 5
§ 26526.....24

TABLE OF AUTHORITIES – Continued

Page

42 United States Code
§ 1983.....*passim*

OTHER

Cal. Const., Art. XI § 1(a).....20

http://counsel.lacounty.gov/oh.asp (accessed on October 25, 2013).....24

AMICUS CURIAE SUBMIT THIS BRIEF IN SUPPORT OF PETITIONER

The California State Association of Counties (CSAC) respectfully submits this brief as *amicus curiae* in support of Petitioner.

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae CSAC is an association of all 58 of the California counties. The Ninth Circuit opinion that is the subject of the present Petition[2] creates unprecedented county exposure to liability under 42 U.S.C. § 1983 for erroneous state criminal convictions, and is irreconcilable with an on-point 1998 California Supreme Court opinion.[3] Counties cannot reduce their risk of future liability for erroneous state criminal convictions, because California law affirmatively forbids counties from interfering in a district attorney's investigative and prosecutorial function.[4] This Court should take this opportunity to determine whether California counties should be financially

[1] The parties have consented to the filing of this brief. This brief was not authored in whole or part by counsel for any party. No person or entity other than *amicus curiae* made a monetary contribution to this brief's preparation or submission. The parties were notified more than ten days prior to the due date of this brief of the intention to file.

[2] *Goldstein v. City of Long Beach*, 715 F.3d 750 (9th Cir. 2013).

[3] *Pitts v. County of Kern*, 17 Cal.4th 340 (1998).

[4] California Government Code § 25303.

liable under § 1983 for erroneous convictions over which they had no control.

STATEMENT OF THE CASE

Amicus curiae adopts the Statement of the Case set forth in the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The present Ninth Circuit opinion approves of § 1983 liability against California counties for erroneous criminal convictions attributable to failures of district attorneys to create systems or provide training that might avoid such erroneous convictions.[5] That would lead to virtually limitless county liability for erroneous convictions, since any erroneous criminal conviction can, in hindsight, be blamed on district attorney policymaking failures. California counties are expressly forbidden by California law from interfering in the investigative and prosecutorial function of elected district attorneys,[6] and cannot, by law, remove erring or incompetent district attorneys from office.[7] The State of California has its own system for compensating erroneously-convicted persons, further

[5] See *Goldstein*, 715 F.3d at 762.

[6] California Government Code § 25303.

[7] California Government Code § 3073.

demonstrating that compensation for erroneous criminal convictions is a state (not county) responsibility in the State of California.[8]

ARGUMENT

I. A CALIFORNIA DISTRICT ATTORNEY IS NOT A COUNTY POLICYMAKER IN PROSECUTORIAL MATTERS

The Ninth Circuit's present opinion "turns on whether the Los Angeles District Attorney acted here as a policymaker for the state or for the county."[9] A district attorney's prosecutorial policy is state policy. A district attorney's administrative policy is county policy.[10]

The opinion concludes "that the local administrative policies challenged by Goldstein are distinct from the prosecutorial act,"[11] so the district attorney acted as a county policymaker. Nonsense. The "prosecutorial act" was to have "perennial informant" Fink testify at Goldstein's murder trial, where "Fink lied on the stand when he was asked about previous assistance given or benefits received. [Citation omitted.] Goldstein was convicted almost solely on the basis of

[8] See *Tennison v. California Victim Comp. & Government Claims Bd.*, 152 Cal.App.4th 1164, 1182 (2007).

[9] *Goldstein*, 715 F.3d at 753.

[10] *Pitts*, 17 Cal.4th at 363.

[11] *Goldstein*, 715 F.3d at 759.

Fink's testimony."[12] The relevant policymaking activity allegedly caused Goldstein's erroneous conviction.

The opinion states that "the Los Angeles District Attorney's Office failed to create any system for the Deputy District Attorneys handling criminal cases to access information pertaining to the benefits provided to jailhouse informants and other impeachment information, and failed to train Deputy District Attorneys to disseminate this information."[13] Further: "The conduct at issue here does not involve prosecutorial strategy, but rather administrative oversight of systems used to help prosecutors comply with their constitutional duties."[14]

Again, nonsense. Strategy is a plan or method of achieving a goal.

1. Goal: convict Goldstein of murder.

2. Strategy: call "perennial informant" Fink as a prosecution witness to testify against Goldstein.

3. Policymaker involvement: "lack of an index allowed Fink to lie about the benefits he received for testifying against Goldstein, prevent[ing] prosecutors in Goldstein's case from knowing Fink's history, and

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[12] *Goldstein*, 715 F.3d at 751-52.

[13] *Goldstein*, 715 F.3d at 752.

[14] *Goldstein*, 715 F.3d at 762.

prevent[ing] Goldstein's counsel from impeaching Fink."[15]

When no kind of policymaker except a district attorney would have any use for certain policies or training, it is a safe bet that prosecutorial policies and training are involved. That is true here by a wide margin.

II. COUNTIES SHOULD NOT BE LIABLE UNDER § 1983 FOR FAILURES OF STATE POLICYMAKERS

In California, counties provide some funding for district attorneys, but are statutorily forbidden from interfering in a district attorney's investigative and prosecutorial function.[16] California counties do not hire district attorneys. District attorneys are elected by voters, like state court judges. Also like state court judges, counties cannot fire district attorneys.[17]

The California Supreme Court has held that "in California a district attorney represents the state . . . and not the county, when training and developing policy" related to state criminal prosecutions.

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[15] *Goldstein*, 715 F.3d at 762.

[16] California Government Code § 25303.

[17] See California Government Code § 3073, setting forth the method for removing an elected district attorney from office, which involves appointment of a special prosecutor by the California Superior Court.

> Indeed, a contrary rule would require impossibly precise distinctions. The district attorney would represent the state when he or she personally prepared to prosecute and prosecuted criminal violations of state law, but the county when training others to do so, or when developing related policies. . . . Such a result would be nonsensical, and would impose local government liability under the most arbitrary of circumstances.[18]

The present Ninth Circuit opinion states that "[a]lthough we must consider the state's legal characterization of the government entities which are parties to these actions, federal law provides the rule of decision in § 1983 actions," and "no deference is due" to opinions of California state courts interpreting relevant state law.[19] The Ninth Circuit's present opinion ignores over a century's worth of consistent California state court interpretations of relevant California law, falling back on a "no deference is due" approach to avoid meaningful analysis of those interpretations. The California Supreme Court's analysis of the relationship between California counties and district attorneys has not fundamentally changed since first articulated in 1894:

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[18] *Pitts*, 17 Cal.4th 362.

[19] *Goldstein*, 715 F.3d at 760-61.

> The district attorney in the discharge of the duties of his office performs two quite distinct functions. He is at once the law officer of the county and the public prosecutor. While in the former capacity he represents the county and is largely subordinate to, and under the control of, the board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state. [Citation omitted.] If he fails for any reason to appear at the trial in a criminal case for the discharge of his duty the court is authorized to designate some competent attorney to take his place for the occasion [citation omitted]; and if at any time it is deemed essential for the public service that he have assistance in this behalf, it is made the duty of the attorney general to go to his aid. [Citation omitted.][20]

The Ninth Circuit's present opinion could not have paid deference to relevant California state court opinions and still have reached the present result.

The Ninth Circuit's view that "no deference is due" to state courts is not in harmony with this Court's teachings. For example, this Court held that the outcome of a § 1983 lawsuit for deprivation of a

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[20] *County of Modoc v. Spencer & Raker*, 103 Cal. 498, 501-02 (1894).

property interest without due process of law can turn on whether state law has created such a property interest:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[21]

In a § 1983 policymaker context, this Court has held that "'whether an official had final policymaking authority is a question of state law.' [Citation omitted.] Thus the identification of policymaking officials is not a question of federal law. . . . The States have extremely wide latitude in determining the form that local government takes. . . ."[22]

In a federal habeas corpus case from Florida, a federal appellate court ruled that the sentencing judge had imposed the death penalty in improper reliance on future dangerousness in violation of state law, thereby imposing arbitrary punishment under the Eighth Amendment. This Court disagreed. The Florida Supreme Court had already concluded that the sentencing judge had not improperly relied on

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[21] *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

[22] *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

future dangerousness. If interpretation of the sentencing judge's remarks was a legal issue, it was an issue of state law that the federal appellate court should have accepted. The views of a state's highest court with respect to state law are binding on federal courts.[23]

In a federal habeas corpus case from Ohio, this Court held that the federal appellate court erred in holding that the doctrine of transferred intent was inapplicable to aggravated felony murder under an Ohio statute. The Ohio Supreme Court's statutory interpretation, announced in its review of the respondent's case, directly contradicted the federal appellate court's analysis. This Court explained that the Ohio Supreme Court's "explanation of Ohio law was perfectly clear and unambiguous. We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."[24]

The Ninth Circuit's view that "no deference is due" to state court interpretations of state law in § 1983 lawsuits also clashes with the doctrine that federal constitutional issues should be avoided if a case can be decided on state law grounds.[25] This Court

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[23] *Wainwright v. Goode*, 464 U.S. 78, 83-84 (1983).

[24] *Bradshaw v. Richey*, 546 U.S. 74, 75-76 (2005).

[25] See *Siler v. Louisville & Nashville Railroad Co.*, 213 U.S. 175, 193 (1909).

has taught federal courts to avoid the adjudication of federal constitutional issues when alternative grounds are available.[26]

The "no deference is due" view also reflects a Ninth Circuit double standard. In an earlier § 1983 lawsuit in which a California county was sued by an Indian tribe because a district attorney obtained and enforced state court criminal subpoenas for tribal records despite tribal objections that tribal policies precluded compliance, the Ninth Circuit ruled that the district attorney was required to defer to tribal interpretations of tribal policies, stating by way of example that "California's sovereign immunity would be compromised if the United States demanded that the State follow procedures other than those adopted by the state policymakers."[27] The present opinion shows that the Ninth Circuit does not practice what it preaches. The present Ninth Circuit opinion is an example of the United States (through one of its courts) demanding that the state follow procedures other than those adopted by state policymakers.

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[26] See *Jean v. Nelson*, 472 U.S. 846, 854 (1985).

[27] *Bishop Paiute Tribe v. County of Inyo*, 291 F.3d 549, 558 (9th Cir. 2002), rev'd on other grounds by *Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003).

III. THE NINTH CIRCUIT'S PERCEIVED "CALIFORNIA TREND" IS AT ODDS WITH STATE COURT INTERPRETATIONS OF CALIFORNIA LAW

In McMillian v. Monroe County,[28] this Court examined Alabama law and concluded that sheriffs act for the State of Alabama in law enforcement matters. The present opinion acknowledges McMillian, but attempts to distinguish it:

> Most significant is the contrast between the steps that were taken in Alabama to increase the state's control over the sheriff in McMillian and the contrary California trend to categorize district attorneys as county officials. . . . [29]

Again, nonsense. The California Supreme Court's *Pitts* opinion was published in 1998.[30] If the California Legislature disagreed with the California Supreme Court's interpretation of California law in the *Pitts* opinion, it could have amended California statutes to countermand that interpretation. That would indeed have amounted to a "California trend" – but no such thing happened. Indeed, in 2004 the California Supreme Court followed its *Pitts* opinion with an opinion holding that California sheriffs act

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[28] 520 U.S. 781 (1997).

[29] *Goldstein*, 715 F.3d at 759.

[30] *Pitts*, 17 Cal.4th at 359-60.

for the state in their state law enforcement investigations.[31] That 2004 opinion shows a "California trend" in the opposite direction from that perceived by the Ninth Circuit, which simply ignored the more recent California Supreme Court opinion in its present opinion.

Historically, when the California Legislature has disagreed with the California Supreme Court over law enforcement policy, it has enacted appropriate statutes to clarify state policy. For example, the California Supreme Court held (in 1979) that law enforcement officers could be presumed negligent if they violated procedures set forth in their tactical manuals.[32] The California Legislature responded with a corrective statute providing that negligence cannot be presumed for violating policies that have not been formally adopted as statutes, ordinances or agency regulations.[33] In that example, the Legislature intended to overrule the California Supreme Court on a question of state law, and effectively did so.[34] Nothing prevented the Legislature from legislatively overruling the *Pitts* opinion, if it had a different view of California law enforcement and prosecutorial policy-making authority than the California Supreme Court.

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[31] *Venegas v. County of Los Angeles*, 32 Cal.4th 820, 839 (2004).

[32] *Peterson v. City of Long Beach*, 24 Cal.3d 238 (1979).

[33] California Evidence Code § 669.1.

[34] See *Minch v. California Highway Patrol*, 140 Cal.App.4th 895, 907 (2006).

In a case that did not arise under § 1983, the California Court of Appeal, applying well-established California law, held that "[i]nvestigation and prosecution of state criminal law are statewide concerns, not municipal affairs."[35] The *Pitts* opinion held that "when preparing to prosecute and when prosecuting criminal violations of state law, a district attorney represents the state and is not a policymaker for the county. While this issue depends on an analysis of state law, and hence the conclusions of other jurisdictions are not conclusive, we note other jurisdictions have reached the same result."[36] As noted in the next section, seven federal circuits have now reached the same result, contrary to the Ninth Circuit.

The *Pitts* opinion employed the well-established statutory interpretive presumption that the word "person" in a statute excludes the sovereign, and therefore excludes the state.[37] In accordance with that interpretive presumption, California courts traditionally interpret the word "person" in California statutes to exclude the State of California.[38] This Court likewise interprets the word "person" as used in § 1983

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[35] *Rivero v. Superior Court*, 54 Cal.App.4th 1048, 1059 (1997).

[36] *Pitts*, 17 Cal. 4th at 362.

[37] See *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000).

[38] *Trinkle v. California State Lottery*, 71 Cal.App.4th 1198, 1203 (1999) (a California state agency is not a "person" within the meaning of the California Unfair Competition Act).

consistently with that interpretive presumption: a state is not a "person" under § 1983.[39] Thus, it is not necessary to address Eleventh Amendment immunity. Defendants sued as the official-capacity equivalent of states are not "persons" under § 1983.

IV. IN MOST STATES, PROSECUTING ATTORNEYS ARE STATE (NOT COUNTY) ACTORS IN MATTERS RELATED TO STATE PROSECUTIONS

Federal courts in 38 states (including federal appellate courts in the Second, Third, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits) have ruled that prosecuting attorneys act for their respective states in matters related to state criminal prosecutions. Those states are Alabama,[40] Arkansas,[41] Colorado,[42] Connecticut,[43] Delaware,[44] Florida,[45]

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[39] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989).

[40] See *Harris v. Falls*, 920 F. Supp.2d 1247, 1255-56 (N.D. Ala. 2013).

[41] See *Freeman v. Kincade*, 2006 WL 1236674, *2 (W.D. Ark. 2000).

[42] See *Rozek v. Topolnicki*, 865 F.2d 1154, 1158 (10th Cir. 1989).

[43] See *Doe v. City of Bridgeport*, 2006 WL 905361 (D. Conn. 2006).

[44] See *Rodriguez v. Stevenson*, 243 F. Supp.2d 58, 64 (D. Del. 2002).

[45] See *Romano v. Doe 1*, 2013 WL 1729226, *3 (M.D. Fla. 2013).

Georgia,[46] Illinois,[47] Indiana,[48] Iowa,[49] Kansas,[50] Kentucky,[51] Maine,[52] Maryland,[53] Massachusetts,[54] Michigan,[55] Minnesota,[56] Mississippi,[57] New Hampshire,[58] New Jersey,[59] New Mexico,[60] New York,[61] North

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[46] See *Owens v. Fulton County*, 877 F.2d 947, 950-52 (11th Cir. 1989).

[47] See *McGrath v. Gillis*, 44 F.3d 567 (7th Cir. 1995).

[48] See *Range v. Brubaker*, 2008 WL 1818494 (N.D. Ind. 2008).

[49] See *Harrington v. Willes*, 670 F. Supp.2d 958 (S.D. Iowa 2009).

[50] See *Nielander v. Board of County Comm'rs of County of Republic, Kan.*, 582 F.3d 1151, 1170 (10th Cir. 2009).

[51] See *Boone v. Kentucky*, 72 Fed. Appx. 306 (6th Cir. 2003).

[52] See *Gordon v. Maine*, 2008 WL 2433196 (D. Me. 2008).

[53] See *Strickland v. Carrol County Md.*, 2012 WL 401075, *31 (D. Md. 2012).

[54] See *Miller v. City of Boston*, 297 F. Supp.2d 361 (D. Mass. 2003).

[55] See *Cady v. Arenac County*, 574 F.3d 334, 336 (6th Cir. 2009).

[56] See *St. James v. City of Minneapolis*, MN, 2006 WL 2591016 (D. Minn. 2006).

[57] See *Chrissy F. by Medley v. Mississippi DPW*, 925 F.2d 844, 849 (5th Cir. 1991).

[58] See *Ramsay v. McCormick*, 1999 WL 814366, *6 (D. N.H. 1999).

[59] See *Hyatt v. County of Passaic*, 340 Fed. Appx. 833, 837 (3d Cir. 2009).

[60] See *Ysais v. Richardson*, 2008 WL 4861697, *5 (D. N.M. 2008).

[61] See *Baez v. Hennessy*, 853 F.2d 73, 76-77 (2d Cir. 1988).

Carolina,[62] North Dakota,[63] Ohio,[64] Oklahoma,[65] Oregon,[66] Pennsylvania,[67] South Carolina,[68] Tennessee,[69] Texas,[70] Vermont,[71] Virginia[72] and Wisconsin.[73]

State supreme or appellate courts in four additional states: Alaska,[74] California,[75] Montana,[76] and

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[62] See *Mathis v. Town of Waynesville, N.C.*, 2009 WL 6067335, *8 (W.D. N.C. 2009).

[63] See *Emerson v. Cleveland*, 2011 WL 1103243, *7 (D. N.D. 2011).

[64] See *Pusey v. City of Youngstown*, 11 F.3d 652, 657-58 (6th Cir. 1993).

[65] See *Arnold v. McClain*, 926 F.2d 963, 964-66 (10th Cir. 1991).

[66] See *Cram v. Oregon*, 2010 WL 1062555, *3-14 (D. Or. 2010).

[67] See *Whifield v. City of Pennsylvania*, 587 F. Supp.2d 657, 671 (E.D. Pa. 2008).

[68] See *Byrd v. Chesterfield County*, 2007 WL 3046707 (D. S.C. 2007).

[69] See *Teats v. Johnson*, 2012 WL 4481449 (M.D. Tenn. 2012).

[70] See *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997).

[71] See *Bethea v. Plusch*, 2011 WL 5967180 (D. Vt. 2011).

[72] See *Trantham v. Henry County Sheriff's Office*, 2011 WL 863498, *5 (W.D. Va. 2011).

[73] See *Loveland v. Centinario*, 2010 WL 4103008 (E.D. Wis. 2010).

[74] See *Coleman v. State*, 553 P.2d 40, 47 (Ak. 1976).

[75] See *Pitts*, 17 Cal.4th 340.

[76] See *State ex rel. Porter v. District Court of First Judicial District*, 124 Mont. 249, 274 (1950).

Washington,[77] have held that criminal prosecutors are state (not county) actors in matters related to state criminal prosecutions.

Prior to the present opinion, federal courts in three states: Arizona,[78] Louisiana,[79] and Nevada,[80] ruled that district attorneys may act for counties or local entities rather than states in prosecutorial matters. The Ninth Circuit's present opinion adds California to that group, with all but one state placed in that group by Ninth Circuit opinions.

Federal district courts in two states, Nebraska[81] and Utah,[82] have ruled both ways on whether district attorneys may act for counties or local entities rather than states in prosecutorial matters. The issue

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[77] See *Whatcom County v. State*, 999 Wash. App. 137 (2000).

[78] See *Gobel v. Maricopa County*, 867 F.2d 1201, 1208-09 (9th Cir. 1989).

[79] See *Hudson v. City of New Orleans*, 174 F.3d 677, 679 (5th Cir. 1999).

[80] See *Botello v. Gammick*, 413 F.3d 971, 979 (9th Cir. 2005).

[81] Compare *Stagemeyer v. County of Dawson*, 192 F. Supp.2d 998 (D. Neb. 2002) (no § 1983 claims against county attorneys in official capacity), with *White v. Smith*, 2009 WL 3335967 (D. Neb. 2009) (allowing § 1983 claim against county based on allegations that county attorney had a policy of coercing lying under oath to obtain conviction).

[82] Compare *Cheek v. Garrett*, 2011 WL 1085785 (D. Utah. 2011) (Utah County district attorney is county officer), with *Blazier v. Larson*, 2011 WL 776208, *3 (D. Utah 2011) (prosecutor in Utah County attorney's office acted as state agent in prosecuting plaintiff).

remains unlitigated in seven states: Hawaii, Idaho, Missouri, Rhode Island, South Dakota, West Virginia, and Wyoming.

As shown above, the Fifth Circuit has ruled that prosecutors are not state actors in Louisiana criminal prosecutions. This Court's only case addressing § 1983 failure-to-train liability for district attorneys arose in Louisiana.[83] This court has not directly addressed whether district attorneys act for the state (and are therefore not "persons" for § 1983 purposes) in other states.

V. A CALIFORNIA DISTRICT ATTORNEY SETS PROSECUTORIAL POLICIES ON BEHALF OF THE STATE

This Court has held that

> municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. . . . whether an official had final policymaking authority is a question of state law.[84]

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[83] See *Connick v. Thompson*, 131 S.Ct. 1350 (2011).

[84] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

An "official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."[85] Therefore, an official-capacity suit which, like the present one, is based on training and related policymaking is, in all respects except name, a suit against the entity for which the policymaker has final authority to make policy.

In California, subordinate prosecutors hired by a district attorney are county employees in the ordinary master-servant context, but counties may not be held vicariously liable under § 1983 for the unconstitutional acts of employees under a respondeat superior theory.[86] To impose liability against a county under § 1983, a plaintiff must show, *inter alia*, that the county had a policy that was the moving force behind the constitutional violation.[87]

When a natural person is sued in official capacity under § 1983, it "generally represent[s] only another way of pleading an action against an entity of which an officer is an agent."[88] In the present case, official-capacity liability depends upon whether state law vested the district attorney with relevant final policymaking authority for the County of Los Angeles,

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[85] *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

[86] *Board of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 403 (1997).

[87] See *Plumeau v. School Dist. No. 40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997).

[88] See *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

and whether his relevant act resulted from a deliberate choice made from among various alternatives.[89]

This Court has held that Eleventh Amendment protection "applies only to States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes."[90] The California Constitution provides that the "State is divided into counties which are legal subdivisions of the State."[91] On one hand, California district attorneys are generally classified as county officers, but on the other hand, California counties are classified by California law as state subdivisions, not municipalities. Prosecution of state crimes is not a municipal function in California; it is a state function. Since the State of California considers counties to be its subdivisions, there is no inconsistency in the idea that a California district attorney is answerable to the county for some functions and answerable to the state for others.

The opinion states that "counties are required to defend and indemnify the district attorney in an action for damages," citing California Government Code §§ 815.2 and 825.[92] Neither of those statutes mentions counties. They deal generally with defense and indemnification of public entity employees.

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[89] See *Gillette v. Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992).

[90] *Will*, 491 U.S. at 70.

[91] Cal. Const., Art. XI § 1(a).

[92] *Goldstein*, 715 F.3d at 759.

However, it is true that counties generally defend and indemnify district attorneys who have been sued for compensatory damages for conduct in the scope of duty. No one yet knows whether counties (or the state) would pay damages attributable to a California district attorney's prosecutorial-related policymaking, because until the present Ninth Circuit opinion, such liability was impossible under either state law[93] or federal law.

The present Ninth Circuit opinion states that "the county's obligation to defend and indemnify the district attorney in an action for damages is a 'crucial factor [that] weighs heavily' in favor of holding that district attorneys act for counties rather than the state."[94] Thus the opinion "heavily" relies on vicarious liability as a basis for policymaker liability. The opinion's defense-and-indemnification rationale is at odds with this Court's earlier opinion in this same case,[95] which did not deem the district attorney's right to request defense and indemnification under California law to be a factor in a prosecutorial liability analysis. A prosecutor who is individually sued under § 1983 is entitled to defense and indemnification from

[93] California Government Code § 821.6 provides for prosecutorial immunity under California law.

[94] *Goldstein*, 715 F.3d at 758.

[95] *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009).

compensatory damages if immunity is not upheld, and if the prosecutor was acting in the scope of duty.[96]

VI. THE STATE ALREADY COMPENSATES WRONGLY-CONVICTED PRISONERS

The present Ninth Circuit opinion overlooks the existence of a century-old California system for compensating erroneously-convicted persons:

> A claim for "pecuniary injury sustained . . . through . . . erroneous conviction and imprisonment" may be presented pursuant to [California Penal Code] section 4900 if the claimant can show he or she is "innocent of the crime with which he or she was charged" because it was "not committed by him or her." (§ 4900.) Specifically, "[i]n order to receive favorable board action on a claim of erroneous imprisonment, claimant must prove three factual propositions. 'The claimant must prove the facts set forth in the statement constituting the claim, including [1] the fact that the crime with which he was charged was either not committed at all, or, if committed, was not committed by him, [2] the fact that he did not, by any act or omission on his part, either intentionally or negligently, contribute to the bringing about of his arrest or conviction for the crime with which he was charged, and [3] the pecuniary injury sustained by him through his erroneous

[96] See California Government Code § 825(a).

> conviction and imprisonment.'" [Citation omitted.][97]

The state's system for compensating erroneously-convicted persons undercuts the Ninth Circuit's conclusion that California law supports county compensation for such persons.

VII. NO MEANINGFUL DISTINCTION EXISTS BETWEEN THE FACTS OF THE PRESENT CASE AND THE FACTS UNDERLYING THE *PITTS* OPINION

The present Ninth Circuit opinion accurately recites the *Pitts* plaintiff's claim that the district attorney "established a pattern, custom, and practice of procuring false statements . . . by . . . bribery. . . ." and "failed to provide adequate training, procedures, guidelines, rules, and regulations to prevent such conduct. . . ."[98] But the opinion then reaches the opposite ultimate outcome while claiming not to "disrupt" the *Pitts* opinion.[99] More nonsense. It makes no moral difference whether a prosecution witness is allegedly bribed with dollars, or (as in the present case) with a reduced prison sentence. A reduced prison sentence would be at least as valuable to a prisoner as a handful of cash.

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[97] *Tennison,* 152 Cal.App.4th at 1182.

[98] *Goldstein*, 715 F.3d at 761.

[99] *Goldstein*, 715 F.3d at 761.

VIII. THE OPINION ERRONEOUSLY RELIES ON AN IRRELEVANT CALIFORNIA STATUTE

The present Ninth Circuit opinion cites California Government Code § 26526, which states that a district attorney is the "legal advisor" for the county, if there is no county counsel.[100] No California county has relied on a district attorney for legal advice in decades. All California counties rely county counsels for legal advice except San Francisco (which has a combined city-county government and relies on its city attorney). The statute cited by the Ninth Circuit is an outdated relic to the extent it suggests that district attorneys are legal advisors to counties. Los Angeles County (the county involved in this case) has relied on county counsels as legal advisors since 1913, a full century.[101]

IX. THE OPINION MISCHARACTERIZES THE CALIFORNIA ATTORNEY GENERAL'S PROSECUTORIAL POWERS

The present Ninth Circuit opinion misleadingly states that the California "Attorney General does not have those powers [to prosecute criminal cases in place of the district attorney] unless and until he or

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[100] *Goldstein*, 715 F.3d at 758.

[101] See http://counsel.lacounty.gov/oh.asp (accessed on October 25, 2013).

she steps in. . . ."[102] Again, nonsense. Statutory powers are statutory powers. California counties have no such statutory powers, and never exercise powers they do not have.

X. THE OPINION ERRONEOUSLY ATTRIBUTES STATEWIDE ACTION TO COUNTIES

The present Ninth Circuit opinion cites a 2008 report of the California Commission on the Fair Administration of Justice (created by a 2004 California State Senate resolution) recommending that "California District Attorney Offices adopt a written internal policy, wherever feasible, to govern the use of in-custody informants" to support the opinion's conclusion that "district attorney office policies related to informants" have not been addressed "by the state."[103] Maybe not, but those policies have not been addressed by county governments either. The state's failure to address policies across the state does not shift statutory authority from the state to counties. Why would a California state-created commission make recommendations for district attorneys throughout the state on a subject that only applied to a county?

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[102] *Goldstein*, 715 F.3d at 757.

[103] *Goldstein*, 715 F.3d at 758-59.

XI. THE OPINION IS INCONSISTENT WITH THIS COURT'S REVERSAL OF THE EARLIER NINTH CIRCUIT OPINION IN THIS CASE

The present opinion's ultimate conclusion that Goldstein is suing over administrative policies rather than prosecutorial policies plainly clashes with this Court's reversal of the Ninth Circuit's earlier opinion in this same case on that same issue. Here is relevant language from the earlier Ninth Circuit opinion that this Court reversed:

> In this case, [Los Angeles District Attorney] Van De Kamp and Livesay contend that the challenged conduct was prosecutorial in function even if it may have been administrative in form. We disagree.[104]

This Court unanimously rejected that rationale:

> The management tasks at issue, insofar as they are relevant, concern how and when to make impeachment information available at a trial. They are thereby directly connected with the prosecutor's basic trial advocacy duties.[105]

The Ninth Circuit's present opinion avoids both the letter and spirit of this Court's opinion in this case, in

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[104] *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1175 (9th Cir. 2007).

[105] *Van de Kamp*, 555 U.S. at 346-47.

order to revive the rejected rationale of the reversed opinion.

CONCLUSION

This Court first recognized § 1983 immunity for state prosecutors in a lawsuit in which the plaintiff had been convicted of murder by a state court jury, but was later judicially ordered released on grounds that did not include actual innocence.[106] That scenario – § 1983 plaintiffs who were convicted of murder or other serious felonies by state court juries, and years or decades later were judicially freed without proof of actual innocence – is often seen in prosecutorial liability lawsuits.[107] That scenario is now repeated in the present case. Such lawsuits are especially difficult to defend, because memories fade, witnesses die, and physical evidence proving guilt is not necessarily preserved for years or decades.

Any erroneous conviction can be characterized as a district attorney's failure to make policy or provide training that might have prevented that type of erroneous conviction. That makes prosecutorial immunity a dead letter. Worse, it works a transfer of liability from an immune prosecutor for the state to a

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[106] See *Imbler v. Pachtman*, 424 U.S. 409 (1976).

[107] See, e.g., *Marsh v. County of San Diego*, 680 F.3d 1148 (9th Cir. 2012); *Sommer v. United States*, 713 F. Supp.2d 1191, 1206 (S.D. Cal. 2010).

county that lacks authority and control over the prosecutorial function. Under the Ninth Circuit's opinion, all California counties become liable merely for being the geographic location of state criminal trials.

The present Ninth Circuit opinion creates an absurd situation in which future plaintiffs alleging district attorney policymaking liability under § 1983 will be able to choose between two versions of California law. One version is based on the California Supreme Court's interpretation, and will apply to cases filed in California state courts. A diametrically-opposed Ninth Circuit interpretation of California law will apply to cases filed in federal courts.

This Court should take this opportunity to clarify the nature and extent of § 1983 policymaker liability for erroneous convictions. This Court should also expressly reject the Ninth Circuit's result-oriented view that "no deference is due" to state court interpretations of state law related to § 1983 policymaker liability, and should determine that California counties are not responsible under § 1983 for compensating

persons who were erroneously convicted, when the State of California has already assumed that financial responsibility for itself.

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Respectfully submitted,

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