No. _____

In The Supreme Court of the United States

COUNTY OF LOS ANGELES,

Petitioner,

vs.

THOMAS LEE GOLDSTEIN,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

McMillian v. Monroe County, 520 U.S. 781, 785-86 (1997) requires courts to look to state law to determine whether a given public official acts on behalf of a state or a local entity for purposes of imposing municipal liability under *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658 (1978). In *Pitts v. County of Kern*, 949 P.2d 920, 934-35 (Cal. 1998), the California Supreme Court, interpreting *McMillian*, held that under the California Constitution, district attorneys act on behalf of the State and not a county when prosecuting criminal violations of state law, and when engaging in administrative conduct such as establishing policy or training relating to prosecutions. In *Van de Kamp v. Goldstein*, 555 U.S. 335, 347-48 (2009), this Court held that administrative actions concerning the creation and use of an information-management system concerning jailhouse informants and disclosure of exculpatory information in criminal prosecutions, are directly related to the conduct of trial and the prosecutorial function for purposes of granting district attorneys absolute immunity from liability under *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

The questions presented by this petition are:

1. Under *McMillian*, *Van de Kamp* and *Pitts*, do California district attorneys act on behalf of the State and not a county in formulating policy regarding the creation and use of an information-management

QUESTIONS PRESENTED – Continued

system concerning jailhouse informants in preparing for and prosecuting cases at trial?

2. Where a state court has determined that a particular public official acts on behalf of the State and not a local entity for purposes of liability under *Monell v. Dep't of Soc. Servs.*, do principles of comity and federalism require federal courts to defer to a state court decision absent a showing that the state court decision is irrational, unreasonable or expressly designed to defeat application of federal law?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, and defendant below, is the County of Los Angeles ("County").

Respondent, and plaintiff below, is individual Thomas Lee Goldstein.

Additional defendants below, who were dismissed from the case are the City of Long Beach; Henry Miller, in his individual and official capacity; William Collette, in his individual and official capacity; Logan Wren, in his individual and official capacity; William MacLyman, in his individual and official capacity; and former Los Angeles County District Attorney John Van de Kamp and his Chief Deputy District Attorney, Curt Livesay.

There are no corporations involved in this proceeding.

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OPINIONS BELOW

The Ninth Circuit opinion was published at 715 F.3d 750 (9th Cir. 2013). (App.1-38.)[1] The district court order granting the County's motion for judgment on the pleadings that is the subject of this petition was not published. (App.39-69.)

BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit filed its opinion and judgment on May 8, 2013. (App.1.) Petitions for panel rehearing and rehearing en banc were denied on July 2, 2013. (App.70.) 28 U.S.C. §1254(1) confers jurisdiction on the Court to review the opinion and judgment of the Ninth Circuit.

STATUTORY PROVISION AT ISSUE

42 U.S.C. §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

[1] Appendix citations are to the Appendix attached to this petition.

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

A. This Court's Prior Decision In *Van de Kamp v. Goldstein*.

In 1998, respondent Thomas Lee Goldstein (then a prisoner) filed a habeas corpus action in the district court on the basis that the key evidence supporting his conviction was the unreliable testimony of a jailhouse informant who had received reduced sentences for his testimony, and that Goldstein's attorney had never been told of that favorable treatment. *Van de Kamp v. Goldstein*, 555 U.S. 335, 339 (2009). Goldstein contended the prosecution's failure to provide his attorney with this potential impeachment information had led to his erroneous conviction. *Id.*

The district court agreed with Goldstein and ordered the State either to grant him a new trial or to release him. The Court of Appeals affirmed, and the State then released Goldstein. *Id*.

Goldstein then filed suit under 42 U.S.C. §1983 against the County, former Chief Deputy District Attorney Curt Livesay, former District Attorney John Van de Kamp, the City of Long Beach and various police officers. *Id.* at 340. (*See also* App.8 n.2.) Goldstein alleged the County defendants violated his constitutional rights because Van de Kamp and Livesay failed "adequately to train and to supervise the prosecutors who worked for them" and failed "to establish an information system about informants" that would have led the prosecution to communicate exculpatory information to Goldstein's criminal defense attorney. *Id.*

Claiming absolute immunity, Van de Kamp and Livesay moved to dismiss the action. *Id.* The district court denied the motion on the ground that the conduct asserted was "administrative," not "prosecutorial,"; hence it fell outside the scope of a prosecutor's absolute immunity from §1983 claims. *Id.* The Ninth Circuit affirmed. *Id.*

However, in *Van de Kamp*, 555 U.S. 335, this Court reversed, finding that although the conduct alleged was administrative in nature, it was nonetheless directly related to the prosecutorial function and hence Van de Kamp and Livesay were entitled to absolute prosecutorial immunity for their actions. *Id*. at 346-49.

B. District Court Proceedings On Remand.

On remand to the district court, petitioner County of Los Angeles filed a motion for judgment on the pleadings, citing this Court's decision in *Van de Kamp* and arguing that in engaging in administrative conduct directly related to the prosecution of cases, Van de Kamp and Livesay were acting on behalf of the State and not as County policymakers for purposes of municipal liability under *Monell*. (App.40-42.) The County also argued that in *Pitts v. County of Kern*, 949 P.2d 920 (Cal. 1998) the California Supreme Court held that for purposes of *Monell* liability, district attorneys act on behalf of the State, and not counties in prosecuting cases and in making administrative decisions related to prosecution. (App.51.)

The district court granted the County's motion. (App.41.) The district court reasoned that this result was compelled by the Ninth Circuit's decision in *Weiner v. San Diego County*, 210 F.3d 1025 (9th Cir. 2000), which held that California district attorneys act on behalf of the State, and not a county, when engaged in prosecution and decisions to prosecute, and found persuasive two opinions by another district court relying on the California Supreme Court's decision in *Pitts*. (App.57-61.)

After dismissing with prejudice the claims against the other defendants, the district court entered judgment in favor of the County. (App.61-62.)

C. The Appeal.

Goldstein appealed and, on May 8, 2013, the Ninth Circuit issued its opinion reversing the district court's dismissal of the §1983 claim against the County. (App.4.)

The Ninth Circuit held that although this Court had concluded in *Van de Kamp* that the training and policymaking involved in this case constituted "prosecutorial" conduct (for which Van de Kamp and Livesay therefore had absolute immunity), that holding did not require a conclusion that such training and supervision was prosecutorial for purposes of determining that district attorneys act as a policymaker for the State, and not a county for purposes of *Monell* liability. (App.25-26.) The Ninth Circuit reasoned that it was not bound by *Van de Kamp* because the analysis for absolute prosecutorial immunity, on one hand, and policymaking for purposes of *Monell* liability on the other hand, were different. (*Id.*)

The Ninth Circuit also concluded that its earlier decision in *Weiner*, holding that California district attorneys act on behalf of the State when engaged in prosecution, did not govern the result in this case because training and policymaking impacting prosecution are not the equivalent of prosecution itself. (*Id.*)

Finally, the Ninth Circuit held that it was not bound by the California Supreme Court's decision in *Pitts v. County of Kern*, 949 P.2d 920, holding that for

purposes of *Monell* liability district attorneys act on behalf of the State and not a county in making administrative decisions related to prosecution of cases. (App.26-30.) This was because the federal court owed "no deference" to the state court (App.27), and in any event the training and policymaking involved in *Pitts* was different than that in the present case which, according to the Ninth Circuit, "challenges administrative policy and accompanying training, rather than prosecutorial training and policy." (App.29.)

Judge Reinhardt joined the opinion and separately concurred to more fully explain why he believed the California Supreme Court had misinterpreted California law. (App.32-38.)

The County petitioned for panel rehearing and rehearing en banc. On July 2, 2013, the Ninth Circuit denied the petition. (App.70.)

REASONS FOR GRANTING CERTIORARI

Respondent Thomas Lee Goldstein sued petitioner County of Los Angeles, former Los Angeles County District Attorney John Van de Kamp, the City of Long Beach and various Long Beach police officers for violation of his civil rights under 42 U.S.C. §1983 alleging that he was wrongfully convicted of murder based upon an improperly procured eyewitness identification and the testimony of a jailhouse informant whose receipt of a reduced sentence in consideration of his testimony was not disclosed to

Goldstein's attorney. (App.5-7.) In *Van de Kamp v. Goldstein*, 555 U.S. 335, this Court held that Van de Kamp and other supervisors were absolutely immune from liability under *Imbler v. Pachtman*, 424 U.S. 409 (1976), because the conduct alleged by Goldstein – the failure to create an information-management system concerning jailhouse informants and to implement policies concerning use of that system – was directly related to the manner in which cases were prosecuted. 555 U.S. at 343-49.

Following remand, Goldstein settled with the Long Beach defendants. (App.8 n.2.) The district court granted the County's motion for judgment on the pleadings, concluding that based upon prior Ninth Circuit authority and two decisions by another district court interpreting the California Supreme Court's decision in *Pitts v. County of Kern*, the conduct at issue was prosecutorial and that the district attorney acted as a policymaker on behalf of the State and not the County for purposes of liability under *Monell*. (App.57-62.)

The Ninth Circuit reversed, holding that in establishing policy concerning information-management regarding witnesses, most specifically jailhouse informants, district attorneys act on behalf of counties, and not the State for purposes of *Monell* liability. The Ninth Circuit's decision represents a sea-change in the law governing the liability of all 58 counties in California for the actions of prosecutors in making administrative decisions concerning the prosecution of cases. This sea change effectively ignores the prior

decision of this Court in this case, and displays a casual disregard of the authority of the California Supreme Court that offends basic principles of federalism. Hence, review is warranted for the following reasons:

1. Review is necessary because the Ninth Circuit decision directly conflicts with this Court's prior decision in this case, the California Supreme Court's opinion in *Pitts* and provisions of the California Constitution that make it clear that district attorneys in California act on behalf of the State and not counties in developing and implementing policies related to prosecution.

As this Court recognized in *Van de Kamp*, setting policy concerning creation and use of a database regarding jailhouse informants is directly related to the prosecutorial function. *Van de Kamp*, 555 U.S. at 346. In *Pitts*, the California Supreme Court employed virtually identical reasoning in recognizing that there was no practical distinction between a district attorney directing that a particular policy concerning witnesses be followed in a particular case, and the setting of policy directing that particular practices be followed in all cases. *Compare, Pitts*, 949 P.2d at 934-35 *with Van de Kamp*, 555 U.S. at 346. Thus, in *Pitts*, the California Supreme Court held that for purposes of *Monell* liability, a California district attorney acted on behalf of the State and not a county in formulating policies and training with respect to interviewing witnesses and procuring testimony in the course of

preparing for prosecution of child abuse charges. 949 P.2d at 923, 927, 934-37.

The Ninth Circuit declined to follow *Pitts*, declaring it owed "no deference" to the California Supreme Court, because the ultimate issue is one of federal, not state, law. (App.27.) The panel also purported to distinguish *Pitts* as concerning "prosecutorial training and policy" and simply labeled plaintiff's claims here as involving "administrative policy and accompanying training." (App.29.) Thus, the Ninth Circuit asserts that 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." (*Id*.) Yet, as this Court held in *Van de Kamp*, the creation and use of this "administrative" system are necessarily intimately tied to the prosecutorial process – creation of an information-management system concerning jailhouse informants presupposes prosecutorial decision-making as to what information to include in that database and formulation of policies requiring use of that information in the prosecution of cases. *Van de Kamp*, 555 U.S. at 344-48. It is nonsensical to assert, as the Ninth Circuit does, that policies and training concerning the creation and use of a system to disclose jailhouse informant information are, under *Pitts*, not "related" to the prosecution of cases.

Whether in declining to follow *Pitts* because it believed it need not defer to the California Supreme Court, or in disingenuously purporting to distinguish *Pitts* by employing semantic gamesmanship, the

Ninth Circuit's decision plainly conflicts with *Pitts* and requires intervention by this Court. The Ninth Circuit has rewritten California law, imposing massive costs of defense and liability on counties for administrative decisions of district attorneys that directly relate to the prosecution of crimes. As this Court recognized in *Van de Kamp*, virtually any transgression by a prosecutor's office at trial can be recast as a claim of administrative failings. 555 U.S. at 346-47. Every disgruntled criminal defendant can allege deficient "information management" with respect to use of particular evidence, witnesses, or other data relevant to prosecution. The result will be a flood of lawsuits that would otherwise be foreclosed by the California Supreme Court's decision in *Pitts,* and a profound disruption of the manner in which the most populous state in the country allocates responsibility between the State and counties for the prosecution of crime. This devastating impact on the day-to-day operations of among the State's most basic functions, criminal prosecution, in and of itself, warrants review by this Court.

Moreover, these cases will be filed in federal court, since no plaintiff will pursue them in state court given that state courts would have to apply *Pitts*. As this Court has repeatedly recognized, intervention is warranted to secure uniformity between state and federal courts on recurring issues of law, *Hagen v. Utah*, 510 U.S. 399, 409 (1994); *United States v. Estate of Romani*, 523 U.S. 517, 521-22 (1998), and foreclose forum selection as outcome

determinative in section 1983 actions, *Howlett v. Rose*, 496 U.S. 356, 377-80 (1990); *Felder v. Casey*, 487 U.S. 131, 153 (1988).

2. Review is necessary to address an issue left open by the Court's decision in *McMillian v. Monroe County*, 520 U.S. 781 (1997), namely the extent to which federal courts must defer to state court determinations of whether particular officials act on behalf of the state or a county for purposes of *Monell* liability.

In *McMillian*, the Court held that courts must look to state law to determine whether a given official acts on behalf of a county or a state for purposes of *Monell* liability, but noted that the question was ultimately one of federal law. 520 U.S. at 786. Here, the Ninth Circuit, consistent with its prior case law, interpreted *McMillian* as holding that since the question of whether an official acts on behalf of the state or a county is ultimately one of federal law, a federal court owes "no deference" to a state court determination – here, that of the Supreme Court in *Pitts* – as to whether a particular official acts on behalf of a state or a county. (App.27.)

Yet, that is flatly incorrect. This Court has repeatedly recognized that principles of federalism and comity dictate that federal courts defer to state court resolution of federal issues that are dependent upon construction of state law, absent some indication that the state court determination is arbitrary, unreasonable, or designed to defeat federal supremacy. *O'Dell*

v. Netherland, 521 U.S. 151, 156 (1997) (federal courts precluded from reversing state criminal judgment on habeas corpus based upon newly declared rule of constitutional law so long as state court decision is based upon good faith interpretation of existing precedent); *Howlett v. Rose*, 496 U.S. at 362-66, 377-78 (state court's interpretation of state common law as precluding assertion of §1983 claims against municipalities in state court was without support other than as an intent to discriminate against federal claim and hence invalid); *Hale v. Iowa State Bd. of Assessment*, 302 U.S. 95, 101 (1937) (impairment of contract claim: "we lean toward agreement with the courts of the state, and accept their judgment as to such matters unless manifestly wrong"); *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42-43 (1944) (consideration of due process issue foreclosed because state court found no property rights under state law and the state court decision "rest[s] on a fair and substantial basis").

This principle is dictated by our federal system which requires due deference to the states in the manner in which they organize their governments, and that equal dignity be accorded to state courts in interpreting not simply state, but federal law. Hence, as a matter of comity, federal courts should defer to state court determinations on federal issues, especially where dependant on construction of state law. Indeed, a lack of deference would be nonsensical, given the principle that this Court itself defers to circuit courts in their interpretation of state law

within their circuit based upon the presumption that the circuit court is in a better position to be acquainted with "local" law. *McMillian*, 520 U.S. at 786-87. Plainly then, the highest state court is entitled to deference in interpreting its own law, especially as it may apply to the federal law in question.

The Ninth Circuit's "no deference" rule has led to a direct conflict with the California Supreme Court not simply in regard to county liability for the actions of district attorneys as in this case, but also liability with respect to the actions of county Sheriffs in enforcing state law. *Compare, Streit v. County of Los Angeles*, 236 F.3d 552, 566-67 (9th Cir. 2001) (California Sheriffs act on behalf of counties and not state in enforcing law); *Brewster v. Shasta County*, 275 F.3d 803, 807 (9th Cir. 2001) (same) *with Venegas v. County of Los Angeles*, 87 P.3d 1, 11 (Cal. 2004) (Sheriffs act on behalf of State and not counties in enforcing state law); *County of Los Angeles v. Superior Court* (*Peters*), 80 Cal. Rptr. 2d 860 (Cal. Ct. App. 1998) (same). The Ninth Circuit interprets *McMillian* as a blank check to wantonly second-guess state courts' constructions of their own laws, going to the heart of the manner in which states organize their governments. Absent some showing that the state court is acting arbitrarily or unreasonably in construing state law, or expressly attempting to shield particular officials from liability under federal law, federal courts should defer to state court adjudications as to whether a particular official acts on behalf of a county or the state. For this reason too, review is warranted.

I.

THE NINTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN *VAN de KAMP V. GOLDSTEIN* ESTABLISHING THAT ACTIONS RELATED TO CREATION AND USE OF AN INFORMATION-MANAGEMENT SYSTEM CONCERNING JAILHOUSE INFORMANTS ARE INTIMATELY RELATED TO THE PROSECUTION OF CASES, AND THE CALIFORNIA SUPREME COURT'S DECISION IN *PITTS V. COUNTY OF KERN* HOLDING THAT DISTRICT ATTORNEYS ACT ON BEHALF OF THE STATE AND NOT COUNTIES IN PERFORMING ADMINISTRATIVE FUNCTIONS RELATED TO THE PROSECUTION OF CASES.

A. In *Van de Kamp*, This Court Held That Formulation Of Policies Regarding The Creation And Use Of An Information Database Concerning Jailhouse Informants Was Intimately Related To The Prosecution Of Cases.

In its prior decision in this case, the Ninth Circuit rejected a claim of absolute immunity by a former Los Angeles County District Attorney John Van de Kamp and various other supervisors within the district attorney's office on the ground that the conduct alleged was merely "administrative" and hence fell outside the bounds of absolute immunity. *Goldstein v. Long Beach*, 481 F.3d 1170, 1176 (9th Cir. 2007). This Court reversed in a unanimous decision. *Van de Kamp v. Goldstein*, 555 U.S. at 349. The Court

characterized plaintiff's claim as "the failure of petitioners (the office's chief supervisory attorneys) adequately to train and to supervise the prosecutors who worked for them as well as their failure to establish an information system about informants." 555 U.S. at 340.

The question before the Court was whether that conduct could be deemed intimately associated with the prosecution of cases so as to fall within the absolute immunity of *Imbler v. Pachtman*, 424 U.S. 409. While acknowledging that previous cases had indicated that administrative conduct fell outside the protections of absolute immunity, the Court emphasized that merely labeling conduct "administrative" was not enough to foreclose absolute immunity. Rather, the question was whether the administrative function was intimately related to the prosecution of cases. *Id*. at 343-44. The Court squarely held that the very conduct alleged in this case, even if "administrative," was nonetheless directly related to the prosecution of cases:

> [W]e conclude that prosecutors involved in such supervision or training or information-system management enjoy absolute immunity from the kind of legal claims at issue here. Those claims focus upon a certain kind of administrative obligation – a kind that itself is directly connected with the conduct of a trial.

Id. at 344.

As the Court emphasized, creation and development of policies concerning the use of such a database necessarily required exercise of prosecutorial judgment:

> [T]he types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, *e.g.*, in determining what information should be included in the training or the supervision or the information-system management.

Id.

As the Court explained:

> 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. And, in terms of *Imbler*'s functional concerns, a suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging that a supervisor trained and supervised inadequately, on the other, would seem very much alike.

Id. at 346.

The Court also rejected Goldstein's contention that maintenance of an information-management system concerning jailhouse informants was necessarily

purely administrative, and could be compiled by individuals other than prosecutors:

> The critical element of any information system is the information it contains. Deciding what to include and what not to include in an information system is little different from making similar decisions in respect to training. Again, determining the criteria for inclusion or exclusion requires knowledge of the law. [¶] Moreover, the absence of an information system is relevant here if, and only if, a proper system would have included information about the informant Fink. Thus, were this claim allowed, a court would have to review the office's legal judgments, not simply about *whether* to have an information system but also about *what kind* of system is appropriate, and whether an appropriate system would have included *Giglio*-related information *about one particular kind of trial informant*. Such decisions – whether made prior to or during a particular trial – are "intimately associated with the judicial phase of the criminal process."

Id. at 348-49, quoting *Imbler*, 424 U.S. at 430.

Based on this Court's prior decision in *Van de Kamp*, it is clear that the very conduct characterized as "administrative" here, i.e., formulation of policies regarding creation and use of an information-management system concerning jailhouse informants, is directly related to the prosecution of cases. As we discuss, the California Supreme Court, anticipating

Van de Kamp, employed virtually identical analysis in concluding that precisely such administrative conduct necessarily falls within the duties of a district attorney in acting on behalf of the State, and not a county under the California Constitution.

B. In *Pitts v. County Of Kern*, The California Supreme Court Held That A District Attorney's Administrative Conduct Related To The Prosecution Of Cases Constitutes Conduct On Behalf Of The State, And Not A County, For Purposes Of *Monell* Liability.

In *Pitts v. County of Kern*, 949 P.2d 920, plaintiffs sued a county, among other defendants, asserting that the district attorney, as a county policymaker, had caused a violation of civil rights under 42 U.S.C. §1983 by failing to implement policy and training that would have prevented their having been improperly charged with child abuse. Plaintiffs asserted that the district attorney's office had a "pattern, custom, and practice of procuring false statements and testimony by threat, promise, intimidation, force, bribery, and coercion of witnesses," and that the county, through the district attorney, had "failed to provide adequate training, procedures, guidelines, rules, and regulations to prevent such conduct by district attorney employees, and hence were deliberately indifferent to plaintiffs' constitutional rights." 949 P.2d at 927.

Citing this Court's decision in *McMillian v. Monroe County*, 520 U.S. 781, the California Supreme

Court noted that it was required to examine state law, most specifically the state Constitution, to determine whether or not a district attorney was acting on behalf of the State, or the county, when engaging in the alleged conduct for purposes of evaluating liability under *Monell*. *Pitts*, 949 P.2d at 928. In reviewing the applicable provisions of the California Constitution, as well as various statutes, the California Supreme Court held that while district attorneys in California are paid by counties, and the counties fund the operation of the district attorney's office, that nonetheless, California law makes it clear that counties cannot control the operations of district attorneys with respect to preparation for and prosecution of cases. 949 P.2d at 930-34.

Having concluded that a district attorney acts on behalf of the State, and not a county in prosecuting cases, the next question was whether a district attorney acted on behalf of the State or the county in undertaking administrative tasks, such as training and supervision with respect to prosecution of cases. Anticipating the very analysis this Court employed in *Van de Kamp*, the California Supreme Court concluded that a district attorney necessarily acts on behalf of the State and not a county when engaging in administrative functions relating to criminal prosecutions, such as training and supervising staff:

> Just as we have concluded that in California a district attorney represents the state when preparing to prosecute and when prosecuting criminal violations of state law, we further

> conclude it logically follows that he or she also represents the state, and not the county, when training and developing policy in these areas. No meaningful analytical distinction can be made between these two functions. 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. Moreover, anytime the district attorney relied on a formal policy to handle a particular aspect of a case, that decision would be attributable to the county, even though the prosecution itself would be a state function. Such a result would be nonsensical, and would impose local government liability under the most arbitrary of circumstances.

949 P.2d at 934-35.

The California Supreme Court emphasized that under the California Constitution and various statutes, it was plain that the Attorney General's power over the actions of California district attorneys "is not reasonably susceptible to an interpretation that is limited to oversight of a district attorney's actions when he or she is prosecuting a particular case." 949 P.2d at 935. The court observed:

> Rather, the Constitution provides that it is the "duty of the Attorney General to see that the laws of the State are uniformly and adequately

> enforced," and that the Attorney General has "direct supervision over every district attorney . . . *in all matters pertaining to the duties of their . . . office*[ ], and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable." (Cal. Const., art. V, §13, italics added; Gov. Code, §12550.) This is most reasonably interpreted to include oversight of policies formulated and training conducted in connection with the district attorney's preparation for and prosecution of state criminal violations.

Id.

The court acknowledged that some administrative tasks clearly fell within a district attorney's duties as a county official, such as "hiring or firing an employee, workplace safety conditions, procuring office equipment, or some other administrative function arguably unrelated to the prosecution of state criminal law violations." 949 P.2d at 935. The court, however, rejected plaintiffs' contention that simply by characterizing conduct as "administrative" it did not fall within a district attorney's duties as a state official related to prosecution of crime:

> [T]hey [plaintiffs] assert that "[c]onducting a prosecution does not necessarily contemplate training of personnel or establishing policy or practice," and that the "statutorily designated prosecutorial functions of the district

> attorney under state law do not include any management, administrative or training function." It is difficult to imagine, however, how criminal prosecutions could be conducted with any efficiency absent these functions. Moreover, we have already concluded that the broad provisions of the Constitution and the Government Code give the Attorney General oversight not only with respect to a district attorney's actions in a particular case, but also in the training and development of policy intended for use in every criminal case.

Id.

The court thus held that the county could not be liable under *Monell* and *McMillian*, because it was clear that the district attorney acted on behalf of the state, and not the county, with respect to policies and training concerning the manner in which prosecutors dealt with witnesses in the course of preparing for and prosecuting cases of child abuse. In sum, it is clear under *Pitts* that a district attorney in California acts on behalf of the State, and not a county, in making administrative decisions concerning policy and training related to criminal prosecutions.

C. The Ninth Circuit's Decision Is Flatly Inconsistent With *Van de Kamp* And *Pitts*.

The Ninth Circuit's transparent disregard of this Court's decision in *Van de Kamp* and the California Supreme Court's decision in *Pitts* is underscored by

the labored and patently superficial attempt to avoid the clear holding of those cases.

For example, the Ninth Circuit states that this Court's decision in *Van de Kamp* was confined solely to the issue of absolute immunity, and thus has no relevance to the question of whether a district attorney acts on behalf of the state or a county when making administrative decisions of the sort at issue here. (App.25.) Yet, the Ninth Circuit turned a blind eye to its prior case law holding that it is proper to look to immunity cases for "guidance" in determining whether a district attorney was acting as a prosecutor for a state, or as an administrator for a county for purposes of *Monell* liability. *Ceballos v. Garcetti*, 361 F.3d 1168, 1183-84 (9th Cir. 2004), *rev'd on other grounds*, 547 U.S. 410 (2006).

Instead, the court simply notes that this Court had characterized Goldstein's claims as attacking "'the office's administrative procedures,'" although observing that this Court granted absolute immunity because the administrative procedures in question were "'directly connected with the conduct of a trial.'" (App.7 (citing *Van de Kamp*, 555 U.S. at 344).) The court conspicuously ignores this Court's analysis in *Van de Kamp* as to *why* the administrative procedures at issue here – the creation and management of a database concerning jailhouse informants – are directly related to the trial process.

The Ninth Circuit's disdain for, and resolution to undermine, *Pitts* is even more obvious. As a threshold

matter, the bulk of the court's opinion consists of second-guessing the *Pitts* court's construction of California law, going chapter and verse through the very provisions of the California Constitution and various statutes that the *Pitts* court examined, but coming to the opposite conclusion. *Compare,* App.13-21 *with Pitts*, 949 P.2d 930-34. This is understandable, given the Ninth Circuit's clear statement that it is not bound by *Pitts* and owes "no deference" to the California Supreme Court's opinion concerning the status of a district attorney in prosecuting a case, because under governing Ninth Circuit authority, that is a question of federal law for the circuit court alone to resolve. (App.27.)

Having devoted the bulk of its opinion to attempting to demolish the *Pitts* court's construction of California law with respect to district attorneys, the Ninth Circuit nonetheless, as a fig leaf to cover its disregard, purports to distinguish *Pitts* through what amounts to mere semantic generalization. Thus, the Ninth Circuit states that *Pitts* "focused on the district attorney's functions 'when preparing to prosecute and when prosecuting criminal violations of state law, and when training and developing policies for employees engaged in these activities'" (App.28) while ignoring the analysis employed by the California Supreme Court in *Pitts*. Thus, it contends the question here is different from the question in *Pitts* "because Goldstein challenges administrative policy and accompanying training, rather than prosecutorial training and policy" and 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." (App.29.) The Ninth Circuit therefore asserts that in *Pitts* "there was no administrative function involved." (App.30.)

Nonsense. In *Pitts*, the California Supreme Court specifically characterized the conduct at issue as administrative, but, anticipating this Court's analysis in *Van de Kamp*, found that administrative tasks such as formulating policy and training concerning the examination and use of witnesses in preparing for and prosecuting cases, were necessarily directly related to the prosecutorial function, and hence indistinguishable from the conduct of district attorneys in prosecuting cases – conduct that was squarely undertaken by district attorneys on behalf of the State, and not counties, under the California Constitution and applicable laws. *Pitts*, 949 P.2d at 934-36.

The Ninth Circuit's disingenuous sleight-of-hand is particularly obvious in its observation that *Pitts* recognized that the inquiry as to whether a district attorney engages in a prosecutorial function for purposes of absolute immunity is different than whether the district attorney may act as a prosecutor on behalf of the state for purposes of *Monell* liability. (App.25-26 (citing *Pitts*, 949 P.2d at 935).) The Ninth Circuit takes the California Supreme Court's discussion of the issue out of context, and in fact turns it completely upside down. In the cited passage from *Pitts*, the Supreme Court was responding to the

plaintiffs' contention that because the conduct alleged in *Pitts* was "administrative" it could not be prosecutorial in nature, citing this Court's pre-*Van de Kamp* opinions declining to grant absolute immunity for administrative decisions by prosecutors. 949 P.2d at 935-36. The California Supreme Court, based upon pre-*Van de Kamp* case law, therefore construed the functions for which absolute prosecutorial immunity would be granted as *narrower* than the functions performed by district attorneys in acting on behalf of the state and not a county. As noted, the California Supreme Court, anticipating the very analysis this Court would employ in *Van de Kamp* in expanding prosecutorial immunity, concluded there was no meaningful distinction between developing policy and training concerning the prosecution of cases, and actual prosecution of cases. *See* §I.B., *supra*.

Moreover, the very conduct at issue in *Pitts*, i.e., a failure to implement policy and training concerning the manner in which prosecutors dealt with witnesses in the course of preparing for and prosecuting child abuse cases, is directly analogous to the very conduct alleged here – as this Court previously found in *Van de Kamp*. The administrative procedures in question concern the manner in which certain witnesses were used in preparing for and prosecuting cases. Creation of the database of jailhouse informants may have been "administrative," but it presupposed exercise of prosecutorial judgment as to what information would go into the database, as well as policies directing that particular witnesses – jailhouse informants – be used

in a particular manner in prosecuting cases. Similarly in *Pitts*, the policies at issue concerned directing the manner in which prosecutors conducted examination of juvenile and other witnesses in child abuse cases. There is not a dime's worth of difference between the conduct at issue in *Pitts* and the conduct at issue here. The Ninth Circuit's decision flatly ignores this Court's decision in *Van de Kamp* and the California Supreme Court's decision in *Pitts*.

D. It Is Essential For This Court To Grant Review To Resolve The Conflict Between The Ninth Circuit And The California Supreme Court Concerning *Monell* Liability Arising From The Administrative Actions Of District Attorneys Related To Criminal Prosecutions.

This Court has repeatedly recognized the need for uniformity between state and federal courts on recurring issues of federal law that arise in both systems. *Hagen v. Utah*, 510 U.S. at 409 (resolution of conflict between Utah Supreme Court and Tenth Circuit regarding size of tribal lands and extent of state criminal jurisdiction in such areas); *United States v. Estate of Romani*, 523 U.S. at 521-22 (resolution of conflict between Pennsylvania Supreme Court and Sixth and Ninth Circuits regarding prioritization of federal tax liens against an estate). Here there is a clear conflict between the California Supreme Court in *Pitts* and the Ninth Circuit's decision in this case concerning the liability of counties for the

administrative decisions of a district attorney relating to the prosecution of cases.

Moreover, the conflict between the Ninth Circuit and the California Supreme Court will necessarily drive cases to a single forum – the federal courts. No rational plaintiff would file a §1983 complaint in state court asserting claims based upon the district attorney's failure to take particular administrative action related to prosecution, for the very reason that such claims would be foreclosed by *Pitts*. Even putting aside the undue additional burden that channeling these cases into the federal courts will have on the federal judicial system, as this Court has repeatedly recognized, forum selection, particularly in the context of civil rights claims, should not be outcome-determinative. *Felder v. Casey*, 487 U.S. at 153 (striking down state law that required that a notice of claim be filed before allowing state court suit under §1983); *Howlett v. Rose*, 496 U.S. at 362-66, 377-78 (state court interpretation of state common law as extending sovereign immunity to suit in state court to municipal officials otherwise subject to liability under §1983 invalid as discriminating against federal claim in state courts).

In addition, it is essential that this Court resolve the conflict in order to give due deference to the decision of the California Supreme Court and avoid the imposition of liability on counties for conduct by a district attorney that, under the California Constitution and pertinent statutes, is necessarily undertaken in the district attorney's capacity as a state official

prosecuting crimes on behalf of the State of California. The Ninth Circuit's departure from *Pitts* represents a wholesale change in the potential liability of all 58 counties in the State of California for the actions of district attorneys related to prosecution of cases. As this Court noted in *Imbler*, criminal proceedings by their nature create a strong likelihood of spawning subsequent litigation against those involved in the prosecution. *Imbler*, 424 U.S. at 424-25. Further, as the Court observed in *Van de Kamp*, virtually any action that takes place during the course of a criminal prosecution can somehow be cast as the product of some administrative failing, whether it is selecting and keeping track of witnesses and evidence, or following particular strategy pursuant to training. 555 U.S. at 346-47.

As a result, California counties will be swamped with such claims and bear overwhelming costs of defense, let alone liability. The result is even more pernicious, given the fact, as noted in *Pitts*, that while counties fund the district attorney's office, they lack both the practical and legal means to directly interfere with the prosecution of cases and setting of related policies. 949 P.2d at 932, 934. Indeed, as the Eleventh Circuit has recognized, imposition of liability on a local entity where it in fact exercises no control over the particular state official is effectively worse than the respondeat superior liability specifically rejected in *Monell*. *Grech v. Clayton County*, 335 F.3d 1326, 1331 (11th Cir. 2003) (en banc) (citing

Turquitt v. Jefferson County, 137 F.3d 1285, 1291 (11th Cir. 1998) (en banc)).

The Ninth Circuit's decision is flatly inconsistent with this Court's reasoning in this very case, as well as the California Supreme Court's decision in *Pitts*. This disregard of both the authority of this Court and the California Supreme Court should not be countenanced. It is essential that this Court grant review.

II.

REVIEW IS NECESSARY TO ADDRESS AN ISSUE LEFT OPEN BY *McMILLIAN*: THE DEGREE TO WHICH FEDERAL COURTS MUST DEFER TO STATE COURTS' INTERPRETATION OF STATE LAW CONCERNING WHETHER A PARTICULAR OFFICIAL ACTS ON BEHALF OF THE STATE OR A COUNTY FOR PURPOSES OF *MONELL* LIABILITY.

In *McMillian v. Monroe County*, 520 U.S. 781, this Court held that in determining whether a particular official, in that case a sheriff, acted on behalf of a state or a county, a court must look at the applicable state law. 520 U.S. at 786 ("[O]ur inquiry is dependent on an analysis of state law."). After reviewing provisions of the Alabama Constitution, relevant statutes, and state case law, the Court concluded that in Alabama, sheriffs act on behalf of the state and not counties in enforcing state criminal law. *Id*. at 793.

Although after *McMillian* it is clear that the courts must look to state law to determine whether a

particular official acts on behalf of a state or a county for purposes of *Monell* liability, it is not clear the degree of deference a federal court must give to a state court's interpretation of the applicable law, particularly in the context present here – a state Supreme Court interpreting its state law with respect to the very federal question at issue. Yet, as we discuss, this Court has repeatedly held that basic principles of federalism require deference to state courts absent a showing that the state court decision is arbitrary, unreasonable, or intended to defeat the federal claim at issue.

Nonetheless, as the Ninth Circuit noted here, under existing Ninth Circuit's precedents no deference is given to state court interpretations of state law concerning whether a particular official acts on behalf of a state or a county. The result is a wholesale disregard and indeed disrespect for the decisions of the California Supreme Court and the creation of two parallel and conflicting sets of rules for resolving §1983 cases in California – one for state courts and another for federal courts.

A. The Ninth Circuit Has Repeatedly Held That Federal Courts Owe No Deference To State Courts In Determining Whether A Particular Official Acts On Behalf Of A State Or A County For Purposes Of Imposition Of *Monell* Liability Under §1983.

Although the Ninth Circuit purported to distinguish the California Supreme Court's decision in *Pitts*

on the most dubious of grounds (section I.C., *supra*), as the Ninth Circuit itself notes, it had no need to do so, because the Ninth Circuit has long held that it gives "no deference" to the decision of state courts interpreting state law as applied to a claim for *Monell* liability under §1983. (App.27.)

In *Streit v. County of Los Angeles*, 236 F.3d 552, plaintiffs sued the Los Angeles County Sheriff for alleged constitutional violations resulting from their overdetention in the county jail. *Id*. at 556. The question before the Ninth Circuit was whether the Los Angeles County Sheriff acted on behalf of the state, or the County, when performing law enforcement functions related to operation of the jail. The County argued that in *County of Los Angeles v. Superior Court* (*Peters*), 80 Cal. Rptr. 2d 860, the California Court of Appeal had held that for purposes of a *Monell* claim under §1983 that the sheriff acts on behalf of the state, and not a county in performing law enforcement functions. 236 F.3d at 556-57. Acknowledging that under *McMillian*, it was required to look to state law in order to determine whether the sheriff acts on behalf of the county or the State, the Ninth Circuit rejected the contention it was required to defer to state law in any way:

> Although 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 section 1983 actions. *See Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 n.5 [citation] (finding that "the question whether a particular

> state agency has the same kind of independent status as a county . . . is a question of federal law . . . [b]ut that federal question can be answered only after considering the provisions of state law that define the agency's character.").

Id. at 560.

> As the Ninth Circuit observed:
>
> [A]lthough it may be instructive on questions of liability in certain specific contexts, state law does not control our interpretation of a federal statute.

Id.

The *Streit* rule of "no deference" to state court determinations of state law as defining a policymaker under *Monell* is firmly established, as indicated by the Ninth Circuit's invocation of *Streit* here. (App.27.) *See also Brewster v. Shasta County*, 275 F.3d at 807 (applying *Streit* in holding that sheriffs act on behalf of counties and not state in performing law enforcement functions: "[W]e explained [in *Streit*] that we were not bound by the conclusion of the California Court of Appeal in *Peters*, because the question regarding section 1983 liability ultimately implicated federal, not state, law."); *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1191 (9th Cir. 2002) (same).

Significantly, in *Venegas v. County of Los Angeles*, 87 P.3d 1, 11, the California Supreme Court reaffirmed *Peters* in holding that California sheriffs act as state officers while performing state law enforcement

duties such as investigating possible criminal activity, thus solidifying a direct split between state and federal appellate courts – a split made possible by the Ninth Circuit's adherence to a strict "no deference" policy with respect to state court determinations of state law in the context of federal civil rights claims. The Ninth Circuit's policy is as indefensible as it is unwise.

B. Principles Of Comity And Federalism Dictate That Federal Courts Defer To State Court Determinations As To Whether A Defendant Acts As A Policymaker On Behalf Of The State Or A County For Purposes Of *Monell* Liability, Absent Evidence That The Decision Is Arbitrary, Unreasonable Or Expressly Designed To Avoid Application Of Federal Law.

The Ninth Circuit has cited *McMillian* as supporting the circuit's rule of "no deference" to state court determinations of state law as to whether a particular actor acts on behalf of the state or a county for purposes of *Monell* liability. *Streit*, 236 F.3d at 560. Yet, review of *McMillian* belies such a construction.

As a threshold matter, in *McMillian* the Court reaffirmed its rule of deference to circuit court interpretations of state law based on the premise that such courts are better acquainted with the law of the states within the circuit. 520 U.S. at 786-87. Surely then, the highest state court is entitled to deference in interpreting its own law, especially as it may apply to the federal law in question.

In addition, *McMillian*, although not explicit on the point, implicitly follows a well-established rule of our federal system, namely, that federal courts should defer to state court interpretations of state law that impact application of federal law, so long as the state court interpretation is not arbitrary, unreasonable or designed expressly to defeat a federal claim.

For example, in *McMillian*, the Court emphasized the extreme deference to be given states in internally structuring their governments. 520 U.S. at 795 ("the States have wide authority to set up their state and local governments as they wish"). In response to the contention that a state might artificially manipulate its law solely for the purpose of insulating local officials from liability under §1983, the Court observed that there was no such evidence of manipulation here, given that the Alabama provisions that cut most strongly against plaintiff's position there predated the decision in *Monell*. *Id*. at 796.

This is consistent with the Court's recognition that it need not defer to state court determinations of state law where such decisions arbitrarily discriminate against the federal claim. Thus, in *Howlett v. Rose*, 496 U.S. 356, the Court found that the common law of Florida as interpreted by the Florida courts arbitrarily and intentionally discriminated against such §1983 claims in state court in holding that local officials were protected from all state court suits by sovereign immunity. *Id*. at 365-66. The Court analogized to its review of independent and adequate

state grounds as defeating review of a federal claim noting:

> It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward nonfederal grounds of decision *that were without any fair or substantial support*.

Id. at 366, quoting *Staub v. City of Baxley*, 355 U.S. 313, 318-19 (1958) (quoting *Ward v. Love County Board of Comm'rs*, 253 U.S. 17, 22 (1920)) (emphasis added).

Indeed, in the context of reviewing state court decisions based upon independent and adequate state grounds to avoid resolution of federal issue, or state court determinations of state law as an antecedent to a federal question, the Court has repeatedly recognized it must defer to state court adjudications, albeit the degree of deference has varied. *See*, *e.g.*:

- *Hale v. Iowa State Bd. of Assessment*, 302 U.S. at 101 ("The power is ours, when the impairment of an obligation is urged against a law, to determine for ourselves the effect and meaning of the contract as well as its existence. . . . Even so, we lean toward agreement with the courts of the state, and accept their judgment as to such matters unless manifestly wrong");
- *Phelps v. Board of Ed. of West New York*, 300 U.S. 319, 323 (1937) (state court interpretation of state statute concerning

contract should be followed unless "palpably erroneous");

- *Fox Film Corp. v. Muller*, 296 U.S. 207, 209 (1935) (declining to reach question of whether contract was invalid under federal antitrust laws, because independent state ground was "not without fair support");
- *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 654-55 (1942) (declining to reach constitutional claim where dependent upon whether contract was for interstate as opposed to intrastate commerce, and state court held only intrastate commerce was involved: "We examine the contract only to make certain that the non-federal ground of decision is not so colorable or unsubstantial as to be in effect an evasion of the constitutional issue. . . . We cannot say that there is not a substantial basis for the state court's conclusion. . . .");
- *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. at 42-43 (declining to decide due process issue, because state court had determined no property rights under state law and the state court decision "rest[s] on a fair and substantial basis"); *see also id*. at 49 (Douglas J. & Black J., concurring) (property right "is a question of New York law on which the New York court has the final say. It is none of our business – whether we deem

that interpretation to be reasonable or unreasonable, sound or erroneous. [Citation.] And there is no suggestion here that state law has been manipulated in evasion of a federal constitutional right");

- *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (in determining contract clause challenge "ultimately we are bound to decide for ourselves whether a contract was made," but the Court "accord[s] respectful consideration and great weight to the views of the State's highest court"); and
- *Central Union Tel. Co. v. Edwardsville*, 269 U.S. 190, 195 (1925) (upholding Illinois Supreme Court interpretation of state waiver rule resulting in forfeiture of federal constitutional rights, explaining that state court determination "should bind us, unless so unfair or unreasonable in its application to those asserting a federal right as to obstruct it").

Even within the confines of habeas corpus, a procedure designed to review state court determinations of federal constitutional law, the Court has noted that principles of federalism, which recognize that state courts are of equal dignity in interpreting federal constitutional claims, dictate the Court defer to reasonable state court determinations of federal law even if the Court ultimately believes them to be erroneous. *See O'Dell v. Netherland*, 521 U.S. at 156 ("[T]he *Teague* doctrine [governing retroactive

application of new decisions of constitutional law to convictions] validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."). As the Court observed in *Stone v. Powell*, 428 U.S. 465 (1976) in holding that the defendants were not entitled to federal review of their criminal convictions based upon alleged Fourth Amendment violations where the state courts allowed a full and fair opportunity to litigate the claims in state court:

> Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.

Id. at 493 n.35.

The Court continued:

> [T]here is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the (consideration of Fourth Amendment claims) than his neighbor in the state courthouse."

Id.

The Ninth Circuit's "no deference" rule is directly contrary to these basic principles of comity and federalism. The result is a disregard of the California Supreme Court's authority as ultimate arbiter of state law, and offense to its dignity as a coequal arbiter of federal law. It is therefore essential that this Court grant review to repudiate the Ninth Circuit's "no deference" rule with respect to consideration of state court decisions regarding whether an official acts on behalf of the State or a county for purposes of *Monell* liability.

In addition, it is vital that the Court provide guidance for courts throughout the country in making the important day-to-day determinations of whether, under state law, a particular official acts on behalf of a state or a county for purposes of *Monell* liability. As *McMillian* contemplated, states vary in their internal organization of government and allocation of responsibility between state and county officials. The result has been widespread litigation on a jurisdiction-by-jurisdiction basis as to whether particular actors, i.e., district attorneys or, more commonly sheriffs, act on behalf of a state or a county in performing various functions. As one commentator has noted, the absence of clear standards in *McMillian* as to what weight to give particular aspects of state law, i.e., the source of payment for any judgment, the source of ultimate control or direct control, have led to wildly unpredictable results – with judges "seemingly . . . guided more by their preferences and prejudices than by any principles of federal law flowing from Supreme Court

pronouncements." Karen M. Blum, *Support Your ~~Local~~ Sheriff: Suing Sheriffs Under §1983*, 34 Stetson L. Rev. 623, 629 (2005).

Requiring federal courts to not simply "look to," but actually defer to state courts in their interpretation of state law as to whether a particular individual acts on behalf of a state or a county, absent some showing that the state court decision is arbitrary, unreasonable, or designed to defeat the federal claim, will at least bring some predictability and uniformity in resolution of these issues. For this reason too, review is warranted.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS LEE GOLDSTEIN,
Plaintiff-Appellant,

v.

CITY OF LONG BEACH; JOHN HENRY MILLER, in his individual and official capacity; WILLIAM COLLETTE, in his individual and official capacity; LOGAN WREN, in his individual and official capacity; WILLIAM MACLYMAN, in his individual and official capacity,
Defendants,

and

COUNTY OF LOS ANGELES,
Defendant-Appellee.

No. 10-56787

D.C. No. 2:04-cv-09692-AHM-E

OPINION

Appeal from the United States District Court
for the Central District of California,
A. Howard Matz, District Judge, Presiding

Argued and Submitted
November 8, 2012 – Pasadena, California

Filed May 8, 2013

Before: Stephen Reinhardt and Sidney R. Thomas, Circuit Judges, and Gloria M. Navarro, District Judge.*

Opinion by Judge Thomas; Concurrence by Judge Reinhardt

SUMMARY**

Civil Rights

The panel reversed the district court's grant of a motion for judgment on the pleadings, entered following a decision by the United States Supreme Court, and held that the County of Los Angeles could be liable pursuant to 42 U.S.C. § 1983 because the district attorney acted as final policymaker for the County when adopting and implementing internal polices and procedures related to the use of jailhouse informants.

Plaintiff spent 24 years in prison after being convicted for murder based largely upon the perjured testimony of unreliable jailhouse informant Edward Fink. He was released after the district court determined that Fink had lied and that it might have

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* The Honorable Gloria M. Navarro, District Judge for the U.S. District Court for the District of Nevada, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

made a difference if the prosecution had told plaintiff's lawyer that Fink had received prior rewards in return for favorable testimony. Subsequently, in plaintiff's § 1983 case, the Supreme Court held that the Los Angeles County district attorney and chief deputy district attorney were absolutely immune from plaintiff's claims that the prosecution failed to disclose impeachment material due to a failure to properly train prosecutors, failed to properly supervise prosecutors, and failed to establish an information system containing potential impeachment material about informants. *Van de Kamp v Goldstein*, 555 U.S. 335, 339 (2009). On remand, the district court, among other things, granted the County's motion for judgment on the pleadings.

Reversing the district court, the panel held that the Los Angeles County District Attorney represents the County when establishing administrative policies and training related to the general operation of the district attorney's office, including the establishment of an index containing information regarding the use of jailhouse informants. Therefore, a cause of action may lie against the County under § 1983.

Judge Reinhardt concurred with the opinion and wrote separately to emphasize the problems related to the eponymous and notorious Edward Fink and to explain why he found unpersuasive the California Supreme Court's reasoning in *Pitts v. County of Kern*, 949 P.2d 920, 923 (Cal. 1998) (holding that the district attorney represents the state, not the county, when preparing to prosecute and when prosecuting

crimes, and when establishing policy and training employees in these areas).

COUNSEL

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OPINION

THOMAS, Circuit Judge:

We consider in this case whether a district attorney acts as a local or a state official when establishing policy and training related to the use of jailhouse informants. We find that, as to the policies at issue here, the district attorney was acting as a final policymaker for the County of Los Angeles. We thus reverse the district court's grant of the motion for judgment on the pleadings and remand the case.[1]

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[1] Appellant's motion for judicial notice is GRANTED.

I

Thomas Goldstein spent 24 years in prison after being convicted for murder based largely upon the perjured testimony of an unreliable jailhouse informant, the aptronymic Edward Fink. *Van de Kamp v. Goldstein,* 555 U.S. 335, 339 (2009); *see also Thompson v. Calderon,* 120 F.3d 1045, 1053-1054 (9th Cir. 1997) (describing Fink as a "perennial informant," and describing his exploits in some detail), *rev'd,* 523 U.S. 538 (1998).

Fink was a heroin addict and convicted felon who had previously received reduced sentences by testifying in other cases and received a reduced sentence in exchange for his testimony against Goldstein. *Goldstein v. Superior Court,* 195 P.3d 588, 590 (Cal. 2008). Some prosecutors in the Los Angeles County District Attorney's office allegedly knew about Fink's history, but failed to inform the prosecutors trying Goldstein's case or Goldstein's counsel that Fink had testified before or that he received a benefit for testifying against Goldstein, and Fink lied on the stand when he was asked about previous assistance given or benefits received. *Van de Kamp,* 555 U.S. at 339.

Goldstein was convicted almost solely on the basis of Fink's testimony. The California Supreme Court explained the evidence against Goldstein:

> In 1979 Goldstein was an engineering student and Marine Corps veteran with no criminal history. He became a murder suspect after an eyewitness to an unrelated shooting

> saw the gunman enter Goldstein's apartment building. No witness or forensic evidence connected Goldstein with the murder victim, but Long Beach police detectives showed Goldstein's photograph, among others, to Loran Campbell, an eyewitness to the homicide. Campbell did not recognize anyone in the photo lineup, and Goldstein did not match Campbell's description of the suspect. However, a detective asked if Goldstein could have been the person Campbell saw running from the scene. Campbell said it was possible, though he was not certain.
>
> Goldstein was arrested and placed in a jail cell with Edward Floyd Fink, a heroin addict and convicted felon. At Goldstein's trial, Fink testified that Goldstein said he was in jail because he shot a man in a dispute over money.

Goldstein v. Superior Court, 195 P.3d 588, 590 (Cal. 2008). Campbell later recanted his identification of Goldstein, leaving Fink's testimony as the basis for the conviction. *Id.*

In 1998, Goldstein filed a habeas petition in the Central District of California. *Van de Kamp,* 555 U.S. at 339. At an evidentiary hearing, the district court agreed that Fink had lied and that it might have made a difference "if the prosecution had told Goldstein's lawyer that Fink had received prior rewards in return for favorable testimony[.]" *Id.* at 339. The court ordered the state to grant Goldstein a new trial or release him, and the Court of Appeals affirmed. *Id.*

The state decided to release Goldstein, who had already served 24 years of his sentence. *Id.*

Goldstein then filed this action under 42 U.S.C. § 1983. *Id.* at 340. As relevant here, Goldstein claims that the Los Angeles County 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. Goldstein explains that the district attorney's office was on notice that jailhouse informants were falsely testifying and considered the creation of a system to track benefits provided jailhouse informants and other impeachment information, but failed to create any system.

In 2009, the United States Supreme Court addressed whether the Los Angeles County district attorney and chief deputy district attorney had absolute immunity from suit for Goldstein's claims. While the Supreme Court "agree[d] with Goldstein that, in making these claims, he attack[ed] the office's administrative procedures," it concluded that "[t]hose claims focus upon a certain kind of administrative obligation – a kind that itself is directly connected with the conduct of a trial." *Van de Kamp,* 555 U.S. at 344. Therefore, the Court held that the Los Angeles County district attorney and chief deputy district attorney were absolutely immune from Goldstein's claims that the prosecution failed to disclose

impeachment material due to a failure to properly train prosecutors, failed to properly supervise prosecutors, and failed to establish an information system containing potential impeachment material about informants. *Id.* at 339.

On remand, the district court entered judgment in favor of Los Angeles County district attorney John Van de Kamp and chief deputy district attorney Curt Livesay.[2] As to the County of Los Angeles' motion for judgment on the pleadings, the district court explained that this Court has not had occasion to address the claims at issue here, but "reluctantly concluded" that the district attorney acts on behalf of the state, rather than the county, in setting policy related to jailhouse informants "in light of *Weiner* [*v. San Diego County,* 210 F.3d 1025 (9th Cir. 2000)] and the two decisions of [the Northern District of California] construing it." Therefore, the district court granted the County of Los Angeles' motion for judgment on the pleadings.

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we review an order granting a motion for judgment on the pleadings de novo. *Harris v. Cnty. of Orange,* 682 F.3d 1126, 1131 (9th Cir. 2012). For purposes of our review, "[a]ll material allegations in a

[2] The district court had also dismissed with prejudice claims against Long Beach, California defendants the City of Long Beach, John Henry Miller, William Collette, and William MacLyman based on a settlement between those parties and Goldstein.

complaint must be taken as true and viewed in the light most favorable to the plaintiff." *Geraci v. Homestreet Bank,* 347 F.3d 749, 751 (9th Cir. 2003).

II

"Pursuant to 42 U.S.C. § 1983, a local government may be liable for constitutional torts committed by its officials according to municipal policy, practice, or custom." *Weiner v. San Diego Cnty.,* 210 F.3d 1025, 1028 (9th Cir. 2000) (citing *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690-91 (1978)). "To hold a local government liable for an official's conduct, a plaintiff must first establish that the official (1) had final policymaking authority concerning the action . . . at issue and (2) was the policymaker for the local governing body for the purposes of the particular act." *Id.* at 1028 (citing *McMillian v. Monroe Cnty.,* 520 U.S. 781, 785 (1997)). States and state officials acting in their official capacities cannot be sued for damages under Section 1983. *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 (1989); *see Ceballos v. Garcetti,* 361 F.3d 1168, 1183 n.11 (9th Cir. 2004).

Here, all parties agree that the district attorney is the relevant policymaker. Thus, the viability of Goldstein's claim turns on whether the Los Angeles District Attorney acted here as a policymaker for the state or for the county. This determination is made on a function-by-function approach by analyzing under state law the organizational structure and control

over the district attorney. *See McMillian v. Monroe Cnty.,* 520 U.S. 781, 785-86 (1997).

A

In *McMillian,* the Supreme Court first set out the procedure to determine whether a policymaker acts on behalf of the state or local government. The case involved the sheriff of Monroe County, Alabama, and the Court sought to determine whether he acted as a state or local official when intimidating a witness into making false statements and suppressing exculpatory evidence. 520 U.S. at 784. The Court was clear that the inquiry is not undertaken in a "categorical, 'all or nothing' manner," but rather that the "cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government in a particular area, or on a particular issue." *Id.* at 785 (citations omitted).

The Court explained that the "inquiry is dependent on an analysis of state law." *Id.* at 786. It looked first to the Alabama Constitution, and concluded that "the constitutional provisions concerning sheriffs, the historical development of those provisions, and the interpretation given them by the Alabama Supreme Court strongly support Monroe County's contention that sheriffs represent the State, at least for some purposes." *Id.* at 787. Alabama had taken specific steps both in its Constitution and statutes to increase state control over sheriffs and move the authority to

impeach sheriffs "from the county courts to the State Supreme Court, because of the failure of county courts to punish officers for neglect of duty." *Id.* at 788 (citation and alterations omitted).

When looking to Alabama's statutes, the Supreme Court explained that sheriffs must "attend upon" state courts in the county, "obey the lawful orders and directions" of state courts, and "execute and return the process and orders of any state court, even those outside his county." *Id.* at 789 (internal quotation marks and citation omitted). "[T]he presiding circuit judge exercise[s] a general supervision over the county sheriffs in his circuit, just as if the sheriffs are normal court [*i.e.,* state] employees." *Id.* at 790 (alterations in original) (internal quotation marks and citation omitted). "[M]ost importantly," the Court explained, "sheriffs are given complete authority to enforce the state criminal law in their counties" and must report evidence of crimes to the district attorney (who is, in Alabama, a state official), while the counties have no powers of law enforcement. *Id.* The governor and attorney general can "direct the sheriff to investigate any alleged violation of law in their counties," and the sheriff must "promptly" complete the investigation and write a report to the state official. *Id.* at 791 (internal quotation marks and citations omitted). Finally, the Court noted that "the salaries of all sheriffs are set by the state legislature, not by the county commissions." *Id.* (citation omitted).

On the other hand, the Supreme Court explained that "the sheriff's salary is paid out of the county treasury,"[3] "the county provides the sheriff with equipment (including cruisers)," "the sheriff's jurisdiction is limited to the borders of his county," and "the sheriff is elected locally by the voters in his county." *Id.* (internal quotation marks and citation omitted). The Court noted but found "little merit" in the fact that the county coroner fills temporary vacancies in the sheriff's office, the sheriff is indicated in the code among "county officials" or "county employees," and that the Monroe County Commission's insurance policy may cover "some, but not all" of the claims against the Sheriff in this case. *Id.* at 792 n.7. The Court "d[id] not find these provisions sufficient to tip the balance in favor of petitioner" because the county commission's influence over the sheriff's operations was only "attenuated and indirect." *Id.* at 792.

Therefore, the Supreme Court concluded that "the weight of the evidence is strongly on the side of the conclusion" that "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties." *Id.* at 793.

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[3] The county was not able to change the sheriff's salary or refuse to pay him, though it could "deny funds . . . beyond what is reasonably necessary." *McMillian,* 520 U.S. at 791, 117 S.Ct. 1734 (internal quotation marks and citation omitted).

B

Based on our analysis of the relevant California constitutional and statutory provisions, we conclude that California district attorneys act as local policy-makers when adopting and implementing internal policies and procedures related to the use of jailhouse informants.

We begin by examining district attorneys' place within the structure of government, and then by looking at the constitutional and statutory provisions relevant to power and duties of district attorneys within their counties, as well as the control the California Attorney General and the county boards of supervisors exercise over them. Our task, of course, is not merely to weigh the amount of control that the Attorney General and county board of supervisors possess over a district attorney; instead, we must decide whether the district attorney was acting *on behalf of* the state or the county.

As to governmental structure, "[t]he officers of a county [include] [a] district attorney." Cal. Gov. Code § 24000. This is also reflected in Article XI of the California Constitution, "Local Government," under which "[t]he Legislature shall provide for county powers, an elected county sheriff, an elected district attorney, an elected assessor, and an elected governing body in each county." Cal. Const. art. XI, § 1(b). Additionally, a district attorney must be a registered voter of the county in which he or she is elected, Cal. Gov. Code § 24001, and is elected by the voters of the

county, Cal. Gov. Code § 24009. A district attorney may be removed from office by the same procedure as for other city and county officials. Cal. Gov. Code § 3073.

Though these structural provisions provide a helpful starting point for our analysis, the state's label of the district attorney as a county official informs but of course cannot determine the result of our functional inquiry. *See McMillian,* 520 U.S. at 792 n.7 (finding "little merit" in the fact that the sheriff is indicated in the code among "county officials" or "county employees"). For our more specific inquiry, we focus on district attorneys' roles vis-a-vis the state Attorney General and the county board of supervisors.

First, Article V, Section 13 of the California Constitution states:

> Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may

> seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.

Cal. Const. art. V, § 13.

We have already analyzed Article V, Section 13 of the California Constitution as it relates to sheriffs' supervision by the Attorney General, and concluded that despite this provision, sheriffs are county officers for the purposes of investigation. *Brewster v. Shasta Cnty.,* 275 F.3d 803, 805 (9th Cir. 2001). We cautioned that significant "reliance on Article V, section 13, would prove too much." *Id.* at 809. "Under this provision, if taken to its logical extreme, *all* local law enforcement agencies in California would be immune from prosecution for civil rights violation, thereby rendering meaningless the decision in *Monell,* which preserves § 1983 actions against local governments." *Bishop Paiute Tribe v. Cnty. of Inyo,* 291 F.3d 549 (9th Cir. 2002), *vacated on other grounds by Inyo Cnty. v. Paiute-Shoshone Indians,* 538 U.S. 701 (2003). Instead, "[s]uch general law enforcement authority 'does not contemplate absolute control and direction' of the officials subject to the Attorney General's

supervision." *Brewster,* 275 F.3d at 809 (citing *People v. Brophy,* 120 P.2d 946, 953 (Cal. Ct. App. 1942) ("[I]t is at once evident that "supervision" does not contemplate control. . . .")); *see also Pitts v. Cnty. of Kern,* 949 P.2d 920, 939 (Cal. 1998) (Mosk, J., dissenting) (explaining that *Brophy*'s analysis of the California Constitutional provision "is still good law").[4]

Though the Attorney General "shall have direct supervision over every district attorney and sheriff," the Attorney General's control over the district attorney is quite limited: he or she is limited to requiring a district attorney to "make reports." Cal. Const. art. V, § 13; *see* Cal. Gov. Code § 12550. The Attorney General may also "call into conference the district attorneys" "for the purpose of discussing the duties of their

[4] A contrary conclusion here that the district attorney here acts on behalf of the state would be in tension with *Brewster,* given our conclusion there that the sheriff acts on behalf of the county when conducting investigations even though the Attorney General has much greater supervisory power over sheriffs than district attorneys. *Compare* Cal. Gov. Code § 12560 ("Whenever [the Attorney General] deems it necessary in the public interest *he shall direct* the activities of any sheriff relative to the investigation or detection of crime within the jurisdiction of the sheriff. . . ." (emphasis added)) *with* Cal. Gov. Code § 12550 ("When [the Attorney General] deems it advisable or necessary in the public interest, or when directed to do so by the Governor, *he shall assist* any district attorney in the discharge of his duties. . . ." (emphasis added)). This is in contrast to the many provisions of the California Code that treat sheriffs and district attorneys identically. *See, e.g.,* Cal. Gov. Code §§ 12524, 24000, 24001, 25300, 25303, 29601.

respective offices." Cal. Gov. Code § 12524. This falls far short of a power to dictate policy to district attorneys statewide, and is in contrast to the sheriffs' role in *McMillian* in which the governor and attorney general could "direct the sheriff to investigate any alleged violation of law in their counties," and the sheriff had to "promptly" complete the investigation and write a report to the state official. *McMillian,* 520 U.S. at 791 (internal quotation marks and citations omitted).

Further, unlike in *McMillian,* there was no significant constitutional or statutory change that makes clear a trend to place district attorneys under state control. *See id.* at 788. Instead, when Article V, Section 13 was proposed in 1934, it had as its goal efficiency and horizontal coordination, rather than a desire to weaken district attorneys or give the Attorney General additional power. *See* 1934 Proposed Amendments to Constitution, Propositions and Proposed Laws at 9 ("[T]he manner in which the Dillingers, the 'Baby Face' Nelsons, the Machine Gun Kellys, the Tuohys [sic] and numerous other criminal gangs have been playing hide and seek with the public authorities has truly became [sic] a National disgrace."). Additionally, district attorneys were added to the list of county officials in a 1986 Amendment, which shows that the most recent trend in California is to confirm the district attorney's place as a county officer. *See* Cal. Const. Art. XI, § 1(b), historical notes.

If the Attorney General believes a district attorney is not adequately prosecuting crime, the Attorney General is not given the power to force a district attorney to act or adopt a particular policy, but instead may step in and "prosecute any violations of law" himself or herself. Cal. Const. art. V, § 13; *see* Cal. Gov. Code § 12550. The Attorney General may also, "with or without the concurrence of the district attorney, direct the grand jury to convene" and "may take full charge of the presentation of the matters to the grand jury. . . ." Cal. Penal Code § 923(a). The power to act in place of a district attorney is undoubtedly less than if the Attorney General could force a district attorney to use his or her own time and resources to act.

If the Attorney General does step in to conduct a prosecution, "in such cases the Attorney General shall have all the powers of a district attorney," Cal. Const. art. V, § 13, which suggests that the Attorney General does not have those powers unless and until he or she steps in to conduct a particular prosecution himself or herself. Finally, the Attorney General is given the power to "assist the district attorney in the discharge of the duties of that office," Cal. Const. art. V, § 13, but this similarly does not suggest control over or the power to mandate that a district attorney adopt a particular policy.

Outside of conducting criminal prosecutions, the Attorney General's power is even more attenuated: California authority indicates that district attorneys act on behalf of the county and are under the general

control of the county board of supervisors. "The board of supervisors shall supervise the official conduct of all county officers," including the district attorney, and the district attorney's use of public funds. Cal. Gov. Code § 25303. As did the state in *McMillian,* the county board of supervisors "exercise[s] a general supervision over the" district attorney, and for most purposes, district attorneys are treated as "normal" county employees. *See McMillian,* 520 U.S. at 790 (alterations in original).

The fact that the board of supervisors' control "shall not be construed to affect the independent and constitutionally and statutorily designated investigative and prosecutorial functions of the sheriff and district attorney of a county," Cal. Gov. Code § 25303, does not change this conclusion. As we have previously explained when analyzing this provision as to the sheriff, this limitation seeks to insulate the sheriff and district attorney "from political pressure." *Brewster,* 275 F.3d at 809. "The provision thus is akin to a separation of powers provision, and as such has no obvious bearing on whether [they] should be understood to act for the state or the county. . . . Merely because a county official exercises certain functions independently of other political entities within the county does not mean that he does not act *for* the county." *Id.* at 810. Therefore, even though the board of supervisors does not exercise complete control over the district attorney, that does not mean that the district attorney was not acting on behalf of the county here.

Other provisions indicating that the district attorney here acts on behalf of the county include that the district attorney is paid "out of the county treasury," Cal. Gov. Code § 28000, and the board of supervisors "shall prescribe the compensation" of the district attorney, Cal. Gov. Code § 25300; *cf. McMillian,* 520 U.S. at 791 ("[T]he salaries of all sheriffs are set by the state legislature, not by the county commissions."). Necessary expenses incurred "in the prosecution of criminal cases" are "county charges," Cal. Gov. Code § 29601, the district attorney must "account for all money received by him in his official capacity and pay it over to the treasurer" of the county board of supervisors. "The district attorney shall render legal services to the county without fee," Cal. Gov. Code § 26520; is the "legal adviser" for the county if there is no county counsel, Cal. Gov. Code § 26526; cannot "in any way advocate" against the county, Cal. Gov. Code § 26527; and may defend the county against the State of California in a state eminent domain proceeding, Cal. Gov. Code § 26541.

Finally, counties are required to defend and indemnify the district attorney in an action for damages. Cal. Gov. Code §§ 815.2, 825. The county's obligation to defend and indemnify the district attorney in an action for damages is a "crucial factor [that] weighs heavily[.]" *Streit v. Cnty. of Los Angeles,* 236 F.3d 552, 562 (9th Cir. 2001) (citation omitted). In *McMillian,* the Court explained that the state's responsibility for judgments against the sheriff was "critical" for the case and "strong evidence in favor of

the . . . conclusion that sheriffs act on behalf of the State." *McMillian,* 520 U.S. at 789.

C

In addition to constitutional and statutory provisions, the practical treatment of the policies Goldstein addresses supports the conclusion that this is a local, not statewide, determination. In 1988, a jailed informant demonstrated on *60 Minutes* how easy it was to concoct a plausible "confession" to a crime by a prisoner he had never even met; in part because of this demonstration, a Los Angeles County Grand Jury convened to conduct "intensive investigation" and heard testimony from 120 witnesses about the use of jailhouse informants in Los Angeles County. Report of the 1989-90 Los Angeles County Grand Jury, *Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County* 1-2 (1990), *available at* http://www.ccfaj.org/documents/reports/jailhouse/expert/1989-1990%20LA%20County%20Grand%20Jury%20Report.pdf.

The report it issued in 1990 recommended that the Los Angeles County "District Attorney's Office should maintain a central file which contains all relevant information regarding the informant," *id.* at 149, which that District Attorney's Office has now done. *See* Steve Cooley, Los Angeles County District Attorney's Office, Legal Policies Manual 188 (April 2005), *available at* http://www.ccfaj.org/documents/reports/jailhouse/expert/LACountyDApolicies.pdf.

In 2004, a California State Senate Resolution created the California Commission on the Fair Administration of Justice, which was asked to "make any recommendations and proposals designed to further ensure that the application and administration of criminal justice in California is just, fair, and accurate[.]" California Commission on the Fair Administration of Justice, Final Report 186 (2008), *available at* http://www.ccfaj.org/documents/CCFAJ FinalReport.pdf.

The Commission issued its final report in 2008 and made individualized recommendations about informant testimony for the legislature, police agencies, prosecutors, judges, and defense lawyers. *Id.* at 13-14. The report specifically recommended that "California District Attorney Offices adopt a written internal policy, wherever feasible, to govern the use of in-custody informants. The policy should provide [for] the maintenance of a central file preserving all records relating to contacts with in-custody informants, whether they are used as witnesses or not." *Id.* It is instructive that the Committee, with significant expertise with both district attorneys offices and state office,[5] specifically recommended that "California

[5] For example, the Chair of the Commission was John K. Van de Kamp, the Los Angeles County District Attorney at the time Goldstein was tried and later a two-term Attorney General for the State of California. *See* California Commission on the Fair Administration of Justice, Final Report 1 (2008), available at http://www.ccfaj.org/documents/CCFAJFinal Report.pdf.

District Attorney Offices" should maintain the central file of informants, and did not include this among its separate recommendations for the legislature or suggest that the Attorney General promulgate a rule. The Commission also conducted a survey of California county district attorneys, and of the nine responses the Commission received, only two offices had a "policy [that] requires the maintenance of a central file of all informant information." *Id.* at 47. This similarly suggests that, at least up to this point, district attorney office policies related to informants have been addressed by the individual offices rather than by the state.[6]

[6] We do recognize that the fact that the Attorney General has not required all district attorney offices to adopt a policy creating a central file for informants does not mean that she lacks the power to do so, but we do note that Los Angeles County contends that the Attorney General has much greater power than has ever been exercised. At oral argument, for example, the County explained that the Attorney General has the power to make the decision that no death penalty cases will be prosecuted in the state of California, to require district attorneys offices statewide to maintain an "open-file" policy, or to require that a centralized database for jailhouse informants be adopted. The County offered neither authority for nor examples of an Attorney General establishing policy in this way. The County was also unable to offer and we have been unable to find any example of the Attorney General stepping in to take over a prosecution or dictating any sort of policy to a district attorney's office without a request from the district attorney's office that he or she do so.

D

Taking all of these provisions together, it is clear that the district attorney acts on behalf of the state when conducting prosecutions, but that the local administrative policies challenged by Goldstein are distinct from the prosecutorial act. 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; the fact that "[t]he board of supervisors shall supervise the official conduct of all county officers," Cal. Gov. Code § 25303; and the fact that the county must defend and indemnify the district attorney in an action for damages, which the Supreme Court deemed "critical" in *McMillian,* 520 U.S. at 789; *see* Cal. Gov. Code §§ 815.2, 825. Even taking into account the control and supervisory powers of the Attorney General, the Los Angeles County District Attorney represents the county when establishing administrative policies and training related to the general operation of the district attorney's office, including the establishment of an index containing information regarding the use of jailhouse informants.

III

The County raises additional arguments. However, on close examination, none is persuasive.

The County's contention that the Supreme Court's conclusion in *Van de Kamp* determines the outcome of this case is incorrect. Though the inquiries of prosecutorial immunity and state or local policy-making may be related, they are separate. The prosecutorial immunity inquiry focuses on "policy considerations which compel civil immunity," *Imbler v. Pachtman,* 424 U.S. 409, 429 (1976), and is a federal question that will have a consistent answer nationwide. *See Howlett v. Rose,* 496 U.S. 356, 383 (1990). The state-local determination under Section 1983, although also a federal question ultimately, depends on a careful and thorough analysis of state constitutional and statutory provisions, and will vary "from region to region, and from State to State." *McMillian v. Monroe Cnty.,* 520 U.S. 781, 795 (1997). In *Van de Kamp,* the Supreme Court did not look to or examine California law, but focused on common-law traditions and policy implications in determining that the district attorney was entitled to absolute immunity.

The County similarly asserts, without citation, that California law conflates the two analyses: district attorneys act as State officials in the same instances that they are protected by absolute prosecutorial immunity. However, the California Supreme Court has explained that it is incorrect to "assume [ ] that the functions for which a prosecutor may obtain absolute, as opposed to qualified, immunity parallel those for which a district attorney represents the state, as opposed to the county." *Pitts,* 949 P.2d at

935. "[T]hese are in fact separate inquiries." *Id.; see also Pembaur v. City of Cincinnati,* 475 U.S. 469, 474 n.2 (1986) (holding county liable for prosecutor's actions after petitioner had conceded that prosecutor was absolutely immune).

Contrary to the County's argument, our decision in *Weiner* has no bearing on this case. In *Weiner,* we held that a "district attorney act[s] on behalf of the state, not the county, in deciding to prosecute" a person for a crime, but acknowledged that "this is not to say that district attorneys in California are state officers for all purposes. To the contrary, California law suggests that a district attorney is a county officer for some purposes." *Weiner,* 210 F.3d at 1026, 1031. Weiner challenged the prosecutor's decision to retry him for murder after he was granted a new trial. *Id.* at 1027. In concluding that "a county district attorney acts as a state official when deciding whether to prosecute an individual," we focused on the fact that, under California law, "[i]n the prosecution of criminal cases [the district attorney] acts by the authority and in the name of the people of the state." *Id.* at 1030 (citations omitted); *see also* Cal. Gov. Code § 26500. Because we do not address the decision to prosecute an individual, the analysis in *Weiner* does not resolve the question before us today.

Similarly, the County is incorrect that we are bound by the California Supreme Court's determination in *Pitts* that the district attorney acts on behalf of the state for some purposes. Though we must look

at the relevant state law and state courts' characterizations of that law, the final determination under 42 U.S.C. § 1983 is a federal law statutory interpretation question; no deference is due to the ultimate conclusion of the California court that the provisions, taken as a whole, indicate the district attorney was a state actor under Section 1983 for any particular function. *See Weiner,* 210 F.3d at 1025. "Although 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 section 1983 actions." *Streit v. Cnty. of Los Angeles,* 236 F.3d 552, 560 (9th Cir. 2001) (citations omitted). "State law does not control our interpretation of a federal statute." *Id.; see also Cortez v. Cnty. of Los Angeles,* 294 F.3d 1186, 1191 (9th Cir. 2002); *Brewster,* 275 F.3d at 811.

Nonetheless, we need not disrupt the California Supreme Court's conclusion because *Pitts* addressed a district attorney function different than the one we confront today. In *Pitts,* the California Supreme Court concluded that "the district attorney represents the state, not the county, when preparing to prosecute and when prosecuting crimes, and when establishing policy and training employees in these areas." *Pitts v. Cnty. of Kern,* 949 P.2d 920, 923 (Cal. 1998). Pitts alleged that the County and district attorney "established a pattern, custom, and practice of procuring false statements and testimony by threat, . . . bribery, and coercion of witnesses" that "failed to provide adequate training, procedures, guidelines, rules, and

regulations to prevent such conduct. . . .” *Id.* at 927. The court noted that it was “not seeking to make a characterization of [California district attorneys] that will hold true for every type of official activity they engage in,” but instead focused on the district attorney’s function “when preparing to prosecute and when prosecuting criminal violations of state law, and when training and developing policies for employees engaged in these activities.” *Id.* at 928.

The California Supreme Court analyzed the provisions of the California Constitution and the statutes discussed above, and based on these considerations, it concluded 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.” *Id.* at 934. That determination is not implicated by Goldstein’s claims.

As to training and supervising staff, the California Supreme Court said that based on its conclusion that the district attorney represents the state “when preparing to prosecute and when prosecuting criminal violations of state law,” it “further concludes it logically follows that he or she also represents the state, and not the county, when training and developing policy in these areas. No meaningful analytical distinction can be made between these two functions.” *Id.* at 935. Separating these two functions would “require impossibly precise distinctions” and would lead to “nonsensical,” “arbitrary” results. *Id.*

The *Pitts* Court examined the training and policies that "failed to . . . prevent" the use of "threat, . . . bribery, and coercion of witnesses," *id.* at 927, and the challenged policies were part of the training for district attorneys' preparation of individual witness for particular trials. In *Pitts,* child witnesses were coerced into testifying falsely that the defendants, their acquaintances or relatives, had sexually abused them. *Id.* at 923. Coerced testimony from the alleged victim of a crime is inextricably linked to the prosecution of that crime.

The function at issue here, on the other hand, is distinguishable from the question confronted by the California Supreme Court because Goldstein challenges administrative policy and accompanying training, rather than prosecutorial training and policy. Goldstein's challenge focuses on the failure to create an index that includes information about benefits provided to jailhouse informants and other previous knowledge about the informants' reliability, and the failure to train prosecutors to use that index. Goldstein alleges that it was the lack of an index that allowed Fink to lie about the benefits he received for testifying against Goldstein, prevented prosecutors in Goldstein's case from knowing Fink's history, and prevented Goldstein's counsel from impeaching Fink.

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. *See Van de Kamp,* 555 U.S. at 344 ("We agree with Goldstein that, in making these

claims, he attacks the office's administrative procedures."); *Pitts,* 949 P.2d at 935 ("Our conclusion as to which entity the district attorney represents might differ were plaintiffs challenging . . . some other administrative function. . . ."). In *Pitts,* there was no administrative function involved. There can be a "meaningful analytical distinction" between policies and training relating to prosecutorial functions and an index made and maintained as an administrative matter.

IV

In sum, we conclude that the policies challenged by Goldstein are distinct from the acts the district attorney undertakes on behalf of the state. Even taking into account the control and supervisory powers of the Attorney General, the Los Angeles County District Attorney represents the county when establishing policy and training related to the use of jailhouse informants. Therefore, a cause of action may lie against the County under 42 U.S.C. § 1983. We reverse the judgment of the district court.

REVERSED AND REMANDED.

REINHARDT, Circuit Judge, concurring:

I concur fully in Judge Thomas's opinion and write separately to make two points, one brief and one less so.

I.

Judge Thomas understates the problem with the eponymous and notorious Edward Fink, if that is possible. In the case that Judge Thomas cites, *Thompson v. Calderon,* 120 F.3d 1045 (9th Cir. 1997) (en banc), *rev'd,* 523 U.S. 538 (1998), Thomas Thompson was executed on the basis of Fink's perjured testimony. It is unlikely that Thompson was death-eligible for his part in the crime, if he was guilty at all of any offense. *See generally* Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process",* 74 N.Y.U. L. Rev. 313, 322-26 (1999). At Thompson's trial, the prosecutor committed prosecutorial misconduct that constituted a constitutional violation and required reversal. *See Thompson,* 120 F.3d at 1055. Additionally, Thompson's lawyer provided woefully inadequate representation, which constituted another constitutional violation that required reversal. *See id.* at 1053-54.

Despite a request to reverse Thompson's conviction by seven California prosecutors with extensive death penalty experience, including the author of California's death penalty statute, the Supreme Court refused to consider Fink's perjured testimony or any of the constitutional violations, on the dubious ground that our court abused its discretion in recalling the mandate, on a basis that the Court had never before recognized. *Calderon v. Thompson,* 523 U.S. 538 (1998).

Although Thompson was executed as a result of Fink's perjury (as well as the other unfortunate judicial matters described above), the innocent Mr. Goldstein was fortunate enough to avoid that fate. *See Goldstein v. Harris,* 82 F. App'x 592, 593 (9th Cir. 2003) (affirming the district court's grant of habeas relief). He now seeks civil damages for spending twenty-four years of his life in prison, as a result of the Los Angeles County District Attorney's Office's failure to adopt necessary and reasonable internal administrative policies and procedures. I agree that he is entitled to pursue his claim.

II.

One of the principal arguments on which the County relies is the California Supreme Court's decision in *Pitts v. County of Kern,* 949 P.2d 920, 923 (Cal. 1998), in which that court held that "the district attorney represents the state, not the county, when preparing to prosecute and when prosecuting crimes, and when establishing policy and training employees in these areas." I agree with Judge Thomas that we are not bound by *Pitts* and that the policy at issue in *Pitts* differs in kind from the administrative procedure that the District Attorney failed to implement in this case. I write separately, however, to explain why I find the reasoning in *Pitts* to be unpersuasive. In short, the California Supreme Court's reasoning in *Pitts* is imprecise on a question that demands precision.

To begin, the California Supreme Court never clearly states the scope of its holding. On multiple occasions, the state court writes that the setting of policy and training of employees "in these areas" is a state function. *E.g., Pitts,* 949 P.2d at 923; *id.* at 934. I can only presume that "in these areas" refers to the prosecution of crimes. The problem is that virtually every "policy" in a district attorney's office has *some* relationship to the prosecution of crimes. Some policies are directly related to the prosecutorial function – e.g., a policy that prosecutors must instruct their witnesses to tell the truth at all times when testifying. Some procedures are indirectly related, if at all – e.g., a procedure governing the disposal of confidential material in the office. I would call the latter category of procedures "administrative." The real question then is whether the matter *at issue* is prosecutorial or administrative. If prosecutorial, then the district attorney – under the circumstances present in *Pitts* – serves as a state actor. If administrative, then the district attorney – as Judge Thomas's opinion for the court explains – serves as a county actor.

The California Supreme Court in large part avoided this question in *Pitts*. It stated that drawing lines would "require impossibly precise distinctions." *Pitts,* 949 P.2d at 935. It further declared that "no meaningful analytical distinction can be made between" individual prosecutions and the setting of policy and training of employees. *Id.* Thus, it suggested that the establishing of all policies (including dress codes and the like) and the training of all employees

(presumably including secretaries and janitors) is a state function, as well as the prosecution of all cases.

I find the California Supreme Court's imprecise answer unpersuasive, for three reasons. First, the California Supreme Court failed to follow the process set forth in *McMillian,* which is for courts to make an independent determination "whether governmental officials are final policymakers for the local government *in a particular area or on a particular issue.*" *McMillian v. Monroe County,* 520 U.S. 781, 785 (1997) (emphasis added). In *Pitts,* however, the California Supreme Court made no function-specific determination. Rather, it relied primarily on its conclusion that a district attorney is a state actor when conducting individual prosecutions and asserted that it "logically follow[ed]" that a district attorney was also a state actor when setting policy or training employees. *Pitts,* 949 P.2d at 934-35.[1] In contrast, in our opinion for the court, we conduct a close examination of the relevant constitutional and statutory provisions and conclude that the "Los Angeles County District Attorney represents the county when establishing administrative policies and training related to the general operation of the district attorney's office, including the establishment of an index containing information regarding the use of jailhouse informants." Maj. Op. at 22.

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[1] It made only a passing reference to one provision of the California Constitution, Article V, Section 13, which is not specific to the function at issue in *Pitts* or in this case. *See* Maj. Op. at 13-17.

Second, the California Supreme Court's discussion is not internally consistent. Despite asserting that distinguishing policy and training decisions from individual prosecutorial decisions would require "impossibly precise distinctions." *Pitts,* 949 P.2d at 935, the state court stated that its conclusion "might differ were plaintiffs challenging a district attorney's alleged action or inaction related to hiring or firing an employee . . . or some other administrative function." *Pitts,* 949 P.2d at 935. This distinction eludes me. The training of employees is no more related to individual prosecutions than the hiring, firing, or disciplining of those employees. If "no meaningful analytical difference" exists between individual prosecutions and employee training, then it should not exist between individual prosecutions and employee hiring or firing; yet the California Supreme Court suggested that the latter might yield a different conclusion. A better explanation for the California Supreme Court's inconsistency is that it must have recognized that its conclusion would otherwise call into question a vast swath of Section 1983 jurisprudence, in which counties are generally held liable for failure to hire or fire decisions. *See Bd. of Cnty. Commis. v. Brown,* 520 U.S. 397 (1997). Unlike the California Supreme Court, we reach a consistent conclusion here: counties should be held liable for their administrative policies and procedures, including the training of their employees *and* the hiring and firing of those employees. *See, e.g., Connick v. Thompson,* 131 S.Ct. 1350, 1359 (2011).

Third, the California Supreme Court was simply incorrect when it stated that its conclusion follows as a matter of "logic." The entirety of our opinion contradicts this assertion of logical inference. As we have demonstrated through a close examination of the various constitutional and statutory provisions, a district attorney may act on behalf of the state when making prosecutorial decisions but act on behalf of the county when setting administrative policy or training employees. *See* Maj. Op. at 11-22. I therefore agree with the highly respected California Supreme Court Justice Stanley Mosk who wrote:

> [T]here is no insurmountable analytical difficulty to concluding that a county cannot be held liable under section 1983 when the district attorney or one of his or her deputies, as an agent of the state, commits prosecutorial misconduct, but can be held liable when the district attorney's hiring, training and supervision program, which the district attorney undertakes as a local policymaker, results in injury to a person's civil rights.

Pitts, 949 P.2d at 940 (Mosk, J., dissenting). Indeed, several circuits have come to the same conclusion that we reach here, that district attorneys act as county officers when deciding administrative policy and procedures related to training or supervision, even though they act as state officers when conducting prosecutions. *E.g., Walker v. City of New York,* 974 F.2d 293, 296 (2d Cir. 1992); *Carter v. City of Philadelphia,* 181 F.3d 339, 352 (3d Cir. 1999); *Esteves v. Brock,* 106 F.3d 674, 678 (5th Cir. 1997); *Owens v.*

Fulton County, 877 F.2d 947, 952 (11th Cir. 1989). Thus, I believe that there can be and is a "meaningful analytical distinction" between prosecutorial decisions and the creation of administrative policy or the training of employees.

I do not suggest that it is always easy to distinguish between policies that are prosecutorial in nature and procedures that are administrative in nature. That point notwithstanding, it is the proper inquiry. Line drawing is frequently a difficult task for jurists. It is, however, one we perform regularly. As Justice Oliver Wendell Holmes wrote almost a century ago:

> Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types.

Irwin v. Gavit, 268 U.S. 161, 168 (1925) (internal citation omitted); *see also Dominion Hotel v. State of Arizona,* 249 U.S. 265, 269 (1919) (Holmes, J., for the court) ("[T]he constant business of the law is to draw such lines."). Nor is he the only jurist of the Supreme Court to recognize this point.[2] The *Pitts* court abdicated

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[2] *10 E. 40th St. Bldg. v. Callus,* 325 U.S. 578, 584-85 (1945) (Frankfurter, J., for the court) ("On the terms in which Congress drew the legislation we cannot escape the duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases. To speak of drawing lines in adjudication is to express figuratively the task

(Continued on following page)

its judicial function by adopting a rule that avoids a case-by-case inquiry into whether a particular function at issue is prosecutorial or administrative.

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of keeping in mind the considerations relevant to a problem and the duty of coming down on the side of the considerations having controlling weight. Lines are not the worse for being narrow if they are drawn on rational considerations."); *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) ("Reliance on categorical platitudes is unavailing. Resolution instead depends on the hard task of judging – sifting through the details and determining whether the challenged program offends. . . . Such judgment requires courts to draw lines, sometimes quite fine, based on the particular facts of each case."). These are but a handful of the examples in which Justices of the Supreme Court have recognized that line-drawing is inherent in the task of judging.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THOMAS LEE GOLDSTEIN, Plaintiff, v. CITY OF LONG BEACH, et al., Defendants.	CASE NO. CV 04-9692 AHM (Ex) ORDER GRANTING THE COUNTY OF LOS ANGELES'S MOTION FOR JUDGMENT ON THE PLEADINGS

I.

INTRODUCTION

In this "section 1983" lawsuit, Plaintiff Thomas Goldstein has sued former Los Angeles County District Attorney John Van de Kamp and his Chief Deputy District Attorney, Curt Livesay.[1] Goldstein alleges that these defendants failed to institute a system enabling and requiring the prosecutors they supervised to obtain and disclose information concerning jailhouse informants, in violation of the prosecutor's constitutional duties under *Brady v. Maryland,* 373 U.S. 83 (1963) and *Giglio v. United*

[1] Plaintiff also has claims against the City of Long Beach and Long Beach detectives John Henry Miller, William Collette Logan Wren, and William MacLyman. Those claims are not at issue in this motion.

States, 405 U.S. 150 (1972). One such informant, Edward Fink, testified at Goldstein's 1979 trial that while in jail Goldstein had confessed to killing a man. Fink testified that he received no benefits in exchange for his testimony. Goldstein was convicted and was in custody for 24 years. Then he was granted a habeas corpus hearing at which he presented testimony that Fink had lied; in fact he *did* have an agreement with prosecutors and had received benefits for cooperating with law enforcement. Largely because of this evidence, Goldstein was released from prison. *See Goldstein v. Superior Court,* 45 Cal.4th 218, 223 (2008) (providing complete background).

Defendants Van de Kamp and Livesay previously moved to dismiss the claims against them in this case, claiming they were entitled to absolute prosecutorial immunity. This Court denied their motion and the Ninth Circuit affirmed that ruling. On January 26, 2009, however, the United States Supreme Court held that Van de Kamp and Livesay are entitled to absolute prosecutorial immunity. *See Van de Kamp v. Goldstein,* 129 S.Ct. 855 (2009).

Now before the Court is defendant County of Los Angeles's motion for judgment on the pleadings on the Fourth Claim for Relief, which alleges that under *Monell v. Dep't of Social Services of the City of New York,* 436 U.S. 658, 98 S.Ct. 2018 (1978) the County is liable to Goldstein for former District Attorney Van de Kamp's constitutionally violative policies and practices. The fundamental question raised by this motion is whether the conduct and practices of the Los Angeles

County District Attorney at issue in this case "may fairly be said to represent [the] official policy" of the County of Los Angeles, as opposed to the State of California, for purposes of section 1983 liability. *Monell,* 98 S.Ct. at 2037-38; *McMillian v. Monroe County,* 520 U.S. 781, 117 S.Ct. 1734, 1736 (1997).

McMillian held that the public official whose conduct triggers a section 1983 claim must have acted as a policymaker for a local political entity or agency. *See McMillian,* 117 S.Ct. at 1737; *Ceballos v. Garcetti,* 361 F.3d 1168, 1183 n. 11 (9th Cir. 2004) ("Whereas political subdivisions of states, along with their agencies and officials are 'person[s]' for the purpose of § 1983 liability, *see Monell,* 436 U.S. at 663, 98 S.Ct. 2018; 18 U.S.C. § 1983 (providing only that "person[s] . . . shall be liable"), states, state agencies, and state officials sued in their official capacity are not. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)).

The Court finds that although the issue is close, existing Ninth Circuit precedent applying *McMillian* leads to the conclusion that the District Attorney was acting as an agent of the State. Accordingly, the Court GRANTS the County's motion.[2] However, this determination may well warrant interlocutory review by the Ninth Circuit. (See Section IV.)

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[2] Docket No. 245.

II.

SUMMARY OF PARTIES' ARGUMENTS

A. The County's Argument.

Although the County recognizes that *McMillian* provides the framework for this determination, it nevertheless relies on the recent Supreme Court ruling in *Van de Kamp v. Goldstein,* 129 S.Ct. 855 (2009). There, the Court held that Plaintiff's claims against former District Attorney Van de Kamp and his Chief Deputy pertaining to supervision, training, and information-system management were "directly connected with the prosecutor's basic trial advocacy duties" and "intimately associated with the judicial phase of the criminal process." *Id.* at 862-64. The County now argues that because the Supreme Court found that those functions were prosecutorial, under California law the District Attorney was acting on behalf of the State, not the County.

The County's conclusion is sound but its reasoning is faulty. The *Van de Kamp* decision did not examine California law. It was based solely on common law precedents and policy implications relating to prosecutorial immunity. True, some courts purporting to use the *McMillian* framework have referred to the distinctions various other courts assessing absolute immunity claims drew among administrative, investigative and prosecutive functions of district attorneys. *Cf. Ceballos v. Garcetti,* 361 F.3d 1168, 1183-84 (9th Cir. 2004) (noting that the court may look for "guidance" to absolute and qualified immunity cases

to determine whether prosecutor was acting in his prosecutorial or administrative capacity), *rev'd on other grounds,* 126 S.Ct. 1951 (2006); *Bishop Paiute Tribe v. County of Inyo,* 291 F.3d 549, 564-65 (9th Cir. 2002) ("By analogy, these cases [*i.e.* cases addressing whether obtaining and executing a search warrant involve prosecutorial, as opposed to investigative, conduct] inform our decision [on whether a district attorney is a state or county officer]") *vacated and remanded on other grounds, Inyo County v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony,* 538 U.S. 701 (2003).[3] But however helpful this jurisprudence may be, it is not dispositive.

B. Plaintiff's Argument.

For his part, Plaintiff argues that this is a "mixed case involving administrative and prosecutorial aspects," which "can fairly [be] characterized as administrative inaction touching on prosecutorial functions," and that "the conduct is primarily administrative." Opp'n at 22. Based on that characterization, Goldstein contends that the District Attorney was not acting in the capacity of a state officer.

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[3] Since the Ninth Circuit *Bishop Paiute Tribe* decision has been vacated, it should not be cited as precedent. However, the Supreme Court did not address the part of the *Bishop* decision that is relevant here.

Plaintiff's reliance on such contrived classifications also is beside the point, because the *Van de Kamp* decision did not hinge on labels or characterizations. To be sure, the Supreme Court did agree with Plaintiff that the training, supervision, and information-system management obligations of the District Attorney are generally "administrative obligations." *Van de Kamp, supra,* at 861-62. But that characterization made no difference to its analysis and did not affect its conclusion. In deciding whether Van de Kamp and Livesay were entitled to absolute immunity, what mattered to the Supreme Court were public policy considerations – above all, the need to ensure that a prosecutor can carry out his duties without "harassment by unfounded litigation" and exposure to damages liability. 129 S.Ct. at 860 (quoting *Imbler v. Pachtman,* 424 U.S. 409, 423 (1976)); see also *id* at 864. To protect prosecutors' independent judgment and reinforce public trust in the integrity of their decision-making, the Supreme Court held, the immunity must be absolute, and it must extend to legal judgments prosecutors make relating to management and dissemination of trial-related information.[4]

Plaintiff also treats this motion as one asserting sovereign immunity under the Eleventh Amendment,

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[4] But *Cf. Al-Kidd v. Ashcroft,* ___ F.3d ___, 2009 WL 2836448 (9th Cir. Sept. 4, 2009) (former United States Attorney-General not entitled to absolute immunity for his role in authorizing and possibly procuring material witness arrest warrant).

which would be subject to the Ninth Circuit's test for determining whether a local government entity is an "arm of the state." This assessment also is mistaken. To be sure, various courts have "blended" *McMillian* with Eleventh Amendment immunity. This Court did so at an earlier stage in this case, when the County asserted Eleventh Amendment immunity, yet relied on *McMillian*. *See* Order Granting and Denying Motions to Dismiss, July 27, 2005. In *Ceballos v. Garcetti,* the Ninth Circuit stated that the analyses for determining whether a political subdivision is an arm of the state and for determining whether a county is a "person" subject to the provisions of § 1983 are similar.[5] *See* 361 F.3d at 1183

[5] "In determining whether an entity is an arm of the state, we inquire whether 'the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from . . . [private damage actions brought in federal court.'" *Streit v. County of Los Angeles,* 236 F.3d 552, 566 (9th Cir. 2001). *See Mitchell v. Los Angeles,* 861 F.2d 198, 201 (9th Cir. 1988) (describing the circuit's five-factor balancing test for determining whether an entity is actually an instrumentality of the state). The five factors are: (1) "whether a money judgment would be satisfied out of state funds," (2) "whether the entity performs central governmental functions," (3) "whether the entity may sue or be sued," (4) "whether the entity has the power to take property in its own name or only the power of the state," and (5) "the corporate status of the entity." *Mitchell v. Los Angeles,* 861 F.2d 198, 201 (9th Cir. 1988). The first factor refers to the state's exposure to *legal liability* for a monetary judgment, and it is the most important of the five factors. *Eason v. Clark County School District,* 303 F.3d 1137, 1141-1142 (9th Cir. 2002); *Belanger v. Madera Unified School District,* 963 F.2d 248, 251 (9th Cir. 1992).

n. 11; *see also Smith v. County of Los Angeles,* 535 F.Supp.2d 1033, 1035-38 (C.D. Cal. 2008) (using *McMillian* line of cases for an Eleventh Amendment immunity analysis). If under *McMillian* the county officer was acting as an agent of the state, there would be no basis for county liability, and the suit against the individual officer would in fact run against the state as the principal policymaker, which would be immune. *Edelman v. Jordan,* 415 U.S. 651, 668, 94 S.Ct. 1347 (1974) (Eleventh Amendment immunizes states from liability for retroactive monetary relief).

McMillian focuses on how state law defines the actual functions of a particular official. As Judge Patel succinctly explained, "the section 1983 inquiry focuses primarily on which party is empowered to make decisions regarding the formulation and implementation of various programs, while the Eleventh Amendment question centers around whether the state will be financially liable for a judgment against the County and touches peripherally on other questions of the County's fiscal and operational independence." *Laurie Q. v. Contra Costa County,* 304 F.Supp.2d 1185, 1195 n.7 (N.D. Cal. 2004). Perhaps the clearest demonstration of the two distinct analyses is in *Streit,* where the Ninth Circuit first considered the County of Los Angeles's liability under § 1983 for Los Angeles County Sheriff's Department policies using the *McMillian* framework, and then considered the Sheriff's Department argument that if it were a separately suable entity, it would be entitled

to Eleventh Amendment immunity under the "arm of the state" doctrine. *Streit,* 236 F.3d at 559-567.

III.

DISCUSSION

A. Identification of Policymaking Officials for Municipal Liability Under § 1983

42 U.S. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

The Supreme Court in *Monell* established that local government bodies are "persons" within the meaning of this statute. 98 S.Ct. at 2036. However, a municipality cannot be held liable through *respondeat superior – i.e.*, "solely because it employs a tortfeasor." *Id.* (emphasis in original). Rather, a municipality may be held liable only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," causes the constitutional injury. *Id.* at 2037-38.

The Supreme Court later prescribed the manner for determining where policymaking authority lies for purposes of § 1983 as follows:

> Reviewing the relevant legal materials, including state and local positive law, as well as custom or usage having the force of law, the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity.

Jett v. Dallas Independent Sch. Dist., 491 U.S. 701, 109 S.Ct. 2702, 2724 (1989) (emphasis in original).

Here, there is no dispute that Van de Kamp was the final policymaker with responsibility for the practices that Goldstein alleges violated his rights.

B. *McMillian*

McMillian v. Monroe County, supra, should have been the primary Supreme Court authority on which the County relied, not *Van de Kamp v. Goldstein.*

McMillian was convicted of murder. After his conviction was overturned, he sued Monroe County (Alabama) and its Sheriff, claiming they had intimidated witnesses and suppressed exculpatory evidence, thereby causing his wrongful conviction and violating his constitutional rights. The issue was not whether in carrying out the particular acts underlying the plaintiff's section 1983 claim the Sheriff was a final "policymaker" (the parties agreed he was) but whether the policy the Sheriff made was the policy of the State of Alabama or of Monroe County. The Court held that he was a policymaker for the State, not the County.

Two principles from the Supreme Court's previous cases guided its analysis. *See Streit,* 236 F.3d at 560. First, the Court noted that it had to characterize the "actual function" of the county official "in a particular area, or on a particular issue," rather than generalizing about his function or role. *McMillian* at 1737 (citing *Jett,* 109 S.Ct. at 2724). Second, it had to look to how state law defined the official's functions in order to determine whether he was making policy for the state or the county. *Id.* (citing *Jett,* 109 S.Ct. at 2723; *St. Louis v. Praprotnik,* 485 U.S. 112, 123, 108 S.Ct. at 924 (plurality op.) (1988); and *Pembauer v. Cincinnati,* 475 U.S. 469, 483, 106 S.Ct. 1292, 1300 (plurality op.) (1986).

Based on its review of Alabama's constitution, statutes and case law, the Court determined that the Alabama sheriff was a state official when carrying out his law enforcement duties. *Id.* at 1740. The

Court placed particular weight on the Alabama Supreme Court's understanding that it was "'the framers' intent to ensure that sheriffs be considered executive officers of the state.'" *Id.* at 1738 (quoting *Parker v. Amerson,* 519 So.2d 442, 444 (Ala. 1987). In support of this conclusion, the Court noted that the state's current constitution designated sheriffs as executive officers of the state, whereas a previous version of the constitution did not list them as executive officers. In addition, the constitution provided that for neglect of their law enforcement duties they could be impeached not by the county courts, but by the Alabama Supreme Court. *Id.* Thus, sheriffs were subject to the same impeachment procedures as state legal officers and lower state court judges, setting them apart from county and municipal officers. *Id.* The Court also found it significant that the Alabama Supreme Court had interpreted the state constitution as prohibiting county liability for a sheriff's official acts based on *respondeat superior. Id.* at 1738-39.

The Court then considered the duties of the sheriff under the Alabama Code, finding it important that while the sheriffs were given complete authority to enforce the state criminal law in their counties, the governing body of the counties (county commissions) could not instruct them in their law enforcement duties. *Id.* at 1739. In contrast, the Court noted, the Alabama Attorney General did have "direct control" because state law allowed the Attorney General to direct the sheriff to conduct special investigations in his county. *Id.* Moreover, the state legislature set the

salaries of all the sheriffs. *Id.* Given these provisions establishing sheriffs as state officers, the Court did not find it sufficiently convincing that Sheriffs' salaries were paid out of the county treasury, that their jurisdiction was limited to the borders of their county, or that they were elected locally by county voters. *Id.* at 1740. Although officials and residents had some "element of control," the "weight of the evidence" pointed to the conclusion that Alabama's sheriffs were locally placed state officials who represented the state when they executed their law enforcement duties. *Id.*

C. Post-*McMillian* California and Ninth Circuit Cases

In *Pitts v. County of Kern,* 17 Cal.4th 340, 362 (1998) the California Supreme Court held that a district attorney was a state official for purposes of Section 1983 liability when preparing to prosecute and prosecuting state crimes and when training and developing policy in these areas. The County relies heavily on *Pitts.* In 2004 the California Supreme Court, also relying heavily on *Pitts,* held that Sheriffs, too, act on behalf of the State when performing law enforcement activities. *Venegas v. County of Los Angeles,* 32 Cal. 4th 820 (2004).

The *Venegas* court provided the following useful description of *Pitts*:

> In *Pitts,* persons whose child molestation convictions were reversed on appeal brought civil actions against the County of Kern and

its district attorney and his employees, asserting civil rights violations under section 1983 arising from alleged misconduct during the criminal prosecution. The district attorney and his employees prevailed under the doctrine of prosecutorial immunity and, accordingly, *Pitts* was concerned only with the liability of the county. (*Pitts,* supra, 17 Cal.4th at pp. 345-347, 352, 70 Cal.Rptr.2d 823, 949 P.2d 920.)

The plaintiffs' action against the county alleged that its district attorney had established a pattern or practice of procuring false statements and testimony by threats, promises, and intimidation, and also failed to provide adequate training procedures and regulations to prevent such conduct. (*Pitts,* supra, 17 Cal.4th at p. 352, 70 Cal.Rptr.2d 823, 949 P.2d 920.) . . . *Pitts* held, however, that a district attorney represents the state rather than the county when preparing to prosecute crimes and training and developing policies for prosecutorial staff. *Although Pitts involved district attorneys rather than sheriffs, the court relied on statutes and analysis applying to both kinds of officers* . . .

In *Pitts,* we first observed that the question whether a public official represents a county or a state when acting in a particular capacity is analyzed under state, not federal law. (*Pitts,* supra, 17 Cal.4th at pp. 352-353, 356, 70 Cal.Rptr.2d 823, 949 P.2d 920; see *McMillian,* supra, 520 U.S. at p. 786, 117 S.Ct. 1734 [determining actual functions of

government officer is dependent on relevant state law].) For guidance in resolving this question, *Pitts* next turned to *McMillian,* which had examined Alabama state law to determine whether a sheriff was a state or county official . . .

Pitts applied McMillian's analytical framework to conclude that a California district attorney acts on behalf of the state rather than the county in preparing to prosecute crimes and in training and developing policies for prosecutorial staff. (*Pitts,* supra, 17 Cal.4th at pp. 356-366, 70 Cal.Rptr.2d 823, 949 P.2d 920.) In reaching its conclusion, the court considered several constitutional and statutory provisions tending to support or negate state agency, but placed special emphasis on article V, section 13, of the state Constitution, providing that "[t]he Attorney General shall have direct supervision over every district attorney . . . in all matters pertaining to the duties of their . . . offices. . . ." Under this same provision, the Attorney General may require district attorneys to make appropriate reports "concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions," and may prosecute violations of law if, in his or her opinion, state laws are not adequately being enforced in any county. (*Pitts,* supra, 17 Cal.4th at pp. 356-357, 70 Cal.Rptr.2d 823, 949 P.2d 920.) We also noted in *Pitts* that Government Code sections 12550 and 12524, and Penal Code section 923 contain similar provisions placing county district

attorneys under the supervision of the state Attorney General. (*Pitts,* supra, at pp. 357-358, & fn. 5, 70 Cal.Rptr.2d 823, 949 P.2d 920.)

We observed in *Pitts* that, in contrast to the broad supervisory powers of the Attorney General over district attorneys, Government Code section 25303 bars county boards of supervisors from affecting or obstructing the district attorneys' investigative or prosecutorial functions. (*Pitts,* supra, 17 Cal.4th at p. 358, 70 Cal.Rptr.2d 823, 949 P.2d 920.) We also pointed out that a district attorney acts in the name of the people of the state when prosecuting criminal violations of state law. (*Id.* at p. 359, 70 Cal.Rptr.2d 823, 949 P.2d 920.)

Pitts readily acknowledged that other constitutional and statutory provisions would support a conclusion that a district attorney is a county officer: For example, county voters elect district attorneys (Cal. Const., art. XI, § 4, subd. (c)), who are listed as county officers (Gov.Code, § 24000, subd. (a)), are generally ineligible to hold office unless they are registered voters of the county in which they perform their duties (Gov.Code, § 24001), and are compensated as prescribed by the county board of supervisors (Gov.Code, § 25300). (*Pitts,* supra, 17 Cal.4th at pp. 360-361, 70 Cal.Rptr.2d 823, 949 P.2d 920.) Furthermore, under Government Code section 25303, the county board of supervisors supervises the district attorney's official conduct and expenditure of funds, although it cannot affect

> the district attorney's independent investigative and prosecutorial functions. (*Pitts,* supra, at p. 361, 70 Cal.Rptr.2d 823, 949 P.2d 920.) Necessary expenses incurred by the district attorney in the prosecution of criminal cases are considered county charges. (Gov.Code, § 29601, subd. (b)(2).) Yet, after balancing the competing factors, and relying on *McMillian's* similar analysis, we concluded in *Pitts* that, when preparing to prosecute and prosecuting crimes, a district attorney represents the state, and is not considered a policy maker for the county. (*Pitts,* supra, 17 Cal.4th at p. 362, 70 Cal.Rptr.2d 823, 949 P.2d 920.) We similarly concluded that a district attorney does not represent the county when training staff and developing policy in the area of criminal investigation and prosecution. We stated that "[n]o meaningful analytical distinction can be made between these two functions [i.e., prosecuting crime on the one hand, and training/policymaking regarding criminal investigation and prosecution on the other]. Indeed, a contrary rule would require impossibly precise distinctions." (Ibid.) Thus, the constitutional and statutory provisions discussed above give the Attorney General "oversight not only with respect to a district attorney's actions in a particular case, but also in the training and development of policy intended for use in every criminal case." (*Id.* at p. 363, 70 Cal.Rptr.2d 823, 949 P.2d 920.)

Venegas, 32 Cal.4th at 830-833 (emphasis in original).

Despite the importance of *Pitts* (reflected in the length of the foregoing summary of that case in *Venegas*), *Pitts* does not control this Court's analysis. Liability under § 1983 is ultimately a federal question. *Streit,* 236 F.3d at 560. Although the Ninth Circuit takes into account state courts' analyses of state law, it requires an "independent analysis of California's constitution, statutes and case law." *Id.* at 561; *see also Weiner v. San Diego County,* 210 F.3d 1025, 1029 (9th Cir. 2000); *Bishop Paiute Tribe v. County of Inyo, supra,* 291 F.3d at 562-65. Indeed, the Ninth Circuit has sometimes diverged from the California Supreme Court. Like *Pitts,* the Ninth Circuit has held that a California district attorney is acting for the state when deciding whether to prosecute an individual. *Weiner,* 210 F.3d at 1031. Unlike *Pitts,* the Ninth Circuit has gone no further. A district attorney is acting for the county, it has held, when investigating a crime, *Bishop Paiute Tribe,* 291 F.3d at 565 (district attorney's execution of a search warrant) or when making personnel decisions unrelated to any particular prosecution or ongoing judicial proceeding. *Ceballos v. Garcetti,* 361 F.3d 1168, 1184 (9th Cir. 2004), *rev'd on other grounds,* 126 S.Ct. 1951 (2006). *See Womack v. County of Amador,* 551 F.Supp.2d 1017, 1027 (E.D. Cal. 2008) (describing the divergence of California and Ninth Circuit authority).[6]

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[6] The California Supreme Court and Ninth Circuit have also split on the question of whether county sheriffs are state or county policymakers. The former court holds that sheriffs act on

(Continued on following page)

D. Application of *McMillian* in Ninth Circuit

Weiner v. San Diego County, 210 F.3d 1025 (9th Cir. 2000) is the key case. There, the plaintiff sued the county under Section 1983, claiming that the district attorney had twice wrongfully prosecuted him for murder (the first time securing a conviction, which was overturned, and the second time an acquittal). Plaintiff claimed the district attorney's office had withheld exculpatory evidence. The Ninth Circuit held that "the district attorney acted on behalf of the state, not the County, in deciding to prosecute Weiner, and as a result Weiner's § 1983 claim against the County for his alleged wrongful prosecution fails." *Id.* at 1026-27.

In *Weiner,* the Ninth Circuit relied heavily on the California Supreme Court's opinion in *Pitts. Id.* at 1028-29. Indeed, the Ninth Circuit adopted the *Pitts* Court's assessment of at least five aspects of California constitutional and statutory law to which *Pitts*

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behalf of the state when executing their law enforcement duties, while the latter has consistently held that sheriffs act on behalf of the County. *Compare Venegas v. County of Los Angeles,* 32 Cal.4th 820, 832-33 (2004) with *Streit,* 236 F.3d at 564-65 (sheriffs' management of county jails); *Brewster v. County of Shasta,* 275 F.3d 803, 812 (9th Cir. 2001) (sheriffs' investigation of crimes); *Bishop Paiute Tribe,* 291 F.3d at 554 (sheriffs' execution of search warrant). As previously explained, the differences between prosecutive, investigative and administrative functions are central to the issues of absolute immunity and not to *Monell/McMillian* liability.

pointed in concluding that a district attorney is a state officer: (1) Art. V, section 13 of the California constitution (conferring direct supervision over every district attorney on the State Attorney-General), *id.* at 1029; (2) Gov't Code § 12550 (same), *id.*; (3) Gov't Code § 12524 (authorizing Attorney-General to call into conference district attorneys for the purpose of achieving uniform enforcement of state laws), *id.*; (4) Gov't Code § 25303 (prohibiting county boards of supervisors from obstructing the *investigative and* prosecutorial functions of the district attorney), *id.* (emphasis added); (5) Gov't Code § 100(b) (all suits are to be conducted in the name of the state), *id.*

On the other hand, *Weiner* also discussed at least four of the "provisions that weigh . . . against concluding that the district attorney is a state officer" that *Pitts,* too, had considered: (1) Gov't Code § 24000(a) (listing district attorneys as county officers), *id.*; (2) Gov't Code § 25300 (counties set district attorneys' salaries), *id.*; (3) Gov't Code § 24001 (district attorneys must be registered to vote in their respective counties), *id.*; and (4) Gov't Code § 25303 (counties supervise district attorneys' use of public funds), *id.* The Ninth Circuit went on to cite two additional statutes that could support the conclusion that under California law district attorneys are county officers: Gov't Code §§ 3060 and 3073 (county grand juries can

initiate proceedings to remove a district attorney). *Id.* at 1029-30.[7]

Having reviewed these factors, the Ninth Circuit concluded,

> Balancing the foregoing constitutional and statutory factors leads us toward the conclusion that under California law a district attorney acts as a state official when deciding whether to prosecute an individual . . . [This is so because] the function of the district attorney, including who can control the district attorney's conduct is the issue.

Id. at 1030. Given that determination, the Ninth Circuit held that the "district attorney was acting as a state official in deciding to proceed with Weiner's criminal prosecution. Weiner's § 1983 claim against the County, therefore, fails." *Id.* at 1031.

Should *Weiner* be limited only to a district attorney's decision to proceed with a prosecution, as opposed, for example, to decisions about how his office investigated or continued to pursue a prosecution? The short answer is "no."

To start with, *Weiner* itself twice cited Gov't Code § 25303, which provides that a county may not obstruct *both* "the investigative and prosecutorial

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[7] However, *Weiner* later noted that under Gov't Code § 3073 the state court must appoint a prosecutor to conduct such removal proceedings. *Id.* at 1030.

function of the district attorney. . . ." *Id.* at 1029-30. *Weiner* also stated, "All relevant California cases, including *Pitts,* have held that district attorneys are state officers for the purpose of *investigating and* proceeding with criminal prosecutions." *Id.* at 1030 (emphasis added).

In this regard, the pithy summary of *Weiner* that Judge Whyte provided in *MK Ballistics Systems v. Simpson,* 2007 WL 2022025, at *3; (N.D. Ca. 2007) is worth quoting:

> With the exception of prosecuting suits under the name of the state of California, all of the constitutional and statutory provisions the Ninth Circuit considered in *Weiner* apply to both investigations and prosecutions. See also *Brewster v. County of Shasta,* 275 F.3d 803, 810 (9th Cir.2001). In distinguishing *Weiner* to find that a sheriff acted for the county in conducting investigations, the court in *Brewster* drew the line not between investigations and prosecutions but between sheriffs and district attorneys. *Id.* It found that California law "establishes a closer relationship between the Attorney General and district attorneys than between the Attorney General and county sheriffs," stressing that the Attorney General could "take full charge of any investigation or prosecution, in which case [he] would have all the powers of a district attorney." *Id.* (emphasis added (citing Cal. Const. art. V, § 13 and Cal. Gov.Code § 12550). *Brewster* thus implicitly accepts the proposition that *Weiner* applies to district

> attorneys acting in both investigations and prosecutions.

In *MK Ballistics,* the Section 1983 claim against the district attorney arose out of the conduct of an investigator. Judge Whyte nevertheless concluded that the claim should be dismissed because the district attorney had acted as a state officer. He reached the same conclusion in *Walker v. County of Santa Clara,* 2005 U.S. Dist. LEXIS 42118 (N.D. Cal. 2005), where he noted that in *Pitts* "[t]he California Supreme Court went on to find that there was no reasonable distinction between a district attorney's actions when prosecuting violations of state law, and the district attorney's training and developing policy in these areas. Thus, a district attorney also represents the state when training *and developing policies related to prosecuting* violations of state law." Id. at *11. (emphasis added).

E. Conclusion.

As noted above, Goldstein's claims basically are that the District Attorney and his office violated Goldstein's constitutional right to due process by not creating and maintaining systems necessary to assure that if a jailhouse informant has an agreement with the District Attorney, the agreement is disclosed to the defendant. In light of *Weiner* and the two decisions of Judge Whyte construing it, the Court reluctantly concludes that these claims must be

dismissed because the District Attorney was acting as a state officer.

IV.

POSSIBLE INTERLOCUTORY APPEAL

This Court is profoundly concerned that the foregoing conclusion could result in a terrible injustice. Plaintiff Goldstein spent 24 years in custody for a crime that, the evidence now available strongly suggests, he did not commit. Goldstein alleges that the evidence that led to his release after that very lengthy incarceration had been withheld from him prior to and during his trial as a result of the policies and practices of the then-District Attorney (Van de Kamp) and his Chief Deputy (Livesay). Because of the U.S. Supreme Court's recent ruling in *Van de Kamp v. Goldstein, supra,* those two individuals recently have been relieved of potential liability; they are entitled to absolute immunity. Now, the County of Los Angeles, for whose District Attorney Office Van de Kamp and Livesay were *the* highest ranking policymakers, will also be relieved of potential liability, as a result of an entirely different legal doctrine (*McMillian*).

Unfortunate and even inequitable consequences of a district court's rulings do not warrant interlocutory review under 28 U.S.C. § 1292(b). But an "order [that] involves a controlling question of law as to which there is substantial ground for difference of opinion and [as to which] an immediate appeal from

the order may materially advance the ultimate termination of the litigation" does warrant such review. It appears to this Court that this ruling may meet that standard, for the following reasons.

A. Provisions Not Cited in *Weiner* Indicate District Attorneys Are County Officers.

California's 58 district attorneys serve both the state and their respective counties. *See Ceballos,* 361 F.3d at 1182 (noting that district attorneys serve both the state and the county). The Ninth Circuit has not squarely addressed the part of the *Pitts* holding dealing with the district attorney's "preparing to prosecute" and "training and developing policy" for prosecutions. Its previous decisions concerning district attorneys, – *Weiner, Bishop Paiute Tribe,* and *Ceballos,* – dealt with a specific decision whether to prosecute an individual, a specific decision about a search warrant during an investigation, and personnel decisions alleged to be retaliation against one prosecutor, respectively. In short, the Ninth Circuit has not had occasion to apply the *McMillian* framework to a claim, such as Goldstein's here, of failure on the part of a prosecutor to enact policies and procedures, including training and supervision, that were constitutionally required.

In finding the district attorney functioned as a state official in *Weiner,* the Ninth Circuit did not cite certain state law provisions that could warrant the opposite conclusion it had reached in *Ceballos* and

Bishop Paiute. Thus, in addition to Gov't Code § 25303, in California district attorneys are beholden to, and serve as a guardian of, the county treasury and county interests. The District Attorney's Office submits a proposed budget to the county board of supervisors each fiscal year. *Cf. Streit,* 236 F.3d at 562 (citing Los Angeles County Code, subch. 4.12.070). (In Alabama, in contrast, sheriffs' and district attorneys' salaries are set by the state legislature. *McMillian,* 117 S.Ct. at 1739.) Necessary expenses incurred by the district attorney in prosecuting criminal cases are county charges. Gov't Code § 29601(b)(2). *See also id.* § 26520. The district attorney must defend the county treasurer and auditor from legal claims. *Id.,* § 26520. He cannot advocate or present claims against the county. *Id.,* § 26527. He may defend the county against claims of the State of California in a state eminent domain proceeding. *Id.,* § 26541. Moreover, counties are required to defend and indemnify the district attorney in an action for damages. Cal. Gov. Code § 825. *Cf. Brewster,* 275 F.3d at 808 (noting that a similar provision in Gov't Code § 815.2 indicates the state legislature considered the sheriff to be a county actor). It is also significant that if Goldstein *were* entitled to pursue his claims against the County because of the District Attorney's alleged constitutional violations, the county, not the state, would be liable for any monetary judgment, a "crucial factor [that] weighs heavily[.]" *Streit,* 236 F.3d at 562 (citing Cal. Gov. Code § 815.2).

These various budgetary and funding provisions certainly suggest that the county government and county residents have not just an "element of control" over the district attorney, *McMillian,* 117 S.Ct. at 1740, but an array of tools and powers that assure the district attorney is truly answerable to the county. (Of course, in any event he is answerable to the voters in the county.) Moreover, as described in the next section, most of the laws treating district attorneys as state officers are not as wide-ranging or direct.

B. The state law provisions providing for Attorney General supervision do not necessarily establish that district attorneys act for the state in making policies for their offices.

California law does not confer on the Attorney General the power to direct the activities of any district attorney, only the power to assume the district attorney's powers and responsibilities. *See* Cal. Const., art. V, § 13; Cal Gov. Code § 12550. Turning first to Article V, § 13 of the constitution, the Ninth Circuit has cautioned against placing much weight on that constitutional provision. The original purpose of the provision "was to ease the difficulty of solving crimes, and arresting responsible criminals, by coordinating county law enforcement agencies and providing the necessary supervision by the Attorney General over them." *Brewster,* 272 F.3d at 809 (quoting *Pitts,* 17 Cal.4th at 357 n.4). Since this constitutional provision

applies to "all law enforcement officers in California," it is not helpful in determining whether a particular local law enforcement entity is subject to § 1983 liability. *See id.* Indeed, the Ninth Circuit has found that California sheriffs are county actors, notwithstanding Article V, section 13. *See, e.g., Brewster,* 275 F.3d 807-08; *Streit,* 236 F.3d at 555-56.

Government Code §§ 12550 and 12524, which implement Article V, section 13 of the constitution, merely entitle the Attorney General to assist and coordinate across local jurisdictions or to take over a district attorney's role of prosecuting criminal violations; they do not explicitly grant the Attorney General the power to direct the manner in which the district attorney carries out his duties.

The Attorney General is not authorized to supervise a district attorney in the same manner that a district attorney is required to supervise the activities of junior prosecutors in his office, or even in the way the Attorney General may "*direct the activities* of any *sheriff* relative to the investigation or detection of crime within the jurisdiction of the sheriff . . . " Cal. Gov. Code § 12560 (emphasis added). In contrast, in *McMillian* the Alabama Attorney General had "direct control" over sheriffs by virtue of being able to direct them to conduct investigations. *McMillian,* 117 S.Ct. at 1739.

California case law confirms this interpretation. *People v. Brophy,* cited in *Brewster,* 275 F.3d 810-11 and *Bishop Paiute Tribe,* 291 F.3d at 563-64, addressed at

length (albeit in *dicta*) the relationship under Government Code § 12550 between the Attorney General and county sheriffs and district attorneys. The Court of Appeal in *Brophy* wrote that the Attorney General's "direct supervision over every district attorney and sheriff . . . does not contemplate absolute control and direction of such officials," because district attorneys and sheriffs are officers created by the Constitution, "with public duties delegated and entrusted to them. . . . the performance of which is an exercise of the governmental functions of the particular political unit for which they, as agents, are active." 49 Cal.App.2d 15, 28 (Cal. Ct. App. 1942). The Court of Appeal further stated that "sheriffs and district attorneys cannot avoid or evade the duties and responsibilities of their respective offices by permitting a substitution of judgment." *Id.* The provision allowing the Attorney General to assume the powers of a district attorney could allow a substitution of judgment, *Brophy* noted, but "even this provision affords no excuse for a district attorney or a sheriff to yield the general control of his office and duties to the Attorney General." *Id.*

Government Code § 25303, which also applies to both district attorneys and sheriffs, authorizes the board of supervisors "to supervise the official conduct of all county officers," although it goes on to prohibit the board from obstructing the investigative and prosecutorial functions of the sheriff and district attorney. The Ninth Circuit has noted that the limitation on obstruction "appears to be directed at preserving the

independence of the sheriff from political pressure. The provision thus is akin to a separation of powers provision, and as such, has no obvious bearing on whether the sheriff should be understood to act for the state or the county . . . Merely because a county official exercises certain functions independently of other political entities within the county does not mean that he does not act *for* the county." *Brewster,* 275 F.3d at 809-10 (emphasis in original). The *Brewster* characterization of the limitation in Gov't Code § 25303 could also apply to district attorneys.

Although the Attorney General unquestionably has the authority to take over a particular case or institute prosecutions himself, nothing in these California statutory and constitutional provisions indicates that he has the authority to prescribe a jailhouse informant policy that county district attorneys would have to follow, or to proscribe the one that the District Attorney followed here. In short, these provisions do not establish that the Attorney General has the authority to formulate policies and procedures applicable to the day to day conduct of a District Attorney office.

C. Choice Available to Plaintiff

This difficult lawsuit has been pending for some five years, in large measure because it has triggered several important and precedential decisions (including by the United States and California Supreme Courts). Typically, a plaintiff abhors delay. But if in

light of this Section IV Goldstein wishes to request the Ninth Circuit to grant interlocutory review of this ruling, this Court would probably certify it for such review (although first giving the County an opportunity to oppose certification). Accordingly, by not later than October 2, 2009, Plaintiff shall specify in writing whether he seeks interlocutory review. If he does, the County shall file its written response to that request not later than seven days after plaintiff's request has been filed. The Court will thereafter decide whether to certify the matter for interlocutory review.

IT IS SO ORDERED.

DATE: September 23, 2009

/s/ A. Howard Matz
A. Howard Matz
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS LEE GOLDSTEIN, Plaintiff-Appellant, v. CITY OF LONG BEACH; et al., Defendants, And COUNTY OF LOS ANGELES, Defendant-Appellee.	No. 10-56787 D.C. No. 2:04-cv-09692-AHM-E Central District of California, Los Angeles ORDER (Filed Jul. 2, 2013)

Before: REINHARDT and THOMAS, Circuit Judges, and NAVARRO, District Judge.*

Defendant-Appellee's petition for panel rehearing is DENIED. The full court has been advised of the petition for rehearing en banc and no judge of the court requested a vote on whether to rehear the matter. Defendant-Appellee's petition for rehearing en banc is DENIED.

The California State Association of Counties' motion for leave to file an amicus brief is GRANTED.

* The Honorable Gloria M. Navarro, District Judge for the U.S. District Court for the District of Nevada, sitting by designation.