No. 24-102

In the Supreme Court of the United States

MANUEL ADAMS, JR.,

Petitioner,

v.

CITY OF HARAHAN, LOUISIANA,

Respondent.

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

BRIEF OF AMICUS CURIAE NATIONAL POLICE ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The National Police Association is an Indiana non-profit corporation founded to provide educational assistance to supporters of law enforcement and support to individual law enforcement officers and the agencies they serve. The NPA seeks to bring important issues in the law enforcement realm to the forefront of public discussion in order to facilitate remedies and broaden public awareness.

SUMMARY OF THE ARGUMENT

If "society wins not only when the guilty are convicted but when criminal trials are fair," *see Brady v. Maryland*, 373 U.S. 83, 87 (1963), it is also true that society wins when fairness prevails in other areas where one's rights run up against government power. Society indisputably lost when Captain Manuel Adams, Jr.'s supervisors fired him for false reasons. But it lost further when those supervisors reported their fake reasons to the Jefferson Parish District Attorney's office, which, in turn stuck Captain Adams

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[1] Under Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Under Rule 37.2(a), *amicus curiae* states that all parties received notice of its intention to file this amicus brief at least 10 days before the due date.

on a list that effectively bars him from working in law enforcement ever again. These lists, commonly called *Brady* or *Giglio* lists, and their practical and constitutional problems, are the subject of this *amicus curiae* brief.

The Court should grant Captain Adams' petition for the reasons set forth in it alone. The Fifth Circuit's standard—that to maintain a liberty-interest due process suit requires showing that the government's action "completely prevented" an individual from working in their chosen profession—runs headlong into this Court's precedent and less-restrictive standards in fellow Circuit courts. Resolving the circuit split is an indisputable must. Yet even if the Court finds the split lacking, Captain Adams' predicament still mandates review. The slapdash, unregulated job-check regime created by law enforcement agencies after *Brady* and *Giglio v. United States* in fact does completely prevent wrongfully accused officers from ever working in their chosen profession again. In other words, even if the Fifth Circuit's liberty-interest standard is correct, the Circuit's conclusion was plainly wrong. Because of how *Giglio* lists function, the City of Harahan's actions have likely blocked Captain Adams from working in his chosen field ever again. Because this background provides further color to Captain Adams' claim, it is important to the outcome of his case, and warrants review.

ARGUMENT

I. THE COURT SHOULD TAKE THIS CASE TO ENSHRINE RELIEF FOR A SUBSET OF ONGOING DUE PROCESS VIOLATIONS THAT STEM FROM *BRADY V. MARYLAND* AND *GIGLIO V. UNITED STATES*.

While *Brady v. Maryland* and *Giglio v. United States* set standards for resolving one set of due process wrongs, the way many law enforcement agencies have implemented rules to comply with those cases has created a vast, unregulated field of other due process wrongs that proliferate to this very day—and of which Captain Adams' situation is a prime example. Correcting this problem either by rejecting the Fifth Circuit's beyond-the-pale liberty-interest standard *or* by recognizing that unmerited placement on a *Giglio* list[2] does act as a permanent ban on employment so as to give life to a liberty-interest deprivation claim is a crucial step the Court must take. Understanding why requires an assessment of (1) *Giglio*'s development and

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[2] For simplicity's sake, this brief will refer to the disclosable evidence in question as "*Giglio* material," "*Giglio* evidence," and so on. It is mostly the problem of *Giglio* disclosures—disclosure of impeachment material—that has inspired the lists which this brief discusses. *See* Section I(B), *infra*, at 9. These references may occasionally be used where the actual court decision or statute refers to *Brady v. Maryland*. Rest assured that no alteration modifies the meaning of the original, as *Giglio* refers to a small, but important, subset of material within the much larger *Brady* universe. *See McCort*, *infra*, at 2297. Still, some references to *Brady* remain in quoted material—these should be understood to refer to the general principles articulated in this brief.

complex requirements for law enforcement agencies; (2) the individual career-ending incentives those requirements create for law enforcement agencies against their officers; (3) how carrying out those incentives led to a regime where innocent officers suffer with no recourse today; and (4) how this Court can fix it.

A. *Giglio* Requires Disclosure of Evidence That Impeaches a State Witness, Which Is Not As Straightforward as It Seems.

In *Brady v. Maryland*, this Court held that prosecutors who withhold evidence favorable to the accused violate the Fourteenth Amendment's Due Process Clause when the evidence is material to guilt or punishment and the defense requested it. *See Brady*, 373 U.S. at 87. Nine years later, in *Giglio v. United States*, the Court expanded *Brady*'s "favorable to the accused" standard to impeachment evidence, making it a due process violation for prosecutors to withhold information that could be used to impeach a state witness at trial when the "reliability of a given witness may well be determinative of guilt or innocence." *See* 405 U.S. 150, 153-54 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).[3]

The Court has returned to *Giglio* twice in substance since 1972, and though it plainly strove to clarify the prosecutor's role in making disclosures under *Giglio*, the intervening decisions have, as one commentator put it, "confused the disclosure doctrine

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[3] Four years after *Giglio*, the Court removed the "requested" requirement, holding that the duty-to-disclose applies even if the accused has not asked for the evidence. *United States v. Agurs*, 427 U.S. 97, 107 (1976).

and its workability to this day." *See* Samantha N. McCort, *A Simple Solution to a Complicated Problem:* Giglio *Disclosures in Iowa Criminal Cases*, 109 IOWA L. REV. 2293, 2299 (2024).

First, in *United States v. Bagley*, the Court explained that "material" evidence for *Brady/Giglio* purposes is evidence which, if disclosed, would create "a reasonable probability that…the result of the proceeding would have been different," with a "reasonable probability" being that which is "sufficient to undermine confidence in the outcome [of the trial]." *See Bagley*, 473 U.S. 667, 682 (1985); *see also Stricker v. Greene*, 527 U.S. 263, 280 (1999). *Bagley* also made clear that the prosecutor's discretion governs what materials should be disclosed under *Brady/Giglio*—though, of course, the prosecutor may not necessarily know the defense's case theory. *Id.* at 682-83.

Next, the Court addressed what happens when police withhold exculpatory information from even the prosecution, so that it is neither turned over to the defense nor, in many cases, known by prosecutor at all. *See Kyles v. Whitley*, 514 U.S. 419, 428-29 (1995). This, the Court held, does not matter for *Brady/Giglio* purposes—"the . . . prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Id.* at 437. Thus, under *Kyles*, prosecutors must undertake to uncover potentially disclosable evidence, which may not be so easy to do given the unique nature of the police-prosecution relationship. *See*, *e.g.*, Felice F. Guerriere, *Law & Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. ILL. U. L.J. 353, 377-78 (2001). This can also put prosecutors in "an uncomfortable position [of having] to turn over evidence

that may impeach key witnesses, including their [own] investigators[.]"*See* McCort, *supra*, at 2302.

Taking the view that the prosecution benefitted from *Bagley*'s grant of discretion with respect to *Giglio* material, the *Kyles* Court reasoned that the prosecution must bear the "corresponding burden" of gauging the "net effect" of all potential *Giglio* material and pull the trigger on disclosure when the prosecutor believes "the point of reasonable probability" is reached, 514 U.S. at 438. This responsibility is non-delegable, *see United States v. Swenson*, 894 F.3d 677, 685 (5th Cir. 2018), and tilts toward disclosure. *See Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) (citing *Kyles*, 514 U.S. at 440).

That the above-referenced cases are this Court's only pronouncements on *Giglio* (impeachment evidence disclosure) "has left scholars, prosecutors, defense attorneys, judges, and criminal defendants grappling with major doctrinal issues." *See* McCort, *supra*, at 2301. What is not in doubt, however, is that *Brady/Giglio* decisions are an incredibly complex factual ones, doctrine notwithstanding. *Brady* and *Giglio* task prosecutors with a case-by-case, piece-of-evidence-by-piece-of-evidence analysis that must be done correctly lest the entire prosecution be tossed because one item was not disclosed when it should have been. A massive complicating factor to this already complex dilemma is the more fundamental question of what constitutes *Giglio* material. Consider this list of questions:

> For example, must the prosecutor disclose the fact that a police officer suffers from a mental illness that may taint the officer's ability to recall information correctly? Should the prosecutor disclose an unfounded accusa-

> tion that a police officer searched a person without the necessary probable cause under the Fourth Amendment? Or in a case where a defendant allegedly resisted arrest, is it relevant that the officer who was on the scene and plans to testify for the prosecution once searched a person's car without probable cause? What if the illegal search happened two, five, or ten years ago? Is the prosecutor required to look at a police officer's internal misconduct records, and if so, what if the officer lied about the reason he called out of work or why his body camera allegedly faltered? Is the defendant entitled to the contents of the officer's misconduct record under the Sixth Amendment's guarantee of the right to a fair trial?

See McCort, *supra*, at 2303. As the commentator posing those questions suggests, "'*Giglio* material' is a moving target that evades categorization and relies heavily on the facts of particular cases." *Id.*[4] This particular

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[4] The McCort article posed an interesting hypothetical that illustrates the problems with *Giglio* disclosures:

> Consider an instance in which Officer Y—the sole witness against Defendant D—testifies against Defendant D, stating that Defendant's car was red, but it later turns out the car was blue. Facially, mistaking the color of a car may not seem like a big deal. But what about in a subsequent, unrelated trial against a different defendant, Defendant H, where the case hinges on Officer Y's testimony versus Defendant F's testimony, but the two disagree about the color of the car? Suddenly, the officer's ability to accurately identify the color of a car could mean the difference between a guilty verdict and an acquittal.

problem is a bug of the Court's *Giglio* precedents, and it seems Justice Marshall would agree. *See Bagley*, 473 U.S. at 698 ("Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense, and might make the difference to the trier of fact") (Marshall, J., dissenting); *Agurs*, 427 U.S. at 116-17 ("the exculpatory value to the defense of an item of information will often not be apparent to the prosecutor in advance of trial. And while the general obligation to disclose exculpatory information no doubt continues during the trial, giving rise to a duty to disclose information whose significance comes apparent as the case progresses, even a conscientious prosecutor will fail to appreciate the significance of some items of information") (Marshall, J., dissenting).

In other words, the *Brady/Giglio* analysis is exceptionally complicated, pressurized, and difficult, both legally and factually. But the point of this brief is not to contend that *Brady* and *Giglio* were wrongly decided. Due process indisputably, and fairly, requires the disclosure of the information pondered in each case. But it must not be lost that *Brady* and *Giglio* require difficult decisions under immense pressure, as the prosecutor is, after all, "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose

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See McCort, *supra*, at 2304. That said, generally accepted categories of *Giglio* material tend toward things like criminal convictions, judicial findings of dishonesty or misconduct, and, more concerningly, information in internal personnel files, information from government sources, and public information. *See* Rachel Moran, *Brady Lists*, 107 MINN. L. REV. 657, 667-74 (2022).

interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). And it is how many law enforcement agencies have responded to *Giglio*'s pressure that creates the host of problems law enforcement officers on the ground face now.

B. Following *Giglio*, Agencies Created and Maintain Lists of Individuals Whose Credibility Could Be Impeached So as to Avoid Employing Those Individuals Ever Again.

Today, many law enforcement agencies maintain lists that identify "officers with credibility issues that must be disclosed to a defendant in a criminal trial," and, theoretically, use these lists to short-circuit the process of having to look into each involved officer's background each time that officer is a witness or otherwise involved in an investigation. *See*, *e.g.*, *Hewitt v. Stephens*, No. 2:22-CV-00388, 2023 WL 4494457, at *2, n. 3 (S.D.W.V. July 12, 2023). These lists also "ostensibly" permit prosecutors to "keep track of, and disclose to defense counsel when necessary, information that negatively impacts officers' credibility." *See* Moran, *supra*, at 659. These are the so-called "party lines," anyway.

In reality, however, *Giglio* lists are geared towards helping the prosecutor avoid the hard call on *Giglio* material at all. This is because many agencies simply fire and refuse to hire any officer that ends up on a

Giglio list.[5] *See*, *e.g.*, Mary Ellen Reimund, *Are Brady Lists (aka Liar's Lists) the Scarlet Letter for Law Enforcement Officers? A Need for Expansion and Uniformity*, 3 INT'L J. HUMANS. & SOC. SCI. 1, 1-2 (2013); *see also* Val Van Brocklin, *Do Brady and Giglio Trump Officers' Due Process Rights?*, POLICE1 (January 3, 2022), https://www.police1.com/patrol-issues/articles/do-brady-and-giglio-trump-officers-due process-rights-g585QOS4UeSOSF5u/ ("Being *Brady* [or] *Giglio* listed can end careers and ruin reputations . . . [b]eing listed can negatively impact future employment"). As a result, prosecutors in these jurisdictions don't have to worry about whether their investigation and later prosecution will be compromised by witness-impeachment issues.

If done properly, one can see the obvious utility. A *Giglio* list that contains stringent protections to ensure that listed officers are only so after a verified instance of dishonesty or wrongdoing facially protects the due process rights of criminal defendants,[6] streamlines a prosecutor's time-consuming task list, and provides the officer an opportunity to legally resist their naming. *See Ass'n for L.A. Deputy Sheriffs v. Superior Ct.*, 447 P.3d 234, 239 (Cal. 2019) (maintaining *Giglio* lists is "laudable"). Indeed, creating a structured and well-functioning *Giglio* list like the hypothetical one discussed above likely tacks with this Court's admonition to prosecutors to develop "procedures and regu-

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[5] Officers that find themselves on these lists can anticipate being referred to as "*Giglio*-impaired," and can also anticipate finding themselves out of a job.

[6] *See*, *e.g.*, Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1340-42, 1382-83 (2018).

lations" to ensure their office complies with *Brady* and *Giglio*. *See Kyles*, 514 U.S. at 33. Colorado requires its district attorneys to maintain such lists, *see* Colo. Rev. Stat. § 16-2.5-502 (2022), while other states, like Arizona and California, have passed laws aimed at ensuring officers have notice of a pending list placement and an opportunity to challenge it, *see* Ariz. Rev. Stat. Ann. § 38-1117 (2021), or barring punitive actions against an officer solely because they are on a *Giglio* list. *See* Cal. Gov't. Code § 3305.5(a) (West 2022). Iowa passed a statute that combined the features of Arizona and California's laws. *See* Iowa Code § 80F.1(24).

These are the sorts of structural frameworks that reflect a healthy respect for due process procedures across the political spectrum, despite the fact that *Giglio* lists tend to "spark[] partisan tension." *See* McCort, *supra*, at 2305. Captain Adams would not be here, nor would *amicus curiae*, if such frameworks were the norm.

C. These *Giglio* Lists Lack Any Due Process Controls and Thus Wrongly Contain Names of Innocent Officers, Ending Those Officers' Careers.

At their base, *Giglio* lists work when they have safeguards that protect both the criminal defendant and the employed police officer. The problem is that almost no *Giglio* list is so regulated. *See* Moran, *supra*, at 659 (collecting authorities).[7] To the contrary, in most

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[7] *See*, *e.g.*, Rachel Harmon, *The Law of the Police*, 228 (2021) ("Brady lists are an informal means for shaping officer conduct. There are no legal standards for putting officers on such lists"); Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect*

instances, nothing governs how or when information about an officer results in that officer showing up on a *Giglio* list. Certainly in states with no authority whatsoever, precious few, if any *Giglio* lists have measures in place to prevent false allegations from slapping an officer with a *Giglio* designation. Because of this, officers routinely find themselves on *Giglio* lists with no advanced notice about who listed them and why. Then, when digging into the facts, those officers learn that their listing stemmed not from verified instances of misconduct but mere unfounded accusations, or far less blameworthy acts, like:

(1) criticizing the district attorney's policies in the local newspaper;

(2) failing to support the prosecutor's reelection campaign;

Each Other: How Police-Prosecutor Codependence Enables Police Misconduct, 100 B.U. L. REV. 895, 923-24 (2020) ("[T]here is little to no uniformity across the country as to how law enforcement decides who gets on the list, for what conduct, for how long, etc."); Reimund, *supra*, at 10 ("some prosecutors are in compliance with Brady while others are not"); Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 46 HOFSTRA L. REV. 87, 88 (2017) ("[I]n over fifty years since the Supreme Court's landmark 1963 decision, very little regulation or enforcement of the Brady disclosure duty has occurred."); Val Van Brocklin, *Brady Lists Ignite Conflicts Between Police and Prosecutors*, *Management and the Front-Line*, POLICE1 (Feb. 25, 2019), https://www.police1.com/legal/articles/brady-lists-ignite-conflicts-between-police-and-prosecutors-management-and-the-front-line-jaBRldmLu8wSdPnN ("There are no formal, nationally agreed upon guidelines for what conduct will result in an officer being *Brady* listed or to what standard the conduct must be proven").

(3) providing testimony that was truthful but unhelpful to the prosecution;

(4) complaining to city officials about corruption in the police department; and

(5) raising questions about improprieties on the part of one of the district attorney's employees.

See Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 784 (2015); *see also* Van Brocklin, *supra*, n. 7, at 13. Consider also the example of Iowa police officer Travis Hamilton, as recounted by commentator Samantha McCort:

> "In 2018, Iowa police officer Travis Hamilton was asked to resign from the Johnston Police Department in Polk County, Iowa after being placed on the county's *Brady–Giglio* list, a list that he 'was unaware . . . even existed.' When a reporter notified Hamilton that he was on a list, he did not know what he had done to impact his credibility, nor would the County Attorney shed any light on his alleged transgressions. In addition, the County Attorney's office told Hamilton that 'there was no protocol for being placed on the list and no means to appeal.' Hamilton subsequently made a public records request, and saw his name along with the name of eleven other officers, 'but [without] explanation for why he was on the list.' In retrospect, Hamilton believed there may have been an allegation that he 'ordered [a] young male to empty his pockets' without probable cause,

> but Hamilton claimed there was another side to the story and he was not given an opportunity to explain himself prior to being placed on the list which eventually led to his termination."

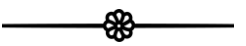
See McCort, *supra*, at 2306. Officer Hamilton's situation spurred the Iowa Legislature to action, ending with the passage of the law discussed above which provided due process guardrails for putting officers on a *Giglio* list and barring employment actions against those officers if they do get put on such a list. *See* Iowa Code § 80F.1(24). The problem remains widespread throughout the country, however, and due process protections are straining under its weight. Officers are losing their livelihoods based on a system that demands no proof that they deserve it.

D. Even If the Fifth Circuit's Liberty-Interest Standard Is Correct, Unmerited Placement on a *Giglio* List Satisfies the Standard and Gives Rise to a Suit.

The Fifth Circuit staked a wildly incongruous position with its declaration that Captain Adams (and anyone in his shoes) could only prevail on a Fourteenth Amendment liberty-interest deprivation claim if he established that the City of Harahan's employees' actions "completely prevented" him from working in law enforcement going forward. *See* Pet.App.14a. Captain Adams' petition thoroughly explains why this standard runs directly into the Court's precedent and other, more well-reasoned decisions from the First, Third, Ninth, and D.C. Circuits, meriting review. *See* Petition, at 11-15. *Amicus curiae* fully endorses Captain Adams' position, as might be expected.

Nonetheless, given the circumstances surrounding them described at length above, *amicus curiae* posits that *Giglio* lists—by whatever name—also stand as a complete bar to reemployment in law enforcement. For officers that have earned their way onto such lists through vetted, verified action, their recompense is limited. The "verification" of the action in question prior to such a listing provides the wrongdoing officer all the process due. *See*, *e.g.*, *Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 547 (1985). Not so for the thousands of officers like Captain Adams or Travis Hamilton, who find out they are on a *Giglio* list second- or third-hand, and upon investigation learn that their listing stems not from verified wrongdoing but from unverified, false rumors planted by aggrieved colleagues.

In these circumstances, the lack of due process controls which allowed the officer's listing based only on unverified conjecture, plus the complete bar on future employment posed by the listing itself, flatly satisfies even the Fifth Circuit's extreme standard for liberty-interest-deprivation claims. In other words, law enforcement officers who find themselves improperly placed on *Giglio* lists suffer a fate the Fifth Circuit or any other Circuit would endorse as violating the Due Process Clause. This injustice in and of itself merits a review of Captain Adams' case.



CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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August 29, 2024