No. 11-783

In the Supreme Court of the United States

JAMES A. BROWN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS; THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION; THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AND LAW PROFESSORS JEANNINE BELL, L. SONG RICHARDSON, D. MICHAEL RISINGER, JENNY ROBERTS, ANDREW TASLITZ, AND ELLEN YAROSHEFSKY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, in reviewing a *Brady* ruling, the Fifth Circuit erred in applying the highly deferential "clear error" standard of review instead of *de novo*, thereby exacerbating confusion, widening a Circuit split, and conflicting with this Court's approach.

2. Whether the Fifth Circuit recast and misapplied this Court's definition of materiality in *Kyles* by (i) failing to account for the cumulative impact of multiple failures to produce exculpatory evidence or (ii) postulating a theory of nonmateriality that required abandonment of the government's entire theory of the case.

3. Whether the suppressed exculpatory evidence was material as a matter of law under *Brady* and *Kyles* because prosecutors (i) impaired the adversary process by providing incomplete and misleading summaries, causing the defense to assume that the concealed exculpatory evidence did not exist or (ii) capitalized on their concealment by repeatedly eliciting evidence and making representations to the jury that the suppressed evidence explicitly contradicted.

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BRIEF OF THE NEW YORK COUNCIL OF DEFENSE LAWYERS, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

The New York Council of Defense Lawyers (NYCDL) is a not-for-profit professional association of more than

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that counsel of record for both petitioner and respondent were timely notified of the intent to file this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

200 lawyers, including many former prosecutors, whose principal area of practice is criminal defense in New York state and federal courts. NYCDL's mission includes protecting individual rights guaranteed by the Constitution, enhancing the quality of defense representation, and promoting the proper administration of criminal justice.

James Brown's petition raises questions of significant concern to accused individuals in state and federal courts alike. Under *Brady* v. *Maryland*, 373 U.S. 83 (1963), prosecutors should disclose to criminal defendants all evidence favorable to their defense, regardless of whether it is likely to alter the result at trial. Under current law, however, prosecutors often act as gatekeepers of favorable evidence: They are required to disclose only that evidence they deem "material" to the question of guilt or innocence. Other favorable evidence, judged unlikely to affect the jury's verdict, may safely be suppressed.

That practice creates an intractable tension between the prosecutor's obligation to turn over exculpatory evidence and the desire to convict the defendant. While this Court has stated that prosecutors are required to disclose only *material* favorable evidence, more recently it has indicated that prosecutors must turn over *all* favorable evidence. Those latter statements reflect the better view. Whether the evidence is sufficiently likely to affect the outcome at trial is a question best left to reviewing courts after trial, not prosecutors before trial. This case presents an opportunity to clarify prosecutors' *Brady* obligations and end the confusion faced by courts, prosecutors, and defense attorneys alike.

NYCDL and its members have a substantial interest in and unique insight into the ongoing problems created by the current lack of clarity in the *Brady* doctrine.

NYCDL's members regularly handle some of the most complex and significant white-collar criminal cases in the state and federal courts. They have a strong interest in the doctrine's proper application so that they can afford their clients the full protections of *Brady* and ensure the integrity of the criminal-justice system's truth-seeking process.

Joining NYCDL as *amici* are the Texas Criminal Defense Lawyers Association (TCDLA) and the National Association of Criminal Defense Lawyers (NACDL). TCDLA was founded more than 40 years ago and has since grown into the largest state association for criminal defense attorneys in the nation. Its 3,100 members are a "who's who" of the criminal defense profession in Texas. TCDLA provides a unique statewide forum for criminal defense lawyers and is the only voice in the legislature for attorneys who actually defend those accused of crimes.

NACDL is a nonprofit, professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of criminal wrongdoing. It has over 11,000 members and over 40,000 affiliate members, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL regularly files *amicus* briefs in cases implicating the rights of criminal defendants.

Amici also include six law professors (listed in the Appendix) who teach a variety of courses related to criminal justice, including criminal procedure, evidence, ethics, and clinics. As scholars and instructors of future lawyers, they share an interest in the fair administration of justice in criminal trials.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance to all criminal defendants. The prosecution here purported to meet its *Brady* obligation to disclose favorable evidence by giving Brown "summaries" of individuals' statements and testimony. But those summaries were incomplete and misleading. Brown was convicted of lying about Enron's alleged guarantee that it would arrange to buy back barges it sold to Merrill Lynch. Yet the government's summaries of statements by Jeff McMahon—an alleged guarantor—failed to mention that McMahon *denied* making any guarantee.

In finding that suppressed evidence not material, the Fifth Circuit committed several fundamental errors: It improperly deferred to the district court on a question of constitutional law, see Pet. 14-24; it misstated this Court's standard for materiality, see *id.* at 25-26; and it ignored that disclosure of the evidence would have forced the government to present an entirely different case, without its two key witnesses, see *id.* at 27-34. This Court should grant review on those issues and reverse the judgment below.

This Court should also take the opportunity to clarify the proper scope of prosecutors' *Brady* obligations. Relying on this Court's decision in *United States* v. *Bagley* and decisions applying *Bagley*, some prosecutors take the view that they must disclose favorable evidence *only* if they think it will be material to—*i.e.*, sufficiently likely to affect the outcome of—the upcoming trial. But prosecutors are in no position to judge the likely impact of evidence on a trial that has yet to occur. In addressing Brown's *Brady* claims, this Court should set out the governing framework and hold that *Brady* requires disclo-

sure of *all* favorable evidence. Absent a bright-line disclosure rule, future *Brady* violations are inevitable.

Here, moreover, the government purported to satisfy—indeed, to *exceed*, see Pet. App. 210a—its *Brady* obligations by releasing "summaries" of some favorable evidence in lieu of disclosing the evidence itself—summaries that failed to mention important exculpatory evidence. That practice allows the government not only to choose what evidence to give to the defense, but also to put its own spin on that evidence. Here, misleading and incomplete summaries obscured statements and testimony contradicting the prosecution's central theory. This Court should reject that distortion of the adversarial process.

I. THIS COURT'S REVIEW IS NEEDED TO CLARIFY THAT *BRADY* OBLIGATES PROSECUTORS TO DISCLOSE ALL FAVORABLE EVIDENCE

In reviewing *Brady* claims, this Court has previously stated part of the *Brady* standard as obligating prosecutors to disclose only "material" evidence—evidence whose disclosure would create a "reasonable probability" of a different result at trial. This Court should clarify that *Brady* requires more: Prosecutors must disclose *all* favorable evidence to the defense. That bright-line rule will remove the distorting lens of prosecutors' pre-trial materiality review, increasing defendants' access to favorable evidence and reducing the incidence of *Brady* claims. Materiality can be reviewed by a court after trial when the significance of the suppressed evidence will be clear.

A. Under *Brady*, prosecutors have an "affirmative duty to disclose evidence favorable to a defendant." *Kyles* v. *Whitley*, 514 U.S. 419, 432 (1995). That duty is broad and automatic. It applies equally to "exculpatory

and impeachment evidence." *Id.* at 433. And it applies "regardless of request" by the defendant. *Ibid.*

That obligation reflects "the special role played by the American prosecutor in the search for truth in criminal trials." *Strickler* v. *Greene*, 527 U.S. 263, 281 (1999). The prosecutor is not just another advocate. She represents "'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all,'" and she shares its "'interest, * * * not that it shall win a case, but that justice shall be done.'" *Ibid.* (quoting *Berger* v. *United States*, 295 U.S. 78, 88 (1935)). Where the government withholds favorable evidence, this Court has explained, the prosecutor abandons that role and assumes "the role of an architect of a proceeding that does not comport with the standards of justice." *Brady*, 373 U.S. at 87-88; *Kyles*, 514 U.S. at 433.

Nevertheless, this Court has declined to find reversible constitutional error "every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." *Kyles*, 514 U.S. at 437. Instead, it has held that there is no due process violation unless the suppressed evidence is "material"—where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); see *id.* at 685 (White, J., concurring in part and concurring in judgment); *Kyles*, 514 U.S. at 433.

In articulating that standard, *Bagley* departed from the usual practice of distinguishing between the scope of a constitutional protection and the circumstances in which a breach of that protection constitutes reversible error. This Court has said *Bagley* collapsed the two inquiries: The prosecutor has "discretion" to "gauge the

likely net effect of all [favorable] evidence," and is required to *disclose* that evidence only when it "*ris[es] to a material level of importance*." *Kyles*, 514 U.S. at 437-438 (emphasis added).

B. That approach is inherently problematic. No matter how honestly a prosecutor seeks to fulfill her duty to disclose favorable evidence, cognitive biases inevitably influence judgments about what evidence qualifies as "material." See Scheck, *Professional and Conviction Integrity Programs*, 31 Cardozo L. Rev. 2215, 2233 (2010). "[T]unnel vision, selection bias, hindsight bias, confirmation bias, asymmetrical skepticism, [and] cognitive dissonance" all drive prosecutors to credit information consistent with their existing beliefs, while discounting inconsistent evidence. *Ibid.* "[C]ompared to a neutral decision maker, the prosecutor will overestimate the strength of the government's case * * * and underestimate the potential exculpatory value of the evidence whose disclosure is at issue. As a consequence, the prosecutor will fail to see materiality where it might in fact exist." Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1612 (2006).

Under this Court's precedents, moreover, "the same standard must apply" to both the prosecutor's pre-trial materiality assessment and the court's post-trial materiality review: whether "the omission deprived the defendant of a fair trial." *United States* v. *Agurs*, 427 U.S. 97, 108 (1976). But that is an exceedingly difficult task when the trial *has yet to happen*. "Because *Brady*'s materiality standard turns on a comparison of the supposedly exculpatory evidence and the rest of the trial record, applying the standard prior to trial requires that prosecutors engage in a bizarre kind of anticipatory hindsight review."

Burke, *Improving Prosecutorial Decision Making*, *supra*, at 1610 (italics added). The prosecutor must speculate about "what the other evidence against the defendant will be by the end of the trial" and "whether the evidence at issue would place 'the whole case' in a different light." *Ibid.* (footnote omitted). A prosecutor may not fully appreciate what is material until hearing the defense's strategy in its opening statement.[2]

Such concerns have led some courts to conclude that materiality should not be assessed pre-trial. As one court observed, "prosecutors are neither neutral * * * nor prescient, and any such judgment" about whether evidence would affect a trial's outcome "necessarily is speculative on so many matters that simply are unknown or unknowable before trial begins." *United States* v. *Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005) (listing unknown factors). Accordingly, that court and others require disclosure of *all* favorable evidence, "without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial." *Ibid.*; see also *United States* v. *Acosta*, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005); *United States* v. *Carter*, 313 F. Supp. 2d 921, 924-925 (E.D. Wis. 2004); *United States* v. *Sudikoff*, 36 F. Supp. 2d 1196, 1198-1199 (C.D. Cal. 1999).

Those decisions make eminent practical sense. But disclosure required by due process should not depend on the happenstance of being tried in a jurisdiction that affords broader protection than the minimum *Bagley* requires. See pp. 15-21, *infra*. This Court should clarify

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[2] Courts have even less pre-trial insight into how evidence will fit into the trial record. Unlike prosecutors, they do not know the full extent of the case against the defendant. The Fifth Circuit's deference to the district court's pre-trial assessment of materiality, see Pet. App. 16a-17a, ignores that reality and warrants review. See Pet. 14-24.

that *Brady* disclosure extends to *all* favorable evidence, not merely the evidence that "prosecutors, in their wisdom, conclude [could] make a difference to the outcome of the trial." *Safavian*, 233 F.R.D. at 16. Favorable evidence should be disclosed and allow the adversary process to assist in the search for the truth.

C. At the same time, requiring disclosure of all favorable evidence would mark only a modest change in the current approach toward *Brady*. This Court has itself articulated *Brady*'s disclosure obligation more broadly than merely a duty to disclose material evidence. While not purporting to overrule *Bagley*, in *Strickler* this Court stated that prosecutors have a "broad obligation to disclose exculpatory evidence—* * * so-called '*Brady* material.'" 527 U.S. at 281. That "duty" is breached whenever the prosecution suppresses favorable evidence. *Ibid.* But a breach does not amount to "a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." *Ibid.* In other words, *Strickler* indicates that prosecutors' *Brady* duty to disclose should extend to *all* favorable evidence, without regard to materiality. But a breach of that duty constitutes *reversible* error only where the withheld evidence was in fact material to the outcome.[3]

Even when expressly stating that prosecutors need disclose only material evidence, this Court has repeatedly indicated that broader disclosure should be the norm. "[A] prosecutor anxious about tacking too close to the wind," it has admonished, "will disclose a favorable piece

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[3] *Strickler* was no aberration. Just this Term, four Justices expressed the same understanding of *Brady* during oral argument in *Smith* v. *Cain*. See Tr. of Oral Arg. 45-51, No. 10-8145 (U.S. Nov. 8, 2011).

of evidence." *Kyles*, 514 U.S. at 439; see also *Agurs*, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."). "This is as it should be": Broad disclosure of favorable evidence "justif[ies] trust in the prosecutor" and the criminal-justice system. *Kyles*, 514 U.S. at 439.

Unfortunately, "how it should be" is often not how it *is*. Even when acting in good faith, prosecutors may make errors in judgment. The prosecutor must somehow divorce her judgment from the natural tendency to believe that her case is so strong—and the defense's so weak—that few things favorable to the defense will be important enough to be material. So long as disclosure remains a matter of discretion rather than duty, prosecutors will continue to make mistakes.

Clarifying prosecutors' disclosure obligations under *Brady*, moreover, would not "undermine the interest in the finality of judgments." *Bagley*, 473 U.S. at 675 n.7. To the contrary, it would enhance it: The rule *amici* urge would reduce the amount of evidence withheld in the first place, by making disclosure of favorable evidence automatic and removing the materiality screen that often causes nondisclosure. The few *Brady* claims arising despite the broadened duty to disclose, moreover, would require reversing convictions only where a court determines, with proper hindsight, that the suppressed evidence was material within the meaning of *Brady* and *Bagley*.[4]

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[4] *Amici* thus do not challenge *Bagley*'s materiality *standard*. That standard is correct, and the Fifth Circuit's departure from it warrants review. See Pet. 25-34. The proper time to apply it, however, is when assessing the prejudice caused by suppression of favorable evidence, *not* (as *Bagley* provides) when defining the government's obligation to turn over that evidence in the first place.

D. *Bagley*'s "puzzling" statement of prosecutors' *Brady* obligations "has earned its retirement." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 563 (2007). This case provides an opportunity to end the current confusion surrounding prosecutors' disclosure duties. While Brown's claims here directly focus on whether the suppressed evidence was material, determining whether prosecutors were obligated to disclose it in the first place is an important step in setting forth the proper analytical framework. This Court has regularly addressed prosecutors' disclosure duties in the course of determining whether nondisclosure of evidence requires reversal. See, *e.g.*, *Strickler*, 527 U.S. at 281; *Kyles*, 514 U.S. at 437. The same approach is warranted here. This Court should grant review of Brown's *Brady* claims and, in doing so, clarify that *Brady* requires prosecutors to disclose *all* favorable evidence, irrespective of their subjective assessments of its materiality.

II. THE USE OF SUMMARIES IS INCONSISTENT WITH *BRADY* AND CREATES AN IMPERMISSIBLE RISK OF BIAS, ERROR, OR ABUSE

A. Summaries Do Not Disclose All Favorable Evidence

This Court has consistently described prosecutors' *Brady* obligation as an "affirmative duty to disclose *evidence*." *Kyles*, 514 U.S. at 432 (emphasis added).[5] Sum-

[5] See *Connick* v. *Thompson*, 131 S. Ct. 1350, 1358 (2011) (crime lab report); *Cone* v. *Bell*, 129 S. Ct. 1769, 1777 n.10 (2009) ("'statements of'" six witnesses and "'statements contained in official police reports'"); *id.* at 1783-1784 ("documents" and "undisclosed notes"); *id.* at 1784 (referring to "the quantity and quality of the suppressed evidence"); *Brady*, 373 U.S. at 84 (co-defendant's "extrajudicial statements").

maries by their nature are not *evidence*. Thus, disclosure via a summary cannot satisfy *Brady*.[6]

Even in ideal circumstances, summaries present unnecessary risks of mistake and misrepresentation. They pose the same cognitive-bias problems that arise whenever the government is afforded discretion over what it discloses to defendants. See pp. 7-8, *supra*. In fact, they compound the problem in several ways. The prosecutor must ask herself not only which *items* to disclose, but which *aspects* of those items to describe—adding one more filter between favorable evidence and the defendant. While a prosecutor may normally have to decide whether, say, a police report should be turned over, the summarizing prosecutor can be even more discriminating, deciding that only certain parts of the report merit inclusion in her summary. The more finely-grained that inquiry becomes, the greater the risk that favorable evidence will be screened out and suppressed.

More critically, written summaries require characterization of the evidence. The prosecutor assumes the role not merely of compiler, but of *editor*. Describing evidence rather than disclosing it affords the prosecutor the opportunity to put her own spin on damaging evidence.

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[6] "Evidence" need not be *admissible* to fall within *Brady*; it is enough that it "could lead to admissible evidence" or "be an effective tool in disciplining witnesses during cross-examination." *United States* v. *Gil*, 297 F.3d 93, 104 (2d Cir. 2002) (collecting cases). Likewise, favorable evidence is not exempt from disclosure simply because it is in some way a "summary" of facts, *e.g.*, contemporaneous notes of a witness interview. Rather, *Brady* requires the government to give defendants the *same raw material* that prosecutors possess—whatever its form—rather than reprocessing that material into summaries prepared for the purpose of disclosure. In speaking of "evidence" and "summaries" here, *amici* are referring to those concepts.

Even "[s]ubtle shifts in tone" can have a significant impact on how a document is interpreted. *United States* v. *Omni Int'l Corp.*, 634 F. Supp. 1414, 1425 (D. Md. 1986). "Minor modifications today could be become significant alterations tomorrow, based on the judgment of the reviser." *Id.* at 1426.

"[T]he use of summaries is an opportunity for mischief and mistake." Tr. of Mot. Hr'g 9, *United States* v. *Stevens*, No. 08-231 (D.D.C. Apr. 7, 2009) (dismissing indictment against former Senator Ted Stevens for *Brady* violations). They present prosecutors with dangerous risks—and temptations—to selectively cull and frame the "favorable" evidence they choose to disclose. Consistent with prosecutors' obligation to disclose all favorable evidence, this Court should make clear that the government must turn over the *actual* favorable *evidence* it possesses, not repackaged and reprocessed *summaries* reflecting its view of the evidence.

B. This Case Illustrates The Grave Risks That Summaries Present

Brown was convicted of perjury for testifying before a grand jury that, according to his "understanding," Enron had not "promise[d]" to arrange a buyback of barges it sold to Merrill Lynch, but offered only to "use best efforts." Pet. App. 3a-5a. Thus, the existence of a buyback guarantee was the critical question. See *id.* at 2a, 11a.

The prosecution contended that Enron's treasurer Jeff McMahon had made such a guarantee on behalf of the company. See Pet. App. 200a-202a. McMahon—who was never indicted for making the alleged guarantee—did not testify at trial. See *id.* at 23a. But he did speak with investigators about the Merrill Lynch deal. See *id.* at 22a. And when asked whether he had made the alleged guarantee, McMahon flatly answered, "No," he had

"never guaranteed to take out w/ Rate of Return." *Id.* at 218a (government notes).

The one-paragraph summary of McMahon's interview that the prosecution disclosed read much differently. It omitted McMahon's assertion that he "never guaranteed" Merrill Lynch a buyback. Instead it said only that "McMahon *does not recall* any guaranteed take out at the end of the 6 month remarketing period." Pet. App. 184a (emphasis added). Thus, while McMahon issued a *denial* to investigators, all the government's summary disclosed was a *memory lapse*.

The distinction between what McMahon said and what the defense was told he said was crucial. The crux of the prosecution's case was its contention that "Enron was selling the barges to Merrill Lynch based upon Jeff McMahon providing an oral guarantee." Pet. App. 200a. The summary of McMahon's statements failed to provide the defense powerful evidence to the contrary.[7]

Under a clear rule that the government must turn over all favorable *evidence*, not merely summaries, Brown would have received all the notes of McMahon's statements. There would be no question whether the prosecution mischaracterized those statements. There would be no dispute whether "I do not recall" is "close

[7] This case also demonstrates that *in camera* review of the actual evidence does not cure summaries' defects. Despite such review here, the prosecution's summaries (which the district court did not review) nevertheless omitted critical evidence. Expecting courts to pore over pages of scrawled notes (see Pet. App. 213a-227a) to make sure prosecutors' summaries include every favorable nugget sets *Brady*'s allocation of responsibilities on its head.

enough" to "no" to qualify as disclosure. Cf. Pet. App. 23a. The evidence would speak for itself.[8]

III. Absent Review By This Court, Disparate, Inconsistent Approaches To *Brady* Disclosure Will Continue To Prevail In The Lower Courts

The violation of Brown's *Brady* rights was in some ways an accident of geography. The Nation's 94 federal judicial districts follow almost as many different approaches regarding disclosure of favorable evidence. For example, had Brown been tried in a district requiring full disclosure of all favorable evidence regardless of materiality, see p. 8, *supra*, it is possible the government would have complied with that clear mandate and turned over the exculpatory evidence.

The same would be true had Brown been tried in a district that allows defense counsel to inspect and copy all favorable evidence, see S.D. Ga. Local Crim. R. 16.1(f), or to "fully revie[w] the government's case file" as a matter of course, see M.D.N.C. Local Crim. R. 16.1. In any of those districts, the incomplete "summaries" the government used here would have been unacceptable—prosecutors would have been required to make available the favorable *evidence*.

Brown, however, was tried in a district that permits disclosure of summaries in lieu of the underlying *Brady* material. As a result, he did not receive the exculpatory evidence to which he was entitled. That lack of uniform-

[8] To the extent this Court would ever allow summaries in satisfaction of prosecutors' *Brady* obligations, it should hold that when prosecutors urge the existence of facts contradicted by evidence omitted from summaries, they render that suppressed evidence material as a matter of law. See Pet. 34-38.

ity confirms the need for review and clear guidance from this Court.

A. Prosecutors' Disclosure Obligations Vary Across The Nation

The Federal Judicial Center recently conducted a comprehensive review of *Brady* practices in federal courts, surveying "all federal district and magistrate judges, U.S. Attorneys' Offices, federal defenders, and a sample of defense attorneys." Hooper *et al.*, Fed. Judicial Ctr., *A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases* 1 (Feb. 2011) ("FJC, *2011 Summary*"). That survey's results demonstrate the need for a clear rule: "[T]he two most common reasons expressed by judges as to why an amendment [to current disclosure rules] is needed were (1) to eliminate confusion surrounding the use of materiality as a measure of a prosecutor's pretrial disclosure obligations and (2) to reduce variation that currently exists across circuits." *Id.* at 20. Judges cited "scope of disclosure" as one of the "two most frequently mentioned disclosure violations committed by federal prosecutors." *Id.* at 27.

The lack of a clear rule has led to great variance in how federal judicial districts address disclosure of favorable evidence. Only 38 districts "have a local rule or standing order that codifies the government's obligations to disclose exculpatory and/or impeachment material in either very general or specific terms, and/or provides timing requirements for the disclosure of exculpatory and/or impeachment material." FJC, *2011 Summary*, *supra*, at 11. The Southern District of Texas—where this case was tried—is not among those districts.

Of the 38 districts, 31 have a "'defined approach' for establishing the scope of the government's obligation to disclose." FJC, *2011 Summary*, *supra*, at 12. For example, the District of Kansas provides that, "[p]ursuant to *Brady* * * * , the government shall produce *any and all evidence* in its possession, custody or control which would tend to exculpate the defendant," and then provides a non-exhaustive list of evidence that must be disclosed. *Id.* at App. B-7 (emphasis added). The other seven districts, by contrast, "have adopted a more open-ended approach to establishing the scope of the government's disclosure obligations." *Id.* at 13. The Southern District of Florida, for example, requires prosecutors to "[p]ermit defendant's attorney to inspect and copy or photograph *any evidence* favorable to the defendant." *Id.* at App. B-5 (emphasis added).

Other differences among the 38 districts abound. Most prominently, they differ with respect to whether the prosecutor must disclose *all* exculpatory information, regardless of materiality. Although 28 districts retain *Brady*'s materiality requirement, 10 dispense with it altogether. FJC, *2011 Summary*, *supra*, at 16; see *id.* at App. B-1, B-3. Disclosure approaches also vary widely among U.S. Attorney's Offices—particularly with respect to materiality. The FJC's survey of 80 U.S. Attorney's Offices counted no fewer than *seven* different approaches to "how they determine whether information is material under the Constitution in their district." *Id.* at 32.

B. Only This Court Can Restore Uniformity

Despite that lack of a consistent, coherent standard, efforts to establish clear *Brady* disclosure rules have failed. The Justice Department has consistently opposed any change, insisting that its internal reforms will sufficiently "decrease disclosure violations." FJC, *2011 Sum-*

mary, *supra*, at 23. Absent this Court's review, similarly situated defendants will continue to be treated differently.

The first effort at standardizing *Brady* practices stalled early on. Five years after *Brady*, the Advisory Committee considered amending Criminal Rule 16 to "codify *Brady*." Advisory Comm. on Rules of Criminal Procedure Minutes, at 15 (Sept. 30-Oct. 1, 1968), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CR09-1968-min.pdf. But it declined to adopt a uniform standard, believing instead that *Brady* "should be left to the development of the case law and should not be in the rule." *Ibid.*

More recent efforts to clarify prosecutors' obligations have likewise failed. In 2003, amendments were proposed to "(1) codify the rule of law first propounded in *Brady* v. *Maryland*; (2) clarify both the nature and scope of favorable information; (3) require the attorney for the government to exercise due diligence in locating information; and (4) establish deadlines by which the United States must disclose favorable information." FJC, *2011 Summary*, *supra*, at 3. And in 2006, the Advisory Committee proposed amending Rule 16 to provide the defense with "access before trial [of] *any* exculpatory and impeaching information known to the prosecution." *Id.* at 4 (emphasis added). The proposed amendment would have "codified the prosecutor's duty to disclose * * * and therefore would become a standard part of pretrial discovery in federal prosecutions." *Ibid.*

But those efforts, too, have been unsuccessful—largely because of the Justice Department's role in defeating them. The Department "has consistently opposed any proposed amendment to Rule 16, generally contending that codification of the *Brady* rule is unwarranted be-

cause the government's *Brady* obligations are 'clearly defined by existing law that is the product of more than four decades of experience with the *Brady* rule.'" FJC, *2011 Summary*, *supra*, at 3. The Department has resisted with particular force any effort to "eliminate any materiality requirement for the disclosure" of favorable evidence. *Id.* at 4. In 2007, the Department "persuaded the Standing Committee to reject the [2006] proposed amendment to Rule 16" that would have done just that, invoking recent revisions to its U.S. Attorneys' Manual as an adequate alternative response. *Ibid.*

The U.S. Attorneys' Manual does contain broad disclosure language, stating that "prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence." *U.S. Attorneys' Manual* §9-5.001(B)(1); see also *id.* §9-5.001(C)(1). And the Justice Department has "encouraged [prosecutors] to provide discovery broader and more comprehensive than the discovery obligations." Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.pdf.

But the Manual and the Ogden Memorandum are "short on specific guidance." American Bar Association, Resolution 105D & Report Regarding Disclosure Rules, at 6 (Aug. 8-9, 2011) ("ABA Resolution & Report"). They also allow individual U.S. Attorney's Offices to interpret the *general* guidance they offer differently. The Ogden Memorandum, for example, instructs *each* of the 93 U.S. Attorney's Offices to "develo[p] a discovery strategy that is consistent with the guidance and takes into account controlling precedent, existing local practices, and judi-

cial expectations." Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group (Jan. 4, 2010), http://www.justice.gov/dag/dag-memo.pdf. As a result, the Justice Department—by design—follows no uniform approach to disclosure of favorable evidence.

Furthermore, the Department's guidance provides no enforcement mechanism. The U.S. Attorneys' Manual and Ogden Memorandum are "aspirational," not binding. ABA Resolution & Report, *supra*, at 6. As Judge Emmet Sullivan—who presided over Senator Ted Stevens's infamous trial—recognized, that sort of voluntary governmental "guidance" is insufficient. Advisory Comm. on Criminal Rules Minutes, at 7 (Apr. 15-16, 2010). "[A] permanent solution is warranted." *Ibid.* Relying on the government to police itself, moreover, does nothing to solve the underlying problem: "[T]he government should not make unilateral judgments as to what it should turn over to the defendant." *Ibid.*

Full, fair, and uniform disclosure of favorable evidence is needed if *Brady*'s protections are to be afforded equally. The limited disclosure Brown received here would not have been acceptable in the many districts that expressly require disclosure of "any and all" exculpatory evidence, or "any evidence favorable to the defendant," or evidence "without regard to materiality." See pp. 8, 15-17, *supra*. But it is a fundamental principle that courts should "trea[t] similarly situated defendants the same." *Griffith* v. *Kentucky*, 479 U.S. 314, 323 (1987); see also *Kyles*, 514 U.S. at 456 (Scalia, J., dissenting) ("In a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of proce-

dural legality that leave ample margins of safety * * * ."). Federal courts' divergent approaches to *Brady* cannot be reconciled with that principle. But, as the numerous failed reform efforts demonstrate, the lack of uniformity will continue until this Court intervenes.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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