No. 09-1456

IN THE
Supreme Court of the United States

JOHN J. RIGAS AND TIMOTHY J. RIGAS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF LAW PROFESSORS AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTION, STATUTES, REGULATIONS, AND RULES

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

U.S. SENTENCING COMM'N:

OTHER MATERIALS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors[2] whose teaching and research interests include criminal law, criminal procedure, and sentencing law in the United States.

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NACDL joins this brief because both questions presented are of significant interest to its members. As noted herein, a significant percentage of criminal sentences are informed and determined by loss calculations under the U.S. Sentencing Guidelines. Further, issues regarding the scope of the prosecution's obligation to produce exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), are of daily concern to our members practicing in the criminal courts. In light of conflict and confusion in the courts over both of these questions, this case is doubly deserving of review.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that no counsel for a party authored this brief in whole or in part and that no person or entity, other than the Sandra Day O'Connor College of Law at Arizona State University, which paid for the printing of this brief, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

[2] A full list of *amici* law professors, who join this brief as individuals and not as representatives of any institutions with which they are affiliated, is set forth in the Appendix to this brief.

ARGUMENT

This case presents two questions for review: how to calculate economic loss under the U.S. Sentencing Guidelines, and the scope of prosecutors' disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Both are important issues warranting this Court's review.

I. THIS COURT SHOULD CLARIFY HOW TO CALCULATE ECONOMIC LOSS UNDER THE U.S. SENTENCING GUIDELINES

Although the U.S. Sentencing Guidelines are no longer mandatory, they continue to play a central role in federal sentencing. The Guidelines promote sentencing uniformity by serving as the starting point for all sentencing proceedings. Thus, it is crucial that this Court and other appellate courts continue to resolve legal uncertainty surrounding specific Guidelines. This is particularly so for § 2B1.1, the Guideline regarding the calculation of economic loss. That Guideline affects a large number of defendants, and it can result in significant sentencing increases. Disagreement in lower courts' application of the Guideline has resulted in disparate sentences. Accordingly, this Court should provide guidance regarding how to calculate loss under the Guideline.

A. It Is Imperative that the Court Continue To Address and Resolve Legal Disputes Regarding the Appropriate Application of the U.S. Sentencing Guidelines

Under 18 U.S.C. § 3553(a), sentencing courts must consider, among other things, the applicable sentencing guidelines. Although the U.S. Sentencing Guidelines were once mandatory, in *United States v. Booker*, 543 U.S. 220 (2005), this Court held that mandatory sentencing guidelines violated the Sixth Amend-

ment right to a jury trial. To remedy that constitutional violation, the Court excised the statutory provision making the Guidelines mandatory, thereby rendering the Guidelines "effectively advisory" for district courts. *Id.* at 245.

But, in doing so, the Court did not strip the Guidelines of importance. To the contrary, the Court retained a principal place for the Guidelines in federal sentencing, stating that district courts, "while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing." *Id.* at 264. The Court explained that maintaining the centrality of the Guidelines was critical to promoting the uniformity in sentencing desired by Congress. *Id.* at 250-56; *see also Gall v. United States*, 552 U.S. 38, 49 (2007) ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

Subsequent decisions by this Court have reaffirmed the continuing importance of the Guidelines. *See, e.g., Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (noting that, after the excision of the mandatory provision in *Booker*, "the statute still requires a court to give respectful consideration to the Guidelines"); *Gall*, 552 U.S. at 50 n.6 (articulating "the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process"). In those decisions, the Court has made clear that the Guidelines should anchor sentencing decisions. Thus, it has held that, in imposing a sentence, district courts must first calculate the appropriate Guidelines sentence. *See Gall*, 552 U.S. at 49 (stating that "the Guidelines should be the starting point and the ini-

tial benchmark" at sentencing). And it has explained that, if a sentencing court fails to calculate the Guidelines range, or if the court improperly calculates the range, an appellate court should vacate that sentence and remand for resentencing. *See id.* at 51; *see also United States v. Todd*, 515 F.3d 1128 (10th Cir. 2008) (vacating and remanding sentence based on improper Guidelines calculation); *United States v. Livesay*, 525 F.3d 1081 (11th Cir. 2008) (vacating and remanding sentence based on improper Guidelines application). Indeed, in light of these decisions, lower courts have continued to treat the Guidelines as the most important consideration at sentencing, as is clear from the fact that most federal sentences continue to fall within the advisory Guidelines range, *see United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008) (noting that "most federal sentences fall within Guidelines ranges even after *Booker*").

Given that the reason for the centrality of the Guidelines is to promote uniformity in sentencing, it is critical that the Court provide guidance on the interpretation of those Guidelines. Uniformity in federal sentencing does not depend solely on whether district courts ultimately elect to sentence defendants within the Guidelines; it also depends on whether district courts initially are calculating Guidelines sentences in a consistent manner. Achieving consistency in sentencing is impossible if district courts apply different understandings of the Guidelines when imposing a sentence.

B. How To Calculate Economic Loss Under the Guidelines Is a Particularly Important Legal Question Requiring Prompt Resolution

Of the open legal questions regarding Guidelines calculations, the appropriate way of calculating economic loss under § 2B1.1 is one of the most important. That Guideline affects a large number of federal defendants, it can have a significant effect on the overall sentence a defendant receives, it requires complicated and sophisticated analysis, and it has resulted in conflict among the circuits.

The calculation of economic loss under § 2B1.1 affects a large number of defendants every year. In Fiscal Year 2009, 8,618 defendants were sentenced under § 2B1.1. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2009), *available at* http://www.ussc.gov/ANNRPT/2009/Table17.pdf. That is more than 10% of all defendants sentenced for the year, making it the third most applied Guideline.[3] And past years show similarly high numbers of federal defendants sentenced under § 2B1.1. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2008), *available at* http://www.ussc.gov/ANNRPT/2008/Table17.pdf (reporting 8,947 defendants were sentenced under § 2B1.1); U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2007), *available at* http://www.ussc.gov/ANNRPT/2007/Table17.pdf (reporting 8,777 defendants were

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[3] Only § 2D1.1 (controlled substances) and § 2L1.1 (immigration offenses) were the subject of more sentences during that year. *See* U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2009), *available at* http://www.ussc.gov/ANNRPT/2009/Table17.pdf.

sentenced under § 2B1.1); U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 17 (2006), *available at* http://www.ussc.gov/ANNRPT/2006/Table17.pdf (reporting 8,322 defendants were sentenced under § 2B1.1).

The calculation of loss can have a drastic impact on the ultimate length of a defendant's sentence. *See* Peter J. Henning, *White Collar Crime Sentences After Booker: Was the Sentencing of Bernie Ebbers Too Harsh?*, 37 MCGEORGE L. REV. 757, 767 (2006) ("While various modifications can have a small effect on the offense level for a defendant in a white collar crime case, the determination of loss can raise a sentence quickly from modest to substantial."). The sentencing court's determination of the amount of loss a defendant caused can result in an increase of up to 30 offense levels, *see* § 2B1.1(b)(1)(p), which may translate into more than 20 additional years of imprisonment, *see* Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 DUKE L.J. 1001, 1017-18 (2010).

The Sentencing Guidelines provide only limited guidance in how to calculate loss under § 2B1.1. *See* Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611, 1628 (2007) ("Congress and the Sentencing Commission have been no help to courts faced with the task of determining loss in cases of financial reporting fraud."). The Guidelines and their commentary do not provide a definition of the term "loss," nor do they explore the causation issues implicit in the issue. Because of this lack of guidance, there has been much disagreement in particular cases about how to calculate loss. For example, in *United States v. Adelson*, 441 F. Supp. 2d

506, 509-10 (S.D.N.Y. 2006), the government contended that the defendant was responsible for $260 million in loss, the defendant argued that it was impossible to calculate the amount of loss for which the defendant was responsible, and the sentencing court ultimately concluded that the defendant was responsible for $59 million in loss. In *United States v. Ferguson*, 584 F. Supp. 2d 447, 449-50, 456 (D. Conn. 2008), the government contended that the defendants caused between $1.2 billion and $1.4 billion in loss, the defendants argued that the loss attributable to their actions was zero, and the sentencing court ultimately concluded that the defendants were responsible for a loss of between $544 million and $597 million. Such discrepancies are not solely the product of disagreements over the facts; rather, they also reflect disagreement about the proper method for calculating loss. *See id.* at 450-52. Other examples of such disagreement abound. *See, e.g.*, *United States v. Brown*, 338 F. Supp. 2d 552, 557-59 (M.D. Pa. 2004); *United States v. Bakhit*, 218 F. Supp. 2d 1232, 1236-42 (C.D. Cal. 2002).

How to calculate loss under the Guidelines — in particular whether to apply the analysis from *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), which applies to civil cases — has caused conflict in the circuits. The Fifth Circuit has adopted the *Dura* analysis, *see United States v. Olis*, 429 F.3d 540 (5th Cir. 2005), while the Ninth Circuit has declined to adopt the analysis, *see United States v. Berger*, 587 F.3d 1038 (9th Cir. 2009); *see also United States v. Brown*, 595 F.3d 498, 527 n.32 (3d Cir. 2010) (noting the disagreement). The Second Circuit joined the Fifth Circuit in adopting the *Dura* analysis in *United States v. Rutkoske*, 506 F.3d 170 (2d Cir. 2007), but it

does not appear to have employed that analysis in the present case. Given the impact that loss calculation may have on sentences, resolving this disagreement is critical.

II. THE IMPORTANT AND RECURRENT *BRADY* ISSUES RAISED IN THE PETITION WARRANT THIS COURT'S REVIEW

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Id.* at 87. This requirement is fundamental to our system of criminal justice. As the Court has explained, disclosing such evidence is necessary not only to satisfy the "rudimentary demands of justice" by ensuring the fairness of criminal trials, *id.* at 86, but also to promote the public's "trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done,'" *Kyles v. Whitley*, 514 U.S. 419, 439-40 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Highlighting the basic importance of this requirement is the fact that *Brady* issues arise in hundreds of cases each year. *See Recent Cases*, 123 HARV. L. REV. 1019, 1025 (2010).

Given the critical role of *Brady* in protecting due process rights, it is important that the Court provide guidance about *Brady*'s application. Inaccurate application of the doctrine may lead to prosecutors erroneously suppressing evidence. Conversely, it may also lead to courts erroneously overturning convictions based on evidence that prosecutors did not disclose. The importance of precisely defining the

contours of *Brady* is confirmed by the fact that this Court has issued numerous decisions on the scope of *Brady*. *See, e.g.*, *Kyles*, 514 U.S. at 439 (elucidating the government's disclosure obligations under *Brady*); *United States v. Bagley*, 473 U.S. 667 (1985) (extending *Brady* to impeachment evidence); *United States v. Agurs*, 427 U.S. 97 (1976) (outlining the prosecution's duty to disclose exculpatory documents not requested by the defendant); *Moore v. Illinois*, 408 U.S. 786 (1972) (defining the materiality requirement for disclosure).

A. This Court Should Clarify When a Defendant's Knowledge Excuses the Suppression of Evidence Under *Brady*

One particularly important issue regarding the scope of *Brady* involves the circumstances under which a defendant's knowledge about the potentially exculpatory nature of evidence suppressed by the government excuses what otherwise could be a *Brady* violation. *Brady* requires disclosure only of material evidence, that is, evidence whose disclosure would have had "a reasonable probability" of changing the outcome of the trial. *Kyles*, 514 U.S. at 433-34.

This Court has not addressed whether a defendant's knowledge of exculpatory evidence in the possession of the prosecutor justifies the government's suppression of that evidence under *Brady*. For their part, lower courts have concluded that evidence is not material when a defendant is actually aware of the exculpating facts established by the suppressed evidence, so long as the defendant could have introduced that exculpating evidence himself. *See* Pet. at 16-18. But they have disagreed whether a *Brady* violation occurs when the defendant "should" have been aware of the exculpatory evidence or could have

discovered the exculpatory evidence through "reasonable diligence." *Compare United States v. Gaggi*, 811 F.2d 47, 59 (2d Cir. 1987) ("[N]o *Brady* violation occurs if the defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory evidence"), *and Ferguson v. Secretary for Dep't of Corr.*, 580 F.3d 1183, 1205 (11th Cir. 2009) (no *Brady* violation if defendant could have obtained evidence through "reasonable diligence"), *cert. denied*, No. 09-1186 (June 1, 2010), *with Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1091 (9th Cir. 2008) (rejecting a reasonable diligence rule).

Resolving this issue is critical, because it potentially impacts the government's disclosure obligation in many cases. There are many circumstances where the government possesses exculpatory evidence and the defendant should be aware of that evidence. Similarly, there are no doubt many cases where the defendant might be able to uncover exculpatory evidence with some amount of investigation. It is unclear how courts should evaluate the sufficiency of a defendant's efforts, particularly when they fail to uncover the evidence. Without guidance as to whether *Brady* violations occur in those circumstances, prosecutors cannot faithfully honor the due process rights of criminal defendants, and courts cannot consistently uphold them.

How these issues are resolved will also affect defendants' conduct. Defendants often rely on the government's obligation under *Brady* to disclose exculpatory evidence. If *Brady* does not apply when the defendant could have uncovered the exculpatory evidence on his own, defendants must conduct more extensive investigations either to discover the evidence themselves or to erase any doubt that they

could have discovered the evidence through reasonable efforts without the government's aid. Guidance is therefore necessary to inform defendants of the scope of their duty to obtain exculpating evidence.

Resolution of this issue is particularly important for white collar cases, like this one. Such cases often involve large amounts of evidence. Sifting through that evidence to ascertain whether any of it is exculpatory can take substantial time and resources. If defendants have the burden of doing so, they must plan ahead by allocating resources to conduct such investigations.

B. The Court Should Resolve Whether *Brady* Requires Disclosure of Evidence Possessed by Another Government Agency

The other *Brady* issue presented by the petition — whether *Brady*'s disclosure obligation extends to exculpatory evidence in the sole possession of another government agency — is also important.

This Court has made clear that the prosecutor's disclosure obligation under *Brady* extends beyond information in the actual possession of the prosecutor. *See Kyles*, 514 U.S. at 437 (stating that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). The Court has not, however, delineated the precise contours of that duty. In particular, it has not decided whether, or under what circumstances, the prosecutor must disclose evidence held by another government agency.

This issue is of significant importance. The federal government regularly pursues concurrent civil and criminal actions for unlawful conduct, especially for alleged violations of securities laws. *See, e.g.*, State-

ment of John Coffee before the Senate Judiciary Committee (Sept. 29, 2006), *available at* 2006 WLNR 16669716 ("[the Securities and Exchange Commission ("SEC")] and the Department of Justice frequently conduct parallel civil and criminal investigations"); *see also, e.g., United States v. Kordel*, 397 U.S. 1, 7 (1970) (permitting prosecution based on evidence provided by parallel SEC investigation). Although related to the criminal proceeding, a civil suit is bound to uncover different evidence because it is conducted separately. That is especially so given the broad discovery rules in civil cases. *See* Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 598 (1994) (detailing broader discovery in SEC investigations). When the government learns of potentially exculpatory evidence by taking advantage of broader civil discovery rules that a criminal defendant cannot employ, that raises an important question about whether the government has an obligation to disclose that evidence to the defense.

Resolving this issue is also necessary to give potential defendants adequate opportunity to gather exculpatory evidence. If disclosure is not required, defendants will have an incentive to seek evidence held by other government agencies investigating their conduct to determine if any of it is exculpatory, because they cannot rely on the prosecutor to provide any exculpatory evidence. Moreover, insofar as a defendant might bear the burden of conducting an investigation to determine whether the government possesses exculpatory evidence, whether evidence in the sole possession of another agency is covered by *Brady* will dictate the breadth of that investigation.

Accordingly, this Court should grant review to determine whether disclosure is required in these circumstances.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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