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

REPLY BRIEF FOR PETITIONERS

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The lower courts are irreconcilably divided on the legal standards for evaluating suppression of evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and the applicability of the loss-causation principles in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), to sentencing enhancements. Those issues carry great practical significance for 85-year-old petitioner John J. Rigas, who faces the specter of serving the rest of his life in prison, and his son, petitioner Timothy J. Rigas, currently serving a 17-year sentence. The Government's response acknowledges that the circuits are divided on the important and recurring issues presented. The vehicle "problems" it raises, however, are insubstantial. This case offers an ideal opportunity for the Court to resolve conflicts in a case where such resolution meaningfully will affect the criminal liability and sentences of two successful businessmen.

ARGUMENT

I. THE COURT SHOULD REVIEW THE LEGAL STANDARDS FOR *BRADY* SUPPRESSION

The Government does not dispute that: the circuits disagree about the legal standards for suppression under *Brady*, *see* Opp. 9, 15; the standards applied by the Second Circuit conflict with this Court's decisions, *see* Pet. 22-24, 26; and the *Brady* questions presented by the petition are important and recurring, *see* Pet. 26-27. Instead, the Government opposes certiorari because the acknowledged "disagreement among the courts of appeals" supposedly is not sufficiently "direct," "sharply drawn," or of sufficient "degree" to warrant review, Opp. 9-10, 15, and because it perceives "vehicle" issues with the petition, Opp. 11. Those contentions are unpersuasive.

A. The Government Acknowledges The Circuit Conflict Regarding *Brady* Suppression

1. Scope of defendants' knowledge

a. State and federal courts are divided three ways regarding the scope of a defendant's knowledge that is necessary to excuse the Government's suppression of evidence. *See* Pet. 16-20. Some courts – like the Second Circuit here – apply a "knew or should have known" standard, *see* Pet. 16; some apply a "reasonable diligence" standard, *see* Pet. 16-17; and some apply a knowledge standard that best comports with this Court's decisions, *see* Pet. 18-20, 22-24.

The Government's opposition brief makes two critical concessions. *First*, it acknowledges the "disagreement among the courts of appeals" on whether prosecutors may suppress evidence about which a defendant "should have known." Opp. 9. *Second*, the Government does not contest that a "should have known" standard is inconsistent with this Court's precedents, which "'suggest[] a focus on actual knowledge.'" Pet. 22 (quoting *Boss v. Pierce*, 263 F.3d 734, 743 (7th Cir. 2001)).[1] Those concessions highlight the need for this Court's review.

b. The Government erroneously contends that the circuits' "disagreement" "is not as sharply drawn as petitioners suggest," and therefore not of sufficient "degree" to warrant review. Opp. 9-10.

The Ninth Circuit repeatedly has held that only a defendant's actual knowledge or awareness of exculpatory evidence justifies the Government's suppres-

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[1] Indeed, the Government does not dispute that a "should have known" standard is inconsistent with *Brady* and sound policy. Pet. 22-23.

sion of such evidence. *See* Pet. 18 (citing cases). Indeed, the Ninth Circuit has found *Brady* violations in numerous cases factually analogous to petitioners'. *See* Pet. 19 n.27 (citing *Tennison v. City & County of San Francisco*, 570 F.3d 1078, 1091 (9th Cir. 2008); *Benn v. Lambert*, 283 F.3d 1040, 1062 (9th Cir. 2002); *Paradis v. Arave*, 130 F.3d 385, 392 (9th Cir. 1997)).[2] The Government contends that, in those cases, "the defendant did not have direct knowledge of the witness's involvement in the underlying events, and thus lacked knowledge of the facts as to which the witness could testify." Opp. 12 n.3. But the same is true here. Although petitioners knew that Carl Rothenberger had given Adelphia legal advice, which they had followed, they lacked knowledge of the facts to which he would testify. *See infra* Part I.B; Pet. 24-25. And Rothenberger's repeated statements that he would not talk to petitioners' counsel prior to their criminal trials because he would invoke his Fifth Amendment rights conveyed precisely the *opposite* impression – that petitioners could *not* rely on what they knew of Rothenberger's role as legal counselor because he perceived himself to be in legal jeopardy. Accordingly, if petitioners had been prosecuted in the Ninth Circuit, the Government would not have been free to suppress the Rothenberger interview notes.[3]

The same is true of the D.C. and Tenth Circuits. *See Levin v. Katzenbach*, 363 F.2d 287, 291 (D.C. Cir.

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[2] State courts have done the same. *See* Pet. 19 n.27.

[3] In citing *United States v. Bond*, 552 F.3d 1092, 1095 (9th Cir. 2009), the Government relies on what the Ninth Circuit itself referred to as "dictum." *Id.* at 1095. Moreover, the defendant in that case knew what the witness would say, because "both sides had access to [his] public testimony." *Id.* at 1096 n.3.

1966) (per curiam) (holding that breach of duty to disclose "may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own"). Indeed, the Tenth Circuit has held that "the fact that defense counsel 'knew or should have known' about [exculpatory] information . . . is irrelevant to whether the prosecution had an obligation to disclose." *Banks v. Reynolds*, 54 F.3d 1508, 1517 (10th Cir. 1995) (also stating that what defendant "knew or should have known" will "bear on whether there has been a *Brady* violation"). And the Government does not dispute that the Tenth Circuit more recently has "applie[d] a knowledge standard for *Brady* suppression." Pet. 18 (citing *Scott v. Mullin*, 303 F.3d 1222, 1229-30 (10th Cir. 2002) ("It is not a petitioner's responsibility to uncover suppressed evidence.")).[4] Thus, the conflict with the judgment below is well-developed and ripe for review.[5]

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[4] The South Dakota Supreme Court's divergent views on the question, *see* Opp. 11 n.2, confirm the lower courts' inconsistent approaches to determining when the Government may suppress evidence.

[5] The need for review is compounded by the additional conflict between the "should have known" and "reasonable diligence" standards in cases like this one involving witness statements. *See* Pet. 16-17. Unlike the "typical reasonable diligence case" involving a "document" – which is physical evidence that often can be discovered with some amount of diligence – "material contained in a witness's head" may be "nearly impossible for defense counsel to discover," no matter how diligent the effort or how friendly the witness. *Boss*, 263 F.3d at 740-41; *see also Strickler v. Greene*, 527 U.S. 263, 285 n.27 (1999) (excusing defense's failure to discover notes from witness "because she refused to speak with defense counsel before trial"). The "reasonable diligence" standard recognizes that distinction; not all

2. Evidence possessed by another agency

The circuits also diverge on whether prosecutors may suppress evidence in the sole possession of another agency. *See* Pet. 20-21. The Government does not dispute that "most circuits reject" the "possession" standard applied by the Second Circuit below. Pet. 20 (citing cases). Nor does the Government contest that the "possession" standard is inconsistent with this Court's precedents.[6] Instead, the Government asserts (at 15) that no "direct" conflict exists between circuits that apply the narrow "prosecution team" test and circuits that consider whether "'a government agency is charged with the administration of a statute and has *consulted* with the prosecution in the case.'" Pet. 20 (quoting *United States v. Bhutani*, 175 F.3d 572, 577 (7th Cir. 1999) (emphasis added)).

In fact, a direct conflict exists between the Seventh and Ninth Circuits' test, which imputes to the prosecution the knowledge of agencies with which prosecutors consulted, *see Bhutani*, 175 F.3d at 577; *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995),[7] and the "prosecution team" test, which (at least in some circuits) only imputes to the prosecution the

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courts applying the "should have known" standard do. *See* Pet. 17.

[6] Instead, the Government claims incorrectly that the decision below is consistent with *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), because the Second Circuit's judgment stemmed from "the relationship between the [U.S. Attorney's Office and the SEC]." Opp. 14. The Second Circuit's judgment rested solely on the fact that "the United States Attorney's Office was *not in possession* of notes from SEC interviews with Rothenberger or other witnesses, and *did not have an obligation to disclose what they did not possess*." Pet. App. 32a (emphases added).

[7] The Government incorrectly claims (at 15) that *Bhutani* and *Wood* applied the "prosecution team" test.

knowledge of those "over whom [the prosecutor] has authority," *Moon v. Head*, 285 F.3d 1301, 1309 (11th Cir. 2002). For example, in *United States v. Reyes*, 577 F.3d 1069 (9th Cir. 2009), the Ninth Circuit held that the prosecution "is charged with knowledge of [a] parallel SEC investigation." *Id.* at 1078. By contrast, the Government admitted below that "the SEC conducted a parallel civil enforcement investigation," Gov't CA Br. 134 (Nov. 19, 2008), yet the Second Circuit found no duty to disclose. Moreover, the Government produced to petitioners, before trial, various materials from the SEC, including transcripts of sworn testimony from the SEC investigation of several Deloitte auditors. *See* Pet. 7. The prosecution's possession of such documents confirms that, as in *Reyes*, it had "forged a strong, cooperative relationship [with the SEC] in pursuing civil and criminal punishment." 577 F.3d at 1078.[8] Yet the Government continues to suppress potentially exculpatory material from the SEC investigation that it claims not to possess.

B. This Case Is A Good Vehicle For Deciding The Question Presented

The Government claims this case is a poor vehicle for addressing the question presented because: (1) petitioners supposedly knew to what matters Rothenberger could testify, (2) petitioners identify no

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[8] *See also* SEC Press Release, "SEC and U.S. Attorney Settle Massive Financial Fraud Case Against Adelphia and Rigas Family for $715 Million" (Apr. 25, 2005) (announcing that SEC and U.S. Attorney's Office "reached an agreement to settle a civil enforcement action and resolve criminal charges against Adelphia Communications Corporation, its founder John J. Rigas, and his three sons"), *available at* http://www.sec.gov/news/press/2005-63.htm.

material information in the suppressed evidence, and (3) the Government does not consider the suppressed evidence exculpatory. Each argument fails.

First, nothing in the record supports the claim that petitioners "knew . . . the facts about which [Rothenberger] could testify." Pet. App. 31a; *see* Pet. 24-25. The district court, the Second Circuit, and the Government – despite having yet another opportunity to present such evidence – cite nothing. Moreover, the Government's claim that petitioners "do not dispute that they had firsthand knowledge of [Rothenberger's] role in the underlying events" (Opp. 11 (internal quotation marks omitted; alteration in original)) is off-point. Petitioners' knowledge of Rothenberger's "identity and 'role' as outside counsel to Adelphia" does not translate into knowledge of testimony that Rothenberger refused to reveal to petitioners while conveying his own perception of legal jeopardy. Pet. 24. Unlike the Government, which interviewed Rothenberger, petitioners had no way of knowing the crucial information in Rothenberger's head.[9]

Second, while faulting petitioners for not identifying exculpatory evidence in the Rothenberger notes – a burden no defendant can meet when, as here, those materials are suppressed – the Government refuses to permit even *in camera* review by a court. If the notes are as benign as the Government claims, then

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[9] The Government seeks to evade review by suggesting (at 12) that the "case-specific" question whether a district court's plain error regarding petitioners' knowledge is not a "legal issue of recurring significance" warranting review. But the district court's plain error serves as the only basis for affirming the judgment below under the flawed and conflicting "should have known" standard. It would be manifestly unjust if courts could deepen circuit conflicts but evade review through plainly erroneous fact-findings.

the Government has no basis for suppression or denying *in camera* review.[10]

Third, the Government assures the Court that the prosecution and the SEC have reviewed the Rothenberger notes and SEC materials and found nothing exculpatory. *See* Opp. 13, 16. That argument strips *Brady* of any meaning; if the Government's say-so were enough, then *Brady* protections would be unnecessary. Moreover, if the SEC was as removed from the prosecution's investigation as the Government claims (at 14), then its reliability in recognizing exculpatory evidence is questionable.[11]

II. THE LOSS-CAUSATION ISSUE IN FEDERAL SENTENCING WARRANTS REVIEW

The lower courts vastly increased petitioners' sentences based on unfounded assumptions. Ignoring petitioners' unrebutted expert testimony, the courts below relied on "immediate press reaction" and the sheer "scope" of "the numbers" to assume causation and estimate the loss amount. *See* Pet. 29, 30-34.

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[10] Although Adelphia's *civil* counsel deposed Rothenberger more than a year after his government interview, those depositions focused on Adelphia's claims against Deloitte, not petitioners' *Brady* claims. Moreover, notwithstanding that Rothenberger's memory of the interviews undoubtedly had diminished in the interim, he recalled enough to suggest that the Government's pre-trial interview notes would have undermined the Government's criminal case or assisted petitioners during sentencing. *See* Pet. 9-10.

[11] Because the prosecution produced countless witness statements and SEC materials, the production of limited information from Rothenberger regarding the so-called "timber rights transaction" led petitioners at that time to believe that the prosecution had no other potentially exculpatory Rothenberger evidence. *Compare* Pet. 25 n.33 *with* Opp. 12 n.3.

More is required for such dramatic sentencing enhancements.

The Government concedes the circuit conflict on how to evaluate causation under the U.S. Sentencing Guidelines without addressing the numerous flaws in the lower courts' causation analysis or the importance or recurring nature of this legal question. Instead, the Government unpersuasively (1) argues that the decision below is consistent with decisions from some other circuits, (2) attempts to prop up the Second Circuit's analysis, and (3) suggests that the U.S. Sentencing Commission (not this Court) should resolve the conflict.

A. The Government Acknowledges The Circuit Conflict In Applying *Dura Pharmaceuticals*' Causation Principles To Sentencing

A well-entrenched circuit split exists among the three largest circuits on whether *Dura*'s causation principles apply to loss causation in securities fraud cases. *See* Pet. 28-29. The Government does not dispute that the Fifth Circuit unequivocally applies *Dura*, the Ninth Circuit unequivocally rejects *Dura*, and the Second Circuit has waffled on whether *Dura* applies. *See* Pet. 29. Nor does the Government dispute that the Eighth and Tenth Circuits have split on the closely analogous question whether *Dura*'s causation principles apply to sentencing enhancements in insider-trading cases. *See* Pet. 30. Indeed, the Government does not even dispute that *Dura*'s causation principles *should* apply to sentence enhancements.

Instead, the Government incorrectly opposes review with the assertion that the decision below is consistent with *United States v. Rutkoske*, 506 F.3d

170 (2d Cir. 2007), and *United States v. Olis*, 429 F.3d 540 (5th Cir. 2005). If the Second Circuit's analysis had followed *Rutkoske* or *Olis*, it could not have affirmed petitioners' sentences. Those cases applied *Dura*'s loss-causation principles and recognized the importance of expert testimony and accounting for other loss-causing factors. The Second Circuit here ignored the only expert testimony in the record and simply assumed that all Adelphia shareholder losses over a three-month period were attributable to unspecified offense conduct by petitioners. *Compare* Pet. 30-34 *and* Pet. App. 18a-20a, 44a-45a, *with Rutkoske*, 506 F.3d at 179-80 (remanding for re-sentencing because of district court failure to consider other factors in share price decline), *and Olis*, 429 F.3d at 547-49 (remanding for re-sentencing because district court refused to consider expert report identifying other factors for loss). Contrary to the Government's claim, the Second Circuit's analysis here cannot be reconciled with *Rutkoske* or *Olis*.

B. The Second Circuit Erroneously Enhanced Petitioners' Sentences

The Government gamely attempts to rehabilitate the lower courts' analysis of loss causation, which primarily relied on the "immediate press reaction" to Adelphia's March 27, 2002 disclosures. *See* Opp. 17-18; Pet. App. 44a. However, like the courts below, the Government ignores petitioners' arguments and does not address the missing causal link between specific offense conduct and loss, expert testimony regarding other loss-causing factors, and contrary "press reaction" that minimized the importance of the co-borrowing arrangements. *See* Pet. 30-34.

The Government generously characterizes the courts below as having "traced the loss" to petitioners'

fraud. Opp. 17. In reality, the lower courts did no such thing. Rather, they estimated a ball-park total loss for all Adelphia shareholders over a three-month period, presumed that petitioners must have caused at least $100 million of that loss,[12] and ignored contrary evidence. *See* Pet. 30-34. They gave no indication of having "*considered* petitioners' expert testimony," as the Government claims (at 18 (emphasis added)). The Second Circuit ignored petitioners' expert testimony altogether, and the district court did not address or respond to that testimony, but simply dismissed it as "frivolous" and "meritless." Pet. App. 44a-45a.

C. This Court Should Resolve The Conflict

Finally, the Government argues that, under *Braxton v. United States*, 500 U.S. 344 (1991), the U.S. Sentencing Commission, not this Court, should resolve causation issues under the Sentencing Guidelines. *See* Opp. 20. That request ignores the seismic shift in sentencing law that occurred after *Braxton* – namely, the now-advisory role of the Guidelines.

In *Braxton*, this Court declined to "resolve the . . . question presented" because the U.S. Sentencing Commission had "undertaken a proceeding that *will eliminate circuit conflict*" on the issue presented. 500 U.S. at 348-49 (emphasis added). Now that the Sentencing Guidelines are "effectively advisory," *United States v. Booker*, 543 U.S. 220, 245 (2005), and courts need give them only "respectful consideration," *Kimbrough v. United States*, 552 U.S. 85, 101 (2007), the Sentencing Commission lacks the power now to issue

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[12] For example, the Second Circuit simply assumed, without citing evidence, that petitioners were responsible for a loss of $0.50 per share. *See* Pet. App. 20a.

Guidelines revisions that can resolve circuit conflicts. The Sentencing Commission certainly cannot require district courts to evaluate evidence of loss, as the court below failed to do. Moreover, because the question here implicates the constitutional concern of sentencing enhancement without jury findings, the Sentencing Commission's guidance could not be definitive. *Cf. Booker*, 543 U.S. at 226.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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