No. 22-186

IN THE
Supreme Court of the United States

TROY MANSFIELD,
Petitioner,

v.

WILLIAMSON COUNTY, TEXAS,
Respondent.

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

BRIEF OF GOV. TOM CORBETT, JOSÉ GARZA, AND H. JOSEPH PINTO III AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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September 29, 2022

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, Gov. Tom Corbett, José Garza, and H. Joseph Pinto III, are current and former state and federal prosecutors. Governor Tom Corbett is the former Governor and Attorney General of the Commonwealth of Pennsylvania. He also previously served as the United States Attorney for the Western District of Pennsylvania. José Garza is the District Attorney for Travis County, Texas (which is adjacent to Williamson County). He was elected in 2020 after serving as a federal public defender in the Western District of Texas and Deputy General Counsel for the House Committee on Education and Labor. H. Joseph Pinto III is a former Assistant United States Attorney for the Western District of Kentucky. He previously served as a trial attorney in the Antitrust Division of the Department of Justice. *Amici* join this brief solely in their individual capacities and not as representatives of their employers or former employers.

Amici have a range of political views. *Amici* are unanimous, however, in their view that factually innocent defendants should not be imprisoned on the grounds that they decided to accept a plea bargain while the government had undisclosed exculpatory evidence in its possession. *Amici* also believe that a consistent rule would give prosecutorial teams

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* also represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date and that the parties have consented to the filing of this brief.

necessary guidance on when their duty to disclose exculpatory evidence begins.

Accordingly, *amici* submit this brief to urge the Court to grant certiorari.

SUMMARY OF ARGUMENT

"[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). With 97% of federal convictions and 94% of state convictions coming as a result of guilty pleas, *see id.*, it is more important than ever for principles of fundamental fairness and due process to apply at the plea-bargaining stage. This case, in which the court of appeals held that prosecutors may withhold exculpatory evidence at the plea-bargaining stage, presents an issue of profound importance for our criminal justice system that merits this Court's review.

First, withholding exculpatory evidence at the plea-bargaining stage transgresses fundamental notions of due process and would render the right this Court articulated in *Brady v. Maryland*, 373 U.S. 83 (1963), a dead letter. For millennia, from Aristotle to Blackstone to the present, the foundations of our justice system have recognized that it is crucial to avoid punishing the innocent. This Court's decision in *Brady* reaffirmed that concept. *See id.* at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of . . . justice suffers when any accused is treated unfairly."). But in many jurisdictions, only a few percent of criminal defendants—those who go to trial—are afforded the protection guaranteed by *Brady*. If *Brady* is to mean anything, it must apply at the plea-bargaining stage.

Second, jurisdictions throughout the Nation have long been deeply split over this question, with the

decision below further entrenching the divide. Whether a criminal defendant is entitled to receive exculpatory materials at the plea-bargaining stage varies from State to State, from federal district court to federal district court, and from circuit to circuit—and, indeed, sometimes within those different jurisdictions even at a single location. That split requires this Court's intervention. It also demonstrates the error of the decision below: contrary to the policy concerns frequently cited to justify the outcome the lower court reached, requiring disclosure of exculpatory materials at the plea-bargaining stage does not interfere with the operation of the plea-bargaining system, as decades of experience in jurisdictions throughout the Nation have demonstrated.

Third, this Court's intervention on the important question presented by this case can help ensure the integrity of the American justice system and help promote public trust in prosecutors' offices.

The petition for certiorari should be granted to address this important issue.

ARGUMENT

I. The Decision Below Conflicts with Fundamental Notions of Due Process and Would Render *Brady* a Dead Letter

This case warrants this Court's review because the Fifth Circuit's erroneous decision conflicts with some of the deepest-rooted fundamental principles of justice in our legal system. In a just system, no innocent person should be imprisoned for a crime they did not commit. Nor should the innocent be bluffed into an unwarranted plea deal simply because the other side holds all the leverage and withholds critical information that it would otherwise ultimately be required to provide to the defendant.

A. Withholding Exculpatory Evidence Presents an Unacceptable Risk of Punishing the Innocent and Therefore Violates Due Process

1. Ensuring that the innocent are not convicted is a fundamental tenet of our justice system

Due process protects those "principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). Among the most fundamental principles of our criminal justice system is the principle that innocent persons should not be wrongfully convicted. Withholding exculpatory evidence from a criminal defendant before accepting a guilty plea, however, poses an unacceptably high risk of violating that critical tenet of our justice system. The decision below warrants this Court's review because—as its own author observed—it will conflict with deep-seated principles of justice. *See* App. 11a-12a (Higginbotham, J., concurring) ("[w]e must bring exculpatory evidence within the reach of *Brady* and refuse to sanction lying by prosecutors to avoid *Brady* obligations").

Here, the practice of withholding exculpatory evidence from criminal defendants at the plea-bargaining stage violates the fundamental principle that we must not, in our zeal to convict the guilty or our desire for efficient prosecution, likewise condemn the innocent. The "teachings of history" and "the basic values that underlie our society," *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality), unambiguously establish this central principle. It dates back thousands of years and is deeply rooted in the religious and secular foundations that underlie

Western civilization generally and our criminal justice system specifically.[2]

In Judeo-Christian religious tradition, the principle of not punishing the innocent pre-dates even the Ten Commandments. In the Book of Genesis, for example, after God announced his plan to destroy the city of Sodom, Abraham objected: "Will you sweep away the righteous with the wicked? . . . Far be it from you to do such a thing—to kill the righteous with the wicked."[3] God confirmed that he would spare the city if even just 10 righteous persons could be found there.[4] And though fewer than 10 could be found, God still waited to destroy Sodom until Lot, the last righteous man in the city, could escape with his family.[5] Reflecting on this story in the twelfth century A.D., the great Jewish philosopher Maimonides would say that "'[i]t is better and more satisfactory to acquit a thousand guilty persons than to put a single innocent man to death once.'"[6]

Secular history bears out the same fundamental principle. Writing in the fourth century B.C., Aristotle said that "'[e]very one of us would rather acquit a guilty man as innocent than condemn an innocent

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[2] Many of the examples below come from Alexander Volokh, *n Guilty Men*, 146 U. Pa. L. Rev. 173 (1997). Professor Volokh's article provides a valuable and entertaining overview of this principle from ancient times through the present.

[3] *Genesis* 18:23, 25.

[4] *Genesis* 18:32.

[5] *Genesis* 19:12-22.

[6] Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 Harv. L. Rev. 1065, 1077 (2015) (quoting 2 Moses Maimonides, *The Commandments* 270 (Charles B. Chavel ed. & trans., Soncino Press 1967)).

man as guilty . . . . For when there is any doubt one should choose the lesser of two errors.'"[7]

The Romans adopted this wisdom from the Greeks. Emperor Trajan wrote in the first century A.D. that "'it was better to let the crime of a guilty person go unpunished than to condemn the innocent.'" *Coffin v. United States*, 156 U.S. 432, 454 (1895) (quoting Dig. L. 48, tit. 19, l. 5). And, nearly 500 years later, the Byzantine Roman Emperor Justinian I echoed that principle in multiple of the foundational works of the civil-law tradition.[8]

This principle flowed from religious and civil-law traditions into the English common law. English Chief Justice John Fortescue wrote in 1471 that he "would rather wish twenty evil doers to escape death through pity than one man to be unjustly condemned."[9] Lord Hale wrote in 1678 that "'it is better five guilty persons should escape unpunished than one innocent person should die.'" *Coffin*, 156 U.S. at 456 (quoting 2 Matthew Hale, *Pleas of the Crown* 290). And Blackstone concurred in 1769:

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[7] *Id.* (quoting 2 Aristotle, *Problems* bk. XXIX at 145 (W.S. Hett trans., Harvard Univ. Press rev. ed. 1957), *available at* https://archive.org/details/problems02arisuoft/page/n3/mode/2up).

[8] *See* 4 *The Digest of Justinian* 360 (Alan Watson ed., Univ. of Penn. Press 1985) ("[I]t was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned."); *Code of Justinian: Book 1 – Concerning the Composition of a New Code* 436 (Fred H. Blume et al. trans.) (declaring that it is no "matter of small importance to rashly condemn an innocent party"), *available at* https://uwdigital.uwyo.edu/islandora/object/wyu%3A14972#page/436/mode/2up.

[9] John Fortescue, *A Learned Commendation of the Politique Lawes of Englande* 63 (Robert Mulcaster trans., 1969) (1567).

"[T]he law holds, that it is better that ten guilty persons escape, than that one innocent suffer."[10]

The English colonists brought this aversion to punishing the innocent with them to America. Thus, even during the Salem witch trials in 1692, the Rev. Increase Mather, who was then the president of Harvard College, stated that it "were better that ten suspected witches should escape, than that one innocent person should be condemned."[11]

The Founders likewise knew and respected this principle. John Adams invoked it in his defense of the British soldiers charged with committing the Boston Massacre: "We are to look upon it as more beneficial, that many guilty persons should escape unpunished, than one innocent person should suffer. The reason is, because it's of more importance to community, that innocence should be protected, than it is, that guilt should be punished."[12] And Benjamin Franklin similarly wrote in 1785: "That it is better 100 guilty Persons should escape, than that one innocent Person should suffer, is a Maxim that has been long & generally approv'd."[13]

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[10] 4 William Blackstone, *Commentaries on the Laws of England* 352 (1769), *available at* https://archive.org/details/lawsofenglandc04blacuoft/mode/2up.

[11] Increase Mather, *Cases of Conscience Concerning Evil Spirits Personating Men, Witchcrafts, Infallible Proofs of Guilt in Such as Are Accused with That Crime* 66-67 (1693) (capitalization modernized), *available at* https://salem.lib.virginia.edu/speccol/mather/mather.html.

[12] Adams' Argument for the Defense (Dec. 3-4, 1770), *available at* https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016.

[13] Letter from B. Franklin to B. Vaughan (Mar. 14, 1785), *available at* https://founders.archives.gov/documents/Franklin/01-43-02-0335.

After the Founding, this Court recognized that the fundamental principle of avoiding punishing the innocent is intimately connected to criminal due process. For example, it forms the basis for the presumption of innocence and the beyond-a-reasonable-doubt standard. *See Coffin*, 156 U.S. at 453-54. Modern polling shows that a strong majority of Americans across the political spectrum continue to agree that it is worse to imprison the innocent than to let the guilty go free.[14]

This central principle also underlies *Brady* rights. As the Court explained in *Brady v. Maryland*, 373 U.S. 83 (1963), withholding evidence that "would tend to exculpate"—*i.e.*, show the innocence of—the accused "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* at 87-88. This is because "our system of . . . justice suffers when any accused is treated unfairly." *Id.* at 87.

2. The fundamental interests underlying *Brady* rights are fully present at the plea-bargaining stage

Withholding exculpatory evidence during plea bargaining prioritizes obtaining convictions over ensuring that the innocent are not unjustly punished. This risk is not just theoretical. Deprived of exculpatory evidence, and threatened with ruinous alternatives, many innocent persons have in fact accepted guilty pleas. "[T]he recent wave of DNA exonerations has revealed many guilty-plea convic-

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[14] *See* Emily Ekins, Cato Inst., *Policing in America: Understanding Public Attitudes toward the Police. Results from a National Survey* 6, 59-60 (Dec. 7, 2016), https://www.cato.org/sites/cato.org/files/survey-reports/pdf/policing-in-america-august-1-2017.pdf.

tions of defendants who are factually innocent."[15] Approximately "15% of known exonerees pled guilty," including roughly half of those exonerated of manslaughter, two-thirds of those exonerated of drug crimes, and four-fifths of those exonerated of sex offender registration violations.[16] That overall ratio has been roughly the same in the most recent years for which data were available.[17] And for certain crimes in some jurisdictions, the ratio can be substantially higher: for example, from 2014-2015 there were "71 drug exonerations in Harris County (Houston), Texas, and the defendants pled guilty in *every one of them*."[18]

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[15] Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 Wm. & Mary L. Rev. 1055, 1059-60 (2016).

[16] Nat'l Registry of Exonerations, *Innocents Who Plead Guilty* 1 (Nov. 24, 2015) ("NER, *Innocents Who Plead Guilty*"), https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf. This fraction is most likely an undercount of innocent defendants who enter guilty pleas, because "innocent defendants who plead guilty almost always get lighter sentences than those who are convicted at trial – that's *why* they plead guilty – so there is less incentive to pursue exoneration." *Id.*

[17] For example, false confessions were involved in roughly 17% (24/143) of exonerations in 2019, 10% (13/129) in 2020, and 12% (19/161) in 2021. *See* Nat'l Registry of Exonerations, *Annual Report* 2 (Mar. 31, 2020), https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2019.pdf; Nat'l Registry of Exonerations, *Annual Report* 2 (Mar. 30, 2021), https://www.law.umich.edu/special/exoneration/Documents/2021AnnualReport.pdf; Nat'l Registry of Exonerations, *2021 Annual Report* 4 (Apr. 12, 2022), https://www.law.umich.edu/special/exoneration/Documents/NRE%20Annual%20Report%202021.pdf.

[18] NER, *Innocents Who Plead Guilty* at 2 (emphasis added).

Indeed, at the plea-bargaining stage, the effect of withholding exculpatory evidence can be particularly acute. Overstating the strength of the prosecution's case in connection with plea bargaining "is likely to work particularly well against innocent defendants, who are on average more risk averse than guilty defendants."[19] Without a rule expressly requiring disclosure of *Brady* material at the plea-bargaining stage, that overstatement can happen even *despite* diligent efforts by the prosecutor to make those disclosures.[20]

B. The *Brady* Right Is Largely a Dead Letter Unless It Applies at the Plea-Bargaining Stage

The dispensation of a criminal case by plea bargaining is not a new idea. Although "a full-dress criminal trial" has long been considered "the exorbitant gold standard of American justice," *Lafler v. Cooper*, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting), the plea bargain has for (at least) eight decades been the most prevalent way by which criminal cases are decided—in both federal and state courts. In 1945, more than 85% of federal convictions were

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[19] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2495 (2004).

[20] For example, "no one doubts that police investigators sometimes fail to inform a prosecutor of all they know." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). A prosecutor might turn over what she believes to be all exculpatory evidence at the plea-bargaining stage, but investigators may have withheld other exculpatory evidence from the prosecutor herself because they are not compelled to turn it over until trial. An express rule requiring earlier disclosure of those materials would force investigators to provide that evidence to prosecutors earlier, or else risk being responsible for a conviction being overturned on appeal.

obtained through guilty pleas.[21] That number has grown steadily since, such that in recent decades roughly 97% of federal felony convictions have come through guilty pleas.[22] State courts are comparable.[23] And in the Nation's 75 largest counties, 98% of felony convictions have been obtained through plea bargains.[24] Plea bargaining is now (and has long been) the norm.[25]

As a result, if *Brady* rights do not attach at the plea-bargaining stage, then they will not exist for the vast majority of criminal defendants—in some jurisdictions, virtually all of them. That would be inconsistent with fundamental notions of justice as described above.[26]

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[21] *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics – 2003*, at 423 (2005), https://www.ojp.gov/pdffiles1/Digitization/208756NCJRS.pdf.

[22] *See The Truth About Trials*, The Marshall Project (updated Nov. 4, 2020), https://themarshallproject.org/2020/11/04/the-truth-about-trials.

[23] *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Sentences in State Courts, 2006 – Statistical Tables* 25 (Dec. 2009; rev. Nov. 22, 2010) (94% of state felony convictions in 2006 obtained through guilty pleas), https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf.

[24] *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables* 24 tbl. 21 (Dec. 2013), https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf.

[25] *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 Calif. L. Rev. 1117, 1137-38 (2011).

[26] As this Court has recognized: "To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing

Due process exists "to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). And plea bargains should maintain the same sense of fundamental fairness that trials ensure. *Cf. Frye*, 566 U.S. at 144 (recognizing that criminal defendant is entitled to assistance of counsel at plea-bargaining stage).

C. This Case Warrants Review Because It Conflicts with These Fundamental Principles

The holding below is inconsistent with these fundamental principles of justice. Allowing prosecutors to skirt a due process right simply to obtain a conviction flies in the face of the notions of fundamental fairness that are central to our justice system. *See Brady*, 373 U.S. at 87 ("our system of . . . justice suffers when any accused is treated unfairly").

This case provides a stark example of how unfair treatment of the accused can offend fundamental notions of due process and result in unjust punishment of the innocent. Petitioner pleaded guilty to "one of the most heinous crimes—sexual misconduct with a child—without knowing that the victim had told prosecutors that 'nothing happened.'" App. 13a (Costa, J., specially concurring). The prosecutors were under a *Brady* order and, despite knowing that they would have to disclose the evidence, lied to petitioner. App. 11a (Higginbotham, J., concurring). As this Court has recognized, "there are situations in which evidence is obviously of such substantial value

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means that a plea agreement can benefit both parties." *Missouri v. Frye*, 566 U.S. 134, 144 (2012). But even the most well-intentioned pursuit of efficiency cannot override fundamental due process protections.

to the defense that elementary fairness requires it to be disclosed even without a specific request." *United States v. Agurs*, 427 U.S. 97, 110 (1976). As the author of the decision below expressly recognized, the court of appeals' decision in this case represents a "signal flaw in the jurisprudence of plea bargaining" that "[o]nly the Supreme Court can fully address." App. 12a (Higginbotham, J., concurring).

II. This Court's Review Is Warranted To Resolve Important Conflicts Between Jurisdictions

The decision below deepens a significant conflict between jurisdictions, including the federal courts of appeals and state courts—with conflicts sometimes arising even in the same State. *See* App. 12a n.9 (Higginbotham, J., concurring) (describing circuit split). This case in particular demonstrates the conflict: the Fifth Circuit held that there is no *Brady* right at the plea-bargaining stage, yet Texas law provides that there is one—so a Texas criminal defendant's rights will differ significantly if charges are brought in state court or federal district court, and may even differ depending on *which* federal district in Texas hears the case.[27] As Judge Higginbotham noted below, "[t]he cold reality is that

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[27] In the Western District of Texas, for example, local rules provide that *Brady* material must be disclosed within 14 days of arraignment, *see* W.D. Tex. Crim. R. 16(b)(1)(C)(i)—even though the court below held that no such right exists throughout the broader Fifth Circuit. This anomaly is not limited to the Fifth Circuit. For example, the First Circuit has held that *Brady* rights do not attach at the plea-bargaining stage. *See United States v. Mathur*, 624 F.3d 498, 506-07 (1st Cir. 2010). But at least one district court within that circuit has local rules that require such disclosure within 28 days of arraignment. *See* D. Mass. Crim. R. 116.2(b).

the want of certitude shadows the federal criminal dockets across the country." App. 13a (Higginbotham, J., concurring); *see also* App. 15a (Costa, J., specially concurring) ("[W]hat is not tenable is affording defendants in many jurisdictions a constitutional right to exculpatory evidence before they are deprived of their liberty while those in [the Fifth] [C]ircuit do not enjoy the same protection.").

Many jurisdictions across the Nation already require prosecutors to disclose exculpatory evidence at the plea-bargaining stage, including jurisdictions in which one *amicus*, Mr. Garza, has served as a prosecutor. By 2004, 30 of the 94 federal district courts had a local rule governing the disclosure of *Brady* materials, and many of those districts required *Brady* disclosure within 28 days of arraignment or sooner.[28] Several States also require prosecutors to hand over exculpatory evidence at the plea-bargaining stage. *See*, *e.g.*, *Buffey v. Ballard*, 782 S.E.2d 204, 216 (W. Va. 2015) ("[A] defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage."); *State v. Huebler*, 275 P.3d 91, 96-98 (Nev. 2012); *Medel v. State*, 184 P.3d 1226, 1234 (Utah 2008) ("Surely, if there is any evidence suggesting factual innocence—even if it is impeach-

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[28] *See* Laural L. Hooper, Jennifer E. Marsh & Brian Yeh, *Treatment of* Brady v. Maryland *Material in United States District and State Courts' Rules, Orders, and Policies*, Report to the Advisory Committee on Criminal Rules of the Judicial Conference of the United States, tbl. 2 (Oct. 2004), https://www.uscourts.gov/sites/default/files/bradymat_1.pdf.

In *amici*'s experience, plea bargains ordinarily occur much closer to trial and much later than 28 days after arraignment. As a result, such deadlines for disclosing *Brady* material have the practical effect of extending *Brady*'s protection to the plea-bargaining stage.

ment evidence—the prosecution will always have a constitutional obligation to disclose that evidence to the defendant before plea bargaining begins."); *State v. Hill*, 630 S.E.2d 274, 279 (S.C. 2006); *State v. Parsons*, 775 A.2d 576, 579-80 (N.J. Super. Ct. App. Div. 2001); *State v. Sturgeon*, 605 N.W.2d 589, 593-94 (Wis. Ct. App. 1999); *Carroll v. State*, 474 S.E.2d 737, 739 (Ga. Ct. App. 1996); *State v. Gardner*, 885 P.2d 1144, 1149-50 (Idaho Ct. App. 1994); *State v. Davis*, 823 S.W.2d 217, 219-20 (Tenn. Crim. App. 1991); *Ex parte Lewis*, 587 S.W.2d 697, 701 (Tex. Crim. App. 1979) ("[T]he prosecutor's duty to disclose favorable information (whether relating to the issue of competence, guilt, or punishment) extends to defendants who plead guilty as well as to those who plead not guilty."). Others have rules of criminal procedure that explicitly require prosecutors to hand over exculpatory evidence in early stages, albeit without necessarily making specific reference to plea bargaining. *See*, *e.g.*, Alaska R. Crim. P. 16(b)(3); Fla. R. Crim. P. 3.220(b); Minn. R. Crim. P. 9.01, subd. 1(6); N.J. Ct. R. 3:13-3(a), (b); Tex. Code Crim. Proc. Ann. art. 39.14(a), (h).[29]

Texas's law is illustrative. In 2014, in response to flagrant prosecutorial misconduct by the Williamson County District Attorney (the same one who prosecuted petitioner), the State amended its rules of criminal procedure with the "Michael Morton Act."[30]

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[29] Many of these States have enacted so-called "open-file" policies under which the prosecution must provide the defense with everything in its file without regard to the materiality of the evidence. These examples are illustrative and do not represent all state laws requiring the disclosure of exculpatory evidence.

[30] *See* Daniele Selby, *Only One Prosecutor Has Ever Been Jailed for Misconduct Leading to a Wrongful Conviction*, The

Like other "open-file" policies, Texas's rule requires that, upon request of the defendant, the State must provide "any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers." Tex. Code Crim. Proc. Ann. art. 39.14(a).

Other sources of authority, including ethical rules, may require that prosecutors disclose exculpatory evidence at these early stages. For example, Rule 3.8(d) of the Model Rules of Professional Conduct imposes an ethical obligation on prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Every State and the District of Columbia has adopted this rule.[31] Depending on how those ethical rules are interpreted, disclosure may have to occur before the plea-bargaining stage in order to be "timely."[32]

Innocence Project (Nov. 11, 2020), https://innocenceproject.org/ken-anderson-michael-morton-prosecutorial-misconduct-jail/.

[31] *See* Marc Allen, *Non*-Brady *Legal and Ethical Obligations on Prosecutors to Disclose Exculpatory Evidence*, Nat'l Registry of Exonerations at 5-7 tbl. 1 (July 2018), https://www.law.umich.edu/special/exoneration/Documents/NRE_Exculpatory_Evidence_Obligations_for_Prosecutors.pdf.

[32] The American Bar Association ("ABA") has clarified that, in certain other respects, this ethical rule is "more demanding than the constitutional case law." ABA Standing Comm. on Ethics & Prof'l Resp., Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense, Formal Opinion 09-454, at 4 (July 8, 2009), *available at* https://legaltimes.typepad.com/files/aba_opinion.pdf. But it has not expressly addressed whether the "timel[iness]" requirement in the ethical rule is intended to be more demanding than or merely equal to the constitutional minimum.

These jurisdictions stand in conflict with those, including the Fifth Circuit in the decision below, that have held that no *Brady* disclosures are required at the plea-bargaining stage. This Court's review is warranted to address this deep and important conflict.

Notably, the mere existence of this conflict negates many of the arguments in favor of the Fifth Circuit's decision below. For example, the concurrence in a recent en banc decision by the Fifth Circuit (which the court below held foreclosed petitioner's claim) worried that extending the *Brady* right to the plea-bargaining stage would somehow cause prosecutors to offer less favorable deals or simply stop offering deals altogether. *See Alvarez v. City of Brownsville*, 904 F.3d 382, 401 (5th Cir. 2018) (en banc) (Ho, J., concurring). But for decades, various jurisdictions have recognized and implemented a pre-plea right to exculpatory evidence. None has had any problem doing so. Pleas have not stopped in the many jurisdictions described above that have recognized a right to pre-plea disclosure of *Brady* material—including jurisdictions in which certain *amici* have worked as prosecutors. Indeed, one commentator has suggested that open discovery rules *increase* the speed and efficiency of the plea-bargaining process.[33]

That is consistent with *amici*'s own experience as prosecutors. Should this Court require as a uniform nationwide rule that prosecutors disclose *Brady* material at or before the plea-bargaining stage, we see no credible reason to think that the rule would be

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[33] *See* Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 Brook. L. Rev. 1329, 1383 (2012).

unworkable. No serious practical impediments stand in the way of this Court's review.

III. Requiring That Prosecutors Disclose Exculpatory Evidence at the Plea-Bargaining Stage Will Promote Desirable Results

A. This Requirement Acts as a Check on the Government's Power in Plea Bargaining, Which Is Otherwise Largely Unrestrained

Requiring prosecutors to disclose exculpatory evidence at the plea-bargaining stage would act as a check on the government's power in plea bargaining, which is otherwise largely unrestrained. Plea bargaining is largely unsupervised and generally involves only the prosecutor and the defendant—no jury or judge determines the truth or fairness of plea bargaining as it is ongoing. Indeed, as some commentators have noted, most plea bargains are reached "between attorneys familiar with only the basics of the case, with no witnesses present, leading to a proposed resolution that is then 'sold' to both the defendant and the judge."[34]

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[34] Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1911-12 (1992). To be sure, judges do enter the process as a check at the plea-colloquy stage, but their ability to scrutinize the parties' bargain is generally limited to ensuring procedural (rather than substantive) fairness. *See* Bibas, 57 Wm. & Mary L. Rev. at 1065 (noting that judges in a plea colloquy "have no evidence in the record, no access to discovery, and no sense of the victim, the defendant, and the circumstances of the alleged crime"); *see also* Fed. R. Crim. P. 11(b); *Boykin v. Alabama*, 395 U.S. 238, 243 & n.5 (1969) (requiring that the record of a guilty-plea allocution reflect a defendant's affirmative waiver of her right to a jury trial, right to confront her accusers, and privilege against self-incrimination). As Judge Lynch explained, "[t]he substantive evaluation of the evidence and assessment of the defendant's responsibility is . . .

Our adversarial system can create perverse incentives for unchecked prosecutors to withhold exculpatory evidence at the plea-bargaining stage. The overriding goal for prosecutors should be to ensure just results; but some prosecutors may prioritize their personal "win" rate (*i.e.*, the proportion of cases ending in conviction rather than acquittal). A weak case brought to trial might turn into an acquittal; a plea bargain in that same case, even for a minimal sentence, would count as a conviction. As a result, some prosecutors might feel pressure to bluff the defendant into pleading guilty, thereby securing the conviction and avoiding the risk of an acquittal at trial. And, as described *supra* note 20, prosecutors can even be made to engage in such "bluffing" unwittingly, if investigators fail to disclose *Brady* material to them in the first place. A clear rule that *Brady* material must be disclosed at the plea-bargaining stage would eliminate these pressures and thereby promote the integrity of the criminal justice system.

B. This Requirement Can Help Preserve and Restore Americans' Faith in Their Justice System

Pleas obtained under the pall of withheld exculpatory evidence diminish the public's confidence by increasing the likelihood of imprisoning the innocent.

In recent years, the criminal justice system generally and prosecutors specifically have received criticism from all corners. Clark Neily of the Cato Institute has written that "prisons are packed because

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made . . . in the office of the prosecutor." Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2123 (1998) (exploring the inquisitorial role of the prosecutor in criminal proceedings).

prosecutors are coercing plea deals."[35] Ronald Cass has written for The Federalist Society that "prosecutorial discretion" today poses "risks to government structure, personal liberty, and ordinary market competition."[36] Taylor Pendergrass of the ACLU Campaign for Smart Justice has called prosecutors "the most powerful, unaccountable, and least transparent actors in the criminal justice system."[37] David D'Amato of The Heartland Institute has written that "prosecutors are among the greatest dangers to the rule of law and the most socially destructive forces in American life today."[38]

Academics have been critical as well. Professor Bennett Gershman has written that "one of the most prominent features of U.S. prosecutors is their ability to threaten, intimidate, and embarrass anyone—defendants, witnesses, lawyers—without any accountability, or apology."[39] And Professor Angela Davis

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[35] Clark Neily, Cato Inst., *Prisons Are Packed because Prosecutors Are Coercing Plea Deals. And, Yes, It's Totally Legal* (Aug. 8, 2019) (capitalization omitted), https://www.cato.org/commentary/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-its-totally-legal.

[36] Ronald A. Cass, *Power Failures: Prosecution, Power, and Problems*, Federalist Soc'y (Dec. 17, 2015), https://www.fedsoc.org/commentary/publications/power-failures-prosecution-power-and-problems.

[37] *Americans Overwhelmingly Support Prosecutorial Reform, Poll Finds*, ACLU (Dec. 12, 2017), https://www.aclu.org/press-releases/americans-overwhelmingly-support-prosecutorial-reform-poll-finds.

[38] David S. D'Amato, *Prosecutors are mainly to blame for the criminal justice crisis*, The Hill (Aug. 21, 2019), https://thehill.com/opinion/criminal-justice/458176-prosecutors-are-mainly-to-blame-for-the-criminal-justice-crisis/.

[39] Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 Loyola U. Chi. L.J. 327, 328 (2014).

has written in the *New York Times* that "prosecutors control the criminal justice system through their charging and plea bargaining powers," powers that they exercise "behind closed doors" to make decisions that they "are not required to justify or explain . . . to anyone."[40]

These sentiments are not unique to think tanks and ivory towers; they have spread to the broader public. Public polling shows that, as far back as 2013, nearly 43% of the public believed that prosecutor misconduct was widespread.[41] And Gallup's most recent annual survey of public confidence in U.S. institutions shows that just 14% of the population has a "great deal" or "quite a lot" of confidence in the criminal justice system.[42]

The growing popularity of media depicting prosecutorial corruption and misconduct is another symptom of (and perhaps contributor to) the public's growing mistrust of prosecutors and the criminal justice system. Popular podcasts such as *Serial* and *In the Dark* have publicized prosecutorial misconduct that has led to the release of individuals who spent decades in prison for crimes they may not have

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[40] Angela J. Davis, *Federal Prosecutors Have Way Too Much Power*, N.Y. Times (Jan. 14, 2015), https://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/federal-proscutors-have-way-too-much-power.

[41] *See* Ctr. for Prosecutor Integrity, *An Epidemic of Prosecutor Misconduct* 5 (Dec. 2013), http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf.

[42] Jeffrey M. Jones, *Confidence in U.S. Institutions Down; Average at New Low*, Gallup (July 5, 2022), https://news.gallup.com/poll/394283/confidence-institutions-down-average-new-low.aspx.

committed.[43] And the popular docuseries *Making a Murderer* prominently featured accusations that the prosecution coerced Brendan Dassey to plead guilty to murder (accusations that a federal magistrate judge and panel of the Seventh Circuit found sufficient to overturn Dassey's conviction and grant a writ of habeas corpus, though the en banc Seventh Circuit would later reverse based on the deferential standard applicable to habeas review).[44]

The public's frustration with unchecked prosecutorial power, misconduct, and the growth of the prison population is also evident in the election of reform-oriented prosecutors in both large and small jurisdictions around the country. *Amici* have a wide range of political views; but whether one agrees or disagrees with reform-oriented prosecutors' practices and policies, their rise is indicative of public frustration with prosecutors and with the criminal justice system as a whole.

The public's lack of faith in prosecutors negatively affects prosecutors' ability to do their jobs. In *amici*'s experience, public cooperation is important to effective prosecution. Prosecutors rely on cooperation from the public to report crimes, provide information during investigations, serve as witnesses, and more. As faith in prosecutors and the criminal justice system

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[43] *See* Brian Witte, *'Serial' host: Evidence that freed Syed was long available*, Assoc. Press (Sept. 20, 2022), https://apnews.com/article/adnan-syed-crime-maryland-baltimore-27123d46cbb0e4a48b0e5d30b22ed647.

[44] *See* Steve Almasy, *'Making a Murderer': Brendan Dassey conviction overturned*, CNN (Aug. 12, 2016), https://www.cnn.com/2016/08/12/us/making-a-murderer-brendan-dassey-conviction-overturned/index.html; *see also Dassey v. Dittmann*, 877 F.3d 297, 318 (7th Cir. 2017) (en banc).

erodes, the public's willingness to fill these roles decreases. Conversely, as the standing of prosecutors in the public's perception rises, so too do the public's willingness to work with prosecutors and prosecutors' ability to administer justice.

Amici know that recognizing defendants' right to exculpatory evidence at the plea-bargaining stage is not a panacea. Not all of the public's growing distrust of prosecutors stems from the current lack of such a right in parts of the country. But it contributes. As the above examples from surveys and popular media show, public awareness of the overwhelming power prosecutors possess in plea bargaining is growing. And part of the message the public gets is that prosecutors can withhold exculpatory evidence from the defendant the prosecutor is trying to persuade to plead guilty. Requiring prosecutors to disclose exculpatory evidence at the plea-bargaining stage by recognizing a *Brady* right at that stage would help to remove the suspicion that the government knowingly obtains pleas of innocent persons by withholding exculpatory evidence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 29, 2022