No. _____

In The
Supreme Court of the United States

GEORGE ALVAREZ,

Petitioner,

v.

THE CITY OF BROWNSVILLE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that due process requires the government to disclose material exculpatory evidence to a criminal defendant. In *United States v. Ruiz*, 536 U.S. 622 (2002), the Court held that due process does not require the government to disclose impeachment evidence before entering a plea agreement with a criminal defendant.

The question presented is whether due process requires the government to disclose exculpatory evidence before entering a plea agreement with a criminal defendant.

2. Three essential elements must be established for a municipality to face §1983 liability. There must be: (1) a policy maker; (2) an official policy; and (3) a violation of a constitutional right whose "moving force" is the policy or custom. *Monell v Dep't of Soc. Servs*., 436 U.S. 658, 694 (1978). The Court of Appeals held a) that the City's existing non-disclosure policy was not the cause of the non-disclosure of exculpatory evidence and b) the non-disclosure policy was not promulgated with deliberate indifference because said policy was not a municipal requirement.

The question presented is whether a ruling that no causation or deliberate indifference can be found where municipal actors "could have" hypothetically chosen not to follow City policy impermissibly elevates the § 1983 municipal liability causation and deliberate indifference standards.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are set forth in the case caption. *See* SUP. CT. R. 24.1(b).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner George Alvarez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

INTRODUCTION

Plea bargaining is not "some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (internal citation and quotations omitted). With rare exception, plea bargaining—and the procedural rights that protect criminal defendants during that process—"determines who goes to jail [,] for how long" and for which crimes. *Id.*

Although plea-bargaining predominates in the criminal justice system, courts remain divided over how *Brady v. Maryland*'s due-process protections apply at this critical stage. This Court answered part of this question in *United States v. Ruiz*, 536 U.S. 622 (2002), holding that *impeachment* evidence need not be disclosed before a plea. But *Ruiz* did not resolve whether the government must disclose non-impeachment *exculpatory* evidence. Three courts of appeals and four state supreme courts have determined that due process requires the government to disclose exculpatory evidence before entering a plea agreement with a criminal defendant. By contrast, the Fifth Circuit below, bound by its earlier decisions, held that an accused who enters a plea agreement has no right to *Brady* evidence, whether impeachment or exculpatory.

This case provides the Court an ideal vehicle to resolve a question that bears on the pre-trial rights

of almost every person charged with a crime—one with particularly high stakes for defendants like Mr. Alvarez, who pleaded guilty in the dark because exonerating evidence remained concealed. Review should be granted.

OPINIONS BELOW

The *en banc* decision and dissenting opinions of the United States Court of Appeals for the Fifth Circuit, Pet. App. 1a-70a, are reported at 904 F.3d 382 (5th Cir. 2018). The panel opinion, Pet. App. 71a-79a, is published at 860 F.3d 799. The district court entered judgment in petitioner's favor in an unpublished order. Pet. App. 80a-81a. An earlier unpublished order of the district court granting summary judgment on liability in petitioner's favor (Pet. App. 82a-104a, is available at 2014 WL 12600164.

JURISDICTION

The judgment *en banc* of the Court of Appeals was entered on September 18, 2018. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

A. Factual background

In November 2005, just after his seventeenth birthday, petitioner George Alvarez was arrested and jailed by respondent City of Brownsville (Texas) for public intoxication and suspicion of vehicle burglary. Pet. App. 72a; CA5 Record on Appeal (ROA) 666. While Mr. Alvarez awaited arraignment, an altercation occurred involving Mr. Alvarez and three jailers, after which Mr. Alvarez was charged in state court with assault on a public servant. Pet. App. 71a. A video of the incident later surfaced that, as discussed further below, the Texas Court of Criminal Appeals found established Mr. Alvarez's actual innocence. *Id.* 73a.

The video shows the jailers removing Mr. Alvarez from one cell and pointing him toward another doorway across the jail booking area. Mr. Alvarez remains standing and shrugs. One of the jailers, Officer Jesus Arias, then grabs Mr. Alvarez by the arm and spins him into a chokehold. Mr. Alvarez attempts to squirm out of the officer's grasp while another jailer circles behind the pair and takes hold of Mr. Alvarez's arm. The other jailers lower the struggling pair to the floor, and the group blocks the camera's view of Mr. Alvarez for several seconds. Mr. Alvarez is then seen squirming in the chokehold, his wrists grasped by one of the jailers as Mr. Alvarez attempts to keep his arms braced. The jailers handcuff Mr. Alvarez, shackle his feet, and carry him face-down through another doorway. *See video attached to* Pl.'s Resp. to Defs.' Mot. Summ. J., Ex. B, Dist. Ct. Dkt. 29, Nov. 30, 2012.

After subduing Mr. Alvarez, Officer Arias contacted the Brownsville Police Department's Criminal Investigation Division (CID). CA5 ROA 3719-20. Officer Arias told a CID sergeant that he wished to press charges against Mr. Alvarez "for assaulting him and causing him pain," claiming that Mr. Alvarez had grabbed his throat, choked him, and grabbed his groin area. Pet. App. 72a; CA5 ROA 3719-20.

Because the incident involved a jailer's use of force, a Brownsville Internal Affairs sergeant reviewed the video, completed an internal use-of-force report, and submitted the report, which noted the video, to the Chief of Police. Pet. App. 83a, 96a n.5. Under the police department's policies, the Chief of Police is solely responsible for reviewing internal affairs reports and disclosing *Brady* evidence to CID. *Id.* 96a-97a, 100a. Here, the Chief of Police never reviewed the report or the video. *Id.* 83a, 97a. As a result, Mr. Alvarez did not know the police possessed video of the incident. *Id.*

Based on Officer Arias's accusations, Mr. Alvarez was indicted in Texas state court for assault on a public servant, a third-degree felony. Pet. App. 72a. If convicted, he faced up to ten years in prison. CA5 ROA 1578. In March 2006, he took his lawyer's advice and entered a plea agreement providing that Mr. Alvarez would serve no time in prison. CA5 ROA 254, 1579. Instead, the agreement suspended an eight-year prison sentence on the condition that Mr. Alvarez complete a substance abuse treatment program and ten years of community supervision. Pet. App. 72a; CA5 ROA 254, 1935, 1582. The Texas state court entered judgment consistent with the agreement. CA5 ROA 1582-87. But Mr. Alvarez did

not complete the treatment program. Pet. App. 72a. As a result, the state court revoked the suspended sentence in November 2006, and Mr. Alvarez began serving the eight-year sentence. *Id.*; CA5 ROA 204.

Three years later, in a separate suit filed by another detainee against the same officer (Jesus Arias) and the City, the video of the altercation between Mr. Alvarez and Officer Arias surfaced. Pet. App. 72a. Based on the video, Mr. Alvarez sought a writ of habeas corpus in state court claiming he was innocent of the crime charged. *Id.* 72a-73a.

Two Texas courts reviewed the video and agreed. Pet. App. 73a. The trial court found that the new evidence "supports the defense theory that [Mr. Alvarez] did not assault the jailer" and recommended that relief be granted and a new trial ordered. CA5 ROA 1017. As required by Texas law, *see* Tex. Code Crim. Proc. Ann. art. 11.07, § 3 (2013), the Texas Court of Criminal Appeals reviewed the trial court's findings and, based on its own "independent examination of the record," declared Mr. Alvarez "actually innocent" and granted the writ of habeas corpus. Pet. App. 73a.

After four years in prison, Mr. Alvarez was released unconditionally. *See* Pet. App 73a; CA5 ROA at 304.

B. Proceedings below

1. In April 2011, Mr. Alvarez filed this suit under 42 U.S.C. § 1983 in the Southern District of Texas against the City of Brownsville, Officer Arias, and other law enforcement officials, claiming that they had violated his constitutional rights by failing to disclose the video before he entered a plea

agreement. Pet. App. 73a. The district court had jurisdiction under 28 U.S.C. § 1343.[1]

Mr. Alvarez offered evidence that the Brownsville Police Department had reviewed the video during the November 2005 internal investigation of the use-of-force incident but had not disclosed it to Mr. Alvarez before his March 2006 plea. Pet. App. 96a-97a.

Adopting the recommendations of a magistrate judge, the district court denied summary judgment to the City on its claim that Mr. Alvarez had no right to *Brady* disclosures because he had entered a plea agreement. CA5 ROA 721. The magistrate judge distinguished the Section 1983 context from Fifth Circuit precedents holding that defendants cannot use a *Brady* violation to collaterally attack the voluntariness of a plea. *Id.* at 682-84.

The district court then granted partial summary judgment to Mr. Alvarez on the issue of the City's liability. Pet. App. 104a-105a. It first concluded that a *Brady* violation had occurred because the video was favorable to Mr. Alvarez, the government failed to disclose it, and the video was material to the outcome of the proceeding. *Id.* 92a-94a. The court then found the City liable based on the Chief of Police's failure to review and pass on to prosecutors the report noting the exculpatory video. *Id.* 100a-102a. This omission, the court found, constituted deliberate indifference by a policymaker to the obvious consequence that a *Brady* violation would result. *Id.*

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[1] All claims against the individual defendants were later dismissed voluntarily or on the basis of qualified immunity. The City is the only remaining defendant. Pet. App. 73a.

(citing *Monell v. Department of Social Services*, 436 U.S. 658 (1978)).

After finding the City liable, the district court held a two-day trial on damages. Pet. App. 2a, 80a-81a. A jury awarded Mr. Alvarez $2 million. *Id.*

The City appealed to the Fifth Circuit, arguing, first, that the verdict should be overturned because Mr. Alvarez had no right to pre-plea disclosure of exculpatory information under *Brady*. The City raised other issues regarding municipal liability, the damages trial, and the district court's purported failure to remit the verdict or to order a new trial on damages. CA5 Br. of Appellant City of Brownsville 1-2, Oct. 14, 2016.

A panel of the Fifth Circuit reversed on the *Brady* issue alone. Pet. App. 72a. The court held, based on its prior precedents, that Mr. Alvarez had no constitutional right to obtain non-impeachment exculpatory evidence pre-plea. The court first discussed *Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000), which held that suppressing *Brady* material does not render a guilty plea invalid. *Id.* 5a. It then turned to *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009)—a decision postdating this Court's decision in *Ruiz v. United States*, 536 U.S. 622 (2002)—which found that *Ruiz* drew no distinction between exculpatory and impeachment evidence. Pet. App. 77a. Thus, the court of appeals concluded, "under this court's interpretation of *Ruiz* in *Conroy*," Mr. Alvarez "did not have a constitutional right to exculpatory evidence when he pleaded guilty." *Id.*

Nevertheless, the Fifth Circuit panel acknowledged that *Ruiz* had left open the question of a defendant's pre-plea right to exculpatory evidence.

Pet. App. 76a. In this regard, the court of appeals noted the Seventh Circuit's observation that "it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea." *Id.* 77a (quoting *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003)).

On November 2, 2017, Mr. Alvarez's petition for rehearing *en banc* was granted and on September 18, 2018, the Fifth Circuit *en banc* reversed the district court's judgment and rendered judgment in favor of the City of Brownsville. Pet. App. 2a. The Fifth circuit declined the invitation to disturb its precedent that a defendant has no constitutional right to exculpatory evidence prior to entering a guilty plea. 9a. The Court also ruled that the City of Brownsville should have been dismissed as a matter of law and should not have been subjected to municipal liability for Alvarez's § 1983 claim. *Id*

REASONS FOR GRANTING THE WRIT

I. DEFENDANTS HAVE A CONSTITUTIONAL RIGHT TO PRE-PLEA DISCLOSURE OF EXCULPATORY EVIDENCE

A. Legal background

In *Brady v. Maryland*, this Court held that the prosecution's failure to disclose evidence favorable to the defendant "violates due process where the evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963). This right exists "irrespective of the good faith or bad faith of the prosecutor," *id.*, because the government's

overriding interest "is not that it shall win a case, but that justice shall be done," *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (quotation marks omitted).

Since *Brady*, this Court has further explained the government's disclosure obligations. The government must disclose material exculpatory evidence absent any specific request from the defense. *United States v. Agurs*, 427 U.S. 97, 110-11 (1976). The government's duty to disclose includes "evidence that is known only to police investigators and not to the prosecutor," because it is the prosecution's "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

The three components of a due-process violation under *Brady* are well-settled: (1) the evidence at issue must be favorable to the defendant; (2) the evidence must have been suppressed by the government, either willfully or inadvertently; and (3) the evidence must be material. *Strickler*, 527 U.S. at 281-82. Evidence is material if there is "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-70 (2009).

In the trial context, *Brady* applies to both impeachment evidence and non-impeachment exculpatory evidence. *See Giglio v. United* States, 405 U.S. 150, 153-54 (1972). Impeachment evidence is evidence that undermines the reliability or credibility of an adverse witness. *Evidence*, *Black's Law Dictionary* (10th ed. 2014); *see also* Edward J. Imwinkelried et al., *Courtroom Criminal Evidence* 267-68 (2005) (describing impeachment as evidence

offered to "decrease the witnesses' credibility"). In contrast, exculpatory evidence "tend[s] to establish a criminal defendant's innocence." *Evidence*, *Black's Law Dictionary*.

In *Ruiz v. United States*, 536 U.S. 622 (2002), this Court addressed whether *Brady v. Maryland* requires the pre-plea disclosure of impeachment evidence to a criminal defendant. The defendant challenged the validity of a plea agreement that waived her right to obtain "impeachment information relating to any informants or other witnesses." *Id.* at 625. The agreement also specified that the government would disclose to the defendant all evidence of factual innocence. *Id.* at 630.

The parties' briefs in *Ruiz* concerned whether the government must disclose "material exculpatory information" generally, without distinguishing impeachment evidence from non-impeachment exculpatory evidence. *See* Brief for United States at 6, *Ruiz*, 536 U.S. 622 (No. 01-595), 2002 WL 316340; Brief for the Respondent at 9, *Ruiz*, 536 U.S. 622 (No. 01-595), 2002 WL 523026. The Court took pains, however, to limit its holding to only whether impeachment evidence must be disclosed pre-plea. *See Ruiz*, 536 U.S. at 629, 631. Thus, as the Fifth Circuit Panel explained below, *Ruiz* "did not address whether the withholding of exculpatory evidence during the pretrial plea bargaining process would violate a defendant's constitutional rights." Pet. App. 76a.

Ruiz held that criminal defendants do not have a due-process right to obtain impeachment evidence before pleading guilty. 536 U.S. at 625. *Ruiz*'s reasoning centered on distinguishing impeachment

evidence from exculpatory evidence. *See id.* at 629-30. The Court emphasized the "special" nature of impeachment evidence and its limited value to defendants when deciding to plead guilty. *Id*. at 629-30. Because impeachment evidence is tied to a specific witness, *see Evidence, Black's Law Dictionary*, the Court observed that it is strategically valuable only if a defendant can predict which witnesses the prosecution will call. *See Ruiz*, 536 U.S. at 629-30. Thus, the Court reasoned that impeachment evidence is rarely "critical information" a defendant must have before pleading guilty. *Id.* at 629.

The Court also weighed concerns regarding the efficient administration of justice, determining that the costs of disclosing impeachment evidence would outweigh its benefits to the accused. *Ruiz*, 536 U.S. at 631. "Premature disclosure of Government witness information" might, the Court explained, disrupt the government's investigations or put potential witnesses at unnecessary risk. *Id.* at 631-32. Moreover, disclosing all impeachment evidence could "depriv[e] the plea-bargaining process of its main resource-saving advantages." *Id*. at 632.

B. The courts are openly divided on whether the government must disclose exculpatory evidence pre-plea.

The federal and state appellate courts are conflicted over how *Brady* applies pre-plea. Standing alone, the Fifth Circuit has repeatedly held that *Brady* does not require the pre-plea disclosure of exculpatory evidence. In contrast, numerous state courts of last resort and federal courts of appeals have held the opposite. This conflict predates this

Court's decision in *United States v. Ruiz*, 536 U.S. 622 (2002), and has expanded after it. *See* Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 Fordham L. Rev. 3599, 3614 (2013) (surveying the split in appellate authority pre- and post-*Ruiz*).

1. The conflict is established.

Before *Ruiz*, three circuits and a state supreme court held that the government must disclose exculpatory information pre-plea, while the Fifth Circuit rejected that position.

The Eighth Circuit was the first court of appeals to address the issue. In *White v. United States*, the court reasoned that when evidence is "unavailable to aid [the defendant] and his attorney in evaluating the chance for success at trial," a guilty plea may be challenged as unknowing or involuntary. 858 F.2d 416, 422 (8th Cir. 1988). Thus, the Eighth Circuit concluded that this Court's precedent "does not preclude a collateral attack upon a guilty plea based on a claimed *Brady* violation." *Id.*; *accord Nguyen v. United States*, 114 F.3d 699, 705 (8th Cir. 1997) (citing *White*, 858 F.2d at 422).

The Tenth Circuit expressly agreed with the Eighth in *United States v. Wright*, holding that, "under certain limited circumstances, the prosecution's violation of *Brady* can render a defendant's plea involuntary." 43 F.3d 491, 495-96 (10th Cir. 1994) (citing *White*, 858 F.2d at 422). However, the court stopped short of defining these "limited circumstances." 43 F.3d at 496.

The Ninth Circuit thereafter squarely held in *Sanchez v. United States* that "a defendant

challenging the voluntariness of a guilty plea may assert a *Brady* claim." 50 F.3d 1448, 1453 (9th Cir. 1995). The court reasoned that the decision to enter a guilty plea "cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution." *Id.* (internal quotation marks omitted). The court emphasized that, under a no-disclosure rule, "prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas." *Id.*

Three years later, the Second Circuit in *United States v. Avellino*, reached a similar conclusion, albeit for a slightly different reason. 136 F.3d 249, 255 (2d Cir. 1998). Rather than viewing the question as one of voluntariness, the court held that a pre-plea *Brady* violation constituted government misconduct serious enough to render a plea invalid. *See id.*; *see also Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988) (reasoning that *Brady* applies pre-guilty plea and, for that reason, holding that it applies pre-insanity plea).

The South Carolina Supreme Court then expressly joined the Second, Eighth, and Ninth Circuits, holding in *Gibson v. State* that a defendant "may challenge the voluntary nature of his guilty plea . . . by asserting an alleged *Brady* violation." 514 S.E.2d 320, 523-24 (S.C. 1999).

As noted earlier, the Fifth Circuit expressly disagreed with its sister circuits in *Matthew v. Johnson*, 201 F.3d 353 (5th Cir. 2000), the ruling that formed the basis for the decision below. There, the court reasoned that because "a *Brady* violation is defined in terms of the potential effects of

undisclosed information on a judge's or jury's assessment of guilt," "the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation." *Id.* at 362.

2. The conflict persists and expands post-*Ruiz*.

In 2002, this Court decided *Ruiz v. United States*, 536 U.S. 622 (2002), which, as explained above, resolved only the question whether the government must make pre-plea disclosure of *impeachment* evidence. Courts remain intractably divided over whether the government must disclose non-impeachment *exculpatory* evidence before an accused enters a plea agreement. Indeed, the conflict has expanded since *Ruiz*.

The pre-Ruiz *terrain remains the same*. As noted, the Fifth Circuit has repeatedly reaffirmed its earlier holding in *Matthew*, further cementing the conflict. *See United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009); Pet. App. 70a. The Fifth Circuit in *Conroy* read *Ruiz* as making no distinction between impeachment and exculpatory evidence. *Conroy*, 567 F.3d at 179. Accordingly, *Conroy* concluded that *Ruiz* did not abrogate the court's earlier decision in *Matthew*. *See id.*; *see also* Pet. App. 78a.

On the other side of the conflict, the holdings of the Ninth and Tenth Circuits—both at odds with the Fifth Circuit's approach—remain good law. *See Smith v. Baldwin*, 510 F.3d 1127, 1148 (9th Cir. 2007) (applying pre-*Ruiz* holding in *Sanchez*); *United States v. Dahl*, 597 Fed. Appx. 489, 490 (10th Cir. 2015) (reaffirming *Wright* in light of *Ruiz*); *United States v. Ohiri*, 133 Fed. Appx. 555, 562 (10th Cir.

2005) (distinguishing *Ruiz* and recognizing a pre-plea *Brady* right). For its part, the Second Circuit has questioned but declined to abrogate its pre-*Ruiz* decision in *Avellino*. *See Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010).[2]

And in *Hyman v. State*, without expressly considering *Ruiz*, the South Carolina Supreme Court reaffirmed its earlier holding that a pre-plea *Brady* violation may render a guilty plea involuntary. 723 S.E.2d 375, 380 (S.C. 2012) (quoting *Gibson*, 514 S.E. 2d at 324).

The conflict expands. Since *Ruiz*, the conflict has grown, with three state courts of last resort rejecting the Fifth Circuit's position and holding that the government must disclose exculpatory evidence before entering a plea agreement with a criminal defendant.

In *State v. Huebler*, 275 P.3d 91, 93, 96 (Nev. 2012), the Nevada Supreme Court held that "the state is required under *Brady v. Maryland* . . . to disclose material exculpatory evidence within its possession to the defense before the entry of a guilty plea." The court noted the split in authority and expressly agreed with the Seventh Circuit that *Ruiz* implicitly distinguished impeachment from exculpatory evidence. *See id.* at 96-98 (citing

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[2] District courts in the Second, Ninth, and Tenth Circuits have continued to apply their circuits' pre-*Ruiz* holdings. *See, e.g.*, *Davis v. United States*, 2015 WL 1277011, *5 (D. Conn. 2015) (applying *Avellino*, 136 F.3d at 255); *Hastings v. Ortiz*, 2006 WL 1517722, at *5-7 (D. Colo. May 26, 2006) (applying *Wright*, 43 F.3d at 495-96); *Robinson v. Yates*, 2015 WL 13236949, at *9 (C.D. Cal. Mar. 31, 2015) (applying *Sanchez*, 50 F.3d at 1454). *But see Clark v. Lewis*, 2014 WL 1665224, at *8 (E.D. Cal. Apr. 25, 2014).

McCann v. Mangialardi, 337 F.3d 782, 787-88 (7th Cir. 2003)). The court went on to emphasize that "an obligation to provide exculpatory information" pre-plea "comports with the prosecution's special role . . . in the search for truth." *Huebler*, 275 P.3d at 98 (internal quotation marks omitted).

The Supreme Court of Appeals of West Virginia has also held that "a defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage." *Buffey v. Ballard*, 782 S.E.2d 204, 216 (W. Va. 2015). Surveying the conflict, the court rejected the Fifth Circuit's position and agreed with the Nevada Supreme Court and the Tenth Circuit. *Id.* at 212-18 (quoting *Huebler*, 275 P.3d at 97-98, *Matthew*, 201 F.3d at 361, and *Ohiri*, 133 Fed. Appx. at 562).

And in *Medel v. State*, the Utah Supreme Court reasoned that *Ruiz* did not endorse "a rule declaring that the prosecutor may hide [and the] defendant must seek" exculpatory evidence "as long as there is a plea bargain on the table." 184 P.3d 1226, 1234 (Utah 2008) (alteration in original) (internal quotation marks and citations omitted). The court went on to hold that nondisclosure of "material exculpatory evidence" renders a guilty plea involuntary. *See id.* at 1235.[3]

Other circuits acknowledge the problem. Three other courts of appeals have addressed the question

[3] The intermediate appellate courts of Mississippi and Missouri have also weighed in. *Compare Walton v. State*, 165 So.3d 516, 524-25 (Miss. Ct. App. 2015) (following the Fifth Circuit's precedents), *with Wallar v. State*, 403 S.W.3d 698, 707 (Mo. Ct. App. 2013) (recognizing a right to pre-plea disclosure of non-impeachment exculpatory evidence).

presented, but each declined to decide it. In *United States v. Moussaoui*, 591 F.3d 263, 267, 285-86, 287 (4th Cir. 2010), the court indicated that it favored the Fifth Circuit's approach. On the other hand, the Seventh Circuit has expressed the opposite view, observing that "*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence." *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003); *see* Pet App. 76a. The Sixth Circuit has simply recognized "disagreement among [its] sister circuits." *Robertson v. Lucas,* 753 F.3d 606, 621-22 (6th Cir. 2014) (surveying the Second, Fifth, Seventh, and Tenth Circuits).

3. The conflict is ripe for resolution.

The question presented has had sufficient time to percolate in the nearly three decades since the Eighth Circuit first addressed it. Numerous circuits and state high courts have decided the issue—both before and after *Ruiz*. Of particular relevance is the minority approach of the Fifth Circuit, whose trial courts encounter nearly one-fourth of all federal criminal defendants.[4] Over the past seventeen years, that court has reached the same no-disclosure holding in three precedential rulings that straddle this Court's decision in *Ruiz*, leaving it inalterably committed to that position. The Fifth Circuit continues its strict adherence to its prior precedents in the case of Alvarez.

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[4] *See* United States Courts, Table D-3: U.S. District Courts—Criminal Defendants Commenced, by Offense and District, During the 12-Month Period Ending December 31, 2016 (2017), https://perma.cc/2TMH-56CQ (Fifth Circuit accounted for 17,286 of 76,135 of federal defendants).

Moreover, without a definitive ruling from this Court, government officials in jurisdictions that have yet to weigh in may well believe that they are not required to reveal exculpatory evidence before they enter plea agreements with defendants. At the least, unclear disclosure obligations leave defendants with ambiguous rights to access *Brady* material, convictions vulnerable to collateral attack, and governments vulnerable to Section 1983 actions.

This Court should resolve the conflict now.

C. The question presented is important to criminal defendants and to the integrity of the justice system.

Over the past few decades, structural changes in the criminal justice system have armed the government with powerful tools in the plea-bargaining process—a shift that has resulted in rising plea rates. Without access to exculpatory evidence, innocent defendants face substantial, sometimes overwhelming, pressure to plead guilty.

1. Developments since *Brady* jeopardize pre-plea due process rights.

Today, plea bargaining is "not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)). As recently as 1980, nearly a quarter of all federal criminal cases were resolved by trial.[5] Now, pleas

[5] Ronald F. Wright, *Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background*, Wake Forest Univ. Legal Studies Paper (Sept. 2005), Appendix 1 (Disposition

account for ninety-seven percent and ninety-four percent of federal and state convictions, respectively. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

Noting this trend, this Court has recognized in several recent decisions that due process protections apply at the plea stage, "which is almost always the critical point for a defendant," *Frye*, 566 U.S. at 144. Acknowledging that "the guarantee of a fair trial" does not serve as a "backstop that inoculates any errors in the pretrial process," the Court reaffirmed defendants' rights to effective assistance of counsel during plea negotiations. *Id.* at 143-44; *see Lafler*, 566 U.S. at 165. *Padilla v. Kentucky* similarly identified plea negotiations as a "critical phase" during which defendants are entitled to accurate advice regarding the collateral immigration consequences of entering a plea. 559 U.S. 356, 373 (2010). Building upon that ruling, *Lee v. United States* held that a defendant claiming ineffective assistance need only show that accurate immigration advice would have changed the decision to plead guilty, not the outcome of the case. 137 S. Ct. 1958 (2017).

Rising plea rates stem from structural changes in the criminal justice system that have magnified the power differential between prosecutors and defendants. Absent disclosure requirements, plea negotiations occur under significant informational asymmetry. Burdened dockets and limited access to detention facilities leave defense attorneys few opportunities to interview their clients and investigate the facts. *See* Jed S. Rakoff, *Why Innocent*

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of Federal Criminal Cases and Defendants, 1871-2002), https://perma.cc/5JUK-6TWV.

People Plead Guilty, N.Y. Rev. Books, https://perma.cc/S9XN-KSTX. By contrast, the government's files—typically unavailable to defense counsel—usually include police reports, witness interviews, forensic information, and other evidence. *Id.*; *see also* Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. Crim. L. & Criminology 1, 16 (2017).

Empowered by this asymmetry—as well as broad charging discretion, mandatory minimum sentences, and loose constraints on bargaining tactics—the government can all but dictate the terms of plea agreements. [6] The government wields "enormous leverage" over defendants facing long, fixed sentences if convicted at trial. Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 Hastings Const. L.Q. 1029, 1030 (2011). Rather than being arms-length deals, plea agreements often resemble one-sided "contracts of adhesion." *See* Rakoff, *Why Innocent People Plead Guilty*, *supra*.

2. Withholding exculpatory information puts innocent people at risk of wrongful conviction.

When defendants and their lawyers are denied access to exculpatory evidence, the justice system's

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[6] Rakoff, *Why Innocent People Plead Guilty*, *supra*; *see also* Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady* v. Maryland, 38 N.Y.U. Rev. L. & Soc. Change 407, 409-10 (2014); Ellen Yaroshefsky, *Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 Temp. Pol. & Civ. Rts. L. Rev. 343, 350 (2010).

integrity and the liberty of innocent defendants are threatened. Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651, 656, 660 (2007). This Court has emphasized the importance of avoiding wrongful convictions, describing the criminal justice system's "great precautions against unsound results" regardless of "whether conviction is by plea or by trial." *Brady v. United States*, 397 U.S. 742, 758 (1970). Anticipating the issues confronting defendants today, the Court expressed "serious doubts" about a justice system in which "the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves." *Id*.

Today, these concerns are anything but theoretical. Here, with nothing but his word against the testimony of the jailers and the prospect of a ten-year sentence hanging over his head, Mr. Alvarez tried to avoid prison by following his attorney's advice to plead guilty. Pet. App. 72a; CA5 ROA 1579. His case is not unique. A growing body of research demonstrates that many innocent people plead guilty. Even before pleas became so dominant, an analysis of conviction rates in twenty-nine federal district courts concluded that almost one-third of defendants who entered guilty pleas would have been found innocent at trial. Lee Sheppard, *Disclosure to the Guilty Pleading Defendant:* Brady v. Maryland *and the* Brady *Trilogy*, 72 J. Crim. L. & Criminology 165, 170 (1981); Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 Harv. L. Rev. 293, 293 (1975). Now, criminologists estimate that wrongful pleas account

for between two and eight percent of felony convictions. Rakoff, *Why Innocent People Plead Guilty*, *supra*. And forty-five percent of people exonerated last year had pleaded guilty to crimes they did not commit. Nat'l Registry of Exonerations, U.C. Irvine Newkirk Cent. for Science & Soc., *Exonerations in 2016* (2017), https://perma.cc/S544-WAPK.

Studies identify a host of factors unrelated to guilt that encourage innocent defendants to accept plea deals. Large differentials between anticipated plea and trial sentences, pretrial detention, and risk aversion motivate defendants' decisions to falsely condemn themselves.[7]

Access to exculpatory evidence prior to entering a plea acts as a counterweight to these factors and is therefore especially important for factually innocent defendants. *See* McConkie, 107 J. Crim. L. & Criminology at 12. Of the forty-two percent of 2016 exonerations in which official misconduct contributed to conviction, the most common type was concealment of exculpatory evidence. Nat'l Registry of Exonerations, *Exonerations in 2016*, *supra*. Disclosure, this information indicates, can prevent innocent people from wrongfully pleading guilty. *See* McConkie, 107 J. Crim. L. & Criminology at 52.

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[7] *See* Lee Sheppard, *Disclosure to the Guilty Pleading Defendant: Brady v. Maryland and the Brady Trilogy*, 72 J. Crim. L. & Criminology 165, 170 (1981); Mike Work, *Creating Constitutional Procedure:* Frye*,* Lafler*, and Plea Bargaining Reform*, 104 J. Crim. L. & Criminology 457, 461 (2014); Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711, 711 (2017) (detained defendants are twenty-five percent more likely to plead guilty).

Perversely, it is in the weakest cases that the government has the strongest incentives to negotiate plea deals without disclosing evidence to the defense. Research going back decades shows that the government brings "the greatest pressures to plead guilty to bear on defendants whose conviction at trial is highly improbable."[8] Where conviction is unlikely, the government has an interest in offering large sentencing discounts, which encourage innocent defendants like Mr. Alvarez to plead guilty. McMunigal, *Guilty Pleas*, 57 Case W. Res. L. Rev. at 661.

The true scope of this problem is very large but impossible to quantify precisely. It is, after all, a problem of *non-disclosure*. And defendants do not typically unearth evidence that has been suppressed after entering a plea and exiting the adjudicatory process.

Exculpatory evidence is often discovered by happenstance. Mr. Alvarez, for instance, learned of the exculpatory video only because an attorney found it while representing another Brownsville jail detainee. *See* CA5 ROA 30-31, ¶ 19; Pet. App. 72a. And in *Gibson v. State*, the exculpatory evidence came to light only when the victim's family sued to recover on a life insurance policy. 514 S.E.2d 320, 322 (S.C. 1999). These cases are a reminder of the many other innocent defendants who plead guilty

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[8] Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 Am. J. Crim. L. 223, 244 (2006) (describing research published in 1968); *see also* James S. Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* 411-12 (2002), https://perma.cc/87ZU-PDCU.

under the pressures of plea negotiations and are never exonerated because exculpatory evidence stays buried forever.

D. This case is an ideal vehicle for resolving the conflict among the appellate courts.

This case offers an ideal vehicle for the Court to decide whether due process requires the pre-plea disclosure of exculpatory evidence. That question was the single dispositive issue in the court of appeals below, and the case comes to the Court on a clear factual record.

If this Court affirms, Mr. Alvarez's case is over. But if, as Mr. Alvarez urges, he had the right to obtain exculpatory evidence from the government before entering a plea agreement, this Court would reverse and remand to the Fifth Circuit to consider the remaining issues raised by the City's appeal.

Moreover, the facts related to the *Brady* claim are undisputed as they come to the Court. *See* Pet. App. 2a-8a, 72a-73a, 82a-84a. Consistent with the Texas Court of Criminal Appeals' finding that Mr. Alvarez was "actually innocent," *id.* 1a, the district court made the factual findings necessary to invoke *Brady*: the evidence was favorable to Mr. Alvarez, suppressed by the government, and material to the criminal proceeding, *id.* 92a-95a.

E. The Fifth Circuit erred in denying petitioner's right to the pre-plea disclosure of material exculpatory evidence.

The Fifth Circuit's decision, permitting the pre-plea suppression of exculpatory evidence of Mr.

Alvarez's actual innocence, runs afoul of the due-process principles underlying *Brady*'s disclosure requirements. Far from shutting the door to the right to pre-plea disclosure of exculpatory evidence, the Court's decision in *United States v. Ruiz* "implicitly draw[s] a line," 536 U.S. 622, 633 (2002) (Thomas, J., concurring in judgment), between non-impeachment exculpatory evidence, which must be disclosed before a plea agreement, and impeachment evidence, which need not. The Fifth Circuit's precedents push aside this distinction and offend due process.

1. *Brady's* rationale applies pre-plea to exculpatory evidence.

Now more than ever, that search for truth ends at the plea-bargaining table. The "reality is that plea bargains have become so central to the administration of the criminal justice system," that the "negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012). Carving pre-plea exculpatory evidence out of *Brady*—as the Fifth Circuit has done—would strip an essential due-process protection from more than 94% of those convicted of crimes in the United States. *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

To be sure, the Court has viewed disclosure under *Brady* as supporting the right to a fair trial. *See, e.g.*, *United States v. Bagley*, 473 U.S. 667, 675 (1985); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). But it is not *only* that. This Court has found that analogous rights rooted in "the accused's right to a fair trial" apply with equal force at the plea-bargaining stage. *Lafler*, 566 U.S. at 165; *see also*

Padilla v. Kentucky, 559 U.S. 356 (2010); *Frye*, 566 U.S. at 143-44. It "is insufficient," the Court has emphasized, "simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." *Frye*, 566 U.S. at 143-44. Because "trial" rights "cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences," this Court has not "ignore[d] the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler*, 566 U.S. at 170. The Fifth Circuit's position disregards this reality.

2. Due process demands pre-plea disclosure of exculpatory evidence.

The same traditional due-process considerations that led *Ruiz* to reject a right to the pre-plea disclosure of *impeachment* evidence require the disclosure of pre-plea non-impeachment *exculpatory* evidence. Applying the familiar due-process inquiry derived from *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), the Court in *Ruiz* considered "(1) the nature of the private interest at stake, . . . (2) the value of the additional safeguard, and (3) the adverse impact of the requirement upon the Government's interests." 536 U.S. at 631. Each factor favors the right to the pre-plea disclosure of exculpatory evidence.

The private interest at stake for plea-bargaining defendants is "the most elemental of liberty interests": freedom from unjust and unwarranted "physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004). A person considering whether to accept a plea deal is

not a "criminal defendant proved guilty after a fair trial" who has been stripped of the "liberty interests [of] a free man." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). Quite the contrary, a defendant "is presumed innocent until conviction upon trial or guilty plea." *Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016).

The "added value" of pre-plea disclosure of exculpatory evidence is hard to overstate. The existence (or not) of exculpatory evidence goes to the heart of whether "innocent individuals accused of crimes will plead guilty," *Ruiz*, 536 U.S. at 631, and thus exculpatory evidence is more likely than impeachment evidence to be critical information that affects whether a plea is "knowing, intelligent," and "done with sufficient awareness of the relevant circumstances and likely consequences," *Brady v. United States*, 397 U.S. 742, 748 (1970); *see also Ruiz*, 536 U.S. at 629-30. Without a pre-plea right to exculpatory evidence, innocent defendants such as Mr. Alvarez will continue to accept plea agreements for crimes they did not commit. *See* Lee Sheppard, *Disclosure to the Guilty Pleading Defendant: Brady* v. Maryland *and the Brady Trilogy*, 72 J. Crim. L. & Criminology 165, 170 (1981).

That situation is a far cry from the impeachment evidence at issue in *Ruiz*. The plea agreement there specified that the government would disclose "any information establishing the factual innocence of the defendant." *Ruiz*, 536 U.S. at 631. The Court found that this "safeguard . . . diminishe[d] the force of Ruiz's concern that, in the absence of impeachment information, innocent individuals, accused of crimes, will plead guilty." *Id.* The Fifth Circuit's rule, which applies to the very evidence that the *Ruiz* plea

agreement excluded, provides no similar safeguard against innocent individuals pleading guilty.

Ruiz also observed that impeachment evidence is unique "given the random way in which such information may, or may not, help a particular defendant," and that the "degree of help" offered by impeachment evidence may "depend upon the defendant's own independent knowledge of the prosecution's potential case." *Id.* at 630. That is so because impeachment evidence, by definition, is tied to a specific witness and is valuable only if a defendant can divine whether the prosecution will call a particular witness, how much the evidence will undermine the witness's testimony, and the importance of the testimony to the prosecution's overall case. *See id.* Thus, the Court reasoned that impeachment evidence is rarely "critical information" a defendant must have before pleading guilty. *Id.* at 629.

Not so for exculpatory evidence. It "tend[s] to establish a criminal defendant's innocence" rather than merely "undermine a witness's credibility," *Evidence*, *Black's Law Dictionary* (10th ed. 2014), and thus it will consistently aid "particular defendant[s]" in entering pleas that are truly "knowing, intelligent, and sufficiently aware," *Ruiz*, 536 U.S. at 629-30 (internal alterations and quotation marks omitted).

The right to pre-plea disclosure of exculpatory evidence does not "seriously interfere" with the government's interest in "securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice." *Ruiz*, 536 U.S. at 631.

A guilty plea that can be secured only through the suppression of exculpatory evidence is a guilty plea in which the government—and society at large—has no legitimate interest. *See* Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 Case W. Res. L. Rev. 651, 656, 660 (2007). In contrast to impeachment evidence—which implicates only a witness—exculpatory evidence is substantially less likely to "expose prospective witnesses to serious harm" or reveal the identities of "cooperating informants, undercover investigators, or other cooperating witnesses." *Ruiz*, 536 U.S. at 632.

The video footage withheld by the government here, for instance, put no witness at risk. The same is true for the exonerating DNA evidence withheld in *Buffey v. Ballard*, 782 S.E.2d 204, 208 (W. Va. 2015). And in the rare circumstance where disclosure of exculpatory evidence may raise real risks, courts can take appropriate measures to mitigate any risk while protecting the due-process rights of plea-bargaining defendants. *See, e.g.*, *Hyman v. State*, 723 S.E.2d 375, 381 (S.C. 2012) (permitting disclosure to defense counsel but not to defendant); *United States v. Moussaoui*, 591 F.3d 263, 289 (4th Cir. 2010) (same).

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At bottom, a rule that permits the government to suppress exculpatory evidence to encourage an innocent defendant to take a plea deal cannot be squared with due process. The Fifth Circuit's decision should be reversed.

II. FIFTH CIRCUIT RECLASSIFIES EVIDENCE OF MUNICIPAL LIABILITY

To establish municipal liability in a Section 1983 case, the plaintiff must show "proof of three elements: a policymaker; an official policy; and a violation of constitutional rights whose moving force is the policy or custom." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 166 (5th Cir. 2010) (discussing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978)). The Fifth Circuit does not deny that Chief Garcia was a policymaker and it does not appear to contest the existence of a non-disclosure policy. However, the court takes issue with the causation and deliberate indifference elements of municipal liability.

A. Acts pursuant to policy reclassified as interconnected errors.

The Fifth circuit majority states that the City's failure to disclose the video evidence was not the result of the City's non-disclosure policy but rather the result of a "series of interconnected errors" by individual officers that was "separate from" official BPD policy. Pet. App. 13a. In other words, a policy of nondisclosure existed but the nondisclosure of evidence in this case was not caused by the nondisclosure policy.

Here, as part of the internal affairs division ("IAD") investigation, Officer Arias created a use of force report and submitted it up his chain of command to Sgt. Infante and Commander Rodriguez. Infante and Rodriguez then reviewed the report, and the video evidence, and submitted their own individual reports to Chief Garcia. Garcia never

reviewed the file, and none of the officers disclosed the videos outside of the IAD. Pet. App. 40a-41a.

Sergeant Infante testified that the video of the incident was created "for internal purposes only," and that he would only turn over the video to criminal investigations if it was specifically requested. CA5 ROA.2828-29. He said that this was "the way [Infante] had always done [his] job." CA5 ROA. 2829. The head of internal affairs Lieutenant Etheridge testified that CID and IAD conduct "two different investigations" and that rules, such as *Brady*, do not apply to the internal affairs investigation. CA5 ROA.3263-64. IAD officers were, as a matter of policy, not to disclose information or evidence directly to CID. CA5 ROA.2715, 2748, 2750, 2828, 3263, 3275.

As such the City has a policy, that IAD officers do not proactively disclose evidence, including *Brady* evidence, to CID investigators. Instead, IAD officers pass all *Brady* evidence up their chain of command to Chief Garcia, who has sole responsibility to ensure that any *Brady* evidence is properly disclosed. Pet. App. 41a-42a.

Thus, contrary to the majority's view, the officers committed no "interconnected errors" in conducting their investigation. The IAD officers faithfully passed the evidence up the chain of command to Chief Garcia without disclosing the evidence to CID. In turn, the CID officer, unaware that relevant evidence existed, simply passed the file to the District Attorney's office. This was not error, it was how the system was designed to work. Pet. App. 42a.

B. The would've, could've, should've standard used by the Fifth Circuit

heightens the deliberate indifference standards.

The majority next concludes the City could not have implemented the non-disclosure policy with deliberate indifference because there was an "understanding throughout the police department" that exculpatory evidence "could be" disclosed. Pet. App. 14a. Aside from not being supported by the record evidence, this conclusion incorrectly heightens the deliberate indifference standard.

Though BPD officers did claim that they "should," "could," and "would" have disclosed the video evidence to the CID if asked to do so, the overwhelming weight of the evidence is that officers understood that IAD evidence was simply not shared with CID as a matter of policy. Pet. App. 43a.

Here, the only BPD officer to acknowledge an obligation to disclose exculpatory evidence discovered during internal use-of-force investigations was Chief Garcia. *See* CA5 ROA 2717-18. The other officers involved in investigating Officer Arias's use of force and subsequent criminal charge against Alvarez testified that it was not their responsibility to seek out or disclose exculpatory evidence. CA5 ROA 2929, 3012 (Detention Officer); 2815-16 (jail supervisor); 3178-81 (CID investigator); *see also* 3155-56, 3166 (BPD commander).

This voluminous testimonial evidence reflects the city's written policy for internal investigations, which imbues the Chief of Police with final responsibility for reviewing use-of-force reports. CA5 ROA 2806-07; *see also* CA5 ROA 2715. For example, Sergeant Infante—the City jail supervisor who investigated Officer Arias's use of force—acknowledged that he would have disclosed the video

to CID if asked, but that his only job was to pass the video "up my chain of command, not [to] criminal investigations." CA5 ROA 2814-16, 2828-29. Lieutenant Etheridge, who supervised the City's internal-affairs investigations, testified that any evidence revealed in internal investigations went "to the chief, who, I would assume, would disclose it" to criminal investigations "if it needed to be disclosed." CA5 ROA 3274. Chief Garcia suggested that other BPD officers involved in the case *should* have disclosed the video, but acknowledged that no explicit policy *required* anyone do so. *See* CA5 ROA 2704-07, 2712. Rather, regular practice at BPD was to send any evidence collected during internal investigations only to Chief Garcia via the "strictly administrative" chain of command, and not to criminal investigators. CA5 ROA 2814-16.

The majority's conclusion that there was an "understanding throughout the police department" that IAD officers could hypothetically disclose exculpatory evidence under certain circumstances, does not outweigh the fact that they in fact didn't disclose evidence in accordance with the City's non-disclosure policy. Hinging liability upon what "could've" or "should've" been done elevates the deliberate indifference standard. In other words, in order to prevail on a §1983 claim one must eliminate the possibility that a municipal actor "could have" hypothetically deviated from the policy in order to prevail. In essence, the definition of a policy would be transformed into a requirement. Imposing any liability upon a municipality would be rendered impossible.

C. Police Chief's repeated and deliberate indifference reclassified as negligent oversight.

A policy or custom may be proven either by showing a pattern of unconstitutional conduct by municipal actors, or by showing a single unconstitutional action by a final municipal policymaker. *Woodard v. Andrus*, 419 F.3d 348, 352 (5th Cir. 2005). Here, Alvarez has produced abundant evidence of unconstitutional acts by multiple BPD officers as well as causal evidence of a policy through the acts of the final municipal policymaker, Chief Garcia.

The City, has an express written policy that the chief is solely responsible for the final review of all IAD investigations. CA5 ROA.2806. When an internal affairs incident occurs, an IAD officer—in this case, Sergeant Infante—submits a report including any video recordings or other materials to the Chief of Police. CA5 ROA.2806. The Chief of Police—in this case, Garcia—is responsible for reviewing the report, making any final decisions about the internal affairs incident, and disclosing any material that should be disclosed to CID. CA5 ROA.3281, 2717, 2722, 2806.

Chief Garcia acknowledges that any evidence "internal affairs discovers is not to be shared with the criminal investigation division." CA5 ROA. 2750. He reiterated this position when he testified that those two divisions "shouldn't" share information. CA5 ROA 2748.

Indeed, Garcia did not review nine out of thirteen known use of force cases. Even when Garcia did review such files, it may be "several weeks, even up to a month or more . . . after the criminal case had

been submitted to the [D]istrict [A]ttorney's office." Garcia's failure to review the instant case was entirely in line with the City and its final policymaker's practice. Pet. App. 42a.

Taken together, the policy and practices of the City gave Chief Garcia sole responsibility to disclose exculpatory material revealed in internal use-of-force investigations like the one in this case. Here, the Chief acknowledged that he received but did not review the relevant report, so the video was never disclosed. CA5 ROA 2720-23, 2727. He further testified that, based on his experience, it is foreseeable that a jailer injured during a use-of-force incident will file a police report seeking charges against the detainee. CA5 ROA 2743. "Because the policy in place to ensure disclosure within the BPD was Garcia's review of the" internal use-of-force reports, "Garcia should have known that the 'highly predictable' consequence of his failure to review those files would be a *Brady* violation." CA5 ROA 1097. The district court correctly held that Chief Garcia's failure to review the report here "constitute[d] an official policy or custom of the City of Brownsville for which the City may be held liable under § 1983." CA5 ROA 1098.

The majority, however, characterizes Garcia's failure to review the file as well as his deliberate indifference acts as nothing "more than negligent oversight". Pet. App. 15a. The record however paints a different picture.

Therefore the majority's conclusion that Alvarez has not established that the non-disclosure policy was the moving force behind the alleged violation is erroneous. Because Garcia was a final policymaker BPD, his actions in promulgating the non-disclosure

policy and in failing to review the Alvarez file to ensure disclosure of the video are the acts of a municipal policymaker. *Zarnow,* 614 F.3d at 169 (*citing Bolton v. City of Dallas*, 541 F.3d 545, 548 (5th Cir. 2008). CA5 ROA.685-688.

D. Argument that pre-plea right to *Brady* material not recognized right is inapplicable.

The City never made this "clearly established" argument in the district court or in the Fifth Circuit. By adopting it sua sponte, the Fifth Circuit court repeats the mistake recently made in *Hernandez v. Mesa*, 785 F.3d 117 (5th Cir. 2015) *(en banc*). There the Court held that a border patrol agent was entitled to qualified immunity for shooting a Mexican national because the law was not clearly established that the Fifth Amendment applied to a foreign citizen injured outside the United States. *Id. at 121.* The Supreme Court reversed, explaining that the agent did not know at the time of the shooting whether the victim was a U.S. citizen. 137 S. Ct. 2003, 2007 (2017). The same is true for the similar deliberate indifference inquiry here.

When he failed to disclose the exculpatory video, Police Chief Garcia did not know that Alvarez was pleading guilty. Even more than in *Mesa*, he could not have known as that fact did not yet exist (that is, the plea decision had not yet been made).

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In sum, a rule that allows someone like Alvarez go to prison without telling him that there is evidence that exonerates him offends due process-whether he pleas or not. The Fifth Circuit's decision should be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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