NO. 22-55614

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGER WAYNE PARKER,

PLAINTIFFS– APPELLEES,

V.

COUNTY OF RIVERSIDE ET AL.,

DEFENDANT– APPELLANT.

On Appeal from the United States District Court
for the Central District of California
The Honorable Jesus G. Bernal
District Court Case No. 21-cv-01280

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF SOUTHERN CALIFORNIA, AMERICAN CIVIL LIBERTIES UNION OF NOTRTHERN CALIFORNIA, NATIONAL POLICE ACCOUNTABILITY PROJECT OF THE NATIONAL LAWYERS' GUILD

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, amici curiae state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

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STATEMENT OF INTEREST

Amici curiae the **American Civil Liberties Union of Southern California** and the **American Civil Liberties Union of Northern California** (together the ACLU California Affiliates) are nonprofit, nonpartisan organizations dedicated to defending the principles embodied in the United States Constitution and our nation's civil rights laws. The ACLU California Affiliates have frequently appeared before the U.S. Supreme Court, this Court, and other federal and state courts in cases defending the rights of criminal defendants and those in pretrial custody. The ACLU California Affiliates are particularly concerned with safeguarding the protections of the Due Process Clause; ensuring prosecutors are held accountable for charging and detention decisions; and protecting the physical liberty of people in the criminal justice system. ACLU attorneys and advocates bring litigation to protect these constitutional principles and promote legislation and local policy in accordance with these values.

The **National Police Accountability Project (NPAP)** was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil-rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including dozens of members who represent clients that have been grievously harmed by prosecutorial misconduct.

Every year, NPAP members litigate the thousands of egregious cases of law enforcement abuse that do not make news headlines as well as the high-profile cases that capture national attention. NPAP provides training and support for these attorneys and resources for non-profit organizations and community groups working on police and correction officer accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as amicus curiae in cases, such as this one, presenting issues of particular importance for its members and their clients.

SOURCE OF AUTHORITY TO FILE

Counsel for Defendant-Appellant and Plaintiffs-Appellees consent to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

FED. R. APP. P. 29(A)(4)(E) STATEMENT

Amici declare that:

1. No party's counsel authored the brief in whole or in part;
2. No party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. No person, other than amici, their members, or their counsel, contributed money intended to fund preparing or submitting the brief.

INTRODUCTION & SUMMARY OF ARGUMENT

This appeal concerns whether a person detained pretrial for four years, for a crime he unquestionably did not commit, may sue the prosecutors who illegally withheld evidence demonstrating his innocence. A Deputy District Attorney (DDA) employed by Defendant-Appellee Riverside County expressed "serious concerns about" Plaintiff-Appellant, Roger Parker's, guilt as early as two weeks following his arrest for murder. Sounding the alarm about physical evidence and Mr. Parker's interrogation, the prosecutor "expressly stat[ed], 'The man's innocent. He did not do it.'" 2-ER-201–02 . Defendant-Appellee's response was to remove the prosecutor from Mr. Parker's case. A second DDA also concluded Mr. Parker was factually innocent, raised concerns with his supervisors, and—six months prior to Mr. Parker's release—obtained a recorded confession from another man. 2-ER-205–06. In response, Defendant-Appellee removed the second DDA from the case. 2-ER-237–38. As a direct result of these actions, Mr. Parker remained in custody, asserting his innocence without access to the exculpatory evidence that eventually freed him, for four years. *Id.*

Mr. Parker sued in federal court under 42 U.S.C. § 1983 for violation of his right to due process. The District Attorney's Office moved for judgment on the pleadings. The district court correctly concluded that Mr. Parker's claim could

proceed because the DA Office's decision to withhold exculpatory evidence prejudiced him, in the form of a lengthy pretrial incarceration.

Appellants' argument that Mr. Parker's claim cannot proceed because he was never convicted wrongly conflates the standard for challenges to the suppression of material evidence in criminal proceedings with the law governing claims brought by civil litigants under Section 1983. A procedural due process violation for the suppression of exculpatory evidence is actionable under Section 1983 even if the plaintiff was never convicted. *See Tatum v. Moody*, 768 F.3d 806 (9th Cir. 2014) (intentional or reckless failure to disclose highly significant exculpatory information violates due process when it results in detentions unusual in length). As Ninth Circuit cases like *Tatum* and *Rivera v. Los Angeles*, 745 F.3d 384 (9th Cir. 2014), demonstrate, the traditional analytical framework for determining whether a criminal defendant has been afforded due process first announced in *Mathews v. Eldridge*, 424 U.S. 319 (1976)—and not the narrower inquiry grounded in the right to a fair trial, articulated in *Brady v. Maryland*, 373 U.S. 83 (1963)—governs here. Viewed through this lens, the facts in Mr. Parker's complaint support the district court's conclusion that his claim may continue.

This Court can affirm the decision below by simply applying the balancing test laid out in *Eldridge*. But even if the Court analyzes his claim under the specific framework set forth in *Brady*, Mr. Parker should prevail. Unlike a *Brady* claim in

the criminal context, which seeks the remedy of a new trial, a claim arising under Section 1983 seeks damages for prejudice incurred during the proceeding—in this case, nearly four years of unlawful pretrial detention that Mr. Parker experienced as a direct result of the prosecutors' deliberate misconduct. A wrongful conviction is one type of harm a criminal defendant may suffer, but it is not the only form of prejudice that may flow from the withholding of exculpatory evidence. *Brady* acknowledged this, reasoning that "the suppression of evidence favorable to the accused was *itself* sufficient to amount to a denial of due process." *Brady*, 373 U.S. at 87 (citing, *inter alia*, *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Napue v. Illinois*, 360 U.S. 264 (1959)) (emphasis added). Recognizing that the civil prejudice inquiry is different from the showing of harm needed to win a new criminal trial, courts have already imposed different procedural requirements on civil and criminal *Brady* claims. *See, e.g.*, *Tennison v. San Francisco*, 570 F.3d 1078, 1088 (9th Cir. 2009) (distinguishing between the standard of liability for a *Brady* claim brought by a criminal defendant and the standard for such a claim brought by a civil litigant under § 1983).

Finally, as a matter of policy, this Court should preserve plaintiffs' ability to bring civil due process claims under Section 1983. These claims foster accountability for reckless or intentional prosecutorial misconduct, which so

frequently goes undeterred in our criminal legal system. This Court should affirm the district court's conclusion that Mr. Parker's due process claim may proceed.

ARGUMENT

Mr. Parker asserts a viable due process claim via Section 1983. Part I draws on established due process jurisprudence, grounded in *Mathews v. Eldridge*, to demonstrate why Defendants-Appellants' wrongful withholding of exculpatory evidence caused Mr. Parker cognizable prejudice in the form of a lengthy wrongful pretrial detention. Part II argues that even if this Court chooses to analyze Mr. Parker's claim using the standard articulated in *Brady v. Maryland*, it should not require that a plaintiff seeking damages under Section 1983 have suffered the harm of a wrongful conviction. Part III urges this Court to consider the importance of civil litigation in deterring prosecutorial misconduct and to ensure civil plaintiffs who suffer harm short of a wrongful conviction may hold prosecutors accountable.

I. Failure to disclose exculpatory evidence to a person charged with a crime is a procedural due process violation actionable under 42 U.S.C. § 1983, regardless of whether the person is ultimately convicted.

A. Failure to disclose exculpatory evidence is a procedural due process violation.

The due process clause of the Fourteenth Amendment sets the minimum procedural protections that governments must provide to lawfully detain a person

pretrial. *See Rivera v. County of Los Angeles*, 745 F.3d 384, 389-90 (9th Cir. 2014) ("Precedent demonstrates . . . that post-arrest incarceration is analyzed under the Fourteenth Amendment alone."); *accord Baker v. McCollan*, 443 U.S. 137, 145 (1979) (extended detention of defendant claiming innocence may violate due process).[1]

In the Ninth Circuit, the Due Process Clause protects against the government's reckless or deliberate failure to investigate and disclose exculpatory evidence to pretrial detainees—regardless of whether the plaintiff was ultimately convicted. *See Tatum v. Moody,* 768 F.3d 806, 816 (9th Cir. 2014) ("Where, as here, investigating officers, acting with deliberate indifference or reckless disregard for a suspect's right to freedom from unjustified loss of liberty, fail to disclose potentially dispositive exculpatory evidence to the prosecutors, leading to the lengthy detention of an innocent man, they violate the due process guarantees of the Fourteenth Amendment."); *Lee v. City of Los Angeles*, 250 F.3d 668, 683-84 (9th Cir. 2001) (reversing dismissal of complaint that adequately alleged defendants failed to accord plaintiff "minimum due process" by recklessly and with deliberate indifference ignoring his "obvious" mental incapacity and failing to

[1] *Albright v. Oliver*, 510 U.S. 266 (1994), which discouraged analysis of post-arrest, pre-trial detention under the *substantive* component of the Due Process Clause, is inapposite. *See id.* at 275 ("We . . . hold that substantive due process, with its scarce and open ended guideposts, can afford him no relief.") (cleaned up).

take steps to identify him, causing two-year incarceration); *see also Rivera*, 745 F.3d at 390-92 (Fourteenth Amendment provides remedy where the defendants ignored indications that they were mistaken about the detainee's identity or where defendants withheld detainee's access to a judicial forum for raising such a claim).

The Court's reasoning in *Tatum* demonstrates why these procedural protections extend to Mr. Parker. In *Tatum*, the plaintiff, Mr. Walker, was incarcerated pending trial on charges arising from a string of robberies with a similar modus operandi. 768 F.3d at 809. The investigating officers knew that nearly identical robberies took place while Mr. Walker was incarcerated and that another man had confessed to some of those later crimes. The detectives never disclosed this information to the prosecutor. *Id*. After twenty-seven months of pretrial detention, Mr. Walker's defense attorney learned of the other man's conviction for the nearly identical crimes. *Id.* When the prosecutor became aware of the other man's conviction, he dropped the charges and Mr. Walker was declared factually innocent. *Id.* Mr. Walker sued the officers under Section 1983 alleging a violation of his Fourteenth Amendment due process rights and prevailed in a jury trial. *Id*.

The Ninth Circuit affirmed, holding "that the Constitution does protect Walker from prolonged detention when the police, with deliberate indifference to, or in the face of a perceived risk that, their actions will violate the plaintiff's right

to be free of unjustified pretrial detention, withhold from the prosecutors information strongly indicative of his innocence[.]" *Id*. at 814-15. The court confirmed that the Fourteenth Amendment is the correct vehicle for such a claim, citing *Rivera*, *Baker*, and *Lee*, and noting that the Due Process Clause's protections are especially salient where, as here, the person detained asserts their innocence and/or the facts suggest a case of mistaken identity. *Id.* at 815-17 (citing, *inter alia*, *Russo v. City of Bridgeport*, 479 F.3d 196, 199, 208 (2d Cir. 2007); *Brady v. Dill*, 187 F.3d 104, 112 (1st Cir. 1999)). The court expressly rejected the defendants' argument that Mr. Walker's claim was foreclosed because he was never convicted and so was not denied the right to a fair trial:

> To resolve this appeal, we need not decide the scope of the protections established by *Brady* and its progeny, because Walker's claim sounds in the right first alluded to in *Baker*, not *Brady*. Where, as here, investigating officers, acting with deliberate indifference or reckless disregard for a suspect's right to freedom from unjustified loss of liberty, fail to disclose potentially dispositive exculpatory evidence to the prosecutors, leading to the lengthy detention of an innocent man, they violate the due process guarantees of the Fourteenth Amendment. *Id*. at 816.

The *Tatum* court imposed three limitations on its rule that a failure to investigate and/or disclose exculpatory information implicates the Fourteenth Amendment: its holding is "restricted to detentions of (1) unusual length, (2) caused by the investigating officers' failure to disclose highly significant exculpatory evidence to prosecutors, and (3) due to conduct that is culpable in that

the officers understood the risks to the plaintiff's rights from withholding the information or were completely indifferent to those risks." *Id.* at 819-20.

Mr. Parker's case meets each of these limitations and indeed presents even more egregious facts than *Tatum*. *First*, Mr. Parker was detained for nearly four years, almost double the length of Mr. Walker's detention. Mr. Parker was arrested on March 18, 2010, and the charges against him were not dismissed until March 6, 2014. 3-ER-407–08. (Transcript from hearing dismissing charges). Mr. Parker was held in custody for the duration of the case. *Id*.

Second, Mr. Parker's detention was caused by the state's failure to disclose exculpatory evidence. DDAs suspected Mr. Parker's innocence, doubted physical evidence, had concerns about his interview, and ultimately obtained someone else's confession. 2-ER-205–07, 236–38. That the relevant state actors were prosecutors in Mr. Parker's case but detectives in *Tatum* is of no consequence. Prosecutors, like police officers, are constitutionally obligated to investigate and disclose exculpatory material. *See United States v. Bruce*, 984 F.3d 884, 895 (9th Cir. 2021) (individual prosecutors have 'the duty to learn of any favorable evidence known to others acting on the government's behalf' as part of their 'responsibility to gauge the likely net effect of all such evidence' to the case at hand.") (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)); *cf.* California Rules of Professional Conduct Rule 3.8(d) (Special Responsibilities of a Prosecutor)

(enumerating disclosure obligations). Moreover, Defendants-Appellants withheld exculpatory evidence from Mr. Parker because of improper political considerations, not because they deemed the suppression proper according to their exercise of prosecutorial discretion. The *Tatum* court's reasoning applies with at least the same force in Mr. Parker's case, where the prosecutors failed to disclose dispositive exculpatory evidence for improper political purposes.

Third and finally, Mr. Parker has credibly alleged that the prosecutors' conduct in his case was reckless or deliberately indifferent. There is ample evidence suggesting the District Attorney's Office knew from the outset that Mr. Parker was likely innocent and simply silenced any deputy who said as much. Deputy District Attorney Lisa DiMaria expressed "serious concerns about [Mr. Parker's] guilt" at the "initial staffing" meeting in March 2010. 2-ER-93 (July 22, 2011 memorandum). Ms. DiMaria also raised concerns about how the police conducted their interviews with Mr. Parker, leading to his obviously false confession. 2-ER-94–95. Further, as early as July 2011, Ms. DiMaria received results from the analysis of the physical evidence against Mr. Parker, which "reinforced [her] concern for the actual guilt of the defendant." 2-ER-93. Around that time, detectives reinterviewed Mr. Parker, who told them that he "made the whole thing up because they kept pressuring him to say something." 2-ER-95. Finally and contemporaneously, physical evidence eliminated Mr. Parker from

contact with the victim's sweatshirt and the murder weapon. *Id.* In other words, nearly three years prior to Mr. Parker's release, all the evidence pointed to his factual innocence. But instead of releasing Mr. Parker, the District Attorney's Office removed Ms. DiMaria from the case because she insisted on Mr. Parker's innocence and "refused to prosecute the case." 2-ER-202.[2] This brazen disregard for the truth and Mr. Parker's rights amounts to recklessness or deliberate indifference. *See*, *e.g.*, *Lee*, 250 F.3d at 684 (plaintiff alleged recklessness and deliberate indifference where defendant ignored plaintiff's "obvious" mental incapacity; failed to take any steps to identify him including fingerprints or physical comparisons to a suspect profile; extradited him pursuant to a fugitive warrant; and caused him to be detained for two years pretrial).

Although it has not yet confronted this specific scenario, the Supreme Court has also recognized that due process protections may apply to the pre-conviction disclosure of exculpatory evidence, especially where—as in *Tatum*, *Lee*, and this

[2] Even if the Court were inclined to conclude that Mr. Parker's unconstitutional detention began only when another man confessed to the crime in the fall of 2013, 2-ER-201–02, this would still be sufficient for relief under *Tatum*. There, the Court distinguished *Baker*, 443 U.S. at 145, where the mistaken detention lasted only three days, analogizing instead to *Russo*, 497 F.3d at 209, where the court held that "a 217-day and even a 68-day detention were lengthy enough to carry constitutional violations." (cleaned up). In this case, even after prosecutors discovered another man's recorded confession to the crime, they failed to turn this evidence over to Mr. Parker and instead removed the Deputy DA who discovered the recording from Mr. Parker's case.2-ER-201–02. This prolonged Mr. Parker's detention by approximately six months.

case—the evidence withheld causes the criminal defendant substantial harm. *See United States v. Ruiz*, 536 U.S. 622, 628-33 (2002) (applying *Mathews v. Eldridge* and analyzing whether due process requires the prosecution to turn over material impeachment evidence before negotiating a plea deal); *see also id.* at 633-34 (Thomas, J., concurring in the judgment) ("The Court . . . suggests that the constitutional analysis turns in some part on the 'degree of help' [the exculpatory] information would provide to the defendant at the plea stage . . . ."). In *Ruiz*, although the Court held that the plaintiff was not entitled to impeachment evidence at the plea stage, *id.* at 633, it reached this conclusion by applying the traditional due process factors, weighing the value of exculpatory material to a criminal defendant considering a plea against the potential risk of prematurely disclosing witness information that could harm the government's case or put the witnesses at risk, *id.* at 631-32. The Court reasoned that a criminal defendant considering a guilty plea already knows their own guilt or innocence (lessening the value of a disclosure), and further that the plea agreement in *Ruiz* specified that the government would provide "any information establishing the factual innocence of the defendant" regardless of the Court's ruling. *Id.* at 631. These considerations, weighed against the risk of harming the government's case should the defendant decline the plea, were insufficient to establish a due process right to material impeachment evidence at the plea stage. *Id.* at 632-33.

In Mr. Parker's case, the concrete harm of a wrongful deprivation of liberty—especially where the exonerating material was deliberately withheld—is far more prejudicial than the harm of incomplete impeachment information prior to a plea deal that the Court considered in *Ruiz*. Instead, it is akin to the deprivation of liberty this Court found actionable in *Tatum*. In the district court's words, "Mr. Parker experienced an additional, prolonged period of pretrial confinement seemingly but-for the government's non-disclosure of material, exculpatory evidence." 1-ER-8 . The severity of the harm Mr. Parker experienced and the egregiousness of the District Attorneys' conduct warrants a finding of prejudice pretrial. *Tatum*, 768 F.3d at 809.

B. Section 1983 provides a remedy for constitutional violations.

Because he has suffered harm from the appellants' due process violation, Mr. Parker is entitled to a remedy under Section 1983. The Section 1983 drafters intended for the statute to be construed broadly and provide for a remedy of *any* constitutional violations. *See* Cong. Globe App., 42d Cong., 1st Sess. 68 (Mar 28, 1871) (statement of Rep. Shellabarger) (stating § 1983 should be "liberally and beneficently construed" because it is "remedial and in aid of the preservation of human liberty and human rights"); *id.* at 217 (Apr 13, 1871) (statement of Sen. Thurman) (stating that § 1983's language is without limit and "as broad as can be used"); *see also Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982) ("To read

the 'under color of any statute' language of the Act in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the § 1983 cause of action would be wholly inconsistent with the purpose of § 1 of the Civil Rights Act of 1871 . . . from which § 1983 is derived."). Courts have therefore established a presumption that Section 1983 remedies exist for constitutional violations that injure a plaintiff. *Franklin v. Gwinnet Cty. Pub. Sch.*, 503 U.S. 60, 65-66 (1992) ("[W]e presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise"); *Carey v. Piphus*, 435 U.S. 247, 255 (1978) (upholding damages remedy under § 1983 even though Congress did not directly address whether the statute provided for a damages remedy). Because Mr. Parker's wrongful four-year pretrial detention was a deprivation of liberty without due process, he is entitled to a remedy.

II. Conviction is not an underlying requirement for civil claims seeking money damages for the failure to disclose exculpatory evidence.

Under the framework laid out in *Matthews v. Eldridge*, Mr. Parker unquestionably can establish a due process violation for the suppression of material evidence even though he was never convicted. But Mr. Parker's claim is viable even under the specific framework set forth in in *Brady*, because as this Court has held, a conviction is not required to satisfy the prejudice component of the *Brady* test. Mr. Parker's is a civil suit seeking a damages remedy, and not a criminal case seeking a new trial. The conviction requirement Defendants-Appellants propose is

an illogical prerequisite. Courts have long understood the difference between the two remedial schemes and imposed different law accordingly. The same is appropriate here.

A. A criminal conviction is not an element of the *Brady* standard; it is merely a prerequisite for claimants seeking the remedy of a new trial.

Under the framework set out in *Brady v. Maryland*, an individual can prevail on their due process claim for the suppression of evidence if they demonstrate two elements: (1) the prosecution suppressed evidence favorable to them as an accused and (2) the suppressed "evidence is material either to guilt or to punishment." 373 U.S. 83, 87 (1963). *Brady* made no mention of any conviction requirement, and certainly did not include conviction as an element of the due process violation. *See id*. Instead, the Supreme Court reasoned in *Brady*, in line with its earlier decisions in *Mooney v. Holohan*, 294 U.S. 103 (1935), *Pyle v. Kansas*, 317 U.S. 213 (1942), and *Napue v. Illinois*, 360 U.S. 264 (1959), that "the suppression of evidence favorable to the accused was *itself* sufficient to amount to a denial of due process." *Id*. (cleaned up) (emphasis added). *See also* Sunil Bhave, *The Innocent Have Rights Too: Expanding* Brady v. Maryland *To Provide The Criminally Innocent With a Cause of Action Against Police Officers Who Withhold Exculpatory Evidence*, 45 CREIGHTON L. REV. 1, 8 (2011) ("What can be gleaned from pre-*Brady* precedent such as *Mooney*, *Pyle*, *Alcorta*, and *Napue* is a settled rule: the mere withholding of exculpatory evidence during a criminal prosecution violates

due process."). The conviction "requirement" Appellants asks the Court to impose onto all *Brady* claims stems not from *Brady* itself but from cases interpreting the meaning of "material evidence" in the context of a criminal appeal or habeas proceeding. In *United States v. Agurs*, 427 U.S. 97, 104 (1976), the Court defined "material evidence" as evidence that "might have affected the outcome of the trial." *See also United States v. Bagley*, 473 U.S. 667, 678 (1985) (evidence is "material" if it "its suppression undermines confidence in the outcome of the trial"). Later, in *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), the Court interpreted "material evidence" as evidence that "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *See also Strickler v. Greene*, 527, U.S. 263, 289 (1999) (to prevail on a *Brady* claim, an individual must demonstrate "a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense") (cleaned up).

Critically, neither *Brady* nor these cases interpreting *Brady*'s "materiality" requirement were civil suits brought under Section 1983. Each of these cases reached the Supreme Court either on direct appeal of a criminal conviction, *see Brady*, 373 U.S. at 84-85; *Agurs*, 427 U.S. at 100; *Bagley*, 473 U.S. at 674, or through writ of habeas corpus, *see Kyles*, 514 U.S. at 421; *Strickler*, 527 U.S. at 265. Thus, the petitioners in these cases were challenging their criminal

convictions and seeking the remedy of a new criminal trial. The Court, in turn, took for granted that each of these petitioners was, in fact, convicted following a criminal trial.

The incorporation of a conviction "requirement" into criminal *Brady* cases is simply a function of the relief requested in these cases. In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court held that a criminal defendant's request for a new trial is subject to harmless-error analysis. *Id.* at 20. Courts evaluating requests for new trials based on alleged *Brady* violations simply determined that the harmless-error inquiry—whether the withheld evidence would have likely changed the result of the criminal trial—was the same as the *Brady* materiality standard, and accordingly collapsed the two. *See, e.g.*, *Kyles*, 514 U.S. at 435 (holding that "once a reviewing court . . . has found constitutional error there is no need for further harmless-error review," because the materiality and harmless-error inquiries are redundant). *See also* Bhave, *supra*, at 12; Brandon Garrett, *Innocence, Harmless Error, Wrongful Convictions*, 2005 WIS. L. REV. 35, 38 (2005) ("[T]he Court has shifted the evidentiary burden of proving error *not* harmless to criminal defendants by incorporating harmless error rules into . . . the 'materiality and prejudice' prong of the *Brady v. Maryland* right."). But in folding *Brady*'s materiality requirement into the harmless-error standard when evaluating *Brady* cases brought *in the criminal context*, the Court never held that a *Brady* litigant

must suffer a conviction—or even endure a criminal trial, *see United States v. Ruiz*, 536 U.S. 622 (2002) (applying *Brady* to a plea offer)—as a precondition for asserting a *Brady* violation. Thus the Court has never treated a conviction as an element of *Brady*'s underlying due process violation, but merely a prerequisite for seeking the remedy of a new trial *because of* the due process violation. Although a conviction is a precondition for any request for a new criminal trial, it is not an element of the due process claim for the suppression of material evidence and is therefore not a "requirement" for all litigants bringing *Brady* claims.

B. A *Brady* claim brought under Section 1983 seeks compensation for harm and deterrence from future misconduct, rendering a criminal conviction irrelevant.

Unlike a *Brady* claim brought in the criminal or habeas context, a civil *Brady* claim seeks money damages to compensate for harm endured and deterrence from future government misconduct, not relief from criminal punishment. *See* Bhave, *supra*, at 13 ("In the civil context, the question is not whether the plaintiff, who has been acquitted yet also denied *Brady* evidence, deserves a new trial. Instead, the question becomes how much harm has the plaintiff suffered by the withholding of exculpatory evidence."); Garrett, *supra*, at 55 ("The underlying purposes of [Section 1983] are to compensate a civil rights violation and to deter future wrongful government conduct."). Because a civil plaintiff does not, and indeed cannot, bring a § 1983 suit to challenge the validity of their conviction and

seek a new trial, *see Heck v. Humphrey*, 512 U.S. 477 (1994), the harmless-error analysis applied to criminal and habeas *Brady* cases and its attendant conviction prerequisite do not apply to civil suits, *see* Bhave, supra, at 25 (arguing that the federal circuits that have determined a civil *Brady* suit requires a conviction have inappropriately applied harmless-error review to civil suits seeking money damages); Garrett, *supra*, at 63 ("Where harmless error operates during criminal appellate review, it serves no function once the criminal process has terminated in a vacatur of the conviction," an acquittal, or a dismissal).

The potential harm for which a civil *Brady* litigant may seek redress extends far beyond the harm of a criminal conviction following a constitutionally inadequate trial.[3] Any individual facing criminal charges is forced "to endure the pain, humiliation, and financial costs associated with being accused of [a] crime[]." Bhave, *supra*, at 25. These harms are triggered immediately upon commencement of the prosecution and are fully independent of the prosecution's ultimate disposition. The Ninth Circuit's "binding precedent clearly explains that an acquittal" or a dismissal "does not bar a Section 1983 action based on a due process violation during an underlying criminal proceeding." *Park v. Thompson*,

[3] This Court's model jury instructions for the due process violation of the suppression of evidence account for this reality. The instructions require the jury to find the plaintiff was "harmed" by the government's deliberate or reckless suppression of favorable evidence but do not define "harm" as a conviction. Ninth Cir. Model Jury Inst. 9.33A.

851 F. 3d 910, 923 (9th Cir. 2017). An individual's dismissal or "acquit[tal] speaks only to the amount of damages he suffered; it is irrelevant to whether he has a cause of action." *Haupt v. Dillard*, 17 F.3d 285, 287 (9th Cir. 1994).

In addition to compensating civil litigants for harm suffered, *Brady* provides a crucial tool for holding prosecutors accountable to constitutional standards. *See Smith v. Almada*, 640 F.3d 931, 940 (9th Cir. 2011) (a *Brady* claim in the § 1983 context seeks compensation for harm and deterrence for future misconduct, not relief from criminal punishment); *id.* at 948 (Nelson, J., dissenting) ("*Brady* pursues two interdependent goals: it is a judicially enforced mechanism for *both* protecting the right to a fair trial *and* discouraging misconduct on the part of police and prosecutors."). *Brady* imposes an affirmative duty to search for and disclose exculpatory material, *see Bagley*, 473 U.S. at 675—a protection that goes beyond the standard in a civil malicious prosecution claim. Permitting a § 1983 claim premised on a *Brady* violation to proceed without a conviction promotes *Brady*'s goal of discouraging misconduct while ensuring officers who lack the requisite intent are not subject to suit.

A rule requiring civil *Brady* litigants to suffer a criminal conviction before filing suit has led to absurd results in other circuits. The illogical conviction prerequisite prevents individuals with timely claims who have suffered real harm from seeking accountability for prosecutorial misconduct. *See* Bhave, *supra*, at 17

(requiring a § 1983 plaintiff to demonstrate "prejudice" in the narrow criminal sense of an unfair conviction leads to "absurd result[s] because prejudice in a civil action is, in essence, being injured or damaged"); *see also* Part I.B., *supra* (Section 1983 exists to remedy constitutional violations). This Court should not replicate other circuits' misinterpretations of *Brady*'s core elements and intended goals.

C. It is not burdensome for courts to differentiate between civil and criminal *Brady* claims when applying the conviction requirement because courts have already established different requirements for civil and criminal *Brady* claims given the differences in relief sought.

Courts have already established different state-of-mind requirements in civil and criminal *Brady* claims. In the criminal and habeas contexts, the prosecution's suppression of material evidence violates due process, "irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. By contrast, a civil litigant pursuing a *Brady* claim "must show that the [prosecution] acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence." *Tennison v. San Francisco*, 570 F.3d 1078, 1088 (9th Cir. 2009). *See also Porter v. White*, 483 F.3d 1294, 1306 (11th Cir. 2007) (negligent failure to disclose is sufficient in the criminal but not civil context); *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004) (same); *Jean v. Collins*, 221 F.3d 656, 660-61 (4th Cir. 2000) (holding police officers who acted in good faith could not be liable for *Brady* claim brought under § 1983); *see also* Garrett, *supra*, at 74 (discussing distinctions between civil and criminal *Brady* analysis).

The nature of the underlying due process violation—the withholding of exculpatory evidence—is identical in both cases despite the differing standards. Courts can similarly adopt different conviction requirements for civil and criminal *Brady* claims, requiring a conviction in criminal cases seeking a new trial but not in civil cases where a conviction is irrelevant.

III. Creating additional barriers to civil litigation will reduce prosecutors' incentives to investigate and disclose exculpatory evidence.

Withholding exculpatory evidence is a disturbingly common form of prosecutorial misconduct, yet there are few mechanisms available for victims to hold prosecutors accountable when they engage in this harmful and intentional practice. This Court should permit civil claims like Mr. Parker's to continue in order to deter prosecutorial misconduct.

A. Prosecutors frequently withhold exculpatory evidence but rarely face professional consequences.

According to available data, state suppression of evidence is prevalent, even though significantly undercounted.[4] Margaret Z. Johns, *Reconsidering Absolute*

[4] *See* Jerry P. Coleman & Jordan Lockey, Brady *"Epidemic" Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It*, 50 U.S.F. L. REV. 199, 224 (2016); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 869 (1997) (asserting that "we have every reason to suspect that there are many more [*Brady* violations] in which the prosecutor's refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney").

Prosecutorial Immunity, 2005 BYU L. REV. 53, 141 n.671, 142, 146 (2005); *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting) ("There is an epidemic of *Brady* violations abroad in the land."). One study of exonerations revealed that failure to disclose exculpatory evidence occurred in 37% of cases. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 119 (2008). An analysis of California cases found exculpatory evidence was withheld in close to 20% of cases alleging prosecutorial misconduct. *See* CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, *Report and Recommendations on Reporting Misconduct*, at 3 (2007) (locating 2,130 California cases in which claims of prosecutorial misconduct were raised and finding misconduct in 443, the majority of which involved the withholding of exculpatory evidence). The majority of prosecutorial *Brady* violations are knowing, reflective of an impetus to win conviction over doing individual justice. Jon B. Gould, *Mapping the Path of* Brady *Violations: Typologies, Causes, & Consequences in Erroneous Conviction Cases*, 71 SYR. L. REV. 1061, 1083 (2021) (finding 81% of suppression violations were motivated by law enforcement's desire to convict the defendant).

Despite the frequency and deliberate nature of these violations, prosecutors rarely face discipline from state professional responsibility boards or their bar association. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for*

Brady Violations: A Paper Tiger, 65 N.C. L. REV. 693, 697-703, 731-33 (1987) (noting the "disturbingly large number of published opinions" involving "deliberately suppressed unquestionably exculpatory evidence" that nevertheless did not result in disciplinary action against prosecutors, classifying typical *Brady* violations, and arguing that further deterrents are necessary); *see also* David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thomson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011). Disclosure violations are often tolerated or even encouraged by leadership in prosecutors' offices; attorneys are unlikely to be written up or terminated when they withhold evidence. Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 Fordham L. Rev. 537 (2011).

In keeping with these findings of district attorneys' offices condoning evidence suppression, the suppression in this case was *directed* by Riverside County District Attorney Office leadership. Deputy District Attorneys who opposed moving forward with prosecution in light of exculpatory evidence were removed from the case. 2-ER-201–02. Mr. Parker's suit would establish accountability for these prosecutors, who will not otherwise face consequences for their egregious due process violations.

B. Civil remedies are already limited and additional restrictions with foreclose accountability.

Civil rights claims provide a relatively accessible form of recourse for those injured by concealment of exculpatory evidence, but plaintiffs still face a number of doctrinal hurdles to relief and accountability. Prosecutorial immunity generally shields individual attorneys from any liability for due process violations. *See Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003) ("A prosecutor's decision not to preserve or turn over exculpatory material before trial, during trial, or after conviction is a violation of due process" and "is nonetheless, an exercise of the prosecutorial function and entitles the prosecutor to absolute immunity"); *Jean v. Collins*, 221 F.3d 656, 661 (4th Cir. 2000). Even where disclosure decisions are characterized as investigatory and subject to qualified, rather than absolute, immunity, plaintiffs will still have to overcome the significant barrier of qualified immunity. *See eg.*, *Munchinski v. Solomon*, 747 Fed. Appx. 52, 65 (3d Cir. 2018) (remanding case to determine whether defendants were entitled to qualified immunity on evidence suppression claims); *Estrada v. Healey*, 647 Fed. App'x 335, 338 (5th Cir. 2016); Brian M. Murray, *Qualifying Prosecutorial Immunity Through* Brady *Claims*, 107 IOWA L. REV. 1107, 1114 (2022).

Plaintiffs are also often stymied in their claims against supervisors and institutional defendants. The Supreme Court has found that managing prosecutors are generally not liable for failing to train, supervise, and manage information,

even if those deficiencies result in constitutional violations. *Van de Kamp v. Goldstein*, 555 U.S. 335, 348 (2009). Plaintiffs also have fewer methods of proving municipal liability for prosecutorial misconduct than they do for proving municipal liability for other forms of official misconduct. While other municipal agencies can be held liable for failure to train absent the plaintiff's presentation of numerous incidents of like misconduct, the same is not true for the district attorney's office. The Supreme Court effectively found a municipality has fewer training obligations for prosecutors because of their profession as attorneys. *Connick v. Thompson*, 563 U.S. 51, 64-65 (2011). Accordingly, plaintiffs must usually demonstrate a pattern of suppression violations or, as Mr. Parker has done here, trace the misconduct to a policymaker. Neither task is easy to accomplish. *See* Karen Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 916 (2015).

Overall, even though courts provide more recourse to victims of misconduct than other accountability mechanisms do, plaintiffs still encounter a number of hurdles to asserting a claim. Importing prejudice standards from the criminal context will only create yet another hurdle for plaintiffs and shrink the already-narrow path to relief. The impact of such a hurdle will be devastating for individual litigants like Mr. Parker. But the systemic implications are even more alarming. Relieving prosecutors of the possibility of civil liability for suppression violations

will breed additional flagrant violations and more abuse. If the district court's decision is reversed, the result will be even greater impunity.

CONCLUSION

For these reasons, amici respectfully urge this Court to affirm the district court's partial denial of Appellants' motion for judgment on the pleadings and to hold that Mr. Parker's due process claim should proceed on the merits.

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Respectfully submitted,

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILING

I hereby certify that January 3, 2023, I electronically filed the foregoing Amici Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which effects service upon all counsel of record.

January 3, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,759 words, excluding the items exempted by Fed. R. App. P. 32(f), and complies with the length specifications set forth by Fed. R. App. P. 29(a)(5). I further certify that this brief was prepared using 14-point Times New Roman font, in compliance with Fed. R. App. P. 32(a)(5) and (6).

January 3, 2023

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