No. 16-15442

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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GREGORY L. BROWN,

Petitioner-Appellant,

v.

W.L. MUNIZ,

Respondent-Appellee.

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Appeal From The United States District Court
For The Northern District Of California
Yvonne Gonzalez Rogers, District Judge, Presiding

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# BRIEF OF THE FEDERAL DEFENDER ORGANIZATIONS OF THE NINTH CIRCUIT AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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## INTEREST OF AMICI CURIAE

The Federal Defender Organizations of the Ninth Circuit provide representation to accused persons who lack financial means to hire private counsel in each district of this Circuit pursuant to 18 U.S.C. § 3006A. The Defenders advocate on behalf of the criminally accused, with the core mission of protecting the constitutional rights of their clients and safeguarding the integrity of the federal criminal justice system. Specific to this case, the Defenders represent individuals at the trial level on federal charges and on collateral review of both state and federal convictions. The Defenders have a profound interest in ensuring that the constitutional rights of those individuals are protected by *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. The panel opinion in this case diminishes the protections afforded by *Brady*; conflicts with this Court's previous approach in *United States v. Lopez*, 577 F.3d 1053 (9th Cir. 2009), as reinforced by recent Supreme Court authority; and creates perverse incentives for prosecutors and law enforcement officers to delay disclosure of exculpatory evidence.[1]

[1] No party or party's counsel or any person other than employees of amici curiae authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. The parties have consented to the filling of this amicus brief.

## REASONS FOR REHEARING EN BANC

The panel decision holds that a second-in-time habeas corpus petition asserting a *Brady* claim is "second or successive," triggering the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) gatekeeping requirements in 28 U.S.C. § 2244(b), because the factual predicate for the claim – lack of disclosure – existed at the time of the first habeas petition. *Brown v. Muniz*, 889 F.3d 661, 667 (9th Cir. 2018). In doing so, the panel diluted the Supreme Court's standards for remedying *Brady* violations and failed to recognize the special circumstance when, through no fault of the accused, the prosecution fails to disclose exculpatory evidence. This Court should rehear this case en banc because the appeal involves a question of exceptional importance. The Court should follow the reasoning in *Lopez* and hold that a second-in-time habeas corpus petition asserting a *Brady* claim that had not been disclosed earlier is not "second or successive." By treating undisclosed *Brady* violations as ripe before they are known by the defense, the panel undercut judicial efforts to recognize and to root out systemic problems that too frequently result in failure to deliver the disclosures necessary for confidence in the criminal justice system. The statutes must be construed to permit full access to federal habeas corpus review of constitutional violations of the *Brady* obligation to avoid suspension of the writ.

### A. The *Brady* Obligation Provides A Fundamental Prerequisite To A Constitutionally Adequate System That Is Too Often Unmet.

Even without a request, the prosecution has an affirmative obligation to provide exculpatory and impeachment material to the defense. *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999). "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). In the pretrial context, disclosure is required regardless of the prosecution's assessment of materiality. *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009). The suppression of evidence favorable to an accused violates due process "irrespective of the good faith or bad faith of the prosecution." *Wearry v. Cain*, 136 S. Ct. 1002, 1006 (2016) (quoting *Brady*, 373 U.S. at 87). When a *Brady* violation is discovered, the conviction must be reversed if "the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.'" *Smith v. Cain*, 565 U.S. 73, 75–76 (2012) (quoting *Kyles*, 514 U.S. at 433-34).

"[T]he actual rate of *Brady* violations and how these violations are spread across prosecutorial offices is likely unknowable because *Brady* violations occur in private." Jason Kreag, *The Jury's Brady Right*, 98 B.U.L. Rev. 345, 356 (2018) (Kreag). However, the number of cases that reach this Court have been sufficient to generate concern. *See, e.g.*, *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013)

(Kozinski, C.J., dissenting from denial of rehearing en banc) ("There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it."); *United States v. Kohring*, 637 F.3d 895, 903 (9th Cir. 2011); *United States v. Chapman*, 524 F.3d 1073, 1085 (9th Cir. 2008). *Brady* violations stem from many sources: the failure of law enforcement officers to provide prosecutors information that weakens their case, stinting determinations by prosecutors of what evidence is helpful to the defense, and the competitive desire not to provide an edge to an adversary. These dynamics are reinforced by the panel opinion that indicates there will be no meaningful accountability in habeas corpus proceedings – whether under 28 U.S.C. § 2254 or § 2255 – if exculpatory information remains undisclosed for one year after the conviction becomes final.

The importance of the *Brady* right and the unknowable degree of compliance with the *Brady* obligation provide compelling reasons for rehearing en banc of a decision that reduces accountability for *Brady* violations that come to light. Studies attempting to quantify violations "almost certainly underestimate the scope of *Brady* violations." Kreag, *supra* at 357-358 (documenting widespread *Brady* violations). *Brady* violations not only condemn countless defendants to fundamentally unfair

trials, they corrode public faith in the criminal justice system.[2] Judicial intervention is necessary to protect defendants' *Brady* rights and the integrity of our judicial system.[3]

Far from putting a stop to the "epidemic" of *Brady* violations, the panel decision rewards prosecutors and police officers who successfully suppress exculpatory information for at least one year after the conviction becomes final. The facts in the present case illustrate how "[a] *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out." *Connick v. Thompson*, 131 S. Ct. 1350, 1385 (2011) (Ginsburg, J., dissenting). Through no fault of his own, the defendant was unable to discover the *Brady* violation until the prosecutors disclosed impeachment material in police officers' files more than a

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[2] Nina Morrison, *What Happens When Prosecutors Break The Law?* N.Y. Times (June 18, 2018) (usually nothing); Editorial, *Rampant Prosecutorial Misconduct*, N.Y. Times (Jan. 4, 2014); Editorial, *Don't Ignore the Brady Rule: Evidence Must Be Shared*, L.A. Times (Dec. 29, 2013).

[3] *See, e.g.*, Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 46 Hofstra L. Rev. 87, 89 (2017); *United States v. Kiszewski*, 877 F.2d 210, 216 (2d Cir. 1989) (court should not rely on the government's representations regarding *Brady* materiality of potential impeachment evidence where credibility is the central issue in the case); *United States v. Jones*, 620 F. Supp. 2d 163, 167 (D. Mass. 2009) ("it is insufficient to rely on Department of Justice training programs for prosecutors alone to assure that the government's obligation to produce certain information to defendants is understood and properly discharged.").

decade after the defendant's first federal habeas petition was filed. *Brown*, 889 F.3d at 665-66.

The panel recognized that its construction of AEDPA "may seem harsh." *Brown*, 889 F.3d at 676. The Court has previously called similar results "especially troubling." *See Benjamin v. Gipson*, 640 F. App'x 656, 660–61 (9th Cir. 2016) (retaining jurisdiction over any further claims when the habeas petitioner could not have included his *Brady* claim in his first habeas petition, because the state allegedly failed to disclose material exculpatory information to the defense, and the petitioner did not learn of this fact until after the time within which to file a habeas claim had expired). But the Court is not helpless to avoid these harsh and troubling results because the statutes can and should be reasonably construed to provide a full remedy when a second-in-time petition asserts a *Brady* claim that was not previously disclosed and there has been no abuse of the writ.

By holding that second-in-time petitions asserting *Brady* claims are subject to the "second or successive" gatekeeping rules in 28 U.S.C. § 2244(b), which applies in collateral proceedings to both state and federal convictions, the panel decision adopts a standard in conflict with the Supreme Court's *Brady* jurisprudence in two basic ways. First, the new rule requires that evidence be "discovered" by the defendant, when *Brady* requires that the evidence be "disclosed" by the prosecution

with no obligation that the exculpatory or impeachment material be requested. *Strickler*, 527 U.S. at 280-81. Second, the Supreme Court has held that a *Brady* claimant can prevail by undermining confidence in the result, even if "the undisclosed information may not have affected the jury's verdict." *Wearry*, 136 S. Ct. at 1006 n.6. In contrast, under the panel's rule, federal habeas review is limited to "only those *Brady* claims that show by clear and convincing evidence a petitioner's actual innocence." *Brown*, 889 F.3d at 671. The panel decision's standard diminishes the Supreme Court's standard for the constitutional protections guaranteed by *Brady* and its progeny based on factors in the sole control of government actors.

### B. The Panel Decision Conflicts With The Reasoning Of The *Lopez* Decision As Well As Supreme Court Authority On Second-In-Time Petitions For Habeas Corpus Relief.

En banc consideration is necessary to maintain uniformity with the Court's decision in *Lopez*, which the panel recognized is "in some tension" with its holding. *Brown*, 889 F.3d at 673. The reasoning of *Lopez* and of post-*Lopez* Supreme Court authority contradicts the panel's holding and supports construing AEDPA to allow full review of *Brady* claims when the government delays disclosure of exculpatory material until after the initial effort at collateral review.

*1. The Reasoning Of Lopez*

In *Lopez*, the Court rejected the broad rule advocated by the government in that case, and adopted in the present case, because it "would completely foreclose federal review of some meritorious claims and reward prosecutors for failing to meet their constitutional disclosure obligations under *Brady*." 577 F.3d at 1064-65. The Court in *Lopez* held that "second in time *Brady* claims that do not establish materiality of the suppressed evidence are subject to dismissal" as second or successive. *Id.* But the Court's reasoning was premised on the proposition that second-in-time *Brady* petitions were not necessarily "second or successive."

In *Lopez*, this Court recognized the special problems that arise with *Brady* claims under AEDPA. 577 F.3d at 1064. The Court in *Lopez* first noted that "second or successive" is undefined, and the Supreme Court has not interpreted it literally to include all second-in-time petitions. 577 F.3d at 1061-62 (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998)). The Court in *Lopez* relied on the Supreme Court's three considerations in *Panetti v. Quarterman*, 551 U.S. 930, 945-46 (2007), for determining whether a second-in-time petition is a "second or successive" petition subject to the gatekeeping requirements of 28 U.S.C. § 2244(b): "(1) the implications for habeas practice of adopting a literal interpretation of 'second or successive,' (2) the purposes of AEDPA and (3) the Court's prior habeas corpus

decisions, including those applying the abuse-of-the-writ doctrine." 577 F.3d at 1063.

Based on the reasoning of *Panetti*, this Court refused to endorse a blanket rule classifying all second-in-time petitions asserting *Brady* claims as "second-or-successive." *Lopez*, 577 F.3d at 1063-65. The Court reasoned that such a rule "would completely foreclose federal review of some meritorious claims and reward prosecutors for failing to meet their constitutional disclosure obligations under *Brady*." *Id*. at 1064-65. The Court considered this a "perverse result" inconsistent with Supreme Court authority because, "[g]iven the nature of *Brady* claims, petitioners often may not be at fault for failing to raise the claim in their first habeas petition." *Lopez*, 577 F.3d at 1064.

Although the Court in *Lopez* ultimately found that the petitioner's *Brady* challenge lacked merit because the petitioner had failed to establish the materiality of the suppressed evidence, 577 F.3d at 1066, this Court left open the "question whether *Panetti* supports an exemption from § 2255(h)(1)'s gatekeeping provisions for meritorious *Brady* claims that would have been reviewable under the pre-AEDPA prejudice standard." *Lopez*, 577 F.3d at 1068.

*2. Post-Lopez Authority*

Since *Lopez*, the Supreme Court has repeatedly held that AEDPA incorporates pre-AEDPA equitable limitations on literal application of its restrictions. In *Holland v. Florida*, the Court held that the one-year statute of limitations under AEDPA incorporated equitable tolling. 560 U.S. 631, 648-49 (2010). "The importance of the Great Writ, the only writ explicitly protected by the Constitution, Art. I, § 9, cl. 2, along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open." *Holland*, 560 U.S. at 649. In *McQuiggin v. Perkins*, the Supreme Court reiterated its reasoning in *Holland*: "'[E]quitable principles have traditionally governed the substantive law of habeas corpus,' *Holland* reminded, and affirmed that 'we will not construe a statute to displace courts' traditional equitable authority absent the clearest command.'" 569 U.S. 383, 397 (2013).

The equitable principles identified in *Holland* and *McQuiggin* as relevant to construction of AEDPA's other procedural barriers apply with full force to construction of "second or successive" in § 2244(b). Nothing in the statute – certainly no "clearest command" – requires federal courts to reward prosecutors who fail to disclose exculpatory material by precluding habeas review of the conviction.

The panel decision's inconsistency with *Lopez* strayed from the reasoning of Supreme Court precedent both preceding and post-dating *Lopez*. First, the panel applied only two of the three *Panetti* factors. The first factor, the "implications for habeas practice," was left out of the panel's reasoning. *Panetti*'s practical concerns are directly implicated because, by holding that claims asserting newly-revealed *Brady* violations are "second or successive," even if meritorious, "conscientious defense attorneys" would be required to observe the "empty formality" of filing unripe and premature claims. *Panetti*, 551 U.S. at 931. In every trial case, diligent counsel would need to file a boilerplate *Brady* claim that could be revived with a motion for relief from judgment upon the belated disclosure of a *Brady* violation. Requiring such protective filings "neither respects the limited legal resources available to the States nor encourages the exhaustion of state remedies," nor does it "conserve judicial resources, reduce piecemeal litigation or streamline federal habeas proceedings." *Panetti*, 551 U.S. at 943, 946-47 (internal citations and quotation marks omitted).

The panel also gave short shrift to the second *Panetti* factor – the purposes of AEDPA. The panel stated that its interpretation serves AEDPA's goals of state-federal comity and finality. *Brown*, 889 F.3d at 671, 676. But in *Lopez*, this Court concluded that "foreclosing all federal review of meritorious claims that petitioner

could not have presented to a federal court any sooner" was "certainly not an AEDPA goal." *Lopez*, 577 F.3d at 1065. The earlier opinion on this point should have precedence. *See Hart v. Massanari*, 266 F.3d 1155, 1170-71 (9th Cir. 2001) (earlier panel decision controls).

The third *Panetti* factor, the abuse-of-the-writ doctrine, was disposed of by the panel opinion with the reasoning that, under *United States v. Buenrostro*, 638 F.3d 720, 725–26 (9th Cir. 2011), and *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015), an undiscovered *Brady* claim is ripe prior to its discovery because the factual predicate exists at the time of trial. *Brown*, 889 F.3d at 674. Neither case requires the incongruity of considering an undisclosed *Brady* violation to be "ripe" for review.

*Buenrostro* is inapposite because it involved the claim of a newly discovered ground for ineffective assistance of counsel, not the prosecution's failure to disclose evidence. 638 F.3d at 721. In that context, none of the compelling policy reasons against insulating the government's failure to disclose exculpatory evidence from judicial review are implicated.

The panel's reliance on *Gage* ignored a fundamental distinction: the *Brady* violation was not newly-disclosed. It could have been raised at trial when the judge noted the existence of medical records helpful to the defense. *Gage*, 793 F.3d at

1165. Because the predicate for the claim matured at trial, "[t]his is not a case where the basis for the would-be petitioner's second petition did not exist or was unripe when the first petition was filed." *Id*. In contrast, the basis for the *Brady* claims in the present case did not ripen until the district attorney's office disclosed the information almost a decade after the first habeas petition was filed.

Both *Gage* and *Buenrostro* cited *Lopez* and, notably, neither cast doubt on *Lopez*'s continued validity. To the contrary, this Court in *Buenrostro* reaffirmed *Lopez*'s recognition that "the term 'second or successive' is not to be taken literally but is 'informed by' the abuse-of-the-writ doctrine." 638 F.3d at 724 (quoting *Lopez*, 577 F.3d at 1063 n.8). In *Gage*, this Court explained that *Panetti*'s second-in-time exception to § 2244(b)'s gatekeeping rules is limited to claims where the factual predicate for the second petition "did not exist or was unripe when the first petition was filed." 793 F.3d at 1165. In contrast, the *Brown* panel decided that a *Brady* claim is ripe during the time before the prosecution discloses the exculpatory evidence. 889 F.3d at 672-73. The en banc Court should reject the oxymoron of a ripe undisclosed constitutional violation as inconsistent with Supreme Court doctrine regarding ripeness. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003) (defining ripeness in the administrative context as being fit for judicial decision without undue hardship to the parties).

In failing to similarly respect the reasoning in *Lopez*, the panel decision purports to "align[ ] the Ninth Circuit with our brethren in the Fourth, Tenth, and Eleventh Circuits." *Brown*, 889 F.3d at 673 n. 9 (citing *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1259–60 (11th Cir. 2009)). Only weeks after the panel decision, however, an Eleventh Circuit panel published its own detailed examination of *Panetti* in the *Brady* context and urged en banc review to reject *Tompkins*'s reasoning. *Scott v. United States*, 890 F.3d 1239 (11th Cir. 2018). The *Scott* panel lamented that it was bound by prior panel precedent to apply the "second or successive" rule to the *Brady* claim before it, while providing a seamless argument for construction of the undefined term "second or successive" to exclude second-in-time *Brady* claims. 890 F.3d at 1248-53.

### C. The Court Should Construe AEDPA To Permit Second-In-Time Petitions Raising Newly Disclosed *Brady* Violations To Avoid Suspension Of The Writ Of Habeas Corpus.

The Suspension Clause of the Constitution provides that "the privilege of the writ of habeas corpus shall not be suspended." Art. I, § 9, cl. 2. In *Felker v. Turpin*, the Supreme Court held that AEDPA's restrictions on second habeas petitions do not amount to a "suspension" of the writ because they constituted "a modified res judicata rule, a restraint on what is called in habeas corpus practice 'abuse of the writ.'" 518 U.S. 651, 664 (1996). "[T]he doctrine of abuse of the writ refers to a

complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *McCleskey v. Zant*, 499 U.S. 467, 489 (1991).

Common law habeas corpus was, "above all, an adaptable remedy," and, in the 19th century, "habeas courts in this country routinely allowed prisoners to introduce exculpatory evidence that was either unknown or previously unavailable to the prisoner." *Boumediene v. Bush*, 553 U.S. 723, 779-80 (2008). "Habeas 'is at its core, an equitable remedy.'" *Id*. at 780 (quoting *Schlup v. Delo*, 513 U.S. 298, 319 (1995)). The panel decision denies habeas petitioners' historical and equitable rights to introduce evidence previously undisclosed by the government, pushing AEDPA beyond the constitutional limits prescribed by the Supreme Court in *Felker*. *Scott*, 890 F.3d at 1243 (the Suspension Clause, Supreme Court precedent, and the fundamental right at stake foreclose application of the second-or-successive procedural bar).

Where incarceration based on constitutional violations is at issue, the Supreme Court construes statutes to avoid suspension of the writ. *See Dretke v. Haley*, 541 U.S. 386, 396 (2004) (difficult constitutional question regarding sentencing innocence requires construction of habeas statute to avoid it); *INS v. St. Cyr*, 533 U.S. 289, 299-301 (2001) (construing statues to avoid suspension of habeas corpus

in immigration context). The panel's construction of AEDPA "effects a suspension of the writ of habeas corpus as it pertains to this narrow subset of *Brady* claims." *Scott*, 890 F.3d at 1259. "[I]mprisoning someone based on the results of an unfair trial and then precluding any remedy at all might well work a suspension of the writ of habeas corpus." *Id*. at 1251 (citing *Magwood v. Patterson*, 561 U.S. 320, 350 (2010) (Kennedy, J., dissenting)). Refusal to consider a second-in-time habeas petition challenging an asserted *Brady* violation that could only have been effectively asserted after the denial of the first petition would be inconsistent with abuse-of-the-writ principles and would work an unconstitutional suspension of the writ of habeas corpus.

## CONCLUSION

For the foregoing reasons and those found in the petition for rehearing, the Court should grant rehearing en banc.

Respectfully submitted this 29th day of June, 2018.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29-2(c)(2) because it contains 3,521 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, 14-point Times New Roman font.

Dated this 29th day of June, 2018.

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## CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, I electronically filed the foregoing Brief of the Federal Defender Organizations of the Ninth Circuit as Amici Curiae in Support of the Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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