No. 15-15799

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SIERRA PACIFIC INDUSTRIES, INC., et al.,

Defendants-Appellants.

On Appeal from the U.S. District Court for the Eastern District of California
Case No. 2:09-cv-02445-WBS-AC
The Honorable William B. Shubb

BRIEF OF *AMICUS CURIAE* CAUSE OF ACTION INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF AMICUS CURIAE

Cause of Action Institute is a government oversight group committed to ensuring that government decisions are open, honest, and fair. Cause of Action works to expose and prevent the abuse of discretionary government power by, *inter alia*, defending small businesses and individuals in administrative, civil, and criminal cases, and by appearing as *amicus curiae* to advocate robust judicial review as a check on government overreach. *See*, *e.g.*, *In the matter of LabMD*, FTC Dkt. No. 9357 (counsel for respondent); *O'Keefe v. Chisholm*, 769 F.3d 936 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 2311 (2015) (*amicus curiae* in support of petition for certiorari); *see also McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014) (citing Cause of Action *amicus* brief). Accordingly, the decision below is of great concern to Cause of Action.[1]

INTRODUCTION

To help protect citizens against the government's abuse of power, courts impose duties on government attorneys that private lawyers do not have, and

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[1] All parties consented to the filing of this brief. Fed. R. App. P. 29(a) ("Any other amicus curiae may file a brief ... if the brief states that all parties have consented to its filing"). No counsel for a party authored this brief in whole or in part, and neither the parties nor their counsel, nor anyone except for Cause of Action, financially contributed to preparing this brief. Fed. R. App. P. 29(c).

provide relief when government lawyers fall short. These duties are part of the bedrock of due process.

Defendants have credibly alleged serious misconduct by the government's attorneys, based on evidence from a parallel state case. *See Cal. Dep't of Forestry & Fire Prot. v. Howell*, 2014 WL 7972097, at *1 (Cal. Super. Ct. Feb. 4, 2014). The superior court imposed massive sanctions against the California Department of Forestry and Fire Protection for false testimony, fabricated evidence, and "pervasive and systematic abuse … all of which is an affront to this Court and the judicial process." *Id.* But contrary to its own order about the nature of its Rule 60 inquiry—specifically that it would be limited only to the legal question presented—the court below resolved facts against the defendants based on the government's proffered evidence without allowing defendants an opportunity to prove their allegations, and short-circuited the proper legal inquiry by denying that the government had any special duties at all.

In particular, the district court held that the due process protections announced by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), are somehow inapplicable in civil cases, and then never inquired further about the nature of the government's overall obligations in prosecuting a $1 billion civil action. The court also suggested that government attorneys may speak in open court with reckless indifference to the truth, and that reliance upon an investigator

with a significant financial conflict of interest did not threaten the integrity of the government's case.

A government lawyer "'is the representative not of an ordinary party to a controversy,' the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, 'but of a sovereignty whose obligation ... is not that it shall win a case, but that justice shall be done.'" *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 47–48 (D.C. Cir. 1992) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Thus, government lawyers have "obligations that might sometimes trump the desire to pound an opponent into submission." *Id.* at 48; *see also* 5 C.F.R. § 2635.101(b)(5), (8), (14); *Rhode Island v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 471–72 (R.I. 2008); Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 275 (2000) ("[A]s a public official, the government lawyer has an independent legal duty to faithfully carry out the law. This duty may be distinct from (and possibly, at times, paramount to) the ordinary duty of a lawyer to render zealous representation.").

Contrary to controlling authorities, the district court refused to serve as the critical bulwark protecting citizens from government lawyers' immense discretion, power, and resources. The district court's decision frees government lawyers from their obligation to see "that justice shall be done," increasing the odds of future abuse. The decision below should therefore be reversed.

BACKGROUND

On September 3, 2007, a fire ignited on private property near the Plumas and Lassen national forests in California. One day after the fire began, the California Department of Forestry and Fire Protection ("Cal Fire") and the United States Forest Service began the investigation into its causes that ultimately led to this lawsuit. ER 463–64.

Joshua White from Cal Fire and David Reynolds from the Forest Service performed the investigation together. The two agencies ultimately issued a joint "Origin and Cause Investigation Report," concluding that the fire started from a spark when the front blade of a bulldozer operated by an employee of defendant Howell's Forest Harvesting Company struck a rock. ER 465.

Roughly two years later, on August 9, 2009, Cal Fire initiated a civil action in California Superior Court (ER 466); later that month, the United States Attorney filed a second civil action on behalf of the United States in the Eastern District of California (ER 467–68). The two suits named a variety of defendants, including Sierra Pacific Industries; Eunice E. Howell doing business as Howell's Forest Harvesting Company; and various individual defendants, including landowners (even some minors) who owned interests in the land where the fire purportedly began, as well as persons who operated on the land at the request of the owners. The United States sought as much as $1 billion in damages. ER 468.

According to defendants, throughout the pretrial stage of the litigation, the United States advanced a fraudulent origin and cause investigation; failed to take remedial action when it learned of evidence that undermined its causation theory; misrepresented evidence; proffered false testimony; covered up misconduct; and failed to disclose financial conflicts of interest. ER 20–21, 45.

Roughly three years after the United States filed the federal action, and after losing a handful of key pre-trial motions, defendants entered into a settlement agreement. ER 469, 765–75. Under the terms of the settlement with the United States, Sierra Pacific Industries agreed to pay the government $47 million, Howell's Forest Harvesting Company agreed to pay the government $1 million, and the other defendants agreed to pay the government $7 million. Sierra Pacific also agreed to convey 22,500 acres of land to the government. *Id.* On July 18, 2012, following the settlement, the district court dismissed the case with prejudice. ER 776.

Despite settling the federal action, defendants continued to defend themselves in the state action. In that litigation, defendants were permitted discovery into the misconduct by the federal and state investigators and prosecutors who pursued the case. After a three-day evidentiary hearing, Plumas County Superior Court Judge Nichols dismissed the state court action and entered

judgment for defendants. After additional testimony and fact-finding, Judge Nichols also imposed a $32.4 million sanction on Cal Fire.

The superior court's decision describes an appalling history of investigatory and prosecutorial abuse. Among other findings, the superior court determined that Cal Fire's conduct in initiating, maintaining, and prosecuting the action was corrupt and tainted; that Cal Fire had engaged in egregious and reprehensible conduct for the purpose of recovering money from defendants; that critical witnesses failed to testify honestly, and falsified statements and reports; and that Cal Fire's actions threatened the integrity of the judicial process: "[T]he Court finds that Cal Fire has, among other things, engaged in the pervasive and systematic abuse of California's discovery rules in a misguided effort to prevail against these Defendants, all of which is an affront to this Court and the judicial process." *Cal. Dep't of Forestry & Fire Prot.*, 2014 WL 7972097, at *1; *see* ER 652, 654, 662.

The court's order recited the egregious behavior it found to warrant sanctions. Below are just a few examples of the state court's findings specifically supporting its decision to impose sanctions:

- After the chance discovery of a public state audit report, defendants learned that Cal Fire had failed to produce critical documents evidencing improper financial incentives on the part of the fire investigators. Many of the unproduced documents—which were *already* subject to a court production order—related to Wildland Fire Investigation Training and Equipment Fund (WiFITER), a fund set up by Cal Fire, for Cal Fire, that

holds money recovered from actions initiated against responsible parties to reimburse firefighting costs and therefore creates a financial incentive for investigators to pursue a party with financial resources to provide cost recovery. The court concluded that the late-discovered WiFITER documents "belie Cal Fire's own representations to this Court that there was no evidence whatsoever that the WiFITER fund was improper," and "would have caused [the] Court to rule differently" on past motions if they had been produced as required. *Cal. Dep't of Forestry & Fire Prot.*, 2014 WL 7972097, at *7.

- The court also found that Joshua White, the lead Cal Fire investigator (also an expert and witness in the federal action), failed to testify honestly. Specifically, the court observed that White contradicted himself when providing testimony about the place of origin of the fire, which pursuant to typical procedure is marked with a white flag. "White testified that neither of [the investigators] ever placed any white flags to mark evidence of [the] points of origin .... Notwithstanding White's testimony, discovery revealed … a number of photographs taken by White ... [and] White could not explain or was unwilling to explain the fact that there is a white flag in the center of each one of these photos." *Id.* at *9. The court specifically concluded that Cal Fire's counsel shared the blame for White's dishonesty: "Unfortunately, Cal Fire's lead counsel, officers of this Court, who should be 'operating under a heightened standard of neutrality,' greatly exacerbated the problem by failing to intercede and put a stop to what their witnesses were doing under oath." *Id.* at *10.

- Similarly, the court found evidence that the joint report blaming defendants for the fire had misrepresented the testimony of key witnesses purportedly linking defendants to the fire's start: "[D]espite the fact that Bush [a bulldozer operator for one of the defendants] clearly stated during his September 10 interview that he never told anyone that a rock strike started the fire, White's written interview summary, advanced into the Official Report" asserts that Bush did make that statement. *Id*. at *11.

Following the state court dismissal, subsequent disclosures by Cal Fire, and sanctions imposed by the state court, defendants filed a motion in the federal action pursuant to Federal Rule of Civil Procedure 60(d) to vacate the previous settlement

as a result of fraud on the court. Defendants' motion relied on essentially the same conduct that the superior court had relied upon in awarding sanctions.

The district court then ordered the parties to brief only the legal sufficiency of the evidence as *alleged* by defendants in their motion. ER 573:11–17 ("Focused briefing shall be submitted limited to: ... (2) addressing whether, *assuming the truth of Sierra Pacific's allegations*, each *alleged* act of misconduct separately or collectively constitutes 'fraud on the court,' within the meaning of Rule 60(d)(3)") (emphasis added). Defendants argued the legal sufficiency of their allegations, but did not (per the court's order) submit evidence. ER 63:11–13. The government, however, spent the bulk of its opposition disputing defendants' allegations and submitted voluminous evidence attempting to disprove them. ER 282–427.

Contrary to its order, the district court relied on evidence presented by the government in its response brief. ER 61–63. Even though Judge Nichols in the state action had dismissed the state's case against defendants and ordered a $32 million sanction against the state, the district court ruled in favor of the government and denied defendants' motion. ER 63.

ARGUMENT

Without robust and effective judicial review, government discretion combines with the enticements of power to breed abuse. *See*, *e.g.*, *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971) (judicial review

should confine and control government discretion for "judicial review alone can correct only the most egregious abuses" and ensure that government process itself "will confine and control the exercise of discretion"); *see also Okla. Press Publ'g Co. v. Walling*, 327 U.S. 186, 218–19 (1946) (Murphy, J., dissenting).

The district court had a duty to protect the integrity of government process by addressing defendants' credible allegations of government misconduct. Contrary to the district court's holding, government attorneys have special duties in *all* cases, not just criminal ones. *Freeport*, 962 F.2d at 47–48. Their higher responsibility to pursue the *truth*, not just to win, specifically includes a duty to disclose adverse evidence and to speak with the utmost fidelity to the facts, and an absolute bar on any financial conflicts of interest.

Defendants allege that the government failed to disclose obviously relevant exculpatory evidence, misrepresented key facts, and that the financial interest of one of the key investigators tainted the government's case. These are serious allegations given the massive potential penalty (over $1 billion), and courts *must* apply the appropriate standard, protect the process, and grant relief to those prejudiced by misconduct.

I. Courts Must Check Government Discretion

An attorney representing the United States is accountable "to a higher standard of behavior." *United States v. Young*, 470 U.S. 1, 25–26 (1985)

(Brennan, J., concurring). As the Supreme Court explained in *Berger v. United States*, 295 U.S. 78, 88 (1935), lawyers for the public are "the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest … in a ... prosecution is not that it shall win a case, but that justice shall be done." *See also United States v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993) (Kozinski, J.) ("Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers .... The prosecutor's job isn't just to win but to win fairly, staying well within the rules.") (internal citations omitted).

Contrary to the district court's ruling, this important principle is not limited to criminal cases. *See*, *e.g.*, *Cervantes v. United States*, 330 F.3d 1186, 1190 (9th Cir. 2003) (noting, in a civil case, "the special obligation of the United States Attorney to serve the interests of justice," an obligation at which "the United States thumb[ed] its nose"). The court in *Freeport* acknowledged that "[t]he Supreme Court was speaking of government [criminal] prosecutors in *Berger*," but clarified that no one "has suggested that the principle does not apply with equal force to the government's civil lawyers." *Freeport*, 962 F.2d at 47 (internal citation omitted).

Other federal courts have agreed that in *both* criminal and civil cases, the "dominant purpose" of holding the government "to a high standard of conduct in civil litigation" is "to *assist the court in arriving at a just and true resolution*." *United States v. Moss-American, Inc.*, 78 F.R.D. 214, 217 (E.D. Wis. 1978)

(emphasis added) (civil case). This duty flows from the government attorney's special obligations:

> The U.S. has a higher duty than an ordinary adversary. It is the representative of all the people by the will of the people surviving on and expending the people's tax money and should be charged with a high standard of conduct in litigation, i.e., find the truth regardless of the consequences to the position of the U.S. as a party adversary.

United States v. Choctaw Cty. Bd. of Educ., 310 F. Supp. 804, 810 (S.D. Ala. 1969) (civil case).[2]

The justifications for holding government lawyers to a heightened duty apply in civil cases no less than criminal ones. The sheer scope of government resources necessitates the government exercise extreme caution in the way it wields its authority. *See Wardius v. Oregon*, 412 U.S. 470, 475–76 n.9 (1973) (noting, in a criminal case, that the government possesses "greater financial and staff resources with which to investigate and scientifically analyze evidence"). The government often also has superior investigatory tools. *See*, *e.g.*, *id.*

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[2] For instance, the Department of Justice has a special duty before the United States Supreme Court, "much like a 'Tenth Justice,'" to "screen[] cases and advocat[e] positions that advance the goals of the Court *as an institution*. As one former clerk told us, the [Solicitor General] is expected to 'play as *an honest broker of the facts*' when communicating with the Court." Ryan C. Black and Ryan J. Owens, *Solicitor General Influence and the United States Supreme Court*, at 3 (emphasis added), *available at* http://www.vanderbilt.edu/csdi/archived/working%20papers/Ryan%20Owens.pdf (last visited Nov. 9, 2015).

(observing that the prosecutor often "begins his investigation shortly after" a potential offense has taken place, "when physical evidence is more likely to be found and when witnesses are more apt to remember events") (citation omitted). These advantages are significant, applicable here no less than in criminal prosecutions,[3] and require the imposition of a heightened obligation on the government.[4]

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[3] This dual application of a heightened duty—to both civil and criminal cases—is not unique. Other judge-made legal principles designed to protect parties from the vast power of the government apply in both civil and criminal cases. *See*, *e.g.*, *World Ins. Co. of Omaha, Neb. v. Pipes*, 255 F.2d 464, 472 (5th Cir. 1958) (applying the rule of lenity to a civil action and observing that "[p]enalties in civil actions are not favored by the courts, and should not be imposed except in cases that are clear and free from doubt"); *see also First Nat'l Bank of Gordon v. Office of Comptroller of Currency*, 911 F.2d 57, 65 (8th Cir. 1990) (noting that penal provisions should be construed narrowly even in civil cases: "Penal provisions, even those involving civil penalties, should be strictly construed").

[4] Defendants' experience here is not an isolated incident. For example, Cause of Action's client, a small cancer detection laboratory named LabMD, Inc., was targeted and destroyed in a six-year administrative investigation and enforcement action by the Federal Trade Commission ("FTC") for allegedly inadequate data security that resulted in no identity theft or other harm to anyone. *See generally* Respondent LabMD's Corrected Post-Trial Brief at 1–4, 6–16, 19–23, *In the matter of LabMD, Inc.*, FTC Dkt. No. 9357 (Aug. 11, 2015), *available at* https://www.ftc.gov/enforcement/cases-proceedings/102-3099/labmd-inc-matter. The FTC commenced the investigation using unverified information, and pursued the enforcement action in the face of evidence that its case was based on perjured testimony and falsified documents. An unprecedented Congressional investigation showed FTC's action against LabMD was the direct product of an inappropriately close relationship between the agency and an economically self-interested "data security" company. *See*

These heightened standards are reflected not only in case law but also in various sources outlining the professional and ethical obligations of government attorneys. For example, the ABA Model Code of Professional Responsibility states that a "government lawyer in a civil action ... should not use his position … to harass parties or to bring about unjust settlements or results." Model Code of Prof'l Responsibility EC 7-14 (Am. Bar Ass'n 1980); *see also id*. (observing that a government lawyer has an obligation to "refrain from instituting or continuing litigation that is obviously unfair"); 5 C.F.R. § 2635.101(b)(5), (8), (14). Cause of Action's work in administrative, civil, and criminal cases confirms the normative theory and empirical research establishing that judicial review effectively checks government overreach. *See*, *e.g.*, *Am. Power & Light Co. v. SEC,* 329 U.S. 90, 105 (1946) ("Private rights are protected [from government power] by access to the courts"); James E. Alt & David D. Lessen, *Political and Judicial Checks on Corruption: Evidence from American State Governments*, 20 J. ECON. & POL. 33, 57 (2008) (demonstrating judicial review can effectively check government corruption).

Staff Report, *Tiversa, Inc.: White Knight or Hi-Tech Protection Racket?* COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM, U.S. HOUSE OF REPRESENTATIVES, 113TH CONGRESS AT 16–18, 56–59, 62, 67 (JAN. 2, 2015), *available at* http://www.databreaches.net/wp-content/uploads/2015.01.02-Staff-Report-for-Rep.-Issa-re-Tiversa.pdf.

The district court justified its contrary view—that government attorneys in a civil case are no different from counsel for any other civil litigant—in part because "[i]n contrast to a criminal case where there is a potential loss of liberty, a civil action such as this is strictly about money. Except that the government happens to be the plaintiff, *this case is no different from any other civil case* in which one party pursues recovery of damages allegedly caused by the other party." ER 11 (emphasis added). This holding cannot be justified. The higher standard applied to government lawyers sounds in due process, and due process rights do not disappear simply because the government demands civil, not criminal, relief. Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1047–48 (1984) ("it has always been clear that the clause applied to the conduct of criminal and civil trials") (citations omitted). The government's *$1 billion* demand was against not only Sierra Pacific and Howell (both corporations) but also against individual landowners. The potential damages threatened each and every defendant with financial ruin. *See* Appellants Opening Br. 78 (describing case as "amount[ing] to an economic death penalty" for defendants).

An action with such extreme consequences requires the highest standards of conduct by the relevant government actors and a high level of scrutiny by the courts.

> It is clear that certain proceedings, even though statutorily or judicially labeled "civil," in reality exact punishments at least as

> severe as those authorized by the criminal law. Arguably, such proceedings should be treated as criminal proceedings for purposes of constitutional safeguards since, in the end, the punishment inflicted on the defendant is the functional equivalent of a criminal sanction.

Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Distinction*, 42 HASTINGS L.J. 1325, 1350 (1991).

Due process limits not only the government's ability to constrain the liberty of its citizens, but also its ability to seize their property. Contrary to the district court's suggestion (*see* ER 11), the deprivation of property by the government is not some "lesser" right than the deprivation of freedom, and requires the same protections. *See*, *e.g.*, *Kaley v. United States*, 134 S. Ct. 1090, 1099 n.7 (2014) ("We simply see no reason to treat a grand jury's probable cause determination as conclusive for all other purposes (including, in some circumstances, locking up the defendant), but not for the one [deprivation of property] at issue here"). The Supreme Court has required careful scrutiny of unbounded discretion, even in civil cases, where there is "an acute danger of arbitrary deprivation of property." *See*, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003).

Here, as detailed above and in appellants' opening brief, defendants alleged that the government advanced a fraudulent origin and cause investigation and permitted its experts and investigators to testify falsely; that the government misrepresented the admission of J.W. Bush that a bulldozer rock strike caused the

fire; that the government proffered false testimony in opposition to the motion for summary judgment; that the government failed to take remedial action when it learned of evidence such as that derived from the Air Attack video that undermined its causation theory; that the government created a false diagram; that the government misrepresented evidence; that the government covered up misconduct; and that WiFITER created an improper financial incentive. ER 20–21, 45.

The district court, however, never analyzed the sufficiency of these allegations. Instead, it accepted much of the government's evidence and focused almost exclusively on the fact that the defendants had settled while purportedly knowing most of the complained of fraudulent conduct. This was erroneous. Defendants' allegations in the district court regarding the investigators' and prosecutors' failure to disclose exculpatory evidence, correct material misstatements, and avoid conflicts of interest raise serious due process concerns. As articulated above, government lawyers *are* different from counsel for regular civil litigants, and the Due Process Clause requires courts to meaningfully consider allegations of misconduct.

II. Due Process Imposes Specific Duties on Government Lawyers, Even in Civil Cases

The government's constitutional duty to speak the truth, and not to win at any cost, carries a duty to disclose adverse evidence and to avoid reckless

disregard for the truth before the court, and prohibits financial conflicts of interest. The district court's rejection of these duties here was error.

A. The Government Should Not Be Permitted to Withhold Exculpatory Evidence, Even in Civil Cases

The district court failed to engage in the necessary and important inquiry regarding the government prosecutors' conduct by simply holding that *Brady v. Maryland*, 373 U.S. 83 (1963), does not apply in civil actions, and therefore that the court need not be concerned with the government's suppression of evidence adverse to its position. Although *Brady* has *usually* been applied in criminal cases, the reasoning underlying *Brady*, just like the justifications for a government lawyer's heightened duty, applies to civil cases every bit as much as to criminal prosecutions.

In *Brady*, the Court concluded that the "suppression of this confession [of petitioner's companion] was a violation of the Due Process Clause of the Fourteenth Amendment." *Id.* at 86. The Court reasoned that regardless of the government's good or bad faith, the suppression of material evidence violates due process. *Id.* at 87. The Court observed that the principle is not "punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.... [O]ur system of the administration of justice suffers when any accused is treated unfairly." *Id.* In fact, the Court observed that "[a]n inscription on the walls of the Department of Justice states the proposition candidly for the federal

domain: 'The United States wins its point whenever justice is done its citizens in the courts.'" *Id.* Nothing in *Brady* explicitly (or implicitly) depends upon the fact that the underlying action was criminal. Instead, the holding arises from guarantees provided by the due process clause which apply to the deprivation of property just as they apply to the deprivation of liberty.

The district court's decision conflicts with the Sixth Circuit's decision in *Demjanjuk v. Petrovsky*, 10 F.3d 338, 353 (6th Cir. 1993), which applied *Brady* to a civil action. The court extended *Brady* to a denaturalization and extradition action because, in part, the proceedings were based on proof of alleged criminal activities. *Id.*[5] The court was also persuaded by the fact that "the government had superior access to such [foreign] materials," and ultimately concluded that "[b]ecause the OSI attorneys consistently followed an unjustifiedly narrow view of the scope of their duty to disclose, and compartmentalized their information in a way that resulted in no investigation of apparently contradictory evidence, Demjanjuk and the court were deprived of information and materials that were critical to building the defense." *Id.* at 342.

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[5] The same is true here. Although the Government chose not to proceed with criminal charges, the conduct it sought to prove is at least arguably criminal under 36 C.F.R. § 261.5(c), which prohibits "[c]ausing timber, trees, slash, brush or grass to burn except as authorized by permit" and under 36 C.F.R. § 261.1b, providing that "[a]ny violation shall be punished by a fine … or imprisonment."

Brady has similarly been applied in civil actions where the government failed to comply with its discovery obligations such that it prevented the opposing party from fairly litigating the case. *See*, *e.g.*, *EEOC v. Los Alamos Constructors, Inc.*, 382 F. Supp. 1373, 1374 (D.N.M. 1974); *see also id.* at 1383 n.5 (observing that a defendant in a "civil case brought by the government should be afforded no less due process of law" than a defendant in a criminal case). *Brady* may also apply in administrative proceedings initiated by federal agencies. *See*, *e.g.*, *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 142 (S.D.N.Y. 1966). *But see*, *e.g.*, *NLRB v. Nueva Eng'g, Inc.*, 761 F.2d 961, 969 (4th Cir. 1985).

Indeed, numerous federal agencies have either wholly incorporated *Brady* as an affirmative obligation under their disclosure rules for civil litigation or incorporated a modified version of the duty. *Compare* 17 C.F.R. § 201.230(b)(2) (modified version of *Brady*, which requires the SEC to disclose certain categories of documents requested by the defendant in its possession that contain material exculpatory evidence of which it is aware), *with* 129 FERC ¶ 61,248 (Federal Energy Regulatory Commission Policy Statement on Disclosure of Exculpatory Materials adopting *Brady* obligations); *In re First Guar. Metals, Co.*, 1980 WL 15696, at * 9 (C.F.T.C. July 2, 1980) (Commodities Futures Trading Commission adopting *Brady* through adjudicative precedent); *Exclusive Tug Franchises-Marine Terminal Operators Serving the Lower Miss. River*, 2001 WL 1085431 (F.M.C.

Aug. 14, 2001) (Federal Maritime Commission, same); *In re Rick A. Jenson*, 1997 WL 33774615 (F.D.I.C. Apr. 7, 1997) (Federal Deposit Insurance Corporation, same). These agencies have adopted *Brady* or *Brady*-like rules because such rules are rooted in due process and are necessary in order to promote fundamental fairness in agency proceedings.

An increasingly vigorous chorus of scholars and others has also called for *Brady*'s application in federal administrative actions. *See*, *e.g.*, Stephen A. Best, Paul F. Enzinna, & Evan N. Turgeon, *Imposing Brady-Like Obligations on the SEC*, THE CORPORATE & SECURITIES LAW ADVISOR, June 2014 ("Civil government attorneys and criminal prosecutors serve the same cause of justice and the same public interest, and should be bound by the same procedural rules"); Justin Goetz, Note, *Hold Fast the Keys to the Kingdom: Federal Administrative Agencies and the Need for Brady Disclosure*, 95 MINN. L. REV. 1424, 1439 (2011) (observing that civil punishments can exact harm similar to criminal punishments, and "[t]hus, as a categorical distinction based on punishment, the criminal-civil dichotomy alone fails to justify divergent application of the *Brady* rule").

Finally, in a recent case out of the Southern District of New York, the district court required the United States Attorney's Office to produce documents from its joint investigation with the SEC. *United States v. Gupta*, 848 F. Supp. 2d 491, 497 (S.D.N.Y. 2012). The court observed that where an investigation

includes joint fact-gathering, the government is charged with reviewing all documents and information connected to that investigation and disclosing any exculpatory information. *Id.* at 494.

In short, the district court's determination that *Brady* does not apply in civil cases was contrary to well-reasoned authorities, and is not a sufficient basis for the court's failure to hold the government to a higher standard of conduct.

B. Government Lawyers May Not Act with Reckless Disregard for the Truth

Defendants argued below that at the very least the government prosecutors acted with reckless disregard for the truth sufficient to entitle defendants to relief. The district court, however, held that only *intentional* misrepresentation by government lawyers can support relief from a judgment. ER 48–51. This was error.

Courts in several jurisdictions have granted relief where prosecutors acted recklessly. In *Demjanjuk*, for example, the Sixth Circuit found that the government's reckless disregard for the truth amounted to fraud on the court entitling the defendant to relief. 10 F.3d at 348–49 (holding that reckless disregard of the truth by the government is sufficient to demonstrate fraud on the court). And this Court has found recklessness by government prosecutors to constitute misconduct sufficient to warrant judicial relief. In *Wang v. Reno*, 81 F.3d 808, 819 (9th Cir. 1996), for example, the court cited *Demjanjuk* in finding that prosecutors

engaged in misconduct when they brought a foreign witness to the United States in "reckless disregard of the real possibility that his inculpatory testimony was false and that, if he told the truth, he would face torture and possible execution" upon his return to China, thereby interfering with the administration of justice and violating the witnesses rights to due process of law. *Id.* at 820–21.

Reckless disregard of the truth is inconsistent with a government attorney's duty to the court and to the judicial process. Although there appears to be a split in authority regarding the sufficiency of recklessness to demonstrate fraud on the court (*compare*, *e.g.*, *Demjanjuk*, 10 F.3d at 348–49, *and Gen. Med., P.C. v. Horizon/CMS Health Care Corp.*, 475 F. App'x 65, 71–72 (6th Cir. 2012) (allowing recklessness to suffice for fraud on the court), *with Herring v. United States*, 424 F.3d 384, 386 n.1 (3d Cir. 2005) (acknowledging the Sixth Circuit's position that recklessness is sufficient but requiring proof of an "intentional fraud")), reckless conduct should not be excused. When it comes to the government, reckless representations, misrepresentations, or omissions should be treated as a fraud on the court without the need for a heightened *mens rea*, because courts expect that federal lawyers will provide a "more candid picture of the facts and the legal principles governing the case." James E. Moliterno, *The Federal Government Lawyer's Duty to Breach Confidentiality*, 14 TEMP. POL. & CIV. RTS. L. REV. 633, 639 (2006); *see also Williams v. Sullivan*, 779 F. Supp. 471, 472

(W.D. Mo. 1991) ("a special duty [is] imposed on government lawyers to 'seek justice and develop a full and fair record'").

C. The State Agency's Financial Interest in the Outcome of the Investigation Tainted the Joint State-Federal Investigation of Defendants' Conduct

Defendants alleged in their Rule 60 motion that Investigator White—one of the key investigators and a disclosed expert for the United States—had an improper financial incentive in the case as a result of WiFITER. After the defendants settled with the United States, they discovered Cal Fire was using WiFITER to divert a portion of the money recovered from those accused of starting wildland fires into accounts controlled by Cal Fire investigators such as Investigator White. ER 543. In other words, Investigator White stood to enrich himself and Cal Fire by ensuring a recovery from defendants.

Although White worked for Cal Fire (not the United States Forest Service), he was one of two primary investigators and the author of the origin and cause report relied upon by the United States in this case. ER 463, 465. It was a violation of defendants' fundamental due process rights for the government to rely on an investigator with a contingent financial interest in the outcome of the litigation.

In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 249–50 (1980), the United States Supreme Court observed that "injecting a personal interest, financial or otherwise,

into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raises serious constitutional questions" applicable to both civil and criminal actions. *See also Young v. United States ex rel. Buitton et Fils S.A.*, 481 U.S. 787, 815, 826 (1987) (relying upon the Court's "supervisory powers" to reverse a conviction for contempt based on the bias of the private criminal prosecutor); *People ex rel. Clancy v. Superior Court*, 39 Cal. 3d 740, 746 (1985) ("When a government attorney has a personal interest in the litigation, the neutrality so essential to the system is violated. For this reason prosecutors and other government attorneys can be disqualified for having an interest in the case extraneous to their official function.").

Here, although it is the investigator (and subsequent expert witness) and not the prosecutor with the direct financial interest, the legal principal is the same—a government prosecutor's duty of impartiality applies likewise to government agents such as investigators. *See* Model Code of Prof'l Responsibility DR 7-108(C) (testifying experts prohibited from having a contingent interest in the outcome of the action in which they are testifying). Because the evidence, support, and opinions for the government and the state's case were largely the same due to the joint investigation, the fact that White may have benefited directly from any recovery in the state action necessarily tainted all of his reports and opinions. In fact, in awarding sanctions against Cal Fire, the superior court observed that Cal

Fire had falsely represented that there was "'zero' evidence WiFITER was a corrupt scheme or that it had any impact on investigations." *Cal. Dep't of Forestry & Fire Prot.*, 2014 WL 7972097, at *15. In other words, the court found that there had been affirmative misrepresentations that affected the case and that the fund likely created a conflict of interest.

And even if the government were to claim that it did not have access to the WiFITER documents, "exculpatory evidence cannot be kept out of the hands of the defense just because the prosecutor does not have it where an investigating agency does." *Tennison v. City & Cty. of S.F.*, 570 F.3d 1078, 1087 (9th Cir. 2008). In this case, White and Cal Fire are akin to an investigating agency. *See Gupta*, 848 F. Supp. 2d 491 (discussed above) (requiring government prosecutors to produce documents from its joint investigation with the SEC that were in the possession of the SEC).

In short, it is plainly improper—indeed, unconstitutional—for the government to rely on an investigator who maintained a substantial financial interest in the outcome.

CONCLUSION

The district court's failure to analyze defendants' allegations regarding misconduct by the government prosecutors was error, and this Court should reverse.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,238 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Microsoft Word 2010, Times New Roman font size 14.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 13, 2015.

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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