No. 06-

IN THE

Supreme Court of the United States

OMAR MEJIA-HUERTA, ANASTACIO PANTOJA-ARELLANO, JOSE ANDRES DEHUMA-SUAREZ, ANTONIO CRUZ-MARTINEZ, LUIS ESTRADA, AND TABRODRICK DESHAUN CRADDOCK,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the opinion below, the Fifth Circuit recognized "an incongruent pattern of caselaw" in the federal courts of appeals, with the Second, Fourth, Sixth, Ninth, and Tenth Circuits differing from the Third, Seventh, Eighth, Eleventh, and now Fifth Circuits on the following question:

Whether Federal Rule of Criminal Procedure 32(h) requires that a district court provide notice of its intent to impose a sentence that is either above or below the sentence recommended by the Sentencing Guidelines.

PARTIES TO THE PROCEEDING

Petitioners are Omar Mejia-Huerta, Anastacio Pantoja-Arellano, Jose Andres Dehuma-Suarez, Antonio Cruz-Martinez, Luis Estrada, and Tabrodrick Deshaun Craddock, each of whom was a defendant-appellant below. Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Omar Mejia-Huerta, Anastacio Pantoja-Arellano, Jose Andres Dehuma-Suarez, Antonio Cruz-Martinez, Luis Estrada, and Tabrodrick Deshaun Craddock ("Petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals is available at 2007 WL 610973 and is reprinted in the Appendix to the Petition ("App.") at 1a-18a. No petitions for rehearing were filed. The final judgments of the district court for all petitioners are unreported and are reprinted in the Appendix at App. 42a-76a. The district court's written orders responding to the sentencing objections of three petitioners are unreported and are reprinted in the Appendix at App. 19a-41a.

JURISDICTION

The court of appeals issued its decision affirming all of the challenged sentences on February 28, 2007. App. 1a-2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 32(h) provides:

> Notice of Possible Departure From Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

18 U.S.C. § 3553(a) provides:

> (a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for –
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to

be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

A. Legal Background

1. Federal Rule of Criminal Procedure 32 provides an integrated set of sentencing procedures to "provide[] for focused, adversarial development of the factual and legal issues" relevant to a federal criminal defendant's sentence. *Burns v. United States*, 501 U.S. 129, 134 (1991). Those issues are primarily defined by the "Presentence Investigation Report" (or "PSR") that the Rule requires a probation officer to prepare for each defendant. Fed. R. Crim. P. 32(c). The PSR must discuss the defendant's "history and characteristics," calculate the defendant's sentence under the Sentencing Guidelines, and "identify any basis for departing from the applicable sentencing range." Fed. R. Crim. P. 32(d).

Congress then ensured that the parties would have ample notice of the basis for the sentence by allowing the parties time to consider the PSR and make any additional presentencing submissions. Under Rule 32, the parties are entitled to receive the PSR "at least 35 days before sentencing"; the parties have 14 days after receipt of the report to make any objections; and the probation officer must submit the report to the court "[a]t least 7 days before sentencing." Fed. R. Crim. P. 32(e)(2), (f)(1), (g).

Rule 32 thus ensures that there is significant development of the factual and legal basis for a sentence prior to the sentencing hearing itself. Further, at the sentencing hearing, attorneys for both the government and the defense have a right to "comment on the probation officer's determinations and other matters relating to an appropriate sentence." Fed. R. Crim. P. 32(i)(1)(C).

In the face of this extensive preparation for the sentencing, if a district court decides to *sua sponte* choose a sentence outside of the Guidelines – a sentence that has not been foreshadowed in any previous submissions – Rule 32 requires that the court provide notice to the parties. Specifically, it states that a district court "must give the parties reasonable notice" before "depart[ing] from the applicable sentencing range" under the Sentencing Guidelines "on a ground not identified for departure either in the presentence report or in a party's prehearing submission." Fed. R. Crim. P. 32(h). That is the provision at issue in this case.

2. The genesis of Rule 32(h) was *United States v. Burns*, 501 U.S. 129 (1991). In that case, this Court considered whether a criminal defendant was entitled to any notice before a district court *sua sponte* imposed a sentence outside of the Sentencing Guidelines. *Id.* at 131. The Court looked to the then-current version of Rule 32, which included substantially the same requirements as it does now, including the requirement that a probation officer prepare a PSR; that the parties receive notice of the PSR and be allowed to make objections; and that the parties have a right "to comment upon the probation officer's determination and on other matters relating to the appropriate sentence." *Id.* at 134 (quoting Rule 32(a)(1)). (Rule 32, at that time, did not include an explicit notice requirement for *sua sponte* departures by district courts.)

The Court considered the text and purposes of Rule 32 and concluded that the parties do have a right to notice before a district court *sua sponte* departs from the Sentencing Guidelines range. As the Court noted, "Rule 32 contemplates full adversary testing" of issues relevant to sentencing, and it "mandates that the parties be given 'an opportunity to comment'" to further that end. *Id.* at 135 (quoting Rule 32(a)(1)). In the Court's view, it would "make[] no sense to impute to Congress an intent that a defendant have the right

to comment on the appropriateness of a *sua sponte* departure but not the right *to be notified* that the court is contemplating such a ruling." *Id.* at 135-36. Indeed, because "the Guidelines place essentially no limit on the number of potential factors that may warrant a departure," "no one is in a position to guess when or on what grounds a district court might depart, much less to 'comment' on such a possibility in a coherent way." *Id.* at 136-37. To the extent that Rule 32 could be read to dispense with notice, that reading should be rejected, the Court stated, because it would raise "the serious question whether notice in this setting is mandated by the Due Process Clause." *Id.* at 138.

Moreover, the Court reasoned, notice is required to further "Rule 32's purpose of promoting focused, adversarial resolution of the legal and factual issues" in sentencing. 501 U.S. at 137. Without notice, parties would be forced to "address possible *sua sponte* departures in a random and wasteful way," for example, "by trying to anticipate and negate every conceivable ground on which the district court might choose to depart on its own initiative." *Id.* And "defense counsel might be reluctant to suggest" a possible grounds for departure even "for the purpose of rebutting it." *Id.* As a result, "[i]n every case in which the parties fail to anticipate an unannounced and uninvited departure by the district court, a critical sentencing determination will go untested by the adversarial process." *Id.* In light of the text of the Rule and its important purposes, then, the Court held that a district court must "give reasonable notice," "specifically identify[ing] the ground" for departure, before *sua sponte* departing from the Guidelines range. *Id.* at 138-39.

Congress then amended Rule 32, adding subsection (h) to make the holding in *Burns* explicit in the rules. *See* Fed. R. Crim. P. 32 advisory committee's note (2002).

3. In *United States v. Booker*, 543 U.S. 220 (2005), this Court determined that the Constitution requires that the Sen-

tencing Guidelines be considered advisory, rather than mandatory. The Court had previously recognized in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that the Sixth Amendment does not permit a district court to enhance a criminal defendant's sentence by finding facts not charged in the indictment or found by the jury beyond a reasonable doubt. In *Booker*, the Court applied that holding to the Sentencing Guidelines, and it determined that the mandatory nature of the Guidelines was incompatible with the Sixth Amendment's strictures. 543 U.S. at 230-34.

As the Court explained, the Guidelines require district courts to find facts by a preponderance of the evidence to increase a defendant's penalty beyond the maximum sentence that the court could impose based only on the facts found by the jury. *Id.* at 231-32. For that reason, the mandatory Guidelines could not stand. *Id.* at 233-34. The Court then determined that it would best further Congress's intent to "make the Guidelines system advisory," *id.* at 246, where the "Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines," district courts "consult those Guidelines and take them into account while sentencing," while "tailor[ing] the sentence in light of" the factors identified in 18 U.S.C. § 3553(a), *id.* at 245-46, 264.[1]

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[1] Those factors include: "the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); "the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, [] to provide just punishment," "to afford adequate deterrence," "to protect the public from further crimes of the defendant," and "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment," *id.* at § 3553(a)(2); "the kinds of sentences available," *id.* § 3553(a)(3); "the sentencing range established" by the Guidelines, *id.* § 3553(a)(4); any "any pertinent policy statement" issued by the Sentencing Commission, *id.* § 3553(a)(5); "the need to avoid un-

After *Booker*, then, a sentence need not be confined to the Guidelines range, but may be anywhere within the statutory minimum and maximum, and the appropriateness of the sentence is judged by reference to the factors in 18 U.S.C. § 3553(a).

B. Factual Background and Procedural History

1. Each petitioner was charged with a federal criminal offense and decided to plead guilty. App. 4a-9a. Although each petitioner was sentenced post-*Booker*,[2] each expected to be sentenced to a term of imprisonment within the Guidelines. Neither petitioners' PSRs nor any sentencing memorandum recommended a sentence above or below the Guidelines. *Id.* at 4a-9a. And the district court gave no prior notice of its intention to depart upward from the Guidelines. As a result, prior to the sentencing hearing, there was nothing that had "indicated the possibility of or reasoning behind the imposition of a non-Guidelines sentence." *Id.* at 4a-9a.

Nevertheless, the district court sentenced each petitioner to a term of imprisonment that was well in excess of the Guidelines range. Indeed, the sentences range from 124% to 444% of the maximum Guidelines sentences. The district court invoked the same reasons for each upward departure. Apparently believing that the defendants' criminal history scores under the Guidelines were non-representative, the district court cited "criminal history" as justifying an upward departure for each of the defendants. App. 4a-8a. The district court also cited each defendant's disrespect for the laws of the United States and potential threat to public safety. *Id.*

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warranted sentence disparities," *id.* § 3553(a)(6); and "the need to provide restitution," *id.* § 3553(a)(7).

[2] Estrada was originally sentenced pre-*Booker*. App. 8a. The court of appeals vacated his sentence based on *Booker* and remanded for resentencing. *Id.*

Defense counsel was "stunned" by the *sua sponte* departures. Pet'r C.A. Br. 8. Because there had been no notice of any potential departures, defense counsel had no opportunity to prepare evidence or argument to address the factual basis for the district court's statements or (if they facts were as the district court believed) whether they warranted upward departures.

Believing that notice was required by Rule 32(h), and recognizing that he could not successfully challenge the departures without notice, defense counsel sought to preserve the claims of Rule 32(h) error through verbal and written objections. Two of the defendants – Pantoja-Arellano and Cruz-Martinez – verbally objected to the lack of notice at the time of sentencing and filed written objections immediately after sentencing. App. 5a, 7a. One defendant – Dehuma-Suarez – objected to the lack of notice by filing a written objection immediately after sentencing. *Id.* at 6a. One defendant – Estrada – entered a pro forma objection to the lack of notice during sentencing but did not file a written objection. Estrada Tr. 9; *see also* Pet'r C.A. Reply Br. 20-22. The district court responded to each objection by explaining that notice was unnecessary because no evidence or argument could change the court's mind. App. 5a-8a.[3]

a. Anastacio Pantoja-Arellano pleaded guilty to a single count of illegal re-entry after deportation. App. 4a. In his PSR, the probation officer calculated a Sentencing Guidelines range of 33 to 41 months of imprisonment. *Id.* at 4a-5a.

The district court *sua sponte* imposed a sentence of 96 months of imprisonment, a 234% increase over the Sentencing Guidelines maximum, and three years of supervised re-

[3] For two defendants – Mejia-Huerta and Craddock – counsel did not object to the sentence. App. 4a, 9a. But, as explained below, these petitioners should prevail even under the plain-error standard. *See infra* p. 25.

lease. *Id.* at 5a. During Pantoja-Arellano's sentencing hearing, his counsel verbally objected to the lack of notice and offered to present additional oral argument or a written objection. *Id.* The district court advised that it preferred a written objection, which defense counsel promptly filed. *Id.* That written objection argued that the district erred in failing to provide notice before *sua sponte* departing from the Guidelines and that the sentence was unreasonable. *Id.*

b. Antonio Cruz-Martinez pleaded guilty to one count of illegal re-entry after deportation. App. 7a. In his PSR, the probation officer calculated a Sentencing Guidelines range of 21 to 27 months of imprisonment. *Id.*

The district court *sua sponte* imposed a sentence of 60 months of imprisonment, a 222% increase over the Sentencing Guidelines maximum, and three years of supervised release. *Id.* During Cruz-Martinez's sentencing hearing, his counsel verbally objected to the lack of notice and offered to present additional oral argument or a written objection. *Id.* As with Pantoja-Arellano, the district court advised that it preferred a written objection, which defense counsel promptly filed. *Id.* at 7a-8a.

c. Jose Dehuma-Suarez pleaded guilty to one count of illegal re-entry after deportation. App. 6a. In his PSR, the probation officer calculated a Sentencing Guidelines range of 21 to 27 months of imprisonment. *Id.*

The district court *sua sponte* imposed a sentence of 120 months of imprisonment, a 444% increase over the Sentencing Guidelines maximum, and three years of supervised release. *Id.* Dehuma-Suarez filed a written objection to the lack of notice immediately following the sentencing. *Id.*

d. Luis Estrada pleaded guilty to a single count of transporting illegal aliens. App. 8a. In his PSR, the probation officer calculated a Sentencing Guidelines range of 33 to 41 months of imprisonment. *Id.* The district court sustained

Estrada's objection to a two-point enhancement and lowered that range to 27 to 33 months of imprisonment. *Id.*

The district court *sua sponte* imposed a sentence of 41 months of imprisonment, a 124% increase over the Sentencing Guidelines maximum, and three years of supervised release. *Id.* Estrada's counsel made a verbal pro forma objection to the lack of notice, but did not file a written objection. Estrada Tr. 4, 7, 9; Pet'r C.A. Reply Br. 20-22.[4]

e. Omar Mejia-Huerta pleaded guilty to a single count of illegal re-entry after deportation. App. 4a. In his PSR, the probation officer calculated a Sentencing Guidelines range of 9 to 15 months of imprisonment. *Id.*

The district court *sua sponte* imposed a sentence of 36 months of imprisonment, a 140% increase over the Sentencing Guidelines maximum, followed by three years of supervised release. *Id.* Mejia-Huerta did not object to the lack of notice before the district court. *Id.*

f. Tabrodrick Deshaun Craddock pleaded guilty to a single count of possessing a firearm while a felon. App. 9a. In his PSR, his probation officer calculated a Sentencing Guidelines range of 21 to 27 months of imprisonment. *Id.*

The district court *sua sponte* imposed a sentence of 60 months of imprisonment, a 222% increase over the Sentencing Guidelines maximum, and three years of supervised release. *Id.* Craddock did not object to the lack of notice before the district court. *Id.*

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[4] The court of appeals determined that Estrada failed to timely object and his sentence thus should only be reviewed for plain error. App. 11a. The record reveals, however, that the district court had considered defense counsel's notice argument with respect to several other defendants that day, Estrada Tr. 4, 7, and defense counsel made the district court aware of the fact that Estrada had the same objection to his sentence, *id.* at 9. In any event, Estrada should prevail even under the plain-error standard. *See infra* p. 25.

The district court filed three written orders that set forth its view that the Rule 32(h) notice requirement does not survive *Booker*.[5] The court first suggested that each defendant actually had "notice" because he knew the statutory maximum sentence and "the Plea Memorandum put Defendant on notice that this Court was free to exercise its discretion and sentence him outside of the recommended Guidelines range." App. 27a; *see also id.* at 21a, 36a. It further reasoned that, in any event, notice is no longer required after *Booker* because a district court "may, in its discretion, impose a sentence outside of the Guidelines range," and "[i]f such discretion is to have any meaning at all, a court should be allowed during the sentencing hearing to determine that the recommended Guidelines range is insufficient." *Id.* at 28a; *see also id.* at 22a, 37a. In the court's view, "variances" from the Guidelines post-*Booker* are different from "departures" from the Guidelines pre-*Booker*, and Rule 32(h) applies only to the latter: "Rule 32(h)'s notice requirement is now unnecessary because any defendant being sentenced is no longer required to be sentenced at a pre-set mandatory range – a range that a defendant would have expected and relied upon." *Id.* at 30a; *see also id.* at 39a.

2. Petitioners each appealed, and their appeals were consolidated. The court of appeals affirmed all of the sentences. In so doing, it rejected the argument that, after *Booker*, Federal Rule of Criminal Procedure 32(h) continues to require that a district court provide notice to the parties before *sua sponte* imposing a sentence above or below the Guidelines range. App. 14a-15a, 18a.

The court of appeals recognized that "Rule 32(h) was a legislative response to the Supreme Court's decision in *Burns*." *Id.* at 12a. *Burns* had held that the then-current ver-

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[5] These orders were for defendants Pantoja-Arellano (App. 19a-23a), Cruz-Martinez (App. 24a-32a), and Dehuma-Suarez (App. 33a-41a).

sion of Rule 32 required notice before a *sua sponte* departure from the Guidelines. *Burns* recognized that without a notice requirement, "a litigant would unfairly have (1) to engage in an incoherent comment and defense at sentencing; (2) in a pre-sentencing filing, to waste large amounts of time guessing when or on what grounds a court might depart *sua sponte*; or (3) to suggest reluctantly a departure possibility to the sentencing court in a pre-sentencing filing, only for the purpose of rebutting the possible departure grounds." *Id.*

But, as the court of appeals noted, the Supreme Court's decision in *Booker* changed the import of the Sentencing Guidelines. Before *Booker*, "sentencing courts were compelled to impose sentences that fell within the sentencing ranges assigned by the Guidelines, unless a specified exception existed," in which case the district court could invoke the exception for an "upward or downward departure" from the Guidelines. *Id.* at 13a. After *Booker*, "a sentencing court may impose a sentence either higher or lower than – at variance with – the appropriate Guidelines range" after calculating the Guidelines range and "us[ing] it as a frame of reference." *Id.* "If the sentencing court chooses to impose a non-Guidelines sentence, its reasons for doing so must be consistent with the facts enumerated in § 3553(a)." *Id.*

The court of appeals then noted that "an incongruent pattern of caselaw has developed" in the federal courts of appeals about "whether *Burns* or Rule 32(h) continue to apply to non-Guidelines sentences" after *Booker*, with the Second, Fourth, Ninth, and Tenth Circuits finding that notice is still required, and the Third, Seventh, Eighth, and Eleventh Circuits finding that it is not. App. 14a. And it specifically noted that "[t[he government *agrees* with the defendants that the district court . . . was required to provide pre-sentencing notice." *Id.* at 10a (emphasis added). "Enter[ing] the fray," the Fifth Circuit held that notice is not required. *Id.* at 14a-15a.

The court of appeals provided two justifications for its conclusion. First, it stated that a pre-*Booker* non-Guidelines sentence – a "departure" from the mandatory Guidelines – is of a different sort than a post-*Booker* non-Guidelines sentence – which it deemed a "variance." *Id.* at 13a-15a. Because "the plain language of Rule 32(h) limits its application to *departures*," the court determined that it was "bound to hold that Rule 32(h) applies to *departures* only and not to *variances* from the Guidelines." *Id.* at 15a.

Second, the court determined that "the concerns that precipitated the Court's decision in *Burns* are no longer viable" under an advisory Guidelines regime. *Id.* Because sentencing courts must base their sentences on "the full host of factors set forth in § 3553(a)," and "[t]hese factors are known (or knowable) by the parties prior to sentencing," litigants are "on notice that a sentencing court has discretion to consider any of these factors." *Id.* That notice, in the court of appeals' view, "eliminates the element of unfair surprise, the concern that defense counsel will waste time with a pre-sentencing filing, the possibility that defense counsel will unwittingly provide the district court with a grounds for departure, and the worry of possibly undermining the adversarial process." *Id.*

Having found that no notice was required under Rule 32(h), the court of appeals then affirmed with respect to each defendant. *Id.* at 15a-18a.

REASONS FOR GRANTING THE PETITION

In this case, a single district court judge imposed on each of six criminal defendants a sentence far in excess of the maximum sentence under the Sentencing Guidelines. For each defendant, a detailed PSR was prepared, and the PSR did not recommend any departure above or below the Guidelines range. Nor did the prosecution or defense counsel suggest any sentence outside the Guidelines. Yet the district court judge imposed a sentence above the Guidelines without

providing the parties any notice or opportunity to address the grounds for departure.

The district court's *sua sponte* imposition of sentences outside of the Guidelines raises an important question on which the federal courts of appeals are evenly split: whether the notice requirement in Federal Rule of Criminal Procedure 32(h) survives this Court's decision in *United States v. Booker*, 542 U.S. 220 (2005). Prior to *Booker*, it was well-settled that notice was required: this Court found in *Burns* that a prior version of Rule 32 required notice in order to give effect to a defendant's right to comment at sentencing, and Congress subsequently made that notice requirement explicit in subsection (h) of the Rule. But after *Booker*'s holding that the Sentencing Guidelines are no longer mandatory, five circuits have held that the advisory nature of the Guidelines makes the concept of a "departure" from the Guidelines less meaningful, so that the notice is no longer necessary. On the other side, five circuits have held that the rationale of *Burns* and Rule 32(h) continues to apply and that notice is required.

This case provides an ideal vehicle in which to resolve that pronounced and mature circuit split. The sentencing hearings of the six defendants in this case starkly illustrate the effects of lack of notice. Both the prosecutor and defense counsel were surprised by the district court's *sua sponte* departure from the Guidelines, and as a result there was no meaningful discussion or adversarial testing of the bases for the departures.

Further, the time to resolve this circuit split is now. This split developed quickly after *Booker*, and it has serious practical effects, particularly in those circuits which do not require notice. Although this Court is current revisiting the question of the weight to be placed on the Guidelines in *Rita v. United States* and *Claiborne v. United States*, the resolution of this case does not depend on those cases. So long as

the Guidelines sentence remains a factor to be considered in sentencing – which it must, under 18 U.S.C. § 3553(a)(4) and (a)(5) – a departure from the Guidelines sentence is meaningful and Rule 32(h)'s notice requirement should apply. And this Court should not hold off on deciding this issue in the hopes that the Judicial Conference will amend Rule 32(h), for the soonest such an amendment could become effective is December 2010. The issue raised in this case cannot wait, especially in light of the numerous practical consequences of the deep circuit split.

I. THERE IS AN ACKNOWLEDGED, DEEP CIRCUIT SPLIT ON THE QUESTION WHETHER RULE 32(H)'s NOTICE REQUIREMENT SURVIVES *BOOKER*.

The decision below presents a critical issue on which the government agrees there is a deep circuit split: whether Rule 32(h)'s requirement that a district court provide both parties with reasonable notice before *sua sponte* imposing a sentence outside the Sentencing Guidelines survives *Booker*.

The Second, Fourth, Sixth, Ninth, and Tenth Circuits have held that notice is required under Rule 32(h) post-*Booker*. The Third, Seventh, Eighth, and Eleventh Circuits – as well as the Fifth Circuit below – have held that no notice is required. The courts of appeals have repeatedly acknowledged this split. And the government has explicitly stated in cases in several of the federal courts of appeals that it believes that the notice requirement survives *Booker*.

The depth and balance of the split shows the need for this Court to resolve the question presented. And the speed with which the split developed post-*Booker* shows the importance of resolving it promptly. This Court should grant review and hold that Rule 32(h) requires notice before a district court *sua sponte* imposes a sentence outside of the Guidelines.

1. There is a 5-5 circuit split on the question of the effect of *Booker* on Rule 32(h)'s notice requirement. This split in authority described above has been repeatedly acknowledged by the federal courts of appeals. *See, e.g.*, *United States v. Atencio*, 476 F.3d 1099, 1104 (10th Cir. 2007); *United States v. Cousins*, 469 F.3d 572, 579 (6th Cir. 2006); *United States v. Irizarry*, 458 F.3d 1208, 1212 & n.4 (11th Cir. 2006), *petition for cert. filed*, No. 06-7517 (U.S. Oct. 26, 2006); *United States v. Anati*, 457 F.3d 233, 236 (2d Cir. 2006).

a. Five circuits have determined that the notice requirement applies to any sentence above or below the now-advisory Guidelines. Those courts generally look to the text of the Rule, which evidences a clear intent to require notice for a non-Guidelines sentence, and to the purposes of the Rule, which are to ensure full and fair adversarial testing of issues relevant to sentencing.

For example, in *United States v. Anati*, the Second Circuit upheld the notice requirement because "the same reasoning that persuaded the Supreme Court [in *Burns*] to apply the comment opportunity . . . to *sua sponte* departures under the mandatory Guidelines regime" applies to a "non-Guidelines sentence under the advisory Guidelines regime." 457 F.3d at 236. The court of appeals noted the "significant similarity between an intent to depart and an intent to impose a non-Guidelines sentence" because "[b]oth forms of sentencing start with a calculated Guidelines range." *Id.* at 236-37 (citing 18 U.S.C. § 3553(a)(4)). Although district courts now have a "somewhat broader opportunity" than before "to sentence above or below that range based on . . . the factors outlined in section 3553(a)," the fact that the Guidelines range remains the starting point for sentencing makes notice before imposition of a *sua sponte* non-Guidelines sentence important. *Id.* at 237. Indeed, notice facilitates the important goal of ensuring full "adversarial testing of factual and legal considerations relevant to sentencing," because although a dis-

trict court's "obligation to consider section 3553(a) factors is known in advance of sentencing," "application of those factors turns on relevant facts, some of which might be in the Court's mind" and will not be subject to adversarial testing if left undisclosed. *Id.*

Similarly, in *United States v. Davenport*, 445 F.3d 366, 371 (4th Cir. 2006), the Fourth Circuit agreed that a criminal defendant is entitled to notice when a district court is "contemplating a sentence above the advisory guideline range." It noted that Rule 32 "contains various procedural requirements intended to ensure the accuracy of the information used at sentencing," one of which is the notice requirement in subsection (h). *Id.* In the court of appeals' view, "[t]he need for such notice is as clear now as before *Booker*." *Id.* As the court explained, now, as in *Burns*, "[t]here is 'essentially no limit on the number of potential factors that may warrant a departure' or a variance, and neither the defendant nor the Government 'is in a position to guess when or on what grounds a district court might depart' or vary from the guidelines." *Id.* (quoting *Burns*, 501 U.S. at 136-37). Therefore, "notice of an intent to depart or vary from the guidelines remains a critical part of sentencing post-*Booker*." *Id.*

In *United States v. Cousins*, 469 F.3d 572 (6th Cir. 2006), the Sixth Circuit also held that notice is required for non-Guidelines sentences after *Booker* and that the failure to provide notice constitutes plain error. The court of appeals reasoned that Rule 32(h) "applies equally" to "departures" under the mandatory Guidelines and to "variances" from the Guidelines range under the advisory Guidelines regime. *Id.* at 580. The court found "persuasive the reasoning of the circuits that continue to apply Rule 32(h) to all sentences that deviate from the Guidelines," and it rejected the arguments of the circuits that do not. *Id.* Specifically, the court rejected the argument that 18 U.S.C. § 3553(a) provides all of the notice to which the parties are entitled: "While it is true that,

after *Booker*, parties may be assumed to know that a district court may impose a variance on the basis of a factor not identified in the PSR or in a party's submission, the same was true of departures before *Booker*" because Chapter 5 of the Guidelines, like § 3553(a), "specifically identifies various factors that a court should take into consideration" in imposing a sentence. *Id.* The court then noted that a district court's failure to comply with Rule 32(h) is a "plain" error, and one that generally affects substantial rights and the fairness of the judicial proceedings because "notice would have permitted [defense] counsel to address the district court's" bases for a non-Guidelines sentence. *Id.* at 580-81.

The Ninth and Tenth Circuits have followed suit. In *United States v. Evans-Martinez*, 448 F.3d 1163, 1167 (9th Cir. 2006), the Ninth Circuit held that "Rule 32(h) requires that a district court provide notice of its intent to sentence outside the range suggested by the Guidelines suggested by the Guidelines post-*Booker*, as it did pre-*Booker*." It found that the rationale of *Burns* is "unaffected by *Booker*'s mandate that the Guidelines be applied in an advisory fashion" because the district court must still "correctly calculate the [Guidelines] range" and use it as a "starting point" in sentencing. *Id.* (internal quotation marks omitted). "Parties must receive notice" when the court is contemplating an above- or below-Guidelines sentence "in order to ensure that issues with the potential to impact sentencing are fully aired." *Id.*

And in *United States v. Atencio*, 476 F.3d 1099 (10th Cir. 2007), the Tenth Circuit agreed. The court of appeals reasoned that *Booker* "has not affected *Burns*'s mandate for focused, adversarial resolution of the legal and factual bases for sentencing; nor does it negate the benefits of notice in furthering this end." *Id.* at 1104 (internal quotation marks omitted). Although defendants are "constructively on notice of § 3553(a) factors post-*Booker*," they were "equally aware

of the specified circumstances for departure" under the previous mandatory Guidelines regime. *Id.* (internal quotation marks omitted). The purposes of notice are still furthered: it "allows the parties to focus their attention on those considerations most relevant to the sentencing court's decision." *Id. See also United States v. Dozier*, 444 F.3d 1215, 1217-18 (10th Cir. 2006) ("We do not question the viability of Rule 32(h) and *Burns* after *Booker*.").

b. Five circuits have held that no notice is required by Rule 32(h) before a district court imposes a non-Guidelines sentence. Those courts of appeals have generally reasoned that Rule 32(h), by its terms, applies only to "departures," a concept with little meaning post-*Booker*, and § 3553(a) provides sufficient notice of the factors the district court might consider in sentencing.

For example, in *United States v. Vampire Nation*, 451 F.3d 189, 195-96 (3d Cir. 2006), the Third Circuit determined that Rule 32(h)'s notice requirement has no vitality after *Booker*. The court of appeals distinguished between pre-*Booker* "departures" and post-*Booker* "variances," which are "discretionary sentences not based on a specific Guidelines departure provision." *Id.* at 195 n.2. The court held that Rule 32(h) should not apply to "variances," because district courts now "exercise broad discretion in imposing sentences" using the factors identified in 18 U.S.C. § 3553(a), and "[t]hose factors are known prior to sentencing," so that "the element of unfair surprise that *Burns* sought to eliminate is not present." *Id.* at 196 (internal quotation marks omitted). Moreover, the court of appeals reasoned, the Guidelines "are now only one factor among many which can influence a discretionary sentence," and to apply Rule 32(h) to "variances" from the Guidelines would "elevate the advisory sentencing range to a position of importance that it no longer can enjoy." *Id.* Finally, the court of appeals suggested that advance notice would be "unworkable" because "*Booker* does

not contemplate that the court will somehow arrive at its sentence prior to sentencing." *Id.* at 197.

The Seventh Circuit came to the same ultimate conclusion in *United States v. Walker*, 447 F.3d 999 (7th Cir. 2006). There, the court of appeals started with the text of Rule 32(h), noting that it only mentions "departures," and stated that after *Booker*, the concept of "departures" is "obsolete." *Id.* at 1005-06 (internal quotation marks omitted). Instead, a district court "now consults the Guidelines as *guidance* for what is a wholly discretionary decision – discretion that is exercised by reference to the broad array of sentencing factors set forth in § 3553(a)." *Id.* at 1007. In that regime, the concerns animating *Burns* no longer apply because there can be no "unfair surprise" when the "defendants are on notice" that district courts may consider "any of the factors specified in § 3553(a)." *Id.*

And the Eighth Circuit and Eleventh Circuits have likewise held that Rule 32(h)'s notice requirement no longer applies. In *United States v. Long Soldier*, 431 F.3d 1120 (8th Cir. 2005), the Eighth Circuit simply reasoned that Rule 32(h) applies only to "departures," not "variances," and thus no notice is required. *Id.* at 1122. *See also United States v. Meyer*, 452 F.3d 998 (8th Cir. 2006), *petition for cert. filed*, No. 06-8085 (U.S. Nov. 27, 2006); *United States v. Sitting Bear*, 436 F.3d 929, 932-33 (8th Cir. 2006).

Correspondingly, in *United States v. Irizarry*, 458 F.3d 1208 (11th Cir. 2006), *petition for cert. filed*, No. 06-7517 (U.S. Oct. 26, 2006), the Eleventh Circuit found that the notice requirement no longer applies, reasoning that "parties are inherently on notice that the sentencing guidelines range is advisory and that the district court must consider the factors expressly set out in section 3553(a)." *Id.* at 1212. Thus, "parties cannot claim unfair surprise or inability to present informed comment – the Supreme Court's concerns in *Burns* – when a district court imposes a sentence above the guide-

lines range based on the section § 3553(a) sentencing factors." *Id.*

Finally, in the decision below, the Fifth Circuit adopted the reasoning of the Third, Seventh, Eighth, and Eleventh Circuits, holding that "sentencing courts are not required to give pre-sentencing notice of their *sua sponte* intention to impose a non-Guidelines sentence, regardless of the pre-*Booker* pronouncements of *Burns* and Rule 32(h)." App. 16a. The court reasoned that "the plain language of Rule 32(h) limits its application to *departures*," and "the concerns that precipitated the Court's decision in *Burns* are no longer viable" because post-*Booker* sentencing is "highly discretionary" and the factors upon which a sentence is based are listed in § 3553(a) and thus "known (or knowable) to the parties prior to sentencing," which "eliminates the element of unfair surprise." *Id.* at 15a. *See also United States v. Garza*, 188 Fed. App'x 274, 276 (5th Cir. 2006), *petition for cert. filed*, No. 06-8481 (U.S. Dec. 20, 2006).[6]

2. Although the circuits are split, the answer to the question presented, as the government recognizes, is plain: Rule 32(h) applies to require that the district court provide notice before *sua sponte* imposing any sentence outside of the Guidelines range after *Booker*. This conclusion is compelled by the text and the purposes of the Rule. Moreover, nothing in *Booker* so alters the position of the Guidelines that a variance from them is no longer deserving of notice.

As an initial matter, the text of Rule 32(h) is clear: the district court "must give the parties reasonable notice" before

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[6] In addition, the First Circuit has held that a district court does not commit plain error when failing to give Rule 32(h) notice before *sua sponte* imposing a non-Guidelines sentence, *see United States v. Mateo*, 179 Fed. App'x 64, 65 (1st Cir. 2006), although it also noted that "it is clearly the better practice – whether or not the legal requirement survives *Booker* – for the court to provide notice," *United States v. Wallace*, 461 F.3d 15, 44 n.14 (1st Cir. 2006).

it "may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission." The term "depart" simply means to impose a sentence outside of the Guidelines range. Indeed, the Sentencing Guidelines Manual defines a "departure" as "imposition of a sentence outside the applicable guideline range." *U.S. Sentencing Guidelines Manual* § 1B1.1 commentary (2006). That broad definition evidences Congress's intent to require notice before any sentence outside of the Guidelines is imposed *sua sponte.*

This Court should reject the logic of those courts that have distinguished between "departures" and "variances" and held that Rule 32(h) applies only to the former. At the time Rule 32 was amended to add subsection (h), the term "variance" had no independent meaning; it is simply a term that some courts have invoked to distinguish between the pre- and post-*Booker* sentencing regimes. *See, e.g.*, *Vampire Nation*, 451 F.3d at 195-96 & n.2. Holding that Rule 32(h) does not apply to non-Guidelines sentences after *Booker* because they are not "departures" elevates form over substance.

Further, the purposes behind Rule 32(h) apply with equal force to sentences outside the Guidelines range both before and after *Booker*. Rule 32(h) is based on the need for "focused, adversarial resolution of the legal and factual issues" relevant to sentencing, which requires that both the prosecution and the defense be allowed an opportunity to present evidence and argument regarding the appropriate sentence. *Burns*, 501 U.S. at 137. Just as before *Booker*, the parties must have notice in order to present argument about the most appropriate sentence under the advisory Guidelines regime. If the district court is permitted to announce a basis for a non-Guidelines sentence and impose that sentence without notice, the parties will be unfairly surprised, and there will be no opportunity for the parties to ensure that the legal and factual bases for the sentence are sound. Indeed, without

notice, there will be just the same "random and wasteful" attempts to anticipate and address *sua sponte* departures contemplated in *Burns*. 501 U.S. at 137.

The fact that 18 U.S.C. § 3553(a) lists a number of factors that the district court must use to choose the appropriate sentence is not an answer to the problem of lack of notice. Section 3553(a) cannot provide the type of "reasonable notice" required to allow the parties to effectively anticipate and address possible departures for the Guidelines, because the factors listed in that section are extremely broad. *See* 18 U.S.C. § 3553(a) (citing, *inter alia*, "the nature and circumstances of the offense," the "history and characteristics of the defendant," "the seriousness of the offense," and the need for "adequate deterrence" and "to protect the public"). Indeed, this Court in *Burns* already effectively rejected the notion that this type of generalized notice is sufficient, for it held that the numerous grounds for departure under the Guidelines were insufficient to provide notice because there was "essentially no limit on the number of potential factors that may warrant a departure" and neither party could reasonably "guess when or on what grounds a district court might depart" from the Guidelines. *Burns*, 501 U.S. at 136-37.

Booker does not suggest that the Guidelines have so little import that notice is no longer required. To the contrary: this Court held in *Booker* that the "Sentencing Commission remains in place" and that district court judges must calculate and consider the Guidelines range as a starting point in sentencing. 543 U.S. at 264. Indeed, notice is even more important post-*Booker*, because the only constraints on a defendant's sentence are the extremely broad factors in § 3553(a) and the statutory minima and maxima and because the sentence is subject to deferential appellate review for "reasonableness." *Id.* at 261. And there is no question that the other portions of Rule 32 continue to apply, requiring the probation office to prepare a PSR and the parties to make

pre-sentencing objections and submissions to guide the sentencing inquiry. In light of the extensive preparation required by the Rule before each sentencing hearing, it would make little sense for that effort all to be undone by a *sua sponte* departure at the sentencing hearing itself.

Moreover, the failure to provide the required notice under Rule 32(h) rises to the level of a "plain" error, for the text of the Rule clearly mandates notice for any *sua sponte* imposition of a non-Guidelines sentence, and the error generally affects a defendant's substantial rights and the fairness and integrity of judicial proceedings because the defendant is provided no meaningful opportunity to challenge the factual and legal bases for the district court's departure from the Guidelines. *See Cousins*, 469 F.3d at 579-81

The government has repeatedly taken the position that Rule 32(h) requires notice even after *Booker* and that to interpret the Rule otherwise would raise serious due process concerns. *See, e.g.*, Pet. App. 10a; *see also, e.g.*, *Anati*, 457 F.3d at 236 n.1; *Vampire Nation*, 451 F.3d at 195; *Evans-Martinez*, 448 F.3d at 1167; *Dozier*, 444 F.3d at 1216, 1218.

In fact, in a letter to the Clerk of the Court of Appeals for the First Circuit, the Chief of the Appellate Section of the Criminal Division at the United States Department of Justice made the Department's position clear:

> Although Rule 32(h) by its terms applies only to "departures" from the Guidelines range, the need for "full adversary testing of the issues relevant" to sentencing, 501 U.S. at 135, continues to apply in the advisory Guidelines system. . . . It would make little sense to require notice of potential departure grounds, while forcing the government and the defendant to "guess when or on what grounds" a district court might deviate from the Guidelines. *Burns*, 501 U.S. at 137. Accordingly, a district court should provide notice to the parties when it is con-

templating a sua sponte deviation (whether upward or downward) from the advisory Guidelines range.

Pet. App. 78a-79a.

II. WHETHER RULE 32(H)'s NOTICE REQUIREMENT SURVIVES *BOOKER* IS AN ISSUE OF URGENT PRACTICAL IMPORTANCE WELL PRESENTED BY THIS CASE

1. The notice issue raised in this case is important, and it has myriad practical consequences for prosecutors and defense counsel alike.

As this Court recognized in *Burns*, notice before a *sua sponte* departure ensures full development of issues relevant to sentencing while ensuring efficient use of resources. *See* 501 U.S. at 135-37. Without notice, both defense counsel and the prosecution must guess at "when [and] on what grounds a district court might depart," and figure out how to respond to those grounds. *Id.* at 136-37. Both would then be forced to attempt to prepare evidence and argument on those hypothetical grounds, a process this Court realized would be "random and wasteful." *Id.* at 137. This process is not only wasteful, but it is likely impossible, in light of the high volume of criminal sentences in the federal district courts. *See, e.g.*, U.S. Sentencing Commission, *Sourcebook of Federal Sentencing Statistics*, "Fiscal Year 2006 Guidelines Sentences National Data," http://www.ussc.gov/ANNRPT/2006/SBTOC06.htm. And if counsel guessed wrong, they would have effectively no opportunity to mount a response to the grounds that that were actually "in the Court's mind." *Anati*, 457 F.3d at 237.

Importantly, both the government and the defense have a significant interest in the resolution of the issue presented in this case. Both have the potential to suffer from lack of notice, for a district court may *sua sponte* impose either an above-Guidelines sentence or a below-Guidelines sentence.

See, e.g., *Dozier*, 444 F.3d at 1217-18; *United States v. Santos Monroy*, 135 Fed. App'x 190, 193 (10th Cir. 2005). Put another way, "the defendant and the Government enjoy equal procedural entitlements" under Rule 32(h). *Burns*, 501 U.S. at 135 n.4.

The facts of this case illustrate the importance of notice. After the preparation of extensive PSRs for each defendant, the district court stunned both the prosecution and defense counsel by *sua sponte* imposing sentences outside of the Guidelines. These deviations from the Guidelines had acute consequences for the defendants; indeed, one defendant was sentenced to a term of imprisonment that was over 400% greater than expected. *See supra* p. 10. Defense counsel struggled to respond to the departures, while also attempting to preserve the argument that notice was required under Rule 32(h). If defense counsel had been given the "reasonable notice" mandated by Rule 32(h), he could have introduced evidence to rebut the district court's assertions that all of the defendants were dangerous and lacked respect for the laws of the United States and could have addressed whether the criminal history scores from the Guidelines were non-representative. But defense counsel had no such opportunity here.

2. This Court should grant review now. The circuit split here developed extremely quickly after this Court's decision in *Booker*. *Booker* was decided in January 2005. Today, less than two and half years later, ten courts of appeals have issued published decisions on whether *Burns* survives *Booker*. This rapid-fire development of judicial disagreement reflects the incredible frequency with which the notice question arises. This judicial attention also suggests that the issue has great practical consequences for administration of the criminal justice system. With prosecutors and defense counsel alike unsure of how to prepare for sentencing hearings, this Court's prompt intervention is necessary.

There is no need for this Court to wait to resolve this issue until it renders its decisions in *United States v. Rita*, No. 06-5754, and *Claiborne v. United States*, No. 06-5618. Those cases both generally concern what weight should be given to the fact that a sentence is within the Guidelines when that sentence is reviewed by an appellate court for reasonableness.[7] They were argued together on February 20, 2007, and a decision is likely within the next few months. Yet the questions posed in those cases will have no impact on the question presented here. The Guidelines will plainly continue to have some weight in the post-*Booker* regime. *Booker* requires that the Guidelines remain an important touchstone for sentencing, *see* 543 U.S. at 245-46, 264, and 18 U.S.C. § 3553(a)(4) and (a)(5) make the Guidelines range an important factor to be considered in sentencing. Because neither *Rita* nor *Claiborne* will disturb the settled law that Guidelines are an important factor in sentencing, the notice issue will be unaffected by those decisions.

Also, this Court should not delay deciding the question presented here in the hopes that the Judicial Conference will amend Rule 32 to resolve the question. The Judicial Conference had proposed an amendment to Rule 32(h) that would

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[7] The questions presented in *Rita* are: (1) "Was the district court's choice of within-Guidelines sentence reasonable?" (2) "In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to accord a presumption of reasonableness to within-Guidelines sentences?"; and (3) "If so, can that presumption justify a sentence imposed without an explicit analysis of the district court of the 18 U.S.C. § 3553(a) factors and any other factors that might justify a lesser sentence?" 127 S. Ct. 551 (2006).

The questions presented in *Claiborne* are: (1) "Was the district court's choice of a below-Guidelines sentence reasonable?" and (2) "In making that determination, is it consistent with *United States v. Booker*, 543 U.S. 220 (2005), to require that a sentence which constitutes a substantial variance from the Guidelines be justified by extraordinary circumstances?" 127 S. Ct. 551 (2006).

have clarified that, post-*Booker*, notice must be given of a court's previously unidentified grounds for either a departure from the Guidelines or for a non-Guidelines sentence. *See* Mem. from Hon. Susan C. Bucklew, Chair, Advisory Committee on Criminal Rules to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 3 (May 20, 2006), http://www.uscourts.gov/rules/Reports/CR052006.pdf. But that amendment will not be enacted for years, if at all, because the Standing Committee on Rules of Practice and Procedure has remanded the proposal to the Advisory Committee on Criminal Rules, which has voted to start the process over and reexamine the amendment. *See* Mem. from Hon. Susan C. Bucklew, Chair, Advisory Committee on Criminal Rules to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 2 (Dec. 18, 2006), http://www.uscourts.gov/rules/Reports/CR12-2006.pdf. This delay means that the soonest any amendment could complete the comment and review process and be enacted is December 1, 2010.[8] Moreover, as was the case with

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[8] The Advisory Committee meets semiannually and has a meeting in April 2007. *Researching Rules Amendments: Minutes of Committee Meetings*, http://www.uscourts.gov/rules/minutes.htm; *Meetings and Hearings*, http://www.uscourts.gov/rules/newrules2.html. But any Rule 32(h) amendment will not be ready for consideration at the Advisory Committee's April 2007 semiannual meeting. E-mail from Timothy Dole, Attorney Advisor, Office of Judges Program, Admin. Office of the U.S. Courts, to Susan Moss, O'Melveny & Myers (Mar. 19, 2007). Because Rule 32(h) is not on the agenda for the April meeting, it cannot obtain Advisory Committee approval to be ready for publication in August 2007, the month that new rules are usually published for comment. *See Pending Rule Amendments*, http://www.uscourts.gov/rules/newrules6.htm. That means August 2008 is the soonest any amendment could be published. And even if that happened, there would be a six-month period for public comment which would not end until February 2009. *See The Rulemaking Process: Judicial Conference Procedures: Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*, http://www.uscourts.gov/rules/procedurejc.htm. Then the Advisory Committee would have to review any comments and give final approval,

the Rule amendments post-*Burns*, the ordinary course is for the rule to be amended to conform with this Court's decision. In any event, resolution of the important issue presented in this case cannot wait.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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then the Standing Committee, Judicial Conference, and Supreme Court would each have to give approval in turn, and finally Congress would have seven months to act on the amendment. *The Rulemaking Process: A Summary for the Bench and Bar: The Federal Rules of Practice and Procedure*, Apr. 2006, http://www.uscourts.gov/rules/proceduresum.htm. Assuming no Congressional action to bar enactment and no delay or expedition of the amendment, it would take effect on December 1, 2010.