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No. 08-6

IN THE

Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT AND ADRIENNE BACHMAN, DISTRICT ATTORNEY,

Petitioners,

v.

WILLIAM G. OSBORNE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF K.G. AND THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF PETITIONERS

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---

UNOPPOSED MOTION OF K.G. TO PROCEED BY USE OF HER INITIALS RATHER THAN THROUGH HER FULL NAME

The parties in this matter have each previously consented to K.G. filing an *amicus* brief in this case with the National Crime Victim Law Institute. K.G. is the crime victim in this case who was raped by respondent Osborne. K.G. now moves the Court to proceed through use of her initials rather than use of her full name to protect her privacy. The parties do not oppose this motion.

Because K.G. is a victim of rape, she has significant privacy interests at stake in this case. Indeed, the very focus of her *amicus* brief is the intrusion on

her privacy that will result if the Ninth Circuit's decision below is affirmed.

Because of the nature of the crime committed against K.G., the parties have already agreed to redact any reference to her full name in the Joint Appendix that is being prepared in this matter. Likewise, in proceedings below, the Ninth Circuit and the Alaska appellate court have referred to K.G. by her initials rather than by her full name. Indeed, the habeas petition that triggered this matter used initials as well.

This Court has allowed the use of pseudonyms or similar devices when significant privacy interests are at stake. *See, e.g, Doe v. Gonzales*, 546 U.S. 1301 (2005) (allowing petitioner to proceed as "John Doe" in case involving access to library records); *Roe v. Wade*, 410 U.S. 113 (1973) (women raising abortion rights allowed to proceed as "Jane Roe"); *Florida v. J.L.*, 529 U.S. 266 (2000) (juvenile allowed to proceed by way of initials). K.G. should similarly be allowed to proceed in a way that does not disclose her full name.

CONCLUSION

For the foregoing reasons, K.G. should be permitted to file an amicus brief using her initials rather than her full name.

Respectfully Submitted,

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QUESTIONS PRESENTED

Petitioners presented two questions in their petition for certiorari. *Amici* will address the first question, which they reframe as follows:

May duly-convicted prisoners like respondent William G. Osborne use 42 U.S.C. § 1983 as a discovery device for obtaining post-conviction access to the state's biological evidence, when doing so would make an end run around legal rights and protections for crime victims found in other bodies of federal and state law?

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BRIEF *AMICI CURIAE* OF K.G. AND THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICI CURIAE*[1]

K.G. is the victim in this case. On March 22, 1993, she was kidnapped, raped, and shot by respondent William Osborne. She comes before this Court asking protection of her rights as a crime victim. In

[1] Together with this brief, *Amici Curiae* have filed letters of consent from counsel for both Petitioner and Respondent. *Amici Curiae* state that no counsel for a party authored any part of this brief, and no person or entity other than *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

particular, if despite his conviction—and later repeated confessions to the parole board—Osborne is going to seek a federal court order for DNA testing of the state's biological evidence, K.G. believes the Court should require him to do so through a proceeding that fully protects her privacy and other legitimate interests.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School, in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys; researching and analyzing developments in crime victim law; and assisting crime victims by providing information on crime victim law and litigating issues of national importance regarding crime victims' rights in cases nationwide.

SUMMARY OF THE ARGUMENT

While K.G. has no wish to recount all of the details of the vicious crime that brings the matter before this Court, it is important to note that respondent William G. Osborne stands convicted of brutally raping her at gunpoint and then shooting her and leaving her to die in the snow in 1993.[2] After his trial in 1994, he was sentenced to serve 21 years in prison.

[2] The details of that horrible evening are recounted in *Jackson v. State*, Nos. A-5276, A-5329, 1996 WL 33686444 (Alaska Ct. App. Feb. 7, 1996), which affirmed Osborne's conviction. Osborne's conviction for these brutal crimes is the "law of the case."

In 2004, Osborne admitted to the Alaska Parole Board, both in writing and orally, that he had raped and beaten K.G.[3]

On June 26, 2007, Osborne was paroled. On December 29, 2007, he was rearrested and was indicted on four counts of kidnapping, four counts of first-degree robbery (with a deadly weapon), two counts of second-degree assault, four counts of third-degree assault, and one count of first-degree burglary. *See State v. Osborne*, No. 3AN-07-14638 CR (Alaska Super. CT.) (Information filed Dec. 29, 2007). According to the information filed with the charges, Osborne and two other men broke into an apartment and attempted to rob its four occupants at gunpoint. The police arrived while the robbery was in progress

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[3] In his 2004 application for parole, Osborne wrote:

> While I was out with friends I made a call to my codefendant [*i.e.,* Dexter Jackson] to come pick me up from the Space Station. . . . [K.G.] got in the car with us, and we all went out to Earthquake Park. Once there[,] I pulled out a gun and ordered [K.G.] to take off her clothes. After she did, me and my codefendant took turns having sex with her. After we were done[,] I ordered [K.G.] to get out of the car. She refused to do so[,] and kept refusing. I attempted to physically remove her from the car, and eventually got her out. My codefendant became enraged . . . and [he] began to assault her with a stick. I also assaulted [K.G.] by kicking and punching her. After a few seconds[,] we both stopped, partially kicked snow on [K.G.], and then got in my codefendant[']s car and drove off[,] leaving her at the park."

Osborne v. State, 163 P.3d 973, 977 (Alaska Ct. App. 2007). Osborne conveniently forgot to mention that he shot K.G. in the head and left her to die. But even setting that aside, in view of Osborne's detailed confession, it is hard to view his latest legal maneuvers as anything other than a ploy to escape justice by manufacturing some unwarranted doubt about his guilt.

and caught Osborne as he tried to flee. Osborne remains in custody at this time on these new charges. He has nevertheless continued to seek DNA testing of biological evidence regarding his earlier, fourteen-year-old rape conviction to show his purported "innocence" of that crime.

K.G. has important privacy interests at stake in the DNA tests that Osborne proposes to conduct. Osborne apparently plans to test not only a condom that could possibly have been used in the attack, but also K.G.'s clothing—a forensic investigation that could reveal other sexual partners that she has had at times far distant from the rape. Osborne also apparently intends to run tests on K.G.'s blood and extract DNA information about her. These tests threaten to intrude on K.G.'s privacy.

Amici are not arguing that Osborne should be denied any opportunity to seek testing. Amici's more limited point is that by seeking these tests through a § 1983 petition rather than a federal habeas petition, Osborne has effectively made an end run around vital protections for crime victims contained in the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. The CVRA guarantees crime victims like K.G. the right to be present and heard in federal habeas proceedings. 18 U.S.C. § 3771(b)(2)(A). The Act also promises victims in habeas proceedings the right to "be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(b)(2)(A). This Court should reject Osborne's § 1983 maneuver because it evades the protections for crime victims that Congress has carefully crafted. Osborne should instead be required to proceed by way of a federal habeas corpus petition, thus ensuring that K.G. will

have protected rights under the CVRA when any testing is considered.

Osborne's approach threatens not only victims' rights found in the CVRA, but also other enactments. If this Court upholds Osborne's § 1983 petition, other prisoners seeking post-conviction access to DNA will no doubt proceed in the same way. This will effectively nullify laws and court procedures in place in virtually all the states and the federal system regulating prisoners' access to DNA evidence, including procedures that protect crime victims. For this reason as well, this Court should reverse the Ninth Circuit's decision granting Osborne's § 1983 petition.

If this Court nonetheless recognizes the viability of a § 1983 claim for post-conviction DNA testing, it should hold that any such claim must be predicated on an actually innocent applicant seeking access to previously-unavailable evidence. The Court should therefore require that an applicant file, under penalty of perjury, an affidavit of actual innocence. The applicant should also be required to demonstrate good cause for not having obtained the testing before trial. Finally, the Court should hold that any testing must be conducted in a fashion that protects the victim's dignity and privacy. Because the Ninth Circuit imposed none of these important prerequisites, its decision should be reversed and the case remanded to see if Osborne can satisfy them.

I. CRIME VICTIMS HAVE IMPORTANT PRIVACY AND PSYCHIATRIC INTERESTS AT STAKE WHEN PRISONERS SEEK POST-CONVICTION TESTING OF DNA EVIDENCE.

A crime victim has significant privacy interests at stake when a prisoner seeks DNA testing of rape-scene evidence. In many cases (including this one), DNA analysis may reveal intimate details about the previous sexual partners of a victim. Moreover, the evidence may include not only biological material from the rapist but also from the crime victim herself. The prisoner may therefore seek (as in this case) to perform analysis of the victim's blood and genetic material—inquiries that can seriously intrude on the victim's privacy.

This case serves as a convenient illustration of the ways in which DNA testing can implicate crime victims' interests. For starters, Osborne proposes to test a condom found near the scene of crime for the presence of his semen. The Ninth Circuit focused exclusively on this request. *See Osborne v. District Attorney's Office for the Third Judicial Dist.*, 521 F.3d 1118, 1136-40 (9th Cir. 2008). But the Ninth Circuit failed to recognize that Osborne's plans are not so narrowly circumscribed. His § 1983 petition asked for broad testing of "K.G.'s clothing that tested positive for seminal fluid and any other clothing that the victim was wearing that may contain semen." Joint Appendix (JA) 24. Moreover, Osborne now admits that he wants to use DNA analysis to "confirm that the epithelial cells identified on the outside of the condom

are from the victim, K.G. . . . ." Br. in Opp'n 6.[4] This would apparently involve testing those cells along with a "reference" blood sample taken from K.G. the day after the rape. *id*. The Ninth Circuit seemingly acceded to all of Osborne's wishes, broadly directing that the state must "open the evidence locker." *Osborne*, 521 F.3d at 1141. So far as appears in the record, if the Ninth Circuit's decision is affirmed, Osborne may conduct unlimited testing on K.G.'s clothing, blood, and any other materials he finds in the evidence locker.

Osborne's broad testing requests raise significant privacy concerns. The condom has some arguable connection to the crime because, if it was in fact the one used by the rapist (a fact open to debate), any semen contained within it would be uniquely linked to the attack. But if allowed to go beyond the condom to test K.G.'s clothing, Osborne will be permitted to embark on a fishing expedition that could lead to, among other things, determination of other sexual partners K.G. may have had at some distant time in the past when wearing the clothing she wore that evening.

Semen samples can remain on clothing for months or even years. If a semen sample is kept in a dry, cool, indoor environment, the DNA associated with it can persist for decades. *See* Howard Coleman & Eric Swenson, *DNA in the Courtroom* 27 (Dwight Holloway & Teresa Aulinskas eds., 1994). For example, Independent Counsel Kenneth Starr was able to develop a semen sample from President Bill Clinton more than seventeen months after a sexual encounter with Monica Lewinsky. Office of The Independent

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[4] Osborne did not seek such testing in the state courts.

Counsel, *The Independent Counsel's Report to Congress on the Investigation of President Clinton* 7 (1998).

Osborne plans to not only search for semen but also to analyze K.G.'s blood. Osborne has not stated exactly what tests he intends to run on the blood, but the potential for invading her privacy is obvious. This Court has previously recognized that testing "of blood[] . . . can reveal a host of private medical facts about [a person], including whether he or she is epileptic, pregnant, or diabetic." *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). Osborne could, for instance, conduct an HIV antibody test, which would show whether K.G. has been infected with HIV (the virus that causes AIDS).

While it is unclear how many tests Osborne intends to conduct on K.G.'s physical samples, it is clear that at a minimum he intends to extract a DNA sample from them. Extracting K.G.'s DNA presents serious privacy issues. DNA testing can reveal intimate details about a person, as James Watson (one of the discoverers of the double helix structure of DNA) has explained:

> A DNA sample taken for fingerprinting purposes can, in principle, be used for a lot more than merely providing identity: it can tell you a lot about me—whether I carry mutations for disorders like cystic fibrosis, sickle-cell disease, or Tay-Sachs disease. Some time in the not so distant future, it may even tell you whether I carry the genetic variations predisposing me to schizophrenia or alcoholism—or traits even more likely to disturb the peace.

James D. Watson & Andrew Berry, *DNA: The Secret of Life* 273 (Random House 2004) (2003). Not

surprisingly, "when the result of genetic testing can mean so much, people want, more than ever, to keep that information private." Stephen Breyer, *Furthering the Conversation about Science and Society*, in DNA and the Criminal Justice System: The Technology of Justice 13, 17 (David Lazer ed., 2004). Some state legislatures (including Alaska's) have responded to this strong privacy concern by making a person's genetic information their own private property.[5] Courts, too, have recognized that DNA analysis differs from traditional evidence collection methods. *See, e.g., Patterson v. State*, 742 N.E.2d 4, 10 n.3 (Ind. Ct. App. 2000) ("DNA analysis provides unprecedented access into an individual's future physical and psychological health, the health of close relatives, and insight into paternity issues."). And even if the genetic testing that the Osborne proposes to conduct in this case might be viewed as insufficiently discriminating and invasive to harm K.G.'s privacy interests, this Court must "take the long view," *Kyllo v. United States*, 533 U.S. 27, 40 (2001), about how technology might progress in this area.

This Court must also consider that fact that the crime of rape is frequently not reported. The National Institute of Justice recently found that rape is a "seriously underreported crime," as only 19.1% of women who were raped reported that fact to the police. U.S. Dept. of Justice, National Institute of Justice, *Special Report: Extent, Nature, and Con-*

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[5] *See, e.g.,* Alaska Stat. § 18.13.010; Colo Rev. Stat. Ann. § 10-3-1104.7; Fla. Stat. Ann. § 760.40; Ga. Code Ann. § 33-54-1; La. Rev. Stat. Ann. § 22:213.7. *See generally* Gary E. Marchant, *Property Rights and Benefit-Sharing for DNA Donors?*, 45 Jurimetrics J. 153 (2005).

sequences of Rape Victimization: Findings from the National Violence Against Women Survey 33 (2006). Researchers have discovered that among the significant barriers to reporting are concerns related to confidentiality. *See, e.g.,* M.R. Sable *et al.*, *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students,* 55 J. Am. Coll. Health 157, 159 (2006).

Amici fully recognize the competing interests at stake in this case. *Amici* do not maintain that K.G.'s privacy interests necessarily trump Osborne's desire to test the biological evidence in this case. Rather, *Amici* argue that K.G's privacy concerns should be weighed in the balance and that a procedure that end runs consideration of such interests and legal protections is impermissible. Transferring the evidence to a defense criminologist is not (as Osborne describes it) a "simple, ministerial act," Br. in Opp'n 29, but rather an important decision with potential privacy implications that courts should carefully evaluate.

One way in which K.G.'s privacy could have been protected by the Ninth Circuit was through an order sequencing the various tests. The defense could have first been granted access only to the condom and permitted to test any semen in it. If the semen indeed came from Osborne (as seems a virtual certainty given his written confession to the Parole Board), then his guilt would be reconfirmed and there would be no need for *any* further testing of K.G.'s samples. Only if Osborne's semen was not found in the condom should further testing have been allowed. Proceeding in this sequential fashion does not compromise any legitimate interest of Osborne's but would help protect K.G.'s privacy. *See* National Comm. on the Future of DNA Evidence, *Post-*

Conviction DNA Testing: Recommendations for Handling Requests 14 (1999) (recommending that "elimination" samples from third parties "should not be sought until after an exclusion has been obtained from DNA testing", thereby helping to "minimize stress for victims and third parties").

The Ninth Circuit should also have protected K.G.'s privacy by requiring defense counsel to precisely explain what tests it planned to perform on the evidence in this case and how those tests were necessary to prove Osborne's claim of innocence. In other words, Osborne should not have been given an open-ended license to conduct a fishing expedition into the biological evidence this case. As part of this process, the Ninth Circuit should also have placed any test results under seal and required that defense counsel use the results exclusively for purposes related to this litigation. Finally, in crafting these limitations, the Ninth Circuit should have made an effort to determine what K.G.'s views were about the testing and the subsequent use of any test results.

II. OSBORNE SHOULD BE REQUIRED TO PROCEED BY WAY OF A FEDERAL HABEAS CORPUS PETITION SO THAT K.G.'S PRIVACY RIGHTS UNDER THE CRIME VICTIMS' RIGHTS ACT ARE RESPECTED.

The overarching structural reason for the Ninth Circuit's failure to consider K.G.'s legitimate interests is that it permitted Osborne to proceed through a § 1983 petition—a civil process that contains no protections for crime victims—rather than through a federal habeas corpus petition that would trigger crime victim protections. To be sure, in theory, K.G.

could have intervened in the civil proceedings below to press her concerns. *See* Fed. R. Civ. P. 24. But K.G. is not familiar with such complex legal principles, as is no doubt the case for most crime victims. *See Gideon v. Wainwright,* 372 U.S. 335, 345 (1963) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law."). She could not, and cannot, afford to retain the legal counsel necessary to carry out such a complex maneuver. *See* John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victim Rights in the Courts*, 33 McGeorge L. Rev. 689, 696-98 (2002) (discussing the problem of crime victims obtaining legal counsel).[6]

The Ninth Circuit should have required Osborne to proceed through a federal habeas petition. In the habeas process, the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771, protects the interests of crime victims, including the rights of victims like K.G. "to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8). Osborne should not be permitted to circumvent these important protections by the simple expedient of labeling his request for testing a § 1983 action.

A. The Crime Victims' Rights Act Protects Victims' Rights In Federal Habeas Corpus Proceedings.

Passed by Congress in 2004, the Crime Victims' Right Act is a far-reaching federal statute that protects victims' rights in the federal criminal justice

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[6] K.G. is represented before this Court by pro bono legal counsel.

system. *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. Rev. 835, 840-50. The CVRA rejects the long-held assumption "that crime victims should behave like good Victorian children—seen but not heard." *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). Instead, the CVRA seeks to dramatically transform the system by "making victims independent participants in the criminal justice process." *Id.* Congress acted because "[i]n case after case [it] found victims . . . were ignored, cast aside, and treated as non-participants in a critical event in their lives." 150 Cong. Rec. S4262 (Apr. 22, 2004) (statement of Sen. Feinstein).

Enacted with near universal congressional support, the CVRA is a "broad and encompassing" statutory victims' bill of rights. 150 Cong. Rec. S4261 (Apr. 22, 2004) (statement of Sen. Feinstein). To make victims participants in the process, the Act specifically grants to victims rights to notice of court hearings, to attend those hearings, and to speak at plea and sentencing hearings. 18 U.S.C. §§ 3771(a)(2)-(4). The Act also promises victims that they will be treated "with respect for [their] dignity and privacy." 18 U.S.C. § 3771(a)(8).

In its original form, the Act protected only victims of federal offenses during federal criminal proceedings. *See* 18 U.S.C. §§ 3771(b)(1), (e). In 2006, as part of the Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587, Congress extended crime victims' rights to victims during federal habeas corpus proceedings. The extension gave the victims of state crimes rights that federal

courts must respect while resolving habeas petitions—including the right to be present and heard at those proceedings, as well as the right to proceedings free from unreasonable delay and the right to be treated with fairness and with respect for the victim's dignity and privacy. *See* 18 U.S.C. § 3771(b)(2)(A).

B. Osborne and Other Post-Conviction Testing Applicants Should Not Be Permitted to Circumvent the CVRA's Protections for Crime Victims By Avoiding the Federal Habeas Corpus Process.

By raising his claim for DNA testing through a § 1983 petition rather than a federal habeas petition, Osborne has effectively made an end run around the crime victims' protections found in the CVRA. Because Osborne's § 1983 action was neither a federal criminal prosecution nor a federal habeas corpus action, K.G. was left without any rights in the process. This approach runs contrary to the command of Congress in passing the CVRA that crime victims' rights must now be respected throughout the criminal justice process.

This Court reached a similar conclusion in *Preiser v. Rodriguez,* 411 U.S. 475 (1973), where a prisoner sought to challenge the calculation of good time credits via a § 1983 action. This Court held that such a challenge must be brought through a habeas petition:

> In amending the habeas corpus laws in 1948, Congress clearly required exhaustion of adequate state remedies as a condition precedent to the invocation of federal judicial relief under those laws. It would wholly frustrate explicit congres-

> sional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings."

Id. at 489-90. In this case, it would likewise frustrate explicit congressional intent that crime victims have protected rights in the habeas process if prisoners seeking DNA testing can simply put a different label on what should be habeas petition. *See Harvey v. Horan*, 278 F.3d 370, 377 (4th Cir. 2002) (rejecting effort to obtain DNA testing through a § 1983 petition because the "claim is more properly pressed as a habeas corpus petition . . .").

K.G. was the victim of atrocious state crimes committed by Osborne, namely kidnapping, first-degree assault, and two counts of first-degree sexual assault. *See Jackson v. State*, Nos. A-5276, A-5329, 1996 WL 33686444, at *3 (Alaska Ct. App. Feb. 7, 1996) (describing counts of conviction). Therefore, under the CVRA, K.G. would have important rights if Osborne had proceeded by way of a federal habeas corpus petition. Of particular importance, K.G. would have a protected right "to be treated with fairness and with respect for the victim's dignity and privacy." 18 U.S.C. § 3771(a)(8) (granting this right to victims); 18 U.S.C. § 3771(b)(2)(A) (extending this right to federal habeas proceedings).

In a habeas action, K.G.'s right under the CVRA to be treated with respect for her dignity and privacy would have required the district court and the Ninth Circuit to ensure that any testing (as well as any subsequent disclosure of testing results) be conducted in a way that protected her interests. Indeed, it bears emphasizing that a habeas application would have triggered a judicial obligation under the CVRA

to respect K.G's interests without any court appearance on her part. A federal court considering a habeas petition from Osborne would have been obligated on its own initiative to "ensure" that K.G. was "afforded" her rights. 18 U.S.C. § 3771(b)(2)(A). This fact is important because K.G. has lacked the funds to obtain legal counsel to protect her interests during Osborne's extended legal maneuvering in both state and federal courts at both the trial court and appellate levels. She is a typical crime victim in this sense, as crime victims (like criminal defendants) are disproportionately poor. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, *Criminal Victimization in the United States* tbl.14 (2006) (finding higher victimization rates at lower income levels).

Curiously, the Ninth Circuit itself had seemingly recognized that a federal habeas petition was the proper way to proceed in cases seeking post-conviction DNA testing. In an earlier decision, *Thomas v. Goldsmith*, 979 F.2d 746 (9th Cir. 1992), the Ninth Circuit had granted post-conviction access to allegedly exculpatory semen evidence through a federal habeas petition. The decision below relied on *Thomas* as the basis for allowing access to evidence. But without any clear explanation, it simply declined to require Osborne to follow this approach. *See Osborne*, 521 F.3d at 1132 ("Faced now with the argument that *Thomas* should be limited to cases with ongoing habeas petitions, we reject that view and hold that Osborne is entitled to assert in this § 1983 action the due process right to post-conviction access to potentially exculpatory DNA evidence that we recognized in Thomas."). The Circuit had it right fifteen years earlier in *Thomas*: an applicant seeking post-conviction access to allegedly exculpatory DNA evidence through the federal courts must proceed by

way of federal habeas petition, thereby ensuring that crime victims' rights are respected.

III. RECOGNIZING A FREE-STANDING SECTION 1983 CLAIM FOR POST-CONVICTION ACCESS TO BIOLOGICAL EVIDENCE WILL EFFECTIVELY NULLIFY LAWS AND PROCEDURES ADOPTED BY THE STATES AND CONGRESS THAT COVER THE SAME SUBJECT AND PROTECT CRIME VICTIMS' INTERESTS.

If this Court holds that Osborne can obtain post-conviction DNA testing through a § 1983 petition, this Court will effectively negate laws and court procedures for such testing that are in place in virtually all 50 states and the federal system. These recently-adopted procedures not only allow applicants to obtain DNA evidence, but also protect crime victims' legitimate interests in privacy and finality. Prisoners would have no reason to follow these approaches to obtaining evidence if an unconstrained § 1983 claim is available to them. As Judge Wilkinson has explained,

> state courts, if given a chance, can rise to their responsibilities. Yet . . . [recognizing a § 1983 claim for DNA testing] . . . would not only deny them that chance, but do so in unprecedented fashion, encouraging state prisoners to press their claims initially in federal court while disregarding all state court procedures and all state legislative avenues of redress.

Harvey v. Horan, 285 F.3d 298, 301 (4th Cir. 2002) (Wilkinson, J., concurring in denial of rehearing). This Court should not use the general language of §

1983 to sweep away such a carefully-considered body of law and undo its protections for crime victims.

A. The States and Congress Have Established Procedures for Obtaining Post-Conviction Access to DNA Evidence With Prerequisites that Indirectly Protect Crime Victims.

As Osborne conceded in opposing certiorari in this case, "[t]oday, forty-three states and the District of Columbia have such laws [governing DNA testing after conviction], the vast majority of which were enacted this decade." Br. in Opp'n 8-9 (collecting citations). The other seven states appear to generally provide for post-conviction access to DNA evidence by court decision or general habeas provisions.[7] Congress also acted in 2004 to provide federal prisoners

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[7] Of the seven states without specific post-conviction DNA statutes, five have appellate court opinions recognizing the possibility of obtaining DNA testing through other procedures. *See Dowdell v. State*, 854 So.2d 1195, 1198 (Ala. Crim. App. 2002); *Osborne v. State*, 110 P.3d 986, 995 (Alaska Ct. App. 2005); *Commonwealth v. Burke*, 809 N.E.2d 1101 (Mass. App. Ct. 2004) (Table) (unpublished); *Brewer v. State*, 819 So.2d 1169, 1172 (Miss. 2002); *Jenner v. Dooley*, 590 N.W.2d 463, 472 (S.D. 1999). The two remaining states—Oklahoma and South Carolina—do not appear to have had the issue presented in an appellate court decision. *See generally* Marjorie A. Shields, *DNA Evidence as Newly Discovered Evidence Which Will Warrant Grant of New Trial or Other Postconviction Relief in Criminal Case*, 125 A.L.R.5th 497 (2005 & 2008 Supp.). But even in these states, prisoners have apparently obtained their release through DNA testing. *See* www.innocenceproject.org/Content/258.php (Calvin Lee Scott released in Oklahoma); www.innocenceproject.org/Content/220.php (Perry Mitchell released in South Carolina).

with access to post-conviction DNA testing. *See* 18 U.S.C. § 3600.

In view of these state and federal approaches, prisoners in this country now possess virtually universal opportunities to request post-conviction DNA testing. At the same time, however, these laws and court decisions also impose important and reasonable threshold requirements—requirements that protect crime victims.

For example, to avoid frivolous applications for testing, many states and Congress require the applicant to file a statement—under penalty of perjury—that he is actually innocent.[8] A number of states further require the applicant to provide some good cause for failing to have made the request for DNA testing earlier, such as showing that the technology was unavailable at the time of trial.[9]

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[8] *See, e.g.,* Fla. Stat. Ann. § 925.11(2)(a); Mont. Code Ann. § 46-21-110(1); N.H. Rev. Stat. Ann. § 651-D:2(I)(a);N.C. Gen. Stat. § 15A-269(b)(3); 42 Pa. Cons. Stat. Ann. § 9543.1(c)(2)(i); Utah Code Ann. § 78-35a-301(2); Vt. Stat. Ann. tit. 13, § 5561(a)(2).

[9] *See, e.g.,* Ark. Code Ann. § 16-112-201(a); Cal. Penal Code § 1405(6); Colo. Rev. Stat. § 18-1-413(1); Del. Code. tit. 11, § 4504(a)(2); Fla. Stat. Ann. § 925.11(2)(a)(2); Ga. Code Ann. § 5-5-41(c)(3)(a); Haw. Rev. Stat. § 844D-123(a)(4); Idaho Code §19-4902(b); 725 Ill. Comp. Stat. Ann. 5/116-3(A)(1), (2); Ind. Code Ann. § 35-38-7-8(3); Kan. Stat. Ann. § 21-2512(a)(3); Ky. Rev. Stat. § 422.285(2)(c); Me. Rev. Stat. Ann. tit. 15, § 2137(4-A)(C); Mich. Comp. Laws § 770.16; Minn. Stat. § 590.01(a)(2); Mo. Rev. Stat. § 547.035(2); Mont. Code Ann. § 46-21-110(1)(5)(f); N.H. Rev. Stat. Ann. § 651-D:2(I)(d); N.J. Stat. Ann. § 2A:84A-32a(d)(6); N.M. Stat. Ann. § 31-1a-2(C)(3); N.C. Gen. Stat. § 15A-269(a)(3); N.D. Cent. Code Ann. § 29-32.1-15(1)(b); 42 Pa. Cons. Stat. Ann. § 9543.1(a)(2); R.I. Gen. Laws § 10-9.1-11(a)(3); Tenn. Code Ann. § 40-30-303(3); Tex. Code Crim. Proc. Ann. art. 64.01(b); Utah Code Ann. § 78-35a-301(2)(d); Vt. Stat. Ann. tit. 13, § 5566(3); Va. Code Ann. § 19.2-327.1(A); Wash. Rev. Code

Still other states require an applicant to move quickly in seeking DNA testing by establishing a statute of limitation for such applications.[10]

All of these provisions serve important interests for crime victims. A victim should not be forced to face the uncertainty of DNA testing and possible resulting release of a convicted prisoner unless that prisoner is truly innocent. An affidavit of actual innocence under penalty of perjury helps to discourage fraudulent applicants. Moreover, when a prisoner has deliberately chosen for tactical reasons not to use a discriminating DNA test before trial, it hardly seems fair to the victim to permit him after he is convicted to switch and obtain a "second bite at the apple." Finally, a statute of limitations serves not merely the State's interest in finality, but also the victim's interest as well. As this Court has recognized,

> Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an

§ 10.73.170(2)(a); W. Va. Code Ann. § 15-2B-14(6); Wis. Stat. Ann. § 974.07(2)(c); Wyo. Stat. Ann. § 7-12-303(c)(viii).

[10] *See, e.g.*, 18 U.S.C. § 3600(a)(10)(A) (rebuttable presumption application is not timely if not filed within five years of the passage of the Act or within three years of conviction); Mich. Comp. Laws § 770.16(1) (application "shall be filed not later than January 1, 2009"); Minn. Stat. § 770.16(1) (application must be filed by January 1, 2009); Okla. Stat. tit. 22, § 1371 ("Oklahoma Indigent Defense System DNA Forensic Testing Program to continue until July 1, 2005"); *see also* La. Code Crim. Pro. 926.1 (applicant convicted of a felony can apply before August 31, 2009, for testing without regard to time limit rules, but after must follow normal time limit rules).

> interest shared by the State and the victims of crime alike.

Calderon v. Thompson, 523 U.S. 538, 556 (1998) (internal quotation omitted). Crime victims naturally do not want distant events dredged up again, particularly when (as in this case) they involve events that the victim would like to put behind her.[11]

B. The States Have Also Protected Crime Victims' Interests Directly in Post-Conviction DNA Access Procedures and in Crime Victims' Rights Amendments to Their State Constitutions.

Not only have crime victims' interests been protected indirectly through procedural requirements governing post-conviction DNA testing, but eleven states directly provide that victims must be (or can be) notified of post-conviction DNA testing results and related issues.[12] In addition to the eleven states that specifically provide crime victims' rights in their DNA statutes, most other states indirectly protect such rights through their general crime victims' rights constitutional amendments and statutes. These state constitutional amendments and statutes guarantee victims the right to be treated with fairness, dignity, and respect throughout the criminal

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[11] Since her miraculous survival that evening when Osborne shot her in the head, K.G. has changed her life and is now runs her own small business.

[12] *See* Ariz. Rev. Stat. §13-4240(J); Haw. Rev. Stat. § 844D-132(c); Ind. Code Ann. § 35-38-7-16; Ky. Rev. Stat. § 422.285(8); Me. Rev. Stat. Ann. tit. 15, § 2137(13); Mich. Comp. Laws § 770.16(10); Mont. Code Ann. § 46-21-110; Utah Code Ann. § 78B-35a-301(10); Vt. Stat. Ann. tit. 13, § 5563; Wash. Rev. Code § 10.73.170(5); Wis. Stat. Ann. § 974.07(4)(a).

justice process[13]—including presumably post-conviction proceedings attempting to obtain access to DNA evidence to obtain a release from a criminal sentence.

C. Affirming the Ninth Circuit's Decision Would Allow Applicants to Completely Bypass Victim-Protective State Procedures.

If this Court affirms the Ninth Circuit's decision, all of the work that the states and Congress have done to directly and indirectly protect crime victims' interests in post-conviction DNA testing will be nullified. Applicants seeking evidence for testing would obviously follow the Ninth Circuit's no-strings-attached approach of a § 1983 claim rather than the carefully-prescribed procedures contained in state and federal law.[14]

There should be no mistake about how broadly the Ninth Circuit's opinion sweeps. The opinion essentially wipes away any meaningful time limits for

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[13] Alaska Const. art. I, § 24; Ariz. Const. art. II, § 2.1(A)(1); Conn. Const. Art. 1, § 8(b); Idaho Const. art. I, § 22(1); Ill. Const. art. 1, § 8.1(a)(1); La. Const. Art I, §25; Md. Const. Decl. of Rts. art. 47(a); Mich. Const. art. I, § 24(1); Miss. Const. art. 3, § 26A(1); N.J. Const. art. I, § 22; N.M. Const. art. II, § 24(A)(1); Ohio Const. art. I, § 10a; R.I. Const. art. I, § 23; S.C. Const. art. I, § 24(A)(1); Tex. Const. art. I, § 30(a)(1); Utah Const. art. I, § 28(1)(a); Va. Const. art. I, § 8-A(2); Wis. Const. art. I, § 9m; Colo. Rev. Stat. § 24-4.1-302.5; D.C. Code § 23-1901(b)(1); Haw. Rev. Stat. § 801D-1; Ind. Code § 35-40-5-1; Kan. Stat. Ann. § 74-7333(a)(1); N.H. Rev. Stat. Ann. § 21-M:8-k(II)(a); Pa. Stat. Ann. § 11.102(1); Tenn. Code Ann. § 40-38-102; Vt. Stat. Ann. tit. 13, § 5303(a); Wash. Rev. Code § 7.69.010

[14] While federal prisoners cannot file a § 1983 action, they could presumably assert constitutional claims for access to evidence via a Bivens-style action. See infra p. 28.

filing a claim for access to DNA evidence, given that Osborne's conviction was affirmed in 1996 and his § 1983 petition was filed seven years later in 2003. *See* Appendix to Petition for Certiorari 113a and JA 23. The Ninth Circuit did not even require Osborne to make the seemingly obvious threshold showing that a DNA testing procedure was unavailable to him at his trial. Nor did the Ninth Circuit impose any restrictions on his seeking access to evidence, such as requiring that he declare under penalty of perjury that he is actually innocent of his crime.

What the Ninth Circuit expansively allows the Fourth Circuit has properly prevented. In defending that Circuit's rejection of a § 1983 claim for post-conviction access to DNA evidence, Judge Wilkinson explained that such claims allow applicants "to bypass Virginia's [and other states'] system of criminal justice altogether. . . . Such disregard of process is an anomaly in an area where criminal defendants, above all, rely on proper process to protect their rights." *Harvey v. Horan*, 285 F.3d 298, 299 (4th Cir. 2002) (Wilkinson, J., concurring in denial of rehearing).

This Court has been wary of broadly preempting state criminal justice procedures. This Court has warned of the need to give state courts "the first chance at remedying their own mistakes," thereby avoiding "the unseemly spectacle of federal district courts trying the regularity of proceedings had in courts of coordinate jurisdiction." *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973) (internal quotation omitted). It is by design that:

> judgments of conviction in criminal cases are not casually reached. The efforts of jurors, judges, witnesses, prosecutors, and defense attorneys

> represent a considerable and conscientious effort at achieving justice—an effort which would be lost if the court or system rendering the judgment were entitled to no respect or even so much as acknowledgment thereafter.

Harvey, 285 F.3d at 300 (Wilkinson, J., concurring in denial of rehearing).

Indeed, if post-conviction § 1983 claims for access to evidence are recognized, federal courts will be precluded from even staying these federal proceedings until simultaneous state court proceedings on the same subject have concluded. This Court recently admonished federal district courts that "§ 1983 contains no judicially imposed exhaustion requirement; absent some other bar to the suit, a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed." *Edwards v. Balisok*, 520 U.S. 641, 649 (1997) (internal citation omitted).

Weighed against all of these costs, Osborne can provide no real benefits on his side of the ledger. There is no demonstrated need for federal courts to create a § 1983 action to free the innocent. Osborne himself made this point quite clearly in opposing *certiorari*. His opposition brief explained that "out of the 220 convicted persons in the U.S. who have been exonerated by DNA testing to date, only one obtained his exculpatory DNA tests through a § 1983 action." Br. in Opp'n 13. The single case arose in 2001 in Pennsylvania, which has long since enacted a post-conviction DNA testing statute. 42 Pa. Cons. Stat. § 9543.1 (adopted in 2002).

In view of the good-faith responses by both the state and federal governments to provide access to

post-conviction DNA testing to those with legitimate claims to it, "Only the most aggressive view of federal judicial power could lead us to preempt both a coordinate branch of the federal government and the state courts and legislatures with what would be in essence prescriptive law making of" the federal courts. *Harvey*, 285 F.3d at 301 (Wilkinson, J., concurring in denial of rehearing). This Court should not preempt the developments in this area, including the notable protections for crime victims that the states have evolved. This Court should instead allow the democratic process to operate by declining to recognize a § 1983 claim for post-conviction DNA testing and instead requiring prisoners to proceed through established state and federal procedures.

IV. EVEN IF THIS COURT RECOGNIZES A SECTION 1983 CLAIM FOR POST-CONVICTION ACCESS TO DNA EVIDENCE, THE CLAIM SHOULD BE NARROWLY DEFINED TO PROTECT CRIME VICTIMS' LEGITIMATE INTERESTS IN PRIVACY AND FINALITY.

Even if this Court decides that it is going to recognize a § 1983 claim for post-conviction access to evidence, an applicant (like Osborne) must present a claim that a state actor has subjected him to "the deprivation of . . . rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983. Osborne describes the right at stake here as the right of "certain convicted persons . . . [to] conduct previously-unavailable DNA testing, at no cost to the State, in order to establish their actual innocence." Br. in Opp'n 1. Assuming *arguendo* that this Court recognizes such a right, the right would then implicitly require an applicant to make several

showings: First, that the applicant is attempting to prove "actual innocence"; second, that the evidence was indeed "previously-unavailable"; and third, that the evidence will help "establish" actual innocence – a materiality requirement.[15] The Court should therefore construe § 1983 as requiring that applicants prove these points, as well as requiring that they proceed in a way that is fair to victims of crime.

A. The Applicant Should Be Required to File a Sworn Affidavit, Under Penalty of Perjury, That He is Actually Innocent of the Crime.

Osborne's § 1983 petition claims that his due process rights have been violated because the state is withholding biological evidence that would prove his actual "innocence." His innocence is, therefore, a prerequisite to any constitutional deprivation by the state. The Ninth Circuit described this as a "Catch-22" because, in its view, without testing the evidence, Osborne would have no way of demonstrating his innocence. *Osborne*, 521 F.3d at 1129.

The Ninth Circuit was wrong to assume, however, that Osborne had no way to begin proving his innocence before conducting testing. He could start to do so by providing a sworn affidavit, under penalty of perjury, that he is indeed innocent. Many states have made such a sworn statement a pre-requisite to moving forward with a post-conviction application for DNA testing. *See supra* p. 19 n. 8. This requirement is vitally important to crime victims, as it can help deter fraudulent claims for DNA testing by guilty

[15] This brief will not discuss the "materiality" requirement, leaving that to the parties.

prisoners, thereby preventing the psychological trauma that attends reopening of long-closed criminal proceedings.

Recognizing the obvious fact that a sworn statement from Osborne would be evidence of innocence, defense counsel filed in the district court a carefully-prepared and notarized affidavit from Osborne attempting to make it appear that he had indeed made such an assertion. But rather than proclaim his innocence, Osborne cagily states that "I have no doubt whatsoever that re-testing of the condom will prove once and for all time *either my guilt or innocence*" and that "I have always *maintained* my innocence." *Osborne v. District Attorney's Office for Third Judicial Dist.,* No. A03-0118-CV (D. Alaska) (Notice of filing affidavit June 7, 2006) (docket #112) (emphases added). If testing is done and the semen and pubic hair samples in this case match Osborne (as seems almost certain), it would be virtually impossible for the state to then prosecute him for perjury based on such cleverly-hedged statements.

In construing § 1983, this Court has not hesitated to ensure that congressional will is fulfilled. Here there can be little doubt about how Congress would have wanted a post-conviction DNA application to proceed. When it enacted the Innocence Protection Act of 2004, 18 U.S.C. § 3600, it required— as the very first prerequisite—that an applicant "assert, under penalty of perjury, that the applicant is actually innocent of [the crime involved]." 18 U.S.C. § 3600(a)(1). The reason for this requirement was to provide a "check[] against frivolous litigation . . . ." 150 Cong. Rec. S10676 (Oct. 7, 2004) (statement of Sen. Leahy). Without such a check, guilty prisoners might use post-conviction requests

for DNA testing to "muddy the waters" and "fuel a new and frivolous series of appeals." 149 Cong. Rec. S12294 (Oct. 1, 2003) (statement of Sen. Hatch).

To be sure, the Innocence Protection Act applies to federal prisoners, not state prisoners like Osborne. But if this Court affirms the Ninth Circuit and finds a constitutional right to access post-conviction DNA evidence even without a sworn declaration of innocence, then this congressional requirement could be effectively invalidated. This Court has previously held that constitutional violations actionable under § 1983 against state officers are actionable by virtue of the Constitution itself against federal officers in certain situations. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). If state prisoners possess a federal constitutional right to force state authorities to turn over biological evidence for post-conviction DNA testing without a sworn affidavit of innocence, then presumably federal prisoners would argue that they possess the same right as well. If the Court agrees,[16] prisoners would be able to avoid the procedural requirements of the Innocence Protection Act by simply filing a straight constitutional claim against the federal government.

If nothing else is obvious in this case, it is at least plain that allowing prisoners to pursue § 1983 claims

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[16] Presumably litigation would ensue over whether DNA access claims fall within the parameters of already-recognized *Bivens* claims, *see, e.g., Carlson v. Green*, 446 U.S. 14 (1980) (extending *Bivens* to 8th Amendment claims by prisoners) and, if not, whether the Innocence Protection Act is an alternative remedial scheme that requires the Court to "stay its *Bivens* hand." *Wilkie v. Robbins*, __ U.S. ___, 127 S.Ct. 2588, 2600 (2007).

for testing of DNA evidence will entail significant costs, both by unsettling the finality of criminal judgments and by forcing crime victims to undergo the uncertainties that such testing entails. Before a prisoner is allowed to impose these costs, this Court should require as a minimum pre-requisite that he provide a direct statement under penalty of perjury that he is actually innocent of the crime for which was convicted. This case should therefore at least be remanded to see whether Osborne will swear under oath that he did not rape K.G.

B. The Applicant Should Be Required to Show Good Cause for Not Having Conducted Testing Before Conviction.

Osborne describes his constitutional claim as a post-conviction right to "conduct *previously-unavailable* DNA testing . . . ." Br. in Opp'n 1 (emphasis added). This formulation makes some sense: if a prisoner could have done the DNA testing before trial, the State cannot realistically be said to have deprived him of any access to evidence. Moreover, this Court has instructed that "[t]here is no general constitutional right to discovery in a criminal case," *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977)—much less a general constitutional right to discovery after conviction. And any obligation to produce exculpatory evidence is limited to situations "involv[ing] the discovery, after trial, of information which had been known to the prosecution but *unknown* to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976) (emphasis added).

In light of these principles, an applicant should not be able to obtain *post*-conviction testing of biological evidence unless he demonstrates good cause for

failing to obtain *pre*-conviction testing. Any other approach would be unfair to crime victims. It would let a criminal gamble on an acquittal at trial without testing. Then, if convicted, the criminal could take a second shot at acquittal by seeking new DNA testing—all the while extending the uncertainty and anxiety that the crime victim understandably will feel while the prisoner's original conviction and sentence remains subject to being potentially overturned.

A number of states have imposed a requirement that the applicant show some level of good cause for failing to secure previous testing. *See supra* p. 19 n. 9. Of course, this requirement will be easily satisfied where DNA technology simply did not exist. In other cases, however, satisfying this requirement will prove more difficult. In this case, for example, Osborne's defense attorney did not ask for more precise DNA testing before trial because "Osborne was in a strategically better position without [more specific] DNA testing." *Osborne*, 110 P.3d at 990. The decision was, the Alaska Court of Appeals concluded after reviewing the evidence, "a tactical one." *Id.* at 991.

The Ninth Circuit did not require Osborne to establish that more discriminating testing was unavailable to him before trial. The case should therefore be remanded for further proceedings to resolve this issue.

C. The Victim of the Crime Should be Treated Fairly and With Respect for Her Dignity and Privacy and Should be Heard With Regard to Any Testing.

Finally, the Ninth Circuit's decision is flawed because it utterly failed to consider K.G.'s interests

as crime victim in allowing Osborne to pursue under § 1983 unlimited testing. There can be little doubt that Congress would want victims' interests considered in construing the broad language of § 1983. In passing the Innocence Protection Act of 2004, Congress explicitly directed that any testing must be "reasonable in scope." 18 U.S.C. § 3600(a)(5). More broadly, as explained earlier, Congress has commanded that crime victims have "the right to be treated with fairness and with respect for the victim's dignity and privacy," 18 U.S.C. § 3771(a)(8), and has extended these rights to both federal criminal and habeas proceedings, 18 U.S.C. §§ 3771(b)(1), (2).

In construing § 1983 in other contexts, the Court has not hesitated to read into the general language qualifications to insure that congressional concerns are not frustrated. For instance, in *Pierson v. Ray*, 386 U.S. 547, 555 (1967), this Court read § 1983 as containing a doctrine of judicial immunity in light of presumed congressional intentions. Similarly, in *Preiser v. Rodriguez,* 411 U.S. 475 (1973), this Court created an exception to § 1983, precluding its use by prisoners in lieu of federal habeas proceedings. To do otherwise, this Court explained, "would wholly frustrate explicit congressional intent." *Id* at 489. And the Court has also read procedural requirements into the statute. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520 (1972) (creating more relaxed procedural requirements for *pro se* § 1983 suits).

In the same fashion as these decisions, this Court should construe any right for prisoners to use §1983 to obtain post-conviction access to DNA testing as being implicitly bounded by the requirement that the testing be "reasonable in scope"—the same requirement found in the recently-passed Innocence Pro-

tection Act of 2004, 18 U.S.C. § 3600(a)(5). Testing is obviously not reasonably in scope if it is conducted without regard for the victims' interests in dignity and privacy. In the opening section of this brief (*supra* pp. 3-11), Amici explained some of the ways in which the unrestrained testing the Ninth Circuit has apparently approved in this case could inappropriately violate her privacy. Because the Ninth Circuit failed to give any consideration whatsoever to K.G.'s privacy concerns, this case should be remanded for further proceedings to consider what limits should be placed on any testing.

As part of that remand, K.G. should have the right to be heard during the proceedings without any formal intervention motion. While K.G. is now represented by *pro bono* legal counsel, in other cases indigent crime victims will typically lack legal counsel. This Court should therefore admonish lower courts that, in the future, they should take steps to hear from crime victims about the scope of any testing. In particular, lower courts should request that prosecutors relay any concerns that crime victims might have about the scope of testing. Lower courts should also use their statutory and discretionary power to appoint counsel for crime victims when important victims' issues appear to be at stake. *See generally* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. Rev. 835, 912-16 (reviewing judicial power to appoint counsel for crime victims).

In cases such as this, fairness will only be achieved by hearing from crime victims like K.G. and crafting testing procedures that protect their interests . As this Court has repeatedly held, "'Justice, though due

to the accused, is due to the accuser also. . . . We are to keep the balance true.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (*quoting Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934) (Cardozo, J.)). The decision of the Ninth Circuit should be reversed and the case remanded for consideration of K.G.'s privacy and other concerns in the proposed testing procedures.

CONCLUSION

For the foregoing reasons, and for those provided by Petitioner, the decision of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully Submitted,

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