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No. 08-6

In the Supreme Court of the United States

DISTRICT ATTORNEY'S OFFICE FOR THE THIRD JUDICIAL DISTRICT, ET AL., PETITIONERS

v.

WILLIAM G. OSBORNE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

KANNON K. SHANMUGAM
ANNA-ROSE MATHIESON
JAYNIE R. LILLEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005

ROBERT C. BUNDY
DAVID T. MCGEE
DORSEY & WHITNEY LLP
1031 West Fourth Avenue
Anchorage, AK 99501

RANDALL S. CAVANAUGH
KALAMARIDES & LAMBERT
711 H Street, Suite 450
Anchorage, AK 99501

PETER J. NEUFELD
Counsel of Record
BARRY C. SCHECK
NINA R. MORRISON
DAVID LOFTIS
COLIN P. STARGER
THE INNOCENCE PROJECT
100 Fifth Avenue, 3rd Floor
New York, NY 10011
(212) 364-5340

DAVID T. GOLDBERG
DONAHUE & GOLDBERG LLP
99 Hudson Street, 8th Floor
New York, NY 10013

QUESTIONS PRESENTED

1. Whether a state prisoner's claim that he is entitled to obtain postconviction access to evidence for DNA testing may be brought in an action under 42 U.S.C. 1983.

2. Whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to obtain postconviction access to evidence for previously unavailable DNA testing at his own expense, where the State has provided no statutory mechanism for access, articulates no justification for its refusal to permit access, and concedes that a favorable test result would conclusively establish the prisoner's innocence.

PARTIES TO THE PROCEEDING

Petitioners are the District Attorney's Office for the Third Judicial District of Alaska and Adrienne Bachman, District Attorney for the Third Judicial District of Alaska. Respondent is William G. Osborne.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 521 F.3d 1118. An earlier opinion of the court of appeals (Pet. App. 51a-62a) is reported at 423 F.3d 1050. The order of the district court (Pet. App. 46a-50a) is reported at 445 F. Supp. 2d 1079.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2008. The petition for a writ of certiorari was filed on June 27, 2008, and granted on November 3, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

Title 42, Section 1983, of the United States Code is reproduced at Pet. Br. 7a.

STATEMENT

Respondent, a state prisoner, filed an action in federal district court against petitioners pursuant to 42 U.S.C. 1983, contending that, under the Due Process Clause of the Fourteenth Amendment, he was entitled to obtain postconviction access to evidence for DNA testing, at his own expense, in order to establish his innocence of the crime for which he had been convicted. The district court initially dismissed the complaint, J.A. 2, 199-209, but the court of appeals reversed, holding that respondent's claim was cognizable in an action under Section 1983, Pet. App. 51a-62a. The district court then granted summary judgment to respondent on the merits of his due process claim, *id.* at 46a-50a, and the court of appeals affirmed, *id.* at 1a-45a. It held that, "under the unique and specific facts of this case and assuming the availability of the evidence in question, [respondent] has a limited due process right of access to the evidence for purposes of post-conviction DNA testing." *Id.* at 2a. Since the court of appeals' decision, petitioners have conceded that a favorable DNA test result "would conclusively establish [respondent's] innocence." Cert. Reply Br. 8.

A. Background

1. DNA testing has aptly been described as "nothing less than "the truth machine of law enforcement, ensuring justice by identifying the guilty and exonerating the innocent." Statement of Attorney General John Ashcroft Concerning the DNA Initiative (Mar. 4, 2002) <tinyurl.com/ashcroftdna>. It is now universally recognized that DNA testing is "the foremost forensic technique for identifying perpetrators, and eliminating suspects, when biological material such as saliva, skin, blood, hair, or semen [is] left at a crime scene." Department of Justice, *Postconviction DNA Testing: Recommendations for Handling Requests* 1 (1999) (*Postconviction DNA Testing*).

Perhaps the most important application of DNA testing has been to identify individuals who have been wrongfully convicted. Postconviction DNA testing has exonerated at least 227 individuals, 17 of whom had been sentenced to death. Notably, that group includes numerous individuals who were convicted on the basis of what had appeared at the time to be powerful evidence of guilt, including multiple eyewitness identifications, other forensic evidence, and their own confessions; it even includes 12 individuals who pleaded guilty. See Edward Connors et al., Department of Justice, *Convicted by Juries, Exonerated by Science* 15-18 (1996); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004); Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 76-92 (2008) (*Judging Innocence*); Michael J. Saks & Jonathan J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 5 Science 892, 893-895 (2005); The Innocence Project,

When the Innocent Plead Guilty <www.innocence-project.org/guiltyplea>.

Although the first exoneration through DNA testing occurred twenty years ago, most exonerations have occurred in the last decade, with the advent of Short Tandem Repeat (STR) testing. That method "increas[ed] exponentially the reliability of forensic identification over earlier techniques" and was "qualitatively different from all that proceeded it." *Harvey* v. *Horan*, 285 F.3d 298, 305 & n.1 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc). The advantages of STR testing are twofold. First, STR testing can generate results even from miniscule and highly degraded samples of DNA. Second, STR testing can generate a profile that is effectively unique among the world's population; for example, the odds that two unrelated white Americans would share the same STR profile are estimated at one in *575 trillion*. See Department of Justice, *Future of Forensic DNA Testing* 19 (2000); John M. Butler, *Forensic DNA Typing* 12, 146 (2005) (Butler).

By contrast, the two previously favored methods of DNA testing, DQ-Alpha and RFLP, suffered from serious deficiencies. While DQ-Alpha testing could be used on small samples, it could not effectively discriminate between different individuals, with the result that DQ-Alpha testing was little more probative than conventional blood-group matching. And while RFLP testing could generate statistically rarer profiles, it required a large quantity of non-degraded DNA, and the interpretation process was potentially subjective and error-prone. See *Postconviction DNA Testing* 27; Butler 146; William Thompson, *Subjective Interpretation, Laboratory Error and the Value of DNA Evidence*, 96 Genetica 153 (1995).

The advent of STR testing has enabled not only the exoneration of individuals who have been wrongfully convicted of crimes, but also, in many cases, the identification of the true perpetrators of those crimes. Both of those tasks have been facilitated by the Combined DNA Index System (CODIS), a database operated by the Federal Bureau of Investigation (FBI) that enables federal and state law-enforcement officers to compare profiles from STR DNA testing against those of more than 6 million convicted felons nationwide. Since its inception, CODIS has generated more than 77,000 "hits" in both active and "cold case" investigations. In fact, in at least 98 cases in which postconviction DNA testing has exonerated a wrongfully convicted individual, the true perpetrator has been identified—in 59 of those cases, by means of a DNA database "hit." See FBI, CODIS-NDIS Statistics <tinyurl.com/fbicodis>; Brandon L. Garrett, *Judging Innocence: An Update* <tinyurl.com/garrett-2009> (*Judging Innocence Update*).

2. The remarkable advances represented by DNA testing in general and STR testing in particular—"which have rendered it literally possible to confirm guilt or innocence beyond any question whatsoever, at least in some categories of cases"—are "no ordinary developments, even for science." *Harvey*, 285 F.3d at 305 (opinion of Luttig, J.). To its credit, the American legal system has, for the most part, responded appropriately to those watershed scientific developments. As of the time of this filing, 44 States and the federal government have enacted DNA testing statutes, all but two of them in the last ten years; indeed, one of those States, South Carolina, did so after the filing of the petition for certiorari in this case. See S.C. Code Ann. § 17-28-10; Br. in Opp. 8

n.4 (listing other statutes). With rare exceptions,[1] those statutes provide broad rights to testing. For example, the federal statute (like most of the state statutes) provides for testing where the applicant can show that the results of DNA testing, if favorable, would "raise a reasonable probability" of innocence. 18 U.S.C. 3600(a)(8)(B); see, *e.g.*, Ark. Code Ann. § 116-112-202(8); Mo. Rev. Stat. § 547.035(7)(1).[2] In recent years, moreover, the federal government has appropriated approximately $100 million annually in grants to States for DNA testing—nearly ten times as much as for all other forensic programs combined. See Nathan James, Congressional Research Service, *An Overview and Funding History of Select Department of Justice Grant Programs* 11, 15 (2006).

Alaska, where this case arises, stands as a stark exception. Although Alaska (like every other State in the Nation) provides mechanisms through which convicted individuals can obtain relief from their convictions based on new evidence of innocence, Alaska is one of the six

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[1] Two States provide for testing only for prisoners sentenced to death. See Ky. Rev. Stat. Ann. § 422.285(1); Nev. Rev. Stat. Ann. § 176.0918(1). In addition, five other State statutes exclude, or have been construed to exclude, testing for prisoners who pleaded guilty or no contest. See Mich. Comp. Laws § 770.16(3)(b); Ohio Rev. Code Ann. § 2953.72(C)(1)(a); *People* v. *O'Connell*, 879 N.E.2d 315, 319 (Ill. 2007); *People* v. *Byrdsong*, 820 N.Y.S.2d 296, 299 (N.Y. App. Div. 2006); *Williams* v. *Erie County Dist. Att'y's Office*, 848 A.2d 967, 972 (Pa. Super. 2004).

[2] Where convicted individuals have been unable to obtain DNA testing through testing statutes (either because they did not qualify for relief under those statutes or because the jurisdiction in question lacked such a statute altogether), they have frequently been able to do so by consent. See *Judging Innocence Update* (noting that prosecutors had consented to DNA testing in 82% of cases resulting in exonerations).

States that provides no statutory mechanism for obtaining DNA testing. As far as we are aware, moreover, it is the only one of those States that has not conducted a single postconviction DNA test pursuant to court order or consent.

B. Facts and Proceedings Below

1. This case concerns the identity of one of the perpetrators of a brutal crime. While the perpetrator's identity is disputed, the basic facts of the crime are not. On the evening of March 22, 1993, Dexter Jackson and another individual, both black men, solicited sex from a white prostitute, K.G., in Anchorage, Alaska. When K.G. agreed and got into Jackson's car, the two men drove her to a secluded location, threatened her at gunpoint, and robbed her. K.G. was then forced to perform a sexual act on Jackson while she was vaginally raped by the second perpetrator, who used a blue condom taken from K.G. When K.G. attempted to flee, the men caught her and beat her severely. One of the men (believed by K.G. to be the second perpetrator) then shot at her, grazing her head. The men buried K.G. in the snow and left her for dead. See Pet. App. 113a-115a.

A few days later, police stopped Jackson's car for a traffic violation and, in the course of that stop, discovered a gun, along with a pocket knife belonging to K.G. Jackson was arrested; police found blood in the car that was consistent with K.G.'s. Police later matched ammunition found at the crime scene to the gun from Jackson's car and matched tracks found at the scene to his tires. After Jackson was arrested, he confessed and implicated respondent—a member of the military with no criminal record—as the second perpetrator. See J.A. 28; Pet. App. 116a-117a.

2. Respondent was charged in Alaska Superior Court with two counts of attempted first-degree murder, two counts of first-degree sexual assault, and one count each of kidnapping, sexual assault, and first-degree assault; Jackson was charged with similar offenses, and the two men were tried jointly before a jury.

At trial, K.G. identified respondent as the second perpetrator. Her initial identification of respondent, however, had been more equivocal. In her report to the police, K.G. had described the second perpetrator as 25-30 years old, 6 feet tall, weighing 180-190 pounds, and clean-shaven. Pet. App. 7a; J.A. 81, 216. Respondent, however, was actually 21 years old and 5'9" tall, weighed 155 pounds, and had a mustache. J.A. 167. And when K.G. had been presented with a photographic lineup, she described respondent only as the "most familiar" and "most likely" suspect in the lineup. Pet. App. 4a. In addition, K.G. had extremely impaired vision and had not been wearing glasses or contact lenses on the night of the crime. J.A. 168.

The State also relied heavily on the results of testing on a blue condom recovered from the scene. The State conducted DQ-Alpha testing on fluids from the condom, which yielded a DNA profile consistent with respondent's. That profile, however, was shared by 14.7% to 16% of all African Americans, which, the State's expert admitted, only made respondent a "possible source" of the fluids. J.A. 117-119. The State's expert considered conducting RFLP testing, which would have been more discriminating, but concluded that such testing would not be feasible due to the "degraded" condition of the sample. J.A. 217. The State nevertheless repeatedly argued to the jury, without qualification, that Osborne's semen

was found on the condom. See J.A. 121, 123, 124, 127, 130.[3]

When defense counsel learned of the DQ-Alpha testing results, she informed respondent that it was her opinion that he would be in a "strategically better position without [RFLP] DNA testing," on the ground that such testing might inculpate him more conclusively. Pet. App. 98a. Respondent repeatedly asked counsel to pursue further testing on the ground that the results would establish his innocence; he also wrote to an out-of-state DNA expert for assistance. J.A. 162-163, 186, 226. Under state law, however, the ultimate decision whether to pursue RFLP testing was left to counsel, and she did not do so. Pet. App. 101a-102a.

At trial, respondent contended that he was misidentified as the second perpetrator; in addition, he contended that, although he was with Jackson later on the evening of the crime, he had an alibi during the events in question, because he was documented on videotape to have been at a local arcade well after K.G. reported that she had been picked up by the two men. J.A. 165. The jury found respondent guilty of the two counts of first-degree sexual assault and the counts of kidnapping and sexual assault, and not guilty of the remaining counts. He was

[3] The prosecution also relied on the results of a microscopic examination of hairs found on the condom and on K.G.'s sweater, which the State's expert testified exhibited "the same characteristics" as respondent's own. Pet. App. 117a. At the time of trial, DNA analysis of the hairs was not possible; today, microscopic analysis, standing alone, is no longer accepted as a valid basis for identification. See, *e.g.*, Jason C. Kolowski et al., *A Comparison Study of Hair Examination Methodologies*, 49 J. Forensic Sci. 1253, 1254-1255 (2002). The State repeatedly argued to the jury that Osborne's hair was found at the scene. See J.A. 123, 124, 127, 130.

sentenced to 26 years of imprisonment, with five years suspended. Pet. App. 117a-118a.

3. Respondent appealed, contending, *inter alia*, that there was insufficient evidence to support K.G.'s identification of him as the second perpetrator. The Alaska Court of Appeals affirmed, Pet. App. 113a-130a, and the Alaska Supreme Court denied review, see *Osborne* v. *State*, No. S-7549 (Sept. 3, 1996).

4. a. Respondent then filed an application for post-conviction relief in Alaska Superior Court. The trial court denied the application. J.A. 14-22. The trial court rejected respondent's contention that defense counsel had provided ineffective assistance by failing to pursue further DNA testing, J.A. 20, and also denied respondent's request to obtain testing of the condom using the STR method, J.A. 22.

b. The Alaska Court of Appeals affirmed in part and remanded. Pet. App. 91a-112a. As is relevant here, the appellate court held that respondent had no federal due process right to obtain testing using the STR method. *Id.* at 105a-109a. The court suggested, however, that a convicted individual might be entitled to testing under the Alaska Constitution if he could show "(1) that the conviction rested primarily on eyewitness identification evidence, (2) that there was a demonstrable doubt concerning [the individual's] identification as the perpetrator, and (3) that scientific testing would likely be conclusive on this issue." *Id.* at 111a.

c. On remand, the Alaska Superior Court determined that respondent could not satisfy any of the three components of the appellate court's proposed test. J.A. 213-222.

d. The Alaska Court of Appeals affirmed. Pet. App. 63a-90a. It agreed with the trial court that respondent

could not satisfy any of the three components of its proposed test. *Id.* at 75a-82a.

Judge Mannheimer, joined by Chief Judge Coats (the author of the majority opinion), concurred. Pet. App. 82a-90a. He suggested that "the due process clause of the Alaska Constitution might require us to intervene in cases where a defendant presents clear genetic evidence of [his] innocence," *id.* at 89a, but agreed that respondent was not entitled to DNA testing in the first place because a favorable DNA test result "[w]ould not *conclusively* establish [his] innocence," *id.* at 90a (emphasis added).

e. The Alaska Supreme Court denied review. See *Osborne* v. *State*, No. S-12799 (Jan. 22, 2008).

5. a. After his state postconviction application was initially denied, respondent filed an action in federal district court against petitioners and others pursuant to 42 U.S.C. 1983. J.A. 23-40. As is relevant here, respondent challenged petitioners' refusal to permit him to have access to the condom for STR testing for the purpose of proving that he was innocent of the crime for which he had been convicted. J.A. 36-37, 39.[4] He alleged that, "[b]y refusing to release * * * biological evidence for DNA testing, and thereby preventing [respondent] from gaining access to evidence which could exonerate him as the perpetrator, [petitioners] have deprived [respondent] of access to exculpatory evidence," in violation of the Due Process Clause of the Fourteenth Amendment. J.A. 37.

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[4] Respondent sought access not only to the condom itself, but also to the hairs found on the condom and on K.G.'s sweater. J.A. 33-35. Respondent sought to subject the hairs to mitochondrial testing, which permits analysis of DNA found in hair shafts (as opposed to roots or follicles). See *ibid.* All of the same arguments that support access to the condom for STR testing support access to the hairs for mitochondrial testing as well.

He also contended that the results of any subsequent STR testing could be run through CODIS (which, like STR testing itself, did not exist at the time of his trial) and used to identify the true perpetrator of the offense. See J.A. 25.

Petitioners moved to dismiss the complaint on the ground that respondent's claim was not cognizable in a Section 1983 action. A magistrate judge recommended granting the motion, J.A. 199-209, and the district court did so, J.A. 2.

b. The court of appeals reversed. Pet. App. 51a-62a. The court of appeals explained that this Court's cases make clear that a Section 1983 action brought by a state prisoner is barred "if success in that action would *necessarily* demonstrate the invalidity of confinement or its duration." *Id.* at 56a (emphasis altered) (quoting *Wilkinson* v. *Dotson*, 544 U.S. 74, 81-82 (2005)). Applying that standard, the court reasoned that "[i]t is clear to us, as a matter of logic, that success in such an action would not necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 58a-59a (internal quotation marks omitted). The court noted that "success would yield only *access* to the evidence—nothing more." *Id.* at 59a. Moreover, the court explained, "even if the results exonerate [respondent], a separate action * * * would be required to overturn his conviction." *Ibid.*

c. On remand, the district court granted summary judgment to respondent. Pet. App. 46a-50a. The court held that "there does exist, under the unique and specific facts presented, a very limited constitutional right to the testing sought." *Id.* at 49a (emphasis omitted). The court found "particularly persuasive" Judge Luttig's opinion in *Harvey*, which had concluded that "there is a limited, constitutional post-conviction right of access to previously-produced forensic evidence for the purpose of

STR and related DNA testing." *Id.* at 49a n.12 (quoting 285 F.3d at 325).

d. The court of appeals affirmed. Pet. App. 1a-45a.

At the outset, the court of appeals reasoned that this case was "controll[ed]" by its earlier decision in *Thomas* v. *Goldsmith*, 979 F.2d 746 (9th Cir. 1992), in which the court had held that a prisoner had a right to obtain post-conviction access to evidence for DNA testing where the results of testing could be material to a "gateway" claim of actual innocence. Pet. App. 15a. The court noted that *Thomas*, in turn, had relied on *Brady* v. *Maryland*, 373 U.S. 83 (1963), which first recognized the principle that the government is obligated to turn over material exculpatory evidence to the defense before trial. Pet. App. 15a. At the same time, the court noted that "courts recognizing a post-conviction right [of access] have done so not necessarily based on *Brady* itself but based on the due process principles that motivated *Brady*, including fundamental fairness [and] the prosecutor's obligation to do justice rather than simply obtain convictions." *Id.* at 22a-23a.

The court of appeals next rejected petitioners' contention that, "before [the State] is obligated to disclose any evidence post-conviction, [respondent] should be required to satisfy the extraordinarily high standard of proof that applies to freestanding claims of actual innocence." Pet. App. 23a-24a. The court explained that "[t]he fundamental flaw in the State's position is that it effectively equates [respondent's] access-to-evidence claim with a habeas [actual-innocence] claim." *Ibid.* The court ultimately concluded that, because "[respondent's] case for disclosure is so strong on the facts," it would "leave to another day" the exact formulation of the standard for when a prisoner is entitled to obtain postconviction access to evidence for DNA testing. *Id.* at 27a. The

court held, however, that "the standard * * * applicable to [respondent's] claim for post-conviction access to evidence is no higher than a reasonable probability that, if exculpatory DNA evidence were disclosed to [respondent], he could prevail in an action for post-conviction relief." *Id.* at 28a.[5]

Applying its standard, the court of appeals rejected petitioners' contention that, even if the results of DNA testing were favorable, those results "would not cast sufficient doubt on [respondent's] conviction to require disclosure of that evidence." Pet. App. 32a. The court explained that "[petitioners'] proposed hypotheticals for reconciling exculpatory DNA tests with [respondent's] guilt are so inconsistent with and improbable in light of the evidence in the trial record that they cannot negate the materiality of further DNA testing to possible post-conviction relief." *Id.* at 39a.[6]

The court of appeals also rejected petitioners' contention that the granting of postconviction access to evi-

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[5] The court of appeals declined to give preclusive effect to the state courts' findings in the state postconviction proceedings. Pet. App. 28a-32a. Specifically, the court reasoned that the finding that a favorable DNA test result would not be conclusive was not entitled to preclusive effect "because it was made in conformity with a materiality standard under state law that is more stringent than any standard this court would apply under federal law." *Id.* at 30a.

[6] The court of appeals also determined that respondent's subsequent statements to a parole board that he had participated in the rape did not necessarily foreclose his right to obtain access to evidence for DNA testing. Pet. App. 40a-42a. The court noted the possibility that, "as [respondent] now claims, he was motivated to confess falsely as the most expeditious means available to obtain release from prison," *id.* at 41a, and also noted that petitioners' proposed rule "would ignore the emerging reality of wrongful convictions based on false confessions and the capability of DNA testing to reveal the objective truth and exonerate the innocent," *ibid.*

dence for DNA testing would be "inherent[ly]" prejudicial on the ground that it "erodes the important value of finality in the criminal justice system." Pet. App. 42a. The court reasoned that "[t]he evidence in question can be produced easily and without cost to the State and, if favorable to [respondent], would be strong evidence in support of post-conviction relief." *Ibid.* The court discounted petitioners' contention that there was "strong evidence" of respondent's guilt, noting that "recent history has shown" that "DNA evidence has the capability of refuting otherwise irrefutable inculpatory evidence." *Id.* at 43a. The court reasoned that, if DNA testing in this case is inculpatory, "the State will have lost nothing; indeed, it will gain even more definitive proof of [respondent's] guilt and will be relieved of the burden of further post-conviction litigation." *Ibid.* On the other hand, if DNA testing is exculpatory, "[respondent] will obviously gain a great deal, as will the State, whose paramount interests are in seeking justice [and] not obtaining convictions at all costs." *Ibid.* In either case, the court concluded, "the truth-seeking function of the criminal justice system is furthered." *Ibid.*

The court of appeals therefore held that "[respondent's] right to due process of law prohibits the State from denying him reasonable access to biological evidence for the purpose of further DNA testing" where (1) "that biological evidence was used to secure his conviction"; (2) "the DNA testing is to be conducted using methods that were unavailable at the time of trial and are far more precise than the methods that were then available"; (3) "such methods are capable of conclusively determining whether [respondent] is the source of the generic material"; and (4) "the evidence is material to available forms of post-conviction relief." Pet. App. 44a.

e. Petitioners then sought review in this Court. At the certiorari stage, petitioners conceded, for the first time in this litigation, that a favorable DNA test result "would conclusively establish [respondent's] innocence." Reply Br. 8.

SUMMARY OF ARGUMENT

This case provides the Court with its first opportunity to consider the application of the requirements of due process to arguably the most important development in the history of forensic science: the advent of DNA testing, which in its current form has the potential to establish beyond a shadow of doubt that an individual convicted of a crime is in fact innocent. For over a decade, petitioners have denied respondent any opportunity to access the evidence used against him at trial to conduct DNA testing at his own expense, even though they now concede that a favorable test result would conclusively establish his innocence. In so doing, petitioners do not contend that favorable test results would be of no consequence—nor could they, in light of the fact that Alaska, like every other State, provides mechanisms through which prisoners can obtain relief from their convictions based on new evidence of innocence. Petitioners nevertheless fail to offer any valid justification for their failure to permit access. In the face of petitioners' stubborn refusal to permit access to the evidence, the court of appeals correctly held, first, that respondent's claim for access to the evidence may be brought in an action under 42 U.S.C. 1983, and second, that petitioners' conduct offends due process.

I. Respondent's access-to-evidence claim may be brought in a Section 1983 action. In a series of cases starting with *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), this Court has held that a narrow category of claims that

otherwise fall within the scope of Section 1983 are nevertheless cognizable only under the habeas statute. Specifically, the Court has held that a Section 1983 action would be barred where a judgment in a prisoner's favor would necessarily imply the invalidity of his conviction or sentence. That is plainly not the case here. Success on an access-to-evidence claim means only that a prisoner gets access to evidence for DNA testing; the prisoner will be able to obtain relief from his conviction only if the resulting DNA testing is exculpatory and he is able to prevail in any subsequent application for postconviction relief. Nor is an access-to-evidence claim inherently antecedent to an actual-innocence claim that would be brought in a subsequent federal habeas petition, as petitioners contend, because a prisoner could (and likely would) pursue other remedies upon obtaining a favorable DNA test result.

II. A. Petitioners' conduct constitutes a breach of procedural due process. Even after his conviction, respondent retains a liberty interest in meaningful access to any mechanisms for postconviction relief that the State chooses to provide. In this case, respondent could seek postconviction relief on the basis of actual innocence by means of either an application in state court or a petition for clemency. In light of respondent's liberty interest in meaningful access to those mechanisms, he is entitled to obtain access to the evidence under the familiar balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Respondent's interest in the accuracy of his conviction is undeniably compelling, and the State has articulated no valid countervailing interest for its refusal to permit access to the evidence for potentially exculpatory DNA testing at respondent's own expense. The result would be no different, moreover, even under the narrower test of *Medina* v. *California*, 505 U.S. 437 (1992).

And this Court's cases concerning access to evidence at trial, which are founded on the truth-seeking function of the criminal justice system, further support the conclusion that procedural due process requires the State to permit access to the evidence here.

B. Because it rises to the level of conscience-shocking behavior, petitioners' refusal to permit access to the evidence also constitutes a breach of substantive due process. The State has offered no legitimate explanation for its refusal to grant access to the evidence, and that refusal is thus arbitrary—indeed, shockingly so, in light of the conceded potential of that evidence to clear respondent completely of the crime with which he was charged. Because Alaska stands alone in refusing to enable *any* postconviction DNA testing, this case is the polar opposite of *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), in which the Court refused to recognize a substantive due process right that would have upended the longstanding practices of the vast majority of the States. Under this Court's due process jurisprudence, respondent should be afforded the opportunity, at no cost to the State, to engage in testing that could conclusively establish his innocence.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT RESPONDENT'S ACCESS-TO-EVIDENCE CLAIM MAY BE BROUGHT IN AN ACTION UNDER 42 U.S.C. 1983

Petitioners contend (Br. 18-35) that respondent's access-to-evidence claim may not be brought in an action under the federal civil-rights statute, 42 U.S.C. 1983.[7]

[7] Neither the amici States nor the United States joins in that contention. The latter omission is particularly notable, because the United States participated as amicus curiae in *Hill* v. *McDonough*,

That contention lacks merit. Under this Court's precedents concerning the interplay between Section 1983 and the federal habeas statute, 28 U.S.C. 2254, it is "not * * * even arguable," as petitioners suggest, that respondent is foreclosed from bringing his access-to-evidence claim in a Section 1983 action. *Harvey*, 285 F.3d at 308 (opinion of Luttig, J.). Like most of the lower courts to have considered the issue, the court of appeals therefore correctly held that respondent's claim was cognizable under Section 1983.

A. Under This Court's Precedents, Respondent's Claim May Be Brought Under Section 1983

1. The federal civil-rights statute, 42 U.S.C. 1983, provides a cause of action for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," and specifically provides for the availability of equitable relief, as well as damages. As a preliminary matter, it is clear that respondent's claim falls within the plain terms of Section 1983, and petitioners do not contend otherwise. In the complaint in this case, re-

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547 U.S. 573 (2006), this Court's most recent case concerning the interplay between Section 1983 and the federal habeas statute. In that case, the United States unsuccessfully argued that a state prisoner's claim that the method to be used in carrying out his execution violates the Eighth Amendment must be brought in a habeas petition. See U.S. Br. at 9-30, *Hill*, *supra* (No. 05-8794). Critically, the United States contended that it had a "substantial interest" in the resolution of that question, on the ground that the Court's decision "will likely resolve the closely related question whether a federal prisoner * * * must bring a method-of-execution claim in a motion * * * under 28 U.S.C. 2255 (the analogue to a petition for habeas corpus by a state prisoner under 28 U.S.C. 2254)." *Id.* at 2. Although the United States presumably has an identical interest in the corresponding issue in this case, it has chosen not to address that issue in its brief.

spondent contended that he had a right to obtain access to evidence for DNA testing under the Due Process Clause of the Fourteenth Amendment, see J.A. 37, and asked the district court to enter an injunction directing petitioners to permit such access, see J.A. 39.

In a series of cases starting with *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), this Court has held that there is a narrow class of claims that fall within the broad scope of Section 1983 but are nevertheless cognizable only under the habeas statute. In *Preiser* itself, the Court indicated that a prisoner would be barred from bringing a Section 1983 action where the claim at issue was at "the core of habeas corpus." *Id.* at 489. Where the habeas statute "so clearly applies," the Court reasoned, it "must be understood to be the exclusive remedy available." *Ibid.* And in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), the Court elaborated on that principle by explaining that a Section 1983 action would be barred where "a judgment in favor of the [prisoner] would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487; see *Nelson* v. *Campbell*, 541 U.S. 637, 647 (2004) (stating that "we were careful in *Heck* to stress the importance of the term 'necessarily'"); *Harvey*, 285 F.3d at 309 (opinion of Luttig, J.) (noting that this Court "snugly drew the fault line to the *necessity* that the success of the 1983 action depend upon proof that the underlying conviction is invalid if it is to be foreclosed").[8]

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[8] Although the Court initially applied the rule of *Heck* where a prisoner was seeking damages, it has since indicated that the same rule would apply where the prisoner was seeking injunctive relief. See *Wilkinson* v. *Dotson*, 544 U.S. 74, 82 (2005); *Edwards* v. *Balisok*, 520 U.S. 641, 648 (1997).

2. The court of appeals correctly held that respondent's access-to-evidence claim is not barred by *Heck* and its progeny because, "as a matter of logic," success on such a claim would not necessarily imply the invalidity of respondent's confinement. Pet. App. 58a-59a. Success on an access-to-evidence claim means only that a prisoner gets access to evidence for DNA testing; the release of the evidence terminates the proceeding. Even if the resulting DNA testing is exculpatory, therefore, the prisoner would still have to "initiate an entirely separate lawsuit," or petition for clemency, in order to obtain relief from the underlying conviction. *McKithen* v. *Brown*, 481 F.3d 89, 103 (2d Cir. 2007), cert. denied, 128 S. Ct. 1218 (2008). Moreover, DNA testing will not prove exculpatory in every case—and where testing is either inculpatory or inconclusive, the prisoner would obviously have no basis to challenge his conviction. For those reasons, "the asserted right of mere access is not a direct, or for that matter even an indirect, attack on one's conviction or sentence." *Harvey*, 285 F.3d at 308 (opinion of Luttig, J.).

It would be particularly inequitable, moreover, to bar a prisoner from bringing a Section 1983 action, because it is unclear whether an access-to-evidence claim could properly be asserted as the basis for a habeas petition. In fact, petitioners do not even concede that an access-to-evidence claim would be independently cognizable in a habeas petition. The habeas statute permits a court to entertain a habeas petition by a state prisoner only where the prisoner is contending that "he is *in custody* in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a) (emphasis added). While this Court has taken a broad view of the remedial powers of a habeas court, "[i]t is one thing to say that permissible habeas relief * * * includes ordering a

quantum change in the level of custody" and "quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody." *Dotson*, 544 U.S. at 86 (Scalia, J., concurring) (internal quotation marks omitted). The relief that respondent seeks here—an injunction ordering access to evidence—certainly differs from the relief usually awarded by habeas courts. At a minimum, it is clear that respondent's claim does not lie at "the core of habeas corpus"—and, for that reason, respondent's action should not be foreclosed by the implicit exception to Section 1983's plain terms. *Preiser*, 411 U.S. at 489.

B. Petitioners' Contrary Contentions Lack Merit

1. In the face of this Court's precedents concerning the interplay between Section 1983 and the federal habeas statute, petitioners contend (Br. 21-28) that respondent's access-to-evidence claim is the functional equivalent of a discovery request antecedent to a federal actual-innocence claim. Because any actual-innocence claim could be brought only in a habeas petition, petitioners' reasoning goes, the access-to-evidence claim may not be brought in a Section 1983 action.

Petitioners' contention—which also infuses their analysis of respondent's underlying constitutional claim, see, *e.g.*, Br. 38-43—fails for the simple reason that the access-to-evidence claim is not inherently antecedent to an actual-innocence claim that would be brought in a subsequent federal habeas petition. In the event that a prisoner obtains a favorable DNA test result in the wake of a successful access-to-evidence claim, it is not automatic, nor even likely, that the prisoner would file a federal habeas petition, particularly given the unsettled

state of the law concerning freestanding claims of actual innocence (and the high substantive standard that would presumably apply to such claims). See *House* v. *Bell*, 547 U.S. 518, 555 (2006). On the contrary, experience teaches that the prisoner would be more likely either to proceed through established mechanisms for postconviction relief or clemency or to seek prosecutorial consent. See *Judging Innocence Update* (noting that prosecutors had consented to motions to vacate convictions in 88% of cases resulting in exonerations). In those circumstances, a Section 1983 action seeking access to evidence for DNA testing would constitute the end, not just the beginning, of proceedings in federal court. A claim of access to evidence is therefore a freestanding constitutional claim in its own right; it is not necessarily bound up with an underlying federal claim of actual innocence, such that the failure to plead the former without the latter somehow constitutes artful pleading (as petitioners suggest, Br. 26-28).

Petitioners seemingly suggest that, if a prisoner wishes to obtain access to evidence for DNA testing, he should first file a habeas petition seeking relief based on actual innocence (notwithstanding the absence of any evidence to support that claim in the first place). Even assuming, however, that a prisoner could bring an actual-innocence claim in a federal habeas petition (an assumption, ironically enough, that petitioners resist), the prisoner would not necessarily be entitled to obtain access to evidence for DNA testing in the resulting habeas proceeding, as petitioners themselves concede. See Br. 34. This Court has long made clear that a habeas petitioner has no entitlement to discovery, see, *e.g.*, *Bracy* v. *Gramley*, 520 U.S. 899, 904 (1997); *Harris* v. *Nelson*, 394 U.S. 286, 295 (1969); instead, the decision whether to provide discovery is left to the district court's discretion,

see Fed. R. Governing Section 2254 Cases 6(a); *Lonchar* v. *Thomas*, 517 U.S. 314, 326 (1996).[9] The upshot of petitioners' position is clear: an access-to-evidence claim not only is not cognizable in a Section 1983 action, but it may not be cognizable in federal court *at all*. That cannot be, and thankfully is not, the law.

2. Petitioners' remaining contentions are equally unfounded.

a. Petitioners contend that respondent's access-to-evidence claim may be brought only in a habeas petition on the ground that his ultimate purpose in seeking access to evidence is to establish his innocence (and therefore to challenge his confinement). See, *e.g.*, Br. 19 (contending that, "[s]tripped to its essence, [respondent's] § 1983 action is nothing more than a request for evidence to support a hypothetical claim that he is actually innocent"). That contention, however, cannot be reconciled with *Dotson*, in which the Court reasoned that it would be erroneous to jump from the "true premise" that the prisoners hoped that success on their claim (challenging the constitutionality of their earlier parole proceedings) would lead to their earlier release, to the "faulty conclusion" that their claims could be brought only in a habeas petition. 544 U.S. at 78. *Dotson* makes clear, if further clarification were needed, that the test for when a Section 1983 action is implicitly foreclosed in no way turns on the motive of the claimant.

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[9] Indeed, it would be passing strange if a prisoner would be obligated to file a habeas petition seeking relief based on actual innocence without any evidence to support that claim, for the sole purpose of obtaining that evidence in discovery. Cf. Pet. App. 17a (noting the "Catch-22" that "the State has opposed [respondent's] access-to-evidence claim based on the argument that [respondent] cannot prove his actual innocence[,] yet [respondent] needs access to the evidence to make that very showing").

b. Petitioners alternatively contend (Br. 33) that this Court should hold that there is another category of claims that are not cognizable under Section 1983, beyond those in which "a judgment in favor of the [prisoner] would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. This Court has rejected similar efforts in the past, see, *e.g.*, *Dotson*, 544 U.S. at 81, and it should do so again here. Petitioners, moreover, make no effort to suggest an actual standard for their new category of claims that would be barred in Section 1983 actions. The closest they come is by suggesting (Br. 32) that respondent's claim should be precluded because success on that claim is the "*sine qua non*" of a claim that could eventually lead to the invalidation of the underlying confinement. *Dotson*, however, forecloses such a standard as well, because success on the instant claims in that case was similarly the *sine qua non* of any subsequent claims that would eventually lead to the prisoners' release. See 544 U.S. at 82. Petitioners offer no new justification for broadening the standard of *Heck* and its progeny into the but-for standard that they seemingly propose. Respondent's access-to-evidence claim is therefore plainly cognizable in a Section 1983 action.[10]

[10] The Court need not decide in this case any question concerning when a Section 1983 action raising a constitutional right-of-access claim is timely. Petitioners have never argued that respondent's claim is untimely, and such claim would therefore be forfeited.

II. THE COURT OF APPEALS CORRECTLY HELD THAT, UNDER THE CIRCUMSTANCES OF THIS CASE, RESPONDENT WAS ENTITLED TO OBTAIN POSTCONVICTION ACCESS TO EVIDENCE FOR DNA TESTING AS A MATTER OF DUE PROCESS

In this case, the State of Alaska has refused to permit access to evidence in its possession for DNA testing at respondent's own expense—DNA testing that the State now concedes could conclusively prove his innocence (and could thereby be used for the purpose of obtaining relief from his conviction). Whether it is couched in terms of "procedure" or "substance"—"[a]nd with a claim such as this, the line of demarcation is faint," *Harvey*, 285 F.3d at 318 (opinion of Luttig, J.)—the State's refusal to permit access to the evidence, in the absence of any valid reason for doing so, offends basic principles of due process.

A. Respondent Is Entitled To Obtain Access To The Evidence As A Matter Of Procedural Due Process

1. Respondent Satisfies The Requirements For A Procedural Due Process Claim

In order to establish that the failure to provide access to evidence for DNA testing would constitute a breach of procedural due process, respondent must show, first, that he has an interest in "life, liberty, or property" that is protected by the Due Process Clause, and second, that the failure to provide access to the evidence would deprive him of that interest without the "process of law" that he is due. U.S. Const. Amend. XIV. Respondent readily satisfies both requirements.

a. Respondent has a liberty interest in meaningful access to mechanisms for postconviction relief

i. Neither petitioners nor the United States resists the proposition that an access-to-evidence claim could implicate a liberty interest that the Due Process Clause protects. Cf. Pet. Br. 47 (leaving open possibility that "a prisoner serving a validly imposed sentence might possess" a "residual liberty interest"); U.S. Br. 32-33 (suggesting that the Court "need not reach the question whether (or in what circumstances) there is any liberty interest supporting the creation of a procedural due process right"). And for good reason. Although this Court has recognized that an individual's liberty interest in freedom from confinement is at least to some extent extinguished once he has been convicted and sentenced of a non-capital crime, see *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 280 (1998) (plurality opinion); *id.* at 288, 289 (O'Connor, J., concurring in part and concurring in the judgment), the Court has also consistently recognized that an individual still retains "a residuum of constitutionally protected liberty while in legal custody pursuant to a valid conviction." *Meachum* v. *Fano*, 427 U.S. 215, 232 (1976); see *Youngberg* v. *Romeo*, 457 U.S. 307, 315-316 (1982) (citing cases).

Of course, a State is under no obligation to provide a prisoner with particular mechanisms for postconviction relief; this Court has suggested that a State could even preclude a prisoner from taking a direct appeal from his conviction. See *McKane* v. *Durston*, 153 U.S. 684, 687 (1894). Where a State *creates* mechanisms for postconviction relief, however, it is a familiar principle that "the procedures used * * * must comport with the demands of the Due Process [Clause]." *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). Thus, relying in part on proce-

dural due process, the Court has held that, where a State provides for a direct appeal as of right, it must afford a criminal defendant an adequate and effective opportunity to present his claims. See, *e.g.*, *Douglas* v. *California*, 372 U.S. 353, 358 (1963) (holding that a State must provide for the appointment of counsel on appeal to an indigent defendant); *Griffin* v. *Illinois*, 351 U.S. 12, 20 (1956) (holding that a State must provide free trial transcripts). Those decisions are rooted in the broader principle that proceedings provided by the State must be "essential[ly] fair[]," even if the proceedings themselves are not constitutionally mandated. *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 120 (1996).

Where a State creates mechanisms for postconviction relief by which a prisoner may obtain relief from his underlying conviction, therefore, the prisoner has a liberty interest in meaningful access to those mechanisms, so as to avoid rendering the provision of those mechanisms arbitrary or futile. See *Ake* v. *Oklahoma*, 470 U.S. 68, 77 (1985) (noting that "[m]eaningful access to justice has been the consistent theme" of this Court's due process jurisprudence); cf. *Bounds* v. *Smith*, 430 U.S. 817, 821 (1977) (holding that provision of law libraries or similar resources to prisoners was necessary to protect "constitutional right of access to the courts"). Notably, that liberty interest exists even if the State is not required to use any particular procedures in a given form of proceeding, and even if the State may leave the ultimate decision on whether to provide relief to the discretion of the decisionmaker. Compare *Woodard*, 523 U.S. at 279-285 (plurality opinion) (concluding that no procedures are required in clemency proceedings), with *id.* at 289 (O'Connor, J., concurring in part and concurring in the judgment) (contending that "some *minimal* procedural safeguards apply to clemency proceedings").

ii. In respondent's case, the State of Alaska has created at least two mechanisms through which respondent could raise a claim of actual innocence. Because DNA testing of evidence in the State's possession could indisputably provide conclusive evidence of respondent's actual innocence—and, as a practical matter, likely provides the only means by which he could make the showing of innocence required to obtain relief—respondent's claim implicates a liberty interest in meaningful access to those mechanisms.

First, Alaska, like virtually every other State, permits a prisoner to move for postconviction relief on the basis of evidence of actual innocence.[11] Specifically, a prisoner may bring such a claim under Alaska law where "there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice." Alaska Stat. § 12.72.010(4). Notably, a prisoner may bring such a claim even outside the ordinarily applicable time limits if the claim is "based on newly discovered evidence," provided that the prisoner "establishes due

[11] In *Herrera* v. *Collins*, 506 U.S. 390 (1993), this Court noted that "[o]nly 15 States allow a new trial motion based on newly discovered evidence to be filed more than three years after conviction." *Id.* at 411. Thanks largely to the advent of DNA testing, however, the landscape has changed dramatically: our research indicates that 49 of the 50 States now provide at least one, and sometimes more than one, mechanism by which a prisoner may seek relief based on evidence of innocence such as a favorable DNA test result, even if the ordinarily applicable time limits have expired. The law in the other State, South Dakota, remains unclear. See *Jenner* v. *Dooley*, 590 N.W.2d 463, 471 (S.D. 1999) (stating that "courts should solemnly consider reopening a case if a truly persuasive showing of actual innocence lies close at hand") (internal quotation marks omitted). Of course, a favorable DNA test result will ordinarily constitute the best possible evidence of innocence.

diligence in presenting the claim and sets out facts supported by evidence that * * * establishes by clear and convincing evidence that the [prisoner] is innocent." Alaska Stat. § 12.72.020(b)(2). Respondent would satisfy the requirements of that provision, because a favorable DNA test result would constitute "newly discovered evidence" that, by petitioners' own concession, would conclusively establish his innocence. Reply Br. 8.[12]

Second, Alaska, like every other State, confers broad authority on its governor to grant clemency (in the form of "pardons, commutations, and reprieves"). Alaska Const. Art. III, § 21. As this Court has recognized, throughout history, clemency "has provided the 'fail safe' in our criminal justice system." *Herrera* v. *Collins*, 506 U.S. 390, 415 (1993). And one of the primary uses of the clemency power has been to provide relief for convicted individuals who present compelling evidence of their innocence. See *Judging Innocence* 120 (noting that nearly one-quarter of the individuals exonerated through DNA testing received pardons).

Because respondent has a constitutionally protected liberty interest in meaningful access to state postconviction proceedings and executive clemency proceedings, this Court need not decide whether respondent could pursue a freestanding actual-innocence claim as a matter of federal constitutional law (and whether respondent therefore has a concomitant liberty interest in meaningful access to those proceedings). Although respondent believes that he would be entitled to pursue an actual-innocence claim as a matter of federal law (and would

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[12] In addition, it appears that the Alaska Constitution would provide an independent "safety valve" mechanism by which a prisoner could challenge his conviction where a DNA test result clearly indicates the prisoner's innocence. See Pet. App. 89a.

therefore have a liberty interest in meaningful access to such proceedings), the Court left open that question as recently as three Terms ago, see *House*, 547 U.S. at 554-555, and it can do so again here. In any event, given the reality that, where a DNA test result is exculpatory, a prisoner can (and almost invariably does) obtain relief through state postconviction proceedings, clemency, or prosecutorial consent, see p. 23, *supra*, it will be the rare case in which such a prisoner would need to seek relief by means of a federal actual-innocence claim instead—and the Court can address the availability of such a claim when and if one is actually brought. In this case, the availability of other, well-established mechanisms through which respondent could obtain relief from his conviction based on a favorable DNA test result suffices to demonstrate that respondent's claim implicates a constitutionally protected liberty interest.

b. Respondent is entitled to access to the evidence for DNA testing at his own expense

i. The remaining question is whether the provision of access to the evidence is necessary in this case in order to afford sufficient process to protect respondent's liberty interest in meaningful access to mechanisms for postconviction relief. That question should be addressed, and resolved, under the familiar balancing test of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). Under that test, a court is required to consider, first, "the private interest that will be affected by the official action"; second, "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and third, "the Government's interest, including the function involved and the fiscal and administrative bur-

dens that the additional or substitute procedural requirement would entail." *Id.* at 335.

In this case, those factors tip decisively in favor of requiring Alaska to provide respondent with access to the evidence at issue. With regard to the first two factors, the analysis is so straight-forward as to hardly require exposition. As to the private interest affected by the official action, this Court has made clear that "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling." *Ake*, 470 U.S. at 78; see *Schlup* v. *Delo*, 513 U.S. 298, 321 (1995) (noting that "a prisoner retains an overriding interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated") (internal quotation marks omitted). That interest is obviously served by obtaining access to evidence for DNA testing, at least where (as here) that testing was not available in a comparable form at trial, because there have been "extraordinary scientific advance[s]" in DNA testing that "have the potential in certain instances to prove beyond *all* doubt whether the requesting person in fact committed the crime for which he was convicted and sentenced." *Harvey*, 285 F.3d at 310 (opinion of Luttig, J.). Indeed, given that Alaska, like many other States, requires near-absolute proof of innocence to obtain postconviction relief outside a strict limitations period (and further requires the evidence presented to be "new"), it is difficult to imagine any other way in which a prisoner ordinarily could hope to prevail in such proceedings.

As to the risk of an erroneous deprivation of that interest, Alaska's steadfast refusal to permit access to the evidence in this case clearly presents such a risk, in light of the proven ability of DNA testing to exonerate convicted individuals (even individuals who pleaded guilty,

confessed to the crime, or were convicted in the face of what appeared at the time to be overwhelming evidence of guilt). See pp. 3-4, *supra*. In this case, moreover, there are no meaningful procedural safeguards for respondent's interest, because the State has provided no statutory mechanism for obtaining access to the evidence for DNA testing.[13]

With regard to the State's interest in refusing to permit access to the evidence, the analysis is scarcely more complicated, because the State has articulated *no* valid interest for its refusal to permit access to evidence for DNA testing that would occur at respondent's own expense. In fact, in response to repeated questions at oral argument before the court of appeals as to why the State was refusing to permit access to the evidence, petitioners defiantly stated that they were not "willing or able" to answer those questions "at this time." See Tataboline Brandt, *Case Tests Alaska's DNA Policies*, Anchorage Daily News, Aug. 21, 2005 (recounting oral argument).

Insofar as petitioners belatedly attempt to identify any interest before this Court, they simply invoke a generic interest in the finality of criminal convictions. See,

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[13] To the extent that, in respondent's state postconviction proceedings, the Alaska Court of Appeals left open the possibility that the Alaska Constitution may provide a right to postconviction access to evidence, the resulting procedure would not meaningfully reduce the risk of an erroneous deprivation of the private interest in the accuracy of a criminal proceeding, because the court's proposed standard for that hypothetical right improperly focuses on the perceived strength of the evidence presented at trial, and would bar altogether prisoners whose convictions did not "rest[] primarily on eyewitness identification evidence." Pet. App. 111a. That standard could result in the erroneous deprivation of access to the evidence for prisoners, like respondent, for whom DNA testing could conclusively prove their innocence.

e.g., Pet. Br. 18, 50. The court of appeals, however, correctly refused to attach dispositive weight to that interest in this context. See Pet. App. 42a-43a. While the State has an undoubted interest in the finality of criminal convictions, the State's overall interests are served, not disserved, by allowing access to evidence for DNA testing in the class of cases in which such testing can provide *more* accurate and reliable evidence about the perpetrator's identity than was available at the time of conviction. Cf. *Herrera*, 506 U.S. at 403 (noting that, ordinarily, "the passage of time only diminishes the reliability of criminal adjudications"). Where DNA testing inculpates the prisoner, it will simply confirm the validity of the original conviction. But where DNA testing exculpates the prisoner, it will serve the State's "paramount interests" in "seeking justice" and "not obtaining convictions at all costs," Pet. App. 43a—and, in many cases, thanks to CODIS, it will allow the State to identify and pursue the true perpetrator of the original offense (and to prevent him from committing other offenses).[14] Notably, the amicus States recognize the exceptional importance of DNA testing in this regard, even if petitioners do not. See Br. of California et al. 2 (noting that "DNA evidence can be of central importance to postconviction litigation concerning actual innocence" and that "[t]he necessity for a meaningful opportunity to obtain postconviction DNA testing in appropriate cases is not in dispute") (internal quotation marks omitted).

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[14] That interest could still be served in this case, notwithstanding petitioners' longstanding refusal to provide access to the evidence for DNA testing, because there is no limitations period under Alaska law for felonious sexual assault or kidnapping. See Alaska Stat. § 12.10.010(a).

For its part, the United States contends (Br. 27 n.5) that the State has an interest in "avoiding indefinite relitigation by prisoners who have already exhausted their appeals and other postconviction relief." To the extent that asserted interest differs from petitioners', it is equally unavailing. It is questionable whether, in determining whether a claimant is entitled to additional process under the balancing test of *Mathews*, a court should consider the burden that the State faces from simply litigating the question whether additional process is due (as opposed to the burden from providing the process that the claimant seeks). But in any event, there is no reason to believe that the resulting burden will be a substantial one. In this case, of course, the State can alleviate any burden through the simple expedient of providing access to the evidence. And more broadly, notwithstanding the fact that it has been eight years since the first final federal decision recognizing a constitutional right of access to evidence, see *Godschalk* v. *Montgomery County Dist. Att'y's Office*, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001), no flood of litigation asserting such a right has resulted, not least because of the ready availability of statutory or consensual remedies. See p. 6 n.2, *supra*.[15] Because there is no valid countervailing state interest in refusing

[15] Our review of published and unpublished federal decisions has discovered only 22 cases in which constitutional access-to-evidence claims have been asserted in Section 1983 actions since *Godschalk*, including only one in the district in which *Godschalk* itself was decided. See *Ross* v. *Lehigh County Dist. Att'y's Office*, Civ. No. 07-2329, 2008 WL 5234411 (E.D. Pa. Dec. 15, 2008). In fact, there has been no flood of claims under statutory testing regimes either. For example, in Cook County, Illinois (the second-largest county in the Nation), only 12 applications for DNA testing were filed in the first three years after the Illinois testing statute took effect. See S. Rep. No. 315, 107th Cong., 2d Sess., Pt. 4(b)(1), at 12 (2002).

to provide respondent with access to the evidence in his case for DNA testing at his own expense, the provision of access is necessary as a matter of procedural due process.[16]

ii. The United States contends (Br. 15-16) that respondent's procedural due process claim is governed not by the familiar balancing test of *Mathews*, but rather by the "narrower" test of *Medina* v. *California*, 505 U.S. 437 (1992), which focuses on whether a challenged procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 445 (internal quotation marks omitted). That contention is unfounded and in any event irrelevant to the ultimate outcome here.

As a preliminary matter, it is doubtful that the *Medina* test applies in this case. This Court has not applied *Medina* in subsequent cases, and, in *Medina* itself, the Court indicated that its test applied only to challenges to "the validity of state procedural rules which * * * are part of the criminal process." 505 U.S. at 443. Here, respondent is not raising any challenge either to his conviction or to any aspect of the process by which he was convicted; instead, he is challenging a subsequent governmental decision to deny him access to the evidence by which he was convicted, for the purpose of engaging in testing that was unavailable at the time of his trial. This

[16] Because respondent has agreed to pay for his own DNA testing, petitioners have not asserted any state interest arising from the expense of providing for testing. The Court therefore need not consider whether the analysis would be different in a case in which a prisoner contends that the government is obligated to pay for DNA testing. That issue may arise only rarely, however, because the federal government and many States already provide funding for DNA testing for indigent prisoners. See, *e.g.*, 18 U.S.C. 3600(c)(3)(B); p. 6, *supra*.

is therefore not a case in which respondent is seeking micromanagement of criminal procedure under the guise of "due process." Cf. *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 53 (1993) (applying *Mathews*, not *Medina*, to the seizure of real property subject to civil forfeiture). Moreover, in *Medina*, the Court granted "substantial deference to the legislative judgment" at issue there, see 505 U.S. at 446, whereas this case involves no legislative judgment at all.

Even if the *Medina* test were to apply here, however, respondent would satisfy it. As noted above, the principal inquiry under *Medina* is whether a challenged procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 505 U.S. at 445 (internal quotation marks omitted). If this test were applied in an excessively literal fashion, respondent would concededly fail it, because there could be "no settled tradition" of granting access to evidence for DNA testing when such testing did not even exist until twenty years ago (and did not exist in its current form until even more recently). *Id.* at 446.

When "history and tradition [are] defined at the appropriate level of generality," however, the *Medina* test is satisfied. *Harvey*, 285 F.3d at 315 n.6 (opinion of Luttig, J.). That is because the failure to permit access to evidence for DNA testing offends the core objective of our criminal justice system: namely, that "the guilty be convicted and the innocent go free." *Herring* v. *New York*, 422 U.S. 853, 862 (1975); see, *e.g.*, *Portuondo* v. *Agard*, 529 U.S. 61, 73 (2000); *Berger* v. *United States*, 295 U.S. 78, 88 (1935). A necessary corollary of that principle is that the criminal justice system is centrally "concern[ed] about the injustice that results from the conviction of an innocent person." *Schlup*, 513 U.S. at

325. For that reason, clemency, a practice that is itself "deeply rooted in our Anglo-American tradition of law," has historically been available as "the 'fail-safe' in our criminal justice system," for situations in which "after-discovered evidence" demonstrates a convicted individual's innocence. *Herrera*, 506 U.S. at 411-412, 415. In light of the unprecedented ability of current DNA testing conclusively to establish innocence, the denial of access to evidence for DNA testing would contravene the fundamental (and long-established) truth-seeking objective of the criminal justice system.

In addition, while the focus of the *Medina* inquiry is on the existence of a tradition supporting the claimed entitlement, the Court indicated in *Medina* that it would also consider, first, whether the challenged procedure was consistent with "[c]ontemporary practice," 505 U.S. at 447, and second, whether it "transgresses any recognized principle of fundamental fairness in operation," *id.* at 448 (internal quotation marks omitted). Those considerations likewise counsel in respondent's favor. With regard to contemporary practice, some 44 States and the federal government have statutes providing for postconviction DNA testing; Alaska is one of only six States that have not yet enacted DNA testing statutes, and, as far as we are aware, is the only one of those States that has not conducted a single postconviction DNA test pursuant to court order or consent. See pp. 6-7, *supra*; cf. *Griffin*, 351 U.S. at 19 (noting that a State's procedure is a "misfit" where only a "few" States follow the same procedure). And with regard to fundamental fairness, the State's failure to articulate *any* valid interest for its failure to provide respondent access to evidence for DNA testing is conclusive on that score, in light of the fact that, by petitioners' own concession, a favorable test result would conclusively establish respondent's innocence.

Thus, under *Medina*, as well as *Mathews*, the State's refusal to permit access to the evidence contravenes procedural due process.

2. This Court's Access-To-Evidence Cases Support Respondent's Procedural Due Process Claim

a. The foregoing analysis is supported by this Court's cases concerning "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). In those cases—which sound in procedural due process, and which either explicitly or implicitly employ the balancing approach of *Mathews*, see, *e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 631 (2002)—the Court has recognized that state officials have broad obligations not simply to provide requested access to evidence to a criminal defendant, but to disclose that evidence as well. See, *e.g.*, *United States* v. *Bagley*, 473 U.S. 667 (1985); *United States* v. *Agurs*, 427 U.S. 97 (1976); *Giglio* v. *United States*, 405 U.S. 150 (1972).

The most prominent of the Court's access-to-evidence cases, of course, is *Brady* v. *Maryland*, 373 U.S. 83 (1963), in which the Court first held that the suppression of material exculpatory evidence violates a defendant's right to due process. In this case, the court of appeals relied on *Brady* in recognizing that respondent possessed a due process right to obtain postconviction access to evidence for DNA testing. See, *e.g.*, Pet. App. 16a.

Petitioners (Br. 36-38) and the United States (Br. 12-15) contend that the court of appeals thereby erred because *Brady*, by its terms, applies only to the failure to disclose evidence pretrial, not postconviction. If the court of appeals had held that the full range of *Brady* obligations applies across the board postconviction, as

well as pretrial, petitioners' contention would have some force, not least because it would undeniably be impractical to charge prosecutors in all circumstances with knowledge of materially exculpatory evidence that may come to light long after trial. See *Harvey*, 285 F.3d at 317 (opinion of Luttig, J.) (agreeing that "no one would contend that fairness, in the constitutional sense, requires a post-conviction right of access or a right to disclosure anything approaching in scope that which is required pre-trial").

The fairer reading of the court of appeals' opinion, however, is that, like other courts to have considered the issue, it relied on *Brady* not as controlling authority, but rather for "the due process principles that motivated *Brady*, including fundamental fairness [and] the prosecutor's obligation to do justice rather than simply obtain convictions." Pet. App. 23a (citing cases). Specifically, *Brady* and its progeny relied heavily on the foundational principle that the ultimate goal of the criminal justice system is to ensure not simply that a defendant is convicted, but that justice is done—and, *a fortiori*, that the government should not stand in the way of justice being done. See, *e.g.*, *Bagley*, 473 U.S. at 675 (noting that "[the] purpose [of the *Brady* line of cases] is * * * to ensure that a miscarriage of justice does not occur"); *Agurs*, 427 U.S. at 110-111 (explaining that the government has an "overriding interest that justice shall be done" and that the prosecutor "is the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer") (internal quotation marks omitted); *Brady*, 373 U.S. at 87 n.2 (quoting Solicitor General Sobeloff's remarks that the government's "chief business is not to achieve victory but to establish justice" and that the government "wins its point when justice is done in its courts") (internal quotation marks omitted).

Contrary to petitioners' contention (Br. 37), therefore, the rules of *Brady* and its progeny do not merely promote a "fair trial" as an end in itself. Rather, they promote a fair trial for the broader purpose of ensuring that the trial process performs its "truth-seeking function." *Agurs*, 427 U.S. at 104; cf. *Ruiz*, 536 U.S. at 631 (holding that *Brady* does not require disclosure of impeachment evidence where the plea agreement already required the government to provide "any information establishing the factual innocence of the defendant"). So too here, "the very same principle of elemental fairness that dictates pre-trial production of *all* potentially exculpatory evidence dictates post-trial production of th[e] infinitely narrower category of evidence" as to which DNA testing could prove innocence. *Harvey*, 285 F.3d at 317 (opinion of Luttig, J.) (emphasis added).[17]

b. Respondent's access-to-evidence claim is supported not only by the strand of cases in the *Brady* line, but also by the strand of cases that prohibit the State from *destroying* potentially or apparently exculpatory evidence in its possession. See *Arizona* v. *Youngblood*, 488 U.S. 51 (1988); *California* v. *Trombetta*, 467 U.S. 479 (1984). To be sure, those cases, like the cases in the *Brady* line, are not directly applicable here. Like the

[17] This case, moreover, differs from the *Brady* cases in two respects that further support the recognition of an obligation to permit access to the evidence here. First, whereas a trial prosecutor has an affirmative (and substantial) duty to learn of and disclose all exculpatory evidence in the State's possession under *Brady*, petitioners in this case are arbitrarily refusing to grant respondent's specific request for access to evidence whose existence is already known to all. Second, whereas the traditional remedy under *Brady* is vacatur of the underlying conviction, respondent in this case is seeking the more modest remedy of access to the evidence, with no burden to the State.

Brady cases, however, those cases rest on the fundamental principle that the goal of the criminal justice system is to "protect[] the innocent from erroneous conviction." *Trombetta*, 467 U.S. at 485. And where the government "withhold[s] from the convicted, *for no reason at all*, the very evidence that it used to deprive him of his liberty" and where "further tests of the evidence could * * * establish to a certainty whether he actually is factually innocent of the crime for which he was convicted," the denial of access to evidence comes "so perilously close to [bad faith] as not to be permitted." *Harvey*, 285 F.3d at 318 (opinion of Luttig, J.). In sum, this Court's access-to-evidence cases provide further support for the conclusion that procedural due process does not allow the State to refuse to permit access to the evidence here.

B. Respondent Is Entitled To Obtain Access To The Evidence As A Matter Of Substantive Due Process

Under the circumstances of this case, the failure to provide respondent with access to the evidence for DNA testing would constitute a breach not only of procedural due process, but of substantive due process as well.

1. This Court has repeatedly made clear that the "touchstone" of due process is "protection of the individual against arbitrary action of [the] government." *County of Sacramento* v. *Lewis*, 523 U.S. 833, 845-846 (1998) (internal quotation marks omitted). The doctrine of substantive due process protects against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective," and "the cognizable level of executive abuse of power" is "that which shocks the conscience." *Id.* at 846 (internal quotation marks omitted); see *Rochin* v. *California*, 342 U.S. 165, 172-173 (1952).

The State's decision deliberately to withhold access to the evidence in this case, in the face of respondent's request, rises to the level of conscience-shocking behavior. Because the State has offered no legitimate explanation for its refusal to grant access to the evidence, that refusal is arbitrary—indeed, shockingly so, in light of the potential of that evidence to clear respondent completely of the crime of which he was convicted (and to identify the true perpetrator of the original offense). See *Harvey*, 285 F.3d at 319 (opinion of Luttig, J.) (noting "the patent arbitrariness of denying access to such evidence in the absence of any governmental interest whatsoever in the withholding of such"). Such conduct "offend[s] the community's sense of fair play and decency," *Rochin*, 342 U.S. at 173, and as such cannot be reconciled with the requirements of due process. And to the extent that history and tradition are relevant to (if not dispositive of) the substantive due process inquiry, see, *e.g.*, *Lewis*, 523 U.S. at 856 (Kennedy, J., concurring), the longstanding principle that the core objective of our criminal justice system is to ensure that "the guilty be convicted and the innocent go free," *Herring*, 422 U.S. at 862, supports recognition of a substantive due process right of access to evidence for DNA testing. See pp. 37-38, *supra*.[18]

[18] Although a State ordinarily bears no affirmative obligation to make postconviction disclosures concerning the evidence as a matter of procedural due process, see pp. 39-40, *supra*, there may be circumstances in which the failure to make such disclosures would be sufficiently arbitrary to raise due process concerns. If, for example, the State had actually conducted STR testing on the evidence in this case post-trial and the results had conclusively proven respondent's innocence, similar due process considerations to those presented here would surely mandate the disclosure of those results.

2. Citing *Washington* v. *Glucksberg*, 521 U.S. 702 (1997), the United States contends that, "where the democratic process is already actively addressing the subject," this Court should be reluctant to recognize the existence of a substantive due process right. Br. 8. In that case, the plaintiffs were asking this Court to recognize a due process right to engage in assisted suicide—a practice that was prohibited by 44 States, see 521 U.S. at 710 n.8, and that "the Anglo-American common-law tradition ha[d] punished or otherwise disapproved of" for "over 700 years," *id.* at 711. Although States were "currently engaged in serious, thoughtful examinations of physician-assisted suicide and other similar issues," the Court noted that States had "not retreated from th[e] prohibition" of assisted suicide. *Id.* at 719. The Court proceeded to note, moreover, that the State had a number of "unquestionably important and legitimate" interests in prohibiting assisted suicide, *id.* at 735, ranging from the State's interest in protecting life itself to its interest in protecting the ill, elderly, and disabled from abuse and neglect, see *id.* at 728-735.

This case could not be more different from *Glucksberg*. Unlike the plaintiffs in *Glucksberg*, respondent is not asking the Court to invalidate a statutory provision that reflects the judgment of a state legislature; instead, he is merely challenging an executive decision to deny him access to evidence for DNA testing. More generally, whereas 44 States had *prohibited* the practice that was the basis of the claim in *Glucksberg*, 44 States have adopted statutes providing for access of the very kind that respondent seeks as a matter of due process—and have done so in rapid response to the watershed technological advance that DNA testing in general (and STR testing in particular) represents. Unlike in *Glucksberg*, therefore, a ruling in respondent's favor would not re-

quire that the Court effectively overturn a large number of state statutes—indeed, insofar as no State *prohibits* the provision of access to evidence for DNA testing, the Court would not have to overturn any statutes at all. And unlike in *Glucksberg*, the State articulates no valid interest whatsoever in support of its refusal to grant respondent access to the evidence in his case.

While this Court rightly exercises the "utmost care" in deciding whether to recognize a right as a matter of substantive due process, *Glucksberg*, 521 U.S. at 720 (internal quotation marks omitted), the United States articulates no valid justification as to why this Court should wait before addressing the issue here. And it is worth remembering that the practical effect of doing so would be to deny relief both to respondent, who has no alternative avenue for obtaining access to the evidence in his case for potentially exculpatory DNA testing in the face of the State's arbitrary refusal to provide it, and to any other individuals who are similarly situated in the Nation's prisons and on the Nation's death rows. The Court should not countenance such paradigmatically conscience-shocking behavior.

C. Whatever The Precise Contours Of A Due Process Right Of Access To Evidence For DNA Testing, Respondent Is Entitled To Obtain Access

For the reasons discussed above, petitioners' conduct in this case—*viz.*, their refusal to permit access to the evidence used at trial for DNA testing at respondent's own expense, in the absence of a valid justification for doing so and despite their recognition that a favorable DNA test would conclusively prove respondent's innocence—violates due process. The Court need not resolve for all time the precise contours of a due process right of access to evidence for DNA testing in order to recognize that respondent was deprived of due process under the

circumstances presented here. To the extent that petitioners and their amici contend that even *respondent* is not entitled to access to the evidence for DNA testing, those contentions are unavailing.

1. The court of appeals correctly held that, under the circumstances of this case, petitioners' conduct violated due process. See Pet. App. 44a. In particular, the court of appeals properly recognized that the most important component of a claim of a right of access to evidence for DNA testing—and the most important limit on the scope of such a right—is that the prisoner must show that there is at least some degree of probability that a favorable DNA test result would cast doubt on his guilt. See *id.* at 26a-28a. Looking by analogy to the materiality standard of *Brady*, the court of appeals concluded that the applicable substantive standard for access-to-evidence claims is "no higher than a *reasonable probability* that, if exculpatory DNA evidence were disclosed to [respondent], he could prevail in an action for post-conviction relief." *Id.* at 28a (emphasis added).

In respondent's view, that standard—which effectively tracks the standard in the federal Innocence Protection Act, see 18 U.S.C. 3600(a)(8)(B), and numerous state statutes, see p. 6, *supra*—is appropriate. Because the relief ordered on an access-to-evidence claim is merely access to the evidence for DNA testing, such relief in no way burdens or prejudices the State—and, *a fortiori*, it seems reasonable to require a prisoner to make a showing comparable to the showing that would enable a prisoner to vacate his conviction *entirely* under *Brady*. See p. 41 n.17, *supra*.

Ultimately, however, it is not necessary for the Court to articulate the exact degree of probability that is required in order to state a valid access-to-evidence claim, because, as the court of appeals noted, "[w]herever the

bar is, [respondent] crosses it." Pet. App. 27a. That is particularly true in light of petitioners' concession at the certiorari stage—after years of litigating the issue—that a favorable test result "would *conclusively* establish [respondent's] innocence." Reply Br. 8 (emphasis added). This case therefore does not present the issue whether due process would also require access to evidence for DNA testing where an exculpatory DNA test result would cast some lesser degree of doubt on the prisoner's guilt.[19]

2. Petitioners and their amici make two primary contentions as to why respondent is not entitled to obtain access to the evidence for DNA testing as a matter of due process. Both of those contentions lack merit.

a. Both petitioners and the United States suggest that, if this Court were to hold that due process requires a State to provide access to the evidence for DNA testing in some circumstances, it should do so only where, based on an assessment of the apparent strength of the evidence presented at trial, a court concludes that the results of such testing are likely to be exculpatory. See Pet. Br. 36 (stating that "there has never been any doubt that [respondent] was the perpetrator"); U.S. Br. 26 (asserting that "it appears quite likely that further DNA testing would only provide further evidence of respon-

[19] It is important to note, however, that *any* plausible formulation of the substantive standard for access-to-evidence claims would have the effect of ensuring that such claims would not be brought in the overwhelming majority of cases. Only a small percentage of felony cases are prosecuted with forensic evidence—and only a small percentage of those cases, in turn, are suitable for DNA analysis. See Department of Justice, *Census of Publicly Funded Crime Laboratories, 2002*, at 6 (2006) (noting that only 2% of forensic cases involve DNA testing).

dent's guilt"). By definition, however, every prisoner who is seeking access to evidence for DNA testing post-trial will have been found guilty on the basis of proof beyond a reasonable doubt—and it would be peculiar to afford that access based on a court's assessment of the degree of residual doubt concerning the prisoner's guilt. Cf. *Oregon* v. *Guzek*, 546 U.S. 517, 523 (2006) (rejecting claim that the Eighth Amendment permits a capital defendant to introduce additional evidence pertaining to residual doubt about guilt at sentencing).

As discussed above, moreover, DNA testing has exonerated many individuals who were convicted in the face of seemingly overwhelming evidence of guilt. See pp. 3-4, *supra*. Indeed, in nearly half of cases resulting in exonerations, a court had previously commented on the exoneree's likely guilt, and, in 10% of those cases, a court had characterized the evidence of guilt as "overwhelming." *Judging Innocence* 107 tbl. 8, 109. If the availability of a right of access were contingent on a court's assessment of the apparent strength of the evidence at trial, therefore, it would result in the arbitrary denial of that right to a significant percentage of actually innocent defendants.

Presumably for that reason, of the 44 States with DNA testing statutes, only three even arguably allow a court to consider the probability that a favorable test result *would actually occur* in determining whether to grant access. See U.S. Br. 22-23. All of the other States and the federal government instead frame the standard in terms of the probability that a favorable test result *would cast doubt on the prisoner's guilt*. See, *e.g.*, 18 U.S.C. 3600(a)(8) (requiring applicant to show that "[t]he proposed DNA testing * * * may produce new material evidence that would * * * raise a reasonable probability that the applicant did not commit the of-

fense"); cf. U.S. Br. 26 (conceding that "the federal DNA statute does not look to whether the results of [the] requested testing would likely be favorable or unfavorable to the applicant"). For the same reason, the inquiry under the Due Process Clause should focus on the germaneness of a favorable test result. And where, as here, the prisoner was convicted of rape and seeks to test a condom that was used in the rape, that germaneness standard is plainly (and, in this case, concededly) met.

b. Petitioners also suggest (Br. 52) that, if this Court were to recognize that their conduct in this case violated due process, it would necessarily invalidate limitations on postconviction access that Congress and many state legislatures have incorporated into their DNA testing statutes. That suggestion, too, is unfounded.

As a preliminary matter, respondent is not asking this Court to invalidate any restriction that Alaska's legislature has placed on postconviction DNA testing; to the contrary, it is the *absence* of any statutory vehicle to override petitioners' arbitrary decision to bar access that gives rise to his claim. Because no State has a statute *prohibiting* the provision of access to evidence for DNA testing, a ruling in respondent's favor would not require the invalidation of any statute. See pp. 44-45, *supra*.

More broadly, respondent's claim does not implicate any of the "reasonable parameters and limitations" on the right of access found in DNA testing statutes. Br. of California et al. 13. Petitioners themselves contend that, should the Court agree that there is a due process right of access to evidence for DNA testing, the federal Innocence Protection Act, 18 U.S.C. 3600, "serves as a paradigm for the imposition of reasonable limits on that right." Br. 53. And as petitioners (Br. 51) and the United States (Br. 22) note, the Innocence Protection Act served as a model for many of the state statutes that

are currently in effect. Notably, however, petitioners and the United States fail to identify a single one of the Innocence Protection Act's requirements that respondent has not satisfied (except for the requirement that the applicant assert "under penalty of perjury" that he is actually innocent of the offense, 18 U.S.C. 3600(a)(1)—a requirement that respondent simply has not *had* to fulfill to date in this litigation).[20]

The United States suggests (Br. 24-25) that respondent should not be entitled to access to the evidence because he forwent RFLP testing at trial. It is undisputed, however, that the STR testing that respondent now seeks was unavailable at the time of trial and represents a substantial advance over RFLP, particularly in light of the development of CODIS. See pp. 4-5, *supra*. Indeed, for that reason, respondent would satisfy any relevant requirements of the Innocence Protection Act. See 18 U.S.C. 3600(a)(3)(A)(i) (permitting testing of evidence that was not previously subject to testing where the applicant did not "knowingly and voluntarily waive the right to request DNA testing" after the Innocence Protection Act's enactment); 18 U.S.C. 3600(a)(3)(B) (permitting retesting of evidence where the applicant wishes to use a testing method that is "substantially more pro-

[20] The United States faults respondent (Br. 26) for filing an affidavit in the state postconviction proceedings that was "oddly worded and not a ringing affirmation of his innocence." Even if that "odd[] word[ing]" could somehow be construed as tantamount to an admission of guilt (notwithstanding respondent's assertion in the affidavit that he has "always maintained [his] innocence," J.A. 226), or if respondent's statements to the parole board were taken into account, respondent would still satisfy the requirements of the Innocence Protection Act, which permits an applicant who has previously "admitted" his guilt to seek DNA testing upon asserting his innocence in the prescribed manner. See 18 U.S.C. 3600(a)(1) and (6).

bative" than the prior one). And to the extent that United States relies on respondent's failure to seek RFLP testing at trial as evidence that respondent "engaged in strategic behavior that does not appear to be consistent with actual innocence" (Br. 25 n.3), that contention is belied by the evidence that respondent wanted to pursue further testing but was prevented from doing so by defense counsel. See p. 9, *supra*. In sum, because respondent could satisfy any reasonable requirement for a constitutional access-to-evidence claim, he is entitled to relief.

Finally, because Alaska is one of the few jurisdictions that do not have DNA testing statutes, the Court need not address any issue concerning the interplay between statutory rights of access and any constitutional right of access. Specifically, the Court need not consider whether a prisoner is required to exhaust statutory remedies before proceeding with a federal constitutional claim; whether any determinations made in statutory proceedings would have preclusive effect in subsequent federal proceedings; and whether (and, if so, how) the existence of statutory remedies informs the analysis of the federal claim. All that the Court need hold in this case is that Alaska's refusal to permit access to the evidence, in the absence of any statutory mechanism for obtaining it, offends due process.

* * * * *

One should not lose sight of the fact that, as in many of the Court's cases involving issues of great constitutional moment, this case ultimately concerns the efforts of one person: a man who has spent more than a decade fighting for access to the evidence for a simple DNA test that could prove his innocence, as similar tests have done for scores of other individuals who have been wrongfully

convicted. Although the State has belatedly conceded that a favorable DNA test result would in fact prove respondent's innocence, it continues steadfastly and arbitrarily to deny him the opportunity to obtain testing. One need not believe in a "living Constitution" to realize the inequity of that result. Instead, one need only apply this Court's well-established due process jurisprudence to the novel factual context resulting from recent transformational developments in forensic science. That jurisprudence dictates affording respondent the opportunity, at no cost to the State, to engage in DNA testing that could conclusively establish his innocence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KANNON K. SHANMUGAM
ANNA-ROSE MATHIESON
JAYNIE R. LILLEY
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005

ROBERT C. BUNDY
DAVID T. MCGEE
DORSEY & WHITNEY LLP
1031 West Fourth Avenue
Anchorage, AK 99501

RANDALL S. CAVANAUGH
KALAMARIDES & LAMBERT
711 H Street, Suite 450
Anchorage, AK 99501

PETER J. NEUFELD
BARRY C. SCHECK
NINA R. MORRISON
DAVID LOFTIS
COLIN P. STARGER
THE INNOCENCE PROJECT
100 Fifth Avenue, 3rd Floor
New York, NY 10011
(212) 364-5340

DAVID T. GOLDBERG
DONAHUE & GOLDBERG LLP
99 Hudson Street, 8th Floor
New York, NY 10013

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