NO. 08-6

IN THE

Supreme Court of the United States

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

v.

WILLIAM G. OSBORNE,
Respondent,

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

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, RUTHERFORD INSTITUTE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, RUTHERFORD INSTITUTE, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

The American Civil Liberties Union, Rutherford Institute, and National Association of Criminal Defense Lawyers respectfully submit this brief as *amici curiae* in support of the respondent.[1]

INTEREST OF *AMICI CURIAE*

Amici have a substantial interest in the resolution of the questions presented in this case.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, non-partisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has appeared before this Court in numerous cases involving the scope of the Constitution's protection for persons convicted of criminal offenses.

The Rutherford Institute is an international civil liberties and human rights organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have filed with the Clerk of the Court blanket letters of consent to briefs of *amicus curiae*.

charge to individuals whose civil liberties are threatened or violated. The Institute also strives to educate the public about constitutional and human rights issues. During its 26-year history, attorneys affiliated with the Institute have represented numerous parties in state and federal courts, as well as before the U.S. Supreme Court. The Rutherford Institute has also filed *amicus curiae* briefs in cases concerning the criminal justice system and its effects on the rights of those accused with criminal offenses.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of more than 11,000 attorneys, with an additional 28,000 affiliate members in every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL frequently files briefs before this Court in cases concerning the constitutional safeguards in the criminal justice system.

SUMMARY OF ARGUMENT

If the Constitution's protection of individual liberty means anything, it must mean that a state cannot continue to detain someone who conclusively proves through a DNA test that he is innocent of the

crime that is the basis for his incarceration. A jury's determination of guilt rests on the evidence that was before it. That jury determination cannot, and does not, extinguish a person's fundamental liberty interest in securing his release based on new evidence that conclusively proves his innocence.

This Court has twice assumed that a person who can make an extraordinarily high showing of his actual innocence states a constitutional claim. When a person can conclusively prove his innocence, that high threshold is satisfied. And whether or not other forms of evidence could satisfy that standard, modern DNA evidence unquestionably can.

When a person conclusively establishes his innocence through a DNA test, there is no possible legitimate state interest in continuing to detain him. Because of the unique reliability of DNA testing, there can be no concern that this second determination may be less reliable than the first. And a state has no finality interest in a conviction that has been conclusively shown to be inaccurate. The continued imprisonment of a person who has conclusively proven his innocence through DNA testing therefore violates Due Process under any potentially applicable standard. It constitutes an arbitrary abridgement of liberty; it shocks the conscience; and it violates the fundamental principle of justice that the innocent should be free.

Due Process also guarantees access to the DNA evidence necessary to establish an actual innocence claim. The same fairness and truth-seeking principles that require pre-trial disclosure of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83

(1963), also require the government to honor a specific post-trial request for DNA evidence that has the potential to establish actual innocence. DNA evidence is uniquely capable of proving an actual innocence claim; there is no source for the evidence other than the government; and the government has no legitimate interest in denying access to evidence that may conclusively prove that a person has been imprisoned for an offense he did not commit.

ARGUMENT

I. THE DUE PROCESS CLAUSE PROHIBITS THE CONTINUED DETENTION OF A PERSON WHO CONCLUSIVELY ESTABLISHES HIS INNOCENCE THROUGH A DNA TEST

Petitioners argue that a person convicted of a crime after a fair trial cannot assert a freestanding claim of actual innocence under the Constitution. *See* Petr. Br. 15. Based on that premise, petitioners argue that there can be no right of access to obtain evidence to prove an actual innocence claim. *Id.* Petitioners' assertion that an actual innocence claim is never cognizable under the Constitution is mistaken. When a person can conclusively establish his innocence through DNA testing, the Constitution prohibits his continued detention. If the Constitution's protection of liberty means anything, it must mean that a state presented with conclusive DNA evidence of a person's innocence may not continue to detain that person for a crime he did not commit.

A. A Person Convicted Of An Offense Has A Powerful Liberty Interest In Securing His Release Based On New Evidence That Conclusively Establishes His Innocence

1. The Due Process Clause prohibits a state from convicting and punishing a person without adequate evidence of guilt. *Thompson v. Louisville*, 362 U.S. 199, 206 (1960). In *Jackson v. Virginia*, 443 U.S. 307, 316, 321 (1979), the Court clarified that the evidence must be sufficient to support a finding of guilt beyond a reasonable doubt. To ensure that this standard is satisfied, a "federal court has a duty to assess the historic facts" of a case and determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 318, 319 (emphasis deleted).

Thompson and *Jackson* establish that the Due Process Clause is concerned not only with the procedures used to determine a person's guilt, but also with whether the evidence actually supports a finding of guilt. When the evidence is insufficient to establish a person's guilt, the Due Process Clause prohibits a state from depriving that person of his liberty.

2. The Constitution's protection for persons who are innocent of wrongdoing does not vanish simply because a person has received a fair trial and the evidence at trial is sufficient to support a finding of guilt. After conviction, evidence may come to light that conclusively exonerates that person. Such a

person retains an undeniably powerful liberty interest in securing his freedom based on that new evidence.

After a trial and conviction, a person is no longer entitled to the freedom that preceded his conviction. And there is much the state can do in confining him that requires no further justification. *Meachum v. Fano*, 427 U.S. 215, 225 (1976). Even after conviction, however, a person retains those liberty interests that are not by their nature extinguished by the jury's determination. *See Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (convicted person has liberty interest in avoiding confinement in a mental institution); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (convicted person has liberty interest in avoiding administration of psychotropic drugs); *cf. Panetti v. Quarterman*, 127 S. Ct. 2842, 2847-48 (2007) (determination of competency to stand trial does not foreclose a prisoner from establishing he is incompetent to be executed because of his present mental condition).

The individual's interest in securing freedom based on new evidence that conclusively establishes innocence ranks at the top of such residual liberty interests. A jury's determination of guilt is based on the evidence that is submitted to it. That adjudication does not remotely suggest that it would be consistent with Due Process to continue to detain a person after he has conclusively demonstrated through new evidence that he is actually innocent of the crime.

Indeed, a jury determination of guilt has never categorically barred a person from seeking to secure

his liberty based on evidence that was not available at the time of trial. Throughout history, the practice of the federal government and of the states has been to leave some avenue open for a defendant to file a motion for a new trial based on new evidence that undermines the jury's determination. *See Herrera v. Collins*, 506 U.S. 390, 407-11 (1993). That practice reflects the longstanding understanding that, at least in some circumstances, a jury determination of guilt cannot justify a continuing deprivation of liberty when new evidence establishes that an innocent person has been detained for a crime he did not commit.

Thus, even when a jury determination of guilt is supported by the evidence at trial, the individual "retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated." *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (plurality opinion); *see Harvey v. Horan*, 285 F.3d 298, 313 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc) ("[O]ne retains, even after conviction and sentence . . . a protected liberty interest to pursue his freedom from confinement.").

B. The Court Has Assumed That A Person Can State A Constitutional Claim Based On Actual Innocence

This Court has twice assumed that a person who can establish his actual innocence states a constitutional claim. In *Herrera*, the Court "assumed" that a showing of actual innocence "would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue

open to process such a claim." 506 U.S. at 417. Similarly, in *House v. Bell*, 547 U.S. 518, 554 (2006), the Court again assumed the viability of a free-standing, actual innocence claim.

In those two cases, the Court also addressed the standard that would apply to an actual innocence claim. In *Herrera*, the Court announced that a person would have to make a "truly persuasive" and "extraordinarily high" threshold showing of his actual innocence. 506 U.S. at 417. In *House*, the Court stated that a freestanding actual innocence claim would require "more convincing proof of innocence" than the "gateway" standard of *Schlup v. Delo*, 513 U.S. 298, 327 (1995), which permits the filing of a successive habeas petition that would otherwise be procedurally barred upon a showing that, "in light of new evidence, it is more likely than not that no reasonable juror would have found [the individual] guilty beyond a reasonable doubt." *House*, 547 U.S. at 536-37 (citing *Schlup*, 513 U.S. at 327).

The Court rested the need for this high threshold on its concern that actual innocence claims, if not carefully cabined, could adversely affect the state's interests in the accuracy and finality of its convictions. The Court noted that a second trial might be more unreliable than the first in many cases because memories fade and witnesses may become unavailable. *Herrera*, 506 U.S. at 403. And it noted the tension between a low threshold for actual innocence claims and the finality interests expressed in the traditional rule limiting the time period for filing new trial motions. *Id.* at 408-11.

The high threshold contemplated by *Herrera* and *House* could be framed in a number of different ways. For example, Justice White formulated the standard as one requiring proof that "based on proffered newly discovered evidence and the entire record before the jury[,] . . . no rational trier of fact could find proof of guilt beyond a reasonable doubt." *Herrera*, 506 U.S. at 429 (White, J., concurring in the judgment) (internal quotation marks omitted). The Ninth Circuit requires a petitioner to "affirmatively prove that he is probably innocent." *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (citing *Herrera*, 506 U.S. at 442-44 (Blackmun, J., dissenting)). And, in the Eighth Circuit, a person must introduce "clear and convincing evidence" that "unquestionably establish[es] the petitioner's innocence." *Cornell v. Nix*, 119 F.3d 1329, 1335 (8th Cir. 1997).

Just like *Herrera* and *House*, this case does not require the Court to resolve precisely what standard must be met in order to raise an "actual innocence" claim. Under any plausible formulation, the standard would be satisfied by proof that new evidence conclusively exonerates a person convicted of an offense. And regardless of whether other evidence could satisfy that standard, DNA testing unquestionably can. Indeed, petitioners have conceded that a favorable DNA test in this case would conclusively establish respondent's innocence. Cert. Reply Br. 8.

C. When New DNA Conclusively Establishes A Person's Innocence, His Continued Detention Violates Due Process

Similarly, there is no need in this case for the Court to decide whether evidence other than DNA evidence could satisfy the standard contemplated by *Herrera* and *House* for actual innocence claims. The Court should hold, however, that where new DNA testing conclusively establishes a person's innocence the person's continued detention violates Due Process. A person who makes that showing has an overpowering liberty interest in securing his release, and there is no possible government justification for detaining him. Under any potentially applicable standard, his continued detention would constitute a core violation of Due Process.

1. Short Tandem Repeat (STR) DNA technology can "distinguish between any two individuals on the planet," except identical twins. *Harvey*, 285 F.3d at 304-05 (Luttig, J.). For that reason, new DNA technology can "render[] it literally possible to confirm guilt or innocence beyond any question whatsoever." *Id*. at 305.

In that respect, modern DNA testing is fundamentally different from other forms of evidence. While other evidence, such as the testimony of witnesses, can lose reliability over time, "DNA evidence is uniquely probative and timeless if preserved and tested properly." Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1647 (2008) ("*Claiming Innocence*") (internal quotation marks omitted).

These are "no ordinary developments, even for science." *Harvey*, 285 F.3d at 305 (Luttig, J.). "And neither can they be treated as ordinary developments for law." *Id.* Because an authoritative DNA test can conclusively demonstrate innocence, the concern that retrying a case years after the crime will be less accurate than the first trial is simply not implicated. Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 595-96 (2002). That concern, therefore, cannot possibly justify detaining someone who has been conclusively exonerated by a DNA test.

2. Nor does a concern for "finality" for its own sake. Although the state has a strong interest in a final, *reliable* conviction, it has no interest in preserving a conviction that has been conclusively shown to be inaccurate through an authoritative DNA test. The state's interest, after all, "is not that it shall win a case, but that justice shall be done." *See Berger v. United States*, 295 U.S. 78, 87 (1935).

The states themselves have recognized that their general interest in finality does not justify detaining a person who is conclusively exonerated by a DNA test. An overwhelming number of states have enacted statutes that except from their traditional statutes of limitations motions based on new DNA evidence. *Claiming Innocence*, 92 Minn. L. Rev. at 1675. Other states "excuse late post-conviction filings based on evidence of innocence" or permit filings based on newly discovered evidence of innocence "at any time." *Id.* at 1674. According to one source, at most three states apply their traditional statutes of limitations to motions based on new DNA evidence.

Id. at 1675. And respondent's research indicates that there is only one state that fails to provide any mechanism by which an individual may seek relief based on new evidence, even if the traditional statute of limitations has run. *See* Resp. Br. 29 & n.11. Congress similarly has enacted legislation that exempts innocence claims based on DNA evidence from the limitations period for new trial motions. *See* 18 U.S.C. § 3600(g). This virtual consensus at the state and federal level confirms that finality interests cannot possibly justify detaining someone who can conclusively establish his innocence through a DNA test.

3. Because the states lack any interest in detaining a person who can conclusively establish his innocence through DNA testing, the continued detention of such a person violates Due Process under any potentially applicable standard. It amounts to an "arbitrary" abridgement of the "[f]reedom from bodily restraint" that "has always been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 78-79 (1992). It "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (setting forth standard); *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998) (applying *Rochin* standard). And it offends a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Medina v. California*, 505 U.S. 437, 445 (1992): that "the innocent go free," *Herring v. New York*, 422 U.S. 853, 862 (1975). If anything, that understates the matter. When a person convicted of a crime has proven to a scientific certainty that he did not commit it, no reasonable system of justice

would countenance any possibility other than his immediate release.

4. The Solicitor General contends that the Court has assumed only that an actual innocence claim is cognizable in capital cases, and that there is no basis for recognizing such a claim in a non-capital case. But while capital defendants raised actual innocence claims in *Herrera* and *House,* there is no basis for drawing a distinction between the two on this core liberty issue.

The text of the Due Process Clause protects against deprivations of both "life" and "liberty" without Due Process. "Just as the capital prisoner continues to possess an interest in his life because he is still alive, so also does the noncapital prisoner continue to have a liberty interest in his freedom, at least for those days that remain to be served on his sentence." *Harvey*, 285 F.3d at 314 (Luttig, J.). And just as a showing of actual innocence based on a conclusive DNA test makes it "arbitrary," "shock[ing]" to "the conscience," and inconsistent with a "fundamental" "principle of justice" to execute a person, continuing to incarcerate a conclusively innocent person deeply offends those Due Process standards.

II. THE DUE PROCESS CLAUSE ESTABLISHES A RIGHT OF ACCESS TO DNA EVIDENCE TO PROVE AN ACTUAL INNOCENCE CLAIM

Because a person who can conclusively establish his innocence based on DNA evidence has a right to bring an actual innocence claim, he also has a corresponding Due Process right of access to DNA evidence in the government's exclusive possession that

would allow him to establish that claim. That right of access is firmly grounded in the Due Process principles underlying the Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963).[2]

A. The Due Process Principles Underlying *Brady* Guarantee A Right Of Access To DNA Evidence

In *Brady,* the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court subsequently held that the government has a duty to disclose material exculpatory evidence even when there is no defense request. *United States v. Agurs*, 427 U.S. 97, 103-04 (1976).

The right of access at issue here is premised on a specific request for identified DNA evidence that could prove actual innocence. There is no claim in this case that a prosecutor who has obtained a conviction has an ongoing post-conviction duty to keep apprised of any and all new evidence that might support an actual innocence claim, or to turn such evidence over without a request. *See* U.S. Br. 14. However, the principles underlying *Brady* compel the government to honor the limited right of access respondent seeks here. When a person asserting his

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[2] As respondent explains, there is also a right of access in order to pursue state law clemency and state law new trial motions. *See* Resp. Br. 29-31. This brief addresses only the right of access to pursue an actual innocence claim based on the federal constitution.

innocence makes a request for specific DNA evidence and that evidence could conclusively prove his actual innocence, the Due Process principles underlying *Brady* preclude the government from simply withholding it. *See Agurs*, 427 U.S. at 106.[3]

As explained in *Brady* and subsequent cases, *Brady*'s holding rests on three underlying Due Process principles. First, it is "unfair" for the government to withhold from the accused exculpatory evidence that is in the government's possession. *Brady*, 373 U.S. at 87. Second, the government's disclosure of exculpatory evidence to the accused is necessary to "protect[] the innocent from erroneous conviction." *California v. Trombetta*, 467 U.S. 479, 485 (1984). And third, disclosure of exculpatory evidence reflects that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done." *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

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[3] *Amici* believe that when a prosecutor has actual knowledge that a DNA test conclusively establishes a person's innocence, Due Process would also require the prosecutor to disclose that evidence even absent a request. *See Agurs*, 427 U.S. at 107; *see also Warney v. City of Rochester*, 536 F. Supp. 2d 285, 289-97 (W.D.N.Y. 2008) (denying prosecutors' motion to dismiss a former inmate's suit alleging that prosecutors withheld the results of an exculpatory DNA test for a significant period of time even though the "the evidence was obviously exculpatory" and "undeniably pointed toward [the inmate's] innocence"). Whatever the precise scope of that duty, it ought to apply as well to other potentially conclusive evidence of innocence—such as a videotape of someone else committing the crime. Those issues, however, are not presented by this case.

Because *Brady* addresses the government's obligations to disclose exculpatory evidence before trial, its holding does not directly apply here. But the fundamental fairness and truth-seeking imperatives that underlie *Brady* require recognition of a post-trial right of access to DNA evidence that has the potential to conclusively prove an actual innocence claim.

It is almost self-evident that withholding DNA evidence that can prove an actual innocence claim is "unfair" to the person seeking to prove that claim. *Brady*, 373 U.S. at 87. As already discussed, DNA evidence is uniquely capable of proving such a claim. Indeed, without DNA evidence, it may be nearly impossible to satisfy the high showing that is necessary to establish an actual innocence claim. Kreimer & Rudovsky, *supra*, at 590. Moreover, a person seeking to prove a claim through DNA evidence is entirely dependent on the government, because only the government will have access to that evidence. *Id*. at 565. Accordingly, when a person seeks access to DNA evidence to prove an actual innocence claim, withholding that evidence is fundamentally unfair.

A right of access to DNA evidence is also necessary to "protect[] the innocent from erroneous conviction." *Trombetta*, 467 U.S. at 485. Unlike a person who seeks access to exculpatory evidence before trial, a person who seeks DNA evidence to prove an actual innocence claim is not presumed to be innocent. But the many cases in which modern DNA evidence has established the actual innocence of persons convicted of crimes attests to the fallibility of convictions that were secured without it. *See* Innocence Project, Facts of Post-Conviction DNA Exon-

erations, *at* http://www.innocenceproject.org/Content/351.php (last visited Jan. 29, 2009) ("Innocence Project Facts") (so far, 232 people have been exonerated through post-conviction testing of DNA evidence). And the widespread practice of the state and federal governments in providing access to DNA evidence proclaims their own understanding that such access is indispensable to ensuring the protection of the innocent from an erroneous conviction.

Finally, a right of access to DNA evidence that could prove an actual innocence claim serves the government's goal of seeing that "justice shall be done." *Kyles*, 514 U.S at 430 (quoting *Berger*, 295 U.S. at 88). If the DNA evidence "exonerates the defendant, then the goal of not allowing an innocent person to stand convicted is served." *Davi v. Class*, 609 N.W.2d 107, 113 (S.D. 2000). At the same time, if the evidence incriminates the defendant, then the reliability of the conviction becomes that much more certain. *Id*. Either result furthers the government's overriding interests in "see[ing] that, so far as possible, truth emerges." *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in the judgment). Indeed, when a DNA test could conclusively prove a person's innocence, it is hard to imagine why any public servant would have any interest at all in withholding that evidence.

Thus, "[a]t least where the government holds previously-produced forensic evidence, the testing of which concededly could prove beyond any doubt that the defendant did not commit the crime for which he was convicted, the very same principle of elemental fairness that dictates pre-trial production of all potentially exculpatory evidence dictates post-trial

production of this infinitely narrower category of evidence." *Harvey*, 285 F.3d at 317 (Luttig, J.). "And it does so out of recognition of the same systemic interests in fairness and ultimate truth." *Id.*[4]

B. Petitioners' Proposed Conditions On Access Are Impermissible

Relying on the federal DNA statute, petitioners contend that a state may permissibly establish as conditions on DNA access that a person formally declare his innocence and that he establish the materiality of new DNA testing. Petr. Br. 53 (citing 18 U.S.C. § 3600(a)(1), (5)-(7)). The court of appeals in this case, however, determined that respondent satisfied both of those conditions. Specifically, it found that respondent "maintains his factual innocence." 521 F.3d at 1121. And it further determined that respondent's request was material, because he had established a "reasonable probability that, if exculpatory DNA evidence were disclosed to [him], he could . . . affirmatively prove that he is probably innocent." *Id.* at 1134 (internal quotation marks omitted). The decision below therefore does not call into question the legitimacy of either of those conditions.

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[4] *Medina v. California,* 505 U.S. 437 (1992) is not an obstacle to recognizing a right of access to DNA evidence. In determining the scope of the government's disclosure obligations, this Court considers the Due Process principles underlying *Brady*; it does not conduct a separate *Medina* analysis. *United States v. Ruiz*, 536 U.S. 622, 631 (2002). But even applying a *Medina* analysis, withholding DNA evidence necessary to establish an actual innocence claim violates the same fundamental principle of justice that underlies *Brady*: that "the innocent go free." *Herring*, 422 U.S. at 862.

While petitioners invoke these federal statutory conditions, in reality, they seek to establish two far more onerous conditions. Both would place serious and unjustified obstacles in the path of persons seeking to establish their innocence and therefore violate Due Process.

First, petitioners contend that a state may deny access to a person who has previously confessed to the crime. *See* Petr. Br. 53. But as petitioners surely know, there are numerous reasons that an innocent person might confess guilt, including a fear that he might be unable to persuade a jury of his innocence, a desire to avoid more serious charges, or a hope that such a confession might speed his release. Moreover, in light of the experience with DNA testing, such a condition simply cannot be justified—a full quarter of the 232 post-conviction DNA exonerations involved false confessions and incriminating statements. *See* Innocence Project Facts; *see also* Kreimer & Rudovsky, *supra*, at 547-48 (describing case of Bruce Godschalk, who was convicted of sexual assault following a detailed confession, but later was completely exonerated by DNA evidence).

Second, petitioners contend that a request for testing may be denied when the existing evidence "convincingly establishes" guilt. Petr. Br. 54. That condition also unduly burdens a person seeking to establish his actual innocence. By definition, when a person has been convicted, the existing evidence is sufficient to establish his guilt beyond a reasonable doubt. To use that evidence as a basis for denying the request for access would threaten to undo the right of access altogether. Moreover, petitioners' proposed condition once again ignores the experience

with DNA testing. As the Ninth Circuit explained, "recent history has shown" that "DNA evidence has the capability of refuting otherwise irrefutable inculpatory evidence." 521 F.3d at 1141; *see* Resp. Br. 3, 48.

Accordingly, the key question is not whether the existing evidence provides convincing proof of guilt, but whether DNA testing holds the potential to exonerate the person seeking access to DNA evidence. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (compelling disclosure of confidential agency file even though it was impossible to say at that stage whether the evidence would be exculpatory). No matter how strong the existing evidence appears, if a favorable DNA test could conclusively exonerate the person seeking to establish his innocence, there is no justification for denying access to the DNA evidence. In this case, petitioners have conceded that a favorable DNA test could conclusively establish respondent's innocence. Cert. Reply Br. 8. In these circumstances, at least, denying access to the DNA evidence violates Due Process.[5]

[5] Congress and state legislatures have established a number of other conditions on access. There is no need in this case to determine the validity of those conditions. The Alaska legislature has not enacted any of those conditions. And petitioners in this case are not relying on any of them. *See* Petr. Br. 52-54 (relying solely on the two proposed conditions discussed above).

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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