No. 09-9000

In The
Supreme Court of the United States

HENRY W. SKINNER,

Petitioner,

vs.

LYNN SWITZER,
District Attorney for the 31st Judicial District of Texas,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR PETITIONER

ROBERT C. OWEN *
UNIVERSITY OF TEXAS SCHOOL OF LAW
727 East Dean Keeton St.
Austin, Texas 78705
Telephone (512) 232-9391
rowen@law.utexas.edu

* *Counsel of Record*

DOUGLAS G. ROBINSON
1440 New York Avenue, N.W.
Washington, D.C. 20005
Telephone (202) 371-7800
Douglas.Robinson@skadden.com

MARIA CRUZ MELENDEZ
1 Chase Manhattan Plaza
New York, New York 10005
Telephone (212) 552-6066
mcruzmelendez@gmail.com

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED
(CAPITAL CASE)

May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties to the proceedings in the courts below and in this Court.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTORY PROVISIONS

TABLE OF AUTHORITIES – Continued

OTHER SOURCES

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The Fifth Circuit's unpublished decision, *Skinner v. Switzer*, 363 F. App'x 302 (5th Cir. 2010), appears at JA 47-49. The district court's unpublished decision, *Skinner v. Switzer*, No. 2:09-CV-0281, 2010 WL 273143 (N.D. Tex. Jan. 20, 2010), appears at JA 44-45, and the United States Magistrate Judge's unpublished Report and Recommendation appears at JA 24-43.

JURISDICTION

The Court of Appeals entered judgment on January 28, 2010. Mr. Skinner's petition for writ of certiorari was filed on February 12, 2010 and granted on May 24, 2010. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In relevant part, 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

The other statutes involved, 28 U.S.C. §§ 2241-2254, which govern federal habeas corpus proceedings, are attached to Petitioner's petition for writ of certiorari as Appendix C.

STATEMENT OF THE CASE[1]

Mr. Skinner was convicted in 1995 and sentenced to death for murdering his girlfriend Twila Busby and her two adult sons Elwin Caler and Randy Busby in the home they all shared in Pampa, Texas. (JA 17.) Mr. Skinner maintained at trial, and maintains to this day, that he is innocent of these murders. Although he has always acknowledged that he must have been present when the killings occurred, Mr. Skinner has attempted to show, through scientific evidence presented both at trial and in subsequent

[1] Because the district court granted Respondent's motion to dismiss, the facts alleged in the complaint, which appears at JA 5-23, must be presumed true. *See, e.g.*, *Nelson v. Campbell*, 541 U.S. 637, 640 (2004). A more complete description of the facts and procedural background can be found in Mr. Skinner's petition for writ of certiorari at pages 4-16 (Petition for Writ of Certiorari, *Skinner v. Switzer*, No. 09-9000 (Feb. 12, 2010)), and in his application for stay of execution at pages 2-9 and 18-22 (Petitioner's Application for Stay of Execution Pending Consideration of Petition for Writ of Certiorari, *Skinner v. Switzer*, No. 09A743 (Feb. 12, 2010)) ("Stay App.").

habeas proceedings, that he was too incapacitated by massive quantities of alcohol and codeine in his system, and by a hand injury incurred prior to the murders, to have possessed the strength and coordination necessary to commit them. (JA 9.) He has also presented extensive evidence, both at trial and in post-conviction proceedings, that Twila Busby's uncle, Robert Donnell, an ex-con with a history of physical and sexual abuse, had both motive and opportunity to have committed the murders. *See* Stay App. at 6-7. This evidence included eyewitness testimony that Ms. Busby had spurned Donnell's crude sexual advances no more than an hour before she was murdered, evidence logs and photos showing that a jacket similar to one that Donnell routinely wore was found next to her body, and the testimony of a neighbor who observed Donnell frantically scouring the inside of his pickup truck with an astringent cleaner, down to the metal floorboards, a day or two after the murders, and destroying the carpet he removed from the vehicle's cab. *Id.* at 6-7, 9.

Substantial amounts of blood and other biological evidence were present and collected by the police at the crime scene. Yet the only DNA testing of any significance done by the State of Texas prior to trial was of blood stains found on Mr. Skinner's clothing. The State's DNA expert testified at trial that Ms. Busby, Mr. Caler, and Mr. Skinner himself were the likely sources of that blood. (JA 8-9.) She opined that

these results suggested Mr. Skinner had contact with two of the victims after they had incurred their injuries, but she acknowledged that they did not speak to how the blood might have gotten there and did not establish that Mr. Skinner was guilty. (JA 9.)

Virtually from the time Mr. Skinner instituted post-conviction proceedings, he has sought testing of the remainder of the DNA material found at the crime scene. In 2000, in response to media pressure, the district attorney who had prosecuted Mr. Skinner decided to test more of the DNA evidence. Even so, he ignored repeated requests by Mr. Skinner's counsel to participate in that testing process so as to insure its integrity and credibility. Instead, the district attorney unilaterally arranged for GeneScreen, a private laboratory, to test some – but still not all – of the DNA material that had not previously been tested. The test results for the items GeneScreen did test, like the DNA test results presented at trial, failed to provide conclusive evidence one way or the other as to who had committed the murders. (JA 10-14.) Mr. Skinner has consistently maintained, however, that the State has avoided testing those items of evidence that are most likely to establish the real killer's identity. Those items include vaginal swabs taken at Ms. Busby's autopsy, which might establish whether she was sexually attacked by Donnell; Ms. Busby's fingernail clippings, which could contain the assailant's DNA if she struggled with him before she was killed; a bloody towel found near Ms. Busby's body, which the killer may have used to wipe blood

from his hands; two knives that were likely used to kill the two sons, either of which could contain the killer's DNA; and, finally, the jacket found near Ms. Busby's body, which was spattered with blood and had its owner's sweat stains around the collar. (*See* JA 14-15.)

Shortly after the last of the GeneScreen test results was released in 2001, Texas enacted Article 64 of the Texas Code of Criminal Procedure ("Art. 64"), a statute allowing prisoners to seek post-conviction DNA testing in limited circumstances. *See* Tex. Code Crim. Proc. Ann. art. 64.01 (Vernon 2006 & Supp. 2009). Mr. Skinner has twice filed motions under that statute to obtain DNA testing of the evidence described above. Both motions were denied by the convicting court, and both denials were affirmed by the Texas Court of Criminal Appeals ("CCA"). (JA 15, 17 (citing *Skinner* v. *State,* 122 S.W.3d 808, 811 (Tex. Crim. App. 2003)); JA 19-20 (citing *Skinner* v. *State,* 293 S.W.3d 196, 202 (Tex. Crim. App. 2009)).)[2] In

[2] In the time between his two state court motions for DNA testing, Mr. Skinner also sought DNA testing through discovery in his simultaneously pending federal habeas action. (JA 17.) Mr. Skinner's habeas petition alleged that his trial counsel had performed deficiently in failing to seek DNA testing of the relevant evidence before trial, and he sought the testing in habeas to prove prejudice from counsels' error. (*Id*.) The Magistrate Judge denied Mr. Skinner's motion, but without prejudice to his "reurging" it if he succeeded in showing deficient performance under *Strickland v. Washington*, 466 U.S. 668, 686 (1984). (JA 17-18.) Because the district court ultimately found that counsel were not deficient in failing to pursue pretrial DNA

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addition to formally seeking DNA testing through Art. 64, Mr. Skinner also has repeatedly requested of Respondent and her predecessors in office that they voluntarily make the evidence available for testing. All of those requests were either ignored or denied. (JA 14, 20.)

While Mr. Skinner's second state court motion for DNA testing was pending before the CCA, this Court rejected an Alaska prisoner's claim for post-conviction DNA testing in *Dist. Att'y's Office v. Osborne*, 129 S. Ct. 2308 (2009), holding that the prisoner had no substantive due process right to such testing. *Id.* at 2322-23. At the same time, however, the Court left the door open for procedural due process claims by state prisoners who have a liberty interest under state law in proving their innocence, invoke a state process under state law to vindicate that liberty interest, and are denied fundamental fairness in their pursuit of that process. *Id*. at 2319-20.

Once the CCA affirmed the denial of his second motion, Mr. Skinner, believing he had a viable due process claim in light of *Osborne*, filed the present lawsuit. The complaint asserts that Respondent's refusal to provide the DNA evidence for testing violates Mr. Skinner's rights under the Fourteenth and Eighth Amendments. (*See* JA 21.) Mr. Skinner's complaint requests only the following relief: (1) a

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testing (JA 18), Mr. Skinner had no opportunity to reurge the motion.

declaratory judgment stating that he is entitled to have access to certain items of evidence for DNA testing at his own expense; (2) a preliminary and permanent injunction requiring Respondent to produce those items of evidence for that purpose, pursuant to an appropriate protocol regarding chain of custody and provisions for their preservation and return; and (3) "[r]easonable attorneys' fees, costs of suit and such other and further relief as [the] Court deems just and proper." (JA 22.) Nothing in the complaint seeks to set aside Mr. Skinner's capital murder convictions or his death sentence, nor does the complaint seek a ruling on any matter that would necessarily demonstrate or imply the invalidity of his convictions or sentence.[3] (*See* JA 22.)

On January 15, 2010, the Magistrate Judge recommended that the suit be dismissed because, under *Kutzner v. Montgomery County*, 303 F.3d 339, 340 (5th Cir. 2002), Mr. Skinner's claim for access to evidence could only be brought in a petition for

[3] Although the *merits* of Mr. Skinner's constitutional claim were not passed upon below and are not before this Court, it bears emphasizing that Mr. Skinner's claim materially differs from the claim that was before the Court in *Osborne*. Osborne bypassed available state avenues for obtaining DNA testing in favor of a federal action under § 1983 asserting a substantive constitutional right to DNA testing, and the Court relied on that fact in rejecting Osborne's procedural due process claim. *See Osborne*, 129 S. Ct. at 2321. By contrast, Mr. Skinner took advantage of every existing state court procedure for seeking access to DNA evidence, and his federal claim invokes familiar procedural due process principles. (JA 14-20, 21.)

habeas corpus. Although noting that recent Supreme Court cases had undercut the Fifth Circuit's ruling in *Kutzner*, the Magistrate Judge concluded he was nevertheless bound by *Kutzner*'s holding that no claim seeking to "'set the stage'" for a future attack on a conviction – including a claim for access to evidence – could be brought in an action under § 1983. (*See* JA 37-39.); *cf*. *Kutzner*, 303 F.3d at 341. The district court adopted the Magistrate Judge's report and recommendation. (JA at 45.) The Court of Appeals summarily affirmed, citing *Kutzner*. (JA 48-49.) Mr. Skinner sought a stay of execution pending review in this Court. This Court granted a stay and subsequently granted certiorari. (JA 50.)

SUMMARY OF THE ARGUMENT

Mr. Skinner's procedural due process claim falls squarely within the plain language of § 1983, and, absent some other bar to its being cognizable under § 1983, should be allowed to proceed under that statute. The court below purported to find such a bar in *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), where this Court applied a judicially created exception to exclude from § 1983's compass those constitutional claims traditionally understood to lie at the core of habeas corpus. But the "*Heck* exception," as this Court has since repeatedly emphasized, bars only those claims which would, if decided in the prisoner's favor, "necessarily imply the invalidity of his conviction or sentence." *Id.* Moreover, this Court has

expressly rejected the view, embraced by the court below, that *Heck* applies where a prisoner merely hopes or expects that a favorable decision in his § 1983 suit might give him a basis for a collateral attack on the conviction or sentence in the future. *See Wilkinson v. Dotson*, 544 U.S. 74, 78 (2005). Accordingly, this Court's cases compel the conclusion that the Court of Appeals erred in finding that *Heck* forecloses Mr. Skinner from bringing his access-to-evidence claim via § 1983.

Redrawing *Heck*'s boundary and abandoning its time-tested rule in favor of some other, necessarily *ad hoc*, approach would needlessly blur the line between § 1983 and habeas corpus, ultimately undermining both. Substituting a vague and difficult-to-apply rule for *Heck*'s bright-line test would also dramatically expand habeas corpus beyond its historic roots and needlessly entangle the Court in the thicket of trying to reconcile habeas procedures with the procedures established by individual states for DNA testing. Such an extensive revision of this area of the law is not only unwise but unnecessary, at least insofar as the exhaustion requirement of federal habeas is concerned, as this Court's ruling in *Osborne* assures that any state prisoner seeking access to DNA evidence must, as a practical matter, invoke all available state avenues of relief before resorting to federal court, just as Mr. Skinner has.

Finally, adhering to the Court's clearly established precedents and allowing cases like Mr. Skinner's to proceed under § 1983 would impose no

additional burden on the lower courts and would remain true to the principles of separation of powers, comity, and *stare decisis*.

ARGUMENT

I. THIS COURT'S PRECEDENTS CLEARLY ESTABLISH THAT MR. SKINNER'S CLAIM FOR ACCESS TO DNA EVIDENCE MAY BE BROUGHT UNDER 42 U.S.C. § 1983.

A. The judicially created *Heck* exception bars only § 1983 claims that necessarily imply the invalidity of the underlying conviction or sentence.

By its terms, 42 U.S.C. § 1983 authorizes "any citizen of the United States or other person within the jurisdiction thereof" who has been subjected "to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws" to initiate a suit in federal court against any person who has caused such deprivation under color of law. 42 U.S.C. § 1983. Mr. Skinner's suit plainly falls within the explicit language of that section: There is no dispute that he is a citizen of the United States, has alleged a denial of due process secured by the Constitution, and has sued a state official who acted under color of law.

The only issue in this case is whether Mr. Skinner's suit, despite falling within the literal scope of § 1983, nevertheless is barred by a judicially

created exception that requires certain claims at the "core" of the habeas corpus statute, 28 U.S.C. § 2254, to be brought in a habeas petition. In a series of cases beginning with *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court has held that claims brought by state prisoners are cognizable exclusively in habeas when the prisoner challenges "the fact or duration of his confinement" and seeks either immediate or accelerated release. *Id.* at 489. Thus, in *Preiser*, the Court held that a claim for the restoration of good-time credits, which if successful would have resulted in the prisoner's immediate release, was cognizable only in habeas because it attacked "the very duration of . . . physical confinement . . . ." *Id.* at 487-88.

This exception to the scope of § 1983 became known as the "*Heck* exception," after this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994). Heck, convicted of voluntary manslaughter, brought a § 1983 action seeking compensatory damages for an "unconstitutional conviction or imprisonment" as a result of an allegedly unlawful investigation by state prosecutors and investigators. *Id.* at 478-80, 486. Because Heck's entire claim rested on the premise that his conviction was unlawful, this Court concluded that Heck's suit for damages effectively "challenged the legality of [his] conviction," *id.* at 490, and, therefore, could not proceed under § 1983 unless the underlying conviction was first declared invalid. *Id.* at 486-87.

Critically, however, the *Heck* Court stressed that its decision rested on its reading of Heck's complaint

as effectively requesting a declaration that his conviction itself was invalid. The Court emphasized that, "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." *Id.* at 487 (footnotes omitted). As an example of a case that "even if successful, [would] *not* demonstrate the invalidity of any outstanding criminal judgment," *id.*, the Court hypothesized a convicted person who sues for damages under § 1983 after an allegedly unreasonable search produced evidence that was introduced at his trial and resulted in his conviction. *Id.* at 487 n.7. The Court observed that a number of legal doctrines (such as the harmless error rule, the independent source doctrine, or the doctrine of inevitable discovery) might vitiate the constitutional violation with respect to the conviction itself. *Id*. As a consequence, success on such a civil action – challenging only the unreasonable search – would not *necessarily* imply that the plaintiff's conviction was unlawful. Accordingly, the Court concluded, such a claim could properly be brought under § 1983.

The Court has emphasized time and again that under *Heck*, prisoners may bring other types of claims via § 1983 as long as they seek "something other than immediate or more speedy release." *Preiser,* 411 U.S. at 494. Indeed, *Heck* permits a prisoner to proceed via § 1983 even where the relief he seeks might have

some incidental impact on his sentence or how it is carried out. *See, e.g.*, *Muhammad v. Close*, 540 U.S. 749, 754 (2004) (holding that claim for damages for injuries allegedly inflicted by a guard during six days of pre-disciplinary-hearing detention was properly brought under § 1983, because, although the claim might "affect the duration of time to be served," it would not "necessarily" have such an effect); *Nelson*, 541 U.S. at 644 (prisoner's challenge to method of execution properly brought under § 1983 because a "suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself").

Subsequently, in *Edwards v. Balisok*, 520 U.S. 641 (1997), an inmate sought a declaration that procedures employed by the State to deprive him of good-time credits violated due process, damages resulting from use of those unconstitutional procedures, and an injunction to prevent the State from employing them in the future. *Id.* at 643. Consistent with its prior decisions, the Court held that Balisok's claim for an injunction to bar future use of the allegedly unconstitutional procedures was cognizable under § 1983 because "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits . . . ." *Id.* at 648. Applying the *Heck* doctrine to Balisok's other claims as originally construed, the Court unsurprisingly determined that, insofar as the prisoner sought declaratory relief and money

damages stemming from alleged deceit and bias on the part of the decision-maker, habeas corpus was the sole vehicle through which he could bring his claim because it "would, if established, necessarily imply the invalidity of the deprivation of [Balisok's] good-time credits." *Id.* at 646. Accordingly, *Balisok* confirms that *Heck* bars *only* those claims that, in fact, challenge the fact or duration of a prisoner's incarceration.

In applying the *Heck* exception, this Court has repeatedly made clear that a claim is not barred simply because the lawsuit is intended by the prisoner as a first step toward an eventual attack on the conviction or sentence. The Court most directly confronted this issue in *Wilkinson v. Dotson*, 544 U.S. 74 (2005), where two prisoners challenged in a § 1983 action Ohio's retroactive application of new parole eligibility guidelines – the effect of which was to delay the dates when the prisoners would become eligible for parole. *Id.* at 78. Canvassing its "legal journey from *Preiser* to *Balisok*" in evaluating the scope of the *Heck* exception,[4] *id.* at 81, this Court summarized

[4] As the *Dotson* Court explained,

> *Preiser* found an implied exception to § 1983's coverage where the claim seeks – not where it simply 'relates to' – 'core' habeas corpus relief, *i.e.*, where a state prisoner requests present or future release . . . . *Wolff* [*v. McDonnell*, 418 U.S. 539 (1974)] makes clear that § 1983 remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the

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that under its precedents, "a state prisoner's § 1983 action is barred . . . *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 81-82. Although Ohio had argued that *Heck* should bar the inmates' claim because their *ultimate goal* was to shorten the duration of their confinement, the Court unequivocally rejected this argument:

> The problem with Ohio's argument lies in its jump from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief). A consideration of this Court's case law makes clear that the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here to achieve Ohio's legal door-closing objective.

Id. at 78. Accordingly, the Court in *Dotson* not only reaffirmed the test it had crafted in *Heck*, but also firmly rejected the argument that the *Heck* exception

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> prisoner. *Heck* specifies that a prisoner cannot use § 1983 to obtain damages where success *would necessarily* imply the unlawfulness of a (not previously invalidated) conviction or sentence. And *Balisok*, like *Wolff*, demonstrates that habeas remedies do not displace § 1983 actions where success in the civil rights suit would not necessarily vitiate the legality of (not previously invalidated) state confinement.

Dotson, 544 U.S. at 81.

bars any claim that "simply 'relates to' core habeas corpus relief . . . ." *Id.* at 81. Applying that rule to the claims advanced by the prisoners, the Court concluded that the claims were not foreclosed because success did not *necessarily* mean release from confinement or a shorter prison stay. *Id*. at 82. For one prisoner, it meant "at most new eligibility review, which at most w[ould] speed *consideration* of a new parole application," *id.*; for the other, it meant "at most a new parole hearing at which Ohio parole authorities m[ight], in their discretion, decline to shorten [the inmate's] prison term." *Id.*

The significance of *Dotson*'s teaching – that in applying *Heck*'s "necessarily implies" test, courts should focus on the actual immediate consequences of a successful suit – was echoed in *Hill v. McDonough*, 547 U.S. 573 (2006). Analyzing a prisoner's § 1983 challenge to Florida's proposed method of execution, this Court determined that *Heck* was no bar to such a challenge because, "at this stage of the litigation," *id.* at 583, the prisoner's action "if successful would not necessarily prevent the State from executing him by lethal injection," *id.* at 579, "and thus it could not be said that the suit seeks to establish 'unlawfulness [that] would render a conviction or sentence invalid.'" *Id.* at 580 (quoting *Heck*, 512 U.S. at 486). Accordingly, by refusing to bar even a § 1983 action that could force the State to modify the manner in which it carried out a death sentence, this Court made it as clear as possible that *Heck* forecloses *only* those § 1983 actions that *necessarily* demonstrate or

imply the invalidity of the underlying conviction or sentence. *See id.*; *see also Nelson*, 541 U.S. at 647 ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.'").

B. Mr. Skinner's suit for access to DNA evidence does not challenge the validity of his underlying conviction or sentence.

The relief Mr. Skinner seeks is simple and limited: the opportunity to obtain access to physical evidence for the purpose of conducting DNA testing. That claim "implies nothing at all about [his] conviction." *Harvey v. Horan*, 285 F.3d 298, 308 (4th Cir. 2002) ("*Harvey II*") (Luttig, J., respecting the denial of rehearing en banc). If successful, Mr. Skinner's suit would merely result in Respondent's making the requested evidence available to him. "That act alone – providing [the prisoner] with access to the biological evidence . . . – does not . . . 'necessarily imply' the invalidity of [the prisoner's] conviction or sentence." *Harvey v. Horan*, 278 F.3d 370, 382 (4th Cir. 2002) ("*Harvey I*") (King, J., concurring in part and concurring in the judgment) (citation omitted). Accordingly, nothing in this Court's cases requires that Mr. Skinner's claim be brought in a habeas petition. Indeed, because success on a § 1983 claim for DNA testing "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), it is doubtful whether

relief on such a stand-alone claim is even available under the habeas statute. *See* Section II.B, *infra*.

While Mr. Skinner may, at some future date, use the results of DNA testing of this evidence to initiate a separate proceeding challenging his incarceration, that fact in no way "necessarily demonstrates" that his conviction is invalid. First and foremost, even if a successful § 1983 action led to DNA tests that proved exculpatory, such results alone would still fall short of mandating Mr. Skinner's immediate or speedier release. Like the prisoners in *Dotson,* Mr. Skinner would be required to overcome several hurdles before his release could even be contemplated, including the initiation of an entirely new legal proceeding.[5] *See Dotson*, 544 U.S. at 82 (discussing various proceedings necessary to secure release upon a favorable ruling on prisoner's § 1983 claim, and the discretionary nature of such proceedings, as proof that prisoners' claims would not necessarily spell speedier release). Indeed, given the uncertain state of the law on claims of actual innocence and the high substantive showing required, *see House v. Bell*, 547 U.S. 518, 555 (2006), most inmates seek other mechanisms for release after favorable DNA tests, such as prosecutorial consent or executive clemency. *See*

[5] In order to seek release through the state judicial process, Mr. Skinner would be required to file a subsequent habeas corpus application, and, even if the CCA authorized review of the merits of such an application, it would be subject to the high standards governing an actual-innocence claim.

Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2932 n.103 (2010) (noting that, in 88% of cases resulting in exonerations, the prosecutors consented to motions to vacate convictions). Because "we do not know whether providing [the prisoner] with access to evidence would assist or hinder his attempts at exculpation . . . [such a] civil action requesting access to biological evidence does not 'necessarily imply' the invalidity of his conviction."[6] *Harvey I*, 278 F.3d at 383 (King, J., concurring in part and concurring in the judgment).

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[6] Properly enforced, this distinction – between cases that necessarily imply the invalidity of the conviction or sentence and those that do not – should alleviate any concern that allowing access-to-DNA-evidence claims to be brought under § 1983 would open the door for those asserting routine claims under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), to "follow the same course," *Osborne*, 129 S. Ct. at 2325 (Alito, J., concurring). First, a claim like Mr. Skinner's does not assert that his constitutional rights were violated *at trial,* but rather that they were violated after he was convicted. *Brady*'s disclosure obligation, by contrast, applies pre-trial and has never been held to continue after conviction. *See Osborne,* 129 S. Ct. at 2319-20. Second, to prevail under *Brady,* a claimant must prove not only that the prosecution withheld favorable evidence, *Brady*, 373 U.S. at 87, but also that such evidence was material to the verdict, *see Strickler v. Greene*, 527 U.S. 263, 296 (1999) (rejecting *Brady* claim where defendant could show suppression of exculpatory evidence but not materiality). Because materiality to the conviction is an element of a *Brady* claim, success on such a claim *does* necessarily imply the invalidity of the claimant's conviction – which, unlike access-to-DNA-evidence claims, places *Brady* claims firmly at the traditional core of habeas corpus and precludes bringing them via § 1983.

Nor is it relevant that Mr. Skinner hopes that favorable DNA testing results might eventually warrant clemency. *See Dotson*, 544 U.S. at 78 (rejecting the State's contention that the prisoners' "hope [that] these actions will help bring about earlier release" mandated dismissal under *Heck*); *see also Harvey I*, 278 F.3d at 383 (King, J., concurring in part and concurring in the judgment) ("A prisoner's underlying rationale . . . for bringing his § 1983 suit is not relevant under *Heck*. The applicable standard is an objective one . . . ."). There is, of course, no "right" to clemency, which is essentially defined by its discretionary character. *See, e.g.*, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280-81, 284 (1998) (plurality opinion) (contrasting the discretionary nature of clemency proceedings with "the more structured and limited scope of judicial proceedings"). Even if Mr. Skinner prevails on his access-to-evidence claim – or, indeed, thereafter obtains favorable DNA testing results – the executive will not "necessarily" intervene to free him or reduce his sentence. Only if success in his § 1983 action alone – even before the DNA test results were known – compelled the Texas clemency authorities to grant clemency would *Heck* justify making habeas corpus the exclusive avenue for his claim.

Finally, it is always possible – although we believe it unlikely in this case – that test results from the requested physical evidence will be inconclusive

or even prove inculpatory, in which case there would be no basis for disturbing the conviction.[7] *See, e.g.*, *Harvey I*, 278 F.3d at 382-83 (King, J., concurring in part and concurring in the judgment); *Harvey II*, 285 F.3d at 308 (Luttig, J., respecting the denial of rehearing en banc).

For all these reasons, every circuit court of appeals – except for the Fifth Circuit – that has directly considered the issue since this Court's path-marking decision in *Dotson* has held that *Heck* does not bar a § 1983 action in which a prisoner seeks only

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[7] In such cases, the test results help confirm for the public that no injustice has occurred. *See generally* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 71-72 (2008) (describing cases in which post-conviction DNA test results proved inculpatory); Josh White, *DNA Tests Confirm Conviction of Rapist; Inmate Claimed Innocence in '89 Case*, Wash. Post, Oct. 10, 2002, at T01; *Harvey I*, 278 F.3d at 383 n.4 (King, J., concurring in part and concurring in the judgment) (citing Brooke A. Masters, *DNA Test Fails to Vindicate Virginia Inmate*, Wash. Post, Nov. 28, 2001, at B8). Of course, the potential scenarios also include the possibility that post-conviction DNA testing will ultimately result in freeing a wrongly convicted prisoner. *See, e.g.*, *Goldschalk v. Montgomery County Dist. Att'y's Office*, 177 F. Supp. 2d 366, 366-67 (E.D. Pa. 2001) (granting relief on prisoner's § 1983 claim for DNA testing after unsuccessful attempts to secure DNA in state court); *Charles v. Greenberg*, No. 00-958, 2000 WL 1838713, at *3 (E.D. La. Dec. 13, 2000) (discussing prisoner's total exoneration after DNA testing which was secured subsequent to § 1983 DNA access litigation); Sara Rimer, *Convict's DNA Sways Labs, Not a Determined Prosecutor*, N.Y. Times, Feb. 6, 2002, at A14 (discussing Goldschalk's exoneration after fifteen years of wrongful incarceration).

access to DNA evidence for testing. *See Durr v. Cordray*, 602 F.3d 731, 735-36 (6th Cir. 2010); *Grier v. Klem*, 591 F.3d 672, 678 (3d Cir. 2010); *McKithen v. Brown*, 481 F.3d 89, 99 (2d Cir. 2007); *Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006); *Osborne v. Dist. Att'y's Office*, 423 F.3d 1050, 1054 (9th Cir. 2005).[8] Each of those courts read *Dotson* to eliminate any doubt about how *Heck* should apply to access-to-evidence claims, and recognized the critical difference between the limited nature of the relief sought in such a § 1983 action (i.e., mere access to evidence) and the plaintiff's ultimate – and indefinite – objective of establishing his innocence. *See Durr*, 602 F.3d at 736 ("'[E]very Court of Appeals to consider the question since *Dotson* has decided that because access to DNA evidence [] does not "necessarily spell speedier release," it can be brought under § 1983'" (second alteration in original) (citations omitted)); *Grier*, 591 F.3d at 677 (following *Dotson*, "the circuit split faded away"); *McKithen*, 481 F.3d at 103 n.15 (the question whether to give any weight to the plaintiff's unspoken motives for seeking relief, as opposed to the actual relief sought, "was laid to rest by the Supreme Court in *Dotson*"); *Savory*, 469 F.3d at 671 (*Dotson* explained that the exception from § 1983 coverage exists only where the claim seeks – not where it simply relates to – relief from a

[8] The Eleventh Circuit is also a member of this consensus; it, however, reached this same result even prior to *Dotson*. *See Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002).

conviction or sentence); *Osborne*, 423 F.3d at 1055 ("Any remaining doubt as to the propriety of [our] approach is removed, we believe, by the Court's recent opinion in *Dotson* . . . .").

Only the Fifth Circuit continues to insist that *Heck* should be read to bar a § 1983 action for post-conviction DNA testing. It does so – and did so here – by rote reaffirmance of its own pre-*Dotson* decision that focused heavily on the inmate's subjective desire eventually to invalidate his conviction. (*See* JA 48-49 (summarily affirming based on *Kutzner*, which held that no claim seeking to "set the stage for a future attack" on a conviction could be brought via § 1983).)[9] The Fifth Circuit has never acknowledged this Court's more recent precedents, including *Dotson*, or

[9] A divided panel of the Fourth Circuit likewise held – pre-*Dotson* – that an access-to-evidence claim was barred in a § 1983 action, *see Harvey I*, 278 F.3d at 374. Rehearing of the panel's decision was denied on the ground that intervening legislation rendered the case moot, but Judge Luttig, who was not a member of the panel, nevertheless filed a forceful and oft-quoted statement registering his disagreement with the panel decision on the *Heck* issue. *Harvey II,* 285 F.3d at 304, 307 (Luttig, J., respecting the denial of rehearing en banc) (criticizing panel for "fairly clear[ ]" error in holding that *Heck* would bar a § 1983 action for access to evidence for DNA testing). The Fourth Circuit has not revisited the issue since *Dotson*. The Sixth Circuit – which, like the Fourth and Fifth Circuits, had decided pre-*Dotson* that a claim for access to DNA evidence could be brought only in habeas, *Boyle v. Mayer*, 46 F. App'x 340, 340-41 (6th Cir. 2002) (not designated for publication) – has since joined the majority of circuits in allowing this type of claim to be brought under § 1983. *See Durr*, 602 F.3d at 735-36.

addressed the views of its sister circuits, some of which have pointedly criticized its position as inconsistent with this Court's holdings. *See, e.g.*, *Savory*, 469 F.3d at 671-72 (noting that *Kutzner*'s reasoning was inconsistent with *Dotson* and its precursors). Indeed, *Kutzner* is so entrenched in Fifth Circuit law that, even after *Dotson*, federal courts in that circuit have expansively applied *Kutzner* to bar other types of prisoner claims that fall far short of attacking a conviction or sentence. *See Cruz v. Bennett,* No. H-05-1954, 2005 WL 2000703, at *2 (S.D. Tex. Aug. 17, 2005) (relying on *Kutzner* to bar § 1983 action seeking access to appellate slip opinions).

The Fifth Circuit's reading of *Heck* cannot survive *Dotson*. The development of this Court's jurisprudence has confirmed Judge Luttig's insight that "the conclusion is inescapable . . . that the claim of a right of access to evidence is not one that in any respect implies the invalidity of the claimant's conviction and sentence." *Harvey II*, 285 F.3d at 309 (Luttig, J., respecting the denial of rehearing en banc). For the reasons discussed more fully below, any other result would depart radically from settled law, create ambiguity and uncertainty where none now exists, and inappropriately thrust the Court into the role of legislative policymaker.

II. A HOLDING THAT ACCESS-TO-DNA-EVIDENCE CLAIMS ARE COGNIZABLE UNDER § 1983 WILL PROVIDE CLEAR, EASY-TO-APPLY GUIDANCE TO THE LOWER COURTS, PRESERVE THE HISTORIC ROLE OF HABEAS CORPUS, IMPOSE NO UNDUE BURDEN ON THE LOWER COURTS, PROMOTE COMITY, AND ADHERE TO THE DOCTRINES OF SEPARATION OF POWERS AND *STARE DECISIS*.

A. Adopting the Fifth Circuit's *Kutzner* rule would blur the line between § 1983 and habeas, and substitute an indefinite, ill-defined test for *Heck*'s clear rubric.

The Court has taken pains over the last thirty years to fashion a bright-line test for determining whether a prisoner's constitutional claim is cognizable under § 1983 or exclusively in habeas. To the extent Respondent urges this Court to depart from its earlier holdings and unnecessarily modify the *Heck* exception, the Court should decline the invitation. The alternative to allowing claims like Mr. Skinner's to be brought under § 1983 is to promulgate a vague and unworkable standard.

Heck's bright-line rule is easy to understand and relatively simple to apply. A federal district court reviewing a prisoner's § 1983 suit ordinarily need not look beyond the claims and prayer for relief to ascertain whether success would necessarily imply

the invalidity of the conviction or sentence. In contrast, the test effectively employed by the Fourth Circuit in *Harvey I* and adopted by the Fifth Circuit in *Kutzner* shares a central feature with the one ultimately rejected by this Court in *Dotson*. *See* 544 U.S. at 81. Namely, it requires judgment calls about the prisoner's presumed intent in bringing suit, or how his present claim may somehow "relate to" a possible future collateral attack on his custody. Such a speculative test would frustrate the goal of judicial economy and increase the risk that prisoners' claims will receive disparate treatment. That federal courts within the Fifth Circuit have extended *Kutzner* to bar § 1983 suits to obtain access to appellate slip opinions, *see Cruz*, 2005 WL 2000703, at *2, is ample evidence of the slippery slope that adopting the Fifth Circuit's expanded version of the *Heck* exception would create.

B. A holding that an access-to-evidence claim lies at the "core" of habeas would indefensibly broaden the scope of the Great Writ.

It is important to keep in mind that the *Heck* exception is based on the premise that some limitation on § 1983 is necessary to preserve the specific and historical role of habeas corpus. *See Preiser*, 411 U.S. at 500; *Dotson*, 544 U.S. at 79. Therefore, a conclusion that a claim merely seeking access to evidence nevertheless falls within the *Heck* exception would necessarily imply that the claim lies at the

"core" of habeas – and in turn would necessarily imply that the claim could properly be brought *as a free-standing claim* in habeas.

It is far from clear under current law, however, that a claim seeking only access to evidence for DNA testing would – or should – fall within the scope of the habeas statute. Although this Court has extended the writ to include challenges to "less obvious restraints," it has held fast to the notion that habeas corpus is, and must remain, a writ of limited reach. *See Preiser*, 411 U.S. at 486 n.7 (characterizing decisions that might have appeared on their face to expand the scope of habeas as "mark[ing] no more than a logical extension of the traditional meaning and purpose of habeas corpus – to effect release from illegal custody"). Mr. Skinner seeks not release from custody – the traditional relief granted by habeas courts – but only access to evidence. Stretching habeas corpus to include causes of action that do not directly seek release from illegal custody – and, indeed, do not even *imply* that the custody is illegal – risks "utterly sever[ing] the writ from its common law roots." *Dotson*, 544 U.S. at 86 (Scalia, J., concurring).[10]

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[10] Justice Scalia has rightly warned against the danger of such expansion:

> It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a 'quantum change in the level of custody,' *Graham v. Broglin*, 922 F.2d 379, 381 (C.A. 7 1991) (Posner, J.),

(Continued on following page)

Thus, concluding that Mr. Skinner may not pursue his claim in a § 1983 action would not only unduly restrict the scope of that statute; perversely, and perhaps more ominously, such a holding necessarily would expand the scope of habeas to include claims that might or might not lead to one or more subsequent proceedings in which the prisoner would attempt to show illegal custody itself. Such a holding would depart dramatically from the plain language of the habeas statute, which provides that a federal court may entertain a petition for writ of habeas corpus from a prisoner in custody pursuant to the judgment of a state court "*only on the ground* 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), as well as from its historical roots. If such a radical revision of the scope of federal habeas is to be undertaken, it should originate with Congress, not this Court. *See* Section II.E, *infra*.

> such as release from incarceration to parole. It is 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).

C. Requiring claims such as Mr. Skinner's to be brought in habeas would create great difficulty in reconciling the habeas statute with the individual States' varying procedures for DNA testing.

To be sure, the Court's decision in *Osborne* imposes substantive limits on the scope of claims for access to evidence for DNA testing. This Court, however, did not hold that such claims could never be pursued, but instead left the federal courthouse door open to those prisoners who possess a state-created liberty interest in proving their innocence through new evidence, but are deprived by state officials of fundamentally fair procedures necessary to vindicate that interest. *Osborne*, 129 S. Ct. at 2319-20. The Court's reasoning in *Osborne* turned on the observation that any substantive rights a state prisoner might have to DNA testing are a matter of state, not federal, law, and that state prisoners must avail themselves of those state procedures before they can complain in federal court that the procedures were inadequate. *Id.* at 2321-22.

A holding that a state prisoner's federal-court challenge may proceed only via habeas corpus would require courts to reconcile individual States' procedures for DNA testing with the procedural requirements of the federal habeas statute, which could prove to be a daunting challenge. For example, the federal habeas statute requires that claims first be exhausted in state court, 28 U.S.C. § 2254(b), and a

state court's reasonable decision on the merits of any claim forecloses federal relief, *see id.* § 2254(d), (e). After *Osborne*, however, a claim in federal court related to the denial of DNA testing does not fit this mold, because the claim in state court is solely a state-law claim (i.e., whether the prisoner meets the requirements for post-conviction DNA testing under state law), whereas the claim in federal court is that the prisoner was denied his federal constitutional right to fundamental fairness in the process by which the State denied his state-law claim.

To cite another example of the difficulty of trying to fit claims for DNA testing into federal habeas procedures, the habeas statute imposes a one-year limitations period that is tolled for "the time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). When Congress wrote this statute in 1995, it could not have anticipated the possibility that an "application for post-conviction or other collateral review" might include a mechanism for DNA testing that is separate and distinct from a State's mechanism for post-conviction relief more generally – as is the case in many States, including Texas. *See, e.g.*, Tex. Code Crim. Proc. Ann. arts. 64.01-64.05 (Vernon 2006 & Supp. 2009) (Texas's post-conviction DNA testing statute). It is uncertain whether an action for DNA testing would qualify as an "application for State post-conviction or other collateral review" for purposes of § 2244(d)(2), and the

consequences of such an action on the limitations period are therefore uncertain at best. *See, e.g.*, *Brown v. Sec'y for the Dep't of Corrections*, 530 F.3d 1335, 1337 (11th Cir. 2008) (holding that prisoner's motion for testing under Florida's DNA statute did not amount to "collateral review" and therefore failed to toll the federal habeas statute of limitations).

These examples are illustrative, but certainly not exhaustive, of the struggles that await the federal courts if they are forced to try to shoehorn stand-alone claims for DNA testing into the federal habeas framework. The federal habeas statute simply was not written to accommodate procedural due process claims of the type that survive *Osborne.* This is yet another reason why, if any such radical departure from the *Heck* doctrine is to be undertaken, it should be by Congress, not this Court. *See* Section II.E, *infra*.

D. Allowing claims for DNA testing to be brought under § 1983 will not create an undue burden for federal courts.

There is no reason to fear that the federal court system will be flooded with lawsuits if this Court finds that a claim for access to evidence for DNA testing is cognizable under § 1983. In the first place, as noted above, most circuits already allow such claims to be brought under § 1983. *See Durr*, 602 F.3d at 736; *Grier*, 591 F.3d at 678; *McKithen*, 481 F.3d at 99; *Savory*, 469 F.3d at 672; *Osborne*, 423 F.3d at 1054; *Bradley*, 305 F.3d at 1291. While § 1983 claims

for DNA testing are not rare, there is no evidence that such claims have created an undue burden on the district courts in those circuits.[11] In addition, *Osborne* has now greatly circumscribed the contours of an actionable procedural due process claim based on the denial of access to evidence for DNA testing, which will limit the number of claims that may reasonably be expected to be brought in federal court. Finally, the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 ("PLRA"), provides ample means by which federal courts and state officials can be spared any burden imposed by baseless claims. *See, e.g.*, 28 U.S.C. § 1915A (as soon as practicable after filing, the court must assess the potential merit of any complaint suing a governmental entity, officer, or employee, and summarily dismiss any suit that fails to state a claim). Accordingly, there is no reason for concern that a decision for Mr. Skinner will result in a dramatic increase in the burden such cases impose on the federal courts.

[11] In any event, an avenue for the vindication of constitutional rights should not be denied simply because the contrary result might lead to more claims. *See, e.g.*, *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring) (the fear of burgeoning caseloads "should not be permitted to stand in the way of recognition of otherwise sound constitutional principles").

E. Allowing post-conviction DNA testing claims to be brought in § 1983 would be true to the principles of separation of powers, comity, and *stare decisis*.

Beyond the *Heck* exception, this Court has consistently looked to Congress to set any limits on the availability of relief under § 1983. *See, e.g.*, *Tower v. Glover*, 467 U.S. 914, 923 (1984) ("It is for Congress to determine whether § 1983 has become too burdensome to state and federal institutions and, if so, what remedial action is appropriate"). And Congress has imposed such limits when it thought them necessary and appropriate. *See, e.g.*, PLRA § 803(d), *amending* 42 U.S.C. § 1997e (adding several new procedures and penalties for prisoners filing § 1983 lawsuits); PLRA § 804(a)(3), *amending* 28 U.S.C. § 1915(b)(1) (requiring a prisoner proceeding *in forma pauperis* to pay full amount of the filing fee with monthly payments equal to twenty percent of his trust fund account); PLRA § 804(c)(3), *amending* 28 U.S.C. § 1915(f)(2)(A) (requiring a prisoner to pay full amount of any cost assessed against him out of his prison trust fund); PLRA § 804(d), *amending* 28 U.S.C. § 1915(g) (preventing a prisoner who has filed three or more lawsuits that fail to state a claim, or are malicious or frivolous, from filing any civil action unless the prisoner faces imminent danger or physical injury).

The particular type of claim asserted here, moreover, would in no way undermine comity between the

federal and state courts. As this Court held in *Dotson* in elaborating on the *Heck* exception, the Court has "already placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement." *Dotson*, 544 U.S. at 84; *see also, e.g.*, *Preiser*, 411 U.S. at 477 ("For if a remedy under the Civil Rights Act is available, a plaintiff need not first seek redress in a state forum"). When determining whether a claim should fall on the habeas side of the line, a court need only apply the test outlined in *Heck*, and clarified in *Dotson*, which asks simply whether "success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 544 U.S. at 82. If the answer to that question is no, then permitting the suit to proceed under § 1983 poses no threat to comity and federalism.

Moreover, *Dotson*'s explanation that the *Heck* doctrine already takes comity considerations into account holds especially true in the context of the case at bar. Under *Osborne,* a state prisoner who brings a due process challenge to the adequacy of state DNA testing procedures cannot prevail without first having tried to invoke those procedures. 129 S. Ct. at 2321. *Osborne* thus assures that claimants will properly have invoked state procedures before turning to the federal forum, protecting comity in just

the same fashion as an explicit requirement that such a prisoner exhaust his available state remedies. Simply put, there is no reason for concern that allowing state prisoners' claims for DNA testing to proceed under § 1983 will result in their "bypass[ing] state courts with their discovery requests," *Id.* at 2324 (Alito, J., concurring), or otherwise undermining the authority of state courts in conflict with the principles of comity.

Finally, given this Court's precedent, adherence to the *Heck* rule is required by principles of *stare decisis*. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law") (citation omitted). This Court's "precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." *Citizens United v. FEC*, 130 S. Ct. 876, 911-12 (2010). There is no reason to believe that the exception developed in *Preiser* and later clarified in *Heck* and *Dotson* requires any refinement by this Court. This is especially so where Congress has had ample opportunity to respond to this Court's decisions and has not done so. *See, e.g.*, *United States v. South Buffalo Ry. Co.*, 333 U.S. 771, 784 (1948) (refusing to overrule its own interpretation of a federal statute that "Congress ha[d] not seen fit to set aside"). Indeed, Congress has not only refrained from expressing displeasure with the *Heck* doctrine, but

adopted a similar formulation when it specifically excluded from the PLRA's coverage "habeas corpus proceedings *challenging the fact or duration of confinement in prison* . . . ." PLRA § 802(a), *amending* 18 U.S.C. § 3626(g)(2) (emphasis added). Absent clear congressional intent, this Court has been careful not to impose limitations on prisoner claims under § 1983. *See McCarthy v. Madigan*, 503 U.S. 140, 149-52 (1992) (refusing, where "Congress has not meaningfully addressed" the issue, to impose an exhaustion requirement for *Bivens* actions), *superseded by statute on other grounds*, 42 U.S.C. § 1997e; *Patsy v. Bd. of Regents*, 457 U.S. 496, 513 (1982) (explaining that "legislative not judicial solutions are preferable" when setting boundaries on § 1983 actions by prisoners).

Given how entrenched the *Heck* doctrine has now become, abruptly deviating from that doctrine to bar § 1983 actions for DNA testing would amount to unwarranted judicial intrusion into an area best left to the political process. *See, e.g.*, *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 214-15 (1962) ("The question of what change, if any, should be made in the existing law is one of legislative policy properly within the exclusive domain of Congress – it is a question for law makers, not law interpreters"), *overruled in part on other grounds by Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). And it would disrupt settled expectations about the availability of that vitally important mechanism for vindicating constitutional rights. *See,*

e.g., *Thomas v. Wash. Gas Light Co.*, 448 U.S. 261, 272 (1980) (*stare decisis* "serves the broader societal interests in evenhanded, consistent, and predictable application of rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force").

The Fifth Circuit's approach cannot be reconciled with this Court's precedents. *Stare decisis* counsels that in these circumstances the remedy is not for this Court to change course abruptly to accommodate the Fifth Circuit's view – and in the process upset settled expectations – but rather to bring that court into line with what is now well-established law interpreting and applying *Heck*. The Court should hold that Mr. Skinner's claim can proceed and remand the case for consideration of the merits of that claim in the first instance.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

ROBERT C. OWEN *
UNIVERSITY OF TEXAS
SCHOOL OF LAW
727 East Dean Keeton St.
Austin, Texas 78705
Telephone (512) 232-9391
rowen@law.utexas.edu

* *Counsel of Record*

DOUGLAS G. ROBINSON
1440 New York Avenue, N.W.
Washington, D.C. 20005
Telephone (202) 371-7800
Douglas.Robinson@skadden.com

MARIA CRUZ MELENDEZ
1 Chase Manhattan Plaza
New York, New York 10005
Telephone (212) 552-6066
mcruzmelendez@gmail.com

Attorneys for Petitioner