No. 09-9000

IN THE
Supreme Court of the United States

HENRY W. SKINNER,
Petitioner,
v.
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 OF *AMICUS CURIAE* NATIONAL DISTRICT ATTORNEYS ASSOCIATION SUPPORTING RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The National District Attorneys Association (NDAA) is the world's oldest and largest professional organization representing prosecutors.[1] Its members—found in the

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* National District Attorneys Association certifies that this brief was not authored in whole or in part by counsel for any party and that no

offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors—prosecute criminal violations in every State and territory of the United States. Its potential membership at any given moment is coterminous with the class of potential defendants that this case would authorize if this Court accepts petitioner's view of the law.

Founded in 1950, the NDAA has sought to provide local prosecutors with a national perspective on issues that appear and recur in their offices nationwide. The NDAA also advocates at the national level regarding those issues. The NDAA's underlying objective, like that of its individual members, is to see that justice is done under the rule of law. To that end, the NDAA seeks to advance the criminal justice system by supporting efforts designed to preserve the honor and integrity of America's state and local prosecuting attorneys, improve and facilitate the administration of justice, and promote the study of law and the diffusion of knowledge of the law through the continuing education of prosecuting attorneys, lawyers, law-enforcement personnel, and other members of the interested public. It is vitally interested in enabling prosecutors to perform their duties to their utmost by most effectively using the limited resources entrusted to them. It therefore urges legislatures to adopt clear and practicable statutes in defining the duties and responsibilities of prosecutors, and courts to make clear and practicable interpretations in construing and applying statutory or constitutional texts.

The interests of the NDAA and its members are di-

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person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Pursuant to Rule 37.3(a), the parties' letters so consenting have been filed with the Clerk.

rectly implicated by this case. Given that actions under 42 U.S.C. § 1983 are limited to claims against state and local governmental actors, the membership of the NDAA will be directly affected if this Court determines that actions under § 1983, rather than only under the statutes authorizing applications for writs of habeas corpus, are an appropriate federal-court vehicle for seeking postconviction access to state-court evidence.

SUMMARY OF ARGUMENT

This case is not about DNA, due process, or actual innocence. It is about whether to expand federal jurisdiction.[2] The NDAA seeks the pronouncement of a clear rule that is faithful to this Court's precedents and avoids any unintended consequences that could needlessly impair the smooth functioning of the States' criminal-justice systems. Because the respondent's view of the law advances these interests, the NDAA respectfully urges the Court to affirm the judgment below.

1. Whether habeas corpus or § 1983 is the proper vehicle to pursue a claim for postconviction discovery—in this case, access to DNA evidence, but in the next case perhaps something completely different—is a question about the contours of federal jurisdiction. The Court has labored for decades to demarcate the boundaries between these two "fertile sources of federal-court prisoner litigation," *Heck* v. *Humphrey*, 512 U.S. 477, 480 (1994). All sides agree that habeas corpus is the exclusive vehicle to directly challenge a conviction or sentence; all agree that claims with only a tenuous connection to such a chal-

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[2] As described below, the expansion of federal jurisdiction refers not to a new subject opened to the federal courts; sitting in habeas, they already can review alleged federal deprivations in state-court criminal proceedings, including those involving discovery. The expansion would arise from removing the appropriate limits on the use of 42 U.S.C. § 1983 as a vehicle for such federal review.

lenge may be brought under § 1983. The parties' dispute boils down to a question of granularity. May a challenge to a conviction or sentence, if chopped up into bite-size litigation nuggets—no single one of which would immediately imply the invalidation of a conviction—be brought under § 1983? If the Court's view is, in fact, that the habeas statutes can be disregarded so long as a § 1983 plaintiff is careful to request relief just shy of actual release or invalidation of a conviction, then this case offers a clear opportunity to expand § 1983 accordingly.

But this Court's cases compel no such result. Indeed, from *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-490 (1973), onward, this Court has sought to deter "eva[sion]" of habeas corpus requirements via "the simple expedient of putting a different label on" a complaint. Petitioner's position, by contrast, would provide a judicially-drawn roadmap for bypassing the exclusivity of habeas corpus when a convict's postconviction claim turns on the very building blocks of a state-court criminal trial, such as the evidence that demonstrates guilt or innocence. The same finality and comity interests that motivated the Court in *Preiser* and its progeny also disfavor the use of piecemeal § 1983 litigation in the place of habeas corpus for federal courts to pass upon claims of postconviction access to evidence. Habeas corpus proceedings are the means for prosecutors, as agents of the State, to defend the conduct of litigation. That process would be undermined by erecting § 1983 suits as an alternative (or additional) pathway to relief and delay. The Court should therefore make clear the simple rule that, when no conviction remains intact, suing a state or local prosecutor for relief connected to any aspect of state-court criminal proceedings is cognizable only under the habeas statutes, regardless of how deftly a complaint is drafted.

2. Whether alleging sins of omission or commission, challenges to any portion of the conviction should remain

within the parameters of habeas corpus. This principle is consistent not only with this Court's cases but with the practicalities of how state and local prosecutors participate in the administration of justice across the Nation. The alternative—a vast expansion of § 1983 as a new form of collateral litigation—would severely disrupt the functioning of state and local prosecutors' offices. Even if somehow limited to cases involving DNA—and there can be little doubt that prisoners will use a newly strengthened § 1983 in creative ways—these new suits could be staggering in number and in new expense.

These new claims are emerging at a time of nationwide economic hardship, which has extended to prosecutors' offices. Budgets are tight even *without* new exposure under § 1983; some prosecutors have even publicly acknowledged that their triage measures have left them unable to prosecute entire categories of crimes. In this context, when it becomes a choice between prosecuting crimes or defending the state policies that limit access to evidence in appropriate cases, as described by this Court in *District Attorney's Office for the Third Judicial District* v. *Osborne*, 129 S. Ct. 2308 (2009), the temptation to capitulate as to the latter may grow along with the costs of defending oneself against civil-rights charges (whether paid individually or through a state-funded budget). Such a "reduction" in litigation might appear salutary. But if it comes at the cost of the balanced legislative policies that require providing postconviction DNA evidence in appropriate cases and refusing it in inappropriate ones, the expansion of § 1983 in this case may seriously undermine the very legislative balancing that this Court embraced in *Osborne.* By maintaining habeas corpus as the vehicle for federal review, the Court will make it more likely that decisions are based on legislative will than on risk-management or budgetary considerations.

ARGUMENT

This case will decide whether state and local prosecutors will continue to respond to challenges to state-court convictions—including demands for postconviction discovery—through the habeas corpus statutes, or whether they will be identified as civil-rights defendants in actions brought under § 1983. This Court's cases militate in favor of a clear holding that, when seeking postconviction access to evidence of guilt established in state-court criminal proceedings, no amount of careful drafting is sufficient to convert an action that *should* be brought in habeas into one that *can* be brought under § 1983. This reading of precedent is undergirded by the deleterious practical effects of a contrary ruling.

I. POSTCONVICTION ACCESS TO EVIDENCE—DNA OR OTHERWISE—SHOULD BE BROUGHT UNDER HABEAS CORPUS RATHER THAN § 1983

For prisoners whose conviction or sentence remains intact, § 1983 should not become a vehicle for "preliminary habeas" actions, whether by seeking postconviction discovery of evidence or any other relief inescapably associated with the central questions of guilt or punishment. In cases like this one, where the convict seeks evidence *precisely to show innocence*, this Court's cases do not support transforming what should be an application for a writ of habeas corpus into an action under § 1983.

A. The question presented amounts to whether a habeas petition is the sum of a collection of § 1983 actions

Drawing the line between cases that must be brought pursuant to the habeas corpus statutes and those that may be brought under § 1983 is a difficult enterprise. Little discussion is required concerning the basic principles, on which the parties agree—first, that § 1983 is closed to a purported plaintiff when "a judgment in favor

of the plaintiff would necessarily imply the invalidity of his conviction or sentence," *Heck*, 512 U.S. at 487, and second, that § 1983 is open to a plaintiff when the "connection" between the particular challenge and the invalidation of a conviction or a speedier release "is too tenuous" to fit within the first rule, *Wilkinson* v. *Dotson*, 544 U.S. 74, 78 (2005). See Brief for Petitioner 11-12; Brief for Respondent 19-21 (describing the general framework). But the parties' understanding of the case law diverges when they move beyond these basic rules.

The real dispute between them concerns the level of granularity with which courts may review a complaint, and can be summed up by their different answers to this question: If a claim can only be brought under habeas, may it be chopped up into multiple litigation segments, each recharacterized as a stand-alone § 1983 action, and each seeking only incremental relief (collectively leading to a final habeas step)?

Petitioner plainly would answer "yes." See Brief for Petitioner 14, 17-18. If he is correct that courts may look no further than the specific, literal relief requested and must treat a § 1983 claim in a self-defined vacuum, then he and many others can easily state a § 1983 claim. His request (at the moment) is simply for postconviction discovery of DNA evidence, and he studiously avoids (for the moment) any demand for release.

But if anything more than the most mechanical reading of a complaint is permitted, then the opposite result follows—courts will hold claims like petitioner's to be an attempted end-run around the exclusivity of habeas corpus. For this reason respondent would answer "no" to the question posed above. See Brief for Respondent 26. Unless courts must not contemplate the obvious, they will recognize that seeking evidence to prove innocence is inseparable from an attempt to show that a jury got the verdict wrong.

This Court's disposition, then, turns on which answer *it* would make. If the Court agrees with petitioner that § 1983 cognizes proto-habeas (or semi-habeas) actions, then it should reverse the judgment below in full recognition of the vast expansion of federal jurisdiction that would ensue. But if the Court concludes that splitting a habeas claim does not generate a parcel of cognizable § 1983 claims, it should affirm. And because nothing in the Court's case law endorses chopping a habeas claim into multiple bite-sized litigation nuggets, and relabeling all of them—save the last—as merely "civil-rights actions" brought under § 1983, it should take that latter course.

B. This Court's cases do not support allowing habeas applicants to label components of a habeas claims as stand-alone § 1983 actions

Petitioner would read the Court's cases as collectively constituting a judicially drawn roadmap to guide prisoners. Following its lead, they could draft artful complaints against state and local prosecutors (and others), thereby unlocking access to collateral litigation in the more comfortable and less demanding context of § 1983 rather than in the traditional and carefully calibrated context of habeas corpus. Section 1983 pleading will be more a matter of tactics than of substance if phrases like "necessarily impl[ies] the invalidity of his conviction or sentence," *Heck*, 512 U.S. at 487, are entirely decontextualized from the plaintiff's objective to achieve precisely that goal.

But this Court's cases draw no such map. The Court's first effort to grapple with the distinction between habeas and § 1983 was motivated by the opposite concern—to *prevent* clever drafting from trumping the substance of the law and thereby allowing potential § 1983 plaintiffs to "evade [habeas] requirement[s] by the simple expedient of putting a different label on their pleadings." *Preiser*, 411 U.S. at 489-490.

Nor has any subsequent case permitted such an evasion. Every case testing the proper demarcation between habeas and § 1983 has firmly classified any claim touching on the integrity of the state-court criminal proceedings as belonging to the realm of habeas corpus. When the Court has found the connection to be "too tenuous," *Dotson*, 544 U.S. at 78, it has been because the claim was *not* merely part of a chopped-up habeas action, but rather sought a legitimate stand-alone remedy restoring civil rights to a plaintiff *without* a particularized effect on conviction or custody:

Challenge to the trial-court proceedings or the duration of confinement	**Challenge not based on individual confinement, conviction, or sentence**
Preiser v. *Rodriguez*, 411 U.S. 475 (1973): Actual release delayed because of deprivation of good-time credits	*Muhammad* v. *Close*, 540 U.S. 749 (2004): Money damages sought from prison guard for making retaliatory accusations
Wolff v. *McDonnell*, 418 U.S. 539 (1974): Actual release delayed because of procedures resulting in forfeiture of good-time credits	*Wolff* v. *McDonnell*, 418 U.S. 539 (1974): Declaratory judgment that disciplinary procedures were *generally* invalid
Heck v. *Humphrey*, 512 U.S. 477 (1994): Money damages sought to vindicate allegedly unlawful conviction	*Nelson* v. *Campbell*, 541 U.S. 637 (2004): Injunction sought against particular method of execution

Edwards v. *Balisok*, 520 U.S. 641 (1997): Declaratory relief and damages for deprivation of individual good-time credits	*Wilkinson* v. *Dotson*, 544 U.S. 74 (2005): Declaratory and injunctive relief sought to compel use of lawful parole procedures[3] *Hill* v. *McDonough*, 547 U.S. 573 (2006): Injunction against specific three-drug sequence for lethal injection

The natural location both for this case and for *Osborne* is on the left side of this division, with claims cognizable only in habeas corpus. Both cases involve pursuit of particular evidence to demonstrate the claimant's innocence and thereby undermine a state-court conviction. Prisoners' claims are not, of course, automatically categorized as habeas claims simply because they are prisoners' claims—so long as the relief they seek is only distantly related to their specific and individualized claims

[3] *Wilkinson* v. *Dotson*, 544 U.S. 74 (2005), merits additional discussion because the parties strongly contest its meaning. Brief for Petitioner 14-20; Brief for Respondent 32-33. In *Dotson*, the Court held that challenges to Ohio parole procedures were cognizable under § 1983 because "neither prisoner's claim would necessarily spell speedier release, [and] neither lies at 'the core of habeas corpus.'" *Dotson*, 544 U.S. at 82 (citing *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973)). Notably, however, neither challenge was individualized; each challenged generally applicable procedures, not any deprivation *particular to the plaintiff* that would get him out of prison sooner. *Id.* at 76-77. But in this case, petitioner is not seeking any generalized declaration—*he wants evidence from his own case to show his own innocence.* If the evidence petitioner seeks is what he says it is, it could not avoid undermining the strength of the state-court conviction, whether he specifically asks for relief or leaves it formally unspoken. Cf. *Dist. Attorney's Office for the Third Judicial Dist.* v. *Osborne*, 129 S. Ct. 2308, 2325 (2009) (Alito, J., concurring).

of innocence or earlier release. But piecemeal litigation of the steps that, taken together, would invalidate a conviction or sentence, does not make that objective less plain when there is no other agenda (such as rectifying unconstitutional conditions of confinement)—and where the very basis of suit involves evidence allegedly material to the correctness of a state-court jury's verdict.

To be clear, the NDAA does not argue that petitioner's construction of the cases is devoid of all support. The federal courts of appeals have largely agreed with his position. See Brief for Petitioner 21-22. But these decisions have focused too narrowly on whatever chopped-up segment—the part of a habeas claim that was sliced out and rechristened under § 1983—was immediately before them. They ask whether the relief requested in that single segment—access to DNA—necessarily implies the invalidity of the prisoner's confinement. See *Durr* v. *Cordray*, 602 F.3d 731, 736 (6th Cir. 2010); *Grier* v. *Klem*, 591 F.3d 672, 678 (3d Cir. 2010); *McKithen* v. *Brown*, 481 F.3d 89, 102-103 (2d Cir. 2007); *Savory* v. *Lyons*, 469 F.3d 667, 672 (7th Cir. 2006); *Osborne* v. *Dist. Attorney's Office for the Third Judicial Dist.*, 423 F.3d 1050, 1054-1055 (9th Cir. 2005); *Bradley* v. *Pryor*, 305 F.3d 1287, 1291-1292 (11th Cir. 2002). This is, of course, the framework that petitioner urges in this Court. Brief for Petitioner 17-18. With the question thus framed, the proper result seems obvious, since some additional step in reliance on possession of exculpatory DNA (rather than the mere possession itself) is required to undo the conviction or the confinement.

But as shown in the chart above, a rigid insistence on accepting a plaintiff's determination of what effect relief in a § 1983 suit would have on his conviction or sentence is not a fair description of how this Court has actually decided its cases. The actual, immediate relief sought is the

wrong analytical focus under *Heck*,[4] where the prisoner disclaimed any formal modification of his conviction or sentence, and argued that payment of damages implied nothing about the validity of confinement. Rather, the Court asked whether "the *basis* for the damages claim" necessarily implied the invalidity of the prisoner's confinement. *Heck*, 512 U.S. at 481-482, 487 (emphasis added). It disregarded artful pleading that attempted to make a very real link to the state-court conviction *seem* tenuous—the worry in *Preiser*. Petitioner here also formally disclaims any relief that necessarily undoes his conviction or sentence, but does so only by a candidly expressed plan to litigate the issue piecemeal. Brief for Petitioner 18. But, as in *Heck*, the only conceivable result here—assuming the allegations are correct—is to undermine the state-court conviction.

C. Claims like petitioner's fall under habeas because they necessarily undermine state-court criminal proceedings

There is nothing tenuous about the relationship between postconviction discovery and undermining the conviction or sentence. That was the reason petitioner

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[4] Along with *Dotson*, petitioner cites *Hill* v. *McDonough*, 547 U.S. 573 (2006), for the proposition that what matters to this Court is the "actual *immediate* consequences of a successful suit," Brief for Petitioner 16 (emphasis added). But rather than concern with "immediate" consequences, *Hill* turns on the same question asked in *Heck* and *Dotson*—whether the prisoner's request challenges the fact or duration of the prisoner's confinement. Summarizing the distinction between habeas corpus and § 1983, the Court stated: "'Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus.' An inmate's challenge to the circumstances of his confinement, however, may be brought under § 1983." *Hill*, 547 U.S. at 579 (quoting *Muhammad* v. *Close*, 540 U.S. 749, 750 (2004) (*per curiam*) (citations omitted)). The Court reasonably concluded that Hill's challenge to the method of execution was a challenge to a condition of his confinement. *Id.* at 580.

sought the very same relief in habeas corpus that he now seeks through § 1983. See J.A. 17. If the evidence does what petitioner says it will do—potentially show his innocence—then it is *directly* connected to undermining the result in the state court. This suit will result in concrete action that cuts to the heart of state-court criminal proceedings—either handing over, or refusing to hand over, the State's evidence of guilt or innocence.[5] Such specific, individualized relief is entirely distinct from the type of generalized declaration or injunction about procedural rights that the Court regarded as appropriate subject matter for § 1983 in earlier cases. See, *e.g.*, *Dotson*, 544 U.S. at 82.

Even if petitioner had not already demonstrated that postconviction discovery should be sought in habeas (by *having sought it* in habeas), it would be hard to imagine such a pursuit as anything *but* an ingredient of a habeas action, and his brief contemplates as much. Brief for Petitioner 18 (petitioner "may, at some future date, use the results of DNA testing of this evidence to initiate a separate proceeding challenging his incarceration"). Unlike, for example, a FOIA request, discovery is not a destination, but a litigation tool. Petitioner has not alleged any basis for seeking discovery as a supplement to intellectual, historical, or educational purposes. While petitioner attempts to distinguish his complaint from pretrial dis-

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[5] As one example of how the claim invariably verges into habeas terrain, petitioner's apparent belief that *Osborne* allows him to use § 1983 to vindicate a liberty interest in having the Texas courts properly apply the Texas statute, see Brief for Petitioner 6, would mean the federal court would have to evaluate the strength of the conviction in light of the evidence, see Tex. Code Crim. Proc. art. 64.03 (Vernon Supp. 2010). Such scrutiny by a federal district court of the final state-court decisions under petitioner's state-law DNA-access claim would also implicate the *Rooker-Feldman* concerns described by respondent. See Brief for Respondent 48-49.

covery rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), see Brief for Petitioner 19 n.6, the demand for postconviction discovery is, if anything, *more* connected to an attack on a conviction because its purpose is to show that the jury got it wrong. See, *e.g.*, *Osborne*, 129 S. Ct. at 2325 n.1 (Alito, J., concurring) (postconviction requests for access to evidence (DNA or otherwise) aim at undermining conviction).

Although formally invoking § 1983, the claim here reflects the motivations and demands that routinely fill habeas petitions—ineffective assistance of counsel and deprivation of exculpatory evidence. Petitioner cannot avoid describing his claim in terms that invoke the reasons that would be expected (and indeed have already appeared) in an application for a writ of habeas corpus:

- In his § 1983 complaint seeking postconviction discovery, petitioner described how his initial habeas petition had sought the same discovery. J.A. 17.
- And in the complaint, petitioner connected that demand for access to evidence to the allegation of his trial counsel's ineffective assistance: "Plaintiff filed a motion contending that DNA testing was necessary in order for Plaintiff to prove that he had been prejudiced by his counsel's failure to ask for the testing prior to trial." J.A. 17.
- The petition for a writ of certiorari in this Court, naming "the real murderer," candidly described the lack of DNA evidence *in the state-court criminal trial* as making that trial deficient: "The evidence presented at trial of [the victim's uncle]'s possible involvement only scratched the surface of what was available and could have been presented." Petition 11.
- And the petition reiterated the connection between ineffective assistance of counsel and the lack of the

> evidence: "Mr. Skinner showed in his federal habeas proceeding that his trial counsel stopped their investigation of him without having a strategic justification for doing so, and thus failed to discover far more troubling information." Petition 11.

However packaged, a claim for discovery and a motivation to rectify ineffective assistance of counsel lie in the heartland of habeas litigation. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 697 (1984) ("An ineffectiveness claim * * * is an attack on the fundamental fairness of the proceeding whose result is challenged[, and] fundamental fairness is the central concern of the writ of habeas corpus."); see also *Osborne*, 129 S. Ct. at 2326 (Alito, J., concurring) (discovery challenges not cognizable under § 1983). Thus, for good reason, this Court has never authorized a § 1983 claim on either of the points that undergird petitioner's claim here—to seek discovery or to correct a deficiency caused by ineffective assistance. And *amicus* is aware of no federal appeals court decisions allowing either goal—until the postconviction DNA-access claims in cases like this one.

Nor is there any textual reason to conclude that suits under § 1983 must inexorably be permitted. Rather, the statutory text contemplates *various* alternative means of achieving a single end—the requirement that one who violates another's federal rights under color of state law be held accountable in federal court. It states that the party alleged to have deprived a person "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 * * *." 42 U.S.C. § 1983 (emphasis added). There can be no doubt that habeas is the "proper proceeding" for undertaking to show that the jury's conclusion of guilt was wrong.

Aside from its explicit reference to such other proceedings, § 1983 is a broad and generally applicable vehicle for remediation of civil-rights violations under color of state law. *Preiser*, 411 U.S. at 489-490. But the federal habeas statutes do this too, with laser-light precision, in the context of the review of state-court criminal proceedings. See 28 U.S.C. §§ 2241-2254. Those statutes already provide the means by which the federal courts may, consistent with bedrock notions of federalism, remediate any state-court violation of federal law in the course of a criminal proceeding resulting in conviction. *Preiser* initially invoked the doctrine that the specificity of habeas relief withdrew the core of that subject from scrutiny under the more general standards of § 1983. 411 U.S. at 489-490. The doctrine that "in most contexts, a precisely drawn, detailed statute pre-empts more general remedies," *Hinck* v. *United States*, 550 U.S. 501, 506 (2007) (internal citations and quotations omitted), remains the rule today. See also, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general.").

D. Prosecutors routinely defend criminal litigation—including evidentiary decisions—before federal judges though habeas corpus

State and local prosecutors routinely address claims involving core elements of state-court criminal prosecutions—including evidentiary issues—through federal habeas corpus proceedings. This system is the time-honored and carefully calibrated method to test whether federal rights have been respected in state-court criminal trials. See, *e.g.*, L. Yackle, Postconviction Remedies § 2.1 (2010). And as petitioner knows from his own prior federal habeas claim, habeas petitioners may seek discovery when courts regard it as appropriate to resolving the is-

sues presented. Rules Governing Section 2254 Cases, Rule 6.

But petitioner would upend this functional system by transforming prosecutors into defenders not of judgments of conviction under state-court proceedings, but defenders of *themselves* as alleged violators of civil rights. Indeed, under petitioner's approach, prosecutors would potentially be defendants in seriatim § 1983 suits leading up to a final habeas push once all the dominoes are in place. Revealingly, however, the results sought are the same—while § 1983 places the prosecutor in a more vulnerable (and the prisoner in a more relaxed) position than habeas, what petitioner wants through § 1983 is what he has already sought through habeas. A ruling that § 1983 cognizes attempts to compel production of evidence of innocence or guilt would therefore expand federal jurisdiction over collateral attacks on state-court proceedings from one into two separate and discrete types of challenges. Maintaining habeas as the exclusive vehicle for federal courts to test state-court convictions would avoid the comity and federalism concerns that would follow from dramatically expanding federal jurisdiction under § 1983. See *Osborne*, 129 S. Ct. at 2325 (Alito, J., concurring) ("It is no answer to say, as respondent does, that he simply wants to use § 1983 as a discovery tool to lay the foundation for a future state postconviction application * * * . Such tactics implicate precisely the same federalism and comity concerns that motivated our decisions (and Congress') to impose exhaustion requirements and discovery limits in federal habeas proceedings.").

A second concern about naming prosecutors as civil-rights defendants is that it takes decisionmaking about a particular convict's postconviction litigation away from the system designed for it—direct appeals and state and federal habeas—and transfers that authority to attor-

neys representing the prosecutor in a civil case. In some cases the § 1983 defendant will be represented by government lawyers, but in others—as in this very case—the prosecutor will be represented solely by his or her own *private* attorneys. In either case, the performance of counsel representing prosecutors will not only determine the prosecutor's "liability," as in any § 1983 claim, but will have a dispositive effect *on the criminal litigation itself.* In this case, the prosecutorial function of whether or not to disclose evidence will be decided by litigation where the prosecutor herself is the client.[6] Litigation under § 1983 compels such a division of interests—where the prosecutor is personally the defendant but the case aims to affect the still-valid criminal conviction of the § 1983 plaintiff—whereas in habeas corpus, the interests of the State in obtaining a just result and the prosecutor's interest in exercising discretion to achieve that result are aligned.

When the underlying legal issue concerns the guilt or innocence of the claimant, this Court's decisions have uniformly channeled the claim through habeas corpus, an ancient writ which has evolved to serve such purposes. Converting prosecutors into § 1983 defendants would undermine this practice, erode the role of habeas corpus, and unjustifiably expand federal jurisdiction.

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[6] Criminal prosecution has been a state monopoly for centuries. See, *e.g.*, *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892). Expanding § 1983 in the context of decisions directly affecting postconviction litigation may be the closest that federal courts will come to having private prosecutors—private law firms, like Sprouse Shrader Smith P.C. and Yetter Coleman LLP, which represent the respondent in this case—making litigation decisions that will result in *discovery of evidence* being granted or denied. In this sense attorneys who do not work for the State are litigating decisions that could amount to defending the State's prosecution.

E. Transforming habeas actions into a series of § 1983 actions would engender undue inefficiency and delay

The chief threat to the administration of the criminal-justice system is *not* that DNA evidence will be produced—most States have statutory standards *requiring* postconviction access to DNA evidence in appropriate circumstances. *Osborne*, 129 S. Ct. at 2322. Rather, it is the inappropriate expansion of federal jurisdiction and the ability of future plaintiffs to use a decision authorizing § 1983 suits as a tool for delay.

After *Osborne*, petitioner and those like him are unlikely in the extreme to make headway in finding any federal due-process violation in the state-law standards for releasing DNA evidence. See 129 S. Ct. at 2319-2320. Yet it is in the remote hope of persuading a federal court to grant such relief that petitioner now describes the nature of the § 1983 complaint that he has filed. Brief for Petitioner 6 (citing *Osborne*, 129 S. Ct. at 2319-2320).

The consequence is not, therefore, that federal courts are actually likely to order disclosure when a prosecutor has declined to produce evidence. It is rather that such meritless claims will imprudently and unjustifiably divert so many resources. Unlike collateral attacks brought under habeas corpus, § 1983 claims do not require claimants to exhaust their state remedies. See, *e.g.*, *Patsy* v. *Bd. of Regents of Fla.*, 457 U.S. 496 (1982). Thus, prisoners will undoubtedly follow the procedurally more painless path of § 1983 rather than the exacting procedures governing habeas claims. And though frivolous claims may ultimately be dismissed under either statute, § 1983 lacks the procedural safeguards to promptly dispose of them as habeas does. Compare, *e.g.*, *Mayle* v. *Felix*, 545 U.S. 644, 669-670 (2005) (Souter, J., dissenting) ("As the Court concedes, the purpose of the heightened pleading standard in habeas cases is to help a district

court weed out frivolous petitions before calling upon the State to answer."), with *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (no "heightened pleading standard" for § 1983).

Further, a newly muscular § 1983 cause of action will open the door to the sort of parallel litigation this Court decried in *Heck*. 512 U.S. at 484. As the Court noted, malicious prosecution actions require a "termination of the prior criminal proceeding in favor of the accused" in order to avoid "parallel litigation over the issues of probable cause and guilt." *Ibid.* (internal quotation omitted). Holding that the petitioner's claim does not "necessarily imply" the invalidity of his sentence would thus permit such parallel litigation, as he pursues remedies under both § 1983 and habeas—as, in fact, petitioner has done. Brief for Petitioner 5 n.2.

If the Court authorizes suits under § 1983 that are almost certainly meritless, the likely consequence will not be improved processing of DNA-access claims, but delay in reaching finality, particularly in capital cases.[7] The NDAA does not question petitioner's good faith in pursuing relief in this case, but accepting his view of the law would draw a roadmap for others to enlist federal courts solely to generate additional delay and needless expense. As described more fully below, see *infra*, pp. 26-28, the NDAA and its membership have no objection to the postconviction disclosure of evidence in appropriate cases—

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[7] Not all postconviction DNA-testing claims involve capital cases (*Osborne* was not), but as petitioner notes, they are a core source. Petition 25. Given that the Fourth and Fifth Circuits—two of the busiest capital-case circuits—are among those which currently do not cognize § 1983 claims for postconviction discovery, a reversal in this case would likely generate substantial additional § 1983 litigation in those circuits.

but they do request that long-established law not be undermined in order to provide what in most cases will be fruitless efforts to pursue that evidence under federal law.

II. Requiring Prosecutors To Respond To Challenges Underlying State-Court Convictions Under § 1983 Risks Needlessly Deleterious Consequences

Authorizing the use of § 1983 to seek postconviction access to evidence—even if cabined by the substantive limits described in *Osborne*—will create a new category of federal litigation for district attorneys nationwide. And if petitioner's analysis is adopted, there would be no principled reason—as petitioner candidly notes—that prisoners could not use it to seek *any* type of evidence, whether DNA or otherwise. *E.g.*, Petition 26 ("The issue presented in this case implicates other issues beyond the scope of relief in the form of DNA testing, including other kinds of evidentiary requests and challenges by prisoners to various actions taken by state officials."). Indeed, so long as the relief demanded in that particular filing did not automatically and instantaneously invalidate the conviction or lead to speedier release, *any* kind of complaint dealing with state-court criminal proceedings—trial procedures, evidentiary sufficiency, jury misconduct—would be cognizable under § 1983.

Although many—or most—such claims would presumably be readily dismissed, the injury to the administration of justice will inhere in the exposure to an onslaught of litigation with potentially debilitating costs in funds and energy (even if damages will rarely be appropriate parts of the § 1983 suits that will proliferate, see *Imbler* v. *Pachtman*, 424 U.S. 409 (1976)).[8] It is consis-

[8] Despite observing the broader implications of potential success in this case—*i.e.*, the expansion of § 1983 beyond DNA evidence—

tent neither with this Court's cases, see *supra* Part I, nor with the effective prosecution of crime, to subject prosecutors to § 1983 liability with respect to matters touching on the guilt or innocence of a prisoner whose conviction remains intact. Litigating any issue within that scope under § 1983, and at any time, would be needlessly burdensome. But postconviction DNA-access claims—especially in today's economic climate of straitened state finances—present particularly noteworthy challenges. At best, those challenges will give prisoners additional and unjustifiable additional bites at the apple at the expense of prosecutors' time, energy, and resources; and they will quite likely undermine state-law procedures for the appropriate release of DNA as well.

1. An upswing in demand for postconviction access to DNA evidence (at minimal cost to prisoners with relatively little to lose), could amount to a substantial increase in § 1983 litigation for district attorneys across the nation.[9] Experts estimate that biological evidence that could be subjected to DNA testing is obtained only in five to ten percent of all criminal cases. See Unvalidated or Improper Forensic Science, http://www.innocenceproject.org/understand/Unreliable-Limited-Science.php (as

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petitioner unconvincingly asserts that "[t]here is no reason to fear that the federal court system will be flooded with lawsuits" if the Court authorizes § 1983 for postconviction discovery. Brief for Petitioner 31. He offers no substantive explanation for why others in other contexts would not wish to make use of the same tool he seeks. And even in his own context, he agrees that "§ 1983 claims for DNA testing are not rare." *Id.* at 31-32.

[9] Frivolous claims can generate consequences for prisoners. See, *e.g.*, *Crawford-El* v. *Britton*, 523 U.S. 574, 596 (1998) (describing effects of Prison Litigation Reform Act). More specifically with respect to DNA claims, legislatures are considering penalties for frivolous demands for DNA evidence. See, *e.g.*, Tex. H.B. 2371, 81st Leg., R.S. (2009).

visited Sept. 14, 2010). However, when this statistic is considered in the context of the hundreds of thousands of criminal prosecutions handled every year,[10] the raw number of cases that could eventually be subject to postconviction DNA requests—before considering the claims for *other* types of discovery in all cases—becomes abundantly clear. And as scientific methods become more sophisticated and collection efforts improve, there is no reason to think that this number would not increase—indeed, some state statutes specifically contemplate this. See *Osborne*, 129 S. Ct. at 2317. If § 1983 cognizes each of these claims, virtually any convicted defendant can transmogrify his state criminal case into a federal civil-rights lawsuit—and state and local prosecutors can anticipate receiving and filing responses to substantial numbers of filings.

Worse, giving so much attention to the *least* meritorious DNA claims cannot help but distract from testing samples that merit it. "[O]ne of the biggest problems plaguing the justice community is the backlog of untested evidence." Kreeger & Weiss, DNA Evidence Policy Considerations for the Prosecutor 11, Am. Prosecutor's Research Institute, Special Topics Series (Sept. 2004), available at http://www.ndaa.org/pdf/dna_evidence_policy_considerations_2004.pdf (as visited Sept. 14, 2010). In 2003, the national DNA backlog stood at 542,000 samples awaiting testing. U.S. Dep't of Justice, National Institute of Justice, 2004 Annual Report 2 (2004). Through efforts of Congress and the White House, this number has been reduced, but it is estimated that the backlog still stands

[10] Annual *felony* convictions can exceed one million in the state-court systems alone. See, *e.g.*, Sourcebook of Criminal Justice Statistics Online, http://www.albany.edu/sourcebook/pdf/t5442004.pdf (as visited Sept. 14, 2010).

at nearly 400,000 samples. Moore, Progress is Minimal in Clearing DNA Cases, N.Y. Times, Oct. 25, 2008, p. A9.

For example, "[a] typical lab performing DNA testing in 2005 began with a backlog of 86 requests for DNA analysis, received 337 new requests, completed 265 requests, and finished the year with 152 backlogged requests." U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Census of Publicly Funded Forensic Crime Labs 2005, at 5 (2008). Improvements in DNA testing technology may actually increase this backlog, as testing becomes more prevalent (or at least in demand) in property-crime investigations and other crimes where DNA evidence has not traditionally been used. See Banda, Thefts Solved by DNA Analysis; Usage Expands in Non-Violent Crime, USA Today, Oct. 20, 2006, p. 1A.

This combination of enormous backlog and increased demand for testing has created substantial staffing challenges for district attorneys' offices and crime labs. "Based on the average performance of a DNA analyst in 2005, laboratories performing DNA analysis would have needed an estimated 73% more staff to complete all DNA requests in 2005." Census of Publicly Funded Forensic Crime Labs 2005, *supra*, at 7. Increased testing of samples that do not meet the standards will add to the bottleneck that delays testing of higher-priority samples. (And handing over samples to private labs for privately-paid testing carries with it the consequence of entrusting evidence to non-governmental actors.)

2. This comes at a time when prosecutors' budgets—like those of most entities around the country—are strained at unprecedented levels. District attorneys' offices across the country are faced with the possibility of layoffs and furloughs as state and local governments grapple with dramatically reduced revenue streams. A press release from one prosecutor's office describes the

severe furloughs and pay reductions in his office as a result of budget pressure, concluding that his office "can't possibly cut more without imploding." See Prosecuting Attorney of Butler County, Ohio, Prosecutor's Office Reduces Budget, June 22, 2010, available at http://www.countyprosecutor.org/displayrelease.cfm?ReleaseID=195 (as visited Sept. 14, 2010). See also, *e.g.*, Elfrink, Budget Cuts at the Miami-Dade State Attorney's Office, Miami New Times, Feb. 19, 2009, available at 2009 WLNR 3410728. These cuts in staff, of course, have led to increased workloads for those that remain. See, *e.g.*, Meagher, Supervisors' Budget Misery: Department Heads Paint Picture of $38 Million Cut, Santa Barbara Independent, Feb. 25, 2010, p. 8 ("For prosecutors in the [Santa Barbara County] District Attorney's Office, which already sees more cases per attorney out of any California county, [a proposed reorganization] could mean an increase from the current 477 cases per attorney (up from 378 last year) to 567.").

Even more distressing, budget constraints have also led some district attorneys' offices to triage measures, so that some are unable to prosecute even serious misdemeanor crimes. See, *e.g.*, Lee, D.A. Cuts Efforts on Lesser Crimes, San Francisco Chronicle, Apr. 22, 2009, p. B1 ("Misdemeanors such as assaults, thefts and burglaries will no longer be prosecuted in Contra Costa County because of budget cuts, the county's top prosecutor said Tuesday."); Wright, Police Prepare to Crack Down on Holiday Crime, Carlsbad Current-Argus, Nov. 25, 2009, available at 2009 WLNR 23735630 ("Fifth Judicial District Attorney Janetta Hicks has announced that due to cuts in state funding, her office can no longer afford to prosecute misdemeanors other than DWI and household battery."); Singer & Ervin, Shortfall Projected—Prosecutor, Judges, Sheriff Warn of Cuts to Courts, Law Enforcement, Seattle Times, June 6, 2008,

p. B1 ("[L]ocal criminal-justice leaders said Thursday they plan to move thousands of property-crime, forgery and drug cases to lower-level courts and cut investigations of fraud, Internet crimes and cold cases."); Vielmetti, DAs Feel State Budget Cuts, Worry Over Possible Layoffs, Milwaukee Journal Sentinel, Jan. 26, 2010, available at 2010 WLNR 1662518 (district attorney's office "no longer would prosecute several types of misdemeanors, about 1,200 a year, if his office loses one of his six full-time assistants").[11]

Expanding § 1983 jurisdiction is wrong as a matter of law. But forcing district attorneys to dedicate resources to defending themselves in § 1983 suits—filed by plaintiffs who could seek the same relief in habeas—amounts to a colossal waste of resources that are urgently needed elsewhere.

3. Given the pressing needs described above, one potential result of the expansion of § 1983 could be to undermine the very legislative balancing that this Court described—and embraced—in *Osborne*, 129 S. Ct. at 2316-2317, 2322. State legislatures (like Congress) have developed regimes placing "certain conditions on access to the State's evidence." *Id.* at 2317. With the thousands of cases involving DNA evidence, combined with the destabilizing effect of an anything-goes policy toward demands for evidence, the justification for an orderly, rather than chaotic, solution is evident.

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[11] Even *before* the worst of the economic downturn, New Orleans prosecutors were so overwhelmed that they were forced to release *felony* suspects (including murder suspects, leading to the phrase "misdemeanor murder") after 60 days under a state statute that required the release of suspects who have not been indicted within that period of time. Filosa, Crime Thrives Under 60-Day Rule, The Times Picayune, Feb. 12, 2007, at http://www.nola.com/news/tp/frontpage/index.ssf?/base/news-7/11712631133140.xml&coll=1.

Nor is prosecutorial stinginess regarding DNA an obvious problem calling out for federal solutions. District attorneys are not somehow *opposed* to the release of evidence. Indeed, they are uniformly bound to disclose exculpatory, material evidence to the accused before trial so that the accused may more effectively counter the prosecutors' case. See, *e.g.*, *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002) (citing *Brady*, 373 U.S. at 87). Prosecuting attorneys are not part of "a pure adversary model," because they are "the representative not of an ordinary party to a controversy, but of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States* v. *Bagley*, 473 U.S. 667, 675 n.6 (1985) (internal quotation marks and ellipses omitted). And law enforcement must preserve evidence that "could have been subjected to tests, the results of which might have exonerated the defendant." *Arizona* v. *Youngblood*, 488 U.S. 51, 57-58 (1988). Similarly, the various state postconviction DNA-access statutes, see *Osborne*, 129 S. Ct. at 2316-2317, impose further disclosure obligations consistent with prosecutors' basic constitutional responsibilities.[12]

Prisoners are also protected by prosecutors' special ethical duties. Under a longstanding provision of the American Bar Association's Model Rules of Professional Conduct, prosecutors must "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." Model Rules of Prof'l Conduct

[12] This case is about the appropriate *classification* of federal claims; the NDAA takes no position in this brief with respect to the appropriateness of second or successive habeas petitions in federal court in the context of actual-innocence claims.

R. 3.8(d) (2008).[13] See also National Center for Prosecution Ethics, Doing Justice: A Prosecutor's Guide to Ethics and Civil Liability 87-103 (2d ed. 2007). Prosecutors have both legal and ethical duties designed to ensure that evidence is properly shared with state prisoners and that the wrongly convicted are set free.

Consistent with these obligations, and far from any effort to "conceal" DNA evidence, prosecutors wish to follow applicable state law and procedure in providing it where appropriate. But if prosecutors are faced with a flurry of federal litigation in the unfamiliar context of § 1983, the severe shortages of human and financial resources may tip the balance between using available resources for prosecution or for fighting a federal lawsuit demanding evidence. In individual circumstances, such "settlements" may be sound husbanding of resources entrusted to the prosecutor by the people, and at first blush avoiding litigation may appear salutary. But if releases attributable to the press of § 1983 suits—rather than dispassionate agreement with the legal principle—the result would fundamentally undermine the very statutory development that *Osborne* sought to foster.

But the adverse consequences of destabilizing the carefully balanced legislative assessments regarding the appropriate times to hand over evidence are only part of the problem. First, with increased demands for (unjustified) testing, the backlogs described above would just grow; cases in which DNA evidence is most needed would be caught up in the chaos engendered by widespread claims. Thus, those postconviction demands which *are*

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[13] More recent amendments to the Model Rules—not yet fully adopted nationwide, but expressing standards for prosecutorial ethics everywhere—provide even greater postconviction protections with respect to disclosure of potentially probative evidence. See Model Rules of Prof'l Conduct R. 3.8(g) (2008); see also *id.* R. 3.8(h).

valid and which state legislatures wish to honor will be obscured by the many federal claims which require filed responses but only divert energy from following a legislatively enacted protocol.

Second, a key scientific basis for reluctance to hand over DNA to all comers is the inherent fragility of the evidence. Overly generous access to DNA evidence raises concerns related to evidence consumption and contamination, and therefore to the integrity of the criminal-justice system. (Offers for private payment of testing in private facilities outside direct government supervision is only a partial answer for this reason, of course.) The amount of biological evidence collected at any crime scene is finite, and often only a small amount of the evidence collected is of testable quality—once the evidence is subjected to DNA testing, the amount used is consumed and thus unavailable for future tests. See D. Bruns et al., Fundamentals of Molecular Diagnostics 158 (2007) ("Evidentiary [DNA] material cannot be replenished and may be present in only trace amounts. Testing may consume the sample and thus complete or repeat testing may be impossible."). And, as Justice Alito noted in *Osborne*, "'[t]he extraction process is probably where the DNA sample is more susceptible to contamination in the laboratory than at any other time in the forensic DNA analysis process.'" 129 S. Ct. at 2327 (Alito, J., concurring) (quoting Murphy, The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing, 58 Emory L.J. 489, 493 (2008)). Thus, if prosecutors are forced to—or feel practically compelled to—turn over more and more evidence, the finite stores of testable evidence will quickly be depleted or rendered useless by contamination.

In at least these ways, widespread threats of § 1983 litigation would risk undermining the progress that, in light of *Osborne*'s analysis, should be nurtured rather

than imperiled.[14] By maintaining habeas corpus as the vehicle for the federal review of state-court criminal proceedings, the Court will make it more likely that decisions about the release of evidence are based on legislative will and judgment rather than on risk-management or budgetary considerations.

CONCLUSION

Expanding federal jurisdiction into supervisory review over state-court criminal proceedings by making § 1983 an additional source of collateral attack is a step that this Court should not take. Its decisions do not require such a drastic step; it should instead recognize that when a § 1983 claim would empower a federal court to supervise any component of state-court criminal conviction that has not been overturned, that claim sounds in habeas. Practical considerations also inveigh against a dramatic shift in the exposure of prosecutors to § 1983 litigation. For these reasons stated above, and presented in respondent's brief, the Court should affirm the judgment of the Court of Appeals for the Fifth Circuit.[15]

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[14] Permitting § 1983 claims seeking access to postconviction DNA evidence would likely undermine state-law evidence-retention policies. See, *e.g.*, Ohio Rev. Code Ann. § 2933.82 (requiring preservation of biological evidence until the earlier of the inmate's release or 30 years); Tex. Code Crim. Proc. art. 38.43(c)(1) (Vernon Supp. 2010) (preservation "until the inmate is executed, dies, or is released on parole"). "Law enforcement agencies vary widely in terms of their policies for retaining forensic evidence, especially in cases where a defendant has been convicted of a crime." Storm et al., The 2007 Survey of Law Enforcement Forensic Evidence Processing, National Institute of Justice 3-9 (Oct. 2009), available at http://www.ncjrs.gov/pdffiles1/nij/ grants/228415.pdf. Cf. *Osborne*, 129 S.Ct. at 2323 (discussing problems with setting federal preservation standards pursuant to the Constitution).

[15] Respondent has suggested that the Court may find that the petition in this case was improvidently granted and dismiss on that basis. Brief for Respondent 50-53. The NDAA respectfully suggests that

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the Court should instead decide the question presented and provide clarity that is needed throughout the country. While respondent is plainly correct that there are serious deficiencies in petitioner's arguments and in the posture of the case, such deficiencies will also exist in many cases presented to the lower courts (and in any event, petitioner argues that none of them is fatal to his claim).