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CAPITAL CASE
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 FOR THE STATES OF ALASKA, ARIZONA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, KANSAS, LOUISIANA, MARYLAND, MISSISSIPPI, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, WASHINGTON, WYOMING, COMMONWEALTH OF NORTHERN MARIANA ISLANDS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Henry Skinner was convicted of a triple murder in Texas. After unsuccessfully invoking the state procedure for seeking postconviction DNA testing of evidence, he filed a complaint under 42 U.S.C. § 1983, alleging that denying him access to the evidence was fundamentally unfair. The district court dismissed his complaint, ruling that his claim was not cognizable under § 1983 but had to be asserted in a federal habeas petition. The question presented is:

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

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INTEREST OF *AMICI CURIAE*

The States have a fundamental interest in the integrity of their laws and, more specifically, in the effectiveness of their laws and rules governing postconviction access to evidence. This federalism concern is not speculative: 48 states have enacted postconviction DNA testing statutes. Allowing a prisoner to challenge a state official's denial of access to evidence by way of a § 1983 claim in federal court – unrelated to any specific constitutional objection to the procedures available to the prisoner under state law – would severely undermine these state laws and would challenge state sovereignty by substituting federal district courts for state courts as overseers of the state postconviction process.

In addition, the States have an obvious interest in conserving their scarce resources. Skinner's approach would substantially increase the amount of postconviction litigation to which States must respond. It would also require diversion of state resources to respond to the increase in the overall amount of discovery, which would be the natural outcome of a rule allowing prisoners to demand evidence that is untethered to any substantive claim for relief. The impact on state resources is by no means *de minimus* and would include the diversion of resources for the additional evidence handling and processing that would undoubtedly result from that litigation.

The Texas DNA law, like the laws of the 47 other states that have adopted statutory procedures for postconviction DNA testing, allows prisoners a fair opportunity to obtain testing that would establish a reasonable probability of innocence. Henry Skinner took advantage of that opportunity but failed to show that the testing he seeks could establish a reasonable

probability of innocence. He now seeks to use § 1983 to obtain the evidence. To allow this type of procedural legerdemain would both diminish the sovereign interests of the States and at the same time impose a significant burden on states' limited law enforcement resources.

The carefully-crafted postconviction DNA laws of the States balance the needs of justice, finality, and the mandates of the Constitution, in accord with the individual needs of each State. These statutes represent the best efforts of the several States to grapple with the changing legal landscape occasioned by the growing availability and sophistication of DNA testing. In the absence of a particularized showing that the application of a state statute has fundamentally failed to provide due process to a litigant, there is neither a need nor any policy justification for this Court to, in effect, abrogate the legislative efforts of the States in favor of a federalized, judge-driven legal doctrine. While the *Amici* recognize that, potentially, there might someday be a case in which a state statutory scheme so fundamentally fails an innocent prisoner that the interests of justice would require this Court to review the matter further, this is not that case. Skinner does not specifically allege in his complaint that the laws of the State of Texas have failed him. Instead, he seeks a judge-crafted remedy that he hopes will be more favorable to him than the carefully-balanced statutory procedure enacted by the legislature in his jurisdiction. Sound principles of federalism and judicial restraint demand that this Court reject Skinner's invitation.

SUMMARY OF ARGUMENT

A fundamental principle of this Court's federalism jurisprudence is that a state prisoner may not use

federal litigation to avoid otherwise valid state laws and procedures. If permitted by this Court, Skinner's suit would vitiate this principle and undermine state sovereignty.

Skinner twice sought, under a state law specifically intended for obtaining postconviction DNA testing, the evidence he seeks in his § 1983 action, and he was twice denied in state court. In seeking relief in federal district court, Skinner did not allege any specific constitutional defect in the state law or state court proceedings. In fact, he expressly disclaimed any allegations to that effect. He claimed only that Switzer's denial of access to the evidence was fundamentally unfair. Allowing Skinner to use § 1983 to do an end-run around valid state procedures negates those procedures and vests in federal courts control over the discovery of evidence relevant to a claim for state postconviction relief.

Last, Skinner has misappropriated this Court's discussion, in *District Attorney's Office v. Osborne*, of the importance of availing himself of state postconviction procedures before challenging their constitutional validity as applied. In that discussion, the Court merely pointed out the obvious: one cannot challenge a state procedure as applied until the procedure has been applied. Skinner has not asserted a specific as-applied challenge to the constitutionality of the state procedures available to him. Therefore, his unsuccessful invocation of those procedures proves nothing.

ARGUMENT

Skinner is attempting to use 42 U.S.C. § 1983 as a vehicle for obtaining discovery relating to a frontal attack on his state convictions. But his proposed

access-to-evidence claim improperly circumvents the existing DNA testing law in his state. Allowing such suits would undermine the state-federal balance governing federal review of state criminal convictions, with significant negative effects for the States.

A. SKINNER'S ACCESS-TO-EVIDENCE CLAIM IMPROPERLY CIRCUMVENTS STATE DNA TESTING LAWS AND DISCOVERY RULES

Skinner's use of § 1983 to obtain access to evidence would allow Skinner to avoid legitimate state laws and court rules regulating discovery and access to evidence. In this respect, Skinner's approach upsets the delicate state-federal balance struck by both Congress and this Court for federal review of state criminal convictions. Federalism concerns animate many aspects of federal habeas jurisprudence. *See Boumediene v. Bush*, 128 S.Ct. 2229, 2268 (2008) (habeas framework "respects federalism" by deferring to state courts' factual findings and requiring exhaustion of state remedies, which are "justified" by the assumption that state courts normally provide fair trials to defendants); *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (federal habeas review is unavailable when state-court decision rests on independent state-law ground that is adequate to support judgment); *McCleskey v. Zant*, 499 U.S. 467, 493 (1991) (doctrines of procedural default and abuse-of-writ both "seek to vindicate the State's interest in the finality of its criminal judgments").

These same concerns are mirrored in Congress's 1996 amendments to the habeas statute. *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 104, 100 Stat. 1214, 1219. Significant among the amendments is the requirement that federal habeas courts give substantial deference to

the factual and legal determinations of state courts. *See* 28 U.S.C. § 2254(d), (e). Congress's objective was "to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law," *Williams (Terry) v. Taylor*, 529 U.S. 362, 386, 404 (2000), as well as "to further the principles of comity, finality, and federalism," *Williams (Michael Wayne) v. Taylor*, 529 U.S. 420, 436 (2000). This Court has in fact cautioned that, although federal courts may be eager "to vindicate and protect federal rights and federal interests," they should do so only "in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The federalism concerns at play here are particularly well illustrated by the procedural history of Skinner's case. Skinner filed two motions in the Texas courts seeking access to the DNA evidence under the Texas postconviction-DNA-testing law. *See Skinner v. State*, 122 S.W.3d 808, 809-10 (Tex. Crim. App. 2003); *Skinner v. State*, 293 S.W.3d 196, 200-01 (Tex. Crim App. 2009). The Texas courts rejected Skinner's first request because Skinner failed to meet the statutory requirement that he show a reasonable probability that the requested testing would prove his innocence. *Skinner*, 122 S.W.3d at 811. The Texas courts rejected Skinner's second request because, contrary to the statute's explicit requirement of pretrial unavailability, the evidence had been available to Skinner and could have been tested prior to trial. *Skinner*, 293 S.W.3d at 200. And because Skinner failed to show that his trial attorney was ineffective in failing to request testing prior to trial, he could not show that the failure to test was "through no fault" of his own or that "the interests of justice" required DNA testing. *Id.* at 201-09.

Skinner's § 1983 complaint does not allege any constitutional defect in the Texas statute on its face, nor does it allege that the Texas courts applied the statute in an unconstitutional fashion. J.A. 5-23. At most, Skinner disagreed with the Texas courts' characterization of the facts and the conclusions they drew from these facts – namely, the courts' estimation of the probability that the DNA testing would establish his innocence and whether previously available testing should be permitted in the interest of justice. J.A. 15-20. Skinner conceded this interpretation of his claims in his pleadings in the § 1983 action. J.A. 31-32 & n.1. As the district court noted, Skinner's "*complaint* does not challenge the constitutionality of Article 64 of the Texas Code of Criminal Procedure nor does it ask this Court to review the application of Article 64 by the [Texas Court of Criminal Appeals]'s judgments denying him access to the DNA evidence." J.A. 31 (emphasis in original). Instead, Skinner "affirmatively state[d] that he does not complain of injuries caused by any state court judgment" and he "reiterate[d] that the injury of which he complains, that is, the refusal of the defendant district attorney to provide access to DNA evidence, existed *prior to* the state court proceedings and, therefore, his injury *could not have been caused by* those proceedings." J.A. 31 n.1 (emphasis added).

In short, Skinner alleged that he had a federal constitutional right to the evidence not because the Texas procedures for obtaining the evidence were constitutionally deficient but because, according to Skinner, the result – denial of access – was fundamentally unfair. To allow such a claim to be brought through a § 1983 action, which does not include key federalism-based provisions incorporated in the federal habeas statute, would open the door to federal

district court review of state court decisions under state DNA testing laws. It would also allow state prisoners to use federal courts to circumvent the restrictions placed on DNA testing requests by those state testing laws.[1] And they could do so without a

[1] Forty-eight States, plus the District of Columbia and the federal government, have enacted DNA testing statutes. *See* 18 U.S.C. § 3600; Ala. Code § 15-18-200 (LexisNexis Supp. 2009); 2010 Alaska Sess. Laws ch. 20, § 20, *codified as* Alaska Stat. § 12.73.010; Ariz. Rev. Stat. Ann. § 13-4240 (2010); Ark. Code Ann. § 16-112-202 (2006); Cal. Penal Code § 1405 (West Supp. 2010); Colo. Rev. Stat. Ann. § 18-1-412 (West Supp. 2009); Conn. Gen. Stat. Ann. § 52-582 (West 2005), § 54-102kk (West. 2009); Del. Code Ann., tit. 11, § 4504 (2007); D.C. Code Ann. § 22-4133 (LexisNexis 2010); Fla. Stat. Ann. § 925.11 (West Supp. 2010); Ga. Code Ann. § 5-5-41 (Supp. 2009); Haw. Rev. Stat. § 844D-121 to -123 (Supp. 2008); Idaho Code Ann. § 19-4902 (Supp. 2010); 725 Ill. Comp. Stat. Ann. § 5/116-3 (West 2008); Ind. Code Ann. § 35-38-7-1 to -5 (LexisNexis Supp. 2010); Iowa Code Ann. § 81.10 (West 2009); Kan. Stat. Ann. § 21-2512 (2007); Ky. Rev. Stat. Ann. § 422.285 (LexisNexis Supp. 2009); La. Code Crim. Proc. Ann. art. 926.1 (Supp. 2010); Me. Rev. Stat. Ann. tit. 15, § 2137 (Supp. 2009); Md. Code Ann., Crim. Proc. § 8-201 (LexisNexis Supp. 2009); Mich. Comp. Laws Ann. § 770.16 (West Supp. 2010); Minn. Stat. Ann. § 590.01 (West 2010); Miss. Code Ann. § 99-39-5 (Supp. 2009); Mo. Ann. Stat. § 547.035 (West 2002); Mont. Code Ann. § 46-21-110 (2009); Neb. Rev. Stat. Ann. § 29-4120 (LexisNexis 2009); Nev. Rev. Stat. Ann. § 176.0918 (LexisNexis 2009); N.H. Rev. Stat. Ann. § 651-D:2 (LexisNexis 2007); N.J. Stat. Ann. § 2A:84A-32a (West Supp. 2010); N.M. Stat. § 31-1A-2 (Supp. 2010); N.Y. Crim. Proc. Law § 440.30(1-a) (McKinney 2005); N.C. Gen. Stat. Ann. § 15A-269 (2009); N.D. Cent. Code § 29-32.1-15 (2006); Ohio Rev. Code Ann. § 2953.72 (West 2006); Or. Rev. Stat. § 138.690 to .696 (2009); 42 Pa. Cons. Stat. Ann. § 9543.1 (West 2007); R.I. Gen. Laws § 10-9.1-12 (Supp. 2009); S.C. Code Ann. § 17-28-30 (Supp. 2009); 2009 S.D. Sess. Laws ch. 120, § 1, *codified as*, S.D. Codified Laws § 23-5B-1; Tenn. Code Ann. § 40-30-303 to -304 (2006); Tex. Code Crim. Proc. Ann. arts. 64.01-64.03 (Vernon Supp. 2009); Utah Code Ann. § 78B-9-300 to -304 (2008); Vt.

single allegation that those state laws are constitutionally infirm. To permit this form of circumvention would leave these state DNA testing laws essentially toothless. More importantly, federal courts would be transformed into discovery masters, superintending the discovery of evidence intended for use in state court proceedings. This would disregard a fundamental federalism principle by unduly interfering with the legitimate activities of the States. *Younger*, 401 U.S. at 44.

B. THE *HECK* EXCEPTION IS NOT THE SOLE BASIS ON WHICH THIS COURT MAY REJECT A § 1983 CLAIM

Skinner focuses most of his attention on the standard adopted by this Court in *Heck v. Humphrey*, 512 U.S. 477 (1994), as later interpreted in cases such as *Edwards v. Balisok*, 520 U.S. 641 (1997), and *Wilkinson v. Dotson*, 544 U.S. 74 (2005). Pet. Br. 10-17. Skinner suggests that *Heck* is the *sole* basis upon which this Court may restrict state prisoners' § 1983 claims. He is mistaken.

In *Heck*, the Court elaborated on the principle articulated in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), that claims within the core of habeas corpus may not be asserted in a § 1983 action, explaining that a

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Stat. Ann. tit. 13, § 5561 (2009); Va. Code Ann. § 19.2-327.1 (2008); Wash. Rev. Code Ann. § 10.73.170 (West Supp. 2010); W. Va. Code Ann. § 15-2B-14 (LexisNexis 2009); Wis. Stat. Ann. § 974.07 (West. Supp. 2010); Wyo. Stat. Ann. § 7-12-303 (2009). Of the two remaining states, Massachusetts has addressed the issue through a court decision. *Commonwealth v. Donald*, 848 N.E.2d 447 (Mass. App. Ct. 2006). And Oklahoma has, by statute, created a DNA Forensic Testing Program to assist indigent prisoners in obtaining postconviction DNA testing. *See* Okla. Stat. Ann. tit. 22, § 1371.1 - .2 (West 2003 & Supp. 2010).

§ 1983 action would be barred where "a judgment in favor of the [prisoner] would necessarily imply the invalidity of his conviction or sentence." *Heck*, 512 U.S. at 487. From this, Skinner assumes that what has become known as the "*Heck* exception" – *i.e.*, claims that "necessarily imply" the invalidity of the conviction or sentence – is the sole basis upon which a court may reject a § 1983 claim asserted by a prisoner.

But nothing in *Heck* or the later cases discussing it suggests that the *Heck* exception stands alone. As explained in *Preiser*, this Court is concerned with the intersection of § 1983, whose broad language covers an extremely wide range of claims, and the federal habeas statute, whose more specific language would be engulfed and rendered a nullity if no limitations were placed on claims that arguably could be asserted under either statute. *Preiser*, 411 U.S. at 489-90. Skinner's complaint presents a similar concern but in a slightly different guise. While *Heck* involved a claim the proof of which necessarily implied the invalidity of the conviction, Skinner has taken a substantive claim (actual innocence) that unquestionably falls within the *Heck* exception and has split that claim into a procedural component, which he seeks to independently assert as a § 1983 claim, and a substantive component, which cannot be asserted as a § 1983 claim. Rejecting this type of artful pleading involves no modification or expansion of *Heck*; it merely prevents prisoners from avoiding the *Heck* exception through inappropriate piecemeal litigation.

A rule against piecemeal litigation of the type pursued by Skinner, moreover, would have application far beyond the context of prisoner litigation and

is thus wholly independent of *Heck*. A rule against splitting discovery requests from the substantive claims to which those requests relate could apply to any litigation involving a State.[2] Even in traditional civil litigation, parties should not be permitted to obtain discovery from a State through a § 1983 action, thereby avoiding applicable discovery rules and any threshold procedural issues (such as the federal court's jurisdiction over the substantive claim to which the discovery relates). To hold otherwise would allow specious and wasteful discovery requests at what would be great expense to a State.

Relying on language from *Dotson*, Skinner also argues that the Court fully addressed *Amici*'s federalism concerns when it crafted the *Heck* exception. Pet. Br. 33-34. In *Dotson*, two prisoners sought declaratory and injunctive relief under § 1983, claiming that state parole procedures were unconstitutional on ex-post-facto and due-process grounds. Although the prisoners clearly hoped that success on their claims would result in their earlier release on parole, that result was in no way certain. The prisoners' procedural challenge did not implicate the substance of their eligibility for parole because the protections

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[2] *Amici* acknowledge that this is a capital case and is thus "different." *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("As Arizona's counsel maintained at oral argument, there is no doubt that '[d]eath is different.'"); *see also Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (plurality opinion) (noting that majority of Court had "expressly recognized that death is a different kind of punishment from any other which may be imposed in this country"). The purely legal issue presented in this case, however, goes well beyond the capital cases. The effects of the rule sought by Skinner will be borne across the spectrum of criminal cases and may extend into civil cases as well.

they sought were too remote to the decisions that would actually affect their eligibility or release. Success in the § 1983 action would provide the prisoners with, at most, opportunities for new or earlier parole hearings. *Dotson*, 544 U.S. at 82.

In response, the State of Ohio argued that allowing a § 1983 action in this context would "break faith with principles of federal/state comity by opening the door to federal court without prior exhaustion of state-court remedies." *Dotson*, 544 U.S. at 84. This Court disagreed, explaining that its earlier cases – specifically, *Heck* and its progeny – have "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." *Id*. From this language, Skinner argues that the comity concerns raised by *Amici* in this case have already been addressed by the Court and cannot be asserted to support an independent restriction on § 1983 jurisdiction. Pet. Br. 34.

But *Heck* and similar cases focused primarily on the States' interest in preventing federal courts from disturbing the finality of state criminal judgments. The "necessarily implied" exception adopted in those cases balances that interest against prisoners' interest in vindicating constitutional rights, as this Court stated in *Dotson*. *Dotson*, 544 U.S. at 84. Skinner's access-to-evidence claim raises an entirely different set of federalism concerns. As explained above, the States have an interest in the continuing vitality of their discovery rules and their postconviction-DNA-

testing laws. This interest is especially significant where, as here, the prisoner is not challenging any specific aspect of state law or procedure, but merely argues that the end result – the legitimate denial of access – is fundamentally unfair.

For these reasons, Skinner's extended discussion of *Heck*, *Dotson*, and *stare decisis* adds nothing to his argument. Pet. Br. 33-37. Simply put, *Amici* are not asking the Court to modify or supersede *Heck* or any of its progeny. Thus, the requirements of *stare decisis* have not been triggered.

C. Severance Of Discovery From Substantive Claims Would Have Serious Practical Consequences For The States

Skinner's severance of discovery from his substantive claim would also have significant practical consequences for the States. These consequences would be felt far beyond the death-penalty context; even states without a death penalty would be affected. If this Court recognizes a § 1983 claim for evidence outside the context of a cognizable substantive claim, Skinner can avoid the near-universal requirement of state and federal discovery rules that he establish the relevance of the requested evidence to a legally cognizable claim prior to demanding access to that evidence. The fact that States would be precluded from raising procedural bars to a prisoner's substantive claim before proceeding with discovery would dramatically increase the amount of discovery activities and would open the door to fishing expeditions for evidence that ultimately has no relevance to any cognizable claim not otherwise procedurally barred.

The burden on the States of opening their evidence lockers to any and all prisoners who request access cannot be underestimated. There are more than one million felony convictions each year in the United States. *See* William Stuntz, *Unequal Justice*, 121 Harv. L. Rev. 1969, 2028 n.276 (2008). The national organization most involved in this issue, the Innocence Project, claims that it is receiving "about 3,000 requests now a year for post-conviction DNA testing." Hearing on DNA Forensics Initiatives Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 110th Cong. (April 10, 2008) (testimony of Peter Neufeld, Co-Founder and Co-Director, Innocence Project). Valid restrictions in state DNA testing laws attempt to filter out non-meritorious claims from this large population. Skinner's approach would permit prisoners who did not otherwise qualify for access as a result of this filtering process to assert a right of access under § 1983 without meeting the threshold requirements often imposed by state DNA testing laws – requirements such as proof that the testing was not previously available or that testing favorable to the defendant will establish a reasonable probability of innocence. In short, it would dramatically increase the number of § 1983 claims (while simultaneously promoting circumvention of valid state postconviction DNA testing laws).

But the cost of litigating § 1983 claims is only one small part of the overall burden on the States of Skinner's approach. That burden will be more far-ranging and will include the diversion of state and local law enforcement resources for purposes of locating and transporting the evidence, assuring proper handling, processing, and packaging to prevent contamination or destruction of the evidence,

and maintaining the chain of custody. These burdens are in addition to the costs of testing either by overburdened and heavily backlogged state crime labs or by private labs hired by the States to perform the requested testing. *District Attorney's Office v. Osborne*, 129 S.Ct. 2308, 2328-29 (2009) (Alito, J., concurring) (describing "costs associated with the DNA-access regime proposed by" Osborne and noting difficulties state crime labs are facing with respect to sheer volume of DNA-testing requests). *Cf.* Brief of the States of Alabama, *et al*. as *Amici Curiae* in Support of Respondent at 24-28 (discussing burdens imposed on government forensic laboratories by processing drugs seized in connection with criminal prosecutions), Brief of *Amici Curiae* National District Attorneys' Assoc., *et al*. in Support of Respondent at 11-16 (same), Brief for the United States as *Amicus Curiae* Supporting Respondent at 24 (same), *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) (No. 07-591). These testing costs would most likely be borne in whole or in part by the States in the majority of cases – *i.e.*, in those cases in which the prisoner is indigent and cannot afford the testing costs.

And testing is rarely as simple as locating and testing a single swab of blood or semen. Skinner's case provides an excellent example of this problem. Skinner is not seeking a single test of a single piece of evidence. He is attempting to show the presence of a third party – the victim's uncle – at the scene. Pet. Br. 2-3. He has requested access to numerous pieces of evidence on which blood or semen of that third party might be found. J.A. 22. In addition, testing a single swab of blood from any blood stain may not be sufficient. Where blood or other biological material from different individuals may have commingled on an item of evidence or within a

particular stain, the fact that a third party's DNA does not appear in one swab from that item or stain does not eliminate the possibility that the DNA would appear in a second swab taken from a different area of that same item or stain. Until the entire stain has been tested, the prisoner can always argue that one more swab could prove his innocence.

There is no reasoned way, moreover, to limit Skinner's approach to requests for DNA evidence, as Justice Alito correctly pointed out in his concurring opinion in *District Attorney's Office v. Osborne*. Justice Alito cited as an example a prisoner's use of § 1983 to obtain discovery in support of an as-yet-unasserted claim under *Brady v. Maryland*, 373 U.S. 83 (1963). Justice Alito took as "common ground" that a *Brady* claim – alleging that the state had failed to disclose exculpatory evidence to the defense prior to trial – must be brought as a federal habeas claim. *Osborne*, 129 S.Ct. at 2325 (Alito, J., concurring). But if the Court accepted Osborne's (and by extension Skinner's) view of § 1983, Justice Alito could "see no reason" why a prisoner could not use § 1983 to assert "a due process right to search the State's files for exculpatory evidence" based merely on speculation that the files might contain undisclosed *Brady* material. *Id.* That is, if Skinner's approach were adopted, state prisoners could use § 1983 to go on fishing expeditions to obtain discovery in support of a *potential Brady* claim. And particularly troubling to Justice Alito, the prisoners could bypass the state courts in doing so. *Id*.

Skinner addresses Justice Alito's concern only briefly in a footnote. Pet. Br. 19 n.6. Skinner distinguishes the *Brady* situation posited by Justice Alito by pointing out that a *Brady* claim, unlike an access-

to-evidence claim, necessarily implies the invalidity of the prisoner's conviction. *Id.* Thus, Skinner concludes, a *Brady* claim could not be brought as a § 1983 claim. *Id.* But he misses Justice Alito's point. Justice Alito was not suggesting that a *Brady* claim could be asserted in § 1983 action; in fact, he took as a given that such claims must be brought in federal habeas. *Osborne*, 129 S.Ct. at 2325 (Alito, J., concurring). Rather, he was concerned, and correctly so, that if Osborne's interpretation of § 1983 were accepted, a prisoner could use a similar access-to-evidence claim under § 1983 to obtain discovery of the state's files, discovery obtained for the sole purpose of finding a previously unseen *Brady* claim.

The best response that Skinner can muster to the obvious drain on resources that would flow from permitting unrestricted discovery divorced from any substantive claim is that, to date, "there is no evidence that such claims have created an undue burden" on federal courts. Pet. Br. 32. Even if true, this assertion provides cold comfort for those States where innocence claims are only now becoming common practice. More important, in States with postconviction DNA testing laws, many of these claims in the past have been filtered through the state courts. Allowing a standalone claim of access, apart from any specific challenge to the state procedures, would open the door to § 1983 claims by prisoners who previously would have sought different avenues to challenge the state-court denial of access.

D. *OSBORNE* DID NOT OPEN THE DOOR TO § 1983 CLAIMS LIKE SKINNER'S

Skinner repeatedly cites this Court's discussion in *Osborne* of the importance of first invoking state postconviction DNA testing procedures before

asserting a due process challenge to those procedures. Pet. Br. 6-7, 9, 29, 34-35. Skinner reads *Osborne* as leaving "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." Pet. Br. 29. The only threshold requirement for asserting such a claim, according to Skinner, is that the state prisoner first avail himself of those state procedures. *Id.* Skinner asserts that his claim differs materially from Osborne's claim because, while Osborne "bypassed available state avenues for obtaining DNA testing," Skinner "took advantage of every existing state court procedure for seeking access to DNA evidence." Pet. Br. 7 n.3.

Skinner reads far too much into *Osborne*'s discussion of fundamental fairness and invocation of state procedures. Osborne asserted a substantive due process right to postconviction DNA testing. This Court rejected that claim but left open the possibility that, where States provide postconviction procedures for establishing actual innocence, those procedures must meet basic procedural due process requirements. *Osborne*, 129 S.Ct. at 2320 ("Federal courts may upset a State's postconviction relief procedures only if they are fundamentally inadequate to vindicate the substantive rights provided.") (citing *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). Osborne did not assert, and this Court could not find, any facial defect in Alaska's postconviction procedures, including procedures for obtaining discovery (such as new DNA testing) in support of an actual innocence claim. *Id.* at 2320. The Court acknowledged that the details of Alaska's procedures were somewhat "uncertain." *Id.* at 2321. But the fault for this uncertainty

lay with Osborne who had brought his § 1983 claim without ever having invoked the state procedures. *Id.* The Court pointed out the obvious: "[I]t is Osborne's burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief. These procedures are adequate on their face, and without trying them, Osborne can hardly complain that they do not work in practice." *Id.* (citation omitted).

Skinner transforms this Court's simple observation about a prisoner's burden of proof into a threshold requirement for a § 1983 access-to-evidence claim. That is, according to Skinner, as long as he has invoked the procedures provided by Texas for postconviction DNA testing and been denied access, he may then file a § 1983 claim. But merely invoking state procedures unsuccessfully is not sufficient to assert a procedural due process claim; Skinner must also allege that some particular aspect of the state procedures is constitutionally inadequate. In this action, Skinner expressly disclaimed any such allegation. J.A. 31-32 & n.1 (noting that Skinner was not challenging the constitutionality of the Texas DNA law or its application by the Texas courts). In fact, even before this Court, Skinner has not identified a single provision of the Texas postconviction DNA testing law that allegedly violates federal procedural due process requirements. While invoking state procedures may be a prerequisite to asserting an as-applied challenge to a state law, Skinner did not assert an as-applied challenge in his complaint. Thus, his invocation of state procedures proves nothing and certainly does not open the door to a vague claim that the end result of the state procedures – the denial of access to the evidence – was itself fundamentally unfair.

In this respect, Skinner's claim varies little, if at all, from Osborne's claim. Although Skinner thinly veils his claim in the language of procedural due process – as opposed to the substantive-due-process claim asserted by Osborne – Skinner is not asserting that any particular aspect of Texas's procedures for obtaining access to DNA evidence is constitutionally flawed. Instead, he asserts that Switzer's denial of his informal request for access to the evidence, wholly independent of the Texas postconviction DNA testing law, was fundamentally unfair. J.A. 20-21, 31 n.1. Despite Skinner's use of the label "procedural due process," his claim is nothing more than *Osborne* redux.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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