No. 18-417

IN THE

Supreme Court of the United States

W. SCOTT HARKONEN, M.D.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE INNOCENCE PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Innocence Project is a nonprofit organization and law school clinic dedicated primarily to providing pro bono legal and related investigative services to people who may be innocent but have nevertheless been wrongfully convicted of crimes. The Innocence Project also seeks to prevent future wrongful convictions by researching how innocent people are convicted of crimes and pursuing reform initiatives designed to enhance the accuracy of the criminal justice system. Because wrongful convictions destroy lives and allow actual perpetrators to remain unpunished, the Innocence Project's work serves as an important check on the awesome power of the state over criminal defendants and helps to ensure a safer and more just society.

The criminal justice system is replete with processes and procedures designed to ensure that we "convict the guilty and free the innocent." *Herrera v. Collins*, 506 U.S. 390, 398 (1993). Unfortunately, history teaches us that sometimes those processes and procedures fail and innocent people are convicted, both at trial and based on guilty pleas. The advent of forensic DNA testing and the use of that testing to review criminal convictions have provided scientific proof that our system is susceptible to convicting the innocent and that wrongful convictions are not isolated events. To date, 363 wrongfully

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[1] Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party and no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(a), both parties received timely notice of the intent to file this brief and have consented to the filing of this brief.

convicted men and women have been exonerated through DNA testing alone. The Innocence Project has played a role in more than half of those cases. Although DNA testing can provide some of the starkest evidence of actual innocence, there is no reason to think that wrongful convictions are limited to cases involving charges of violent crimes.

It is vital to the interests of the Innocence Project to ensure that there is some avenue for relief in all cases in which new evidence is discovered after a conviction that establishes actual innocence.

SUMMARY OF ARGUMENT

The Court should grant certiorari to resolve a clear circuit split regarding the substantive requirements for obtaining relief by the writ of error coram nobis from convictions imposed by federal courts on people who are actually innocent. Petitioner convincingly demonstrates that, more than six years after his trial, a change in science has proven him to be actually innocent of the wire fraud of which he was convicted. In at least three circuits, his proven innocence would be grounds for coram nobis relief from the conviction. In at least five circuits, a person, such as Petitioner, who is actually innocent, has no grounds for relief unless the wrongful conviction is accompanied by some additional triggering circumstance, such as a constitutional or jurisdictional error. These barriers to relief are unjust and serve to strip the writ of coram nobis of its traditional role of remedying miscarriages of justice, such as criminal convictions of innocent people.

The experience of the Innocence Project demonstrates two things about cases where innocent people have been wrongfully convicted of crimes they

did not commit. First, that exoneration often takes many years, and sometimes decades. This means that some people develop the evidence required to prove their actual innocence after having completed their custodial sentences and thus having lost access to the writ of habeas corpus and other post-conviction relief. Second, like in Petitioner's case, exoneration often is based on new science or the discovery of scientific error. These science-based changes demonstrating the wrongfulness of convictions have no necessary correlation to the presence or absence of an accompanying constitutional or jurisdictional error. Thus, coram nobis relief, which is a well-established remedy of last resort for correcting manifest injustice, should be available to persons establishing actual innocence, and no finality interest, federalism concern, or principle of this Court's jurisprudence justify the gateway barriers to obtaining coram nobis relief that have been erected in certain circuits.

ARGUMENT

I. BECAUSE IT OFTEN TAKES MANY YEARS TO PROVE ACTUAL INNOCENCE, WRITS PROVIDE THE ONLY PRACTICAL AVENUES FOR REDRESS.

The experience of the Innocence Project shows clearly that there is often a significant delay between conviction and exoneration. Thus, if coram nobis relief is unavailable as a means of addressing actual innocence, there will be no relief for people who have been wrongfully convicted, but who have completed their custodial sentence and thus are barred from seeking habeas relief. The length of the sentence should have no bearing on the availability of relief.

Innocence cases, by their nature, require greater resources than most cases. Because innocent clients generally have no knowledge of the crime, they are often poorly situated to assist their counsel in developing evidence to support their defenses. As a result, post-conviction investigation in innocence cases is more akin to cold-case, law-enforcement investigation than ordinary criminal-defense practice. Counsel must obtain and test DNA evidence and obtain other forensic testing. Counsel must locate and interview witnesses years after the fact. Counsel must comb through old law-enforcement records, request documents that may not have been previously discovered, and evaluate expert testimony.

The Innocence Project's experience confirms that it takes many years of sustained effort for competent counsel to prove a client's innocence. In the seventeen DNA exonerations reported by the National Registry of Exonerations in 2016, the average time between conviction and exoneration was twenty-one years. *See* The Nat'l Registry of Exonerations, Exonerations in 2016 6 (2017).[2] In addition, an internal Innocence Project analysis of over ten years' worth of closed client cases revealed that, on average, it takes nearly six years after the Innocence Project accepts a client to locate and test DNA evidence, litigate claims of innocence, and secure a client's exoneration. Because the Innocence Project typically only accepts a case after all ordinary appeals have been exhausted, this six-year average period of Innocence Project effort translates into an even longer typical period of post-conviction delay for a petitioner before exoneration. Indeed, each of the Innocence Project's clients

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[2] http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2016.pdf.

exonerated in 2018 waited more than twenty years before his innocence was established in the courts:

- Twenty-eight years after his conviction, Kevin Bailey was proven innocent based on DNA evidence and evidence of systemic abuse of suspects by the Chicago Police Department. Megan Crepeau, *Charges Dropped in 1989 Murder Investigated by Chicago Cops Tied to Jon Burge*, Chicago Trib. (Jan. 30, 2018).[3] Moreover, Kevin Bailey waited fifteen years after first seeking DNA testing in court to be exonerated. *See People v. Bailey*, 897 N.E.2d 378, 381 (Ill. App. Ct. 2008).
- Twenty-four years after his conviction for robbery and felony murder in New Jersey, Eric Kelley was exonerated by DNA evidence. S.P. Sullivan, *Murder Case Quietly Dropped After DNA Raises Doubt. What Took So Long?*, NJ.com (Apr. 7, 2018).[4] The DNA testing identified another individual. *Id*.
- Twenty-three years after his conviction for kidnapping and rape in Texas, Ernest Sonnier was exonerated by DNA evidence. The DNA testing identified two other men as the source of DNA at the crime scene. *See Ex parte Sonnier*, No. WR-85,161-02, 2017 WL 4410272 (Tex. Crim. App. Oct. 4, 2017); *see also* James C. McKinley, Jr., *Man Held For 23 Years Is Set Free by DNA Tests*, N.Y. Times (Aug. 7, 2009).[5]

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[3] http://www.chicagotribune.com/news/local/breaking/ct-met-murder-charges-dropped-jon-burge-20180129-story.html.

[4] https://www.nj.com/news/index.ssf/2018/04/after_dna_raised_doubts_prosecutors_dropped_the_mu.html.

[5] https://www.nytimes.com/2009/08/08/us/08houston.html.

- Twenty-six years after his conviction for murder in Oklahoma, Johnny Tallbear was exonerated by DNA evidence. The State had relied on scientifically invalid testimony from now-discredited forensic serologist Joyce Gilchrist to obtain Mr. Tallbear's conviction. *See* Kyle Schwab, *OKC Man Walks Free After 1992 Murder Conviction Vacated*, NewsOk (June 11, 2018).[6]

In addition, the experience of the Innocence Project shows that people are sometimes exonerated after serving the entirety of their custodial sentences:

- Dion Harrell was proven innocent in 2016, twenty-four years after he was convicted of rape in New Jersey. At the time of his exoneration, he had long since completed his four-year sentence, but remained on the sex offender registry. Alan Feuer, *Wrongfully Convicted of Rape, a New Jersey Man Finds More Punishment After Prison*, N.Y. Times (Aug. 2, 2016).[7]
- VanDyke Perry was exonerated in 2018 of his 1992 New York rape conviction, over a decade after he had completed his entire prison sentence and parole. Jan Ransom, *26 Years Later, Justice for Men Imprisoned for a Bogus Rape*, N.Y. Times (May 7, 2018).[8]

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6 https://newsok.com/article/5597695/okc-man-walks-free-after-1992-murder-conviction-gets-dismissed.

7 https://www.nytimes.com/2016/08/03/nyregion/wrongfully-convicted-of-rape-a-new-jersey-man-finds-more-punishment-after-prison.html.

8 https://www.nytimes.com/2018/05/07/nyregion/innocence-project-manhattan-rape.html.

- Ted Bradford's 1996 Washington State rape and burglary convictions were reversed in 2007 based on DNA evidence, two years after he had completed his entire sentence. *In re Bradford*, 165 P.3d 31, 32 (Wash. Ct. App. 2009). Mr. Bradford was later acquitted at a retrial. Mark Morey, *Ted Bradford—The Nightmare Continues*, Yakima Herald (Nov. 17, 2010).[9]

These proven cases of actual innocence demonstrate that it routinely takes decades for evidence of innocence to surface. Because this delay has no relation to the length of a person's sentence, the Court should guard against arbitrary limitations on the time to bring claims of actual innocence, such as gateway limitations on coram nobis relief that would preclude its use to redress actual innocence. *Cf. McQuiggin v. Perkins*, 569 U.S. 383, 386-87 (2013) (showing of actual innocence under miscarriage of justice standard overcomes statute of limitations for habeas petitions under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)).

II. INNOCENCE CLAIMS ARE NOT INVARIABLY ACCOMPANIED BY CONSTITUTIONAL VIOLATIONS, BUT OFTEN ARISE OUT OF NEW SCIENCE AND THE DISCOVERY OF SCIENTIFIC ERROR.

In recent years, there has been a revolution in both the use of scientific evidence in criminal cases and the scrutiny applied to that evidence, both of which are reflected in the hundreds of DNA exonerations that have taken place in the United States. This

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[9] https://www.yakimaherald.com/ted-bradford-the-nightmare-continues/article_6876221e-7654-11e7-97aa-2f755d502126.html.

Court has recognized the significant impact DNA technology has had on the criminal justice system:

> Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue. DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others.

Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 62 (2009) (citations omitted). As exemplified by each of the four Innocence Project clients exonerated just this past year, a person convicted in the 1980s could wait decades to obtain reliable DNA testing of biological evidence that can prove innocence. *See supra* Part I.

Along with the development of new technologies, the passage of time has also shown that some forensic techniques once relied upon to convict are actually invalid. In 2009, the National Academy of Sciences issued a comprehensive report identifying numerous problems with the reliability of various types of forensic evidence. This Court discussed the issue while highlighting the importance of the right to confront forensic experts at trial:

> Serious deficiencies have been found in the forensic evidence used in criminal trials. One commentator asserts that "[t]he legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics." . . . And the National Academy Report concluded: *"The forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country."*

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 319 (2009) (first citing Pamela Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 491 (2006), then citing Nat'l Research Council of the Nat'l Acad., *Strengthening Forensic Science in the United States: A Path Forward* P-1 (Prepublication Copy Feb. 2009) (emphasis in original)). Invalid forensic evidence is a significant cause of wrongful convictions of innocent men and women:

> Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that "[s]erious deficiencies have been found in the forensic evidence used in criminal trials. . . . One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases."

Hinton v. Alabama, 571 U.S. 263, 276 (2014) (quoting *Melendez-Diaz*, 557 U.S. at 319).

The Federal Bureau of Investigation's (FBI) use of microscopic hair comparison is a good example of scientific evidence that has been shown to be unreliable. Prior to the development of mitochondrial DNA testing of hairs, trace evidence analysts at the FBI and other crime labs would examine the microscopic characteristics of hairs in order to associate a hair collected from a crime with that of a suspect. *See* Press Release, Fed. Bureau of Investigation, FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review (Apr. 20, 2015).[10] Although there was no empirical data supporting the conclusion that hair could be "matched" by this method, FBI agents frequently testified at criminal trials that hairs "matched" a specific person and even provided quasi-statistical statements about the strength of the association. Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis over Decades*, Wash. Post (Apr. 18, 2015).[11] In 268 cases reviewed by the National Association of Criminal Defense Lawyers and the Innocence Project, examiners in the FBI laboratory's microscopic hair comparison unit overstated matches in more than 95% of the cases initially reviewed; these cases included thirty-two defendants sentenced to death. *Id*.

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[10] https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review.

[11] https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/39c8d8c6-e515-11e4-b510-962fcfabc310_story.html?utm_term=.cb3e192a49f1.

After DNA testing showed that a significant percentage of "matches" identified by the FBI were incorrect, the federal government admitted that its agents had testified improperly in court for decades and conducted a comprehensive review of microscopic hair comparison analysis and testimony in over 20,000 cases litigated before December 31, 1999. *See United States v. Ausby*, 275 F. Supp. 3d 7, 23-24 (D.D.C. 2017). The results were alarming: The Department of Justice (DOJ) and FBI "formally acknowledged that nearly every examiner in [the] elite FBI forensic unit gave flawed testimony in almost all trials in which they offered evidence [about hair matches] against criminal defendants over more than a two-decade period." *Gimenez v. Ochoa*, 821 F.3d 1136, 1144 n.4 (9th Cir. 2016) (citation omitted).

In response to these findings of widespread scientific error, the United States government took extraordinary measures to ensure that procedural barriers did not block persons convicted on the basis of flawed FBI testimony from court relief. The DOJ (1) waived reliance on any applicable statute of limitations, and (2) conceded that the invalid testimony constituted "false evidence" with knowledge of the falsity imputed to the prosecution. *Ausby*, 275 F. Supp. 3d at 24. Similar efforts have been undertaken by the federal government to remedy erroneous testimony relating to bullet-lead analysis at the FBI crime lab. *See, e.g.*, *Kretchmar v. FBI*, 32 F. Supp. 3d 49, 51-52 (D.D.C. 2014) (describing that the FBI reviewed trial transcripts in cases in which agents testified about comparative bullet-lead analysis after the work of certain examiners was questioned).

The federal government is not alone in identifying the need for a remedy where invalid scientific

evidence is discovered years after a trial. For example, the Arkansas Supreme Court recently confirmed that its coram nobis remedy allows claims of innocence and constitutional error based on faulty science. *See Strawhacker v. State*, 500 S.W.3d 716 (Ark. 2016); *Pitts v. State*, 501 S.W.3d 803 (Ark. 2016). In these companion cases, *Strawhacker* and *Pitts*, the Arkansas Supreme Court considered writs of error coram nobis brought by two prisoners after they received letters from the DOJ admitting erroneous hair comparison testimony by an FBI forensic scientist at their state murder trials. *Strawhacker*, 500 S.W.3d at 718; *Pitts*, 501 S.W.3d at 805. The Arkansas Supreme Court held that coram nobis required consideration of this newly discovered evidence where the failure to do so would result in a miscarriage of justice. *See Strawhacker*, 500 S.W.3d at 720. Texas and California have enacted statutory remedies to address instances where scientific changes demonstrate a miscarriage of justice. *See* Tex. Code Crim. Proc. art. 11.073; Cal. Penal Code § 1473; *see also In re Richards*, 371 P.3d 195, 207 (Cal. 2016) (describing amendment). Similar model legislation has been proposed by a variety of groups including the Innocence Project and the American Legislative Exchange Council. *See* Am. Legislative Exch. Council, An Act Regarding Post-Conviction Relief on the Grounds of Changes in Forensic Scientific Evidence (Jan. 12, 2017).[12]

In sum, there appears to be a consensus of various federal and state courts, and even, in certain instances, the DOJ, that remedies should be available

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[12] https://www.alec.org/model-policy/an-act-regarding-post-conviction-relief-on-grounds-of-changes-in-forensic-scientific-evidence/.

for exoneration based on new science or the discovery of scientific error. To block such a remedy merely because there is no accompanying constitutional or jurisdictional error is unjust.

III. CORAM NOBIS IS APPROPRIATE WHERE NEW EVIDENCE DEMONSTRATES ACTUAL INNOCENCE.

This Court should grant certiorari and confirm that a proper showing of actual innocence alone is enough to obtain coram nobis relief. Certain circuits have limited access to coram nobis relief—even for a claim of actual innocence—by requiring a petitioner also to show that his or her conviction was subject to jurisdictional or constitutional error. The Second, Third, Seventh, Ninth, and Eleventh Circuits have adopted this restriction on coram nobis relief based on concerns for finality and judicial economy. *See, e.g.*, *Foont v. United States*, 93 F.3d 76, 80 (2d Cir. 1996) (holding that "to entertain [the] petition notwithstanding [the petitioner's] unjustifiable delay would be an unwarranted infringement upon the government's interest in the finality of convictions"); *United States v. Stoneman*, 870 F.2d 102, 106-08 (3d Cir. 1989) (holding that the petitioner did not overcome the presumption that his conviction was valid in his coram nobis proceeding, a jurisdictional requirement that the court found "properly balances the tension between principles of finality and the law's ideal of seeing that no man is improperly convicted"); *Moody v. United States*, 874 F.2d 1575, 1577 (11th Cir. 1989) (finding that newly discovered evidence alone does not afford access to coram nobis relief because "such a remedy would prolong litigation once concluded, thus thwarting society's compelling interest in the finality of criminal

convictions"); *see also* Pet. for Writ of Cert. at 22-25. This restriction is inconsistent with the writ's historic purpose of presenting a remedy of last resort and is ill-suited to achieving the proper balance between concerns for finality and the concern for avoiding the manifest injustice of wrongful convictions.

A. This Court Has Resolved Multiple Circuit Splits Regarding the Import of Actual Innocence.

On at least five occasions, this Court has granted certiorari to resolve circuit splits regarding the import of actual innocence in various contexts in which habeas has been applied. *See McQuiggin v. Perkins*, 569 U.S. 383, 391 (2013) (granting "certiorari to resolve a circuit conflict on whether AEDPA's statute of limitations can be overcome by a showing of actual innocence"); *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (granting certiorari to resolve a split in the circuits "regarding the availability and scope of the actual innocence exception in the noncapital sentencing context"); *Bousley v. United States*, 523 U.S. 614, 618 (1998) (granting certiorari "to resolve a split among the circuits over the permissibility of post-*Bailey* collateral attacks on § 924(c)(1) convictions obtained pursuant to guilty pleas"); *Sawyer v. Whitley*, 505 U.S. 333, 335-36 (1992) (granting certiorari to resolve "whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is 'actually innocent' of the death penalty to which he has been sentenced so that the court may reach the merits of the claim"); *Schlup v. Delo*, 513 U.S. 298, 301 (1995) (granting "certiorari to consider whether the *Sawyer* standard provides adequate protection against the kind of miscarriage of justice that would result from

the execution of a person who is actually innocent"). Similarly, Petitioner's case presents a split in the circuit courts' jurisprudence regarding the issue of actual innocence of at least equal import to these cases, and therefore, this Court should accept the issue for review.

B. Coram Nobis Is a Well-Established Mechanism to Correct Manifest Injustice.

Coram nobis has a long and well-established history as a remedy of last resort to correct factual errors and achieve justice. *See United States v. Morgan*, 346 U.S. 502, 507-09 (1954); *see also* Daniel F. Piar, *Using Coram Nobis to Attack Wrongful Convictions: A New Look at an Ancient Writ*, 30 N. Ky. L. Rev. 505, 508 (2003). In 1954, this Court confirmed in *Morgan* that the writ is available in federal criminal cases under the All Writs Act, codified at 28 U.S.C. § 1651, notwithstanding its abolishment by rule in civil cases. *Morgan*, 346 U.S. at 506 & n.6. The Court recognized that the writ plays a necessary and significant role in American jurisprudence by remedying errors "of the most fundamental character" in "circumstances compelling such action to achieve justice." *Id.* at 511-12 (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914)). In other words, *Morgan* confirms the underlying principle that persons with valid innocence claims should not be barred from challenging their convictions, and, that where other mechanisms are procedurally barred, coram nobis relief, in certain extraordinary circumstances, is available to reach the merits. *See id.* at 512 ("[N]o other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the

nature of the extraordinary writ of coram nobis must be heard by the federal court.").

In the wake of *Morgan*, lower courts have analyzed when a factual or legal error is sufficiently *fundamental* to warrant coram nobis relief. *See* David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. Rev. 1277, 1289. The circuits have largely followed the standards set forth in 28 U.S.C. § 2255 case law for habeas relief. *See id.*; *see also United States v. Doe*, 867 F.2d 986, 988 (7th Cir. 1989) (holding that coram nobis requires the same "type of defect" to justify relief as habeas corpus does); *United States v. Travers*, 514 F.2d 1171, 1173 n.1 (2d Cir. 1974) (finding that "the standards applied in federal coram nobis are similar" to those applied in Section 2255 cases). In Section 2255 cases, relief is available for "fundamental defect[s] which inherently *result[ ] in a complete miscarriage of justice*." *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)) (emphasis added).

Thus, lower courts have found a miscarriage of justice warranting coram nobis relief where a person was convicted under a criminal statute that later was interpreted *not* to encompass the conduct for which the person was convicted. *See, e.g.*, *United States v. Mandel*, 862 F.2d 1067, 1071, 1075 (4th Cir. 1988) (affirming the grant of a writ of error coram nobis to petitioners convicted of mail fraud under 18 U.S.C. § 1341 prior to *McNally v. United States*, 483 U.S. 350 (1987), which held that the mail fraud statute does not criminalize "schemes to defraud persons of their intangible rights such as the right to honest government"). Courts have also found a miscarriage

of justice warranting coram nobis relief where a petitioner discovered new evidence undermining his or her conviction. *See, e.g.*, *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987) (finding coram nobis relief appropriate where no other "statutory avenue to relief [exists] from lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact" (quoting *Yasui v. United States*, 772 F.2d 1496, 1498 (9th Cir. 1985))).

C. An Exacting Standard of Review for Actual Innocence Serves to Protect the Interests of Finality.

In the context of habeas corpus, this Court has adopted an exacting standard of review for determining "actual innocence," which requires that courts independently consider all of the evidence and find that it is "more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *See Schlup*, 513 U.S. at 327-28 (requiring that a "court must make its determination concerning the petitioner's innocence 'in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial" (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970))). The Court adopted this standard out of concern for finality, judicial economy, and federalism. *Id*. at 318-21. In fact, the Court stated: "To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring

that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence." *Id.* at 321.

D. A Claim of Actual Innocence Based on New Evidence Should Be Sufficient for Coram Nobis Relief.

It is unjust and unnecessary for federal courts conducting coram nobis review of federal convictions to require a constitutional or jurisdictional error to accompany proof of actual innocence, and finality interests do not justify these limits on the writ. While the justice system's interest in finality weighs against any collateral attack on conviction, the gateway barriers erected in certain circuits present no meaningful connection to this interest or correlation to its importance in any particular case. That is, the existence of an accompanying constitutional or jurisdictional error is a poor way of determining whether finality should yield to the need to correct injustice. Rather, as in the habeas context, this Court should protect the justice system's interest in finality by using an exacting standard for a demonstration of actual innocence. *See, e.g.*, *Schlup*, 513 U.S. at 327 (holding that to establish probability of innocence, "petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence").

In addition, a federal review of a federal conviction does not present a federalism concern that would justify imposing a gateway requirement of a constitutional violation, as there is in the distinct context of federal habeas review of state convictions. *See, e.g.*, *McQuiggin*, 569 U.S. at 386; *Herrera*, 506 U.S. at 397-98; *Sawyer*, 505 U.S. at 336. Where a

federal court is asked to review a conviction imposed by state courts, this Court has held that the error must be a constitutional one to obtain relief. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[W]e think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."). And, in *Herrera*, this Court stated that "[f]ederal courts are not forums in which to relitigate state trials" when explaining why "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera*, 506 U.S. at 400-01 (citation omitted). This Court explained further in *Herrera* that the rule requiring a constitutional violation in the underlying state criminal trial for claims of actual innocence "is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—*not to correct errors of fact*." *See id.* at 400 (emphasis added). This federalism-based requirement for federal habeas review of state convictions has no place in federal review of federal convictions in the context of coram nobis, which was—and this Court affirmed continues to be—crafted particularly to review errors of fact. *See Morgan*, 346 U.S. at 507 ("[C]oram nobis was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment. . . . While the occasions for its use were infrequent, no one doubts its availability at common law." (citations omitted)). Therefore, actual innocence, even where not

accompanied by constitutional error, should suffice for coram nobis relief.[13]

Finally, although *Morgan* involved a petitioner seeking relief from his federal conviction on the basis that his constitutional rights were violated, nothing about *Morgan* indicates that such an accompanying constitutional violation is a prerequisite to obtaining coram nobis relief. Accordingly, the Court explained that the writ evolved specifically "to correct errors of fact." *Id.* at 507. Furthermore, *Morgan* makes clear that "federal courts should act in doing justice if the record makes plain a right to relief," without specifying that only constitutional errors like the one asserted by the petitioner in that case can be remedied. *Id.* at 505. While *Morgan* gave due regard to the interests of finality, it gave no indication that the presence of constitutional error was related to weighing that interest. Thus, the Court stated that "[c]ontinuation of litigation after final judgment and exhaustion of any statutory right of review should be *allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice*." *Id.* at 511 (emphasis added).

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[13] In the context of federal habeas review of a state conviction, this Court has left open the question of whether a conviction of an actually innocent person is itself a constitutional error. *See McQuiggin*, 569 U.S. at 392 ("[W]e have not resolved whether a [state] prisoner may be entitled to [federal] habeas relief based on a freestanding claim of actual innocence."). To the extent this Court were to decide that it is a stand-alone constitutional error for an innocent person to be subject to a criminal conviction, the constitutional-error-gateway obstacle to coram nobis relief imposed in certain circuits would, by definition, be satisfied in all cases of actual innocence.

To permit courts to consider freestanding actual innocence claims in the context of coram nobis also serves to protect the role of *courts* in addressing situations of demonstrated innocence. As noted above in the context of the FBI's discredited hair comparison, in certain situations where it is clear even to prosecutors that an individual was wrongfully convicted, prosecutors have waived procedural defenses and permitted an avenue to review on the merits. But *prosecutors* should not control whether *courts* hear the merits of egregious injustices such as those created by faulty forensic or scientific testimony. For courts to permit these gateway barriers to stand, except when prosecutors determine to waive them, abdicates to the executive the courts' traditional role as a forum of last resort to remedy injustice. Courts should—and have historically in the context of coram nobis—provide an extraordinary remedy of last resort for true errors of fact, even where prosecutors do not agree.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioner's Petition for a Writ of Certiorari.

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Respectfully submitted,

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