

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL COWELS AND MICHAEL MIMS,

Applicants,

v.

THE FEDERAL BUREAU OF INVESTIGATION,
CHRISTOPHER WRAY, and PAULA WULFF,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable Stephen G. Breyer, Associate Justice of the United States and Circuit Justice for the First Circuit:

Pursuant to this Court's Rule 13.5, applicants Michael Cowels and Michael Mims respectfully request a 25-day extension of time, to and including December 20, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case. The opinion and judgment of the court of appeals were entered on August 26, 2019. Unless extended, the time for filing a petition for a writ of certiorari will expire on November 25, 2019. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). The court of appeals' opinion is attached to this application.

1. This case raises an important issue regarding whether an agency's fundamental misunderstanding of a key aspect of the record before it renders the

agency's decision arbitrary and capricious. This case also implicates whether the Federal Bureau of Investigation has unreviewable discretion to determine if a DNA profile is ineligible for upload to the National DNA Index System ("NDIS").

2. The applicants are two individuals, each of whom served more than 20 years in prison for a 1993 murder. In 2015, however, their convictions were vacated and their cases remanded for new trial by the Massachusetts Supreme Judicial Court based on post-conviction DNA testing of physical evidence put forth by prosecutors at the applicants' 1994 state court trial. *See Commonwealth v. Cowels*, 470 Mass. 607 (2015). After remand, Massachusetts for the first time performed DNA testing on swabs of seminal fluid taken from inside a used condom that had been found at the crime scene close to the victim's body, obtaining a male DNA profile. Recognizing the potentially case-dispositive nature of the swab DNA profile, the state trial court ordered Massachusetts to upload it to the Combined DNA Index System ("CODIS") for comparison to the more than 16 million DNA profiles in CODIS. CODIS includes the State DNA Index System, which consists of state-level databases of DNA records, and NDIS, a national database managed by the FBI. The FBI, however, determined that the swab DNA profile was ineligible for inclusion in NDIS and therefore refused to permit Massachusetts to upload it to NDIS.

3. Applicants filed a lawsuit in the United States District Court for the District of Massachusetts against the FBI and certain FBI officials, alleging, among other things, that the FBI's determination that the swab DNA profile is ineligible for inclusion in NDIS is arbitrary and capricious and should be set aside pursuant to the

Administrative Procedures Act. The district court granted the defendants' motion to dismiss, concluding that the applicants lacked standing because neither the DNA Identification Act of 1994, 34 U.S.C. § 12591 *et seq.*, nor the FBI's NDIS Operational Procedures Manual provided any meaningful standard of judicial review of the FBI's ineligibility determination.

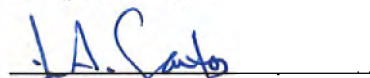
4. The court of appeals did not address the district court's holding that the applicants lack standing. Instead, the court of appeals assumed the FBI's ineligibility determination to be subject to judicial review and concluded that it was not arbitrary and capricious. Op. 2, 11. The court of appeals reached this conclusion despite recognizing that the "FBI's written explanation of its eligibility determination does suggest that the agency was not fully attuned to the distinction between the DNA testing of the swab from the inside of the condom and testing of the outside of the condom, which was never performed," resulting in the "misguided understanding that testing had definitively established that the condom had never come into contact with the victim." Op. 14, 15. In other words, the court of appeals concluded that the agency action was not arbitrary and capricious even while recognizing that the agency had a fundamentally flawed understanding of perhaps the most critical aspect of the record before it. That conclusion is contrary to this Court's precedent. *See, e.g., Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that agency action is arbitrary and capricious where the agency "offered an explanation for its decision that runs counter to the evidence before the agency").

The applicants' forthcoming petition for a writ of certiorari will present the question whether an agency's fundamental misunderstanding of the record before it renders the agency's action arbitrary and capricious, which here implicates the question whether the FBI has unreviewable discretion to determine if a DNA profile is ineligible for upload to NDIS.

5. Counsel for applicant Cowels are currently heavily engaged, including preparing for a criminal trial in federal court scheduled to begin December 2, 2019, and preparing a brief to be filed in the court of appeals on November 13, 2019. Furthermore, counsel for applicant Mims is currently heavily engaged, including preparing for a criminal trial in federal court scheduled to begin December 9, 2019, and preparing for a motion hearing in state court scheduled for December 18, 2019.

Because this case raises a substantial and important question and because there is good cause for the modest extension of time requested, the applicants respectfully request that the time to file a petition for a writ of certiorari in this matter be extended by 25 days, to and including December 20, 2019.

Respectfully submitted,



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November 6, 2019

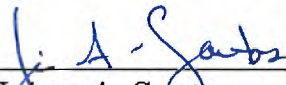
CERTIFICATE OF SERVICE

I, Jaime A. Santos, a member of the Bar of this Court, hereby certify on this 6th day of November, 2019, that a copy of this Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit in the above-entitled case was mailed, first class postage prepaid to counsel for respondents at the following address:

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As required by Rule 29.3, an electronic version is being transmitted to the email address listed above.

I further certify that all parties required to be served have been served.



Jaime A. Santos