No. _____

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**IN THE SUPREME COURT OF THE UNITED STATES**

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**Darrin B. Woodard,**
**Petitioner,**

**v.**

**United States of America,**
**Respondent**

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On Petition for Writ of Certiorari
to the United States Court of Appeals for the Tenth Circuit

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**PETITION FOR WRIT OF CERTIORARI**

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## Question Presented

In *United States v. Lovasco*, this Court instructed lower courts to apply "the settled principles of due process . . . to the particular circumstances of individual cases" in order to assess "the constitutional significance of various reasons for [prejudicial preindictment] delay." 431 U.S. 783, 796–97 (1977). But the Tenth Circuit will not find a due process violation unless a defendant proves both prejudice and that the government intentionally delayed bringing charges for the purpose of obtaining a tactical advantage or to harass. The question presented in this case is:

> Whether, as many courts have held, allowing a prosecution to continue after lengthy and demonstrably prejudicial delay in filing criminal charges offends due process, even absent prosecutorial intent to gain a tactical advantage or harass, where the prosecution cannot provide an explanation for the delay sufficient to justify the extent of the prejudice suffered by the defendant?

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### Opinions Below

The district court denied Mr. Woodard's motion to dismiss in an oral ruling pronounced from the bench. A transcription of that ruling is attached as Appendix B to this Petition. The Tenth Circuit affirmed in an unreported decision, 817 F. App'x 626 (10th Cir. 2018), which is attached as Appendix A.

### Basis for Jurisdiction

The Tenth Circuit entered judgment on June 17, 2020. *See* Pet. App, at 1a–6a. Mr. Woodard did not seek rehearing. This Court's general order of March 19, 2020, extends the deadline in 28 U.S.C. § 2101(c) to file a petition for a writ of certiorari in this case by 60 days, creating a deadline of November 16, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### Constitutional Provision Involved

This petition involves the application of the Due Process Clause of the Fifth Amendment to the U.S. Constitution, which provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

## Introduction

In *United States v. Lovasco*, this Court reaffirmed that maintaining a prosecution in the face of prejudicial preindictment delay can violate the Due Process Clause. 431 U.S. 783, 790 (1977). But—noting that "few defendants have established that they were prejudiced" by preindictment delay—the Court declined to "determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." *Id.* at 796. It preferred to allow "a sustained opportunity" for Courts of Appeals "to consider the constitutional significance of various reasons for delay." 431 U.S. at 797. And so it instructed "the lower courts" to "apply[] the settled principles of due process . . . to the particular circumstances of individual cases." *Id.*

The Fourth and Ninth Circuits, as well as several states, follow this dictate. In each case, they "balance the prejudice to the defendant against the Government's justification for delay." *Hoo v. United States*, 484 U.S. 1035, 1035–36 (1988) (White, J., dissenting from denial of petition for certiorari). But others—including the Tenth—have strayed far afield from traditional due process principals. They require the defendant to undertake the herculean task of proving that the government delayed with the specific intent to gain a tactical advantage over or harass the defendant. *See, e.g., United States v. Comosona*, 614 F.2d 695, 696 n.1 (10th Cir. 1980).

This case provides an ideal vehicle for this Court to return to the unanswered questions of *Lovasco* and resolve this split of authority at a time when the trend in federal and state law is to abolish or extend the statutes of limitations that otherwise protect defendants from the fundamental unfairness that can stem from prejudicial preindictment delay.

## Statement of the Case

In early 2015, Tulsa police obtained a warrant to search a house that had utilities listed in Mr. Woodard's name. 10th Cir. ROA Vol. 1 at 35. After seeing Mr. Woodard leave the home, police entered and discovered drugs and firearms. Pet. App. at 2a. They arrested Mr. Woodard for having marijuana in his pocket. *Id.* They told him that he was "possibly looking at federal charges" for the contraband discovered in the house, but that the charges "might . . . go away" if he cooperated. 10th Cir. ROA Vol. 2 at 157.

Over the next three years, little or no additional criminal investigation was conducted. 10th Cir. ROA Vol. 2 at 159. Mr. Woodard gave no indication that he might consider cooperating. *See, e.g.,* 10th Cir. ROA Vol. 1 at 40–41; Vol. 2 at 140, 158–61. He started a family with his longtime girlfriend. 10th Cir. ROA Vol. 3 at 8–12. He returned to school and earned a Fitness and Health Trainer certificate. *Id.* And he maintained consistent and well-paying lawful employment. *Id.*

Then, in the spring of 2018, the federal government indicted Mr. Woodard on several charges stemming from the search, including possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c). 10th Cir. ROA Supp. Vol. 2 at 13–22. Each charge depended on the government's ability to prove that Mr. Woodard had constructive possession of the drugs found in the home over three years earlier. The district court exercised jurisdiction under 18 U.S.C. § 3231.

Mr. Woodard moved to dismiss the indictment, alleging unconstitutional pre-indictment delay. Pet. App. at 2a. The district court found that Mr. Woodard showed "prejudice with respect to the pre-indictment delay." Pet. App. at 7a. Specifically, Mr.

Woodard demonstrated that a key defense witness—the leaseholder on the home at the time of the search—had committed suicide several years after the search warrant was executed, but before federal charges were filed. *Id.* at 7a. That witness would have testified that (contrary to the government's allegations) Mr. Woodard did not live in the house—his brother did. The utilities accounts were in Mr. Woodard's name only because the leaseholder did not have good enough credit to obtain utility accounts himself. *Id.* at 7a–8a; 10th Cir. ROA Vol. 2 at 39–40, 47.

But the district court denied Mr. Woodard's motion to dismiss. It acknowledged that Mr. Woodard's due process claim was "serious," as it is problematic to "arrest a United States citizen and then tell them, work with us and this will go away, and then three years and one month later shift it to another jurisdiction and have them indict." 10th Cir. ROA Vol. 2 at 153. But the district court rejected Mr. Woodard's argument that a defendant can sustain a motion to dismiss for prejudicial preindictment delay whether "the government's inaction" was "purposeful or not." Pet. App. at 8a–9a. The court explained that it understood "the equity of" what Mr. Woodard was arguing. *Id.* at 9a. But Tenth Circuit law required Mr. Woodard "to show that the delay was intentional and purposeful"—which he failed to do. *Id.*

Mr. Woodard entered a conditional plea for a violation of 18 U.S.C. § 924(c)(1)(A)(i), possession of a firearm in furtherance of a drug trafficking crime. Pet. App. 1a. He reserved his right to appeal the district court's denial of his motion to dismiss for unconstitutional preindictment delay. *Id.*

On appeal, Mr. Woodard argued that the district court's denial of his motion to dismiss was erroneous under governing law. Pet. App. 3a–4a. Exercising jurisdiction under 18 U.S.C. § 1291, the U.S. Court of Appeals for the Tenth Circuit disagreed in an unpublished decision. *See* Pet. App. at 1a–6a. Mr. Woodard also argued that Tenth Circuit law itself is wrong and should be reconsidered, although he acknowledged that the panel would be unable to reach this argument. 10th Cir. Opening Br. at 24–38. The government responded on the merits of this argument. 10th Cir. Answer Br. at 36–42. But the Tenth Circuit did not address it. *See* Pet. App. at 1a–6a.

## Reasons for Granting the Petition

### I. Courts are intractably split on the question raised in this petition.

The Court should grant this petition to resolve a question upon which lower federal courts and state courts are intractably split. After a defendant proves that he was prejudiced by the government's significant delay in bringing an indictment, how does a court determine whether or not to dismiss the charges on due process grounds? The Tenth Circuit has long required defendants to prove the unprovable: that the government intentionally delayed bringing charges for the purpose of obtaining a tactical advantage or to harass. But many other jurisdictions follow the direction that this Court gave in *Lovasco*. After balancing the prejudice against the reasons for delay presented by the government, they hold that due process requires the dismissal of the charges if it is fundamentally unfair to allow the prosecution to continue based on the facts of the case.

### A. Many circuit and state courts require the defendant to prove intentional tactical delay or harassment.

The Tenth Circuit rule is in accord with the majority position in the federal courts and the plurality position in the states. But rather than being based on this Court's holdings in *Lovasco*, it is based on a government concession in an earlier case.

In *Lovasco*, this Court reaffirmed a prior holding—that continuing a prosecution where the defendant was prejudiced by preindictment delay can violate the Due Process Clause. 431 U.S. at 790. Where the delay was caused by a good faith police investigation—as it had been in *Lovasco*—the charges should not be dismissed. *Id.* at 795. But rather than rather than determining "in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions," the Court instructed lower courts to apply "the settled principles of due process . . . to the particular circumstances of individual cases." *Id.* at 796-97.

In a footnote, the Court also "noted with approval" a government "concession" in the previous case where the Court had first recognized the right: that "a 'tactical' delay would violate the Due Process Clause." *Id.* at 795 n.17. In *Lovasco*, the government had been willing to concede even more. As the Court explained, the government "expand[ed]" it prior concession and admitted that a Due Process violation might even occur where "delay [was] incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." *Id.*

Both before and after *Lovasco*, however, the Tenth Circuit has consistently[1] required defendants to prove that the government intentionally delayed seeking an indictment with the specific purpose of obtaining a tactical advantage or harassing the defendant, no matter how seriously the delay prejudiced the defendant. *See, e.g., United States v. Mitchell*, 558 F. App'x 831, 833–34 (10th Cir. 2014) (unpublished); *United States v. Trammell*, 133 F.3d 1343, 1351 (10th Cir. 1998); *United States v. Revada*, 574 F.2d 1047, 1048 (10th Cir. 1978); *United States v. Beitcher*, 467 F.2d 269 (10th Cir. 1972).

At least five other circuits apply materially identical tests. *See, e.g., United States v. Irizarry-Colón*, 848 F.3d 61, 70 (1st Cir. 2017); *United States v. Steiner*, 847 F.3d 103, 117 n. 57 (3d Cir. 2017); *United States v. Jackson*, 549 F.3d 963, 969 (5th Cir. 2008); *United States v. Foxman*, 87 F.3d 1220, 1222 (11th Cir. 1996); *United States v. Mills*, 925 F.2d 455, 464 (D.C. Cir. 1991), *modified on other grounds*, 964 F.2d 1186 (D.C. Cir. 1992) (en banc).[2]

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[1] *But see United States v. Glist*, 594 F.2d 1274, 1378 (10th Cir. 1979). The Tenth Circuit has not applied a different test in at least forty years.

[2] There is "conflicting authority" in the Seventh Circuit. *United States v. Hollins*, 811 F.2d 384, 387–88 (7th Cir. 1987). As there is in the Eighth. *Compare United States v. Miller*, 20 F.3d 926, 931 (8th Cir. 1994) *with United States v. Stierwalt*, 16 F.3d 282, 285 (8th Cir. 1994). And there is some question as to whether the Second Circuit requires the defendant to prove intentional tactical delay. *Compare United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999) *with United States v. Gross*, 165 F. Supp. 2d 372, 378–79 (E.D.N.Y. 2001) ("[N]either the Second Circuit nor the Supreme Court has squarely addressed whether a state of mind short of intent, such as negligence, could fall within the rubric of governmental misconduct.").

A plurality of states also require a defendant to prove intentional tactical delay before they will find a due process violation. *See, e.g., State v. Broughton*, 752 P.2d 483, 397 (Ariz. 1988); *Hilton v. State*, 702 S.E.2d 188, 193 (Ga. 2010); *State v. Murphy*, 584 P.2d 1236, 1239 (Id. 1978); *State v. Crume*, 22 P.3d 1057, 1062–63 (Kan. 2001); *Clark v. State*, 774 A.2d 1136, 1156 (Md. 2001); *Robinson v. State*, 247 So. 3d 1212, 1233 (Miss. 2018); *State v. Watson*, 827 N.W.2d 507, 514 (Neb. 2013); *Wyman v. State*, 217 P.3d 572, 578 (Nev. 2009); *State v. Townsend*, 897 A.2d 316, 325 (N.J. 2006); *State v. Goldman*, 317 S.E.2d 361, 365 (N.C. 1984); *State v. Buchholz*, 678 N.W.2d 144, 150 (N.D. 2004); *State v. Vanasee*, 593 A.2d 58, 64 (R.I. 1991); *State v. Krizan-Wilson*, 354 S.W.3d 808, 814–15 (Tex. Ct. Crim. App. 2011); *State v. Hales*, 152 P.3d 321, 332–33 (Utah 2007); *State v. King*, 165 A.3d 107, 114 (Vt. 2016); *Morrisette v. Commonwealth*, 569 S.E.2d 47, 52 (Va. 2002); *State v. McGuire*, 786 N.W.2d 227, 237–39 (Wis. 2010); *Remmick v. State*, 275 P.3d 467, 470 (Wy. 2012).

### B. Other circuits and states require the government to explain the reasons for prejudicial delay, and they use a balancing test.

While the requirement that the defendant prove intentional delay for tactical advantage is the majority rule in federal circuits and the plurality rule in the states, a substantial minority of jurisdictions have criticized it and adopted an alternate balancing test that better aligns with *Lovasco*'s holding, is more defensible logically, and yet remains a stringent gatekeeping mechanism as the constitution requires.

As articulated by the Fourth and Ninth Circuits, this balancing test "consider[s] the Government's reasons for the delay, [and] balance[s] the prejudice to the

defendant with the Government's justification for delay." *United States v. Automated Med'l Lab. Inc.*, 770 F.2d 399, 403–04 (4th Cir. 1985); *accord United States v. Moran*, 759 F.2d 777, 782 (9th Cir. 1985). It does not place the burden of proof on the defendant. It does not require intentional tactical delay in every case. Rather, "[t]he basic inquiry" is "whether the Government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's sense of fair play and decency.'" *Automated Med'l Lab.*, 770 F.2d at 404 (quoting *Lovasco*, 431 U.S. at 790).

Many states have adopted this test and considers both the prejudice to the defendant and the government's proffered reasons for delay. *See, e.g.*, *Overton v. State*, 976 So. 2d 536, 560 (Fl. 2007); *State v. Higa*, 74 P.3d 6, 10 (Haw. 2003); *People v. Holman*, 469 N.E.2d 119, 130 (Ill. 1984); *State v. Schrader*, 518 So. 2d 1024, 1028 (La. 1988); *State v. Rippy*, 626 A.2d 334, 338 (Me. 1993); *State v. Krinitt*, 823 P.2d 848, 852 (Mont. 1991); *State v. Knickerbocker*, 880 A.2d 419, 468–70 (N.H. 2005); *State v. Jones*, 69 N.E.3d 688, 692 (Ohio 2016); *Garrison v. State*, 103 P.3d 590, 598 (Okla. Ct. Crim. App. 2004); *State v. Stokes*, 248 P.3d 953, 961–62 (Or. 2011); *Com. v. Scher*, 803 A.2d 1204, 1221–22 (Pa. 2002); *State v. Stock*, 361 N.W.2d 280, 284 (S.D. 1985); *State v. Lee*, 602 S.E.2d 113, 537 (S.C. 2004); *State v. Gray*, 917 S.W.2d 668,

673 (Tenn. 1996); *State v. Calderon*, 684 P.2d 1293, 1296–97 (Wash. 1984); *Knotts v. Facemire*, 678 S.E.2d 847, 848–49 (W. Va. 2009).[3]

**C. These conflicting tests lead to very different results.**

The practical difference between the harsh requirements of the Tenth Circuit and the balancing test used elsewhere is clear from the cases where they have been applied. Whereas the balancing test allows courts to recognize fundamental unfairness caused by government delay, the Tenth Circuit's test essentially never does.

[3] Some states apply tests that fall in between the majority and minority federal court positions, or are unclear. For example, Alaska, Connecticut, the District of Columbia, Iowa, and Massachusetts place the burden on the defendant, but the defendant does not need to establish intentional tactical delay. *State v. Gonzales*, 156 P.3d 407, 411 & n.23 (Alaska 2007) (unreasonable delay); State v. John, 557 A.2d 93, 110 (Ct. 1989) ("wholly unjustifiable"); *United States v. Day*, 697 A.2d 31, 33 (D.C. Ct. App. 1997) ("unjustified"); *States v. Edwards*, 571 N.W.2d 497, 501 (Iowa 1997) (unreasonable delay); *Commonwealth v. Dame*, 45 N.E. 3d 69, 76 (Mass. 2016) (reckless delay). Colorado may as well. *State v. John*, 557 A.2d 93, 110 (1989). Kentucky and Missouri require intentional tactical delay, but it is not clear who bears the burden of proof. *Kirk v. Comm.*, 6 S.W.3d 823, 826 (Ky. 1999); *State v. Griffin*, 848 S.W.2d 464, 467 (Mo. 1993). New Mexico requires intentional tactical delay but uses a more complicated burden shifting test. *Gonzales v. State*, 805 P. 2d 630, 631–32 (N.M. 1991) ("While we endorse a shift in the burden of production, we emphasize that the ultimate burden of persuasion remains on the defendant."). Arkansas is inconsistent. *Compare Scott v. State*, 566 S.W.2d 737 (1978) *with Conte v. State*, 465 S.W.3d 686, 701 (Ark. 2015). California and New York apply a balancing test, but in exclusive reliance on their own state constitutions. *People v. Nelson*, 185 P.3d 49, 55 (Cal. 2008); *People v. Vernace*, 756 N.E.2d 66, 67 (N.Y. 2001). Alabama, Indiana, and Michigan have never considered the question in their highest state court. Delaware has not done so since *Lovasco* effectively overruled its sole high court case regarding preindictment delay, *Preston v. State*, 338 A.2d 562 (Del. 1975).

This difference is clearest where the prejudice suffered by the defense involved the loss of exonerating evidence, which apparently has only sufficed to obtain dismissal using the balancing test.

In *United States v. Gross*, for example, prosecutors indicted three men for conspiracy to commit bank fraud nearly ten years after the alleged events, and long after similar fraud had been alleged in unsuccessful civil suits. 165 F. Supp. 2d 372, 375–76 (E.D.N.Y. 2001).[4] In the meantime, so much defense evidence was lost, and so many witnesses died, that the district court concluded that "a fair trial in this case is nearly impossible." *Id.* at 381–83, 385. Despite strong indications from the Second Circuit that it would apply the Tenth Circuit's test, the district court used the balancing test from the Fourth and Ninth Circuits. Under this balancing test, the government was not able to justify the delay—of the six years it claimed to have spent investigating the case, "there was Government activity . . . for a total of only 94 days," *id.* at 384—and the defendant prevailed. But under the Tenth Circuit's rule, the defendant's motion would have been denied, because the defendant could not have proven that the purpose of the delay was to gain a tactical advantage.

In *Scott v. State*, the defendant was the primary suspect in the wake of a murder, but he told the police his alibi. 581 So.2d 887, 888 (Fl. 1991). The state attorney declined to indict at the time because of "a problem with the alibi." *Id.* at 890. Approximately seven years later, the defendant was finally charged. *Id.* at 893. But by

[4] Had they only indicted for bank fraud, instead of for conspiracy, the statute of limitations would have been five years instead of ten. *Id.* at 376–77.

then, he was "no longer able to corroborate his alibi"—witnesses had died and evidence was lost—and the reliability of forensic evidence presented by the state was compromised by the delay. *Id.* at 892–93. While the court found that the delay in fact "provided the prosecution with a tactical advantage" and therefore instructed the trial court "to enter an order of acquittal," *id.* at 893, the defendant was not required—and likely would have been unable—to prove that the state had delayed ***in order to obtain*** that advantage.

The defendant in *State v. Luck* was suspected of murder and was interviewed by police within months of the alleged victim's death. 472 N.E.2d 1097, 1099 (Ohio 1984). After a fifteen year lull in activity, she was indicted "without one shred of new evidence" that had not been available fifteen years before. *Id.* at 1105. Her defense was that the alleged victim physically attacked her and then "was killed in the ensuing fight." *Id.* at 1104. But by then, all tape recorded police interviews with potential witnesses and suspects had been destroyed without being transcribed, and the only other person who had been present for this "fight" was dead. *Id.* at 1102. According to the prosecutor, the only reason that this case was not indicted originally was "a police error in judgment" about whether to submit the case for charges. *Id.* at 1105. Using the balancing test, the Ohio Supreme Court affirmed dismissal because the prejudice the defendant suffered, when weighed against this "unjustifiable" delay, violated "those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and

decency.'" *Id.* (quoting *Lovasco*, 431 U.S. at 790) (alteration marks omitted). But under the Tenth Circuit's test, and in the absence of any evidence of government bad faith, the defendant would undoubtedly have been forced to face trial.

It appears that a defendant has only won in the district court and had that win affirmed in a court of appeals using the Tenth Circuit's test—in any jurisdiction—in a single unpublished case. Notably, that case did not involve loss of evidence at all. Rather, in *United States v. Dewing*, the defendant had been prosecuted by the state on unrelated charges. 2 F.3d 1161 (Table), 1993 WL 307946, *1 (10th Cir. 1993) (unpublished). Before sentencing, while out on bond, he was found with a gun. *Id.* Federal authorities represented to the state court judge that they would not be prosecuting the defendant for possession of the gun. In reliance on that representation, the state court sentenced the defendant to nine years. *Id.* at *1–*2. But "after the state released him earlier than the federal prosecutors thought desirable," and "only ten days before the statute of limitations would run," federal prosecutors indicted him. *Id.* The government is normally well within its rights to "reserve" the option of charges "as a weapon if the state's punishment [i]s insufficient to satisfy the federal prosecutors." *Id.* at *2. What the government cannot do, the Tenth Circuit explained before affirming dismissal, is to explicitly and deliberately promise not to prosecute in order to help secure a longer prison sentence in state court—and then break that promise when dissatisfied. *Id.*

The contrast between the unavailability of evidence in *Gross*, *Scott*, and *Luck*, and the very different type of prejudice shown in *Dewing*, show how very different the two tests are in practice.

## II. The Tenth Circuit's approach is wrong.

This Court should also grant review in this case because the approach taken by the Tenth Circuit conflicts with this Court's opinion in *Lovasco*. It places an unfair burden on defendants to divine prosecutorial motive that is all but impossible to overcome. Thus, it meant that Mr. Woodard had no chance of winning his motion, despite the fact that the government's unexplained delay meant that he could no longer effectively counter its allegations of constructive possession. The balancing test, in contrast, makes it possible for truly prejudiced defendants like Mr. Woodard—who cannot receive a fair trial because of preindictment delay—to prevail on due process claims where otherwise they would fail.

### A. The Tenth Circuit's requirement of specific intent to prejudice or harass conflicts with *Lovasco*.

The first time this Court heard a case squarely presenting the question of the constitutionality of preindictment delay, the government made a concession: "that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay . . . was an intentional device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 324 (1971) (citing Br. of the United States at 26–27). This concession stated at most "the due process ceiling" for demonstrating a constitutional violation, not "the

floor." Phyllis Goldfarb, *When Judges Abandon Analogy: The problem of delay in commencing criminal prosecutions*, 31 Wm. & Mary L. Rev. 607, 623 (1990).

By the time this Court revisited the constitutionality of preindictment delay six years later in *Lovasco*, the Tenth Circuit had already mistakenly adopted the government's concession as its test. *See, e.g., United States v. Beitcher*, 467 F.2d 269, 272 (10th Cir. 1972) (explaining that the law "is clear: the rights of a defendant under the due process clause of the Fifth Amendment are not violated in the absence of a showing . . . that the delay was purposefully designed to gain tactical advantage or to harass the defendants").

When the issue came before the Court again in *Lovasco*, again the Court did not look for intentional delay, or delay for tactical advantage—and it did not require the defendant to prove why the indictment was delayed. Rather, it held that a good faith investigation justifies even prejudicial preindictment delay. 431 U.S. at 795. Although *Lovasco* contrasted such good faith investigation with "delay undertaken by the Government solely 'to gain tactical advantage over the accused,'" *id.*, it nowhere held that intentional tactical advantage was required in order to prove a due process violation—and it certainly never placed the burden on the defendant to prove the reasons for the government delay.

Importantly, the Court ***explicitly declined*** to create a rule to "determine in the abstract the circumstances in which preaccusation delay would require dismissing prosecutions." 431 U.S. at 796. Recognizing how "few defendants" can establish prejudice from preindictment delay, and therefore the lack of "sustained opportunity

to consider the constitutional significance of various reasons for delay," the Court instructed lower courts to apply "the settled principles of due process . . . to the particular circumstances of individual cases" and rule in the first instance regarding "the constitutional significance of various reasons for delay." *Id.* at 796-97.

The Court also noted that the government conceded even more in *Lovasco* than it had in *Marion*—that "'[a] due process violation might also be made out upon a showing of prosecutorial delay incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense.'" 431 U.S. at 795 & n. 17 (quoting Br. for the United States at 32-33).

But the Tenth Circuit did not change course, not even to allow for dismissal where prosecution was delayed "in reckless disregard of circumstances." Rather, it continued to require that the defendant prove that the government delayed intentionally in order to gain a tactical advantage or harass. *See, e.g., United States v. Francisco*, 575 F.2d 815, 817 (10th Cir. 1978). And it misread *Lovasco* as "confirm[ing] this interpretation." *United States v. Revada*, 574 F.2d 1047, 1048 (10th Cir. 1978).

The Tenth Circuit did not go down this path without objection, however. The late Judge Monroe McKay challenged its stringent requirements in a dissenting opinion in *United States v. Radmall*. The test, he argued, was "an excessively narrow interpretation of the *Marion* standard . . . removed from the underpinnings of *Marion* itself." 591 F.2d 815, 552 (10th Cir. 1978) (McKay, J., dissenting). And it now ran "counter to the Supreme Court's [more] recent discussion of pre-indictment delay

problems in *United States v. Lovasco*." *Id.* Although *Marion* used the language of intentional tactical advantage, it did so in order to quote a government concession, and recited only "the minimum standard for due process violation . . . represent[ing] only a flagrant example of due process abuse." *Id.* As to placing the burden on the defendant: "Given the practical difficulties in showing such motivations, our narrow rule takes on the trappings of a literary curiosity fit more for ritual invocation than practical application." *Id.* at 553.

But the Tenth Circuit has continued to require proof of intentional tactical delay. And in doing so it has given per se permission to prosecutors to intentionally delay charging for countless other reasons—no matter the known risk of prejudice to the defense. For example, in the Tenth Circuit, the government may delay intentionally for as long as the statute of limitations allows, and regardless of the prejudice to the defendant, for just about any administrative excuse, such as the need to manage a backlog of cases, a shortage of attorneys, or more pressing matters, *e.g.*, *United States v. Trammell*, 133 F.3d 1343, 1351 (10th Cir. 1998); *United States v. Radmall*, 591 F.2d 548, 550 (10th Cir. 1978).[5] This is a far cry from the delay for active investigation allowed by *Lovasco* because investigative delay is in the best interest of the government, defendant, and court. *See* 431 U.S. at 793–94.

[5] Under Tenth Circuit law, the government may also delay for years, regardless of the prejudice to the defendant, so long as it spends some of the time engaged in pre-prosecution plea negotiations, *United States v. Engstrom*, 965 F.2d 836, 839 (10th

### B. The Tenth Circuit's placement of the burden on the defendant means that the standard is all but impossible to meet.

Where the burden has been placed on the defendant to prove that the government did not delay for administrative reasons, or because of negligence—but rather in order to obtain a tactical advantage over him or to harass—court have affirmed a single dismissal for preindictment delay. *See Dewing*, 1993 WL 307946 (discussed supra, Section I.C).[6] Given the tools available to him, it is unsurprising that Mr. Woodard did not prevail under the Tenth Circuit's test.

It is unclear how Mr. Woodard was supposed to go about proving government motive. As the Tennessee Supreme Court explained, in rejecting the Tenth Circuit's test, it "places a daunting, almost insurmountable, burden on the accused." *Gray*, 917 S.W.2d at 673. It ignores "the difficulty defendants . . . encounter in attempting to prove improper prosecutorial motive" and means that many defendants are unlikely to be able to prove a due process violation "no matter how egregious the prejudice." *Howell v. Barker*, 904 F.2d 889, 895 (4th Cir. 1990).

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Cir. 1992); waiting for unrelated state charges to resolve, *e.g., Revada*, 574 F.2d at 1050; allowing state courts to determine whether they had jurisdiction over related charges, *United States v. Doe*, 642 F.2d 1206, 1208 (10th Cir. 1981); determining whether the state would be proceeding with related charges, *United States v. Pino*, 708 F.2d 523, 528 (10th Cir. 1983); allowing for piece-meal prosecution of multiple defendants, *e.g.*, *Pino*, 708 F.2d at 528; or awaiting the completion of an unrelated sentence in another country, rather than extraditing, *Wright v. Deland*, 986 F.2d 1432 (Table), 1993 WL 18625, * 8 (10th Cir. 1993) (unpublished).

[6] Additionally, it appears that only one court has ever reversed a denial of dismissal using this test. *See United States v. Foxman*, 87 F.3d 1220, 1223 n. 2 (11th Cir. 1996).

This difficultly is readily apparent in federal court, where Mr. Woodard was prosecuted, as a federal defendant has no straightforward path to obtaining discovery regarding the government's charging decisions and other prosecution strategy. He certainly cannot get such evidence through the Federal Rules of Criminal Procedure. Nor, does it seem, can he obtain such discovery outside of the Rules. Under analogous case law from this Court, he would likely be required to make a credible showing that the government delayed intentionally for the purpose of obtaining a tactical benefit or to harass in order to obtain discovery regarding the government's reasons for delay.

Rule 16 of the Federal Rules of Criminal Procedure—the primary means a defendant has to obtain discovery in a criminal case—generally limits discovery to extant tangible items.[7] A criminal defendant has no right to depose witnesses or submit interrogatories. And the rule explicitly exempts from its scope "discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." Fed. R. Crim. P. 16(a)(2).

Even where a defendant is seeking discovery of a tangible item like a report, and even where that report does not fall within Rule 16's work-produce exemption, and even where the defendant intends to use the information obtained to support a motion to dismiss based on a due process violation, he cannot use Rule 16 to obtain

[7] The inapplicable exception is that "the government must disclose to the defendant the substance of any relevant oral statement made by the defendant," even if its content was not previously recorded. Fed. R. Crim. P. 16(a)(1)(A).

the information he is looking for. Rather, this Court has interpreted Rule 16 to cover only discovery relating to "the defendant's response to the Government's case in chief." *United States v. Armstrong*, 517 U.S. 456, 462 (1996). Rule 16 does ***not*** allow for discovery into "any claim that is a 'sword,' challenging the prosecution's conduct of the case." *Id.*

Nor is it a simple matter for a criminal defendant to go around Rule 16 to obtain the discovery some other way. At issue in *Armstrong* was a defendant's attempt to obtain "discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race." *Id.* at 458. This Court held that it was not enough for the defendant to present statistics showing that he and all other individuals charged with the same offense in a certain time period were black. Rather, before obtaining discovery on the subject, the defendant was required to "show that the Government declined to prosecute similarly situated suspects of other races." *Id.* That is, he was required to make "a credible showing" on the ***ultimate question*** before obtaining discovery outside of Rule 16. *Id.* at 465.

At least one court has extended *Armstrong* to the preindictment delay context. *United States v. Lindstrom*, 698 F.2d 1154, 1159 (11th Cir. 1983) (concluding that appellants who successfully showed prejudice from preindictment delay were not entitled to in camera review of government files for evidence of government motive where they "presented no evidence whatever that the delay was intentionally designed to obtain some tactical advantage"). And none has distinguished *Armstrong* where a defendant sought discovery relating to the reasons for preindictment delay.

While some states have more liberal criminal discovery rules than the federal courts, many do not. For example, Wyoming has no general constitutional right to discovery, and the discovery rule is modeled after (and interpreted consistently with) its federal counterpart. *See, e.g., Ceja v. State*, 208 P.3d 66, 68–69 (Wy. 2009). So too are the criminal discovery rules in Georgia and Kansas. *See* 10 Ga. Proc. Criminal Procedure §§ 14:1–14:6; *State v. Lewis*, 327 P.3d 1042, 1047–48 (Kan. Ct. App. 2014). And while Texas's rule is not modeled after Rule 16, it strictly limits discovery rights to certain tangible items that are not work product. *See* Tex. Code Crim. Pro. Ann. art. 39.14. Yet each of these states has adopted the same test as the Tenth Circuit and requires a criminal defendant to prove the government's motive for the prejudicially delayed filing of criminal charges.

Jurisdictions that have adopted a burden shifting test avoid these problems—regardless of their discovery rules—while still protecting the government's legitimate interest in the privacy of its charging decisions and other work product. Under that superior test, the defendant does not have to prove motive. But before the burden shifts to the government to explain any charging delay, the defendant faces the "heavy burden" of proving "non-speculative" prejudice. *Higa*, 74 P.3d at 10. It is relatively uncommon for a defendant to be able to demonstrate actual prejudice. *See United States v. Rogers*, 118 F.3d 466, 477 n.10 (6th Cir. 1997) ("The standard for pre-indictment delay is nearly insurmountable, especially because proof of actual prejudice is always speculative."); *Knickerbocker*, 880 A.2d at 470 ("[T]he possibility of prejudice due to the dimming of memories is inherent in any delay and, alone, is

insufficient to constitute a denial of due process." (quotation marks omitted)); *Jones*, 69 N.E.3d at 695 ("[T]he death of a potential witness will not always constitute actual prejudice"); *Lee*, 602 S.E. 2d at 117 ("When the claimed prejudice is the unavailability of a witness, courts require that the defendant identify the witness he would have called; demonstrate, with specificity, the expected content of that witness' testimony; establish that he made serious attempts to locate the witness; and finally, show that the information the witness would have provided was not available from other sources."). And "[i]f a defendant fails to show actual substantial prejudice, the inquiry ends and the reasons for the delay need not be addressed." *Higa*, 74 P.3d at 10; *accord Jones*, 69 N.E.3d at 172. The government therefore is rarely required to come forward with an explanation for its charging delay. The governments interests are protected without placing an unsurmountable burden on the defendant to prove something that he cannot even investigate.[8]

[8] In this way, due process violations relating to prosecutorial charging decisions like preindictment delay are categorically different from due process violations relating to police investigations. Where police have failed to gather or retain evidence that would or could have been exculpatory, a defendant does have the ability to investigate the motives of the police both before and during trial. The discovery process will often provide the investigative reports of the police officers who gathered (or failed to gather) evidence. The defense can compare the methods used to collect and maintain evidence against police department policy manuals obtainable by state and federal open records requests (or, in many cases, a basic internet search). Even if the defense could not obtain all of the relevant reports before trial, it can cross examine testifying officers about investigative decisions made. It can present its own expert testimony about best police practices for collecting or preserving evidence, or the availability of technology that would have been accessible to the police and could have

### C. A balancing test that does not always require intent to prejudice is more consistent with core procedural due process protections.

This Court has long been concerned with historical rules that "ensure[] fundamental fairness in the determination of guilt at trial." *Albright v. Oliver*, 510 U.S. 266, 283 (1994) (Kennedy, J., concurring in judgment). Such rights lie at the historic, procedural core of the Due Process Clause. *Id.* at 273 n. 6 (plurality op.). The right to be free from ***unexplained*** prejudicial preindictment delay—which the burden-shifting test protects, but the Tenth Circuit's test does not—falls within that category.

As an historical matter, the founding generation would have been aware that the British common law protected individuals from unjustified delay not only after prosecution commenced but also before. In *Rex v. Robinson*, 1 Black. W. 541, 96 Eng. Rep. 313 (1765), for example, Lord Mansfield refused a motion for a criminal information against a defendant on the ground that over two years had expired since the offense and "the delay is not accounted for." *Id.* at 542, 314; *see also Rex v. Marshal and Grantham*, 13 East 322, 104 Eng. Rep. 394 (1811). And that right would have been connected, in its mind, to the Magna Carta's prescription that justice have three general qualities that are not limited to trial itself: that it be free, full and swift. *See*

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prevented spoliation of, for example, biological evidence. Defendants can even request instructions—as the defendant did successfully in *Arizona v. Youngblood*, 488 U.S. 51 (1988)—allowing the jury to "infer that the true fact is against the State's interest" if it finds that the state "destroyed or lost evidence." *Id.* at 54 (internal quotation marks omitted). Thus, it is a mistake to adopt the Tenth Circuit test as though preindictment delay is a sub-set of spoliation of evidence claims. *See, e.g., United States v. Crouch*, 84 F.3d 1497, 1510 (5th Cir. 1996) (en banc) (so concluding based on Supreme Court "dicta").

*Klopfer v. North Carolina*, 386 U.S. 213, 224 & n.14 (1967) (citing Magna Carta, c. 29 (c. 540 of King John's Charter of 1215) (1225), translated and quoted in Coke, the Second Part of the Institutes of the Laws of England 45 (Brooke, 5th ed., 1797)).

In *Marion*, this Court relied on the historic, procedural core of the Due Process Clause when it tied the preindictment delay rule to both government-caused delay (which provided the historical basis for the right) and government-caused prejudice (which brought it within the ambit of the due process clause). *Marion*, 404 U.S. at 324–25.

In *Lovasco*, this Court put further limitations on the doctrine when it clarified that the rule was concerned not only with fairness in the determination of guilt, but also with "the community's fair sense of decency." 431 U.S. at 790. While necessary, it is not sufficient for the defense to prove actual prejudice. The government may come forward and explain why the delay itself furthered the end-goal of fundamental fairness, and therefore would be justifiable in the eyes of the community. In *Lovasco*, that acceptable justification was the government's explanation that any delay was caused by a good-faith investigation, since such a delay is "not . . . one-sided." *Id* at 795. It is in the best interested of the state, the defendant, and the courts to allow an investigation to continue until the prosecutor can assess the relative culpability of everyone involved and determine whether and how to prosecute. *Id.* at 794–95. In upholding the delay in the case, the Court contrasted "the goal of 'orderly expedition'" with "that of 'mere speed.'" *Id.* at 795.

In so situating the doctrine of unconstitutional preindictment delay, the Court invited individualized consideration of the tenets at the core of the due process right rather than requiring governmental bad faith in all instances. In *Marion*, the Court explained that "accommodate[ing] the sound administration of justice to the rights of the defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case." 404 U.S. at 325. The Court echoed this sentiment in *Lovasco*, leaving "to the lower courts, in the first instance, the task of applying the settled principles of due process that we have discussed to the particular circumstances of individual cases." 431 U.S. at 797. This weighing is necessary since "[a]ctual prejudice to the defense of a criminal case may result from the shortest and most necessary delay"—which would not offend due process. *Marion*, 404 U.S. at 325.

Many jurisdictions have rightly concluding that these cases require courts to weigh proof of prejudice from the defense against whatever explanation the government is able to provide. Such a test recognizes that it is generally "preferable" for courts to defer, for example, to "prosecutorial priorities and bureaucratic realities." *United States v. Williams*, 738 F.2d 172, 175 n. 2 (7th Cir. 1984). But it also acknowledges that "fundamental conceptions of justice" and "the community's sense of fair play" require those interests—on occasion—to give way. *See Howell*, 904 F.2d at 895. Truly prejudicial preindictment delay can be "so detrimental to the defendant's case as to be patently unfair." *Williams*, 738 F.2d at 175 n. 2. And the "ultimate responsibility" for "delays caused by negligent conduct on the part of the government . . . must rest with the government rather than the defendant." *Moran*, 759 F.2d at 781.

In the criminal realm, due process generally requires prejudice to a defendant—but does not require bad faith by prosecutors. "[I]n cases of alleged prosecutorial misconduct," for example, "the touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). Thus, a prosecutor's suppression of requested exculpatory evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Agurs*, 427 U.S. 97, 110 (1976) ("If the suppression of the evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").[9]

Moreover, trial courts are experienced at requiring the government to justify delay, and then balancing those justifications against other factors such as prejudice to the defense, as they are regularly called upon to do just that in the Speedy Trial context. While it is the Due Process Clause that protects against prejudicial preindictment delay—meaning that the simple passage of time can never be enough to

[9] The limited exception to the rule that a showing of government bad faith is not required involves due process challenges to police investigations, *Youngblood*, 488 U.S. 51, which are categorically different than due process violations relating to prosecutorial charging decisions like preindictment delay. *See supra*, note 8. And even that rule is not universally applied. *See, e.g., Perry v. New Hampshire*, 565 U.S. 228, 239 & n.5 (2012) (explaining that evidence of pretrial identifications made in overly suggestive circumstances can be inadmissible, without regard to law enforcement's subjective intent in arranging the problematic procedure). As to preindictment delay challenges, *Youngblood* at best implies only that a showing of bad faith would be required to overcome the rule articulated in *Lovasco* that ongoing police investigation generally justifies prejudicial preindictment delay.

require dismissal—the constitutional Speedy Trial test articulated in *Barker v. Wingo*, 407 U.S. 514 (1972), is nonetheless instructive. *Barker* adopted a four factor balancing test that considers, among other things, "the reason the government assigns to justify the delay." *Id.* at 531. Yes, "[a] deliberate attempt to delay the trial in order to hamper the defense [is] weighted heavily against the government." *Id.* But "more neutral reason[s] such as negligence," or the press of business, "nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* Despite the differences between the rights involved, *see Marion*, 404 U.S. at 320-25, it makes little sense for the tests to differ so greatly in this respect given that they are protecting the accused from substantially the same type of wrong.[10]

## III. This is an ideal vehicle to consider this important, recurring issue.

This case has preserved—and places front and center—all of this Court's unanswered questions regarding prejudicial preindictment delay. And it arises at a time

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[10] Jurisdictions using the balancing test also understand that "[t]he flexibility" of a balancing test "is faithful to the Court's due process jurisprudence in general, which in a variety of contexts favors multi-factor tests and balancing over bright-line rules." *Stokes*, 248 P.3d at 962. It aligns with this Court's broad statements about due process outside of the criminal realm—that it "is flexible and calls for such . . . protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). For example, under the Due Process Clause, courts weigh the government's objective interest in prosecuting a case against a defendant's liberty interest in refusing the specific psychotropic medication that the government seeks to force upon him. *See Sell v. United States*, 539 U.S. 166, 183 (2003). They rely on three "guideposts" in order to determine whether a punitive damages award violates due process. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574–75 (1996). And the use a three-part balancing test to determine whether a deprivation of property or liberty violates due process. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

where it is becoming clearer that general statutes of limitations are not sufficient to protect every individual defendant from fundamentally unfair trials. Therefore, the Court should grant this petition in order to examine this important, recurring issue.

### A. Mr. Woodard preserved this critical question to his case.

Mr. Woodard proved prejudice below and preserved the question presented in this petition. Resolving this question in his favor would enable him to return to the district court and seek dismissal under a standard that he may be able to meet. Therefore, this case is an ideal vehicle for this Court to consider who has the burden to explain the reasons for prejudicial preindictment delay, and whether the due process clause can be offended even if the government did not delay intentionally, for the purpose of obtaining a tactical advantage over the defendant or to harass.

The federal government waited over three years to indict Mr. Woodard after local police executed a search warrant on a home associated with him. Its indictment relied on a theory of constructive possession of the drugs discovered in the home. But a key witness who could have helped Mr. Woodard distance himself from the home committed suicide a year before the federal charges were filed. There is no indication that anyone conducted any additional investigation after the date of the raid. Mr. Woodard raised preindictment delay in the district court. He proved prejudice to the district court's satisfaction. He argued that he should not have to prove that the government delayed charging him in order to obtain a tactical advantage over him or to harass him. He argued that again on appeal.

But Mr. Woodard lacked both knowledge and access to be able to prove that the government was anything other than negligent in its delay. Under the majority test long used by the Tenth Circuit, that meant that Mr. Woodard lost his motion and his appeal.

Mr. Woodard may well be able to prevail under the superior balancing test, however, which would require the district court to consider whether the prejudice against him was serious enough to merit dismissal under the due process clause, in the face of whatever explanation for the delay the government could provide. Thus, his case is an ideal vehicle for this Court to resolve the split of authority on the questions presented in this petition.

### B. General statutes of limitations are not necessarily sufficient to protect individual defendants from fundamentally unfair trials.

Determining when prejudicial preindictment delay transforms into a violation of the Due Process Clause has long been an "important question of constitutional law." *See Hoo*, 484 U.S. at 1035–36 (1988) (White, J., dissenting from denial of petition for certiorari). But its importance has only grown in recent years as the trend in federal and state law has been to expand and even abolish statutes of limitations—"the primary guarantee against bringing overly stale criminal charges," *Lovasco*, 431 U.S. at 789 (quotation marks omitted).

Statutes of limitations and the due process clause stand as the civil law and common law bookends that the United States relies upon to protect defendants from oppressive and prejudicial delay in the filing of criminal charges. *See* Note, The Statute of Limitations in Criminal Law: A Penetrable Barrier to Prosecution, 102 U. Pa.

L. Rev. 630, 631 & n.7 (1954) (positing that "[t]he more extensive use of statutory limitations here than in England" may be explained by the fact that "in this area the civil law was accepted"); *supra* Section II.C (discussing common law roots of due process preindictment delay doctrine). Statutes of limitations represent attempts by legislatures to balance in advance the interests of the state and the defendant in the prompt filing of charges. The due process clause mandates dismissal where the statute of limitations has failed to prevent fundamental unfairness in a particular case.

Statutes of limitations are absolute restrictions designed to balance different state interests. "Statutes of limitation are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proofs necessary to the protection of the accused have by sheer lapse of time passed beyond availability." *United States v. Eliopoulos*, 45 F. Supp. 777, 781 (D.N.J. 1942). But legislatures that choose to pass statutes of limitations[11] do so only after balancing defendants' interests against other considerations, such as "the time ordinarily requisite for investigation" of a particular type of

[11] *Marion* and *Lovasco* did not recognize that not all jurisdictions in the United States make use (or extensive use) of statutes of limitations. Wyoming and South Carolina have long had no criminal statutes of limitations. *Phillips v. State*, 835 P.2d 1062, 1069 (Wyo. 1992) ("Wyoming has no statute of limitations for criminal offenses[.]"); Vance Eaton et al., "Is Justice Delayed Justice Denied?" 28-Jul. *South Carolina Lawyer* 46, 46 (2016) ("South Carolina has no statute of limitations (SOL) for criminal offenses."). And at least five others have no statute of limitations for most or all felony charges. *See, e.g,* Ky. Rev. Stat. § 500.050(1) (setting default of no limitations period to file felony charges); *Smallwood v. State*, 443 A.2d 1003, 1006 (Md.

offense, and "the deterrence and retribution aims of the criminal law," which generally support allowing later prosecutions to move forward. The Statute of Limitations in Criminal Law, 102 U. Pa. L. Rev. at 638–39, 651.

The tension between these interests is such that each is at its strongest in the same types of prosecutions—"[w]here a crime is especially serious and the punishment is correspondingly great." *Id.* at 636. On the one hand, "it would seem particularly important to protect the defendant's right to garner reliable information for a defense and to prevent the use of stale evidence against him" in particularly serious cases. *Id.* On the other hand, "the more serious the crime, the more likely it is that [the] desire [for retribution] will outweigh the aims of the limitation statutes." *Id.* at 636–37. Thus, for example, murder has almost never been subject to a statute of limitations in this country. *See, e.g.,* Crimes Act of 1790, § 32, 1 Stat. 112, 119 (exempting murder from first federal statute of limitations); The Statute of Limitations in Criminal Law, 102 U. Pa. L. Rev. at 636 (noting only one state with limitations period for murder).

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1982) ("Maryland has no statute prescribing the time in which a prosecution for a felony must be commenced."); *State v. Johnson*, 167 S.E.2d 274, 279 (N.C. 1969) ("In this State no statute of limitations bars the prosecution of a felony."); *Anderson v. Comm.*, 634 S.E.2d 372, 375 (Va. Ct. App. 2006) ("Virginia has no general statute of limitation on felonies."); *State v. Carrico*, 427 S.E.2d 474, 477 (W. Va. 1993) ("West Virginia has no statute of limitations affecting felony prosecutions.").

Since this Court last addressed the question of prejudicial preindictment delay, dramatic developments in forensic technology and in societal recognition of delayed outcry by sex assault victims has dramatically altered the statute of limitations landscape. The advent of DNA testing in 1985,[12] and subsequent innovations allowing for the testing of smaller and less complete samples, have meant that investigations can take much longer while at the same time having at least the potential to raise fewer concerns about the accuracy of later adjudications, because the evidentiary value of properly preserved evidence can actually increase as time passes and DNA testing technology improves. And Americans have been more accepting of delayed reporting of crimes—especially sexual assault, and especially by child victims—even though the passage of time in those cases typically has an adverse relationship to the reliability of available evidence.

This has led to dramatic extensions of general statutes of limitations, and often their outright abolition—which means that charges can be filed later and later even in cases that do not involve DNA evidence or delayed reporting. Since *Lovasco* was decided, for example, the federal government has eliminated the limitations period for kidnapping offenses involving minor victims and for certain sexual offenses involving any victim. Pub. L. 109-248, Title II, § 211(1), July 27, 2006, 120 Stat. 616, *codified at* 18 U.S.C. § 3299.

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[12] *See* Randy James, "A Brief History of DNA Testing," *Time* (June 19, 2009). DNA evidence was first used to obtain a criminal conviction in the United States in a 1987 sexual assault case in Florida. *Id.*

Even the beginning of an alphabetical survey of states reveals similar examples and a seemingly universal trend from Alabama to California. In 1985, Alabama abolished its three year statute of limitations in sexual assault cases with child victims, and in all cases involving violence, threats, physical injury, or death. *See Hawkins v. State*, 549 So. 2d 552, 554 (Ala. Ct. Crim. App. 1989). Alaska expanded its previous five year limitations period for late-reported sex offenses against children starting in 1983, *State v. Creekpaum*, 753 P.2d 1139, 1140 (Alask. 1988), and now has no statute of limitations for serious sexual assault charges, including just about any sexual assault charge where the victim was a minor at the time of the offense, Alask. Stat. Ann. § 12.10.010. Arizona amended its seven-year limitations period for most felony offenses in 1997, such that it does not begin to run so long as the "identity of the person who commits the offenses or offenses is unknown." *State v. Gum*, 153 P.3d 418, 420–21 (Ariz. Ct. App. 2007). Arkansas began to lengthen its limitations period for rape of a minor in 1987, before eliminating it completely in 2013. *Oliver v. State*, -- S.W. 3d --, 2020 WL 6305730, *6 (Ark. Ct. App. Oct. 28, 2020). California started to lengthen its limitations period for many felony offenses in 1984, which lead to the complete abolition of statutes of limitations for a multitude of felony sex offenses in 2016. *See* Cal. Penal Code § 799, Credits, and Editors' Notes; *see also* 2016 Cal. Legis. Serv. Ch. 777 (S.B. 813) (explaining most recent amendment). The remainder of the alphabet is to similar effect.

As a policy matter, this trend is defensible. Yet the loosening of statutes of limitations necessarily increases the likelihood that cases will be charged years and

decades after the alleged crimes, after memories have faded, witnesses have died or disappeared, and crucial defense evidence has been lost to time or destroyed. This is so regardless of whether the specific cases involves the type of forensic evidence or late-reporting victim that led to the expansion or elimination of the application statute of limitations in the first place—where, instead, the delay was intentional, reckless, or negligent on the part of the state. Even if the results are just in most cases, the extension and abolition of statutes of limitations greatly increases the chance that individual prosecutions will offend "fundamental conceptions of justice" or "the community's sense of fair play and decency." *Lovasco*, 431 U.S. at 790.

In these situations, a defendant should have recourse to the Due Process Clause. But as a practical matter, the constitutional protection against a trial that has been rendered fundamentally unfair by preindictment delay is only available in some jurisdictions. Those that apply a burden-shifting balancing test will manage to catch those select few cases where the government cannot adequately justify prejudicial preindictment delay. But the majority that require the defendant to prove intentional tactical delay—like Wyoming, which has limited discovery tools and no statutes of limitations—protect no one, no matter how significant the prejudice or how inexplicable the delay.

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## Conclusion

For all of these reasons, the time has come for this Court to confront the questions left unanswered in *Lovasco*—and this is the ideal vehicle by which to do that. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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