No. 15-308

IN THE

Supreme Court of the United States

THE CITY OF NEW YORK

Petitioner,

v.

ALAN NEWTON

Respondent.

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

BRIEF FOR REPONDENT IN OPPOSITION

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QUESTION PRESENTED

In *District Attorney's Office* v. *Osborne*, 557 U.S. 52 (2009), this Court held that where state law vests a convicted prisoner with a liberty interest in demonstrating his innocence, due process requires that procedures "essential to the realization of th[at] right" not be "fundamentally inadequate." *Id*. at 68-69. For more than a decade, Respondent Alan Newton sought to establish through DNA testing his innocence of the sexual assault for which he was wrongfully convicted. He satisfied the conditions provided for under New York State's DNA access law, but his efforts were thwarted by procedures of Petitioner's Property Clerk that the courts below described as "grave[ly] deficien[t]," "recklessly chaotic," and "dysfunctional." After a three-week trial, a jury—instructed that liability required proof of "persistent, widespread" wrongdoing and "intent [or] * * * reckless disregard for Newton's rights" and that "[m]ere negligen[ce] was insufficient"—rendered a verdict for Newton, finding that Petitioner's system was fundamentally inadequate. The court of appeals upheld the verdict, concluding, after a thorough review of the entire trial record, that the jury's findings of a "custom or policy" that deprived Respondent of his due process rights were fully supported.

The question presented is:

Whether the court of appeals erred in applying *Osborne* and Fed. R. Civ. P. 50(b) to the trial record and concluding that the jury's § 1983 due process verdict was supported by the evidence.

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BRIEF FOR RESPONDENT IN OPPOSITION

The Second Circuit has not announced a "broad" and "sweeping" rule that imposes "retroactive" constitutional liability for "negligent actions of line-level municipal employees." Pet. i. Rather, its decision reinstated a verdict rendered by a properly-instructed jury, after a three-week trial, conscientiously applying this Court's due process precedents to the extraordinary facts established at trial. That decision, which is not alleged to conflict with that of any other federal court, was correct and would not warrant further review under any circumstances.

Denial is further warranted here because the "purely legal questions" the Petition asks the Court to resolve are not presented by the court of appeals decision, which expressly *rejected* negligence-based liability and upheld under Rule 50(b) the jury's specific determinations of intent or recklessness on the City's part. That and other explicit findings and the extensive evidence supporting them are omitted entirely from Petitioner's Statement of the Case, as are lengthy sections of the court of appeals' decision that reviewed the trial record in detail. Under the Court's Rules, this basic failure to present centrally relevant aspects of the "fully developed record," Pet. 15—and to reckon with the legal significance of the jury verdicts for Respondent—is itself "sufficient reason * * * to deny [the] petition." S. Ct. R. 14.4.

COUNTERSTATEMENT OF THE CASE

1. In 1984, 22-year-old Alan Newton was arrested and charged with a violent sexual assault and robbery that someone else had committed. He

was sentenced to consecutive terms totaling up to 40 years.

2. Newton's efforts to establish his innocence through scientific testing began soon after his conviction became final. In 1988, before DNA testing was widely available, Newton sought serology testing on the contents of the rape kit collected from the victim, which could have demonstrated to a 90% certainty that Newton was not the assailant. A state court ordered the Bronx District Attorney to produce the kit for independent testing, but the medical examiner preempted that testing by reporting (falsely, it would later emerge) that the kit did not contain any spermatozoa that could be subjected to testing. C.A. App. 1694-1699, 1747.[1]

3. In 1994, the New York Legislature enacted its DNA statute, including a provision, N.Y. Crim. Proc. L. § 440.30(1-a)(a), directing that courts "shall" order DNA testing of specified evidence upon a convicted defendant's demonstration of "a reasonable probability that the verdict would have been more favorable" had the results of such testing been admitted at trial. The statute established that DNA results should be treated as the sort of newly discovered evidence that could be relied upon in state post-conviction proceedings. See N.Y. Crim. Proc. Law § 440.30 (Practice Commentary).

4. The year the statute was enacted, Newton filed a *pro se* motion in state court seeking DNA

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[1] Citations to "C.A. App. __" are to the 13-volume Court of Appeals Joint Appendix.

testing of the rape kit. The District Attorney did not deny that Newton's application satisfied the statutory standard, but represented to the state court that the Property Clerk Division of the New York City Police Department ("PCD") had searched "extensively" for the rape kit and could not locate it. C.A. App. 3351.[2] Relying on this representation, the court denied Newton's motion.

Newton filed another § 440.30(1-a)(a) application in 1998. The District Attorney again conceded the threshold requirements were met. But PCD advised that the rape kit "most likely" had been destroyed "in accordance with standard Police Department procedure," C.A. App. 3332, and that it could not supply further information because records (known as "invoices") relating to the kit had been destroyed, either in a 1995 warehouse fire or pursuant to a Bronx PCD practice of destroying all records connected to evidence more than six years old. C.A. App. 2779.

Between 1994 and 2005, Newton also filed a federal habeas corpus petition and numerous state open records law requests seeking to locate and test the rape kit. Each of these was rebuffed based on similar PCD representations.

In 2005, the Innocence Project took up Newton's cause and requested that the District Attorney ask PCD to conduct another search for the rape kit,

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[2] See N.Y.C. Admin. Code § 14-140(a)(1)-(2) (instructing the Property Clerk to "take charge of all property" seized by police and requiring that "[a]ll such property * * * be described and registered by the property clerk in a record kept for that purpose").

notwithstanding previous representations that the kit and documents attesting to its location had likely been destroyed. In November 2005, the missing rape kit was found, in the same PCD barrel in which it had been placed in 1989. (The corresponding invoice was subsequently found, in the same folder in which *it* had been filed two decades earlier.)

DNA testing conclusively exonerated Newton, and the District Attorney consented to vacating his conviction. In July 2006, after serving more than two decades for a crime he did not commit, Newton, by then 44 years old, was released from prison.

Although important aspects of the circumstances relating to Newton's wrongful conviction and incarceration would emerge through litigation, he had some indication at the time of his release of the deficiencies that would be central focus of the trial. Not only had the rape kit been in the City's possession throughout his incarceration, but PCD had also informed Newton that two other separately vouchered items of evidence he sought for forensic testing—the victim's clothing and his own sneakers—could not be found and were "likely destroyed." C.A. App. 3332. But the clothing, like the rape kit, was found years later in the City's possession. C.A. App. 3336. And none of the multiple tracking documents relating to that physical evidence had been located at the time of his release. (Tracking documents for the sneakers and clothes were found in an unmarked box in a PCD satellite warehouse years after this suit was commenced.)

Finally, Newton had learned that his experience was not uncommon. Many Innocence Project clients

had had their cases closed based on familiar assertions that evidence and corresponding documentation was "untraceable," "likely destroyed," and the like. C.A. App. 3288, 3357.

5. Newton filed this § 1983 civil rights suit against the City of New York in 2007. His claims fell into three categories: (1) that he had been falsely arrested and maliciously prosecuted; (2) that incompetent or false testing of the rape kit's contents by the City's medical examiner in 1988 had wrongfully foreclosed independent testing that would have exonerated him; and (3) that his incarceration had been unlawfully prolonged by pervasive and fundamental defects in PCD's evidence management system. In particular, Newton alleged that the City's customs and practices, by effectively denying him a fair opportunity to demonstrate his innocence in accordance with state law, violated his rights under the Due Process Clause and his First Amendment right to court access.

a. The district court (Scheindlin, J.) dismissed the claims relating to the arrest and conviction and the false test report, but denied Petitioner summary judgment with respect to Newton's evidence management claims. See 681 F. Supp. 2d 473 (S.D.N.Y. 2010); 738 F. Supp. 2d 397 (S.D.N.Y. 2010). As to the surviving claim, the court rejected Petitioner's argument that Newton's due process claim was foreclosed by *Third Judicial District* v. *Osborne*, 557 U.S. 52 (2009), in which this Court held that there is no substantive due process right to access DNA evidence, but that state laws entitling inmates to post-conviction relief based on new

evidence create federally protected liberty interests and corresponding obligations to provide fair and adequate procedures for realizing such rights.

b. Newton's due process and court access claims (and related state law claims) were tried to a jury. Over 14 trial days, jurors heard from 29 witnesses, C.A. App. 2006-2725, and examined 778 pages of exhibits. *Id.* 2727-3504. Newton presented overwhelming evidence that, from 1994 through 2006, the City's entire system for storing, tracking, and retrieving critical forensic evidence was, as the Second Circuit would later describe it, "dysfunction[al]," "recklessly chaotic," and "wholly inadequate," with "unconstitutionally deleterious effect[s]" in Newton's case and "a large number of [others]." Pet. App. 20a, 32a.

First, PCD officers, including its highest-ranking officers, had no idea how the system was supposed to work. PCD's policies and procedures for operating its complex and antiquated evidence management system were codified in a 500-page "Property Guide." But multiple PCD officers—including the one responsible for the "search" in 1998—had never seen the Guide, C.A. App. 1299-1300; and key officials, including Petitioner's two "Integrity Control Officers," testified that they did not know of the Guide's existence. *Id.* 2349, 2596-2598.

Second, PCD's practice was to destroy evidence—and the tracking records relating to evidence—in haphazard fashion. Although PCD's commanding officer testified that he issued a "verbal directive" in 2000 not to destroy rape kits, there concededly was no such policy in effect between the 1994 enactment of the DNA statute and 2000; and even after that,

this claimed "directive" was not committed to writing. PCD frequently destroyed *invoices* without regard to whether the corresponding evidence still existed, thereby rendering much evidence in its possession untraceable. C.A. App. 1166.

Third, the trial evidence showed that Petitioner made no effort to implement internal controls that might have mitigated the obvious and widely-known deficiencies in its system. For example, PCD's commanding officer claimed that there had been 400 "inspections" of its facilities during the relevant period, but an expert witness testified that she could find no substantiation that *any* such inspections had been performed. C.A. App. 2496.

Fourth, these problems were serious and pervasive. The expert testified (as did two Innocence Project attorneys) that PCD's deficiencies were more fundamental and far more serious than those in police departments in "the rest of the country," C.A. App. 2574, 2569, causing the system to fail in a large fraction of cases where potentially exonerative post-conviction evidence was sought. When the Innocence Project sought information regarding DNA evidence in 21 cases, PCD identified 87 invoices relating to those cases, of which it could find only four. *Id.* 3444.

Finally, when its "searches" did not yield the item that a person was statutorily entitled to test, it was common for PCD to provide prosecutors and courts with explanations like those offered in response to Newton's 1998 application referencing "likely" destruction by fire or pursuant to "procedure." The trial record contained numerous other instances in which PCD responded to inquiries

about DNA evidence with similarly baseless and false representations. See C.A. App. 3259.[3]

c. The jury returned verdicts against the City on both Newton's § 1983 due process and court access claims. Specifically, the jury determined that "the City engaged in a pattern, custom or practice of mishandling evidence"; that the City "acted with an intent to deprive Newton of his constitutional rights or with reckless disregard of those rights"; and that the City's actions between 1994 and 2006 proximately caused Newton's protracted incarceration. C.A. App. 3502. The jury awarded Newton $18 million in compensatory damages on these claims.

6. Petitioner filed a post-trial motion for judgment as a matter of law, the centerpiece of which was a contention that the jury's verdict conflicted with a post-verdict decision of the Second Circuit, *McKithen* v. *Brown*, 626 F.3d 143 (2d Cir. 2010), which held that New York's statutory procedures governing post-conviction relief satisfied the *Osborne* fundamental adequacy test. The City

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[3] This troubling practice persisted even after Newton's exoneration. A New York City Police Department Assistant Chief, called to testify about Mr. Newton's case and PCD practices generally, told the New York Legislature that "voucher[s are] not destroyed, even if the property is ultimately disposed of"; that "sexual assault kits * * * are never disposed of"; and that "[w]hat happened in Mr. Newton's case" was that invoices for the rape kit "were destroyed" in "a fire in [a PCD] facility." *Storage and Accessibility of DNA Crime Scene Evidence in Criminal Investigations: Hearing on A. 11952 Before the Assemb. Standing Comm. on Codes*, 2006 Leg., 229th Sess. (N.Y. 2006). Each of these representations was contradicted by evidence adduced at trial.

further argued that a provision added to the state DNA law in 2004—directing that "a finding by [a] court that [DNA] evidence no longer exists or the physical location of such specified evidence is unknown" should not support an adverse inference in a post-conviction relief proceeding, N.Y. Crim. Proc. L. § 440.30(1-a)(b)—was fatal to Newton's claim. The City also urged that the verdict be overturned because the trial evidence established "at most negligence" and because, it contended, municipal due process liability under § 1983 required proof that some particular individual officer had acted with a sufficiently culpable intent.[4]

The district court granted the motion. The court agreed with Petitioner that *McKithen* had altered the legal landscape governing the due process right that *Osborne* recognized. Pet. App. 48a. It concluded that although Newton had demonstrated that Petitioner's evidence management system was deficient, the due process claim against the City failed for lack of evidence of a sufficiently culpable individual. *Id.* 11a. The district court further set aside, without any explanation, the jury's separate First Amendment court access verdict.

7. The Second Circuit reversed and reinstated the jury's due process verdict in an opinion that carefully canvased the extensive trial record.

a. The court of appeals began with the governing legal standard, noting that the generally demanding

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[4] The City sought, in the alternative, a new trial. The district court did not rule on that motion, and the City did not appeal from the district court's failure to do so.

Rule 50 burden "is particularly heavy where, as here, the jury has deliberated * * * and actually returned its verdict in favor of the non-movant." Pet. App. 12a (citation omitted).

b. The court then evaluated the jury's due process verdict "according to the familiar two-part test for analyzing alleged deprivations of procedural due process rights." Pet. App. 12a (citing *McKithen,* 626 F.3d at 151). In determining that Newton had "a cognizable liberty or property interest under state or federal law," the court "start[ed] with *Osborne*," noting that this Court's decision—after rejecting both the Ninth Circuit's post-conviction *Brady* right and a "freestanding substantive due process right to DNA evidence"—had held that Osborne, who was imprisoned pursuant to a presumptively valid conviction, nonetheless had "a liberty interest in demonstrating his innocence with new evidence under state law," 557 U.S. at 68, based on "Alaska['s] provi[sion of] a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence," Pet. App. 15a (quoting 557 U.S. at 70). The "liberty interest created by New York law," the Second Circuit concluded, "is no narrower" than the one recognized in *Osborne*. Pet. App. 18a.

In addressing whether Newton had been afforded "the process that was due under the Constitution," the court noted both *Osborne*'s pronouncement that state-created rights "beget yet other rights to procedures essential to the realization of the parent right," and its admonition "that a defendant who has been convicted after a fair trial 'has only a limited interest in postconviction relief,'"

Pet. App. 16a (quoting 557 U.S. at 68), concluding (as had *McKithen*) that "the deferential standard of *Medina* v. *California*, 505 U.S. 437 (1992), governs the process due a prisoner seeking evidence for the purpose of obtaining post-conviction relief." Pet. App. 16a-17a.

c. The court then detailed how Newton had carried his burden under *Osborne* and explained why the decisions in *Osborne* and *McKithen* rejecting facial due process challenges to the Alaska and New York regimes did not support overturning the jury's verdict. The court emphasized that Newton—unlike the claimants in those cases, who had challenged as unconstitutionally restrictive the legislatively-enacted standards by which they had been denied DNA access—had "readily concede[d] that [New York State's] statutory procedures are adequate" and instead targeted practices of "the *City*, not the State," and had shown "that [Petitioner's] evidence management system" was so "inadequate as to nullify [State] procedures." *Id*. 19a-20a. *McKithen,* the court explained, "certainly [did] not" prevent "Newton from challenging a municipal custom* * * [as] undermin[ing] otherwise adequate State procedures." *Id.* 21a. (citing decisions establishing that "a failure of local government in carrying out its role can nullify the adequacy of State procedures and expose the municipality to constitutional liability").[5]

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[5] The court explained that Newton, who, "in contrast to Osborne and McKithen," had "diligently and repeatedly tried the State's procedures for obtaining the necessary DNA evidence," was positioned to bring the type of as-applied

d. The court then rejected arguments that the federalism considerations that *Osborne* had cited in declining to recognize a broad substantive right supported judgment for Petitioner. "[T]he *Osborne* Court was clear," the Second Circuit recognized, that "lower federal courts are to defer to *the judgment of state legislatures* concerning the process due prisoners seeking evidence for their state court post-conviction actions," *id.* (quoting *McKithen,* 626 F.3d at 153), but "reinstating the § 1983 verdict against the City" based on a "local pattern, custom, or practice" that "obstruct[ed] otherwise adequate State law procedures" would not overturn any "considered judgment of [a] State legislature." Pet. App. 22a.

The court then explained that "[t[he addition in 2004 of New York Criminal Procedure Law Section 440.30(1-a)(b) [did] not alter [the constitutional] analysis." Pet. App. 24a. The court reasoned that "the legislature's reasonable determination that a convicted defendant should not be released because the police have lost relevant evidence does not prevent an exonerated person from having a civil remedy under § 1983 against a municipality for an inadequate evidence management system." *Id.* 25a.

e. The Second Circuit then conducted a detailed review of the trial record, canvassing—in more than seven pages of its opinion that are nowhere mentioned in the Petition—some of the evidence that supported the jury's due process verdict and its underlying determinations.

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challenge that *Osborne* contemplated. *Id.* 20a (citing 557 U.S. at 71).

The court of appeals noted trial evidence that PCD warehouses were littered with "hundreds of property items and evidence with no paperwork attached to them," as well as "loose invoices that had not been marked either 'destroyed' or 'auctioned'"—including "invoices for Newton's blue suede sneakers and for clothing from the victim," Pet. App. 27a-28a (citing C.A. App. 2407-08, 2767, 2773)—and that the Bronx Property Clerk's office had folders, dating back decades, "that contained thousands of 'out-to-court' invoices," meaning either that the associated evidence "had never been returned to the PCD or, like the rape kit in Newton's case, had been returned but not properly recorded." *Id.* (citing C.A. App. 2403).[6]

The court found especially "disturbing" testimony that "Integrity Control Officers responsible for ensuring that employees at the PCD complied with the procedures in the Property Guide" were "unfamiliar with those procedures [and] the evidence management component of their positions." Pet. App. 29a (citing C.A. App. 2166, 2345-47, 2364, 2598); that "several high-level officials tasked with supervising the NYPD's evidence management system were [likewise] unfamiliar with the PCD's procedures"; and that "PCD's commanding officer [from 2000 on] * * * was unaware," until he testified in this case, of the written policies governing when

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[6] Nationally eminent law enforcement evidence management professionals who participated as *amici curiae* in the appeals court had explained that "out-to-court" folders should be monitored vigilantly and that such errors should be caught "the next business day," not 20 years later, as happened with the rape kit invoice. Br. for Bruce Adams et al. at 11

arrest evidence could be destroyed. *Id.* 30a (citing C.A. App. 2171).

The court then highlighted evidence that "prior to [Newton's release], PCD had no reliable system to determine what evidence had been destroyed" and that, as a result, evidence may have been improperly destroyed, or, as in Newton's case, reported destroyed when it had not been." Pet. App. 30a. Finally, the court noted PCD's proclivity to terminate searches by referencing destruction—either by fire or pursuant to "regular disposal procedure" that "may not even have existed." *Id.* 32a. Had "Newton accepted the City's recklessly erroneous representations about the evidence at face value," the court observed, "he might have remained in prison far longer than he did." *Id.*

f. The Second Circuit then rejected Petitioner's arguments (1) that a municipality cannot be liable for a procedural due process violation absent proof an individual actor acted more than negligently and (2) that the verdict was "[in]consistent with" the holding in *Arizona* v. *Youngblood*, 488 U.S. 51 (1988), that failure to preserve potentially useful evidence, does not, absent police bad faith, warrant reversal of a criminal conviction. The court recognized that the jury had expressly found the City had shown "an intent to deprive * * * Newton of his constitutional rights or * * * a reckless disregard of those rights," Pet. App. 35a, a finding the court held was not only "supported by the record," but "plainly" correct. *Id.* 34a n.18.[7] The court observed

[7] The court noted that "because Newton proved that the City engaged directly in an unlawful custom or practice, he

that the rationales for requiring "bad faith" in *Youngblood*—the "interests of justice" and keeping "the police's obligation to preserve evidence [within] reasonable bounds," *id.* 37a (quoting 488 U.S. at 58)—had no application, because (1) the rape kit here "*had been* preserved" and was of a category "State law recognized as particularly significant" and (2) because Newton did not (as Youngblood had) seek to overturn a conviction based on the destruction of evidence whose exculpatory (or inculpatory) significance was unknown, but having been exonerated, brought suit to impose civil "liab[ility] for reckless maintenance of a system" that protracted his incarceration. *Id.* 37a-38a.

The Second Circuit explained that its decision "simply reinstate[d] a jury verdict" grounded on findings that the City "intentionally or recklessly administered an evidence management system that was constitutionally inadequate and that prevented Newton from vindicating his liberty interest." *Id.* This "quite narrow" ruling, the court explained, did not mean that the Constitution requires any "specific procedure * * * to manage and track evidence," Pet. App. 23a, nor did it hold that defendants are "entitled to the preservation of evidence" or call into question "[destruction of] evidence according to a legitimate procedure that conformed with State law." *Id.* And the fact that "evidence [is] sometimes lost or inadvertently destroyed" would not open a

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may not have also needed to prove that City officials acted with deliberate indifference." Pet. App 32a. n.18.

fundamentally adequate evidence management system to constitutional challenge. *Id.* 36a.

g. The court concluded by explaining that its decision directing reinstatement of the due process verdict obviated the need for detailed discussion of the jury's separate verdict on Newton's First Amendment court access claim, which the district court had set aside summarily. See Pet. App. 39a-40a. The court observed, however, that its resolution of the due process claim had "rejected the premise of the * * * City's principal argument" against the court access verdict, and, "[a]fter reviewing the record," the court rejected as "without merit" the City's argument "that Newton [had] forfeited his First Amendment claim." *Id.* & n.20.

8. The Second Circuit denied, without recorded dissent, the City's motion for en banc rehearing.

REASONS FOR DENYING THE PETITION

The Second Circuit's decision here, reinstating a § 1983 due process verdict that was based on amply-supported jury findings of "custom and policy," "intent or reckless indifference," and proximate causation, does not warrant further review.

That narrow ruling is not even alleged to conflict with the decision of any other lower federal court, and it carefully and correctly applied this Court's applicable precedents to a trial record brimming with evidence of longstanding, systemic, and consequential dysfunction on Petitioner's part.

Nor do Petitioner's claims of vital national importance withstand scrutiny, let alone warrant this Court's intervention, "even if [the decision is]

correct." Pet. 15. The trial record established that the pervasive failings that gave rise to Petitioner's liability here were *not* typical of practices in "other jurisdictions" (almost all in the 47 States where Second Circuit law does not govern); and no local police department needs an advisory opinion from this Court to distinguish between a functional and a wholly inadequate and recklessly dishonest system.

This case's "post-trial" posture—and the Petition's failure to reckon with the substance and legal import of its "fully developed trial record," Pet. 15—supply compelling reasons for denying review. In identifying the questions presented—concerning the lawfulness of due process liability for employee negligence—the Petition does not even advert to the jury's findings of "intent or recklessness" or the court of appeals' fact-intensive decision sustaining those findings based on a through Rule 50(b) review of the extensive trial record.

A. The Court of Appeals' Careful and Narrow Ruling Was Correct and Does Not Conflict With Any Other Decision

1. Notwithstanding its allusions to "jurisdictions nationwide" (and even to "tens of thousands" of concluded criminal proceedings supposedly affected by the Second Circuit's decision), the Petition does not identify a single federal court of appeals decision that is even alleged to conflict with the decision here.[8]

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[8] Although the Petition does not cite any lower court authority, Respondent is aware of two suits, both filed in district court in North Carolina, that raised somewhat similar claims. One resulted in a confidential settlement after denial

The Petition's claim of "tension" between the Second Circuit's supposedly sweeping and unprecedented decision and this Court's governing precedent is spurious.

2. The lynchpin of Petitioner's claim—that "[t]he scope of state post-conviction remedies * * * [had] *never* been subject to federal constitutional mandates," Pet. 16, before the court of appeals "constitutionalize[d]" them—reflects a wholly mistaken understanding of this Court's allegedly "conflict[ing]" precedents.

Although *Osborne* was emphatic that the Ninth Circuit decision under review had, by extending "preconviction trial rights" to protect "postconviction liberty interest[s]," gone "too far," 557 U.S. at 68, *Osborne* did not, as Petitioner suggests (Pet. 17), establish a Due-Process-free (or § 1983-free) zone. On the contrary, the Court expressly held that the plaintiff in that § 1983 case, a duly-convicted and still-incarcerated prisoner, had a "liberty interest in demonstrating his innocence with new evidence under state law" and that state post-conviction procedures were therefore subject to "fundamental

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of a motion to dismiss; the other was dismissed on statute-of-limitations grounds, an issue not raised in this case. See *Dail* v. *City of Goldsboro*, No. 5:10-CV-00451-BO (E.D.N.C. July 14, 2011); *Grimes* v. *City of Hickory*, No. 5:14-CV-160 (W.D.N.C. June 11, 2015).

The Second Circuit decision supplies no ground for "attack[ing] or reevaluat[ing]" *any* criminal conviction, let alone "thousands." Pet. 3. The court of appeals unequivocally endorsed the lawfulness of New York's statutory rule that loss or destruction of DNA evidence *cannot be* basis for relief from a criminal conviction. See Pet. App. 25a; pp. 23-25, *infra*.

fairness" review. 557 U.S. at 68-69; see also *id.* (quoting the principle that such "state-created rights * * * beget yet other rights to procedures essential to the realization of the parent right").

Two years later, in *Skinner* v. *Switzer*, 562 U.S. 521 (2011), all nine Justices affirmed that "due process challenges to state procedures used to review the validity of a conviction" are cognizable in federal court. *Id.* at 540 (Thomas, J., dissenting). See *id.* ("[A]lthough a State is not required to provide [collateral review] procedures," they are part of the "process of law under which [a prisoner] is held in custody by the State").

Indeed, *Skinner* squarely refutes Petitioner's further accusation that the Second Circuit did anything "novel." *Skinner* rejected the very argument—that such challenges should be "channel[ed]" to habeas, Pet. 24—that Petitioner insists should have prevailed below, holding that a convicted defendant "may bring under 42 U.S.C. § 1983 [a] 'procedural due process' claim challenging [a state] postconviction DNA statute." *Id.* at 537-538 (Thomas, J., dissenting). But see Pet. i (alleging that Second Circuit erred in allowing § 1983 remedy "when the same prisoner would have no due process right to habeas or actual release from prison").[9]

In subjecting post-conviction procedures to federal constitutional scrutiny, *Osborne* and *Skinner*

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[9] Even if the rule the *Skinner* dissent urged had prevailed, the Petition would still be mistaken. Under *Heck* v. *Humphery*, 512 U.S. 477 (1994), a plaintiff like Newton, whose criminal case has been "favorably terminated," may raise under § 1983 claims that a prisoner must raise on habeas. *Id.* at 473.

did not break new ground. Decades ago, the Court held that the Due Process Clause entitles criminal defendants to effective assistance of counsel on appeal even though the "Constitution does not require States to grant appeals as of right to criminal defendants." *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). In *Bounds* v. *Smith*, 430 U.S. 817 (1977), the Court reaffirmed that the right to court access is violated when a prison's failure to provide an adequate law library impedes prisoners from preparing petitions "challeng[ing] the legality of their [state court convictions]." *Id.* at 823. And in *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272 (1998), a majority of the Court recognized that due process imposes limits on arbitrariness in *clemency* proceedings. See *id.* at 289 (O'Connor, J., concurring in part).

Petitioner's suggestion (Pet. 16) that police department property management practices have "never" been subject to constitutional scrutiny likewise fails. There in fact have been a "string of due process challenges to the procedures employed by the property clerk in New York City," *Alexandre* v. *Cortes*, 140 F.3d 406, 409 (2d Cir. 1998), many successful (and a number based on findings that foreshadow in troubling ways those here). See, *e.g.*, *McClendon* v. *Rosetti*, 460 F.2d 111, 115-16 (2d Cir. 1972); *CountryWide Ins. Co.* v. *Rosetti*, N.Y.L.J., July 17, 1970 (N.Y. Civ. Ct. 1970) (describing PCD's procedures as "a studied indifference to the rights of the public"); *Marshall* v. *Kennedy*, 181 N.Y.S.2d 413, 416 (N.Y. Sup. Ct. 1959) (characterizing PCD's withholding of property as an "abuse * * * of constituted authority [and] a flagrant manifestation of the 'insolence of office'; we are bound by every

means at our disposal to condemn it, lest respect for law and order be undermined"); *Gonzalez* v. *Leuci*, N.Y.L.J., Nov. 1, 1948, at 993 (N.Y. Sup. Ct.) (finding PCD's refusal to return property "shocking").

3. The Second Circuit here evaluated the jury's due process verdict under this Court's "familiar two-part test." The decision faithfully stated and applied the central instructions of *Osborne*: that state law vests those convicted of crimes with a protected liberty interest in establishing their innocence, though one that is much more "limited" than that accorded defendants preconviction, Pet. App. 16a, 23a, 24a; that due process review of the adequacy of post-conviction procedures is itself narrow, requiring substantial deference to the policy judgments of State legislatures, *id*. 22a-23a; and that individuals challenging such procedures as inadequate in application must first have diligently pursued them, *id*. 19a-20a.

As the court of appeals opinion makes clear, *Osborne* and this case came out differently not because conflicting constitutional rules were applied but rather because their underlying facts differed in basic, constitutionally significant ways. Unlike Osborne (and McKithen), Newton satisfied the conditions imposed by the New York State Legislature and repeatedly "tried to use the process provided to him by the State" "to vindicate [his] liberty interest," Pet. App. 20a, 23a, only to be defeated by the City's "recklessly chaotic" system. *Id*. And unlike in *Osborne*, where there were credible concerns that the plaintiff was "gam[ing] the system," 557 U.S. at 85 (Alito J., concurring), the inequitable and "disturbing" behavior here, Pet. App.

29a, was on Petitioner's side. The Second Circuit recognized the chilling reality that Newton might still be incarcerated had he accepted the City's "recklessly erroneous representations." *Id.* 32a

4. In the end, the Petition's assertion of a "fatal conflict" with *Osborne* reduces to a claim that the court of appeals, by sustaining the verdict based on pervasive and startling deficiencies in local police practices, showed insufficient deference to the *State Legislature*. Specifically, Petitioner insists (Pet. 20) that the court erred by not treating the "absence" from New York's statute of a provision expressly "requir[ing]" minimally adequate evidence management practices—along with the Legislature's later-enacted prohibition on adverse inferences in post-conviction proceedings—as codifying a "policy judgment" authorizing the City to operate its dysfunctional system with (civil) impunity.

The Second Circuit's alleged error in interpreting New York law would not be, in any event, an issue of "vital importance" to "jurisdictions nationwide," Pet. 13 (whose legislatures may enact and amend their own laws, as may New York State). But the court of appeals was plainly correct to reject this argument. Statutory silence is a notoriously "treacherous" basis from which to infer legislative intent, *United States* v. *Wells*, 519 U.S. 482, 496 (1997), and the Petition offers no support at all for its assertions that the New York Legislature "*deliberately* declined to enact," Pet. 21, a prohibition against fundamentally inadequate municipal practices. The "policy judgment" Petitioner says the court of appeals should have discerned is deeply illogical. A statute making DNA testing available to a subset of

convicted defendants is naturally understood as expressing a preference that those who meet the Legislature's preconditions *not* have their efforts to establish their innocence frustrated by local governments' dishonesty or malfeasance.[10]

Nor, as the Second Circuit correctly recognized, does subsection 440.30(1-a)(b) "alter the [constitutional] analysis" in any way. Pet. App. 24a. That the New York Legislature decided that persons convicted after fair trials should not gain *release* based on the loss or destruction (for whatever reason) of DNA evidence falls miles short of establishing an intent to provide immunity from *civil* responsibility for deficient practices that with "intent or reckless indifference" extinguished a wrongly convicted prisoner's interest in establishing his innocence.

The Second Circuit did not err, let alone defy *Osborne*, by declining to "defer" to the *City* under the circumstances here. As its opinion sensibly observed, the substantial judicial deference owed *States'* legislative judgments, Pet. App. 22a (citing *McKithen*, 626 F.3d at 153, and *Medina*, 505 U.S. at 445-446), does not obviously transfer to municipal

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[10] Ultimately, the process that is due is a federal constitutional question. See, *e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 539-50 (1985). But Petitioner is mistaken even as to state law. If, as the New York Court of Appeals has held, a "mere assertion that the evidence no longer exists based on a phone call to a police Property Clerk's office is insufficient as a matter of law," *People* v. *Pitts*, 828 N.E.2d 67, 71 (N.Y. 2005), it presumably is no more "[]sufficient" to provide what Newton got: a letter supplying a detailed, but baseless and erroneous, account of the evidence's fate.

practices that frustrate a policy judgment codified in state legislation. *Id.* 23a.

Indeed, the "custom and policy" that the jury found here is the antithesis of the sort of rational "balancing of interests," Pet. 16, 25, to which a court might defer. The chaotic, self-defeating system the trial record disclosed was arbitrary in the fullest sense. Participants at every level had conflicting understandings of the basic operating principles; tracking documents were "destroyed due to 'lack of space' while retaining the physical evidence"—a practice a*mici* below likened to the "New York Public Library's * * * burn[ing] its card catalogue to make room while keeping all of the books on the shelves," Adams *Amicus* Br. at 17; and a 500-page compendium of procedures was compiled but not furnished to Petitioner's "integrity control" experts. Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434-435 (1982) ("A system or procedure that deprives persons of their claims in a random manner * * * necessarily presents an unjustifiably high risk that meritorious claims will be terminated.").

5. Nor does the Second Circuit's fact-specific decision clash with *Arizona* v. *Youngblood*. In *Youngblood*, this Court confronted essentially the same issue that the New York Legislature addressed under § 440.30(1-a)(b): the criminal justice consequences of the destruction of potentially important evidence. In holding that automatic reversal should be limited to instances in which evidence was destroyed in "bad faith," 488 U.S. at 56-58, the *Youngblood* Court, like the New York Legislature, was attentive to the heavy societal cost of allowing defendants to go free based on the loss of

evidence that could well have *inculpated* them had it been preserved—a concern not raised in this civil suit by an exoneree.[11] Nor does *Youngblood*'s other principal rationale for "requiring * * * bad faith"—keeping "the police's obligation to preserve evidence [within] reasonable bounds," 488 U.S. at 59—apply, because the rape kit here "*had been* preserved." Pet. App. 38a.

6. Petitioner's putative "second" question, relating to the standards governing municipal liability under § 1983, does not warrant review either. As explained above, this question is not actually presented here. The Second Circuit did not approve liability for "negligent actions of line-level municipal employees." Pet. i. It reinstated a verdict that found intent or recklessness, Pet. App. 23a, rendered by a jury instructed that "[m]ere negligent conduct is not sufficient." C.A. App 2672. And the decision expressly stated that "occasional[] * * * lapses" resulting in the loss or destruction of important evidence *could not* give rise to § 1983 liability. Pet. App. 25a. Though the court of appeals properly focused (as did the jury) on deficiencies in the City's *system*, the court's canvas of the record highlighted evidence of culpable behavior and

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[11] As *Youngblood* explained, a broader "prophylactic" due process rule was not "require[d]" in such cases because criminal defendants have "alternative means of demonstrating their innocence" at trial, *id.* at 56, and are protected by the prosecution's proof-beyond-a-reasonable-doubt burden, by their right to seek an adverse inference based on evidence destruction, and by the prosecution's own interest in seeing that important evidence is available for use at trial, *id.* at 59-60 (Stevens, J., concurring in judgment).

indifference by "high-level officials tasked with supervising the NYPD's evidence management system," including "the PCD's commanding officer," *id.* 30a, 32a, not just "line level employee[s]."[12]

What the Petition describes as a "distortion" of *Monell* was in fact a straightforward application of settled standards. The jury reached its verdict after being instructed that § 1983 liability could be imposed "only when the municipality itself directly causes the constitutional violation by a policy, custom, or practice," C.A. App. 2672, a term further defined as a "persistent, widespread course of

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[12] The Petition's repeated claims of "retroactive" liability imposed for mere "filing errors" that occurred in 1988 or 1989, Pet. 14, reflect the theory of the case that Petitioner advanced at trial but which the jury *rejected*. Although the systemic deficiencies "*dat[e] to* a time * * * before [enactment of] New York's statute," *id.*, Newton did not seek (and the jury did not award) damages for years prior to 1994. Moreover, the record contains copious evidence regarding systemic practices between 1994 and 2006 that amply support the jury's conclusion that a minimally adequate system would have enabled PCD to find even misfiled materials and would not have caused Petitioner to make misleading statements to courts about what had or "must have" happened to evidence in its possession. See, *e.g.*, C.A. App. 1166 (lack of inspections); *id.* 2490, 2492 (unfamiliarity with "out to court" invoice folders). Notably, the trial court's jury instructions made clear that the jury was to evaluate the adequacy of Petitioner's overall system during the relevant time, not the isolated conduct of individuals during the 1980s, and the jury expressly found both proximate causation and that a high-ranking PCD official responsible for Petitioner's system (who had nothing to do with any "misstep" in the 1980s) acted culpably. *Id.* 2673, 3502-03. In any event, Petitioner did not argue before the Second Circuit that the supposed "retroactivity" of its liability was a basis for setting aside the jury verdict.

conduct * * * that has become the usual and accepted way of carrying out policy, and has acquired the force of law." *Id.*

Petitioner conceded below that these jury instructions were correct, Pet. App. 26a, and the court of appeals sustained the verdict—including its predicate findings of "custom or policy" and "intent or indifference"—based on the court's own close review of the trial record.

Petitioner's "*Monell*" arguments rely on a confused mingling of the elements for establishing a substantive constitutional violation and the requirements for municipal liability under § 1983. Procedural due process suits, unlike ones arising from unreasonable use of force, see Pet. 26 (citing *Board of County Commissioners* v. *Brown*, 520 U.S. 397 (1997)), seldom seek to hold local governments accountable for discrete unconstitutional actions by their employees. Rather, such suits almost invariably challenge, as Newton's did, municipalities' *systems*, with constitutional determinations hinging on whether those are, in some objective sense, "inadequate," *Osborne*, 557 U.S. at 69—without regard to the "state of mind" of individual officials who implement them. Thus, in evaluating the adequacy of Alaska's scheme, *Osborne* did not look for culpable individual actors; and decisions such as *Little* v. *Streater*, 452 U.S. 1 (1981), and *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), invalidating, on due process grounds, systems for paternity testing and for revoking prisoners' "good time" credits, did not advert to any particular government actor's *mens rea*. Cf. *Owen* v. *City of Independence*, 445 U.S. 622, 652 (1980) (recognizing

that "systemic" injuries can "result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith").[13]

7. With no credible claim of error (or conflict), Petitioner is left to argue against the Second Circuit's decision on policy grounds, contending that upholding the jury's due process verdict here might have the "perverse" effect of inducing police departments to destroy evidence they otherwise would have stored. Pet. 24. Similar arguments are possible in almost *any* procedural due process case. Recognizing a constitutional obligation to provide effective assistance of appellate counsel supplies an "incentive" to abolish appeals of right, see *Evitts*, 469 U.S. at 401, just as a decision holding that benefit termination hearings are constitutionally required could lead the government to revisit its discretionary decision to extend welfare benefits. See *Goldberg* v. *Kelley*, 397 U.S. 254 (1970).

But such assertions are unusually implausible here. Given the widespread public concern about wrongful convictions and the obviously crucial role DNA evidence plays in rooting out injustice, a police

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[13] Because "the trial evidence support[ed] the jury's finding of reckless disregard," Pet. App. 34a n.18, the court of appeals ultimately saw no need to pursue whether any *mens rea* needs to be established when, as here, a municipality's system is proven to be fundamentally inadequate. But that is yet further reason why this case, in which the jury expressly found the City "directly liable" for violating Newton's constitutional rights, *id.*, would be an unsuitable vehicle for settling questions relating to the scope of *derivative* municipal liability under *Monell*.

department's adoption of a policy of deliberately destroying rape kits (while preserving millions of other items of evidence) in order to avoid potential liability would provoke certain and immediate condemnation. (Unsurprisingly, the Property Clerk Division's testimony to the New York Legislature before contrary evidence emerged in this litigation emphatically *denied* that it destroyed rape kits. See n.3, *supra*.).

Of course, the "perverse" consequences Petitioner forecasts are not what has happened in the one jurisdiction in which *Newton* directly applies. Petitioner does not seriously suggest that New York City will alter course and destroy rape kits when judgment in this case becomes final. On the contrary, the Petition (Pet. 23) vaunts recent efforts, including ones undertaken with the Innocence Project, to address the deficiencies that the trial record laid bare.

This concrete reality counts for much more than Petitioner's unsupported speculation about "perverse" consequences. But Petitioner's effort to hold its recent measures out as proof that "reform [would have been] * * * accomplished" *without* limited federal court intervention, Pet. 23, invites strong skepticism. As the trial record makes clear, sixteen years elapsed between New York City's first DNA exoneration and Petitioner's adoption (after Newton's release) of a written policy against destroying rape kits in its possession; and the failures of candor that characterized PCD's dealings with Newton and the Innocence Project into the mid-2000s persisted post-exoneration. Indeed, prior decisions involving PCD show a unit of government

slow to correct serious deficiencies, even under watchful judicial supervision. See *Alexandre*, 140 F.3d at 409 (describing, in 1998, Petitioner's ongoing failure to comply with a 1972 due process ruling, notwithstanding a detailed [1974] order on remand and a 1990 Second Circuit decision condemning continuing noncompliance and "reprinting [the] order").

This history gives strong reason for concluding that this litigation (and the narrow decision upholding liability under these unusual, extreme facts) *has* played some role in spurring Petitioner's belated reforms and greater forthrightness in this area. See *Owen,* 445 U.S. at 652 ("The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials * * * to err on the side of protecting citizens' constitutional rights.") (citations omitted).

B. The Second Circuit Decided No Broadly Significant Issue

Petitioner's claims that this Court's immediate intervention is "vital[ly] importan[t]" (Pet. 13) are likewise illogical and untethered from real-world experience.

1. Notably, the Petition identifies not a single "state [or] local government[] nationwide," *id.*, that has been held liable for evidence management failures in the five years since the jury rendered its verdict here. And if the Second Circuit's decision were, as the Petition insists, "plain[ly]" and "seriously mistaken," Pet. 2, municipalities and police departments outside Vermont, Connecticut,

and New York could proceed without any concern about Second Circuit law, and would of course be *obliged* to follow this Court's precedent, not the Second Circuit's, in the event of "conflict."

The dearth of decisions rejecting *"Newton"* claims on that basis—and of any litigation "nationwide"—confirms that the Second Circuit accurately characterized its decision as "narrow." And it is consistent with trial evidence establishing that the deficiencies in Petitioner's practices were atypically serious and pervasive.

2. Petitioner's plea for certiorari "even if [the Second Circuit decision is] correct," Pet. 15—in order to provide local governments guidance more specific than a directive to maintain a minimally "adequate" system—makes no sense. *Osborne* itself held, without further elaboration, that Due Process requires procedures that "are fundamentally [ ]*adequate* to vindicate the substantive rights provided." 557 U.S. at 69 (emphasis added). That approach is hardly idiosyncratic. The Court has similarly held that the Fourteenth Amendment guarantees "*adequate* appellate review of criminal convictions," *Griffin v. Illinois,* 351 U.S. 12, 19 (1956) (emphasis added), and that the Constitution "requires prison authorities * * * [to] provid[e] prisoners with *adequate* law libraries," *Lewis* v. *Casey*, 518 U.S. 343, 346 (1996) (quoting *Bounds*, 430 U.S. at 828) (emphasis added), and imposes a "duty to provide *adequate* medical treatment to those in [government] custody," *West* v. *Atkins*, 487 U.S. 42, 56 (U.S. 1988) (emphasis added).

It is exceedingly unlikely that a decision by this Court upholding the Second Circuit would

promulgate a more detailed legal rule. Rather, any such opinion would surely follow the decision below in sustaining the reasonableness of the jury's findings under Rule 50(b), perhaps citing, as did the decision below, examples from the trial record of failures that a government actor conscientiously trying to comply with the law would know to avoid. Indeed, this Court's due process precedents show a general reluctance to be prescriptive, one rooted in the very federalism principles to which Petitioner appeals (and in the Constitution's prohibition on advisory opinions). See, *e.g.*, *Bell* v. *Burson*, 402 U.S. 535, 543 (1971) ("Georgia may * * * devise an entirely new regulatory scheme * * *. [W]e hold only that the failure of the present Georgia scheme * * * denied [petitioner] procedural due process").

The Second Circuit decision in fact provides concerned jurisdictions with significant guidance regarding what not to do in discharging evidence management responsibilities. And a jurisdiction looking for more detailed guidance could, as the Second Circuit observed, acquaint itself with the professional standards established by nationally-recognized accreditation agencies in the field of police property management. Pet. App. 31a n.14.

3. Petitioner's more diffuse claims about the increasing importance of DNA generally, Pet. 14—and about policy questions relating to the preservation of evidence—do not support review either. The Second Circuit made exceptionally clear that it was *not* holding that the Constitution requires preservation of any evidence, Pet. App. 37a, and Petitioner's assertions of "emerging importance," Pet. 14, are themselves somewhat "anachronis[tic]."

Id. 28. It has been a quarter century since the first DNA exoneration in New York, and DNA testing increasingly occurs, as a matter of standard practice, at early stages of sexual assault cases; the many arbitrary practices established at trial would now raise red flags in jurisdictions nationwide. As the Petition itself notes (Pet. 22-23), jurisdictions whose systems shared some of the deficiencies found in this case are working to address those problems (not, as Petitioner elsewhere predicts, destroying potentially exculpatory rape kits, in order to avoid infinitesimal litigation risks).

C. This Case Is Not an Appropriate "Vehicle"

As has been explained, this case is not a plausible "vehicle," let alone an "ideal" one (Pet. 15), for resolving either of the questions the Petition identifies as presented.

Those questions could be reached only if the Court were to address (and resolve in Petitioner's favor) a question that is conspicuously absent from the Petition: whether the Second Circuit's application of Rule 50(b) to the due process verdict in Newton's favor, based on its rigorous, de novo review of the jury's express findings and the 2,500-page trial record, was erroneous. The Petition does not merely omit that question (and omit record citations necessary to consider it); it affirmatively disclaims it, urging that the case be decided on its "undisputed facts," Pet. 15—which, in this procedural posture, means all the evidence in the record (and reasonable inferences therefrom) that support the verdict. See *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). That sort of intensive, case-specific record review is precisely what this Court seldom

does. See S. Ct. R. 10; *Graver Tank & Mfg. Co.* v. *Linde Air Prods., Inc.*, 336 U.S. 271, 275 (1949).

There are still further reasons why this case is an unusually inappropriate vehicle. Although the Second Circuit decision was "post-trial," Pet. 15, the Petition seeks review only of one of the two constitutional violations that the jury found. In addition to the due process verdict the Petition discusses, the jury also found the City liable for depriving Newton of his First Amendment right to court access and that he was entitled to the same damages on that basis. The district court set aside that second verdict literally without explanation, and the Second Circuit—in a ruling that the Petition does not ask the Court to review—rejected the City's perfunctory defense of that disposition. Thus, even a resolution in Petitioner's favor on the due process question (and on the unmentioned evidentiary sufficiency questions) would be of no moment because, as the Second Circuit explained (Pet. App. 39a), the First Amendment verdict itself suffices to support the jury's damage award. Were there any merit to Petitioner's claims of far-reaching significance, such questions would be more appropriately considered in a case in which each of the bases for imposing liability was actually before the Court.[14]

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[14] Given the Petition's omission of any discussion of the First Amendment issue and the cursory treatment it received in the district court, Petitioner's appellate brief, and the Second Circuit decision, it would not properly be before the Court even if it had been raised in the Petition.

There is no sign of even a trickle of similar litigation, but in the unlikely event that the Second Circuit's narrow and fact-bound decision eventually spawns future litigation, the "purely legal" questions Petitioner urges the Court to address would be better considered in a case in which all the relevant issues were before the Court and in which the challenge of sifting through a massive trial record is not presented or the relevant facts truly are "undisputed," rather than (as here) merely wished away.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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