No. 21-____

In the Supreme Court of the United States

RODNEY REED, PETITIONER

v.

BRYAN GOERTZ, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In *Skinner v. Switzer*, 562 U.S. 521, 524-25 (2011), this Court held that state prisoners may pursue post-conviction claims for DNA testing of crime-scene evidence in a civil rights action under 42 U.S.C. § 1983. The Court made clear that a prisoner bringing such a § 1983 claim may seek "to show that the governing state law denies him procedural due process" after he has unsuccessfully sought DNA testing under available state procedures. *Id.* at 525, 530.

The question presented is whether the statute of limitations for a § 1983 claim seeking DNA testing of crime-scene evidence begins to run at the end of state-court litigation denying DNA testing, including any appeals (as the Eleventh Circuit has held), or whether it begins to run at the moment the state trial court denies DNA testing, despite any subsequent appeal (as the Fifth Circuit, joining the Seventh Circuit, held below).

PARTIES TO THE PROCEEDING

Petitioner Rodney Reed was the plaintiff in the district court and the appellant in the court of appeals. Respondents Bryan Goertz, in his official capacity as the District Attorney of Bastrop County, Texas; Steve McCraw, in his official capacity as Director and Colonel of the Texas Department of Public Safety; Sara Loucks, in her official capacity as the District Clerk, Bastrop County, Texas; and Maurice Cook, in his official capacity as Bastrop County Sheriff, were defendants in the district court and appellees in the court of appeals.

RELATED PROCEEDINGS

This case arises from the following proceedings:

21st Judicial District Court of Texas:

- *State v. Reed*, No. 8701 (Nov. 25, 2014) (oral ruling on motion for DNA testing)
- *State v. Reed*, No. 8701 (Dec. 12, 2014) (written findings of fact and conclusions of law)
- *State v. Reed*, No. 8701 (Sept. 9, 2016) (additional findings of fact and conclusions of law following June 29, 2016, remand from Court of Criminal Appeals of Texas)

Court of Criminal Appeals of Texas:

- *Reed v. State*, No. AP-77,054 (June 29, 2016) (order remanding for additional findings of fact and conclusions of law)
- *Reed v. State*, No. AP-77,054 (Apr. 12, 2017) (opinion affirming Texas trial court's denial of motion for DNA testing), *rehearing denied* (Oct. 4, 2017)

Supreme Court of the United States:

Reed v. Texas, No. 17-1093 (June 25, 2018) (denying petition for a writ of certiorari)

United States District Court (W.D. Tex.):

Reed v. Goertz, No. 1:19-cv-0794-LY (Nov. 15, 2019) (order dismissing complaint)

United States Court of Appeals (5th Cir.):

Reed v. Goertz, No. 19-70022 (Apr. 22, 2021) (opinion affirming; decision below here)

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INTRODUCTION

This case presents an exceptionally important issue that has divided the courts of appeals: when the statute of limitations begins to run for an action under 42 U.S.C. § 1983 seeking DNA testing of crime-scene evidence on the ground that available state procedures are constitutionally inadequate. The Eleventh Circuit holds that the period begins to run from the end of state-court litigation denying DNA testing, including any appeals. In contrast, the Fifth Circuit here, joining the Seventh Circuit, runs the statute of limitations from the moment the state trial court denies DNA testing, despite any appeal.

The stakes could not be higher: Petitioner Rodney Reed faces a sentence of death for a murder he has steadfastly denied committing. But the Fifth Circuit dismissed his DNA testing claims as untimely. Had Mr. Reed brought his claims in the Eleventh Circuit, the court would have proceeded to the weighty question whether the Constitution entitles him to testing that could prove his innocence.

1. Mr. Reed was convicted in 1998 of the murder of Stacey Stites. At the time of her murder, Stites was engaged to Jimmy Fennell, a local police officer. Fennell was the last person who said he saw Stites alive. He proved deceptive on polygraph tests and at first invoked the Fifth Amendment. Even so, investigators did not search the apartment he shared with Stites. Instead, the prosecution charged Reed with the crime.

The state rested its case against Reed on a single piece of physical evidence: Reed's DNA matched sperm found in Stites' vaginal tract. Mr. Reed, who is black, protested his innocence, admitting that he was having a clandestine sexual relationship with Stites,

who was white, as is Fennell. The state pressed forward anyway. Relying on Fennell's timeline—that he spent the night with Stites before she was found dead the next morning—plus expert statements about the longevity of sperm, the prosecution argued that Reed kidnaped and raped Stites in the early-morning hours before her death. An all-white jury agreed, convicting Mr. Reed and sentencing him to death.

In 2019, more than two decades and many post-conviction proceedings later, the Texas Court of Criminal Appeals stayed Mr. Reed's execution. He had been scheduled to die in five days. By that time, Mr. Reed had assembled considerable evidence that (a) he and Stites were engaged in a consensual sexual relationship, (b) Fennell was lying, and (c) the scientific literature establishes that sperm can remain intact for days. Among other things, officers who worked with Fennell reported that he gave them a conflicting account of the night before the crime and that he said a month before the murder that Stites was "f***king a n***er." *Reed v. Texas*, 140 S. Ct. 686, 688 (2020) (statement of Sotomayor, J., respecting the denial of certiorari). Individuals unrelated to Reed said that Stites and Fennell had a tumultuous and violent relationship. And in 2008, while Fennell was in prison for kidnaping and sexually assaulting a woman while on police duty, he told a fellow inmate that he "had to kill [his] n***r-loving fiancé[e]." *Id.*

2. Despite all this, Mr. Reed remains sentenced to death, and key crime-scene evidence has never been DNA-tested. In 2014, Reed moved in state court for DNA testing under Texas' Article 64. In November 2014, the trial court denied testing in a one-sentence order. In June 2016, the Texas Court of Criminal Appeals (the state's court of last resort for criminal

matters) remanded for additional findings. Only in April 2017 did the Court of Criminal Appeals affirm after authoritatively construing and applying Article 64. The court denied rehearing in October 2017.

Mr. Reed diligently proceeded to federal court in August 2019, bringing a § 1983 action claiming that Article 64, as construed and applied by the Texas courts, violated his constitutional rights. He pointed to *Skinner v. Switzer*, 562 U.S. 521, 524-25 (2011), where this Court held that a convicted state prisoner may pursue a procedural due process claim seeking DNA testing under § 1983. Such a claim, this Court explained, challenges the constitutionality of the state law as construed by the state courts. *Id.* at 532. But the district court dismissed Mr. Reed's claims, and the Fifth Circuit affirmed, finding them untimely.

In the Fifth Circuit's view, the two-year statute of limitations for Mr. Reed's § 1983 claims began to run in November 2014, the moment the state trial court denied Mr. Reed's request for DNA testing. It didn't matter that the Texas Court of Criminal Appeals remanded for additional findings and only finished its own review of the case nearly three years later, in October 2017. As the Fifth Circuit saw it, Mr. Reed's § 1983 claims—which turn on the Court of Criminal Appeals' construction and application of Article 64—expired *before* that court issued its opinion.

3. The Fifth Circuit's decision cements a circuit conflict over when the statute of limitations begins to run for a § 1983 claim seeking DNA testing. The Fifth Circuit here followed the Seventh Circuit. In the Eleventh Circuit, however, the limitations period begins to run only at the end of the state-court litigation denying DNA testing, including any appeals. That makes

sense: A § 1983 action challenging state-law procedures as inadequate depends on the state courts' construction of those laws in the first place. And state appellate courts, not trial courts, are the final arbiters of state law.

The Fifth and Seventh Circuits' rule, in contrast, is illogical. A § 1983 action claiming that available state-law processes for DNA testing are constitutionally inadequate cannot accrue before the state courts have construed the state law that the prisoner wishes to challenge under § 1983. The prisoner doesn't even know whether he is injured (because the state court might well grant DNA testing), or if so, how (because he doesn't know in advance why the state court will deny testing). So he doesn't have a complete cause of action under ordinary accrual rules. Unsurprisingly, as this Court explained in *Skinner*, a prisoner "is better positioned" to make his constitutional claims if he has "first resorted to state court." 562 U.S. at 531 n.8. And that's not all. The Fifth Circuit's rule also undermines comity, federalism, and judicial economy by inviting (if not requiring) prisoners to rush to federal court while state-court litigation is pending.

4. The question presented is critically important, and this case is an excellent vehicle to resolve the circuit split. "Modern DNA testing can provide powerful new evidence unlike anything known before," and "DNA testing has exonerated wrongly convicted people," *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 62 (2009)—hundreds in the last three decades. Mr. Reed deserves an opportunity to seek DNA testing. A "pall of uncertainty" hangs over his conviction, and the "consequence of setting that uncertainty aside" is "irreversible." *Reed*, 140 S. Ct. at 690 (statement of Sotomayor, J., respecting the denial of

certiorari). The Fifth Circuit's wrongheaded accrual rule should not bar Mr. Reed's access to the halls of justice. This Court should grant review.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-10a) is reported at 995 F.3d 425. The district court's order (App. 11a-35a) is unpublished but available at 2019 WL 12073901. The underlying opinion of the Texas Court of Criminal Appeals (App. 36a-75a) is reported at 541 S.W.3d 759, and that court's earlier remand order (App. 104a-18a) is unpublished but available at 2016 WL 3626329. The relevant orders of the Texas trial court are reproduced in the appendix.

JURISDICTION

The court of appeals entered its judgment on April 22, 2021. This Court's orders of March 19, 2020, and July 19, 2021, extended the time to file a petition for a writ of certiorari to September 20, 2021, 150 days from the court of appeals' judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

> speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Eighth Amendment to the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1983 of Title 42, U.S. Code, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable … .

STATEMENT

A. Legal background

This Court's decisions establish two basic principles essential to this case. First, a convicted state prisoner may seek DNA testing in a § 1983 action in federal court. Second, when a § 1983 claim accrues is a matter of federal law: The earliest a statute of limitations can begin to run is when the plaintiff has a

complete cause of action, and other considerations—practical concerns, federalism, comity, and judicial economy—may support a still-later date.

1. In *Skinner v. Switzer*, 562 U.S. 521, 524-25 (2011), this Court held that a convicted state prisoner may pursue a procedural due process claim seeking DNA testing under 42 U.S.C. § 1983. The petitioner, Henry Skinner, had been sentenced to death for murdering his girlfriend and her sons. *Skinner*, 562 U.S. at 525. But Skinner claimed that another man was responsible for the crime and sought testing of crime-scene evidence to prove it. *Id.* at 525-27. After Texas enacted Article 64, a statute permitting prisoners to access DNA testing in limited circumstances, Skinner invoked the new law's procedures. *Id.* at 527-28. But the state courts rebuffed him for failing to show a reasonable probability that he would not have been convicted if the DNA test results were exculpatory. *Id.* at 528.

Skinner proceeded to federal court, seeking injunctive relief under § 1983. *Id.* at 529. He claimed that Texas' refusal to release the evidence for DNA testing deprived him of his liberty interests in using state procedures to obtain reversal of his conviction, a reduction of his sentence, or a pardon. *Id.* at 530. Disagreeing with the Fifth Circuit, *id.* at 529, this Court found Skinner's claim cognizable under § 1983.

To reach that result, the Court rejected Texas' objections both to federal jurisdiction under *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), and to cognizability under *Heck v. Humphrey*, 512 U.S. 477 (1994). The Court first explained that *Rooker-Feldman* was no bar because Skinner did not

seek review of the Texas courts' decisions. *Skinner*, 562 U.S. at 532. Instead, he sought to challenge the constitutionality of Texas' Article 64 as construed and applied by Texas' courts. *Id.* And the *Heck* bar didn't apply either, the Court continued, because "[s]uccess in his suit for DNA testing would not 'necessarily imply' the invalidity of his conviction." *Id.* at 534. Rather than proving exculpatory, the requested DNA testing might prove inconclusive or even inculpatory. *Id.*

Finding that "a postconviction claim for DNA testing is properly pursued in a § 1983 action," *id.* at 525, the Court remanded for the lower courts to consider the merits of Skinner's claim, *id.* at 537. The Court noted that it had left "room" in *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 71 (2009), "for the prisoner to show that the governing state law denies him procedural due process," *Skinner*, 562 U.S. at 525.

2. The issue here is when the statute of limitations for such a § 1983 claim begins to run. "Although courts look to state law for the length of the limitations period, the time at which a § 1983 claim accrues 'is a question of federal law,' 'conforming in general to common-law tort principles.'" *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019) (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). The ordinary rule is that accrual occurs "when the plaintiff has 'a complete and present cause of action'"—"that is, when 'the plaintiff can file suit and obtain relief.'" *Wallace*, 549 U.S. at 388 (citations omitted). But sometimes the inquiry is not "so simple." *McDonough*, 139 S. Ct. at 2155. A "claim may accrue at a later date" if, for example, it "may not realistically be brought while a violation is ongoing." *Id.*

B. Factual and procedural background

Mr. Reed has been fighting for more than twenty years to prove his innocence of Stacey Stites' murder. During that time, a "considerable body of evidence" has materialized calling Mr. Reed's conviction into question. *Reed v. Texas*, 140 S. Ct. 686, 687 (2020) (statement of Sotomayor, J., respecting the denial of certiorari). This case centers on Mr. Reed's request to perform DNA testing on several pieces of evidence that have not previously been tested.

1. In 1998, a Texas jury convicted Reed of murdering Stacey Lee Stites and sentenced him to death.

In 1996, Stites, a 19-year-old white woman, was found dead on the side of a country road in Bastrop County, Texas. *Ex parte Reed*, 271 S.W.3d 698, 702 (Tex. Crim. App. 2008). Her fiancé, a white man and local police officer named Jimmy Fennell, was the last person known to have seen her alive. *Reed*, 140 S. Ct. at 686 (statement of Sotomayor, J., respecting the denial of certiorari). After Stites disappeared, Fennell's pickup truck was discovered in the Bastrop High School parking lot. App. 37a. It contained a single tennis shoe matching the other single tennis shoe found on Stites' body. *Id.*

Police concluded that Reed, a black man, was responsible for Stites' murder. Vaginal swabs recovered intact sperm matching Reed's DNA. *Reed*, 271 S.W.3d at 705, 710. But Reed admitted that he and Stites were having an affair. *Reed*, 140 S. Ct. at 686 (statement of Sotomayor, J., respecting the denial of certiorari). And no other physical evidence, DNA or otherwise, implicated Reed. *Id.* at 686-87. As for his part, Fennell, who was supposed to drive Stites to work the day she went missing, proved to be deceptive

on polygraph tests and at first invoked his Fifth Amendment privilege. Pet. App. 87a, 166a, 176a, 263a, *Reed v. Texas*, No. 19-411, 140 S. Ct. 686 (2019 Pet. App.). Police never searched the apartment he shared with Stites. *Id.* at 98a.

Given when Fennell said he last saw Stites, the timeline was a key issue at trial. Waiving his prior invocation of the Fifth Amendment, Fennell testified that he had been with Stites the night before she was found dead, and that the two had watched television and showered together before going to sleep. *Id.* at 293a. The prosecution used that testimony to establish that Stites was abducted and killed while driving to work at around 3:00 a.m. the next morning. *Id.* at 312a, 316a. And based on expert testimony that sperm remains intact inside a vaginal tract for no longer than 26 hours, the state posited that the sperm recovered from Stites' body must have been deposited the night before at the earliest. "This evidence thus tended to inculpate Reed (by suggesting that he must have had sex with Stites very soon before her death) and exculpate Fennell (by indicating that Stites died after Fennell claimed to have seen her last)." *Reed*, 140 S. Ct. at 687 (statement of Sotomayor, J., respecting the denial of certiorari).

On direct appeal, the Court of Criminal Appeals affirmed Reed's conviction and death sentence. 2019 Pet. App. 56a-57a. The court relied on Fennell's timeline and the "strength" of the prosecution's expert witnesses and their view of the DNA evidence. *Id.* at 57a, 66a. This Court denied review. *Reed v. Texas*, No. 01-5170, 534 U.S. 955 (2001).

2. For the more than two decades since he was convicted and sentenced to death, Mr. Reed has

maintained his innocence and sought relief from state and federal court. Those efforts, both before and during the litigation here over DNA testing, have produced a "considerable body of evidence" that Mr. Reed is innocent, including "a substantial body of evidence that, if true, casts doubt on the veracity and scientific validity of the evidence on which Reed's conviction rests." *Reed*, 140 S. Ct. at 687, 689 (statement of Sotomayor, J., respecting the denial of certiorari). For example:

- Witnesses not connected to Reed but known to Stites came forward to confirm that the two had a relationship. 2019 Pet. App. 422a-34a.
- Three of the nation's most experienced and respected pathologists each determined that the prosecution's theory of Reed's guilt was impossible because the forensic evidence showed that (a) Stites was murdered before midnight (when Fennell said they were together); (b) Stites was not sexually assaulted; and (c) Reed's DNA was deposited at least a day before her murder. *Id.* at 202a-07a.
- One of the state's key experts retracted his trial testimony, declaring that it "should not have been used at trial as an accurate statement of when Ms. Stites died." *Id.* at 198a.
- A fellow police officer testified that after Stites was reported missing, but before her body was found, Fennell gave an account of his whereabouts that differed substantially from his trial testimony. *Id.* at 328a-31a, 344a-47a. For example, Fennell testified at trial that he went home after baseball practice and spent the evening with Stites, and that they showered

together before she went to sleep. *Id.* at 293a. But Fennell told the officer he went out drinking with other officers that night and stayed out late. *Id.* at 347a-86a. When called as a witness at the same postconviction hearing, Fennell invoked the Fifth Amendment. *Id.* at 325a-26a.

- In 2008, Fennell was sentenced to 10 years in prison for kidnaping and sexually assaulting a woman while on police duty. *Reed*, 140 S. Ct. at 688 (statement of Sotomayor, J., respecting the denial of certiorari). According to a fellow inmate, then a member of the Aryan Brotherhood, Fennell said that Stites "had been sleeping around with a black man behind his back" and "said confidently, 'I had to kill my n***r-loving fiancé[e].'" *Id.* The inmate thought Fennell felt comfortable sharing that information given the inmate's membership in the Aryan Brotherhood. *Id.*
- Another individual who was a police officer at the time of Stites' murder swore that Fennell told him a month before the murder that Stites was "f***king a n***r." *Id.* And yet another officer swore that at Stites' funeral Fennell said to Stites' body, "You got what you deserved." *Id.*
- Finally, other individuals unrelated to Reed explained that "Stites and Fennell had a tumultuous, and seemingly violent, relationship just before Stites' death." *Id.*

On November 15, 2019, while Mr. Reed had a cert petition pending before this Court, the Texas Court of Criminal Appeals stayed Reed's execution. *Id.* The Texas court held that Reed's claims, including a claim for actual innocence, were not procedurally barred,

and remanded to the trial court for further proceedings. *Id.* This Court denied Mr. Reed's cert petition. *Reed v. Texas*, No. 19-411, 140 S. Ct. 686.

Justice Sotomayor wrote separately to emphasize that "Reed has presented a substantial body of evidence that, if true, casts doubt on the veracity and scientific validity of the evidence on which Reed's conviction rests." *Id.* at 689 (statement of Sotomayor, J., respecting the denial of certiorari). She found that "there is no escaping the pall of uncertainty over Reed's conviction" and stated that she expected "that available state processes will take care to ensure full and fair consideration of Reed's innocence." *Id.* at 690.

3. This petition arises from Mr. Reed's long effort to secure DNA testing of evidence of Stites' murder. Reed first sought DNA testing in 1999, before Article 64 was enacted. Pet. App. 98a, *Reed v. Texas*, No. 17-1093 (U.S.). Then, in 2014, Reed's counsel asked the Bastrop County District Attorney to consent to DNA testing and offered to pay for it. *Id.* at 326a. The state refused testing on most of the requested items and moved to set an execution date. *Id.* at 326a-28a.

On July 14, 2014, Reed filed an Article 64 motion in Texas trial court seeking to test items recovered from Stites' body and clothing, items recovered near her body, and items found in or near Fennell's truck. App. 3a. On November 25, 2014, after a one-day hearing, the court denied the motion as untimely and failing to show a reasonable probability that Reed would not have been convicted had the evidence been available at trial. App. 4a, 133a.

On February 15, 2015, Reed appealed to the Court of Criminal Appeals. On June 29, 2016, the court remanded to the trial court for additional factfinding

since the trial court had failed to address all the elements of Article 64. App. 104a-06a. In September 2016, the trial court then signed and docketed with the Court of Criminal Appeals the contradictory proposed findings of fact and conclusions of law submitted by Reed and the state, later clarifying in an email that it meant to adopt the state's proposed findings of fact and conclusions of law. App. 76a-103a.

On April 12, 2017, the Court of Criminal Appeals affirmed. App. 36a-75a. The appellate court agreed that Reed had failed to "establish that exculpatory DNA results would have resulted in his acquittal," App. 37a, in large part because, in its view, the evidence's handling by lawyers and possibly jurors raised chain-of-custody concerns and "undermine[d] its exculpatory value," App. 61a. On October 4, 2017, the court denied rehearing. App. 135a.

On June 25, 2018, this Court denied review. *Reed v. Texas*, No. 17-1093, 138 S. Ct. 2675 (2018).

4. Just a little over a year later, on August 8, 2019, Reed sued under 42 U.S.C. § 1983 in federal district court. App. 11a-35a. He challenged Article 64 both facially and as interpreted and applied by the Court of Criminal Appeals, bringing a due process claim, as in *Skinner*, as well as several other constitutional claims. App. 4a, 20a, 25a-32a. He contended that the Court of Criminal Appeals misinterpreted Article 64's requirements (particularly its chain-of-custody requirement) so as to preclude him from testing key trial evidence to prove his innocence. App. 25a n.6. So construed, Article 64 violates fundamental notions of fairness and denies him due process of law and access to the courts, in violation of the First, Eighth, and Fourteenth Amendments. App. 20a, 25a-32a.

Applying this Court's decision in *Skinner*, the district court first held that it had jurisdiction over Reed's claims and that his claims were cognizable under § 1983. App. 21a-24a. The court held that *Rooker-Feldman* did not bar the suit "[b]ecause Reed is not challenging the adverse state-court decisions themselves but rather the validity of the Texas DNA statute they authoritatively construe." App. 22a. On the merits, however, the district court held that Reed failed to state a constitutional claim and dismissed his complaint. App. 25a-32a.

5. The Fifth Circuit affirmed on the alternative ground that Reed's § 1983 action was untimely. App. 8a-10a. The court first agreed with the district court's jurisdictional analysis, finding Reed's case "no different than *Skinner*." App. 7a. The court held that *Rooker-Feldman* does not apply "because Reed challenged the constitutionality of Texas' post-conviction DNA statute," not "the Court of Criminal Appeals' decision itself." App. 6a.

The Fifth Circuit nonetheless affirmed without reaching the merits. Although the district court had not ruled on the issue, the Fifth Circuit found Reed's action untimely. App. 8a-10a. The court of appeals held that the statute of limitations—two years, borrowed from Texas' limitations period for personal-injury claims—began to run "when the [Texas] trial court denied his Chapter 64 motion in November 2014." App. 9a. In the court's view, the statute of limitations had to run from "the moment" "Reed first became aware that his right to access that evidence was allegedly being violated." App. 9a-10a. It made no difference that Reed could appeal, the court concluded, because he had a "complete and present cause of action" when the trial court denied relief. App. 10a

(citations omitted). The Fifth Circuit also reasoned that "§ 1983 contains no judicially imposed exhaustion requirement." App. 9a-10a (quoting *Edwards v. Balisok*, 520 U.S. 641, 649 (1997)).

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision deepens a square circuit conflict about when the statute of limitations begins to run for a § 1983 claim seeking DNA testing on the ground that available state-law procedures are constitutionally inadequate. The Eleventh Circuit holds that the limitations period begins to run at the end of state-court litigation denying DNA testing. The Fifth and Seventh Circuits, in contrast, run the limitations period from the moment the state trial court denies DNA testing, despite any state-court appeal that might further construe the state-law procedures at issue.

The Fifth and Seventh Circuits' rule makes no sense. A § 1983 action claiming that state-law processes for DNA testing are constitutionally inadequate cannot accrue before the state courts authoritatively construe and apply state law. After all, state trial courts are not the ultimate arbiters of state law. In Texas, that role in criminal cases belongs to the Court of Criminal Appeals. Yet on the Fifth Circuit's view, the statute of limitations for Mr. Reed's § 1983 claim expired almost six months before the Court of Criminal Appeals issued its opinion, and almost a year before the Texas high court denied rehearing. Indeed, to timely bring his § 1983 action challenging Article 64 as construed by the Court of Criminal Appeals, Mr. Reed would have had to sue in federal court nearly six months before the Court of

Criminal Appeals issued the ruling giving rise to his challenge.

The Fifth and Seventh Circuits' view isn't just illogical and in conflict with this Court's precedents. It also undermines comity, federalism, and judicial economy by encouraging (if not requiring) parallel federal court litigation premised on claims that state laws unconstitutionally deny access to DNA testing before the prisoner even knows that the state courts will reach that result. Federal courts do not reach constitutional issues where another ground will do. They shouldn't tell state-court litigants to bring constitutional claims that may prove unnecessary, either.

The question presented is important, and this case is an excellent vehicle for resolving it. All fifty states have postconviction DNA-access statutes, and DNA evidence has exonerated hundreds of individuals over the last thirty years. For much of that time, Mr. Reed too has unwaveringly proclaimed his innocence. He has worked to amass a "considerable body of evidence" that he did not kill Stites. *Reed*, 140 S. Ct. at 687 (statement of Sotomayor, J., respecting the denial of certiorari). After ten state habeas petitions and multiple trips to federal court, nobody can question Mr. Reed's diligence. Yet the Fifth Circuit shut the courthouse doors to his claims that the Constitution requires DNA testing because, in its view, he should have brought his claims in federal court before the state courts had decided whether to permit DNA testing. And it did so despite the familiar principle that courts should avoid resolving constitutional questions when they can rest a decision on another ground.

As one Member of this Court put it when assessing the "substantial body of evidence" casting doubt on

Reed's conviction, "[m]isgivings this ponderous should not be brushed aside even in the least consequential of criminal cases; certainly they deserve sober consideration when a capital conviction and sentence hang in the balance." *Id.* at 689. Mr. Reed's claims deserve review on the merits. The Court should grant review to resolve the circuit split and lift the procedural bar the court of appeals erroneously imposed.

I. The courts of appeals are split over when the statute of limitations begins to run on a § 1983 claim seeking DNA testing.

The courts of appeals are split 1–2 over when the statute of limitations begins to run on a § 1983 claim seeking DNA testing. In the Eleventh Circuit, the statute begins to run from the end of the state-court litigation denying testing—up to, for example, when this Court denies cert. In the Fifth and Seventh Circuits, in contrast, the limitations period runs from the moment the state trial court denies DNA testing, even if the prisoner appeals. As this case shows, those dates can be years apart and determine whether a court ever reaches the merits of the prisoner's claim. And there is no reason to believe that the courts of appeals will resolve this split on their own. Although *Skinner* and *McDonough* support the Eleventh Circuit's rule, the Fifth Circuit joined the Seventh Circuit despite its awareness of those decisions (and despite applying *Skinner* itself to a jurisdictional question).

A. In the Eleventh Circuit, the statute of limitations begins to run at the end of the state-court action denying DNA testing, including any appeals.

The Eleventh Circuit has held that the statute of limitations for a § 1983 action seeking DNA testing

runs from "the end of the state litigation in which [the] Plaintiff unsuccessfully sought access to the evidence." *Van Poyck v. McCollum*, 646 F.3d 865, 867 (11th Cir. 2011) (per curiam). In 2003, William Van Poyck, who had been convicted of murder and sentenced to death more than a decade before, sued in Florida state court seeking access to clothing he and his codefendant wore so that he could perform DNA testing. *Id.* The Florida trial court denied relief, and in 2005, the Florida Supreme Court affirmed. *Id.* In 2008, Van Poyck filed his § 1983 suit.

The Eleventh Circuit rejected the state's argument that Van Poyck's suit was untimely. *Id.* at 867-68. The court explained that Florida's four-year statute of limitations for personal injuries ran from the Florida Supreme Court's 2005 affirmance. *Id.* at 867. Thus, Van Poyck's "federal action was timely." *Id.*

The court has continued to adhere to that rule. *See Pettway v. McCabe*, 510 F. App'x 879, 880 (11th Cir. 2013) (per curiam). *Pettway* left no doubt that "'the end of the state litigation'" means, where appropriate, when "the U.S. Supreme Court denied certiorari." *Id.* (quoting *Van Poyck*, 646 F.3d at 867).

B. In the Fifth and Seventh Circuits, in contrast, the statute of limitations begins to run the moment the state trial court denies DNA testing, despite any appeal.

The Fifth and Seventh Circuits take a different approach. Just a few years before *Van Poyck*, the Seventh Circuit confronted a claim much like Van Poyck's but found it barred by the statute of limitations. *Savory v. Lyons*, 469 F.3d 667, 669 (7th Cir. 2006). In April 2005, Johnnie Lee Savory II brought a § 1983 action alleging that the government's refusal to grant

him access to evidence for DNA testing violated his constitutional rights. *Id.* The Seventh Circuit concluded that the two-year statute of limitations borrowed from Illinois law ran from July 1998, "the date on which the Illinois circuit court denied Savory's request for DNA testing under Illinois law." *Id.* at 672. In the court's view, Savory had sued nearly five years too late. *Id.* at 673.

The Fifth Circuit here followed *Savory*. *See* App. 10a. The court reasoned that a § 1983 claim "accrues when a plaintiff *first* becomes aware, or should have become aware, that his right has been violated." App. 9a. Thus, in the court's view, the statute of limitations for Reed's claim began to run "when the trial court denied his Chapter 64 motion in November 2014." *Id.* That made his appeal time-barred, because he brought it five years later, outside the two-year window borrowed from Texas' statute of limitations for personal-injury claims. *Id.* Reed's appeal made no difference, the court reasoned, because § 1983 does not require exhaustion of state-court remedies. App. 10a (citing *Edwards*, 520 U.S. at 649, and *Savory*, 469 F.3d at 674).

C. The choice of rule is often outcome-determinative.

As Mr. Reed's case shows, deciding when the statute of limitations begins to run often determines whether the case will proceed on the merits. Here, the Fifth Circuit held that the two-year limitations period borrowed from Texas law began to run in November 2014 when the state trial court denied his Article 64 motion for DNA testing. App. 9a-10a. While the statute of limitations was running, the state litigation went up to the Court of Criminal Appeals, which

remanded for further factfinding. App. 104a-06a. The statute of limitations then expired (in November 2016) before the Court of Criminal Appeals reached its final decision (on April 12, 2017), and denied rehearing (on October 4, 2017). App. 36a, 135a.

Reed filed his § 1983 complaint in August 2019, within two years of the Court of Criminal Appeals' denial of rehearing. His complaint thus would have been timely in the Eleventh Circuit under *Van Poyck*. But it was too late for the Fifth Circuit, and would have been too late for the Seventh Circuit as well.

D. The split is entrenched and will persist without this Court's intervention.

Only this Court can resolve the circuit conflict here. As described below, this Court's decisions in *Skinner* and *McDonough* support the Eleventh Circuit's approach, not the rule that the Fifth and Seventh Circuits adopted. *See infra* pp. 21-27. Yet the Fifth Circuit was aware of both decisions and even relied on *Skinner* for its *Rooker-Feldman* analysis. App. 7a-8a; *see* Pet'r CA Br. 43-44 (discussing *McDonough*); Resp't CA Br. 45 n.8 (same). It nonetheless held that the statute of limitations runs the moment the state trial court denies DNA testing. For its part, the Eleventh Circuit, too, relied on *Skinner* to reject the state's *Rooker-Feldman* argument. *Van Poyck*, 646 F.3d at 867 n.5. And *McDonough* would only reinforce its conclusion that the statute of limitations runs from the end of the state-court litigation.

II. The decision below is wrong.

The Fifth Circuit was wrong to conclude that the statute of limitations for a § 1983 claim seeking DNA testing of crime-scene evidence runs from the moment the state trial court denies testing. That conclusion

conflicts with the rule that a statute of limitations should begin to run only when a claim accrues. As *Skinner* makes clear, a claimant like Mr. Reed does not have a ripe claim that a state's statutory process for seeking DNA testing is unconstitutional before the state courts have authoritatively construed the state statute. What's more, the Fifth Circuit's conclusion disregards this Court's recent guidance in *McDonough*. "[F]ederalism, comity, consistency, and judicial economy" all reinforce accrual rules that avoid parallel litigation in state and federal court. *McDonough*, 139 S. Ct. at 2158. And the Fifth Circuit's reasoning that § 1983 contains no exhaustion requirement misunderstands both exhaustion and the nature of this type of § 1983 claim.

1. The Fifth Circuit's determination fails even the first step of the accrual analysis. Courts begin that analysis by asking "when the plaintiff has 'a complete and present cause of action.'" *Id.* at 2155 (quoting *Wallace*, 549 U.S. at 388). According to the Fifth Circuit, that moment occurs when the trial court denies a motion for DNA testing. App. 9a-10a. But that makes little sense given that Mr. Reed's claim—just like Skinner's—challenges "Texas' postconviction DNA statute 'as construed' by the Texas courts." *Skinner*, 562 U.S. at 530. Reed's complaint—just like Skinner's—brings a procedural due process claim based on "the inadequacy of the state-law procedures available to him in state postconviction relief." *Id.* at 531 n.8 (quoting *Osborne*, 557 U.S. at 71). Before the state appellate court interprets the statute, a movant cannot know definitively what the statute means and whether it is adequate to protect his constitutional rights. Put another way, the movant cannot even be

sure that "he has suffered an injury" or what injury he has suffered. App. 9a (citations omitted).

This case illustrates the point. The trial court denied Reed's Article 64 motion on November 25, 2014, in a one-sentence bench ruling. App. 133a. That ruling did not address—among other things—Article 64's chain-of-custody requirement. The Court of Criminal Appeals later remanded the case for additional findings. App. 104a-06a. Only later still, on April 12, 2017, did the Court of Criminal Appeals resolve the case by construing Article 64's chain-of-custody requirement, App. 36a, 52a-55a, 75a, before ultimately denying rehearing on October 4, 2017. App. 135a. Reed could not have challenged Article 64 so construed in his § 1983 petition before the Court of Criminal Appeals' ruling and denial of rehearing.

2. The Fifth Circuit's approach disregards this Court's guidance in other ways too. "[T]he answer is not always so simple" as asking when a plaintiff has been injured or has a complete cause of action. *McDonough*, 139 S. Ct. at 2155. Instead, to avoid beginning a limitations period too early even after the plaintiff may have already "suffered harm," courts must also ask when a claim may "realistically be brought," *id.* at 2155, 2160, and whether the proposed rule "respects the autonomy of state courts" and avoids unnecessary "costs to litigants and federal courts," *id.* at 2159. The Fifth Circuit's rule fails that inquiry too.

In cases like Reed's, the Fifth Circuit's rule would lead to parallel litigation "run[ning] counter to core principles of federalism, comity, consistency, and judicial economy." *Id.* at 2158. As the Court observed in *Osborne*, if a prisoner "simply seeks the DNA through

the State's discovery procedures, he might well get it." 557 U.S. at 71. But more generally speaking, he may be unable to determine whether a state's procedures are adequate without invoking them. *Id.*; *see Skinner*, 530-31 n.8. Just so here. Reed sought review from the Court of Criminal Appeals precisely because he believed that the trial court's ruling on his Article 64 motion *violated* state law. The Court of Criminal Appeals "is Texas' court of last resort in criminal cases." *Moore v. Texas*, 137 S. Ct. 1039, 1044 n.1 (2017) (citing Tex. Const. art. 5, § 5). Until the Texas courts authoritatively interpreted Article 64 and applied it to Reed's case, Reed's constitutional claims in federal court under § 1983 would have been premature.

The Fifth Circuit didn't say how it would have dealt with this problem if Reed had complied with its rule and filed his § 1983 suit while the state-court litigation continued. Presumably the Fifth Circuit's answer would have been to use "stays and ad hoc abstention." *McDonough*, 139 S. Ct. at 2158. In Reed's case, the statute of limitations would have run by November 2016, *see* App. 9a, just a few months after the Court of Criminal Appeals remanded for further fact-finding and nearly a year before it would finally resolve Reed's motion, App. 36a, 75a, 104a-06a, 135a. But just as in *McDonough*, stays and ad hoc abstention are "poorly suited to the type of claim at issue here." *McDonough*, 139 S. Ct. at 2158.

If comity and federalism mean anything, they mean not interfering unnecessarily with state judicial proceedings or entertaining constitutional challenges that might otherwise prove unnecessary. State courts "have the final authority to interpret" state legislation. *Brown v. Ohio*, 432 U.S. 161, 167 (1977) (citation omitted); *accord, e.g.*, *Ring v. Arizona*, 536 U.S. 584,

603 (2002) ("the Arizona court's construction of the State's own law is authoritative"). Indeed, "the views of the State's highest court with respect to state law are binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam). Running the statute of limitations from a trial court's ruling makes *that* court's ruling authoritative, disregarding the state's appellate tribunals. It also risks asking federal courts to adjudicate constitutional issues that they might otherwise not need to confront. *Cf. Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."). As this Court has observed, "[w]arnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 79 (1997).

Thus, even assuming Mr. Reed could have sued the day after the trial court denied his Article 64 motion, "[i]t does not change the result." *McDonough*, 139 S. Ct. at 2160. Whether Reed "suffered an injury" at that point, as the Fifth Circuit put it, App. 9a (citation omitted), "[t]he Court has never suggested that the date on which a constitutional injury first occurs is the only date from which a limitations period may run." *McDonough*, 139 S. Ct. at 2160. Reed's injury was at most tentative before the Court of Criminal Appeals weighed in. And the Fifth Circuit provided no reason a federal court should interfere with such ongoing state-court litigation.

3. Contrary to the Fifth Circuit's view, running the statute of limitations from the end of state-court

litigation does not impose an "exhaustion requirement." App. 9a-10a (citation omitted). Exhaustion means bringing the same claims in state court before bringing them in federal court, as in the habeas context. *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 92 (2006); *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). But a convicted prisoner claiming that a state's procedures for DNA testing are constitutionally inadequate, like Reed or Skinner, brings different claims in state and federal court. In state court he seeks DNA testing under the state's laws and procedures. *E.g.*, *Skinner*, 562 U.S. at 527-29. In federal court he claims that those same laws and procedures unconstitutionally deny him access to testing. *Id.* at 530. In simple terms, he doesn't exhaust his federal claims in state court before bringing them again in federal court. Once in federal court, he brings new claims.

Beyond that, this Court has already made clear that invoking state-law procedures to access DNA evidence is the better course. For one thing, if a plaintiff "simply seeks the DNA through the State's discovery procedures, he might well get it." *Osborne*, 557 U.S. at 71. For another, the plaintiff bears the burden of showing "the inadequacy of the state-law procedures available to him in state postconviction relief," and "without trying them, [the plaintiff] can hardly complain that they do not work in practice." *Id.* The Court later found Skinner "better positioned" to bring a § 1983 claim for just that reason—he had "first resorted to state court," *Skinner*, 562 U.S. at 531 n.8, pressing his request for DNA testing until the Texas Court of Criminal Appeals "affirmed the denial of relief under Article 64," *id.* at 528.

* * *

The Fifth Circuit's rule that a § 1983 claim seeking DNA testing accrues when a state trial court first denies DNA testing is wrong. Taken together, *Skinner* and *McDonough* make clear that the statute of limitations should run from the end of the state-court litigation, including any appeals. Under even the most basic accrual principles, the prisoner's injury doesn't accrue until the state courts authoritatively construe the statute and apply it to his request for DNA testing, because before that time he may not know whether those very state procedures are constitutionally inadequate. And even if there were some way out of that logical maze, the Fifth Circuit's approach undermines comity and federalism by requiring prisoners to challenge the constitutionality of state procedures in federal court before the state appellate courts have had a chance to act. No one can know at that point whether the state courts might yet grant relief, or at least construe the statute in a way that avoids constitutional problems.

III. The question presented is recurring and exceptionally important, as this case shows.

The question presented is critically important to the criminal justice system nationwide. Start with the context: As this Court has recognized, "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices." *Osborne*, 557 U.S. at 55. Indeed, since the first DNA exoneration in 1989, DNA evidence has helped free nearly 400 wrongfully convicted prisoners, including 21 who spent time on death row. *See* The Innocence Project, *DNA Exoneration in the United States*, https://innocenceproject.org/dna-exonerations-in-the-

united-states/ (last visited Sept. 17, 2021). Today, all fifty states plus the District of Columbia and the federal government have postconviction laws permitting access to postconviction DNA testing in specified circumstances. Ian J. Postman, Note, *Re-Examining Custody and Incarceration Requirements in Postconviction DNA Testing Statutes*, 40 Cardozo L. Rev. 1723, 1729 & n.36 (2019). Prisoners asserting claims of innocence have particularly weighty interests in ensuring that they can take advantage of those state-law procedures.

In this context, statutes of limitations perform a particularly important role. They tell prisoners by when they need to sue. They also clarify when prisoners' challenges expire, in a context where prisoners' claims of innocence clash with states' and victims' interests in the finality of convictions and sentences. This Court routinely grants review to resolve limitations questions that have divided the lower courts. *See, e.g.*, *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 774-75 (2020); *Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019); *McDonough*, 139 S. Ct. at 2154 (2019); *Artis v. District of Columbia*, 138 S. Ct. 594, 598 (2018). Certainty about timing rules is no less important in this context.

The Fifth Circuit's rule, as discussed above, produces serious problems. Like the Second Circuit's rule in *McDonough*, it forces prisoners to choose between letting their claims expire and filing a civil suit in the middle of state-court proceedings. 139 S. Ct. at 2158. The rule disrupts prisoners' litigation efforts, diverting their attention and resources from the ordinary state-court appellate process. It may also prejudice prisoners by forcing them to speculate in a § 1983 action about the ways state law might deny them due

process before the state courts have definitively come to such a conclusion. And the rule undermines the comity, federalism, and judicial economy interests in letting the state courts determine the availability of DNA testing under an authoritative construction of state law before federal courts intervene on constitutional questions. *See supra* pp. 23-25.

IV. This case is an excellent vehicle.

This case is an excellent vehicle for resolving the question presented. The question is outcome determinative: If the Fifth Circuit had followed the Eleventh Circuit's rule, Mr. Reed's § 1983 claims would have been timely. And there are no jurisdictional problems, procedural impediments, or alternative holdings. The Fifth Circuit affirmed the dismissal of Reed's claims for the sole reason that they were untimely. App. 8a-10a. Thus, if this Court grants review and reverses, the Fifth Circuit will need to address those constitutional claims on the merits. It is hard to imagine a better vehicle for considering this issue than the case of a capital prisoner who, as one Member of this Court put it, has assembled a "considerable body of evidence" suggesting that he is innocent. *Reed*, 140 S. Ct. at 687 (statement of Sotomayor, J., respecting the denial of certiorari); *see also id.* at 689-90.

* * *

The courts of appeals are divided over when the statute of limitations begins to run in a § 1983 action seeking access to DNA testing. The Fifth Circuit's rule—that the period starts at the moment a state trial court denies testing, despite any appeal—is wrong. It starts the clock while state-court proceedings are underway, before the prisoner whose freedom hangs in the balance has a final decision from the

state courts or receives an authoritative construction and application of state law. Getting the rule right matters. Hundreds of prisoners have been exonerated by DNA evidence over the last thirty years. For Mr. Reed, this is a matter of life or death. Mr. Reed's claims "deserve sober consideration," *Reed*, 140 S. Ct. at 689 (statement of Sotomayor, J., respecting the denial of certiorari), not cursory dismissal based on a misunderstanding of basic accrual rules.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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