No. 21-442

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

REPLY BRIEF FOR THE PETITIONER

Cliff C. Gardner
Michelle L. Davis
Shaivlini Khemka
Gregory P. Ranzini
Peyton V. Carper
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
920 N. King St.
Wilmington, DE 19801

Parker Rider-Longmaid
Counsel of Record
Hanaa Khan
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
priderlo@skadden.com

Barry C. Scheck
Jane Pucher
THE INNOCENCE PROJECT
40 Worth St., Ste. 701
New York, NY 10013

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

INTRODUCTION

Goertz's brief in opposition underscores the need for this Court's intervention. Goertz *agrees* that the circuits are divided on the question presented. Opp. 25-26. So he spends the bulk of his brief reprosecuting Texas' case against Mr. Reed, raising jurisdictional arguments the court of appeals and district court already rejected, and attacking Reed's constitutional arguments.

As the petition explained, the circuits have split 1–2 over whether the statute of limitations for a 42 U.S.C. § 1983 action seeking DNA testing begins to run at the end of state-court litigation or at the moment the state trial court first denies testing, despite any subsequent appeal. Had Mr. Reed's case arisen in the Eleventh Circuit rather than the Fifth, his action would have been timely and he would be litigating his constitutional challenges to Texas' DNA testing regime. Instead, the lower courts tossed his case, leaving him without access to evidence—including the murder weapon—that could help to prove his innocence.

Goertz claims this Court lacks jurisdiction. But the Court rejected *Rooker-Feldman* arguments no different from Goertz's in *Skinner v. Switzer*, 562 U.S. 521, 531-32 (2011). App. 5a-8a. And Goertz's arguments about *Ex parte Young*, 209 U.S. 123 (1908), and standing are more puzzling still. In short, there's no impediment to this Court's review.

As Justice Sotomayor and Mr. Reed's amici have explained, a "considerable body of evidence" suggests that Texas has the wrong man. *Reed v. Texas*, 140 S. Ct. 686, 687 (2020) (statement of Sotomayor, J., respecting the denial of certiorari); *see* Tex. Exonerees et al. Amicus Br. 14-17. Goertz of course disputes that

point. But that only proves that the Fifth Circuit's wrongheaded accrual rule should not bar Mr. Reed's access to the halls of justice. *See also* Const. Accountability Ctr. Amicus Br. 12-18.

The petition should be granted.

ARGUMENT

I. The courts of appeals are split 1–2 over when the statute of limitations begins to run on a § 1983 claim seeking DNA testing.

Goertz concedes the circuit conflict. Opp. 25. In the Eleventh Circuit, the limitations period begins to run from the end of the state-court litigation denying testing. *Van Poyck v. McCollum*, 646 F.3d 865, 867 (11th Cir. 2011) (per curiam). Mr. Reed's suit would have been timely there. But in the Fifth and Seventh Circuits, the limitations period runs from the moment the state trial court denies DNA testing, despite any appeal. App. 9a-10a; *Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006).

A. Split conceded, Goertz claims that "it is unclear whether the Eleventh Circuit would reach the same outcome if it decided the issue today." Opp. 26. *Van Poyck*, he says, "rests on … shaky underpinnings" because it relied on an earlier decision about the ripeness of takings claims, and this Court has since changed those takings rules. *Id.*

Those arguments are baseless. Goertz has identified nothing calling *Van Poyck* into doubt as binding Eleventh Circuit precedent. Nor could he. *Van Poyck* applied *Skinner*, correctly reasoning that Van Poyck "present[ed] an independent claim based on federal law" rather than "seek[ing] review of the state court decision." 646 F.3d at 867 n.5. Even so, the Eleventh

Circuit explained, the claim accrued at "the end of the state litigation in which Plaintiff unsuccessfully sought access to the evidence." *Id.* at 867. That's because "[t]he statute of limitations on a section 1983 claim begins to run when the facts which would support a cause of action are apparent." *Id.* (citation and quotation marks omitted). And as *Skinner* shows, the claim turns on whether state law is unconstitutional *as construed* by the state courts, *see* 562 U.S. at 530-31 & n.8—something "apparent" at "the end of the state litigation," *Van Poyck*, 646 F.3d at 867.

To be sure, *Van Poyck* cited a takings decision (among others) in the course of articulating that rule. But contrary to Goertz's suggestion, *Van Poyck*'s logic didn't turn on anything particular to takings law. As the petition explained, *McDonough v. Smith*, 139 S. Ct. 2149 (2019), and *Skinner* make clear that *Van Poyck* is correct. Pet. 21-29. Nothing in the Court's takings jurisprudence suggests otherwise, and Goertz doesn't bother to explain how it could.

B. Goertz next says this case doesn't implicate the split anyway because Reed's case might be untimely under *Van Poyck*. Opp. 27-28. Wrong again.

First, *Van Poyck* said the claim accrued at "the end of the state litigation." 646 F.3d at 867. As Goertz recognizes (Opp. 28 n.14), a panel later made clear that the "end" can be as late as this Court's denial of cert. *Pettway v. McCabe*, 510 F. App'x 879, 880 (11th Cir. 2013) (per curiam). *Pettway* may not be precedential, but its rule rests on solid foundations. *See, e.g.*, *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012) (state-court judgment is final at end of direct review or when "time for seeking such review expires" (citation

omitted)). Goertz doesn't dispute that Reed's claim is timely under this rule.

Second, the ordinary understanding is that litigation does not end before denial of a timely filed request for rehearing. Indeed, this Court runs the time to seek cert from denial of rehearing. Sup. Ct. R. 13.3. And the Texas Court of Criminal Appeals (CCA) issues its mandate "[t]en days after the time has expired for filing a motion to extend time to file a motion for rehearing if no timely filed motion for rehearing or motion to extend time is pending." Tex. R. App. P. 18.1(b). Mr. Reed's action was timely because he sued within two years of the CCA's denial of rehearing. App. 135a.

II. This case is an excellent vehicle.

As the petition explained, this case is an ideal vehicle. Pet. 29-30. The question presented is outcome-determinative because the court of appeals affirmed the dismissal of Reed's claims solely because it thought they were untimely. Pet. 20-21; App. 8a-10a.

Goertz doesn't contest that point. Instead, he raises jurisdictional arguments that the court of appeals and district court already rejected, *see* App. 5a-8a & n.2, 21a-24a, and for good reason.

A. Goertz first says *Rooker-Feldman* bars Reed's suit. Opp. 20-22. But the court of appeals and district court, following *Skinner*'s clear guidance, correctly rejected that argument. App. 5a-8a, 21a-22a; *see* Pet. 15.

Under *Rooker-Feldman*, "a state-court decision is not reviewable by lower federal courts, but a statute or rule governing the decision may be challenged in a federal action." *Skinner*, 562 U.S. at 532. Thus, as the Court held in *Skinner*, *Rooker-Feldman* doesn't bar §

1983 claims seeking access to DNA testing when the plaintiff—like Mr. Reed—"does not challenge the adverse CCA decisions themselves" but instead "targets as unconstitutional the Texas statute [those decisions] authoritatively construed." *Id.* Unsurprisingly, neither the district court nor the court of appeals had any trouble following *Skinner* to reject Goertz's *Rooker-Feldman* argument.

So Goertz insists that this case is different from *Skinner*. Opp. 21. Not so. Just like Skinner, Mr. Reed challenges Article 64 as construed by the CCA. *See* 562 U.S. at 532. Reed alleges that Article 64 suffers from multiple constitutional deficiencies, including an extratextual chain-of-custody requirement to demonstrate the evidence was not "contaminated, tampered with, or altered" in any material respect. App. 25a n.6, 52a. To be sure, the CCA should not have *applied* those unconstitutional requirements to Mr. Reed, but Mr. Reed here challenges not the application of those requirements but rather their constitutionality—he brings the same kind of "independent claim" that *Skinner* endorses. 562 U.S. at 532 (citation omitted).

Goertz tries to dodge these principles by pointing to "the thrust of Reed's allegations." Opp. 21. But even assuming some of Reed's allegations attack the CCA's decision, this Court still has jurisdiction. As *Feldman* instructs, even where some of a plaintiff's complaints are barred as challenges to a state-court decision, "[t]o the extent [the plaintiff] mount[s] a general challenge to the constitutionality of" the underlying state law, the federal court "ha[s] subject-matter jurisdiction over [his] complaints." *District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482-83 (1983). Here, as the lower courts recognized, Mr. Reed challenges the constitutionality of Article 64 as construed by the

CCA. App. 6a-7a, 21a-22a. So even if Goertz thinks that some allegation or the allegations' collective "thrust" also attacks the CCA's decision, the federal courts still have jurisdiction.

B. Goertz next invokes Eleventh Amendment immunity, claiming *Ex parte Young* doesn't apply. Opp. 22-24. The court of appeals and district court both correctly rejected that argument. App. 5a-6a n.2, 23a-24a

1. Goertz first says *Ex parte Young* applies only to suits for injunctive relief, not declaratory relief. Opp. 22-23. First of all, Goertz can't just ignore injunctive relief because he says Reed hasn't asked for it. Every "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c).

More importantly, Goertz is just wrong about *Ex parte Young*. *Ex parte Young* applies if the "complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 645 (2002) (citation omitted); *accord Alden v. Maine*, 527 U.S. 706, 747 (1999) (under *Ex parte Young*, "certain suits for declaratory or injunctive relief against state officers must … be permitted"). Sure, *Ex parte Young* itself involved only injunctive relief, but that's because the Declaratory Judgment Act was still more than two decades away. *See Steffel v. Thompson*, 415 U.S. 452, 466 (1974). The point of the act, of course, was to give courts a "milder" "alternative to the strong medicine of the injunction," *id.* at 466-67, though one that can "serve as the basis for a subsequent injunction," *Samuels v. Mackell*, 401 U.S. 66, 72 (1971). How strange to think that the Eleventh Amendment permits *Ex parte*

Young suits for injunctive relief but not suits for "less intrusive" declaratory relief. *See Steffel*, 415 U.S. at 469. The court of appeals gave the argument no more than a footnote. App. 5a-6a n.2.

2. So Goertz tries a different tack, arguing that he's the wrong defendant. Opp. 23-24. But the court of appeals correctly rejected that argument too. Mr. Reed has properly pleaded that Goertz "'directed or otherwise caused each of the non-party custodians of the evidence that Reed seeks to refuse to allow Mr. Reed to conduct DNA testing' on such evidence and 'has the power to control access' to that evidence." App. 5a-6a n.2 (alterations adopted). In other words, like Skinner, Mr. Reed has sued the defendant who controls access to the evidence. 562 U.S. at 529. And Goertz's claim that he isn't "enforc[ing]" Article 64, Opp. 23-24, is a puzzling use of English. Goertz is refusing to release evidence for DNA testing unless Mr. Reed satisfies Article 64—*i.e.*, he is withholding the evidence pursuant to the statute Reed challenges as unconstitutional. *See Skinner*, 562 U.S. at 530-33.

C. Goertz closes his jurisdictional objections with a standing argument. Opp. 24. But it's no better than his earlier efforts. As to injury, Goertz doesn't dispute that he is refusing an incarcerated Mr. Reed access to the DNA testing Reed seeks because of Article 64, as construed by the CCA. *See* Opp. 13-15. Instead, Goertz says Reed's injuries aren't traceable to him and won't be redressed by a favorable decision. Opp. 24-25.

Start with causation. As the court of appeals recognized, Mr. Reed properly alleged that Goertz, who "'has the power to control access' to the evidence," won't give it up. App. 5a-6a n.2. So Mr. Reed's injuries are traceable to Goertz.

Next, redress. Goertz seems to think that declaratory relief won't do the trick. *See* Opp. 24-25. But declaratory relief frequently redresses injuries because parties are expected to abide by it. *See, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). Here, declaratory relief will remove any Article 64 justification for withholding the evidence Mr. Reed wants tested, giving him access to a constitutional procedure and the testing he desires. Goertz may dispute the merits of Reed's constitutional claim, *see* Opp. 32-34, but this Court does "not confus[e] [perceived] weakness on the merits with absence of Article III standing." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 800 (2015) (citation and quotation marks omitted).

D. Goertz spends his last two pages disputing the merits of Mr. Reed's constitutional arguments. Opp. 32-34. But the merits aren't relevant here. The court of appeals disposed of Reed's case solely on timeliness grounds, App. 8a-10a, so it didn't address the merits. And this Court is one "of review, not of first view." *Skinner*, 562 U.S. at 537 (citation omitted). Just like in *Skinner*, if this Court resolves the threshold question presented in Mr. Reed's favor, the merits will be "ripe for consideration on remand." *Id.*

III. The question presented is exceptionally important and recurring.

A. As the petition explained, clear and logical statutes of limitations are important, and the Court often grants review to resolve limitations questions that have divided the lower courts. Pet. 27-29. Getting limitations periods right is especially important when life and liberty hang in the balance. "To date, 375 people in the United States have been exonerated by DNA

testing, including 21 who served time on death row." The Innocence Project, *Exonerate the Innocent*, https://innocenceproject.org/exonerate/ (last visited Feb. 1, 2022). Access to DNA testing can be the difference between life and death for prisoners like Mr. Reed, and getting the limitations period right may determine whether those prisoners may pursue a constitutional process for accessing DNA testing in the first place. And even the uncertainty produced by the Fifth and Seventh Circuit's rule is costly. It forces prisoners to choose between letting their federal claims expire and filing disfavored "two-track" litigation that district courts may not wish to entertain. *McDonough*, 139 S. Ct. at 2158.

B. In Goertz's view, none of that matters because the question presented doesn't arise frequently. *See* Opp. 26-27. But contrary to Goertz's argument, the statute of limitations will come into play in many § 1983 suits seeking DNA testing because state-court litigation is rarely swift. And if this Court won't intervene, then prisoners in the Fifth and Seventh Circuits will have little reason to sue in federal court in the first place if the statute of limitations has expired during the state-court litigation. Published circuit decisions thus are not the only important indicators of an important, recurring issue. Indeed, other decisions show that courts confront the question presented more often than Goertz suggests. *See, e.g.*, *Brookins v. Bristol Twp. Police Dep't*, 642 F. App'x 80, 81 (3d Cir. 2016) (per curiam); *Wade v. Brady*, 612 F. Supp. 2d 90, 96-98 (D. Mass. 2009); *Moore v. Lockyer*, No. 04-cv-1952, 2005 WL 2334350, *5-6 (N.D. Cal. Sept. 23, 2005); *Derrickson v. Delaware Cnty. Dist. Att'y's Off.*, No. 04-cv-1569, 2006 WL 2135854, at *6-7 (E.D. Pa. July 26, 2006).

IV. The decision below is wrong.

A. As the petition explained, only the Eleventh Circuit's rule, which runs the limitations period from the end of state-court litigation, accords with *Skinner*. Pet. 21-27. When a § 1983 plaintiff like Mr. Reed challenges a "postconviction DNA statute 'as construed' by the [state] courts," *Skinner*, 562 U.S. at 530, he cannot sue until the state courts have authoritatively construed that statute. By illogically running the limitations period from the state *trial* court's denial of testing, the Fifth Circuit's contrary rule requires plaintiffs to sue before they can definitely know what the statute means and therefore whether it is constitutional. The Fifth Circuit's rule creates a "ticking limitations clock" requiring parallel litigation that "run[s] counter to core principles of federalism, comity, consistency, and judicial economy." *McDonough*, 139 S. Ct. at 2158.

B. Goertz's responses don't wash.

1. Goertz first contends that the Fifth Circuit was correct because "the true harm" is "the denial of postconviction DNA testing," so Reed wasn't harmed "a second time" by the CCA's decision. Opp. 30. But Goertz's attempt to slice and dice Reed's harm ignores *McDonough* and *Skinner*. As *McDonough* reaffirmed, accrual occurs once there is "a complete and present cause of action." 139 S. Ct. at 2158 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). And as *Skinner* makes clear, a § 1983 plaintiff like Mr. Reed knows the fact and extent of his harm only based on the authoritative construction of state law, *see* 562 U.S. at 530-32 & n.8—that is, *after the state court construes that law*. In other words, even though Reed may have "suffered harm" from the original denial of access to evidence,

that harm isn't certain, ripe, or complete. Pet. 22-23. What's more, "the date on which a constitutional injury first occurs" is not "the only date from which a limitations period may run," *McDonough*, 139 S. Ct. at 2160, and it makes little sense to require federal litigation before the state courts have finished construing the statute in question. Pet. 23-26.

2. Although his argument is unclear, Goertz also claims that *McDonough*'s comity and federalism concerns don't apply here, presumably because this case isn't on all fours with *McDonough*. *See* Opp. 30-31. But Goertz does not dispute that the Fifth Circuit's rule will often require the very kind of parallel litigation that will produce comity and federalism problems. Indeed, to have been timely here, Mr. Reed would have had to sue during the CCA litigation, before the CCA construed the very requirements he now challenges as violative of due process. *See* Pet. 24.

* * *

A "pall of uncertainty" hangs over Mr. Reed's conviction. *Reed*, 140 S. Ct. at 690 (statement of Sotomayor, J., respecting the denial of certiorari). This Court should not let the Fifth Circuit's illogical rule bar Mr. Reed's opportunity to seek the DNA testing that could exonerate him, especially when his case would have gone forward in the Eleventh Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Cliff C. Gardner
Michelle L. Davis
Shaivlini Khemka
Gregory P. Ranzini
Peyton V. Carper
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
920 N. King St.
Wilmington, DE 19801

Parker Rider-Longmaid
Counsel of Record
Hanaa Khan
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave. NW
Washington, DC 20005
202-371-7000
priderlo@skadden.com

Barry C. Scheck
Jane Pucher
THE INNOCENCE PROJECT
40 Worth St., Ste. 701
New York, NY 10013

Counsel for Petitioner

February 1, 2022