No. 21-442

IN THE

Supreme Court of the United States

RODNEY REED,

Petitioner,

v.

BRYAN GOERTZ,

Respondent.

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

BRIEF OF TEXAS EXONEREES MICHAEL MORTON AND ANTHONY GRAVES, THE INNOCENCE NETWORK, AND THE CONSTITUTION PROJECT AT THE PROJECT ON GOVERNMENT OVERSIGHT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae submit this brief in support of Petitioner Rodney Reed, pursuant to Supreme Court Rule 37.1.[1]

Michael Morton spent nearly 25 years in prison for the murder of his wife before he was exonerated by post-conviction DNA testing. The State of Texas relied on the unsupported forensic testimony of pathologist Dr. Bayardo to establish that Morton's wife died when he was with her. But Dr. Bayardo was wrong about the time of death. In Reed's criminal trial, the State also relied on now-discredited testimony from Dr. Bayardo that the victim died when Reed was with her. Morton advocates for increased transparency and fairness in criminal prosecutions. In 2014, Texas passed the Michael Morton Act, which requires prosecutors to disclose evidence to defense attorneys regardless of its materiality to guilt or punishment under *Brady v. Maryland*.

Anthony Charles Graves is the 138th exonerated death row inmate in the United States. Graves was wrongfully convicted of murdering a family of six in Somerville, Texas. Graves was convicted based on the testimony of the true killer, who falsely named Graves as an accomplice. After Graves spent 18 years on death

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[1] No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund the preparation or submissions of the brief; and no person other than *amici* or counsel contributed money intended to fund the preparation or submission of the brief. Counsel for *amici* provided Petitioner and Respondents with timely notice of their intent to file this brief, and Petitioner and Respondents have consented to the filing of this brief under Supreme Court Rule 37.2.

row, the Fifth Circuit set aside his conviction and concluded that the prosecutor failed to provide exculpatory evidence to the defense, including many contradictory statements by the actual killer. In 2016, the Texas Board of Disciplinary Appeals upheld the disbarment of the prosecutor for concealing exculpatory evidence, presenting false testimony, and other misconduct during Graves' trial. Like Reed, Graves was tried before Judge Harold R. Towslee of Texas' 335th Judicial District Court of Bastrop, Texas. And Graves was represented at trial by the same court-appointed counsel who represented Reed. Graves has established the Anthony Graves Foundation, which promotes criminal justice reform. The Foundation's Humane Investigation Project investigates prisoners' claims of innocence and works with attorneys and investigators to free the wrongfully convicted.

The Innocence Network (the Network) is an association of independent organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 68 current members of the Network represent hundreds of prisoners with innocence claims in 49 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Brazil, Canada, Ireland, Israel, Italy, the Netherlands, the United Kingdom, and Taiwan. The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which our criminal system convicted innocent persons, the Network advocates for the improvement of the truth-seeking functions of the

criminal justice system to ensure that future wrongful convictions are prevented.

The Constitution Project at the Project On Government Oversight (the Project) advocates for due process and fairness in the criminal legal system as a key part of its mission to protect constitutional rights when threatened by the government's exercise of its national security or domestic policing powers. The Constitution Project is deeply concerned with preserving our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. Accordingly, the Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its nonpartisan positions on constitutional issues to better apprise courts of the importance and broad consequences of those issues. In May 2001, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others, to examine issues related to the administration of the death penalty. The committee issued reports in 2001, 2005, and 2014, the most recent of which makes 39 recommendations essential to reducing the risk of wrongful capital convictions and executions.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A century ago, Judge Learned Hand described criminal procedure as having "been always haunted by the ghost of the innocent man convicted." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923). He derided that concern as an "unreal dream," *id.*, but modern advancements in forensic DNA technology have revealed that the risk of the innocent man convicted is not unreal at all. In fact, hundreds are known to have experienced the nightmare of a wrongful conviction. At least 375 of them in the United States have been exonerated by DNA.[2] But DNA testing's "unparalleled ability . . . to exonerate the wrongly convicted and to identify the guilty," *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 55 (2009), cannot be fully realized if states erect unjust barriers to access such testing.

Rodney Reed has spent over twenty years on death row for a murder he has steadfastly denied committing. There is no question that the true killer should be punished for the brutal crime he committed against Stacey Stites. But the brutality of the crime only heightens the stakes of holding the correct person responsible. An innocent man must not be sent to die while the actual, dangerous perpetrator remains at large.

Reed's habeas suit seeks DNA testing of key evidence that Texas has unjustifiably refused to permit, *including of the murder weapon itself* (which has never

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[2] The Innocence Project, *DNA Exonerations in the United States*, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited July 8, 2022).

been DNA tested). The Fifth Circuit's wrong decision below has life-or-death consequences for Reed and others with convictions that "remain[] so mired in doubt." *Reed v. Texas*, 140 S. Ct. 686, 690 (2020) (Sotomayor, J., respecting the denial of certiorari).

There is substantial reason to believe that Reed is innocent of the capital murder of Stites and that the DNA testing that Texas has denied him would prove his innocence. Reed's brief, and Justice Sotomayor's statement respecting the denial of certiorari in *Reed*, *id.* at 687, give an excellent overview of the non-DNA exculpatory evidence Reed has gathered over the last two decades. *Amici* write separately to explain in greater detail the extensive, reliable evidence supporting Reed's actual innocence, including that Stites's fiancé confessed to the murder while serving ten years in prison for kidnapping and assaulting a young woman.

This substantial non-DNA evidence supports Reed's claim for DNA testing because it raises the specter of an innocent man being executed and strongly suggests that the DNA evidence will exonerate him. The items for which Reed sought, but was erroneously denied, DNA testing include the murder weapon, which inexplicably has never been DNA tested. Reed was also denied testing of the clothing Stites was wearing when she was killed, a name tag left on her body that the killer almost certainly handled, and items from the truck she was in shortly before her death. This critical evidence should have been, but was not, thoroughly tested at the time. There is every reason to believe it contains DNA evidence that could exonerate Reed given the other exculpatory evidence he has amassed.

This Court should reverse the Fifth Circuit's unfounded accrual rule, so that it does not improperly prevent Reed from vindicating his constitutional rights to due process and access to the courts, particularly given "the pall of uncertainty over Reed's conviction" and "the irreversible consequence of setting that uncertainty aside." *Id.* at 690.

ARGUMENT

I. THE QUESTION PRESENTED IMPACTS THE ABILITY OF WRONGFULLY CONVICTED PERSONS TO PROVE THEIR INNOCENCE.

The question Reed's petition presents is exceptionally important to wrongfully convicted defendants and to our constitutional system.

The Fifth and Seventh Circuits' holding—that the limitations period for a § 1983 claim seeking DNA testing begins to run the moment the state trial court denies DNA testing—effectively closes the doors of federal court to potentially innocent people, like Reed, whose constitutional rights to adequate DNA testing have been violated by a state court's authoritative construction of the state's DNA-testing statute. *See Skinner v. Switzer*, 562 U.S. 521, 525 (2011).

The harm cognizable under § 1983 in this context is not the state trial court's adverse judgment, but the state appellate court's authoritative construction of the DNA-testing statute in a way that deprives the plaintiff of his rights to constitutionally adequate DNA testing. Until an appellate court weighs in, a plaintiff seeking post-conviction testing cannot know whether a lower trial court (1) misapplied a state's constitutionally adequate DNA-testing statute or (2) correctly

applied a state's constitutionally inadequate DNA-testing statute. *See* Pet. 16–17. Under the Fifth and Seventh Circuits' erroneous approach, by the time a state appellate court informs a would-be plaintiff that it is the latter, the limitations period likely will have expired.

The importance of ensuring access to constitutionally adequate DNA testing cannot be overstated. *Amicus curiae* Michael Morton, who spent nearly twenty-five years in prison after being wrongfully convicted of murdering his wife Christine is living proof of the difference it can make.

In affirming the jury's verdict against Morton on direct appeal, the Texas Court of Appeals summarized the purported "chilling" evidence at trial against the innocent Morton. *Morton v. State*, 761 S.W.2d 876, 877 (Tex. Ct. App. 1988). That evidence was: (1) a note from Morton to his wife expressing his disappointment with her romantic rebuff; (2) the testimony of Dr. Bayardo—the Chief Medical Examiner of Travis County—that Morton's wife's stomach contents showed she had been killed within four hours of her last meal at 9:30 p.m., *i.e.*, when Morton was home; and (3) semen and pubic hair found in the bed Morton shared with his wife. *See id.* at 877–78. Based on this evidence, the State convinced the jury that Morton "beat [his wife] to death with a billy club[and] masturbated onto the sheet next to her dead body." *Id.* at 877. The Court of Appeals concluded this "chilling" evidence proved his guilt. *Id.* at 879–80.

In 2005, Morton sought DNA testing on items of evidence from the crime scene, including a bloody bandana found at a construction site near the Mortons'

home.[3] As in Reed's case, Texas officials refused to cooperate, stating the DNA testing would "muddy the waters." The court ordered DNA testing of some items, but not the bloody bandana. Five years later, in 2011, the court finally ordered DNA testing on the bandana. The test revealed the DNA of both Christine and an unknown male. Investigators matched the unknown DNA profile to Mark Norwood, a convicted felon from California who lived in Texas when Christine was murdered. Norwood had gone on to murder another woman, Debra Masters Baker, while Michael Morton was in prison. Morton was released on October 4, 2011, after spending nearly 25 years in prison. Morton's freedom is the direct result of DNA testing that Reed has been wrongfully denied.

II. A SUBSTANTIAL BODY OF NON-DNA EVIDENCE CASTS DOUBT ON REED'S CONVICTION.

Reed's post-conviction evidence "casts doubt on the veracity and scientific validity of the evidence on which Reed's conviction rests." *Reed*, 140 S. Ct. at 689 (Sotomayor, J., respecting the denial of certiorari). Doubts these significant "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*. Here, "sober consideration" of Reed's non-DNA evidence reveals substantial grounds for Reed's actual innocence. The extensive and compelling non-DNA evidence also provides a strong basis to believe that the DNA testing

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[3] Pamela Colloff, *The Innocent Man, Part Two*, Tex. Monthly (Dec. 2012), http://www.texasmonthly.com/articles/the-innocent-man-part-two.

Reed seeks will definitively confirm the conclusion that the non-DNA already points to—that Reed is actually innocent.

A. The investigation into Stites's murder.

On the morning of April 23, 1996, Stacey Stites, a 19-year-old white woman, failed to show up for her 3:30 a.m. shift at the Bastrop H-E-B grocery store. *Ex parte Reed*, 271 S.W.3d 698, 702, 703 (Tex. Crim. App. 2008). Her coworkers grew concerned. *Id.* Elsewhere in Bastrop, at 5:23 a.m. a patrolman observed the pickup truck of Stites's fiancé, a white police officer named Jimmy Fennell, parked at Bastrop High School. *Id*. The officer noted a piece of a broken belt on the ground next to the driver's side door. *Id*.

Stites's partially disrobed body was found on a country road shortly before 3:00 p.m. later that day. *Id.* at 704. Stites's H-E-B name tag was placed in the crook of her leg. *Id*. A member of the Texas Department of Public Safety Crime Laboratory (DPS crime lab) identified semen in her underwear. *Id*. at 705. Marks on Stites's neck suggested she had been strangled by her belt. *Id*. at 706. The DPS Crime Lab team also collected two Busch beer cans, a white T-shirt, and another piece of Stites's belt from the area surrounding her body. *Id*. at 705–06.

Pathologist Dr. Bayardo—the same pathologist whose unsupported expert testimony regarding Christine Morton's time of death secured her husband's wrongful conviction—conducted the autopsy on Stites's body. *Id.* at 705. He estimated that Stites died on April 23 around 3:00 a.m. *Id.* Dr. Bayardo also confirmed that Stites was strangled with the webbed belt that was collected from the crime scenes. *Id.* at 706.

Dr. Bayardo took vaginal swabs and found a few intact sperm. *Id.* In addition, he asserted that his observation "that her anus was dilated and that there were some superficial lacerations on the posterior margin . . . was consistent with penile penetration." *Id.*

Stites's fiancé Fennell was the last known person to have seen her alive and a suspect from the outset. *Id.* at 708. Two polygraphs conducted during the investigation into Stites's death indicated Fennell was deceptive when he denied strangling, striking, or hitting Stites. *Id.* at 738. Fennell then invoked the Fifth Amendment, refusing to further cooperate with investigators. *Id.* Authorities eliminated Fennell as a suspect purportedly because they failed to uncover additional evidence of his involvement. *Id.* at 708.

Months after her death, officers determined through DNA testing that the few sperm collected from Stites were from Reed, a Black man. *Id.* at 709. He initially denied knowing Stites, but later explained they were having an affair. *Id.* at 709–10. In 1997, the State charged Reed with Stites's murder based on the few intact sperm found in Stites's body. *Id.* at 709–10. No other physical or testimonial evidence—eyewitness testimony, fingerprints, footprints, hair, or DNA—connected Reed to the murder.

B. The State's case against Reed.

The State's case against Reed rested on the theory that he intercepted, abducted, sexually assaulted, and murdered Stites, a stranger to him, around 3:00 a.m. on April 23, 1996. *See Reed v. State*, No. 73,135 (Tex. Crim. App. Dec. 6, 2000). Without any physical evidence besides Reed's three sperm, "the State's case centered on the estimated time of Stites' death and the

estimated time during which the spermatozoa could have been deposited." *Reed*, 140 S. Ct. at 687 (Sotomayor, J., respecting the denial of certiorari). The State set out to prove that Reed deposited the three sperm around the time Stites died.

The purported timeline for Stites's death was largely supplied by Fennell. Waiving his prior invocation of the Fifth Amendment, Fennell testified at trial that, on the evening of April 22, he coached a youth baseball game, returned home to watch television with Stites, took a shower with her, and went to sleep. *Ex parte Reed*, 271 S.W.3d at 702–03. Fennell said he was asleep when she left, but he testified that Stites usually left for work around 3:00 a.m. *See id.* at 702, 721. Under this timeline, because Fennell's truck and a piece of the belt used to strangle Stites were discovered at 5:23 a.m., Stites must have been murdered between 3:00 a.m. and 5:23 a.m. *Id.* at 740. Dr. Bayardo testified that Stites died at or near 3:00 a.m. *Id.* at 705.

The second prong of the State's theory centered on the testimony of Dr. Bayardo and two other experts that—based on (1) the time the investigators collected the sperm and (2) the typical decomposition of sperm cells—Reed's sperm must have been deposited at or around Stites's time of death at 3:00 a.m. *See id.* at 705–06, 710. This scientific evidence thus undermined Reed's chief defense that he and Stites were having a consensual affair and had sex the day before she died. *See Ex Parte Reed*, 271 S.W.3d at 750.

The evidence at trial "thus tended to inculpate Reed (by suggesting that he must have had sex with Stites shortly before she died) and exculpate Fennell (by indicating that Stites died [and had sex with Reed] after

Fennell claimed to have seen her last)." *Reed*, 140 S. Ct. at 687 (Sotomayor, J., respecting the denial of certiorari).

The all-white jury convicted Reed of Stites's murder and sentenced him to death almost entirely based on the presence of a few of Reed's sperm and testimony that those sperm must have been deposited around Stites's time of death. *Id.* The State presented no eyewitness testimony connecting Reed to the murder; no fingerprint or DNA evidence suggesting Reed was ever in the truck; no other evidence placing him at the scene of the crime; and no reason other than unfounded speculation or improper bias to believe that Reed had any motive to commit a heinous murder.

C. The considerable body of non-DNA exculpatory evidence undermining the State's case.

Never wavering in his pursuit to prove his innocence, Reed has accumulated "a substantial body of evidence" demonstrating his innocence and "cast[ing] doubt on the veracity and scientific validity of the evidence on which Reed's conviction rests." *Reed*, 140 S. Ct. at 687, 689 (Sotomayor, J., respecting the denial of certiorari).

a. Credible witness testimony corroborates Reed and Stites's affair.

At least eight witnesses who are strangers to Reed—including Stites's co-workers, friends, family, and a former member of law enforcement—have provided accounts supporting Reed's contention that he and Stites were engaged in a consensual affair. Their testimony disproves the State's theory that Reed and Stites were

strangers and, therefore, the presence of his sperm meant he kidnapped, raped, and murdered her.

Charles Wayne Fletcher, a former member of the Bastrop County Sheriff's Office, was a close colleague and friend of Fennell. Fletcher testified that, shortly before Stites's murder, he witnessed an "alarming" fight between the couple. After Stites "stomped off," Fennell told Fletcher that Stites was "f***ing a n****r." Plaintiff's Advisory Regarding Federal Habeas Filings, *Reed v. Goertz*, No. 19-cv-00794 (W.D. Tex. Nov. 14, 2019), Doc. 29-2 at 67. Fletcher recalls these "exact words." Applicant's Mem. and Obj. to Findings of Fact and Conclusions of Law, *Ex Parte Rodney Reed*, No. 10,961-10 (Tex. Ct. Crim. App. Jan. 31, 2022) ("2022 CCA Submission").[4]

No less than five of Stites's co-workers testified that Stites was intimate, or at least friendly, with Reed. Alicia Slater testified that Stites confided that she was not excited to get married and was "sleeping with a black man named Rodney." 2022 CCA Submission at 17; *see* 2019 Pet. App. 422a–34a. Suzan Hugen and Brenda Dickinson testified that they saw Stites interacting with a Black man, whom Stites identified as her friend "Rodney." 2022 CCA Submission at 17. And Rebecca Randall and Victor Juarez testified that they observed Stites chatting with Reed, whom they knew from around town and church.

In addition, Stites's cousin, Calvin "Buddy" Horton, reported being "certain" he saw Stites with Reed at a

[4] The Innocence Project has made a copy of this recent state court filing, which provides a fulsome account of the non-DNA evidence supporting Reed's innocence, available online at https://tinyurl.com/bdeahwme.

Dairy Queen in late 1995. 2019 Pet. App. 433a. And a transport officer, Rene Maldonado, overheard a conversation between Reed in which Reed stated he had been having an affair with Stites. 2022 CCA Submission at 18.

b. Post-conviction evidence discredited the State's time of death.

The State's theory of Reed's guilt hinged on Stites supposedly having been murdered *after* she left the home she shared with Fennell at 3:00 a.m. The State presented expert testimony pinpointing Stites's time of death between 3:00 and 5:00 a.m. But this estimate was inaccurate and should not have been relied on at trial, as Dr. Bayardo has now conceded and Reed's post-conviction experts have affirmatively established.

Regarding Stites's time of death, Dr. Bayardo retracted or clarified in Reed's favor key trial testimony. He submitted a declaration stating that his time-of-death estimate "was only an estimate, and should not have been used at trial as an accurate statement of when Ms. Stites died." 2019 Pet. App. 198a. He emphasized that the prosecutors should not have relied on his estimate "as a scientifically reliable opinion of when Ms. Stites died." *Id*. at 198a–99a.

In addition, three of the nation's most experienced and respected pathologists—Drs. Michael Baden, Werner Spitz, and LeRoy Riddick—each determined that the State's theory was medically and scientifically impossible. 2019 Pet. App. 202a–27a. The experts concluded that the decomposition and rigor mortis of Stites's body indicates she "was murdered prior to midnight on April 22, 1996 (the night before her body

was found)." Advisory Regarding Federal Habeas Filings, *Reed*, No. 19-cv-00794, Doc. 29-2 at 11. The lividity—or red-purple discoloration from blood pooling after death—on the front of Stites's body "scientifically proves that she was dead in a different position from that which she was found for a period of at least 4–5 hours" and "[i]t is impossible that this lividity occurred at the scene in the position the body was found because Stites's body was found on her back." *Id.* Thus, "Stites could not have been both murdered *and* dumped . . . at the scene in the two-hour time frame [3:00 a.m. to 5:23 a.m.] asserted by the State at trial." *Id.* at 11–12. The experts each independently estimated her time of death to be in the evening of April 22—when Fennell admitted they were together. *Ex parte Reed*, 271 S.W.3d at 702–03.

c. The existence of a few intact sperm does not suggest recent sexual contact.

The State's theory of guilt also relied on its assertion that Reed's three intact sperm were deposited at or near the time of Stites's death (and *not* during earlier consensual intercourse as Reed maintains). At trial, Dr. Bayardo and two other experts testified that the three sperm, based on typical decomposition rates, could not have been deposited earlier than 3:00 a.m. *See id.* at 705–06, 710. Specifically, a State expert "testified that spermatozoa remains intact inside a vaginal tract for at most 26 hours." *Reed*, 140 S. Ct. at 687 (Sotomayor, J., respecting the denial of certiorari). Like Dr. Bayardo's time-of-death estimate, the sperm-lifespan evidence (and the inferences it purportedly supported) has not withstood the test of time.

Dr. Bayardo has now retracted his trial testimony that the sperm he found in Stites's vaginal cavity had been deposited there "quite recently," because he is "personally aware of medical literature finding that spermatozoa can remain intact in the vaginal cavity for days after death." 2019 Pet. App.199a. Thus, "the spermatozoa [he] found in Ms. Stites's vaginal cavity could have been deposited days before her death." *Id.* Dr. Bayardo further agreed with Reed's experts that the fact that he found "very few" sperm actually suggests the sperm "*was not* deposited less than 24 hours before Ms. Stites's death." *Id.* (emphasis added).

Each of Reed's *pro bono* experts also opined that intact sperm can be found in the vagina for 3 days or more after intercourse. *See* Advisory Regarding Federal Habeas Filings, *Reed*, No. 19-cv-00794, Doc. 29-2 at 12 (Spitz); *id.* at 19 (Baden); *id.* at 29 (Riddick). The "few sperm" collected from Stites's body were thus "entirely consistent with consensual intercourse" with Reed the day before she was murdered. *Id.* at 19. In agreement with Dr. Bayardo's gravely belated clarifications, Dr. Spitz further opined that the fact that "[v]ery few sperm were found on autopsy smears" actually indicates Stites was not recently sexually assaulted because "[a] normal sperm count is considered to be 15 million spermatozoa per milliliter." *Id.* at 12.

The experts were also unanimous that "[t]here is no forensic evidence that Ms. Stites was sexually assaulted in any manner." *Id.* at 19. At trial, Dr. Bayardo testified that he believed Stites was sexually assaulted because his autopsy revealed lacerations on, and dilation of, her anus. *Id.* at 30. But "the observation of dilation of the anus at the time of Dr. Bayardo's autopsy does not indicate anal sexual assault." *Id.* Because the

autopsy occurred more than 36 hours after Stites died, rigor mortis likely caused the dilation. *Id*. at 30–31. And the autopsy report noted only "abrasions," or scrapes, which "can be caused by a hard bowel movement" and "are not necessarily associated with anal intercourse." *Id*. at 31.

D. Evidence inculpating Fennell.

The increasing amount of post-conviction evidence inculpating Fennell also necessarily exculpates Reed.

First, two witnesses have testified that Officer Fennell *confessed to the crime*. In 2008, then-Officer Fennell kidnapped and sexually assaulted a 20-year-old woman while on police duty. He was sentenced to 10 years' imprisonment. In October 2019, fellow inmate Arthur Snow declared in a sworn affidavit that Fennell stated his ex-fiancée "had been sleeping around with a black man behind his back." *Reed*, 140 S. Ct. at 687, 688 (Sotomayor, J., respecting the denial of certiorari). Fennell, in a "confident[]" manner, then stated he "had to kill my n****r-loving fiancé[e]." *Id*. (citation omitted). Snow believed that Fennell "felt safe" and "proud" confessing to Snow "because [Snow] was a member of the Aryan Brotherhood." *Id*. (citation omitted). Another fellow inmate, Michael Bordelon, testified that Fennell stated he "took care of her" and "that damn n****r is going to do the time" while making a strangulation gesture. 2022 CCA Submission at 28.

Second, witness testimony demonstrates Fennell had a motive to murder Stites, because he knew she was having an affair with a Black man. In addition to Snow and Bordelon, Fletcher (the former member of the Bastrop County Sherriff's Office who was friends with Fennell) testified that in March 1996, a month

before Stites's murder, he "remember[s] clearly that Jimmy said that he believed Stacey was 'f*****g a n****r.'" Advisory Regarding Federal Habeas Filings, *Reed*, No. 19-cv-00794, Doc. 29-2 at 67. He "chose to have no further interaction or communication with" Fennell after observing his "cold, empty, and emotionless" behavior at Stites's funeral and "question[ing] whether he was involved in Stacey's death." *Id.* Fletcher was not previously "outspoken about [his] experiences" because he did not want to be "perceived" as "going against local law enforcement." *Id.*

Another member of local law enforcement independently observed alarming behavior by Fennell at his fiancée's funeral. James Clampit, a now-retired Lee County Sheriff's Officer who worked with Fennell, stood next to Fennell in the viewing room and was "completely shocked and floored" by what he observed. "[D]irecting his comment at Ms. Stites's body," Fennell "said something along the lines of, 'You got what you deserved.'" *Id.* at 101. Clampit "knew that [he] would not be able to live with [him]self if [he] did not come forward." *Id.*

Third, numerous neutral witnesses have come forward describing Fennell and Stites's relationship as volatile and abusive. Rubie Volek, an insurance salesperson, sold life insurance to Stites while Fennell was present. Volek overheard Stites question why she needed to purchase life insurance and Fennell respond sternly: "If I ever caught you messing around on me, I will kill you and nobody'll know that I was the one that did it." 2022 CCA Submission at 23.

Brent Sappington—whose father lived in the apartment beneath that of Fennell and Stites—recalled

hearing "loud arguing and fighting" from their apartment. *Id.* at 94. And Sappington's wife, Vicki, declared that her father-in-law told her that the noises he heard led him to believe that Fennell was physically and verbally abusing Stites. *Id.* at 98–99. Another man, Richard Scroggins, testified that he saw Fennell yelling abusive and obscene language at Stites for two to three minutes in a parking lot, including calling her a "lying f**king b*tch." 2022 CCA Submission at 23.

Rebecca Peoples, who worked with Stites at the H-E-B, also swore that Stites told her "she was afraid of her fiancé." *Id.* at 60. Another coworker, Lee Roy Ybarra, recounted in a declaration that "the few times that [Stites's] fianc[é] entered the store to visit her, she would become a nervous wreck" and "there were times that Stacey would deliberately hide so that she didn't have to talk to him." *Id.* at 63. Ms. Dickinson, also a co-worker, testified that Fennell imposed a curfew on Stites and did not permit her to socialize outside of work. 2022 CCA Submission at 23. When Fennell would visit Stites at work, he would cause a scene, so Stites's co-workers would alert her to his presence so she could avoid him. 2022 CCA Submission at 23. Still another co-worker and former classmate of Stites, Paul Espinoza, testified that he witnessed Fennell come into the HEB, approach Stites in an "aggressive manner," and speak to her like "a child being scolded." 2022 CCA Submission at 24. The only witnesses to testify that Fennell and Stites had a good relationship were Fennell and his mother and sister.

Fourth, post-trial testimony reveals inconsistencies in Fennell's account. For example, Curtis Davis, a Criminal Investigator for the Bastrop County Sherriff's Office, who was with Fennell on the day Stites's

body was discovered, testified that Fennell's contemporaneous account of his recent whereabouts and activities that morning differed starkly from Fennell's account at Reed's trial. Fennell told Davis that he "had a few beers" and came home "later that night" after Stites "was asleep." *Id.* at 74–75. Fennell also revealed to Davis that he was supposed to drive Stites to work in his truck, but Stites ended up driving herself. *Id.* at 73. (Stites's mother also stated that "Jimmy said he was going to take Stacey to work the next morning because he wanted his truck." *Id.* at 114). Fennell invoked the Fifth Amendment when confronted with Davis's statement. *See id.* at 81–83.

The foundation of the State's case—that Stites was killed by Reed, a stranger, as she drove to work—crumbles under the weight of the post-conviction evidence (1) discrediting the State's key theory that Stites's time of death necessarily coincided with the time Reed's sperm was deposited and (2) establishing Fennell's self-proclaimed motive and opportunity to murder Stites.

III. DNA TESTING COULD EXONERATE REED.

Like Morton's, Reed's conviction rested on paltry physical evidence and false testimony about the victim's time of death from pathologist Dr. Bayardo. Decades after his conviction, Morton's access to DNA testing on a bloody handkerchief on a construction site near his home—otherwise not known to be connected to his wife's murder—proved his innocence and led to the identification, prosecution, and imprisonment of the true murderer.

Reed likewise deserves the opportunity to prove his innocence through DNA testing. But Reed's claim for

DNA testing is even more compelling than Morton's. Reed does not seek DNA testing only of items that *might* be connected with the murder. He seeks to have crime-scene items *known* to have been handled by the killer—including *the murder weapon*—DNA tested for the first time. DNA testing could prove Reed's innocence.

For purposes of analyzing Reed's request for DNA testing, the Texas Court of Criminal Appeals (CCA) put the items of evidence that Reed requested be DNA tested into two categories: (1) items excluded because the State potentially contaminated them with other persons' DNA; and (2) items excluded because they were not exculpatory assuming the truth of the time-of-death and degredation-of-sperm testimony at trial.

1. In the first category were the following, each of which was known to have been touched by the killer:

The belt. It is undisputed that Stites was strangled to death with her own webbed belt, with such force that the woven belt was "torn not cut" into two pieces. *Ex parte Reed*, 271 S.W.3d at 705. Investigators recovered one piece of the belt near Stites's body and the other piece of belt next to the driver's side door of Fennell's truck. *Id*. Undisputed testimony from one of Reed's experts established that "there would likely be a significant deposit of the perpetrator's skin cells on" the belt pieces. Pet. App. 45a–46a. Neither piece of the murder weapon, which the killer undoubtedly touched, has ever been subjected to DNA testing.

The name tag. After Stites's body was roughly handled, dressed, and dragged after her death, her employee name tag was placed in the crook of her knee. Advisory Regarding Federal Habeas Filings, *Reed*, No.

19-cv-00794, Doc. 29-2 at 35–36. The name tag was almost certainly touched by Stites's killer but never subjected to DNA testing.

Stites's clothing. The bulk of Stites's clothing—her pants, underwear, shoes, socks, bra, and t-shirt—were likely handled by her killer when the killer moved Stites's body. *See id.* Besides one small stain on her underwear, *Ex parte Reed*, 271 S.W.3d at 706, these items have never been subjected to DNA testing.

The CCA's denial of DNA testing on these items violated Reed's rights to due process and access to the courts. The CCA ruled that testing is forbidden under the Texas statute if it is possible that the evidence has been contaminated, including at the hands of *the State*. Pet. App. 54a. But the face of Article 64 does not contain a non-contamination requirement, so Reed had no notice of this requirement until the CCA authoritatively construed Article 64 to require it. The text's chain-of-custody requirement provides only that the evidence must not have been "substituted, tampered with, replaced, or altered in any material respect." Tex. Code Crim. Proc. art. 64.03. Here, the custodian of the evidence testified it was "under lock and key," Pet. App. 49a, and it is undisputed that each item of evidence Reed seeks to test is what it purports to be. Yet the CCA denied testing on crucial pieces of evidence, including the murder weapon, based on the potential existence of "contamination."

This extra-statutory, non-contamination requirement renders Texas's procedures inadequate to protect the DNA-testing rights afforded by Article 64. The requirement is arbitrary because it applies regardless of whether advanced methods of DNA testing and

analysis could "obtain[] probative results"—as unrebutted expert testimony established was possible here even assuming contamination. *Id.* at 46a.

The non-contamination requirement also renders the right afforded by Article 64 illusory. The CCA's decision means that the State could defeat requests for potentially exculpatory DNA testing by itself contaminating the evidence. Officers of the court usually act with integrity, but post-conviction DNA testing serves as a guardrail against occasional abuses of power. Few appreciate this real possibility more than Texas exoneree and *amicus curiae*, Anthony Graves, who spent 18 years on death row—12 of them in solitary confinement—for a wrongful conviction obtained through a now-disbarred prosecutor's presentation of false testimony and intentional withholding of exculpatory evidence. Such bad State actors could easily take advantage of the CCA's non-contamination requirement to defeat a defendant's attempt for oversight. A check on power that is so easily defeated by the potential bad actor is no check at all.

Unintentional contamination by the State is even more common and just as arbitrary a reason to deny relief. And that is precisely what happened here. The State's then-customary storage of evidence together in a box, and courtroom officers' then-customary handling of such evidence, triggered this arbitrary rule and automatically meant that Reed could not benefit from an available, reliable way to test the evidence for DNA. This result is even more senseless because DNA testing is often most helpful in old cases where modern forensic techniques were previously unavailable, and where the State could not have foreseen the need to

store items separately for future touch-DNA-testing that was either in its infancy or did not yet exist.

The CCA authoritatively construed Texas's DNA-testing statute to make its procedures fundamentally unfair, resulting in enormous prejudice to Reed who could be exonerated if permitted to DNA test these crucial items, including the belt used to murder Stites.

2. The second category consisted of items the CCA concluded were properly stored by the State. As to these items, the CCA wrongly concluded that exculpatory DNA results would not have changed the jury's verdict. *See* 2021 Pet. App. 61a. These items include:

Beer cans. The latent-fingerprint examiner collected two beer cans across the road from where Stites's body was discovered. *Id*. at 64a. Curtis Davis declared that Fennell said he was drinking beer with friends the evening Stites died. *See supra* p. 20. Previous, decades-old DNA testing indicated that Stites and two police officers, one of whom was a close friend of Fennell, were potential matches to DNA on the beer cans. *See Ex parte Reed*, 271 S.W.3d at 705. Reed's request that the cans be tested again using the more precise methods available today could exculpate Reed by confirming a DNA match with both Stites and her true killer. If, for example, Fennell or his close friend's DNA is found on the beer cans discovered across the road from where Stites's body was found, it places them at the crime scene. Properly considering the post-trial developments casting serious doubt on the evidence placing Reed at the crime scene, finding Fennell or his friend's DNA on the beer cans would likely lead to Reed's acquittal.

Used condom. A resident recovered the used condom from nearby the crime scene. 2021 Pet. App. 39a. It has never been subjected to DNA testing. *Id.* If the Stites's DNA is on the outside of the condom, and the DNA of a person other than Reed is on the inside of the crime-scene condom, then that person—and not Reed—is the likely killer.

Cigarette lighter. Law enforcement collected several items from Fennell's truck, including a cigarette lighter. 2021 Pet. App. 65a. The killer likely handled the lighter because Stites—a non-smoker—had "a burn from a cigarette on her arm." *Ex Parte Reed*, 271 S.W.3d at 705. Yet the lighter has not been tested. If Fennell's DNA is discovered on the cigarette lighter that the killer likely touched, and Reed's is not, it would tend to exculpate Reed.

Fingerprint on Fennell's truck. If the latent fingerprint contains DNA from Fennell or another person with a history of violence towards young woman, it would tend to exculpate Reed.

The CCA never engaged in the above analysis, however, because it limited its review "to whether exculpatory results 'would alter the landscape if added to the mix of evidence that was available at the time of trial.'" Pet. App. 63a. In other words, it authoritatively interpreted the statute as requiring the court to assume the jury would have credited the State's non-DNA evidence, even if that non-DNA evidence has since been recanted, discredited, or proven false. *See id.* at 66a–67a. Thus, the CCA credited the State's largely recanted and discredited testimony that Reed sexually assaulted Stites around the time of her death,

asking whether the discovery of a redundant DNA profile would have likely resulted in Reed's acquittal even if the jury also believed Reed raped Stites right before she died. Against this fundamentally unfair standard, Reed never stood a chance.

For this second category of items, the CCA imposed another, extra-statutory requirement that Reed "establish why the[] items are relevant to establishing Stites's murderer," beyond "their proximity to the murder's commission" and the possibility that "a perpetrator could have touched them." 2021 Pet. App. 65a. In other words, the CCA decided to limit DNA testing to circumstances where a defendant can "demonstrate that the alternative murderer would have necessarily left" DNA on the items sought to be tested. *Id.* But this requirement, which Article 64 itself does not impose, is fundamentally unfair. False convictions often occur because a fraction of the evidence supports a fictitious narrative in which the falsely convicted defendant murdered the victim. And State officials pursue these convictions often because they lack visibility into the totality of the relevant evidence. If the State lacks such visibility, certainly so does the wrongfully convicted defendant. Requiring a defendant to prove (without the benefit of DNA testing) that an unknown killer deposited DNA on an item collected near a crime scene during a sequence of events unknown to the falsely convicted defendant is a burden that will be frequently impossible to satisfy.

Had these unfair standards been applied in Morton's case, he would still be serving a life sentence for a crime he did not commit. At his trial, Dr. Bayardo testified that Morton's wife's stomach contents proved

that she was killed before 1:30 a.m., when Morton admitted he was home with her. *Morton*, 761 S.W.2d at 877. Discovering an unknown person's DNA on a bloody handkerchief at a construction site near the Morton's home would not necessarily result in Morton's acquittal assuming Morton was lying about his presence at the time of his wife's murder. In addition, Morton could not have demonstrated the relevance of the piece of evidence that ultimately exonerated him to the identity of the killer other than its proximity to the crime scene. The bloody handkerchief would just as likely—if not more likely—have been discarded by a construction worker at the construction site where it was found than by the true killer of Morton's wife. Morton could not have satisfied the CCA's arbitrary, extra-statutory requirement that he "establish why the[] items are relevant to establishing Stites's murderer" beyond "their proximity to the murder's commission," 2021 Pet. App. 65a, and would have been denied due process as Reed was.

DNA testing is warranted here because DNA results favorable to Reed would be are individually and collectively exonerating. If DNA testing definitively excludes Reed from touching any of the items necessarily handled by the killer—including the murder weapon, nametag, cigarette lighter, and clothes—then Reed is likely not the killer. If Reed's DNA can be excluded from *each* of these items, then Reed is *surely* not the killer. If DNA testing also reveals that Fennell left significant deposits of DNA on these items, then Reed is not likely the killer. And if Fennell's DNA is found on the items collected near the crime scene, like the condoms and beer cans, then it would place Fennell at the

location where Stites's body was discarded and exculpate Reed. Finally, Reed could be exculpated if, as in Morton's case, the DNA of a yet-unknown person turns up on the murder weapon and that DNA is matched to a violent criminal who targets young women other than Fennell.

* * *

The compelling non-DNA evidence points to Reed's innocence, and provides strong grounds to believe DNA-testing evidence would too. But the State refused to permit Reed to test key pieces of evidence. Reed timely sought judicial relief, but the CCA construed Texas's DNA-testing statute to deny Reed due process and rejected the request largely because *the State* mishandled evidence. Reed sought relief in federal court, but the Fifth Circuit refused to reach the merits of his constitutional claims because it erroneously held that Reed should have appealed before he was even aware he had been harmed by the CCA's construction and application of the statute.

This Court should reverse the Fifth Circuit, because the harm cognizable under § 1983 in this context is not the state court's first adverse judgment, but its authoritative appellate construction of the DNA-testing statute in multiple ways that deprives Reed of his rights to constitutionally adequate DNA testing. This will ensure that the repeated denials of justice experienced by Reed do not result in Reed's wrongful execution and "allow the most permanent of consequences to weigh on the Nation's conscience." *Reed*, 140 S. Ct. at 690 (Sotomayor, J., respecting the denial of certiorari).

CONCLUSION

The Court should reverse the Fifth Circuit and remand so that it can reach the merits of Reed's due process claims.

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Respectfully submitted,

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