No. 21-442

In the Supreme Court of the United States

RODNEY REED, PETITIONER

v.

BRYAN GOERTZ

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

REPLY BRIEF FOR PETITIONER

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

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

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

Andrew F. MacRae
MACRAE LAW FIRM PLLC
3267 Bee Cave Rd.
Ste. 107, PMB 276
Austin, TX 78746

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

INTRODUCTION

In *Skinner v. Switzer*, 562 U.S. 521, 524-25, 530-32 (2011), the Court told prisoners that they can challenge the state courts' authoritative construction of DNA-testing laws on due process grounds. The Court also gave prisoners guidance on when to bring their claims: after giving state courts an opportunity to order DNA testing or justify the deprivation. *Skinner*, 562 U.S. at 530-32 & n.8; *District Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 68-71 (2009). That guidance, along with this Court's framework governing accrual for claims under 42 U.S.C. § 1983, shows that Reed's due process claim accrued at the end of the state-court litigation, after the Texas Court of Criminal Appeals (CCA) authoritatively construed Article 64 of the Texas Code of Criminal Procedure and denied rehearing. Only then did Texas "complete" its deprivation of Reed's liberty interest without due process. And even assuming Texas completed the due process violation earlier, other key considerations support tying accrual to the end of the state-court litigation: fundamental due process values and purposes, federalism, comity, judicial economy, predictability, practical reality, and fairness.

Goertz proposes two alternative accrual dates: when the trial court denied testing and when the CCA issued its decision. Both are wrong.

As *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019), and *Manuel v. City of Joliet*, 137 S. Ct. 911, 920-21 (2017), made clear, the accrual date for § 1983 claims turns on the specific constitutional right, the context in which that right is asserted, and the values and purposes underlying that right. Goertz ignores that analysis entirely. Indeed, he doesn't cite those

precedents *at all*. Consequently, his arguments don't make sense.

To begin, Reed's claim could not have accrued when the *trial court* denied testing because Reed challenges Article 64 as authoritatively construed *by the CCA*. That context defines the contours of Reed's due process claim and thus informs the accrual date. Goertz responds by alternatively ignoring that context or trying to change it.

Goertz's main argument is that Reed's due process claim accrued when the CCA issued its decision. Not so. The state-court litigation didn't end, and the due process violation wasn't "complete," before the CCA denied rehearing. Before then, the CCA could have changed its reasoning or result (or both), leading to a different authoritative-construction claim (or none at all). Goertz concedes as much, noting that "the outcome of a rehearing petition might change the contours" of a claim like Reed's. Br. 25 n.5. That means the state's failure to provide constitutionally adequate process, which can mean different things in various contexts, is not complete until the state-court litigation ends. Goertz's contrary argument ignores nearly every part of this Court's framework: he fails to mention, much less confront, (1) due process principles, values, and purposes; (2) the standard accrual rule; (3) the accrual date for analogous claims; and (4) the guidance to prisoners in *Osborne* and *Skinner*.

Principles of federalism and fairness favor Reed, too. Take predictability and administrability. Reed's rule would start the clock once the state-court litigation ends, no matter what judicial procedures exist and whether or not rehearing changes the contours of the authoritative-construction claim. That fixed date

advances a basic policy of limitations periods: certainty. Goertz's rule, on the other hand, provides less certainty because it would turn on whether the rehearing decision affects the contours of the claim. That approach would further burden federal courts by requiring a level of case-by-case discretion that *McDonough* discouraged. *See* 139 S. Ct. at 2158-59. Fairness also favors Reed. The short time between issuance and rehearing would promote adjudicative accuracy, at little state expense, by increasing the odds that prisoners will secure DNA testing.

ARGUMENT

I. The federal courts have jurisdiction over Reed's § 1983 claim.

The district court and court of appeals had jurisdiction over Reed's § 1983 claim. Reed Br. 22-24. Although jurisdiction comes first, *e.g.*, *Biden v. Texas*, 142 S. Ct. 2528, 2538 (2022), that's where Goertz *ends*. Goertz Br. 37-44. Order aside, Goertz's arguments fail because they misconstrue Reed's claim and cannot be squared with the Court's decisions.

A. There is no *Rooker-Feldman* problem. *Skinner* controls. Reed Br. 22. Reed challenges Article 64 as authoritatively construed by the CCA. Goertz agrees, calling it "Reed's authoritative-construction claim." Goertz Br. 10. That claim is like Skinner's, who "[did] not challenge the adverse CCA decisions themselves," but rather "the Texas statute they authoritatively construed." *Skinner*, 562 U.S. at 532. As in *Skinner*, Reed's claim "encounters no *Rooker-Feldman* shoal" because it challenges a state "statute," not a "state-court decision." *Id. Contra* Montana Br. 12.

As anticipated (Reed Br. 40-42), Goertz tries distinguishing *Skinner* by cherrypicking language from

Reed's complaint. *See* Goertz Br. 42-43. But jurisdiction, like accrual, is claim-specific. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021). Goertz admits (Br. 10) that Reed "asserted" an "authoritative-construction claim." The lower courts had jurisdiction over that claim, *Skinner*, 562 U.S. at 532, no matter Goertz's complaints about jurisdiction over any other claims, *Mata v. Lynch*, 576 U.S. 143, 148 (2015).

B. Reed has Article III standing. Reed Br. 23-24. Goertz does not contest Reed's injury, the deprivation of his state-created liberty interest in using DNA testing to prove his innocence. Goertz instead argues (Br. 37-39) that Reed has not carried his pleading-stage burden of showing causation and redressability. Goertz is wrong.

1. Reed has met his "relatively modest" burden of showing a "fairly traceable" connection between his injury and Goertz's conduct. *Bennett v. Spear*, 520 U.S. 154, 171 (1997). Reed alleges that Goertz (a) "has the power to control access" to the evidence, (b) "has directed or otherwise caused each of the non-party custodians of the evidence … to refuse to allow Mr. Reed to conduct DNA testing," and (c) "continues to oppose … DNA testing" "on grounds that cannot withstand constitutional scrutiny"—*i.e.*, based on the "CCA's unprecedented interpretation … of Article 64." JA15-JA16, JA39; *see also* Pet. App. 5a-6a n.2.

Those allegations show a "causal connection between the injury"—Reed's inability to conduct DNA testing—"and the conduct complained of"—Goertz's denial of testing unless Reed complies with the CCA's authoritative construction of Article 64. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Unlike

in *California v. Texas*, 141 S. Ct. 2104, 2115 (2021), where there was "no action" but "only the statute's textually unenforceable language," Goertz is blocking DNA testing based on Reed's supposed noncompliance with Article 64 as construed by the CCA. Reed has traced his injury to Goertz's conduct. At this stage, Reed simply needed to allege facts that, accepted as true, support a plausible inference of causation. *Lujan*, 504 U.S. at 561; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). He has done exactly that.

Despite recognizing that Reed is master of his complaint, Goertz rewrites (Br. 39, 41) Reed's claim in a way that concedes causation (and *Ex parte Young*) but changes the accrual question. Goertz wants Reed to contest Goertz's withholding of evidence in 2014. But Reed challenges Goertz's decision to "continue[]" denying testing based on the CCA's authoritative interpretation of Article 64, "grounds that cannot withstand constitutional scrutiny." JA15, JA39.

2. Reed also has met his "relatively modest" burden, *Bennett*, 520 U.S. at 171, of showing that equitable relief will "likely" redress his injury. *FEC v. Cruz*, 142 S. Ct. 1638, 1646 (2022). That's because "it is substantially likely" that Goertz "would abide by" a federal court's declaration that the basis for his action, the CCA's construction of Article 64, violates due process and is unenforceable. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992); *see also Steffel v. Thompson*, 415 U.S. 452, 470-71 (1974) (officials are likely to follow declaratory judgment).

Goertz (Br. 38) selectively quotes *California*, trying to make it seem like plaintiffs seeking only declaratory relief never have standing. But that's not what *California* held. Rather, *California* simply

reiterated the principle that remedies "operate with respect to specific parties." 141 S. Ct. at 2115 (citation omitted). So the question here is whether declaratory relief is likely to stop Goertz from relying on the CCA's unconstitutional interpretation of Article 64 to continue denying DNA testing. The answer is yes.

First, Reed alleges that he has "proved" "his entitlement to relief under the plain language of Article 64." JA31. So, if a federal court were to declare that the extratextual requirements of Article 64 violate due process and are unenforceable, then Reed would be entitled to DNA testing. *Second*, given Goertz's statutory duties related to administering justice in criminal cases, *see* Reed Br. 43-44—which Goertz does not contest—it is substantially likely that Goertz would abide by the federal declaratory order and allow DNA testing. *Lastly*, as Goertz admits, he has power to "allow DNA testing at any time," Br. 5, meaning he can abide by a federal declaration immediately, without waiting for any state-court authorization.

C. *Ex parte Young* permits Reed's § 1983 claim. Reed Br. 23. Goertz no longer disputes the availability of declaratory relief. But he still claims (Br. 39-41) he isn't connected to Article 64. Goertz is wrong.

1. A plaintiff may challenge a state law as unconstitutional by suing a state official with "some connection with the enforcement" of that law. *Ex parte Young*, 209 U.S. 123, 157 (1908). That "some connection" need not "be declared in the same act" being challenged. *Id.* It can even exist at common law. *Id.* at 161.

Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021), is a good example. While the challenged law was codified in the Texas Health and Safety Code, this

Court looked to the Texas Occupations Code to find the requisite connection for certain officials. *Id.* at 534-35. The Court also held, consistent with *Ex parte Young*, 209 U.S. at 159-61, that the officials were proper defendants "at the motion to dismiss stage" even though their state-law duties were discretionary. *Jackson*, 142 S. Ct. at 535-36 (officials "may or must take enforcement actions").

2. Goertz is "sufficiently connected" to Article 64. *Ex parte Young*, 209 U.S. at 161. He "refuse[s] to allow" testing on the evidence to which he "control[s] access." JA15-JA16. And, as Goertz admits (Br. 5), citing *Skinner v. Texas*, 484 S.W.3d 434, 436 (Tex. Crim. App. 2016), he can allow DNA testing when a prisoner files an Article 64 motion. That concession disproves Goertz's argument that he "lacks *any control* over whether a movant qualifies for DNA testing." Goertz Br. 40 (emphasis added). It also proves that Goertz has a duty to implement Article 64. That duty appears to be common-law-based, *cf. Skinner*, 484 S.W.3d at 436, which satisfies *Ex parte Young*, 209 U.S. at 161. Goertz also has statutory duties related to Article 64. Reed Br. 43-44. Goertz ignores, rather than refutes, those duties.

Those connections are "sufficient for *Ex parte Young* at this stage," Pet. App. 5a-6a n.2, because they show that equitable relief likely will "serve[] directly to bring an end to a present violation of federal law." *Papasan v. Allain*, 478 U.S. 265, 278 (1986). Goertz is refusing to allow DNA testing, Reed alleges, unless Reed satisfies Article 64 as construed by the CCA. Reed also alleges that the conditions the CCA read into Article 64 are unconstitutional. If Reed is right, then Goertz is acting "without the authority of … the State," and so without immunity, because the

"legislative enactment" Goertz purports to uphold is "void." *Ex parte Young*, 209 U.S. at 159.

Given Reed's allegations and Goertz's undisputed involvement in Texas' DNA-testing protocol, *see* Goertz Br. 5, Goertz is the official "most responsible" for implementing Article 64. *Berger v. North Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2197 (2022). Declaratory relief will thus serve directly to ensure that Goertz cannot uphold the void conditions Reed challenges here. It doesn't matter that Goertz doesn't judicially interpret Article 64, *contra* Montana Br. 7, or that courts adjudicate Article 64 cases, *contra* Goertz Br. 40-41. While officials' enforcement of challenged laws often must proceed through the courts, that doesn't diminish the officials' connection to the enforcement of those laws. Indeed, *Ex parte Young* involved threatened criminal proceedings, 209 U.S. at 128-29, while *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-80 (1992), for example, was a challenge to state laws that attorneys general threatened to enforce through litigation. If Goertz were right, prisoners could *never* challenge Article 64 because they cannot sue Texas courts. *Jackson*, 142 S. Ct. at 532. *Osborne* and *Skinner* would thus be "a sham." *Nance v. Ward*, 142 S. Ct. 2214, 2225 (2022).

In sum, because Goertz is "giving effect to" Article 64 "in a manner that allegedly injures [Reed] and violates his constitutional rights, an action … for declaratory relief is available against [Goertz]." *McDaniel v. Precythe*, 897 F.3d 946, 952 (8th Cir. 2018) (Colloton, J.).

II. Reed's § 1983 claim accrued at the end of the state-court litigation.

Under this Court's governing framework, Reed's due process claim accrued at the end of the Article 64 litigation, after the CCA authoritatively construed the statute and denied rehearing. While Goertz disagrees, he doesn't even try analyzing the question under this Court's framework. He instead proposes two accrual dates based on an ad hoc analysis. Both are incorrect. The nature of Reed's due process claim shows that the trial court's denial of testing is the wrong date. And the CCA's issuance of its decision isn't right, either, because core due process principles and purposes, plus principles of federalism and fairness, all support tying accrual to the end of the state-court litigation.

A. The accrual analysis for § 1983 claims starts with the specific constitutional right and the context for invoking it.

1. This Court has established a clear framework governing the accrual date for § 1983 claims. *See* Reed. Br. 24-25, 37. The analysis "begins with" "the specific constitutional right" that the claim invokes, *McDonough*, 139 S. Ct. at 2155 (citation omitted), and "courts must closely attend to the values and purposes" of that right, *Manuel*, 137 S. Ct. at 921. Both the "right at issue" and the "nature of [the] claim" are essential to the analysis. *McDonough*, 139 S. Ct. at 2155, 2160.

Once the "contours" of the claim are established, *id.* at 2155, courts must look to certain markers as a "guide," *Manuel*, 137 S. Ct. at 921. Common-law rules and analogous common-law torts often are insightful. *Id.* at 920-21. So are "core principles of federalism, comity, consistency, and judicial economy," not to

mention practical reality and fairness. *McDonough*, 139 S. Ct. at 2155, 2158. These latter considerations, viewed holistically, may favor "a distinctive rule" delaying accrual past "the standard rule." *Wallace v. Kato*, 549 U.S. 384, 388-89 (2007) (citation omitted).

2. *McDonough* and *Manuel* are this Court's most recent decisions explaining the framework governing the accrual date for § 1983 claims. Goertz ignores them entirely, thus "fail[ing] to respect the force of [the Court's] precedents," which "is more than enough reason to reject" his arguments. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019).

Goertz also makes two big-picture mistakes. *First*, he spends most of his time refusing to engage with Reed's specific claim. As the Fifth Circuit recognized, Reed "targets 'as unconstitutional the Texas statute that the Court of Criminal Appeals' decision authoritatively construed.'" Pet. App. 8a (alteration adopted; citation omitted). Yet Goertz tries evading Reed's claim by suggesting (Br. 14-17) that Reed has changed the question presented and is no longer bringing a "facial" challenge. Nonsense.

For one thing, the question presented has not changed; the Petition worded it broadly, repeatedly explaining that "[a] § 1983 action challenging state-law procedures as inadequate depends on the state courts' construction of those laws in the first place." Pet. 4; *see* Pet. 22-24.

For another, it's unclear what Goertz's confused "facial challenge" discussion is meant to accomplish. Reed facially challenges Article 64 as-authoritatively-construed, not Article 64 as it appears in the statute books alone. That makes sense: "A facial challenge is really just a claim that the law or policy at issue is

unconstitutional in all its applications." *Bucklew*, 139 S. Ct. at 1127. And when state courts of last resort, like the CCA, construe state law, they distill rules that apply across the board, as Goertz later acknowledges (Br. 22-23). Regardless, Goertz gains nothing from his game of semantics, because he ultimately agrees that the Court "*should* … consider … Reed's claim 'specifically attack[ing] the authoritative construction' of Chapter 64." Goertz Br. 16 (emphasis added; quoting Reed Br. 26).

Second, even when he purports to address "Reed's authoritative-construction claim," Goertz Br. 17, Goertz still ignores this Court's directive to engage with the claim alleged. He first pretends (Br. 18-21) that Reed is attacking the trial court's order denying testing. "That is not, however, the nature of [Reed's] claim." *McDonough*, 139 S. Ct. at 2160. Goertz then avoids mentioning the "values and purposes" underlying Reed's claim, even though this Court "must closely attend to" those factors. *Manuel*, 137 S. Ct. at 921; *see infra* pp. 14-15, 19-20.

B. Reed's § 1983 claim accrued after the CCA authoritatively construed Article 64 and denied rehearing.

Because Goertz ignores the governing framework, it's helpful to review how that framework applies before addressing Goertz's arbitrary accrual dates.

Reed's due process claim challenges Article 64 as authoritatively construed by the CCA. Under this Court's governing framework, that context-specific claim did not accrue until the end of the Article 64 litigation, after the CCA authoritatively interpreted the statute and denied rehearing. Only then did Texas "complete" its deprivation of Reed's liberty interest

"*without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125-26 (1990). Additionally, Reed's accrual rule promotes core due process and accrual principles, and it's easily administrable.

1. Fundamental due process principles, which Goertz ignores, together with general accrual rules, show that Reed's claim accrued once the state-court litigation ended. Reed Br. 26-27, 30-31.

The Due Process Clause of the Fourteenth Amendment guarantees individuals "fair procedure." *Zinermon*, 494 U.S. at 125. States violate that "specific constitutional right," *McDonough*, 139 S. Ct. at 2155 (citation omitted), when they "take away protected entitlements," *Osborne*, 557 U.S. at 67, without providing "constitutionally adequate" process, *Zinermon*, 494 U.S. at 126. Constitutionally adequate process means different things "in various contexts." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). Courts must therefore resolve due process claims by considering the "process the State provided" in its entirety. *Zinermon*, 494 U.S. at 126. After all, alleged due process violations are "not complete unless and until the State fails to provide due process." *Id.*

Here, Reed claims that Texas' procedures governing DNA testing violate due process because, as authoritatively construed by the CCA, they condition access to testing on compliance with fundamentally unfair requirements. *See* Reed Br. 14-16. Under the "standard" accrual rule, that claim was not "complete," meaning the clock did not start running, *Wallace*, 549 U.S. at 388 (citation omitted), until the CCA authoritatively construed Article 64 and denied rehearing, thereby ending the state-court litigation. Said differently, because due process claims are "not

complete unless and until the State fails to provide due process," *Zinermon*, 494 U.S. at 126, Reed's claim did not "come[] into existence," *Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (citation omitted), until the process Reed challenges—Texas' procedures governing access to DNA testing, as authoritatively construed by the CCA—was conclusively established.

Common sense confirms that conclusion. Reed couldn't have brought his due process claim before the state-court litigation ended because he couldn't have predicted (a) that the CCA would authoritatively interpret Article 64 to include procedures not reflected in the statutory text, or (b) whether those not-yet-identified procedures would be adequate to protect his state-created liberty interest. Given the nature of Reed's claim, it only makes sense to let the CCA—Texas' authoritative court in criminal cases—use the full judicial process, including rehearing, to determine what process Texas will provide prisoners like Reed.

2. *Osborne* and *Skinner*, too, signal that Reed's claim accrued after the state-court litigation ended. Reed Br. 28-30. In holding that prisoners have a liberty interest in using state-created procedures to access DNA testing, the Court cautioned prisoners against challenging those procedures in federal court without first giving states an opportunity to either order testing or justify the deprivation. *Osborne*, 557 U.S. at 68, 71; *see Skinner*, 562 U.S. at 530-31 & n.8.

Reed followed this Court's guidance and invoked the state's procedures. Indeed, knowing that it would be his "burden to demonstrate the inadequacy of the state-law procedures available to him in state postconviction relief," *Osborne*, 557 U.S. at 71, Reed gave Texas every opportunity, including rehearing, to

justify or prevent the deprivation of his liberty interest. Given the nature of Reed's due process claim, *Osborne* and *Skinner* support adopting the accrual date that gives state courts of last resort every opportunity to explain the process by which deprivations may (or may not) occur.

3. The "values and purposes," *Manuel*, 137 S. Ct. at 921, underlying the due process principles discussed above also support tying accrual to the end of the state-court litigation. Reed Br. 30-32. But Goertz ignores them.

"Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey*, 435 U.S. at 259. In the criminal context, due process serves important purposes, like promoting adjudicative accuracy and guarding against the "dire" "consequences of an erroneous determination." *Cooper v. Oklahoma*, 517 U.S. 348, 363-64 (1996).

Reed's accrual date promotes those values and purposes. For example, state courts of last resort will be better equipped to guard against unjustified deprivations of liberty interests if they are given the opportunity to use the entire judicial process, including rehearing, to determine what state law means. Additionally, if this Court adopts an accrual rule that further encourages prisoners to use all available avenues for relief in state court, then prisoners who heed this Court's guidance may "well get" the DNA testing they seek. *Osborne*, 557 U.S. at 71. That would obviate the need for federal review, promoting comity and federalism. *Infra* pp. 15, 22-23. It would also promote adjudicative accuracy given DNA testing's

"unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." *Osborne*, 557 U.S. at 55.

4. Analogous claims, *see Manuel*, 137 S. Ct. at 921, likewise support tying accrual to the end of the state-court litigation. Reed Br. 32-36. Goertz ignores this analysis, too.

The most analogous claims are traditional due process claims, challenges to legislation and administrative action, and the common-law torts of malicious prosecution and false imprisonment. Those analogues show that Reed's claim wasn't "complete," *Zinermon*, 494 U.S. at 126, while the Article 64 proceedings were "ongoing," *McDonough*, 139 S. Ct. at 2158, because only the end of that litigation could "mark the 'consummation' of the [CCA's] decisionmaking process," *Bennett*, 520 U.S. at 177-78 (citation omitted).

5. Lastly, Reed's accrual rule promotes federalism, comity, judicial economy, and fairness. Reed Br. 36-39. Tying accrual to the end of the state-court litigation will avoid parallel litigation, preserving the "autonomy of state courts" to construe state law free from a cloud of unconstitutionality and saving federal courts from using "stays and ad hoc abstention" "to safeguard comity" on a "case-by-case" basis. *McDonough*, 139 S. Ct. at 2158-59.

Reed's accrual rule is also administrable and predictable: the clock runs once the state-court litigation ends, no matter what state-specific judicial procedures exist. By setting "a fixed date," Reed's rule advances "the basic policies of all limitations provisions," particularly "certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Gabelli*, 568 U.S. at 448 (citation omitted).

Plus, prisoners will have a fair chance to vindicate their rights by bringing the specific claim that this Court left "room" for in *Skinner*, 562 U.S. at 525.

State interests also align with Reed's accrual rule. Take, for instance, a Texas equitable-tolling rule. "Where 'a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right.'" *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991) (citations omitted). Texas courts adopted that rule to avoid "a useless, burdensome, or duplicative act that ties up both litigant and court time unnecessarily." *El Pistolón II, Ltd. v. Levinson Alcoser Assocs., L.P.*, 627 S.W.3d 494, 499 (Tex. Ct. App. 2021) (citation omitted). Reed's accrual rule avoids the same problems.

C. Goertz's counterarguments lack merit.

Goertz says Reed's claim accrued either when the trial court denied testing or when the CCA issued its decision. Neither date is correct, because neither follows from the governing framework. *Supra* pp. 9-10. Because accrual is all about what happened when, it helps to discuss Goertz's arguments in chronological order: first the trial court, then the CCA.

1. The nature of Reed's claim shows that the trial court's denial of testing is the wrong accrual date.

Goertz argues (Br. 18-21) that Reed's due process claim—which challenges Article 64 as authoritatively construed *by the CCA*—accrued when the trial court denied testing in 2016, before the CCA even had an opportunity to construe Article 64. Goertz is wrong.

a. Reed, as master of his complaint, Goertz Br. 14, "challenges the constitutionality of Article 64" "as interpreted" "by the CCA." JA14. The "context" or "nature" of that claim, *McDonough*, 139 S. Ct. at 2160, is the authoritative construction of state law by the CCA, not the trial court. *See* Pet. App. 8a.

One reason Reed challenges the CCA's authoritative construction is because the trial court *didn't* interpret Article 64. In 2014, the trial court failed to fully address the Article 64 elements. And in 2016, the trial court signed and docketed with the CCA both Reed's *and* Texas' contradictory proposed findings of fact. The trial court later clarified, via email, that it meant to adopt only Texas' submission. *See* Reed Br. 13-14. But the court still did not interpret Article 64. *See* Pet. App. 77a-103a. For example, contrary to Goertz's suggestion (Br. 18), the court did not construe Article 64 to include a non-contamination requirement. It instead noted, as a *factual* matter, that the evidence might be contaminated. Pet. App. 94.

Another reason Reed challenges the CCA's authoritative construction is because the trial court *couldn't have* authoritatively interpreted Article 64. Only the CCA can authoritatively speak on criminal matters in Texas. Reed Br. 26-27; *Texas ex rel. Vance v. Clawson*, 465 S.W.2d 164, 168 (Tex. Crim. App. 1971). Goertz doesn't disagree. He instead observes that trial courts can interpret statutes. So what? As Goertz admits in the same breath, trial court interpretations of state law can be reversed on appeal. *See* Goertz Br. 21; *see also, e.g.*, *Smith v. Texas*, 165 S.W.3d 361, 364-65 (Tex. Crim. App. 2005). That makes sense. State trial courts are courts of first resort, not last, and in Texas, the law-of-the-case doctrine applies to "questions of law decided on appeal

to a court of last resort." *In re United Servs. Auto. Ass'n*, 521 S.W.3d 920, 927 (Tex. Ct. App. 2017). And, of course, *Skinner* and *Osborne* confirm that it only makes sense for a prisoner denied DNA testing to *take* an available appeal. *See supra* pp. 13-14. At that point, it's what the appellate court conclusively says that matters.

Because Reed challenges *the CCA's* authoritative construction of Article 64, his claim couldn't have accrued—indeed, it didn't exist—when the trial court denied relief. Reed Br. 26-27. Refusing to accept the nature of Reed's claim is not a valid rebuttal.

b. Goertz fights (Br. 19-20) Reed's reliance on *Skinner*, noting that *Skinner* did not address accrual. But *Osborne* and *Skinner* "told prisoners," *Nance*, 142 S. Ct. at 2225, to first try their hand in state court. *Supra* pp. 13-14. Given that guidance, it would neither make "practical sense" nor be fair to start the clock while state-court litigation is ongoing. *Green v. Brennan*, 578 U.S. 547, 557 (2016); Reed Br. 38-39.

c. Goertz invokes "the diversity of approaches" nationwide governing DNA testing, but that nonuniformity supports *Reed*. Goertz Br. 20. Reed's accrual rule is administrable and predictable. *Supra* pp. 15-16. No matter whether an appeal is mandatory, discretionary, or unavailable, and no matter which state court can authoritatively construe state law, *see* Goertz Br. 20, every due process claim modeled after *Skinner* will accrue after the same procedural moment: when the state-court litigation ends. Here, the state-court litigation ended when the CCA denied rehearing. Whatever the judicial procedures, Reed's accrual rule is easily applied. Goertz, on the other

hand, fails to explain how courts could apply his accrual rule with any consistency.

Lastly, it's unclear why Goertz discusses (Br. 20-21) equitable tolling, which, if anything, only helps Reed. *See supra* p. 16. Accrual precedes tolling. *Wallace* mentioned tolling only after it had departed from the standard accrual rule and adopted an even *later* accrual date based on the "reality" about when a § 1983 plaintiff can sue. 549 U.S. at 389, 394-95. And as Reed explained (Br. 47-48), *Wallace* supports his accrual date: the end of the state-court litigation.

2. General accrual rules, due process values and purposes, and federalism and fairness all show that Reed's claim did not accrue before the state-court litigation ended.

Goertz argues (Br. 22-32) that Reed's due process claim accrued when the CCA issued its decision, before the state-court litigation ended and the alleged due process violation was "complete." Goertz is wrong not just about the standard accrual rule but also about the additional considerations supporting "a distinctive rule" for Reed's context-specific claim. *Wallace*, 549 U.S. at 389.

a. Goertz doesn't even try to ground his accrual-upon-issuance rule in this Court's framework. He does not mention due process principles, even though this Court "must" tailor the accrual date to "'the specific constitutional right' at issue," including "the values and purposes" of that right. *Manuel*, 137 S. Ct. at 920-21 (citation omitted). Nor does Goertz mention the common-law accrual rule, even though that is where "courts are to look first." *Id.* at 920. Indeed, in explaining his accrual-upon-issuance rule, *see* Goertz Br. 22-

32, Goertz does not argue that Reed's due process claim was "complete," *see Wallace*, 549 U.S. at 388; *supra* pp. 12-13, when the CCA issued its decision. Goertz also does not mention, let alone rebut Reed's reliance on, the accrual date for "analogous" claims. *See McDonough*, 139 S. Ct. at 2156; *supra* p. 15.

b. Goertz's accrual-upon-issuance rule boils down to one concept: decisions from courts of last resort, like this Court, are binding when issued "even though they may yet be altered or withdrawn." Goertz Br. 23. Therefore, the argument goes, the denial of rehearing is irrelevant because Reed "had notice" that Texas would deprive him of his liberty interest without due process when the CCA issued its decision. *See* Goertz Br. 22-26.

That logic is flawed. Despite repeating (Br. 22-28) that authoritative decisions are binding when issued, Goertz doesn't connect that concept to his conclusion that rehearing is irrelevant for accrual purposes. Quite the opposite, Goertz concedes (Br. 25 n.5) that "the outcome of a rehearing petition might change the contours" of a claim like Reed's. That concession confirms three things.

First, Goertz's accrual-upon-issuance rule is inconsistent with precedent. Accrual depends on the "contours" of the claim. *McDonough*, 139 S. Ct. at 2155; *Manuel*, 137 S. Ct. at 920. If the "contours" of an as-authoritatively-construed claim can change during rehearing, as Goertz admits, then that claim cannot accrue while rehearing is pending. Said differently, the claim isn't complete until the state-court litigation ends. *See supra* pp. 12-13.

Second, Reed's accrual rule is more predictable and administrable. Under Reed's rule, the clock runs

after the state-court litigation ends, regardless of whether rehearing would change the contours of the as-authoritatively-construed claim. *Cf. supra* pp. 15-16, 18. But under Goertz's rule, federal courts would need to compare the original state-court opinion with the rehearing opinion and decide which should start the clock. Additionally, with no "fixed" accrual date, *defendants* will lack "certainty," thus undermining one of the most "basic policies" of limitations periods. *Gabelli*, 568 U.S. at 448 (citation omitted).

Lastly, Goertz's concession confirms that, under core due process principles, the deprivation of Reed's liberty interest "*without due process of law*" was not "complete," *Zinermon*, 494 U.S. at 125-26, until after the CCA denied rehearing and the state-court litigation ended. Until that moment, as Goertz acknowledges, the justification for the deprivation could have changed. And it's the conclusive justification that matters, because due process violations are "not complete unless and until the State fails to provide due process." *Id.* at 126; *see also supra* pp. 12-13. It thus does not matter whether the CCA's April 2017 decision gave Reed "notice" that Texas would deprive him of his liberty interest without due process, *contra* Goertz Br. 26, just as it does not matter whether the trial court's denial of relief gave Reed similar notice, *see* Reed Br. 47. Reed's claim was not "complete," and thus did not accrue, until Texas conclusively deprived him of his liberty interest without due process, *Zinermon*, 494 U.S. at 126.

c. Goertz's arguments about other stages of the judicial process (Br. 28-29) don't undermine Reed's accrual rule. While considerations like federalism and fairness may favor delaying accrual past the denial of rehearing, including to the denial of cert, *cf.* Pet. 19;

Reply 3-4, the point here is that a claim like Reed's can accrue no earlier than the denial of rehearing. State courts of last resort can (and sometimes do) modify their reasoning on rehearing, and because claims like Reed's challenge the state courts' authoritative construction of state law, those modifications could change the contours of the claim. Only after denial of rehearing do "no other state avenues for relief remain open," *Lawrence v. Florida*, 549 U.S. 327, 332 (2007), meaning that the *state's* justification for the deprivation, based on its authoritative construction of state law, becomes conclusive.

d. Contrary to Goertz's suggestion (Br. 30-31), a rehearing-based accrual rule won't "harm federal-state relations," because it won't alter the authoritative effect that state-court decisions have upon issuance. In reality, Reed's rule will promote federal-state comity by giving state courts every opportunity, including rehearing, to explain the process by which deprivations may (or may not) occur. Indeed, the Texas Supreme Court has viewed rehearing as a relevant marker in the context of limitations periods. *See Zive v. Sandberg*, 644 S.W.3d 169, 175-79 & n.8 (Tex. 2022). If the deprivation doesn't occur after rehearing, then there will be no need for federal review at all. *Supra* p. 14. That's why *Osborne* and *Skinner* advised prisoners not to challenge DNA-testing procedures in federal court without first giving states an opportunity to either order DNA testing or justify the deprivation. *Supra* pp. 13-14. It's telling that Goertz entirely ignores *Osborne* and *Skinner* in advancing his accrual-upon-issuance rule. *See* Goertz Br. 22-32.

Goertz fails to rebut the risk of parallel litigation. *See* Goertz Br. 31. In fact, Goertz admits (Br. 25) that his rule would cause a prisoner like Reed to "seek a

stay" of a state-court decision while, "in the meantime," he concurrently litigates in federal court. That's a recipe for conflict, not comity. Moreover, Goertz's suppositions (Br. 31-32) about what may or may not happen on rehearing, and how long that process might take, do not cure the problems associated with parallel litigation. "[T]he onus to safeguard comity" should not be put "on district courts exercising case-by-case discretion." *McDonough*, 139 S. Ct. at 2158.

e. The general interest in obtaining finality of convictions, *see* Goertz Br. 32, does not outweigh the specific interest that prisoners have in bringing the § 1983 claim that this Court left "room" for. *Skinner*, 562 U.S. at 525. That's especially true here, where the "stakes could not be higher." Pet. 1.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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

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

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

Andrew F. MacRae
MACRAE LAW FIRM PLLC
3267 Bee Cave Rd.
Ste. 107, PMB 276
Austin, TX 78746

Counsel for Petitioner

September 22, 2022