No. 23-569

In the Supreme Court of the United States

RODNEY REED, PETITIONER

v.

STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

REPLY BRIEF FOR PETITIONER

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

Jeremy Patashnik
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001

Cliff C. Gardner
Michelle L. Davis
Gregory P. Ranzini
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

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 CONTENTS i

TABLE OF AUTHORITIES..................................... ii

INTRODUCTION..1

ARGUMENT..3

I. The CCA's decision deepens the conflict over the *Schlup* standard and violates Reed's due-process rights. 3

II. The trial court's gross abdication of its judicial duty and the CCA's failure to remedy that constitutional violation require this Court's intervention to provide guidance on an issue that calls both justice and its appearance into doubt. 7

III. This case is an ideal vehicle, and Texas' *Teague* argument misunderstands well-established antiretroactivity principles. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Banister v. Davis,
140 S. Ct. 1698 (2020) 11

Bousley v. United States,
523 U.S. 614 (1998) 11

Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California,
508 U.S. 602 (1993) 1, 7, 8, 9

District Attorney's Office for Third Judicial District v. Osborne,
557 U.S. 52 (2009) 9, 12

Evitts v. Lucey,
469 U.S. 387 (1985) 11, 12

Ex parte Welborn,
785 S.W.2d 391 (Tex. Crim. App. 1990) 6

Goldberg v. Kelly,
397 U.S. 254 (1970) 8

Herrera v. Collins,
506 U.S. 390 (1993) 4

In re Allen,
366 S.W.3d 696 (Tex. 2012) 4

Merrell Dow Pharmaceuticals Inc. v. Thompson,
478 U.S. 804 (1986) 5

Morrissey v. Brewer,
408 U.S. 471 (1972) 8

TABLE OF AUTHORITIES
(continued)

Page(s)

Reed v. Goertz,
598 U.S. 230 (2023) 1

Reed v. Texas,
140 S. Ct. 686 (2020) 1, 2

Schlup v. Delo,
513 U.S. 298 (1995) 1, 3, 4, 5,
.... 6, 7, 10, 11

Smith v. UHS of Lakeside, Inc.,
439 S.W.3d 303 (Tenn. 2014) 8

Strickland v. Washington,
466 U.S. 668 (1984) 6

Teague v. Lane,
489 U.S. 288 (1989) 2, 3, 10, 11, 12

United States v. Agurs,
427 U.S. 97 (1976) 6

Williams v. Pennsylvania,
579 U.S. 1 (2016) 1, 2, 8

Withrow v. Larkin,
421 U.S. 35 (1975) 8

CONSTITUTION

U.S. Const. amend. 14
Due Process Clause 4, 12

OTHER AUTHORITY

Charles Alan Wright et al.,
Federal Practice and Procedure (3d ed. 2012) 5

INTRODUCTION

Four years ago, Justice Sotomayor was "hopeful that available state processes [would] take care to ensure full and fair consideration of Reed's innocence." *Reed v. Texas*, 140 S. Ct. 686, 690 (2020) (statement of Sotomayor, J., respecting the denial of certiorari). The Texas courts have now made clear that that optimism was unwarranted. Texas' brief in opposition confirms that, once again (*see Reed v. Goertz*, 598 U.S. 230 (2023)), this Court must intervene.

Texas does not dispute that the Texas Court of Criminal Appeals (CCA) split from the majority of jurisdictions in failing to faithfully apply the gateway-innocence standard from *Schlup v. Delo*, 513 U.S. 298 (1995). Instead, it insists that question isn't worth this Court's time because it doesn't present a federal question and the CCA reached some of Reed's underlying constitutional claims anyway. But this Court and Texas' own courts have held that the Constitution *requires* application of *Schlup*. And Texas ultimately concedes that Reed has unadjudicated constitutional claims. With its *Schlup* error corrected, the CCA would reach those claims.

On rubberstamping, Texas again denies a federal question and then claims that the CCA engaged in its own independent review of the evidence anyway. Both contentions fail. The notion that rubberstamping doesn't present due-process concerns ignores this Court's precedent making clear that courts cannot abdicate their responsibility to conduct an independent review of the evidence. *E.g.*, *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 617 (1993). It also ignores the principle that "[a]n

insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication." *Williams v. Pennsylvania*, 579 U.S. 1, 15-16 (2016). And the CCA's purportedly "skeptical" review of the trial court's rubberstamped findings didn't cure the constitutional violation. App. 98a. The CCA couldn't make credibility determinations, so it ended up deferring to the trial court anyway—the very court that had credited *all* of the state's witnesses and *none* of Reed's, even *the victim's friends*, and then withheld audio recordings of that critical hearing from the CCA.

Faced with these problems, Texas resorts to leveling (Opp. 8-10) unproven, decades-old sexual-violence allegations against Reed, asking the Court to find Reed guilty of other crimes and thus find this case unworthy of review. But the CCA erred on two certworthy questions that prevented it from reaching the truth based on a "considerable body of evidence" showing Reed's innocence. *Reed*, 140 S. Ct. at 687 (statement of Sotomayor, J.).

Finally, Texas invokes the bar on applying new constitutional rules in *Teague v. Lane*, 489 U.S. 288 (1989). Its argument fundamentally misunderstands antiretroactivity principles. *Teague* guards against the application of new constitutional rules, on postconviction review, to the criminal procedures that occurred before a conviction became final on direct review. *See id.* at 310. But the problem here is that the Texas courts didn't afford Reed a constitutionally fair process *in his postconviction proceedings*. *Teague* doesn't apply—either directly or by analogy—to ensuring constitutionally adequate postconviction

process. What's more, Reed's conviction became final in 2001, after this Court decided *Schlup* in 1995.

The CCA's errors, and the stakes, are serious. The Court should grant review.

ARGUMENT

I. The CCA's decision deepens the conflict over the *Schlup* standard and violates Reed's due-process rights.

A. As Reed explained (Pet. 16-21), lower courts do not uniformly apply *Schlup*. Most courts follow this Court's guidance and require only "new reliable evidence," *Schlup*, 513 U.S. at 324, showing, when considered alongside the other evidence, that a juror would more likely than not have had reasonable doubt about the petitioner's guilt. Pet. 17-19. But the CCA sided with the Missouri Supreme Court and a panel of the Eleventh Circuit and applied a heightened *Schlup* standard. Pet. 19-21. Those courts have categorically refused to consider certain types of evidence and require petitioners to affirmatively prove that they are factually innocent just to pass through the gateway and present their merits claims.

That heightened standard is unconstitutional. *Schlup* "incorporate[s] the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence." 513 U.S. at 328. Disregarding that command, the CCA rejected Reed's gateway-innocence claim because it thought Reed had failed to show that, "more likely than not," his theory of the case "is the correct one." App. 126a, 121a. And, rather than consider the full range of evidence that a hypothetical juror in Reed's case would consider, the CCA excluded Reed's evidence that "weaken[ed] the State's case in chief" because it didn't (in the CCA's

view) "affirmatively show[]" his innocence. App. 134a-135a. A court faithfully applying *Schlup* would have found that Reed satisfied the standard. Pet. 23-24.

Texas doesn't dispute that the lower courts have split on the *Schlup* standard. *See* Opp. 22-26. And beyond offering a single conclusory sentence declaring that the CCA "did not stray outside the boundaries of *its own state law*," Opp. 26, Texas doesn't defend the CCA's articulation or application of *Schlup*.

B. Despite the split, Texas insists that this Court's review is unwarranted.

1. Texas first contends that, even if the CCA deviated from *Schlup*, Reed has not "demonstrate[d] a constitutional violation" because the *Schlup* standard doesn't present a federal question. Opp. 18. That's wrong.

As the Court has explained, because the execution of an innocent person is "constitutionally intolerable," *Schlup* sets a constitutional floor to protect a prisoner's constitutional rights. 513 U.S. at 316; Pet. 7, 23-25. Texas nonetheless notes that *Schlup* was a federal habeas case and argues that "the federal habeas process" does not "find[] its bedrock in the constitution." Opp. 17. That makes no sense, because "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution." *Herrera v. Collins*, 506 U.S. 390, 400-01 (1993). Indeed, even the Supreme Court of Texas has explained that "claims of actual innocence," including "*Schlup*-type claims," exist because "the 'incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person.'" *In re Allen*, 366 S.W.3d 696, 705 (Tex. 2012). So when the Court announces a standard necessary to protect

against a "constitutionally intolerable event," the Constitution "requires application" of that standard. *Schlup*, 513 U.S. at 314, 325-26. Courts cannot disregard that constitutional floor. Pet. 25.

Even if *Schlup* weren't a constitutional standard, *Schlup* would still be a federal standard that Texas has incorporated into state law. App. 100a. And "this Court retains power to review the decision of a federal issue" that is incorporated into questions of state law. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 816 (1986); *see* Pet. 25. Given the need for "uniform interpretation of federal law," a state court's "mistaken conclusions of federal law" "justify Supreme Court review" when "federal questions control the outcome." 16B Charles Alan Wright et al., *Federal Practice and Procedure* § 4031, at 550-551 (3d ed. 2012). The United States has made this very point about the Court's jurisdiction to review questions arising from incorporated federal standards. *See* Pet. 25.

2. Texas next argues that the Court should deny review because the CCA reached the merits of some of Reed's underlying substantive claims despite the *Schlup* standard it applied. Opp. 22-26. That argument (a) fails on its own terms and (b) ignores that the rubberstamping error—which independently justifies review, *infra* pp. 9-10—infected the CCA's purported merits adjudication. The Court must address both issues lest Texas argue or the CCA maintain on remand that each issue is a reason not to reach the merits.

a. Texas concedes (Opp. 25-26) that the CCA didn't reach the merits of two of Reed's constitutional claims, because it determined that he could not satisfy the gateway-innocence standard. But Texas says that doesn't matter because those claims "would

necessarily fail any further merits review." Opp. 26. That's wrong.

First, the CCA never adjudicated Reed's ineffective-assistance-of-counsel claim on the merits. App. 151a-152a. Texas says that claim "rested atop the other three claims" raised in his tenth application, so a merits denial of the other claims amounted to a merits denial of the ineffective-assistance-of-counsel claim. But even if no *individual* error raised by the other claims amounted to a constitutional violation, those errors could have cumulatively created a viable ineffective-assistance-of-counsel claim based on the "*reasonable probability* that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (emphasis added); *see Ex parte Welborn*, 785 S.W.2d 391, 396 (Tex. Crim. App. 1990).

Second, the CCA never reached Reed's claim that the state solicited false forensic testimony. Instead, it denied relief based purely on its erroneous *Schlup* analysis. App. 169a-170a (eleventh habeas application). Texas argues that that claim "would necessarily fail any further merits review" because it "relied on" "evidence presented during the 2021 evidentiary hearing," Opp. 26, and the CCA rejected *other* claims that also relied on evidence presented during that hearing. Nonsense. Reed's false-forensic-testimony claim depends on whether there is a "reasonable likelihood that the false testimony could have affected" the verdict. *United States v. Agurs*, 427 U.S. 97, 103 (1976). The CCA never purported to decide that question.

b. Even if the CCA had adjudicated all of Reed's constitutional claims on the merits, the Court's review of the *Schlup* question would still be crucial because

the CCA's errors on the two questions presented are inseparable.

First, as noted (Pet. 32-33; *infra* pp. 9-10), the trial court's rubberstamping tainted the CCA's purported "independent review" of the record, App. 98a, including its application of its heightened *Schlup* standard.

Second, the CCA's finding that Reed couldn't satisfy its heightened *Schlup* standard stands as an obstacle to relief even if Reed prevails on the merits of his rubberstamping claim. Simply put, the Court must grant review of both questions presented—each of which is certworthy and on each of which the CCA grossly erred—to ensure that Reed receives constitutionally fair postconviction review.

II. The trial court's gross abdication of its judicial duty and the CCA's failure to remedy that constitutional violation require this Court's intervention to provide guidance on an issue that calls both justice and its appearance into doubt.

A. Rubberstamping party-drafted findings without independent decisionmaking is incompatible with due process. As Reed explained (Pet. 26-28), although courts have consistently criticized rubberstamping, this Court has never announced a uniform constitutional rule. But, at the very least, "due process requires a 'neutral and detached judge in the first instance,'" and judges cannot "delegate[] adjudicative functions" to a party, but must conduct their own, independent review of the evidence. *Concrete Pipe*, 508 U.S. at 617. Thus, the Constitution requires vacatur of rubberstamped findings where the trial court failed to render an independent judgment. Pet. 31.

Reed's case proves the need to enforce the constitutional limits on rubberstamping. Pet. 1, 31-33. Even the CCA agreed that the trial court did not "carefully scrutinize[]" the state's proposed findings—regarding forty-seven witnesses—when it rubberstamped them. App. 97a. And the CCA didn't cure that due-process violation by purporting to conduct its own "skeptical," "independent review" of the record. App. 98a. Unlike the trial court, the CCA did not observe any of the testimony and had no way to judge witness credibility, on which so much turns. Pet. 33.

B. Texas' responses only underscore the need for this Court to intervene.

1. Texas first asserts that there's no "constitutional dimension to rubberstamping" and that Reed is trying to "federalize state habeas proceedings." Opp. 18-19. But the due-process problems rubberstamping raises are obvious. The Court has long held that "an impartial decision maker is essential" for due process. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); *see Morrissey v. Brewer*, 408 U.S. 471, 485-86 (1972). More generally, the due-process guarantees "endeavor[] to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Indeed, "[b]oth the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams*, 579 U.S. at 16. That's why courts have expressed such discomfort with rubberstamping. At best, rubberstamping "gives rise to the impression that the trial judge" has failed to fulfill its duty to "fashion[] a considered, independent ruling." *Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 315 (Tenn. 2014). At worst—as here—rubberstamping impermissibly "delegates adjudicative functions" to a party—a

practice this Court has expressly found violates due process. *Concrete Pipe*, 508 U.S. at 617.

Texas claims that rubberstamping comports with due process, and that it simply doesn't matter in state habeas proceedings. That's a merits argument, and one that deserves this Court's careful scrutiny. Texas has made postconviction review available, and the process it provides must comport with the Constitution's due-process guarantee. *See District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 68 (2009); *infra* pp. 11-12. In fact, rubberstamping is uniquely problematic on postconviction review, which is often a prisoner's last resort to vindicate certain critical constitutional rights.

2. Texas argues that, even if rubberstamping raises due-process concerns, Reed "received a full, fair, and independent review by the CCA." Opp. 27. That argument fails, too.

Texas glosses over the CCA's explanation that the deficiencies with the trial court's rubberstamped findings meant that the CCA did not have "due confidence" in those findings. App. 97a. Neither the errors the CCA identified nor those it overlooked were "minor." Opp. 27. The point, as the CCA well understood, was that the mere existence of obvious errors in the court's rubberstamped findings—copied verbatim from the prosecution's proposed versions after the court announced it would sign party-drafted findings, Pet. 12, 31-32—shows that the court didn't even *try* to fulfill its constitutional duty to serve as an independent decisionmaker.

Texas thus doesn't address the fundamental problem with the CCA's attempt to cure the trial court's due-process-violating abdication. Despite lacking

confidence in the trial court's findings, the CCA deferred to the trial court on key credibility determinations because the trial court had "observ[ed]" the witnesses' "testimony and demeanor." App. 117a, 143a. But the CCA could not have formed an independent view of the witnesses' demeanor, because it didn't observe any of the testimony. In short, no neutral decisionmaker has observed the evidence *and* reached an independent judgment.

As explained (Pet. 33), the trial court went out of its way to *prevent* the CCA from conducting any meaningful review by denying Reed's request to include an audio recording of the habeas hearing in the record on appeal. Texas claims that request "was clearly prohibited under state law." Opp. 28. But neither Texas nor the trial court (in its two-sentence order denying the request, App. 249a) has cited any such authority. And even if that's what Texas law says, that only *confirms* the due-process problem—that the CCA could not cure the trial court's rubberstamping.

III. This case is an ideal vehicle, and Texas' *Teague* argument misunderstands well-established antiretroactivity principles.

A. This case is an ideal vehicle for resolving the important *Schlup* and rubberstamping questions. Pet. 33-35. Both are cleanly presented: The CCA stated the factual findings underlying its *Schlup* analysis but expressly relied on an improper standard. Pet. 21-24. And even the CCA admonished the trial court for yet again rubberstamping the prosecution's proposed findings. App. 97a. The stakes in this capital case could not be higher. Contrary to Texas' argument, the questions presented raise critical constitutional issues, *supra* pp. 4-5, 8-9, and this

Court's intervention could change the outcome, *supra* pp. 5-7, 9-10.

B. Texas' only remaining vehicle argument—that this case implicates "anti-retroactivity principles," Opp. 20—reflects a profound misunderstanding of the law. Texas quotes *Teague* to argue that Reed cannot secure any relief from this Court that is not "dictated by precedent existing at the time [his] conviction become final" in 2001. Opp. 20 (quoting 489 U.S. at 301). Putting aside that *Schlup* was decided in 1995, *Teague* has nothing to do with the constitutional rules that apply to the fairness of postconviction proceedings themselves.

As the Court has explained, "*Teague* by its terms applies only to" "'constitutional rules of criminal procedure'" newly announced after a conviction becomes final on direct review. *Bousley v. United States*, 523 U.S. 614, 619-20 (1998) (quoting *Teague*, 489 U.S. at 310). The retroactivity concern is that constitutional developments after direct appeals from a conviction might be applied to the trial or pretrial proceedings, even though those "trials and appeals conformed to then-existing constitutional standards." *Teague*, 489 U.S. at 310.

In contrast, *Teague* has nothing to say about constitutional rules that apply to the process provided not at trial or on direct appeal but in *postconviction* proceedings, which are civil proceedings accepting the finality of the underlying conviction, *see Banister v. Davis*, 140 S. Ct. 1698, 1702-03, 1707-10 (2020). But the Court's other decisions do. When a state offers post-conviction review, like Texas, "it must" "act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause."

Evitts v. Lucey, 469 U.S. 387, 401 (1985). As the Court explained in *Osborne*, the "right to due process" on postconviction review "is not parallel to a trial right," and "[f]ederal courts may upset a State's postconviction relief procedures … if they are fundamentally inadequate to vindicate the substantive rights provided." 557 U.S. at 69. What the law and procedures were before the conviction became final—*Teague*'s concern—are irrelevant to whether the postconviction proceedings, on direct review here, were constitutionally adequate.

The questions presented here have nothing to do with the procedures at Reed's trial. Rather, Reed challenges the constitutionally deficient procedures in the *postconviction proceedings*, on direct appeal from those proceedings. There's nothing retroactive under *Teague* (or by analogy) in deciding that the Texas courts failed to afford Reed due process.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

Cliff C. Gardner
Michelle L. Davis
Gregory P. Ranzini
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

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

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

Jeremy Patashnik
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Manhattan West
New York, NY 10001

Counsel for Petitioner

March 20, 2024