No. 24-____

In the Supreme Court of the United States

RODNEY REED, PETITIONER

v.

BRYAN GOERTZ,

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

In 2023, the Court reversed the Fifth Circuit's holding that Rodney Reed's DNA-testing suit was untimely and rejected District Attorney Bryan Goertz's jurisdictional arguments. *Reed v. Goertz*, 598 U.S. 230 (2023). The case now returns on the merits, as Goertz continues refusing to test the murder weapon.

Reed has been on death row for over a quarter century for a crime he steadfastly maintains he didn't commit. Since he was convicted, Reed has amassed a "substantial body of evidence" refuting the state's theory of the case. *Reed v. Texas*, 140 S. Ct. 686, 689 (2020) (statement of Sotomayor, J., respecting the denial of certiorari). Despite the resulting "pall of uncertainty over Reed's conviction," *id.* at 690, Goertz refuses to DNA-test the murder weapon—testing that Reed's attorneys have offered to pay for and that could prove his innocence. Instead, Goertz relies on the Texas Court of Criminal Appeal's (CCA) authoritative construction of Texas's postconviction DNA-testing statute, Article 64 of the Texas Code of Criminal Procedure, to insist that Reed isn't entitled to DNA testing. The CCA's construction rests, among other things, on the notion that potentially "contaminated" evidence cannot yield probative DNA results—a notion that science disproves and that Texas itself rejects in many cases when seeking to prove guilt.

The question presented is whether Article 64, as authoritatively construed by the CCA, violates due process by arbitrarily denying prisoners access to postconviction DNA testing, rendering illusory prisoners' state-created right to prove their innocence through newly discovered evidence.

PARTIES TO THE PROCEEDING

Petitioner Rodney Reed was the plaintiff in the district court and the appellant in the court of appeals. Respondent Bryan Goertz, in his official capacity as the District Attorney of Bastrop County, Texas, was the defendant in the district court and the appellee in the court of appeals. Steve McCraw, in his official capacity as Director and Colonel of the Texas Department of Public Safety; Sara Loucks, in her official capacity as the District Clerk of Bastrop County, Texas; and Maurice Cook, in his official capacity as Bastrop County Sheriff, were defendants in the district court but were terminated as parties on October 1, 2019.

RELATED PROCEEDINGS

This case arises from the following proceedings:

21st Judicial District Court of Texas:

State v. Reed, No. 8701 (Nov. 25, 2014) (oral ruling on motion for DNA testing)

State v. Reed, No. 8701 (Dec. 12, 2014) (written findings of fact and conclusions of law)

State v. Reed, No. 8701 (Sept. 9, 2016) (additional findings of fact and conclusions of law following June 29, 2016, remand from Court of Criminal Appeals of Texas)

Court of Criminal Appeals of Texas:

Reed v. State, No. AP-77,054 (June 29, 2016) (order remanding for additional findings of fact and conclusions of law)

Reed v. State, No. AP-77,054 (Apr. 12, 2017) (opinion affirming Texas trial court's denial of

motion for DNA testing), *rehearing denied* (Oct. 4, 2017)

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

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

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

Reed v. Goertz, No. 19-70022 (Apr. 22, 2021) (opinion affirming dismissal of complaint as untimely)

Reed v. Goertz, No. 18-70022 (May 1, 2025) (opinion affirming dismissal of complaint on the merits; decision below here)

Supreme Court of the United States:

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

Reed v. Goertz, No. 21-442, 598 U.S. 230 (Apr. 19, 2023) (opinion reversing the Fifth Circuit's April 22, 2021, decision)

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INTRODUCTION

In 2023, this Court reversed the Fifth Circuit's ruling that Rodney Reed's 42 U.S.C. § 1983 suit seeking DNA testing was untimely. *See Reed v. Goertz*, 598 U.S. 230, 235-37 (2023). That decision reflected the importance of the case. For over a quarter century, Reed has fought to prove that he did not murder Stacey Stites and to avoid the tragic execution of an innocent man—"a constitutionally intolerable event," *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring). During that time, Reed has amassed a "considerable body of evidence" casting a "pall of uncertainty" over his conviction. *Reed v. Texas*, 140 S. Ct. 686, 687, 690 (2020) (statement of Sotomayor, J., respecting the denial of certiorari).

But once again, Reed must call on this Court to intervene when no other court will give him justice. Despite compelling evidence of Reed's innocence, District Attorney Bryan Goertz refuses to DNA-test *the murder weapon*—the webbed belt used to strangle Stites. The killer held that belt tight against her throat for minutes, and must have left his sweat and skin cells—and thus his DNA—where he gripped the belt, both on the surface and deep within the webbing. But Goertz won't let Reed's attorneys pay to DNA-test the belt. And the Texas Court of Criminal Appeals (CCA) refused to authorize testing under Texas's post-conviction DNA-testing statute, Article 64 of the Texas Code of Criminal Procedure.

According to the CCA, DNA testing under Article 64 is unavailable for an item that may have been contaminated through, for example, ungloved handling by court personnel. That bar applies even though contaminated evidence can yield reliable testing results,

Texas routinely introduces DNA from contaminated evidence at trial, and the *state* (not the prisoner) is responsible for the evidence's handling.

Reed filed this § 1983 suit seeking a declaration that Article 64's non-contamination requirement and other provisions violate due process. As this Court explained, "if a federal court concludes that Texas's post-conviction DNA testing procedures violate due process, that court order would eliminate the state prosecutor's justification for denying DNA testing," and Goertz likely "would grant access to the requested evidence." *Reed*, 598 U.S. at 234.

But the Fifth Circuit rejected Reed's claims. Its reasoning was wrong under this Court's foundational due process precedents. More fundamentally, the Fifth Circuit erred in ignoring a key argument that Article 64's non-contamination requirement is arbitrary and irrational because it serves no legitimate purpose here. As the Nebraska Supreme Court, the Georgia Court of Appeals, and even the Fifth Circuit have elsewhere recognized, a non-contamination requirement makes no sense because, as science makes clear, the only way to tell if DNA testing can yield reliable results is to do the testing.

That reasoning is consequential in the due process context, because evidentiary rules violate due process if they do not "rationally serve the end that [they] were designed to further." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006). That rule reflects the due process guarantee against irrational and arbitrary government action. Here, the non-contamination requirement rests on the scientifically incorrect assumption that contaminated evidence cannot yield reliable DNA-testing results. But Texas itself has (and

routinely uses) protocols for testing potentially contaminated samples to yield probative results. Indeed, Texas allows prosecutors to use DNA evidence derived from contaminated samples at trial. Yet the CCA's construction of Article 64 means that that same evidence is unreliable after trial.

That is irrational. Texas cannot have it both ways. Science makes clear, and when Texas wants to it accepts, that supposedly contaminated evidence *can* produce reliable DNA results. It is only for prisoners seeking to prove their innocence through DNA testing—including those, like Reed, wrongly condemned to die—for which Article 64 declares categorically that supposedly contaminated evidence *cannot* produce reliable results. That arbitrariness renders Article 64 "fundamentally inadequate to vindicate the substantive rights" Texas law gives a prisoner to prove his innocence by newly discovered evidence. *District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 69 (2009).

Article 64's exoneration and unreasonable-delay requirements also violate due process. But all Reed needs to show is that the non-contamination requirement alone violates due process. That's because the CCA relied only on the non-contamination requirement to deny testing of the belt used to strangle Stites, and testing that belt could prove Reed's innocence. Thus, the simplest course here would be for the Court to summarily vacate the Fifth Circuit's judgment so the Fifth Circuit can finally consider Reed's argument that the non-contamination requirement is arbitrary and irrational.

Alternatively, the Court should grant plenary review. This case and the question it presents are

exceptionally important. Reed deserves a meaningful chance to prove his innocence before Texas executes him. But Article 64 and Goertz persist in denying him testing, at his attorneys' expense, of *the murder weapon*, despite compelling non-DNA evidence of innocence. The only way Goertz justifies that result is by relying on a DNA-testing law that violates due process to deny testing where it is most warranted.

The stakes could not be higher. The Court must once again intervene to avoid a miscarriage of justice.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-23a) is reported at 136 F.4th 535. The district court's unpublished order (App. 24a-48a) is available at 2019 WL 12073901. The CCA's underlying opinion (App. 49a-88a) is reported at 541 S.W.3d 759. The court of appeals' earlier opinion affirming dismissal of the complaint as untimely is reported at 995 F.3d 425. This Court's opinion reversing that decision is reported at 598 U.S. 230.

JURISDICTION

The court of appeals entered its judgment on May 1, 2025. On June 3, 2025, the court denied timely petitions for panel rehearing and rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

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

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

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

Article 64.03 of the Texas Code of Criminal Procedure provides:

> (a) A convicting court may order forensic DNA testing under this chapter only if:
>
> (1) the court finds that:
>
> (A) the evidence: …
>
> (ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; … and
>
> (2) the convicted person establishes by a preponderance of the evidence that:
>
> (A) the person would not have been convicted if exculpatory results had

> been obtained through DNA testing; and
>
> (B) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.

STATEMENT

A. Legal background

This Court's decisions hold that, when a state grants prisoners the right to establish their innocence with DNA evidence, the procedures the state provides for vindicating that right must comply with due process. That due process guarantee follows from three well-established principles in this Court's precedent.

First, DNA testing is a powerful tool for proving innocence. "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty." *Osborne*, 557 U.S. at 55. Indeed, "there is no technology comparable to DNA testing," which "can provide powerful new evidence unlike anything known before." *Id.* at 62. As a result, "DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others." *Id.* To date, more than 600 wrongfully convicted prisoners have been exonerated by DNA testing, including 38 on death row. Daniele Selby, *DNA and Wrongful Conviction: Five Facts You Should Know*, The Innocence Project (updated Apr. 2, 2025), https://innocenceproject.org/news/dna-and-wrongful-conviction-five-facts-you-should-know/.

Second, when a state creates a substantive right to prove one's innocence through DNA testing, that right triggers the Constitution's due process

guarantee. The Fourteenth Amendment's Due Process Clause "imposes procedural limitations on a State's power to take away protected entitlements." *Osborne*, 557 U.S. at 67. That's because "a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Put differently, a "state-created right" can "beget yet other rights to procedures essential to the realization of the parent right." *Osborne*, 557 U.S. at 68 (quoting *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981)). Thus, even though there's no freestanding constitutional right to DNA testing, when a state grants prisoners the right to prove their innocence with DNA evidence, the state's procedures for obtaining that testing must comply with due process. *See id.* at 68, 72.

Finally, state prisoners may challenge the constitutionality of a state's DNA-testing procedures under 42 U.S.C. § 1983. *Skinner v. Switzer*, 562 U.S. 521, 534 (2011). In *Skinner*, the Court held that "a postconviction claim for DNA testing is properly pursued in a § 1983 action," and the prisoner will prevail if he "show[s] that the governing state law denies him procedural due process." *Id.* at 525. Thus, the Court allowed Skinner's due process claim to proceed because Texas's refusal to DNA-test crime-scene evidence could have deprived him of his liberty interest in using state procedures to prove his innocence. *Id.* at 530. The Court recently reaffirmed *Skinner*'s rule and its application to Reed's suit here earlier in this case. *Reed*, 598 U.S. at 235.

B. Factual and procedural background

1. a. On April 23, 1996, Stacey Stites's coworkers reported her missing after she failed to

show up for her 3:30 a.m. shift at a grocery store in Bastrop, Texas. *Ex parte Reed*, 271 S.W.3d 698, 703 (Tex. Crim. App. 2008). Although Stites's fiancé, a local police officer named Jimmy Fennell, was supposed to drive her to work, Stites allegedly left their shared apartment alone in Fennell's truck around 3 a.m. *Id.*

Officers found the truck in the Bastrop High School parking lot a few hours later. *Id.* A piece of Stites's webbed leather belt lay outside the driver's side door. *Id.* Stites's body was found that afternoon several miles away in a ditch on the side of the road. *Id.* at 704. Another piece of the belt was found nearby. *Id.* at 705. That piece matched the one found near Fennell's truck, and its webbing matched "the pattern … on [Stites's] neck." *Id.* at 705. Investigators thus concluded that the killer had strangled Stites with the belt, an act that took "great force" and likely lasted "three to four minutes." *Id.* at 705-06. Investigators also concluded that the belt had been torn, and at least one other piece was never found. *Id.* at 705.

When crime-scene investigator Karen Blakely returned to the lab at 11 p.m. that night, she found three intact sperm on vaginal swabs taken from Stites. *Id.* Because Blakely mistakenly believed that sperm can remain intact inside the vaginal tract for only 26 hours, *id.*; *infra* pp. 10-11, investigators concluded that the sperm had been deposited around the time they believed Stites died. Thus, they theorized, "identifying the man who left the semen would lead to the discovery of Stites's killer." *Reed*, 271 S.W.3d at 705.

Fennell was the last known person to see Stites alive, and he proved "deceptive" in two polygraph tests when asked if he "strangled, struck, or hit Stacey." *Id.* at 708, 738, 742. Even so, investigators never

searched Fennell and Stites's apartment for the missing pieces of the murder weapon or other evidence. *Id.* at 708. Instead, police focused their investigation on Reed after discovering that his DNA matched DNA from the sperm recovered from Stites's body. *Id.* at 710. Reed, a Black man, protested his innocence and insisted that he and Stites, a white woman, were having an affair. *Reed*, 140 S. Ct. at 686 (statement of Sotomayor, J.).

b. At trial, the state's theory was that Reed and Stites were strangers, that he somehow intercepted her as she drove to work, and that he raped and murdered her. That theory relied on two key forensic premises. *First*, the medical examiner testified that Stites died around 3 a.m. *Reed*, 271 S.W.3d at 705. *Second*, Blakely testified that sperm can remain intact in the vaginal tract for only 26 hours. *Id.*; *see* SA45, SA48-SA49. ("SA" refers to the Special Appendix filed in *In re Reed*, No. 24-50529 (5th Cir. Nov. 5, 2024), ECF No. 4.) Those two propositions "tended to inculpate Reed (by suggesting that he must have had sex with Stites very soon before her death) and exculpate Fennell (by indicating that Stites died after Fennell claimed to have seen her last)." *Reed*, 140 S. Ct. at 687 (statement of Sotomayor, J.).

The state insisted at trial that Reed and Stites had not had consensual sex. *See* SA51-SA52. Prosecutors told the jury that nobody knew of any relationship between them. *Id.* They also drew on racist insinuations that Stites would never have associated with Reed, describing the possibility of a consensual sexual encounter between them as "ludicrous." SA55-SA57.

An all-white jury convicted Reed, who was then sentenced to death. *Reed*, 271 S.W.3d at 712.

c. Over the last quarter century, Reed has steadfastly maintained his innocence and sought relief from state and federal courts. Through those efforts, Reed has developed a "substantial body of evidence" supporting his claims. *Reed*, 140 S. Ct. at 689 (statement of Sotomayor, J.).

That evidence corroborates Reed's assertions that he and Stites were having an affair. At a 2021 state-court hearing, several of Stites's coworkers testified that Reed and Stites knew each other and had been intimately involved. *See* SA490:3-19, SA544:23-SA545:11, SA463:20-SA464:25, SA459:24-SA460:16. One coworker testified that Stites had introduced her to Reed, that Reed and Stites were "flirty," and that "[i]t seemed like more than a friendship." SA484:2-23. Another testified that Stites told her that she was "sleeping with a black man named Rodney." SA523:18-SA524:16.

Much of the key forensic testimony offered to convict Reed has been debunked or retracted, too. The pathologist who testified at trial recanted his testimony about Stites's time of death and the likelihood of sexual assault. App. 113a. The agencies that employed the state's experts who had testified that sperm cannot survive for over 26 hours inside the vaginal tract issued letters discrediting that testimony. App. 116a. And expert testimony at the 2021 hearing explained that the state's time-of-death window is at odds with post-mortem changes to Stites's body, suggesting that Stites likely died many hours earlier, when she was alone with Fennell. SA429:5-11, SA432:6-15, SA494:17-SA495:8, SA435:17-SA436:14, SA497:7-22. The state's experts at that hearing couldn't offer any medical evidence to support the

prosecution's time-of-death window. SA553:1-8, SA571:3-22, SA585:19-SA586:10.

Reed has also uncovered evidence that implicates Fennell. After Stites's death, Fennell pleaded guilty to abducting and sexually assaulting a woman whom he had been dispatched as a police officer to protect. App. 101a. While in prison, Fennell associated with the Aryan Brotherhood, SA394, a violent white-supremacist gang, *Aryan Brotherhood*, *FBI Records: The Vault*, Federal Bureau of Investigation, https://vault.fbi.gov/Aryan%20Brotherhood%20 (last visited June 10, 2025). Two inmates came forward to say that Fennell confessed that he "had to kill [his] n****r-loving fiancé" because she was sleeping with a Black man. SA395; *see* SA454:3-SA455:18.

Witnesses testified at the 2021 hearing that Stites and Fennell had a tumultuous, violent relationship. SA440:10-25, SA449:3-16, SA471:7-SA472:25, SA483:1-21, SA501:14-SA502:23, SA513:16-SA514:1, SA517:6-18, SA542:20-SA544:22. For example, a life-insurance agent through whom Stites had applied for a policy testified that Fennell told Stites: "If I ever catch you messing around on me, I will kill you and nobody'll know that I was the one that did it." SA444:22-SA445:12. Other witnesses testified that they observed Fennell acting aggressively toward Stites and were "concerned for [her] safety," SA501:14-SA502:23, that Fennell knew Stites was having an affair with a Black man, SA440:10-25, and that Fennell made disparaging comments about Stites at her funeral, SA399 ¶¶ 8-9, SA449:3-16, SA513:16-SA514:1.

Significant inconsistences have also emerged in Fennell's account of the night that Stites disappeared.

At trial, Fennell testified that he was at home with Stites that evening, and that Stites went to bed while he stayed up watching TV. SA27:16-24, SA30:6-25. After trial, another police officer, Curtis Davis, stated that on the day Stites's body was discovered, Fennell told Davis that he had stayed out drinking with fellow officers the night before. SA251-SA252. When confronted with Davis's account at a 2017 hearing, Fennell asserted his Fifth Amendment right not to testify. SA287:4-SA288:19. At the 2021 hearing, by which point Davis had died, Fennell took a different tack and claimed Davis lied. SA549:1-8.

2. Reed first sought, and was denied, DNA testing of the belt in 1999, before Article 64 was enacted. App. 104a, 122a. In 2014, Reed asked the Bastrop County District Attorney to consent to DNA testing, and Reed's counsel offered to pay for it. App. 104a, 127a. The state refused to test most of the evidence and sought an execution date. App. 105a, 55a-56a.

Reed thus filed a motion in Texas trial court under Article 64, seeking to test key crime-scene evidence recovered on and around Stites's body and Fennell's truck, including both recovered pieces of the belt. App. 55a-58a. The trial court denied Reed's motion, and the CCA affirmed. App. 62a, 87a.

The CCA held that, because many items for which Reed requested testing, including the belt, were "handled by ungloved attorneys, court personnel, and possibly the jurors," they were "contaminated" and thus ineligible for testing under Article 64. App. 66a-67a. After removing the "contaminated" items from consideration, the CCA ruled that Article 64 did not authorize testing because Reed had failed to show by a preponderance of the evidence that he would not

have been convicted even assuming exculpatory DNA results on the remaining items. App. 73a-76a. Finally, the CCA conducted a "fact-specific and subjective inquiry" into the circumstances surrounding Reed's Article 64 motion, and held that "Reed failed to establish that his request [was] not made to unreasonably delay the execution of his sentence or the administration of justice." App. 84a.

The CCA denied rehearing, and this Court denied review. *Reed v. Texas*, 585 U.S. 1016 (2018).

3. Reed then sued in federal court under 42 U.S.C. § 1983, challenging Article 64 as authoritatively construed by the CCA. *See* App. 91a-130a.

a. Reed raised several constitutional claims, including a Fourteenth Amendment due process claim. Reed's amended complaint sets out three ways Article 64 violates due process.

First, Reed explained that the non-contamination requirement is unconstitutional. App. 110a-112a. The CCA grafted the non-contamination requirement onto Article 64' chain-of-custody provision, which requires that evidence sought to be tested "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect." Tex. Code Crim. Proc. art. 64.03(a)(1)(A)(ii). But the extratextual non-contamination requirement puts "arbitrary limitation[s] on the potential 'exculpatory results' from DNA testing" because testing can yield probative results despite "issues of contamination." App. 111a. That requirement also forecloses "relief to any person convicted before rules governing the State's handling and storage of evidence were put in place," because it renders insufficient "the then-customary storage of

evidence" and "the routine handling of such evidence by trial officials." App. 110a-111a.

Second, Reed explained that the CCA's construction of Article 64's requirement that the prisoner establish by a preponderance of the evidence that he "would not have been convicted if exculpatory results had been obtained through DNA testing," Tex. Code Crim. Proc. art. 64.03(a)(2)(A), is unconstitutional. That's because the CCA construed the exoneration inquiry to permit courts to consider discredited trial evidence while prohibiting consideration of DNA-testing results inculpating a third party. App. 113a-117a.

Finally, Reed explained that Article 64's requirement that "the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice," Tex. Code Crim. Proc. art. 64.03(a)(2)(B), is also unconstitutional. The unreasonable-delay requirement, as construed by the CCA, punishes prisoners for previously litigating their innocence and allows later amendments to Article 64 to support a finding that a prisoner should have known earlier that testing was available. App. 112a.

b. The district court dismissed Reed's suit, asserting without analysis that "[t]here is nothing so egregious in Chapter 64 that rises to the level of a procedural due process violation." App. 40a. The Fifth Circuit affirmed without reaching the merits on the ground that Reed's suit was untimely. *Reed v. Goertz*, 995 F.3d 425, 430-31 (5th Cir. 2021).

c. This Court reversed. *Reed*, 598 U.S. at 237.

The Court first rejected Texas's jurisdictional arguments. *Id.* at 234. *First*, the Court explained that Reed had standing to challenge the CCA's

construction of Article 64. *Id.* Reed alleged an injury in fact—"denial of access to the requested evidence." *Id.* And a court order finding Article 64 unconstitutional would redress that injury because it would create "a significant increase in the likelihood" that Reed would obtain DNA testing by "eliminat[ing] the state prosecutor's justification for denying" it. *Id.* (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)). *Second*, the Court held that Goertz lacked sovereign immunity under the *Ex parte Young* doctrine. *Id. Finally*, the Court held that *Rooker–Feldman* was no obstacle to Reed's suit because "Reed does 'not challenge the adverse' state-court decisions themselves, but rather 'targets as unconstitutional the Texas statute they authoritatively construed.'" *Id.* at 234-35 (quoting *Skinner*, 562 U.S. at 532).

Turning to accrual, the Court held that Reed's due process claim was timely because the statute of limitations did not begin to run until the CCA denied rehearing. *Id.* at 235-37. Reed's claim required both a deprivation of liberty and "inadequate state process," meaning it was "not complete when the deprivation occur[ed]," but only "when 'the State fail[ed] to provide due process.'" *Id.* at 236. The Court thus concluded that "Reed's § 1983 claim was complete and the statute of limitations began to run when the state litigation ended." *Id.*

d. On remand from this Court, the Fifth Circuit affirmed the dismissal of Reed's due process claim on the merits. According to the Fifth Circuit, Reed needed to show that Article 64's non-contamination, exoneration, and unreasonable-delay requirements *all* violate due process. App. 12a & n.7. But in its view, all three requirements are constitutional. App. 12a. *First*, the court held that it is not fundamentally

unfair to impose a non-contamination requirement even when the state's own mishandling potentially contaminated the evidence, unless the state acted in bad faith. App. 14a. But the court never addressed (or acknowledged) Reed's argument that the non-contamination requirement arbitrarily and irrationally denies prisoners access to reliable and probative results. *See* App. 12a-17a. *Second*, the court concluded that the exoneration requirement isn't unconstitutional as applied to Reed because DNA-testing results that fail to exclude Fennell as a contributor to the DNA on the belt wouldn't necessarily exculpate Reed. App. 17a-20a. *Finally*, the court held that the CCA's application of the unreasonable-delay requirement did not violate due process because it "hardly seems arbitrary." App. 20a-22a.

The court of appeals denied Reed's timely petitions for panel and en banc rehearing. App. 89a-90a.

REASONS FOR GRANTING THE PETITION

The CCA's construction of Article 64 violates due process and threatens to send an innocent man to his death. At a minimum, the Court should summarily vacate so that the Fifth Circuit can consider the critical arguments it avoided as to why the non-contamination requirement is arbitrary and irrational.

Due process requires states to provide adequate procedures to "vindicate" state-created substantive rights, including a prisoner's right to prove his innocence with new evidence. *Osborne*, 557 U.S. at 68-69. But Article 64's non-contamination requirement is arbitrary, illogical, and disproportionate to whatever purpose it is designed to serve. The requirement rests on the incorrect assumption that DNA-testing potentially contaminated evidence can never yield reliable

results. But science shows that testing a contaminated sample *can* be highly probative. Indeed, Texas has rigorous protocols for interpreting contaminated DNA-testing results, and *the state* routinely uses DNA results from contaminated evidence against criminal defendants at trial. The non-contamination requirement is circular, too. The only way to know whether evidence is contaminated—and if it is contaminated, whether reliable DNA-testing results may nevertheless be obtained—is to test the evidence, which Article 64 prevents.

Article 64's exoneration and unreasonable-delay requirements also violate due process. The exoneration inquiry ignores posttrial developments and evidence inculpating a third party, meaning discredited evidence can foreclose DNA testing. And the CCA's construction of the unreasonable-delay requirement punishes prisoners for exercising their right to develop evidence of their innocence and for failing to predict future Article 64 amendments.

The simplest course would be to summarily vacate, so the Fifth Circuit can consider whether Article 64's non-contamination requirement is arbitrary and irrational—an issue it avoided. That narrow course is available because Reed can obtain § 1983 relief even if only Article 64's non-contamination requirement violates due process given that the CCA stopped the analysis as to the belt—the murder weapon—with non-contamination, and unreasonable delay is a request-specific test Reed can (and has pleaded he can) satisfy. Thus, a declaratory judgment that the non-contamination requirement is unconstitutional "would eliminate the state prosecutor's justification for denying DNA testing." *Reed*, 598 U.S. at 234.

This case and the question it presents are exceptionally important and also warrant plenary review. DNA testing has the power to exonerate Reed, yet Goertz continues refusing to test *the murder weapon*—even as Reed's attorneys have offered to pay for testing that could be completed in a matter of weeks. It is hard to understand how Article 64 can be rational if it produces that result, and hard to see why this Court should tolerate the grave risk of sending an innocent man to his death.

I. Article 64 violates due process because it arbitrarily denies prisoners access to DNA evidence needed to vindicate their state-created interest in proving their innocence.

The Fourteenth Amendment's Due Process Clause requires states to provide adequate procedures to "vindicate" the state-created liberty interest that prisoners like Reed have in proving their innocence with DNA evidence. *Osborne*, 557 U.S. at 69. Article 64, as construed by the CCA, is fundamentally inadequate to fulfill that command. Article 64's non-contamination, exoneration, and unreasonable-delay requirements each violate due process by arbitrarily preventing access to DNA-testing results that could exonerate a prisoner, as Reed's case shows. But to afford Reed relief, this Court need hold only that the non-contamination requirement is unconstitutional, or summarily vacate so that the Fifth Circuit can address that question, which it repeatedly avoided.

A. The due process guarantee means Article 64 cannot arbitrarily deny prisoners their state-created right to prove their innocence through DNA testing.

1. The Constitution's due process guarantee "imposes procedural limitations" on a state's power to deprive an individual of state-created rights. *Id.* at 67. Thus, when state law creates "a liberty interest in demonstrating [a prisoner's] innocence with new evidence," the due process inquiry asks "what process (if any) is due." *Id.* at 67-68. Texas postconviction law gives prisoners the right to prove their innocence with newly discovered evidence, Tex. Code Crim. Proc. art. 11.071(5)(a)(1), so Texas must provide procedures adequate "to vindicate" that interest," *Osborne*, 557 U.S. at 68-69; *see Skinner*, 562 U.S. at 530.

A state's DNA-testing law provides unconstitutionally inadequate process if it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *Osborne*, 557 U.S. at 69 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). The "touchstone of due process is protection of the individual against arbitrary action of government." *Wolff*, 418 U.S. at 558. Thus, due process requires states to provide at least the "minimum procedures appropriate under the circumstances" in order to prevent states from "arbitrarily abrogat[ing]" state-created rights. *Id.* at 557.

2. This Court's caselaw illustrates at least three ways state procedures may violate due process.

a. The due process guarantee prohibits arbitrary or irrational procedures in many contexts. *See*

Morrissey v. Brewer, 408 U.S. 471, 481 (1972). When it comes to the criminal context, as the Court has explained, "evidence rules that 'infringe upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve'" contravene due process. *Holmes*, 547 U.S. at 324-25. Thus, evidentiary rules violate due process if they "exclude[] important defense evidence" but "d[o] not serve any legitimate interests." *Id.* at 325. The question is whether the state's procedures "rationally serve the end that [they] were designed to further." *Id.* at 331.

Under those principles, the Court has held that a Texas evidentiary rule violated due process where it barred a defendant from introducing testimony of another person charged and convicted of the same murder. *Washington v. Texas*, 388 U.S. 14, 22-23 (1967). Similarly, in *Chambers v. Mississippi*, 410 U.S. 284, 294, 297, 302-03 (1973), the Court found that evidentiary rules violated due process where they barred the defendant from cross-examining a man who had previously confessed to the murder and from introducing self-incriminating statements that man had made to others. And in *Crane v. Kentucky*, 476 U.S. 683, 691 (1986), the Court held unconstitutional a rule that prevented the defendant from trying to show that his confession was unreliable based on how it was obtained, and there was no apparent "rational justification for the wholesale exclusion" of that "potentially exculpatory evidence."

Bringing those teachings together in *Holmes*, the Court held unconstitutional a rule barring a defendant from introducing evidence that, "if viewed independently, would have great probative value," just because "the prosecution's case is strong enough." 547 U.S. at 329. The Court explained that the rule was

irrational because "the true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence." *Id.* at 330; *see id.* at 330-31.

b. The due process guarantee also requires states to keep their promises and prohibits states from punishing individuals for exercising their rights. For example, the government cannot use a defendant's silence after *Miranda* warnings to impeach his trial testimony. *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976). Nor can a defendant's exercise of the right to remain silent justify contempt. *Raley v. Ohio*, 360 U.S. 423, 437-39 (1959). And due process likewise requires states to honor promises they make to defendants during plea negotiations. *Santobello v. New York*, 404 U.S. 257, 261-62 (1971).

c. The due process guarantee also prohibits the government from corrupting the reliability of the truth-finding process. The government thus violates due process if it uses false evidence or false testimony to obtain a conviction, *Napue v. Illinois*, 360 U.S. 264, 269 (1959), or if it uses suggestive investigative methods likely to produce unreliable evidence, *Reyes v. Nurse*, 38 F.4th 636, 644-46 (7th Cir. 2022); *Perry v. New Hampshire*, 565 U.S. 228, 241 (2012).

B. As Reed's case shows, Article 64's non-contamination requirement bars prisoners from vindicating their state-created right to prove their innocence and thus violates due process.

Article 64 requires a prisoner to establish that evidence "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material

respect." Tex. Code Crim. Proc. art. 64.03(a)(1)(A)(ii). The CCA construes that chain-of-custody provision to contain an additional non-contamination requirement that forecloses relief if evidence might be contaminated. App. 66a-67a. That extratextual requirement arbitrarily denies prisoners like Reed the opportunity to obtain probative DNA evidence because it serves no legitimate state interest here.

1. The non-contamination requirement violates due process because it arbitrarily prevents prisoners from obtaining exculpatory results.

Denying DNA testing based on potential contamination is arbitrary, illogical, and disproportionate to whatever purpose the non-contamination requirement is designed to serve. *See Holmes*, 547 U.S. at 324-25.

The non-contamination requirement rests on the incorrect assumption that contaminated evidence cannot yield reliable DNA-testing results. But testing a contaminated sample can still result in probative and reliable evidence. *See* Br. of Chase Baumgartner 6, *Reed*, 598 U.S. 230 (No. 21-442). The Texas Department of Public Safety has rigorous protocols for detecting, accounting for, and reporting DNA results despite contamination. For example, laboratories can "deconvolute" a DNA mixture to account for known contaminators. *Id.* at 9, 13-16. Laboratories regularly use these technologies to test evidence that has been improperly sealed, comingled, or handled without gloves. *Id.* at 10-13.

The non-contamination requirement arbitrarily imposes a more-stringent chain-of-custody burden on prisoners seeking postconviction DNA testing than on

prosecutors introducing the evidence at trial. Indeed, Texas's trial practice shows that the state understands DNA science and *agrees* with it. If the chain-of-custody requirement is satisfied (as it is for the belt Reed seeks to test), Texas prosecutors may introduce DNA results derived from contaminated evidence at trial—when a defendant's constitutional rights are at their zenith. *See* Tex. R. Evid. 901(a); *Dossett v. State*, 216 S.W.3d 7, 20-22 (Tex. App. 2006). For example, if a sanitation worker recovered a key piece of evidence from a dumpster hours after a crime, it's unlikely that investigators would refuse to test that evidence simply because the worker's DNA might be on it.

The point is not that a prisoner is entitled to the same due process rights in the postconviction context as a criminal defendant not yet convicted. The point is that it is irrational, arbitrary, and fundamentally unfair to simultaneously accept that testing contaminated evidence *can* produce reliable DNA results, on the one hand, and deny that same science and determine that testing contaminated evidence categorically *cannot* produce reliable results, on the other. Put differently, there is no non-arbitrary rationale for the state to selectively use contaminated DNA evidence to prosecute criminal defendants while refusing to allow prisoners to use that same evidence to prove their innocence after trial. If contaminated evidence can yield probative DNA-testing results at trial (and it can), it can do so after trial, too.

Denying testing because of potential contamination is also circular. The only way to prove innocence through DNA testing is with DNA-testing results. But Article 64 doesn't authorize testing if the evidence is supposedly contaminated, because the non-contamination requirement bars the very testing required to

show that the supposed contamination *doesn't* prevent reliable results. Testing would also reveal whether the evidence was contaminated in the first place.

What's more, the *state*—not the defendant—is responsible for preserving crime-scene evidence. But the non-contamination requirement holds the *prisoner* responsible for the state's failure to properly handle or store the evidence. *See* Tex. Code Crim. Proc. art. 38.43(b), (c)(2)(A). That is fundamentally unfair, because it allows the state to prevent prisoners from ever obtaining postconviction DNA testing simply by improperly handling the evidence. Br. of Eight Retired Judges 23, *Reed*, 598 U.S. 230 (No. 21-442).

In sum, a non-contamination requirement isn't necessary to protect against unreliable DNA results; the testing itself does that. *See* Baumgartner Br. 17-18. Instead, the requirement excludes probative and reliable results, undermining the reliability of the postconviction procedures' truth-seeking function. Article 64's non-contamination requirement is thus "'arbitrary' or 'disproportionate to the purposes [it is] designed to serve.'" *Holmes*, 547 U.S. at 324-25.

2. The non-contamination requirement violates Reed's due process rights.

Reed's case shows precisely how Article 64's non-contamination requirement "transgresses" "recognized principle[s] of fundamental fairness." *Osborne*, 557 U.S. at 69. The CCA held that the belt couldn't be tested under Article 64 because it was "handled by ungloved" court personnel. App. 66a. But denying testing for that reason arbitrarily prevents Reed from obtaining a potentially exculpatory DNA result. Investigators concluded that "great force had been applied" to Stites's neck, *Reed*, 271 S.W.3d at 705, and

prosecutors told the jury that the killer "strangled the life" out of Stites with the belt for "three to four minutes," SA49, SA61. Thus, the killer likely shed his DNA during that prolonged attack, and DNA testing of the belt would likely reveal the killer's profile. If Reed is excluded from that profile, that would strongly suggest he is innocent. *See* Baumgartner Br. 3.

Potential contamination wouldn't necessarily diminish the belt's evidentiary value. DNA deposited by improper handling or storing of evidence can likely be accounted for in the backend analysis. Thus, DNA deposited by court personnel, if any, is unlikely to make testing results unreliable. Indeed, "[e]ven in this worst-case scenario of developing the most complex, contaminated DNA profile that can still be interpreted," Texas Department of Public Safety analysts would be able to "accurately include or exclude [Reed] or Mr. Fennell with about 95% accuracy." Baumgartner Br. 18. Preventing Reed from accessing DNA testing is no more constitutional than the laws that the Court held could not constitutionally bar evidence in *Holmes*, *Washington*, *Chambers*, and *Crane*. *Supra* pp. 19-21.

3. Courts have declined to read non-contamination requirements into other postconviction DNA-testing statutes because such a requirement would be unreasonable.

In interpreting other postconviction DNA-testing statutes, the Nebraska Supreme Court, the Georgia Court of Appeals, and the Fifth Circuit have held that the statutes' chain-of-custody provisions did not contain non-contamination requirements. Although those decisions aren't due process rulings, the courts'

reasoning shows why a non-contamination requirement is illogical and arbitrary.

In *State v. Pratt*, 842 N.W.2d 800, 811 (Neb. 2014), the Nebraska Supreme Court refused to read a non-contamination requirement into Nebraska's postconviction DNA-testing statute. Interpreting the statute "as demanding that the biological evidence was secured in a way likely to avoid accidental contamination with extraneous DNA" would "undermine[]" the statute's "express purposes." *Id.* It would make little sense for a postconviction DNA-testing statute to be "drafted to prevent discovery of relevant exculpatory DNA evidence." *Id.* at 811-12. "Despite any mixtures with extraneous DNA," the court explained, "a partial or full profile of the perpetrator's DNA could still be obtained" because there was an adequate chain of custody which gave analysts "knowledge of the past storage and handling" of the evidence. *Id.* at 811.

The Georgia Court of Appeals has similarly refused to read a non-contamination requirement into Georgia's postconviction DNA statute. *See White v. State*, 814 S.E.2d 447, 454 (Ga. Ct. App. 2018). So long as the chain-of-custody and other statutory requirements are satisfied, the court explained, the statute "does not permit" a court "to speculate as to the viability of any DNA potentially located on the evidence in question." *Id.* "To permit such speculation" about whether an item is contaminated "would likely exclude DNA testing of all but the most recently and pristinely stored physical evidence," "violat[ing] both the spirit and the letter" of the statute. *Id.*

Despite its unwillingness to confront these arguments in the due process frame in Reed's case, the

Fifth Circuit has elsewhere recognized that a non-contamination inquiry puts the cart before the horse. In *United States v. Fasano*, 577 F.3d 572, 576 (5th Cir. 2009), the court refused to read a non-contamination requirement into the federal postconviction DNA-testing statute. The court reasoned that the statute doesn't "impose a more exacting standard" beyond the "showing of the chain of custody." *Id.* Indeed, "much of the uncertainty inherent in this predictive exercise can be dispelled only by the tests a petitioner is seeking." *Id.* Stated differently, it's impossible to know whether testing will yield probative results without testing the sample.

In short, Nebraska and Georgia appellate courts, and even the Fifth Circuit elsewhere, have recognized that denying testing based on supposed contamination concerns makes no sense. Under a proper understanding of the science, it is the testing itself that determines whether reliable DNA results are available. Article 64 violates due process because its contrary approach is arbitrary and irrational.

C. Reed is likely to obtain testing based on the non-contamination requirement alone, but Article 64's exoneration and unreasonable-delay requirements also violate due process.

As explained below (at 33-35), holding that Article 64's non-contamination requirement violates due process would remove Goertz's justification for denying Reed DNA testing on the belt, so the Court need go no further. But Article 64's exoneration and unreasonable-delay requirements also violate due process. The exoneration requirement requires courts to ignore evidence inculpating third parties and blind themselves

to posttrial factual developments that, taken together with exculpatory DNA-testing results, could prove a prisoner's innocence. And the unreasonable-delay requirement punishes prisoners for exercising their right to prove their innocence through means other than DNA testing and for not predicting future amendments to Article 64.

1. The exoneration requirement violates due process because it prevents prisoners from proving their innocence with postconviction evidence and evidence inculpating a third party.

Article 64's exoneration provision requires the prisoner to establish that he "would not have been convicted if exculpatory results had been obtained through DNA testing." Tex. Code Crim. Proc. art. 64.03(a)(2)(A). The CCA holds that this inquiry must ignore posttrial developments discrediting trial evidence and limits "exculpatory" DNA-testing results to those "excluding the convicted person as the donor of the material," even if the results could inculpate a third party. App. 76a.

a. The right to present evidence inculpating another party is a "critical" part of the "fundamental" right "of an accused to present witnesses in his own defense." *Chambers*, 410 U.S. at 302; *see Holmes*, 547 U.S. at 327. The CCA recognizes that point, too. In denying Reed habeas relief, the court faulted Reed for failing (in its view) to "affirmatively demonstrate[]" his innocence by "show[ing] that someone else" murdered Stites. *Ex parte Reed*, 670 S.W.3d 689, 761 (Tex. Crim. App. 2023). The state cannot then ignore those principles in postconviction DNA testing, particularly

given "law's foundational concern for the determination of guilt and innocence" and when DNA technology has time and again proven factual innocence. *Harvey v. Horan*, 285 F.3d 298, 305-06 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing en banc); *see* Br. of Texas Exonerees 4, *Reed*, 598 U.S. 230 (No. 21-442).

The CCA's construction of the exoneration inquiry also prevents courts from considering posttrial factual developments in determining whether exculpatory DNA results would exonerate a prisoner. App. 76a. Under Article 64, a court may consider only the evidence offered at trial, even if credible new evidence, together with DNA-testing results, could prove the prisoner's innocence. And because a court cannot consider posttrial developments, recanted or disproven testimony offered at trial can foreclose DNA testing. That makes no more sense than allowing states to rely on false evidence—which due process prohibits. *Napue*, 360 U.S. at 269; *supra* p. 21.

b. Reed's case highlights how unfair the CCA's construction of the exoneration inquiry is. Postconviction developments have seriously undermined the state's theory of the case and inculpated Fennell. For example, the state has retracted key forensic testimony that prosecutors relied on to establish that Reed's sperm had to have been deposited around the time Stites died. *Supra* pp. 10-11. Fennell has even confessed to the crime, and numerous witnesses have testified that he threatened or was aggressive toward Stites in the days leading up to her murder. *Supra* pp. 11-12. DNA testing, especially in light of those developments, could prove Reed's innocence, but the CCA's construction of the exoneration inquiry arbitrarily prevents him from obtaining it.

2. The unreasonable-delay requirement violates due process because it punishes prisoners for exercising their rights and for not predicting changes in the law.

Article 64's unreasonable-delay requirement violates due process, too. That provision requires the prisoner to "establish[]" that "the request for the proposed DNA testing is not made to unreasonably delay the execution." Tex. Code Crim. Proc. art. 64.03(a)(2)(B). The CCA construes Article 64 to permit an unreasonable-delay finding if a prisoner has previously used postconviction procedures to develop evidence of innocence or if the prisoner did not correctly guess that he could obtain touch-DNA testing through Article 64 *before* the statute was amended to authorize that testing.

For starters, the CCA construes the unreasonable-delay requirement to permit a finding that a prisoner requested DNA testing for an improper purpose just because he previously litigated his innocence based on other evidence. *See* App. 83a-87a. But it is fundamentally unfair for the state to punish a prisoner for exercising his legal rights. *E.g.*, *Doyle*, 426 U.S. at 617-18. And this requirement is particularly perverse where, as here, the reason for the alleged "delay" is the prisoner's development of evidence to prove innocence—a substantive right Texas affords, Tex. Code Crim. Proc. art. 11.071(5)(a)(1). Thus, not only does the requirement punish prisoners for exercising their rights, but it also uses the time required to develop evidence of innocence to shut down the right to prove innocence in the first place. Such a circular and self-defeating rule contravenes due process.

The CCA also construes the unreasonable-delay requirement to deny DNA testing to prisoners for failing to seek touch-DNA testing in Article 64 proceedings *before* Article 64 was amended to authorize that form of testing. Article 64 was amended in 2011 to permit DNA testing of "skin tissue or cells, fingernail scrapings," and "other identifiable biological evidence that may be suitable for forensic testing." Tex. Code Crim. Proc. art. 64.01(a)(1) (2011). That amendment authorized touch-DNA testing, which is "DNA analysis that is conducted on skin tissue or cells on items of evidence, even in the absence of suspected biological *fluids* such as blood." Baumgartner Br. 8. Before 2011, neither the text of Article 64 nor the CCA's interpretation of it suggested that the statute authorized prisoner to seek touch-DNA testing. Yet, in the CCA's view, Reed unreasonably delayed in requesting DNA testing because there was no "legal impediment" prohibiting him from seeking touch-DNA testing before 2011. App. 86a-87a. Denying a prisoner access to DNA testing because he didn't divine that Article 64 would be amended is fundamentally unfair. Indeed, it is a "fundamental principle in our legal system," that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

D. The Court should summarily vacate so the Fifth Circuit can consider the non-contamination argument it avoided, or else grant plenary review.

The most straightforward course is for the Court to summarily vacate the Fifth Circuit's judgment so that court can consider whether the non-contamination requirement violates due process because it is

arbitrary and irrational. The court of appeals did not address that critically important question, despite Reed's repeated arguments and rehearing requests. And that course makes sense, because holding only the non-contamination requirement unconstitutional would redress Reed's injury, meaning the Court need not address the Fifth Circuit's holding on Article 64's other requirements to summarily vacate.

1. The Fifth Circuit refused to consider a key argument about why Article 64's non-contamination requirement is arbitrary and irrational.

Reed emphasized before the Fifth Circuit that the non-contamination requirement is arbitrary and fundamentally unfair given that there can be "probative results even where there is contamination," as his complaint explains. Oral Arg. 9:24-9:34; CA5 Doc. 103, at 30-31; CA5 Doc. 119, at 6-7; *see* App. 111a-112a. But the Fifth Circuit never acknowledged that argument. Rather, the panel held that the non-contamination requirement is constitutional because it is not fundamentally unfair to hold the state's mishandling of evidence (absent a showing of bad faith) against a prisoner and because a state can constitutionally impose a more-stringent standard for postconviction DNA testing than applies at trial. App. 12a-17a. And the Fifth Circuit summarily denied Reed's petition for panel rehearing, App. 89a-90a, which noted the court's failure to address his key arbitrariness argument, CA5 Doc. 176, at 1-2.

By refusing to address Reed's argument that the non-contamination requirement arbitrarily and irrationally denies DNA testing that could yield probative results, the court of appeals "failed" to undertake "the

correct … inquiry," *Sears v. Upton*, 561 U.S. 945, 946 (2010) (per curiam). The Court should thus summarily vacate the Fifth Circuit's opinion and remand for that court to properly consider that argument. *Id.*; *see also Burns v. Mays*, 143 S. Ct. 1077, 1077 (2023) (Sotomayor, J., dissenting from the denial of certiorari).

2. Holding only the non-contamination requirement unconstitutional would redress Reed's injury, making the case an excellent vehicle.

The court of appeals erred in holding that Reed needed to show that all three of Article 64's requirements are unconstitutional. *See* App. 12a & n.7. Reed can obtain relief even if only the non-contamination requirement violates due process.

A declaratory judgment that the non-contamination requirement is unconstitutional "would eliminate the state prosecutor's justification for denying DNA testing." *Reed*, 598 U.S. at 234. It thus would cause "'a significant increase in the likelihood' that the state prosecutor would" allow testing. *Id.* And, at the motion-to-dismiss stage, the Court must draw all reasonable inferences in favor of the nonmoving party. Doing so precludes assuming that Reed's DNA-testing request would be denied based on the exoneration or unreasonable-delay requirements.

a. Goertz couldn't rely on Article 64's exoneration requirement to deny testing of the belt.

Even accepting the CCA's construction of Article 64, *see* App. 76a, results showing a significant concentration of another person's biological material on the belt would be highly exculpatory. The killer applied "a great force" to the belt for "three to four minutes." *Reed*, 271 S.W.3d at 705-06. Finding a significant

amount of someone else's skin cells on the belt (like Fennell's), but not Reed's, *would* likely exclude Reed as the killer-donor, and thus would satisfy Article 64's exoneration requirement. Thus, on a motion to dismiss, the Court cannot assume that Goertz would deny Reed's renewed request to DNA-test the murder weapon based on the exoneration requirement.

Nor could Goertz rely on the CCA's exoneration inquiry on Reed's 2014 Article 64 motion to deny testing of the belt. That decision excluded the belt only on the basis of the non-contamination requirement, and thus never conducted an exoneration analysis on the belt. *See* App. 65a-68a.

b. Goertz also couldn't rely on Article 64's unreasonable-delay requirement to deny testing, because that requirement is motion-specific.

The "unreasonabl[e] delay" inquiry "consider[s] the circumstances surrounding the request," including "the promptness of the request, the temporal proximity between the request and the sentence's execution, or the ability to request the testing earlier." App. 84a. The assessment is "inherently fact-specific and subjective." *Id.* The CCA concluded, based on "the totality of circumstances surrounding Reed's [2014] motion," that Reed was "unable to establish" "that his motion was not made for the purpose of delay." App. 87a. In particular, the CCA noted that that motion "was filed on the same day the judge heard the State's motion to set an execution date" and included a "request to test a significant number of items," including some "whose relevance to the crime are unknown." App. 84a, 86a.

Putting aside Reed's disagreement with those factbound conclusions, the CCA's analysis makes

clear that Reed could show he had not unreasonably delayed when renewing his request for DNA testing and focusing only on the murder weapon. The CCA's previous unreasonable-delay analysis would not control on a renewed DNA-testing request, and the Court cannot assume—drawing all reasonable inferences in Reed's favor—that the request would be denied. Indeed, Reed has been requesting testing of the belt since 1999, more than a decade before the state sought an execution date, and the belt's "relevance to the crime" is not "unknown." App. 84a.

c. For these same reasons, this case is an excellent vehicle. Holding the non-contamination requirement alone unconstitutional would entitle Reed to § 1983 relief; so too would finding the other requirements unconstitutional, as well.

II. The question presented is exceptionally important.

Access to postconviction DNA testing is a critical failsafe to exonerate the innocent. When states grant prisoners the right to prove their innocence, including through postconviction DNA testing, but then fail to provide adequate procedures to vindicate that right, that due process violation can have life-or-death consequences, as Reed's case shows.

A. "[T]he execution of a[n] … innocent person" is "a constitutionally intolerable event." *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring). States thus provide critical mechanisms for correcting wrongful convictions to protect the innocent, restore public trust in the legitimacy of the criminal-justice system, and enhance public safety. Br. of Law Enforcement Action Partnership & the National Police Accountability Project 17, *Reed*, 598 U.S. 230 (No. 21-442).

Postconviction DNA testing, with its "unparalleled ability both to exonerate the wrongly convicted and to identify the guilty," *Osborne*, 557 U.S. at 55, serves all these interests. Indeed, more than 600 wrongly convicted prisoners have been exonerated by DNA evidence—38 of them from death row. Selby, *supra*. And in about half of cases where DNA testing exonerated a prisoner, that testing revealed the actual perpetrator. *DNA Exonerations in the United States (1989-2020)*, The Innocence Project, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited June 10, 2025). It is thus no surprise that all 50 states, the District of Columbia, and the federal government have enacted statutes providing for postconviction DNA testing. Ian J. Postman, Note, *Re-Examining Custody and Incarceration Requirements in Postconviction DNA Testing Statutes*, 40 Cardozo L. Rev. 1723, 1729 & n.36 (2019).

Prisoners asserting their innocence have a particularly strong interest in accessing those state-law procedures. But the power of DNA testing to exonerate the wrongly convicted means little when those procedures contravene due process. The CCA's construction of Article 64 does just that.

B. Reed's case shows what's at stake. Reed has maintained his innocence for more than 25 years. During that time, he has amassed compelling evidence undermining the state's theory. That evidence shows that he and Stites were having a consensual affair and suggests that Fennell knew about it and murdered Stites because of it. *Supra* pp. 10-11. It is likely that the killer's DNA is on the belt, and a DNA test could reveal the truth. That's why Reed has been asking to test the belt since 1999.

But Goertz, relying on an unconstitutional construction of Article 64, continues to arbitrarily deny Reed testing. Article 64's constitutional deficiencies thus carry life-or-death consequences for Reed. The Court should make clear that the due process guarantee does not allow a state to arbitrarily and irrationally deny potentially probative DNA testing that could exonerate an innocent man.

* * *

The CCA's authoritative construction of Article 64 violates due process, and the Fifth Circuit erred in ignoring a key non-contamination argument and finding no constitutional violation. The result is that *the murder weapon* still goes untested. For Reed, correcting the Fifth Circuit's constitutional error could mean the difference between life and death.

The simplest path is to summarily vacate so the Fifth Circuit can address the critical argument it ignored. A favorable ruling on that issue alone would entitle Reed to § 1983 relief. But given the stakes and the merits, the case also warrants plenary review.

CONCLUSION

The Court should summarily vacate the Fifth Circuit's decision and remand for the court of appeals to consider Reed's argument that Article 64's non-contamination requirement violates due process because it is arbitrary and irrational. Alternatively, the Court should grant plenary review.

Respectfully submitted.

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