No. _____

IN THE

Supreme Court of the United States

DAVID WOOD
Petitioner,
V.
RACHEL PATTON,
IN HER OFFICIAL CAPACITY AS DISTRICT ATTORNEY PRO TEM,
Respondent.

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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David Wood is scheduled for execution March 13, 2025

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CAPITAL CASE
QUESTION PRESENTED

Does Article III standing require a particularized determination of whether a specific state official will redress the plaintiff's injury by following a favorable declaratory judgment?

PARTIES BELOW

All parties are listed on the cover page in the case caption. There are no corporate parties involved in this case.

LIST OF RELATED CASES

Wood v. State, No. AP-77,107, 693 S.W.3d 308 (Tex. Crim. App. 2024).

Wood v. Patton, No. 1:24-cv-01058-RP, 2025 WL 629282 (W.D. Tex. Feb. 19, 2025).

Wood v. Patton, No. 25-70004, 2025 WL 732836 __ F.4th __ (5th Cir. March 7, 2025).

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PETITION FOR A WRIT OF CERTIORARI

David Wood petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The March 7, 2025, opinion from the United States Court of Appeals for the Fifth Circuit is attached as Appendix A. The February 19, 2025, order of the Federal District Court for the Western District of Texas is attached as Appendix B.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on March 7, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, which provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

Texas is on the brink of executing David Wood without providing him a constitutionally adequate opportunity to seek DNA testing. In 2011, DNA testing was conducted on a blood stain on the clothes of a female victim, using technology that was not developed until long after his 1992 trial took place. This testing revealed, for the first time, a male DNA profile, and Wood was definitively excluded as its source. This strongly supports what Wood has always said: That he is innocent of this offense.

After that exculpatory DNA result, Wood attempted to utilize Chapter 64 of the Texas Code of Criminal Procedure to seek further DNA testing. He requested DNA testing of other items recovered from the crime scenes and also requested that the State compare the newly discovered male DNA profile to the biological samples it obtained in 1987 from an alternative suspect. The State refused both, and the Texas Court of Criminal Appeals (TCCA) did as well. That leaves this case in a remarkable posture—Wood is set to be executed this week, despite an exculpatory DNA result that the State refuses to compare to its alternative suspect. Furthermore, a substantial amount of evidence exists that is suitable for DNA analysis but which remains untested.

Following the TCCA decision, Wood filed a civil rights complaint asserting that his due process rights were violated for two reasons: 1) the TCCA has rendered Chapter 64 an illusory right by denying DNA testing in every appeal for the last fifteen years, and 2) the TCCA interpreted the statute in a novel way that he did not have reasonable notice of. The district court dismissed Wood's complaint under Rule 12(b)(6). App.B. On appeal, the Fifth Circuit held that Wood lacked Article III standing regarding his first claim and upheld the dismissal of his second claim under Rule 12(b)(6). App.A.

The Fifth's Circuit standing ruling places Wood's case in an identical posture to Ruben Gutierrez's, whose case is currently before this Court. *Gutierrez v. Saenz*, No. 23-7809. The Fifth Circuit recognized this, explicitly relying on its standing rule created in that case to dismiss Wood's complaint: "Under *Gutierrez*, Wood cannot

establish standing because it is not 'substantially likely' that a favorable ruling from our court would cause the state prosecutor to change course and agree to DNA testing." App.A.6. This novel rule is a significant departure from traditional standing analysis, turning what is typically a simple, straightforward assessment into a quest to determine whether the relevant State actors will ultimately agree to DNA testing. The Fifth's Circuit unique standing rule from *Gutierrez*, which diverged from this Court's opinion in *Reed v. Goertz*, 598 U.S. 230 (2023), created a circuit split with the Eighth and Ninth Circuits. It has been fully briefed before this Court and was argued last month.

Standing was the exclusive reason for the dismissal of Wood's claim that the Texas DNA testing statute violates due process because the TCCA's authoritative construction of that statute renders it illusory in practice. This Court stayed Gutierrez's execution in light of its concerns regarding this unique standing rule. *Gutierrez v. Saenz*, 144 S. Ct. 2718 (2024) (mem.). Wood's case presents a materially indistinguishable scenario. This petition should be granted and Wood's execution stayed "to prevent these . . . virtually identically situated litigants from being treated in a needlessly disparate manner." *Roper v. Weaver*, 550 U.S. 598, 601 (2007).

STATEMENT OF THE CASE

I. David Wood was sentenced to death in 1992 for a crime for which he maintains his innocence.

In 1992, Wood was convicted of and sentenced to death for the 1987 murder of Ivy Williams and one or more of the following persons: Desiree Wheatley, Karen

Baker, Angelica Frausto, Rosa Maria Casio, and Dawn Smith in El Paso, Texas. *Wood v. Dretke*, 2006 WL 1519969, *2 (N.D. Tex. June 2, 2006). Wood has always maintained his innocence.[1] The State's case against him was entirely circumstantial. No DNA evidence linked him to the offense. His conviction was primarily based on the testimony of two jailhouse snitches, a witness who testified about an extraneous offense, and other circumstantial evidence. *Wood v. Quarterman*, 503 F.3d 408, 410–11 (5th Cir. 2007). Wood was denied relief on direct appeal, as well as on his initial state and federal habeas petitions.

Wood was scheduled to be executed on August 20, 2009. He filed a subsequent application for writ of habeas corpus raising a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). The TCCA stayed his execution and remanded the case to the district court for an evidentiary hearing. *Ex parte Wood*, 2009 WL 10690712, *1 (Tex. Crim. App. Aug. 19, 2009). Ultimately, the TCCA denied relief on that claim. *Ex parte Wood*, 2014 WL 6765490, *1 (Tex. Crim. App. Nov. 26, 2014). It later granted reconsideration of that claim on its own initiative before again denying relief. *Ex parte Wood*, 568 S.W.3d 678, 682 (Tex. Crim. App. 2018). Wood also sought authorization from the Fifth Circuit to file a successive habeas corpus petition containing an *Atkins* claim, which was later denied. *In re Wood*, 648 F. App'x 388, 389 (5th Cir. 2016).

[1] Wood currently has a subsequent state habeas application pending in the TCCA raising claims relating to his innocence. He also has requested authorization from the Fifth Circuit to file a successive federal habeas petition raising similar claims should the TCCA dismiss the subsequent application.

II. While his *Atkins* proceedings were ongoing, David Wood sought DNA testing under Chapter 64 of the Texas Code of Criminal Procedure.

Chapter 64 of the Texas Code of Criminal Procedure provides a process for a convicted person to obtain access to DNA testing of evidence. Article 64.01 mandates various requirements for filing a Chapter 64 motion, and Article 64.03 outlines additional requirements to obtain testing. To prove his innocence, Wood sought DNA testing under Chapter 64.

A. In 2011, DNA testing of a blood stain on the clothing of one of the victims definitively excluded David Wood as the contributor of male DNA found on it.

In 2010, the State agreed to DNA retesting of three items previously tested before Wood's 1992 trial. App.C.6. The agreed DNA testing was of a blood stain on the sun suit of Dawn Smith, a blood stain on the blouse of Rosa Maria Casio, and tissue found under the fingernails of Angelica Frausto. App.C.6. In June 2011, the DNA testing results on Smith's sun suit revealed the DNA profile of an unknown male. App.C.6. Wood was definitively excluded as the source. App.C.6; *see also Wood v. State*, 693 S.W.3d 308, 331 (Tex. Crim. App. 2024) (The retesting "showed that a bloodstain on a yellow terrycloth sun suit belonging to victim Dawn Smith contained male DNA," and "[Wood] was excluded from this profile."). Testing of the other items was inconclusive. App.C.6.

B. In light of the exculpatory DNA result and based on changes to Chapter 64, David Wood sought further DNA testing and to compare the new, unidentified male DNA profile to an alternative suspect's DNA.

In light of this exculpatory result and due to amendments to Chapter 64, Wood sought further DNA testing. In 2011, Chapter 64 was amended, including by no longer requiring a movant to establish why biological evidence was not previously subjected to DNA testing. *Wood*, 693 S.W.3d at 331. The amendment became effective on September 1, 2011. The next month, Wood filed a Motion for Forensic DNA Testing under the amended version of Chapter 64. App.C.7. Due to the sprawling nature of the case (six victims at six different crime scenes) a large quantity of items could provide probative DNA results. As such, Wood requested DNA testing on sixty-nine items. App.C.7. The State opposed Wood's motion. App.C.7.

In 2015, Wood also sought DNA testing pursuant to Chapter 64 of the hair, saliva, and blood samples of the State's alternative suspect in this offense, Salvador Martinez. App.C.9. Martinez was identified as a suspect by El Paso Police Department (PD) in 1987 after he gave five inconsistent statements, including regarding his relationship with some of the victims and about his presence in El Paso at the time of their disappearances. App.C.9. El Paso PD eventually learned that Martinez had moved to El Paso shortly before the first victim disappeared and moved to Utah shortly after the discovery of the first body. App.C.9. El Paso PD also learned that he had concealed his connection to three of the victims, each of whom he had known. App.C.9. As part of the investigation, Martinez took a polygraph exam, which

he failed, and the examiner reported he showed deception when responding to questions regarding the victims and his personal involvement in their murders.

The State obtained hair, saliva, and blood from Martinez in 1987 and transmitted those to DPS. App.C.9. No DNA profile of Martinez was ever developed. App.C.9. Wood filed a motion on November 2, 2015, requesting that Martinez's DNA profile be obtained from those samples and compared to evidence, including the unknown male profile on Smith's sun suit. App.C.9. The State opposed this request.

In 2015, Chapter 64 was amended again to no longer require proof of the presence of biological material to obtain DNA testing. *Reed v. State*, 541 S.W.3d 759, 768 (2017). The amendment required only "a reasonable likelihood" that the item contain biological material. Tex. Code Crim. Proc. arts. 64.01(a-1), 64.03(B). This amendment thus broadened the category of evidence upon which a movant could obtain DNA testing pursuant to Chapter 64. It became effective on September 1, 2015. In anticipation of those amendments, Wood sought leave on July 27, 2015, to refile his October 2011, motion after September 1, 2015. App.C.10.

The State finalized an inventory of the available evidence that could be tested on August 29, 2016. App.C.11. It indicated that around twelve items of evidence had been lost. App.C.11. The convicting court scheduled a hearing to determine Wood's entitlement to Chapter 64 DNA testing for March 8, 2017. App.C.11. Before this hearing, Wood filed a Motion for Forensic DNA Testing under Amended Chapter 64 on March 3, 2017. App.C.11.

Ultimately, the trial court denied without explanation Wood's motion for DNA testing and request to compare the unidentified male DNA to the alternative suspect. *Wood*, 693 S.W.3d at 336.

C. DNA proceedings in the TCCA.

Wood appealed that denial to the TCCA. The TCCA affirmed. *Wood*, 693 S.W.3d at 311–12. It did so solely on the ground that Wood "failed to show that his subsequent DNA testing requests have not been made to unreasonably delay the execution of sentence." *Id.* at 312; *see* Tex. Code Crim. Proc. art. 64.03(a)(2)(B). The TCCA did not consider any of the other factors under Chapter 64 in its decision, nor did it address the impact of the powerful exculpatory results the initial DNA testing produced when denying the appeal.

On August 21, 2024, the TCCA denied Wood's rehearing motion in an unpublished order. *Wood v. State*, No. AP-77,107 (Tex. Crim. App. Aug. 21, 2024).

D. The State sought an execution date for David Wood before the completion of state court proceedings regarding DNA testing.

Despite knowing that Wood intended to litigate DNA issues further through other available avenues, the State sought an execution date while DNA proceedings remained ongoing. On August 15, 2024, while Wood's motion for rehearing was still pending in the TCCA, an order setting Wood's execution date was signed, setting his execution for March 13, 2025. App.C.13.

III. David Wood filed a federal civil rights complaint asserting that the TCCA's authoritative construction of Chapter 64 violated his due process rights.

Filing a civil rights complaint requires an actual injury. A "procedural due process claim 'is not complete when the deprivation occurs,'" but instead "when 'the State fails to provide due process.'" *Reed*, 598 U.S. at 236 (2023) (quoting *Zinermon v. Burch*, 494 U.S. 113, 126 (1990)). For due process challenges to Chapter 64, injury occurs when the TCCA denies a motion for rehearing. *Id.* The injury to Wood thus became complete on August 21, 2024, when the TCCA denied his timely filed motion for rehearing of his Chapter 64 appeal. On September 9, 2024, just nineteen days after the injury occurred, Wood filed a complaint in federal court under 42 U.S.C. § 1983 asserting that the TCCA's authoritative construction of Chapter 64 violated his due process rights, both facially and as applied. App.C. He requested declaratory and injunctive relief. App.C.24.

While a state court decision denying DNA testing is itself not reviewable by federal courts, plaintiffs may raise challenges regarding the constitutionality of the process provided or of the relevant statute as "authoritatively construed" by the highest state court. *Skinner v. Switzer*, 562 U.S. 521, 532 (2011). Wood alleged two ways in which the TCCA's interpretation of the relevant statute violated fundamental fairness, *see Medina v. California*, 505 U.S. 437, 446, 448 (1992): First, that it renders the ability to obtain DNA testing an illusory right. Second, that it interpreted the statute in a novel way of which he did not have reasonable notice. App.C.14–23. Wood's claim that the TCCA's authoritative construction of Chapter 64 renders the

right illusory is grounded in the fact that the TCCA, which reviews DNA testing motions *de novo* on appeal in most instances, has denied DNA testing in every case that has come before it in the last fifteen years, amounting to twenty-three consecutive denials. App.C.15–17.

On February 19, 2025, the district court granted the Defendant's motion to dismiss for failure to state a claim on which relief may be granted and denied Wood's motion for a preliminary injunction staying his execution. App.A.

Wood appealed this dismissal to the Fifth Circuit. On March 7, 2025, the Fifth Circuit held that Wood lacked Article III standing regarding his first claim and upheld the dismissal of the second claim under Rule 12(b)(6). App.A. The court's standing analysis regarding his first claim mirrored its prior decision in *Gutierrez v. Saenz*, 93 F.4th 267 (5th Cir.), *cert. granted*, 145 S. Ct. 118 (2024), which raised a different challenge to the constitutionality of Chapter 64. There, the Fifth Circuit held that "[b]ecause there is not a substantial likelihood that a favorable ruling by a federal court on Gutierrez's claims would cause the prosecutor to order DNA testing, Gutierrez's claims are not redressable in this Section 1983 suit." *Id.* at 275.

The Fifth Circuit applied its *Gutierrez* standing rule to Wood. It held that "[u]nder *Gutierrez*, Wood cannot establish standing because it is not 'substantially likely' that a favorable ruling from our court would cause the state prosecutor to change course and agree to DNA testing." App.A.6. It further held that "*Gutierrez* controls" because a declaratory judgment finding that Chapter 64 is an illusory right in practice would amount to "a vague declaratory judgment announcing that the CCA

has 'construed' Chapter 64 unconstitutionally [but] would not apprise a state prosecutor (or the CCA) of which denials were unconstitutional and why." App.A.7–8. Therefore, Wood could not establish redressability because a state prosecutor would not be likely to agree to testing after such a judgment. App.A.8.

The Fifth Circuit recognized that this Court is reviewing its standing rule from *Gutierrez*, but circuit precedent required it to apply the rule anyway:

> Although the Supreme Court has granted certiorari in *Gutierrez*, it remains binding under our rule of orderliness unless and until the Supreme Court holds differently. *Texas v. United States*, 126 F.4th 392, 406–07 (5th Cir. 2025). "This rule is strict and rigidly applied, and jurisdictional questions such as a panel's understanding of Article III standing remain binding." *Id.* at 406 (cleaned up). "[A] mere hint of how the Supreme Court might rule in the future" does not "permit a subsequent panel to depart from circuit precedent." *Id.* Thus, we apply *Gutierrez* and hold that Wood lacks standing as to his first claim.

App.A.8.

Because the Fifth Circuit dismissed Wood's first claim on standing grounds, it did not rule on the merits of the claim or the district court's dismissal of it under Rule 12(b)(6).

REASONS FOR GRANTING THE WRIT

This case presents an identical question to that which this Court is considering in *Gutierrez v. Saenz*, No. 23-7809. This Court has already recognized the importance of this question as evidenced by its actions in that case. The Fifth Circuit relied exclusively on its novel standing rule developed in *Gutierrez* to dismiss Wood's claim. Because Wood's case has no material difference to *Gutierrez*, granting certiorari is appropriate here as well.

Furthermore, the Fifth Circuit's unique standing rule justifies this Court's intervention. It departs from longstanding principles regarding standing and this Court's decision in *Reed*, and also generated a circuit split. It has the practical effect of closing the courthouse doors to potentially meritorious civil rights complaints. And that is exactly what has occurred here. Due to its application of its *Gutierrez* rule, the Fifth Circuit did not consider the merits of Wood's potential claim. Wood presented a compelling case that the TCCA's authoritative interpretation of Chapter 64 violates due process by rendering that statute illusory in practice. The Fifth Circuit should resolve that question in the first instance on remand, guided by this Court's forthcoming decision in *Gutierrez*.

I. Certiorari should be granted because this case involves the identical issue that this Court will soon resolve in *Gutierrez v. Saenz*.

This Court has recognized that it is "appropriate to exercise our discretion to prevent . . . virtually identically situated litigants from being treated in a needlessly disparate manner." *Weaver*, 550 U.S. at 601. That rings true here, where Wood's case presents the identical question that this Court is currently considering in *Gutierrez v. Saenz*, No. 23-7809. Because there is no material difference in the two cases, Wood's petition for writ of certiorari should be granted, just as this Court did in *Gutierrez*.

Both cases come to this Court after the Fifth Circuit rejected civil rights complaints regarding the constitutionality of Texas's DNA testing statute solely on the ground that the plaintiffs lacked Article III standing. The Fifth Circuit invented a novel standing rule in *Gutierrez*. There, it held that a plaintiff lacks standing if,

even after a favorable declaratory judgment, the federal court thinks that such a judgment "is not substantially likely" to "cause the state prosecutor to change course and agree to DNA testing." App.A.6.

The Fifth Circuit relied exclusively on its *Gutierrez* standing rule in dismissing Wood's claim that Chapter 64 violates due process because the TCCA's authoritative construction of it renders it illusory in practice. It held that "[u]nder *Gutierrez*, Wood cannot establish standing because it is not 'substantially likely' that a favorable ruling from our court would cause the state prosecutor to change course and agree to DNA testing." App.A.6; *see also* App.A.7 (holding that "*Gutierrez* controls"); App.A.8 ("Although the Supreme Court has granted certiorari in *Gutierrez*, it remains binding under our rule of orderliness unless and until the Supreme Court holds differently."); App.A.8 ("Thus, we apply *Gutierrez* and hold that Wood lacks standing as to his first claim.").

There is no relevant distinction between this case and *Gutierrez*. Both petitioners raised underlying civil rights complaints regarding the constitutionality of Texas's DNA testing statute. While the cases present different arguments on the merits, the Fifth Circuit sidestepped any merits ruling in both cases. Instead, it resolved both based on its unique, newly created standing jurisprudence, which led it to dismiss both cases on a theory that standing turns on a particularized determination of whether the relevant state prosecutor in question would order DNA testing if a favorable declaratory judgment issued.

If anything, Wood's case presents a more egregious example of the Fifth Circuit's standing rule compared to *Gutierrez*. In *Gutierrez*, the Fifth Circuit "distinguished *Reed* and held that Gutierrez lacked standing because the CCA explicitly held that it would have denied DNA testing *even if* the challenged provision was not at issue." App.A.6 (citing *Gutierrez*, 93 F.4th at 273–75). Rather than relying on a clear statement from the TCCA that its opinion on DNA testing would not be altered even if the statute was found unconstitutional as occurred in *Gutierrez*, the Fifth Circuit here simply speculated that the TCCA would still deny testing, untethered from any existing statement from that court.

In *Gutierrez*, this Court stayed the petitioner's execution the day it was set to occur. 144 S. Ct. at 2718. The petition for writ of certiorari was later granted, is now fully briefed, and was argued in this Court on February 24, 2025. In light of the parallel tracks of the two cases, this Court should grant Wood's petition, and then hold his case pending this Court's decision in *Gutierrez*, which inevitably will control Wood's case as well. Failing to do so would amount to an arbitrary and capricious action, and one that is entirely untenable in our justice system, particularly so in a death penalty case. *Cf. Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

II. The Fifth Circuit's *Gutierrez* rule departed from this Court's decision in *Reed* and created a circuit split.

The Fifth Circuit's novel interpretation of standing justifies this Court's intervention. This is particularly true as it created a circuit split. *See* Sup. Ct. R. 10(a). No long explication of this is required, as this Court has already recognized the necessity of resolving this issue in *Gutierrez*.

Article III standing has three elements: 1) an actual or imminent injury in fact; 2) a causal connection between the defendant's conduct and the injury; and 3) a likelihood that the injury is redressable by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Redressability, the question at issue here, is rarely an independent barrier. As this Court recently explained, "[t]he second and third standing requirements—causation and redressability—are often flip sides of the same coin. If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 380–81 (2024) (internal quotation omitted).

This Court applied its traditional standing doctrine recently in a different challenge to the constitutionality of Chapter 64:

> Texas argues that Reed lacks standing. We disagree. Reed sufficiently alleged an injury in fact: denial of access to the requested evidence. The state prosecutor, who is the named defendant, denied access to the evidence and thereby caused Reed's injury. And 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. It is "substantially likely" that the state prosecutor would abide by such a court order. *Utah v. Evans*, 536

> U.S. 452, 464, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002) (internal quotation marks omitted). In other words, in "terms of our 'standing' precedent, the courts would have ordered a change in a legal status," and "the practical consequence of that change would amount to a significant increase in the likelihood" that the state prosecutor would grant access to the requested evidence and that Reed therefore "would obtain relief that directly redresses the injury suffered." *Ibid.*

Reed, 598 U.S. at 234. *Reed* was a straightforward application of traditional standing analysis to a case asserting that Chapter 64 violates due process.

Rather than applying these basic principles, the Fifth Circuit charted a new course. It took the plain statement of *Reed*, which broke no new ground in terms of standing, and turned it into a searching, fact-specific inquiry of what actions the particular state actor in question would take in response to a declaratory judgment. The Fifth Circuit rule is incorrectly outcome determinative regarding what actions the state prosecutor will take in the future. App.A.6 ("Under *Gutierrez*, Wood cannot establish standing because it is not 'substantially likely' that a favorable ruling from our court would cause the state prosecutor to change course and agree to DNA testing."). That is not how standing works. Whether or not DNA testing is ultimately granted is not a dispositive factor when determining standing. *See Department of Education v. Brown*, 600 U.S. 551, 561–62 (2023) ("[T]he fact that the defendant might well come to the same decision after abiding by the contested procedural requirement does not deprive a plaintiff of standing.").

In addition to being wrong, the Fifth Circuit's *Gutierrez* rule created a circuit split regarding standing. The Eighth Circuit, in *Johnson v. Griffin*, 69 F.4th 506 (8th Cir. 2023), faithfully applied *Reed* to a § 1983 action pertaining to the

constitutionality of a state DNA testing statute. That court applied *Reed*, found that standing existed, *Johnson*, 69 F.4th at 510–12, and did so without delving into the particularized actions the defendant might take in response to a favorable declaratory judgment. Similarly, the Ninth Circuit applied *Reed* in *Redd v. Guerrero*, 84 F.4th 874 (9th Cir. 2023). While not a challenge to a DNA testing statute, the court there applied *Reed* correctly and found the plaintiff had standing—again without delving into the particularized actions the defendant might take in response to a favorable declaratory judgment. *Id.* at 884–86.

The Fifth Circuit's opinion flatly contradicts this Court's standing jurisprudence. It also undermines an individual's ability to receive due process. As this Court has already recognized in *Gutierrez*, intervention is warranted to realign the Fifth Circuit with this Court's standing jurisprudence and to resolve the circuit split that case created and which this case entrenches.

III. The Fifth Circuit's application of its *Gutierrez* rule prevented the resolution of a potentially meritorious claim.

The Fifth Circuit's application of its *Gutierrez* rule significantly harmed Wood. It operated to close the federal court doors to a potentially meritorious claim that Texas' DNA testing statute operates in an unconstitutional manner, preventing any merits review of the claim.[2] The question of whether this claim is one on which relief

[2] In the courts below Wood raised a second due process challenge, that the TCCA interpreted the unreasonable delay prong in a novel way that he did not have reasonable notice of. App.C.17–23. Wood stands by his belief in the merit of that claim. However, the Fifth Circuit held that Wood had standing to raise that claim but upheld the district court's Rule 12(b)(6) dismissal of it. App.A.8–10. Pursuing

may be granted under Rule 12(b)(6) is a question for the Fifth Circuit to resolve on remand in the first instance, with the benefit of this Court's forthcoming *Gutierrez* opinion. This is "a court of final review and not first view." *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 110 (2001) (*per curiam*) (internal quotation omitted). As such, this Court does "not decide in the first instance issues not decided below." *National Collegiate Athletic Assn.* v. *Smith*, 525 U.S. 459, 470 (1999). "In particular, when we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

Recognizing that the Fifth Circuit must first resolve it, Wood will still address his underlying claim here to show that a remand is not an empty exercise. This Court has recognized the viability of procedural due process challenges to state DNA testing procedures. *Skinner*, 562 U.S. at 525. While a state court decision denying DNA testing is itself not reviewable by federal courts, plaintiffs may raise challenges regarding the constitutionality of the process provided or of the relevant statute as "authoritatively construed" by the highest state court. *Id.* at 532. There are two elements to a procedural due process claim: (1) "deprivation by state action of a protected interest in life, liberty, or property," and (2) "inadequate state process." *Reed*, 598 U.S. at 236. A procedural due process violation occurs where the state

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that claim here would be a matter of error correction, which this Court rarely does. *See* Sup. Ct. R. 10. In light of that reality Wood does not pursue this second claim here.

procedure "'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.'" *District Attorney's Office v. Osborne*, 557 U.S. 52, 69 (2009) (quoting *Medina*, 505 U.S. at 446, 448).

If a liberty interest, such as Chapter 64, is created by the State, but the State then makes that right impossible to access, due process is violated because it is a fundamentally unfair procedure. *See Medina*, 505 U.S. at 446, 448. In *Gutierrez*, the district court persuasively explained why this is true. *See Gutierrez v. Saenz*, 565 F.Supp.3d 892, 908–11 (S.D. Tex. 2021).[3] As that court explained, "[h]istorical practice and this country's fundamental principles of justice do not countenance an illusory right that cannot be obtained." *Id.* at 908 (citing *Patterson v New York*, 432 U.S. 197, 202 (1977)). "Due process does not countenance procedural sleight of hand whereby a state extends a right with one hand and takes it away with another. To do so renders meaningless an express right and transgresses a principle of fundamental fairness." *Id.* at 911 (citing *Osborne*, 557 U.S. at 69; *Medina*, 505 U.S. at 446; *Douglas v. California*, 372 U.S. 353, 358 (1963); *Burns v. United States*, 501 U.S. 129, 136 (1991); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956)).

Wood alleged that the TCCA's authoritative construction of Chapter 64 has rendered it an illusory right. App.C.15–17. This is a facial challenge to the statute's

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[3] The district court in *Gutierrez* found that Chapter 64 was not illusory in practice. However, it was faced with a different claim than Wood presents and it was not on notice of the factual basis of Wood's claim—the TCCA's fifteen-year unbroken string of DNA testing denials. Wood references this decision for its explanation of how a statute that is illusory in practice violates due process.

constitutional adequacy. Wood's contention is that the TCCA's authoritative construction of Chapter 64 makes it an illusory right because that court makes obtaining DNA testing impossible in practice. As such, it is an empty possibility and facially invalid.

The TCCA has done so by its authoritative construction of Chapter 64, rendering it illusory in violation of historical notions of fundamental fairness. *See Medina*, 505 U.S. at 446. For the last fifteen years, the TCCA has denied DNA testing in every appeal of a Chapter 64 motion where it was requested.[4] That amounts to twenty-three consecutive denials of DNA testing from the TCCA and counts both capital and non-capital cases.[5] The last appeal in which the TCCA granted DNA testing was in 2009. *Esparza v. State*, 282 S.W.3d 913 (Tex. Crim. App. 2009). The TCCA's fifteen-year, unbroken string of denying DNA testing appeals evidences a

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[4] *Gutierrez v. State*, 2024 WL 3220514 (Tex. Crim. App. June 27, 2024); *Wood v. State*, 693 S.W.3d 308 (Tex. Crim. App. 2024); *Murphy v. State*, 2023 WL 6241994 (Tex. Crim. App. Sept. 26, 2023); *Gonzales v. State*, 2022 WL 663806 (Tex. Crim. App. March 3, 2022); *Ramirez v. State*, 621 S.W.3d 711 (Tex. Crim. App. 2021); *Gutierrez v. State*, 2020 WL 918669 (Tex. Crim. App. Feb. 26, 2020); *Hall v. State*, 569 S.W.3d 646 (Tex. Crim. App. 2019); *Castillo v. State*, 2018 WL 739077 (Tex. Crim. App. Feb. 7, 2018); *Cardenas v. State*, 2017 WL 5151142 (Tex. Crim. App. Nov. 6, 2017); *LaRue v. State*, 518 S.W.3d 439 (Tex. Crim. App. 2017); *Reed v. State*, 541 S.W.3d 759 (Tex. Crim. App. 2017); *State v. Swearingen*, 478 S.W.3d 716 (Tex. Crim. App. 2015); *Holberg v. State*, 425 S.W.3d 282 (Tex. Crim. App. 2014); *State v. Swearingen*, 424 S.W.3d 32 (Tex. Crim. App. 2014); *Garza v. State*, 2013 WL 5409270 (Tex. Crim. App. Sept. 19, 2013); *Hughes v. States*, 2012 WL 5878821 (Tex. Crim. App. Nov. 15, 2012); *Wilson v. State*, 2012 WL 3206219 (Tex. Crim. App. Aug. 7, 2012); *Ex parte Gutierrez*, 337 S.W.3d 883 (Tex. Crim. App. 2011); *Cantu v. State*, 2010 WL 4010833 (Tex. Crim. App. Oct. 13, 2010); *Swearingen v. State*, 303 S.W.3d 728 (Tex. Crim. App. 2010); *Leal v. State*, 303 S.W.3d 292 (Tex. Crim. App. 2009); *Skinner v. State*, 293 S.W.3d 196 (Tex. Crim. App. 2009); *Garcia v. State*, 2009 WL 3042392 (Tex. Crim. App. Sept. 23, 2009).

[5] While the TCCA has issued other opinions regarding Chapter 64 appeals in that time period, this number reflects those decisions where the TCCA was ruling on whether to grant DNA testing.

hostility to the legislative intent of allowing post-conviction DNA testing, rendering the statutory right illusory and violating due process.

The TCCA conducts *de novo* review of Chapter 64 motions, except for issues turning on witness credibility or demeanor. *Reed v. State*, 541 S.W.3d 759, 768–69 (Tex. Crim. App. 2017). Therefore, the TCCA alone determines whether or not DNA testing is warranted in cases that reach it. While its decisions affirm or deny the lower court ruling, the TCCA does not do so within the typical appellate framework requiring deference to the lower court's decision.

Wood recognized below that there are a few examples of individuals receiving DNA testing under Chapter 64—but only when the State agreed to permit it or when the State decided not to file an appeal of a lower court granting it. These examples do not defeat Wood's allegation that the TCCA has authoritatively construed the statute in a way that denies due process. First, lower court decisions cannot inform how a statute is authoritatively construed, which is the relevant question under *Skinner*. *See* 562 U.S. at 532. While it is of course true that trial and lower appellate courts in Texas rule on DNA testing motions, the TCCA is the highest state court reviewing Chapter 64 motions and the only Texas court that can authoritatively construe the statute; thus, Wood's focus on the TCCA is in line with *Skinner*.

Second, crediting instances where the State has agreed to testing or decides not to appeal simply creates another constitutional problem: Whether or not an individual seeking DNA testing receives due process comes down to the whims of the state prosecutor in question and whether they agree to testing or choose to appeal to

the TCCA. But when a state creates a liberty interest it must provide due process for all who seek to access it, *see Zinermon*, 494 U.S. at 125 (explaining that due process includes "a guarantee of fair procedure"), not just to those that the State deems worthy of it. It creates a system where the State, rather than offering due process to all, picks and chooses who receives it. If the Texas legislature wanted to create a system where a convicted person could obtain DNA testing only where the State agreed, or only where the State decided not to appeal, it could have drafted such a statute. It did not.

If a declaratory judgment is entered that Chapter 64 is an illusory right, that in itself is an effectual remedy that would redress Wood's injury as it would result in a "change in [the] legal status" of the parties. *Reed*, 598 U.S. at 234 (quoting *Evans*, 536 U.S. at 464). With such a declaratory judgment in hand, Wood would be able to return to state court to again seek DNA testing. That is effectual relief, regardless of whether Wood ultimately receives testing.

As part of its misguided standing analysis, the Fifth Circuit held that Wood's requested declaratory judgement was "vague" and "would not apprise a state prosecutor (or the CCA) of which denials were unconstitutional and why." App.A.7. However, this misperceived the nature of the claim and the available relief. If the TCCA's construction of Chapter 64 renders it illusory in practice, and a declaratory judgment issues to that effect, the statute is facially unconstitutional. Once such a finding is entered, responsibility shifts back to the TCCA to develop a constitutional interpretation of that statute that renders it facially valid. *See Steffel v. Thompson*,

415 U.S. 452, 474 (1974) (explaining that when a federal court finds a statute facially invalid, the state court must supply "a narrowing or clarifying construction" of that statute). It is not the province of federal courts to micromanage state DNA testing statutes, only to assess their constitutionality. *See Billotti v. Legursky*, 975 F.2d 113, 116 (4th Cir. 1992) ("The Fourteenth Amendment does not authorize the federal courts to micromanage state criminal justice systems.").

Wood's petition should be granted to allow this potentially meritorious claim to proceed following guidance from this Court in *Gutierrez*.

CONCLUSION

This Court should grant *certiorari* and then hold Wood's case pending the resolution of *Gutierrez v. Saenz*. Depending on this Court's ruling in *Gutierrez*, it should then vacate the judgment of the Fifth Circuit and remand this case to that court for further consideration in light of the *Gutierrez* decision. It should also stay Wood's execution pending the disposition of this petition, as requested by separate application.

Respectfully submitted,

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