No. 21-442

IN THE

Supreme Court of the United States

RODNEY REED,

Petitioner,

v.

BRYAN GOERTZ, ET AL.,

Respondents.

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

MOTION FOR LEAVE TO FILE AND BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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October 22, 2021

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MOTION FOR LEAVE TO FILE BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Constitutional Accountability Center (CAC) respectfully moves under Supreme Court Rule 37.2(b) for leave to file a brief as *amicus curiae* in support of Petitioner Rodney Reed.

All parties were timely notified of CAC's intent to file this *amicus* brief. Petitioner consents to its filing. Respondents Bryan Goertz, Sara Loucks, and Maurice Cook also consent. Respondent Steve McCraw, however, takes no position on this filing of this brief. CAC thus files this motion seeking leave to file the attached brief.

CAC is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with

legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees.

CAC has a strong interest in the proper interpretation of 42 U.S.C. § 1983, which was passed to protect the uniquely federal rights guaranteed by the Constitution, and thus has an interest in this case. CAC seeks leave to file the attached brief so that it can explain to this Court why the failure of the court below to tailor its accrual analysis to the nature of the right to procedural due process undermines that right itself and contravenes the text and history of 42 U.S.C. § 1983.

For the foregoing reasons, CAC respectfully requests that it be allowed to file the attached brief as *amicus curiae*.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in the proper interpretation of 42 U.S.C. § 1983, which was passed to protect the uniquely federal rights guaranteed by the Constitution, and in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Rodney Reed brings a Section 1983 claim for the deprivation of his right to procedural due process. Time and again, this Court has admonished that analysis of when a Section 1983 claim accrues "begins with identifying 'the specific constitutional right' alleged to have been infringed." *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019) (quoting *Manuel v. City of Joliet*, 137 S. Ct. 911, 920 (2017)). Yet in a decision that never even mentioned the constitutional right at stake, much less engaged in any meaningful analysis of the nature of that right, the court below threw out

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief. Petitioner and Respondents Bryan Goertz, Sara Loucks, and Maurice Cook have consented to the filing of this brief; Respondent Steve McCraw takes no position on this filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

Reed's case as untimely. This Court should grant certiorari to correct that error and resolve the split among the circuits on when Section 1983 claims like the one in this case accrue, Pet. 18-27.

Reed has been on death row since 1998 for a crime he claims he did not commit. "Strenuously maintaining his innocence, Reed has repeatedly sought . . . relief in Texas state courts over the last two decades." *Reed v. Texas*, 140 S. Ct. 686, 687 (2020) (statement of Sotomayor, J., respecting the denial of certiorari). As part of that effort, Reed filed a motion under Texas Article 64, which permits a convicted person to obtain post-conviction DNA testing of biological evidence if certain conditions are met. *See* Tex. Code Crim. Proc. Art. 64.03(a). Reed litigated that motion all the way up to the Texas Court of Criminal Appeals, which ultimately denied his request for relief and his petition for rehearing nearly three years after the Texas trial court had initially denied his DNA-testing motion.

Reed then filed this federal lawsuit pursuant to 42 U.S.C. § 1983, alleging, as relevant here, that Article 64, both facially and as applied by the Texas Court of Criminal Appeals, violates his Fourteenth Amendment right to procedural due process. *See Skinner v. Switzer*, 562 U.S. 521, 524-25 (2011) (holding that state prisoners may pursue procedural due process claims seeking DNA testing in Section 1983 actions). The court below held that Reed's claim was time-barred under Texas's statute of limitations for Section 1983 actions because his claim accrued when the trial court first denied his Article 64 motion, not when the state high court conclusively affirmed the trial court's ruling. Pet. App. 9a. According to the court below, "Reed had the necessary information to know that his rights were allegedly being violated as soon as the trial court denied his motion for post-conviction relief." *Id.*

That statement is inaccurate as a matter of fact and mistaken as a matter of law. And it prevents Section 1983 from serving its purpose in cases like this one: Section 1983 cannot be used to enforce federal rights if, by the time plaintiffs like Reed know their rights have been violated, it is too late for them to go to federal court.

Section 1983 created a new remedy to vindicate the uniquely federal rights guaranteed by the Constitution against infringement by state officials. Enacted during Reconstruction as part of "extraordinary legislation," Cong. Globe, 42nd Cong., 1st Sess. 322 (1871) [hereinafter "Globe"] (Rep. Stoughton), that "alter[ed] the relationship between the States and the Nation with respect to the protection of federally created rights," *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), Section 1983 was passed to provide "further safeguards" to "life, liberty, and property," Globe 374 (Rep. Lowe). To that end, it enabled individuals to seek relief in the federal courts for deprivations of rights "secured by the Constitution of the United States." Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

Consistent with that history, this Court has long held that "[i]n order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Carey v. Piphus*, 435 U.S. 247, 258-59 (1978). That includes rules of accrual: this Court has specifically instructed that in "defining the contours and prerequisites of a § 1983 claim, including its rule of accrual," courts must "closely attend to the values and purposes of the constitutional right at issue," *Manuel*, 137 S. Ct. at 920-21. Thus, in case after case, this Court has begun its analysis of Section 1983 claims by "first . . . identify[ing] the specific

constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *see, e.g.*, *Carey*, 435 U.S. at 259; *Wallace v. Kato*, 549 U.S. 384, 387 n.1 (2007); *Nieves v. Bartlett*, 139 S. Ct. 1715, 1721-22 (2019); *McDonough*, 139 S. Ct. at 2155.

The court below ignored all this precedent. It wholly failed to tailor its accrual analysis to the specific constitutional right at stake—the right to procedural due process. That was error.

"In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Although Reed's initial denial *of DNA testing* happened with the trial court's first order, the deprivation *of his right to due process* was not complete or legally actionable until the state high court conclusively construed Article 64 and denied Reed's request for rehearing. In fact, prior to that point, there was every possibility that the Court of Criminal Appeals would reverse the trial court's ruling and actually *grant* Reed the DNA testing he sought or at least grant him a sufficient opportunity to be heard about why he was entitled to that testing.

Under the lower court's logic, plaintiffs like Reed have to rush to federal court to preserve their right to sue *in case* their due process rights are violated. If they wait and see the state process through—pressing on in an attempt to vindicate their liberty interests, as state law entitles them to do—they will lose their opportunity to seek relief in federal court if the state process ultimately fails them. By that point, it will almost always be too late to file within the statute of limitations, thus denying individuals whose constitutional

rights have been violated the ability to hold state officials liable, as Section 1983 promises.

Thus, the rule created by the court below does not just frustrate the ability to vindicate constitutional rights under Section 1983; it also "run[s] counter to core principles of federalism, comity, consistency, and judicial economy." *McDonough*, 139 S. Ct. at 2158. By forcing plaintiffs to file wasteful federal lawsuits in order to preserve their rights, the decision below places federal courts on a collision course with state courts that have not even finished their own processes, while threatening to mire the federal courts in unripe cases. Remarkably, therefore, the decision below manages to increase tension between federal and state courts while hindering, rather than promoting, the vindication of constitutional rights under Section 1983.

ARGUMENT

I. Section 1983 Was Written to Vindicate the Unique Rights Guaranteed by the Federal Constitution.

A. The Forty-Second Congress enacted Section 1983, originally Section 1 of the Civil Rights Act of 1871, to create "a private right of action to vindicate violations of rights, privileges, or immunities secured by the Constitution." *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012) (quotation marks omitted). The title of the 1871 legislation made its purpose clear: "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. This Act, "along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era," *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982), which established "the role of the Federal Government

as a guarantor of basic federal rights against state power," *Mitchum*, 407 U.S. at 239; *see* Globe 577 (Sen. Carpenter) ("one of the fundamental . . . revolutions effected in our Government" by the Fourteenth Amendment was to "give Congress affirmative power . . . to save the citizen from the violation of any of his rights by State Legislatures").

The text of what is now Section 1983 left no doubt about the new primacy of "federally secured rights," *Smith v. Wade*, 461 U.S. 30, 34 (1983), over state laws and practices that denied or frustrated those rights. The statute gave any person who was deprived of "any rights, privileges, or immunities secured by the Constitution of the United States" the ability to hold the perpetrator liable, "any . . . law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." 17 Stat. 13; *see* Globe 692 (Sen. Edmunds) (declaring it the "solemn duty of Congress . . . to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him").

The "specific historical catalyst" for the passage of this legislation "was the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." *Wilson v. Garcia*, 471 U.S. 261, 276 (1985). This campaign was possible "because Klan members and sympathizers controlled or influenced the administration of state criminal justice," *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983), making the law "a dead letter," Globe 158 (Sen. Sherman). Klan incidents were not "cases of ordinary crime" but rather "political offenses," Globe 158 (Sen. Sherman), aimed at "'the overthrow of the reconstruction policy'" through "intimidation" and "violence," *id*. at 320 (Rep.

Stoughton) (quoting committee testimony of former Klan member).

Section 1983, therefore, "'was not a remedy against the Klan or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.'" *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973) (quoting *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961) (brackets omitted)). Congress recognized that laws were being applied selectively across the South to punish disfavored groups and deprive them of their most basic rights without due process. While "outrages committed upon loyal people through the agency of this Ku Klux organization" went unpunished, as Senator Pratt noted, "[v]igorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid." Globe 505; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 167 (1970) (noting "the persistent and widespread discriminatory practices of state officials").

The fundamental problem, therefore, was not isolated acts of violence but the Southern states' selective and discriminatory tolerance of this violence. *Wilson*, 471 U.S. at 276; Globe 375 (Rep. Lowe) (Southern states were "permit[ing] the rights of citizens to be systematically trampled upon"). And that denial merited a remedy. *Id.* at 333 (Rep. Hoar) ("Suppose that . . . every person who dared to lift his voice in opposition to the sentiment of this conspiracy found his life and his property insecure. . . . In that case I claim that the power of Congress to intervene is complete and ample.").

B. To address this problem, Section 1983 "interpose[d] the federal courts between the States and the people, as guardians of the people's federal rights." *Patsy*, 457 U.S. at 503 (quoting *Mitchum*, 407 U.S. at

242). Previously "Congress relied on the state courts to vindicate essential rights arising under the Constitution." *Carter*, 409 U.S. at 427-28 (quoting *Zwickler v. Koota*, 389 U.S. 241, 245 (1967)). But "[w]ith the growing awareness that this reliance had been misplaced," lawmakers enacted Section 1983 to provide "indirect federal control over the unconstitutional actions of state officials." *Id.* at 428. Thus, while the violence inflicted on freedmen and their sympathizers was repugnant to the principles embedded in the Fourteenth Amendment, "§ 1983 was not directed at the perpetrators of these deeds as much as at the state officials who tolerated and condoned them." *Owens v. Okure*, 488 U.S. 235, 249 n.11 (1989).

Section 1983 thus broke new ground. First, it made available a federal forum, based on the belief that federal courts would be able to "act with more independence" and "rise above prejudices or bad passions or terror." Globe 460 (Rep. Coburn).

Second, "Section 1983 impose[d] liability for violations of rights protected by *the Constitution*," not rights created under state law. *Baker v. McCollan*, 443 U.S. 137, 146 (1979) (emphasis added); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 686 n.45 (1978) (Representative Bingham, the Fourteenth Amendment's principal architect, "declared the bill's purpose to be 'the enforcement . . . of the Constitution on behalf of every individual citizen of the Republic.'" (quoting Globe App. 81)). The statute "was designed to expose state and local officials to a new form of liability," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259 (1981), by providing a remedy for "federally secured rights," *Smith*, 461 U.S. at 34, and would be "supplementary to any remedy any State might have," *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963); *see* Globe 370 (Rep. Monroe) ("occasions arise in which life,

liberty, and property require new guarantees for their security").

II. This Court Has Long Required the Tailoring of Procedural Rules in Section 1983 Cases to the Particular Federal Constitutional Right at Stake.

Although the architects of Section 1983 wrote the statute to create a powerful tool for the protection of federal constitutional rights, "§ 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (quoting *Baker,* 443 U.S. at 144 n.3). Thus, "[t]he first step in any [Section 1983] claim is to identify the specific constitutional right allegedly infringed." *Albright*, 510 U.S. at 271.

Once that right has been identified, the rules governing the procedural requirements for vindicating it "should be tailored to the interests protected by the particular right in question." *Carey*, 435 U.S. at 258-59; *Manuel*, 137 S. Ct. at 920-21 (in "defining the contours and prerequisites of a § 1983 claim, including its rule of accrual," courts must "closely attend to the values and purposes of the constitutional right at issue"). By tailoring procedural rules to the nature of the substantive constitutional right at stake, courts ensure that those rules further the chief purpose of Section 1983: to provide "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution." *Wilson*, 471 U.S. at 271-72 (quoting *Mitchum*, 407 U.S. at 239).

This Court has consistently followed that approach. In *Carey v. Piphus*, for example, this Court addressed "the elements and prerequisites for recovery of damages" by students who were allegedly suspended from

public schools without procedural due process. 435 U.S. at 248. "In order to further the purpose of § 1983," this Court noted, "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question." *Id.* at 258-59. Applying that principle, this Court held that "injury cannot be presumed to occur" from a denial of procedural due process, and so plaintiffs must show proof of actual injury resulting from the denial—in that case, proof that the students' suspensions were unjustified—in order to recover substantial damages. *Id.* at 262-63. Moreover, again looking to the nature of the right at issue—"the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions"—the Court also held that even absent proof of actual injury, "the denial of procedural due process should be actionable for nominal damages." *Id.* at 266.

In *Wallace v. Kato*, this Court addressed the accrual rules for Fourth Amendment claims alleging an unconstitutional arrest without a warrant. 549 U.S. at 386-88. Analogizing this claim to the common law tort of false arrest—because the gist of both claims is "detention without legal process," *id.* at 389—the Court borrowed that tort's "distinctive rule" of accrual, which delays onset of the statute of limitations until the false imprisonment ends. *Id.* Postponing accrual, this Court explained, responds to "the reality that the victim may not be able to sue while he is still imprisoned." *Id.* Thus, even though the plaintiff in *Wallace* "could have filed suit as soon as the allegedly wrongful arrest occurred, subjecting him to the harm of involuntary detention," this Court declined to impose "the standard rule" for accrual, *id.* at 388 (quotation marks omitted), substituting instead "a refinement" that was

tailored "'to claims of the type considered here,'" *id.* (quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994)).

Just a few years ago, this Court heard and decided two cases, *Nieves v. Bartlett* and *McDonough v. Smith*, that yet again affirmed the importance of focusing on the nature of the constitutional right at stake when ascertaining the elements of and crafting procedural rules for Section 1983 claims. First, in *Nieves*, this Court addressed the elements of a First Amendment claim for retaliatory arrest. Such claims, this Court said, pose a difficult "causal inquiry" because "protected speech is often a legitimate consideration when deciding whether to make an arrest," and because retaliatory motives are "easy to allege and hard to disprove." 139 S. Ct. at 1723-24, 1725 (quotation marks omitted). To shield police officers from dubious retaliatory arrest claims, this Court held that such claims are generally defeated by a showing of probable cause, unless plaintiffs provide evidence that they were arrested when "otherwise similarly situated individuals" had not been. *Id.* at 1727. That requirement was directly tied to the nature of the constitutional claim at issue and the unique "problem of causation" it entails. *Id.* at 1723 (quotation marks omitted).

In *McDonough*, this Court again addressed a question of accrual dates, this time for claims that prosecutors used fabricated evidence against a person in criminal proceedings. 139 S. Ct. at 2154-55. Noting that "[a]n accrual analysis begins with identifying the specific constitutional right alleged to have been infringed," this Court assumed without deciding that, as the lower court had held, the Fourteenth Amendment's Due Process Clause includes a "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer." *Id.* at 2155 (quotation marks and citations omitted). Based on the practical

implications of forcing criminal defendants to sue their prosecutors while criminal proceedings were still ongoing, this Court held that "a fabricated-evidence challenge to criminal proceedings" accrues only once those proceedings have "ended in the defendant's favor." *Id.* at 2158. Otherwise, criminal defendants would face "an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them," *id.*, with the latter option inevitably risking "parallel litigation and conflicting judgments," *id.* at 2160. Based on those claim-specific considerations, this Court rejected a rule that the statute of limitations begins to run on a plaintiff's fabricated-evidence claim "as soon as he can show that the [prosecutor]'s knowing use of the fabricated evidence caused him some deprivation of liberty." *Id.* at 2154.

Despite all this precedent, the court below did not even mention the constitutional right underlying Reed's Section 1983 claim for post-conviction DNA testing, much less analyze that right in any meaningful way. As described below, this failure was critical to its decision that Reed's claim was time-barred and frustrates the ability of plaintiffs like Reed to vindicate their right to procedural due process.

III. The Court Below Failed to Grapple with the Nature of the Right to Procedural Due Process Underlying Reed's Section 1983 Claim.

"An accrual analysis begins with identifying 'the specific constitutional right' alleged to have been infringed." *McDonough*, 139 S. Ct. at 2155 (quoting *Manuel*, 137 S. Ct. at 920). Taking account of the nature of that right, a Section 1983 claim accrues "presumptively 'when the plaintiff has 'a complete and present

cause of action.'" *Id.* (quoting *Wallace*, 549 U.S. at 388).

The court below simply skipped over that first step and concluded that "Reed had the necessary information to know that his rights were allegedly being violated as soon as the trial court denied his motion for post-conviction relief." Pet. App. 9a. That statement is simply wrong, which the court below would have recognized had it conducted the required inquiry into the nature of Reed's claimed constitutional right.

Consistent with this Court's decisions in *District Attorney's Office for Third Judicial District v. Osborne* and *Skinner v. Switzer*, Reed's claim for DNA testing is a claim for the denial of procedural due process. *See Dist. Attorney's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 67-70 (2009) (holding that a prisoner seeking DNA testing had "a liberty interest in demonstrating his innocence with new evidence under state law," but that the process provided by state law was sufficient to protect that interest); *Skinner*, 562 U.S. at 524 (holding that Section 1983 may be used to vindicate a right to DNA testing sounding in procedural due process). As the district court correctly noted, Reed asserted in his complaint that "a due-process violation resulted from the [Court of Criminal Appeals'] imposition of 'arbitrary' conditions on Chapter 64, which effectively precludes DNA testing in most cases and eviscerates the relief Chapter 64 was designed to provide." Pet. App. 20a.

This Court has repeatedly explained that "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the *mistaken or unjustified* deprivation of life, liberty, or property." *Carey*, 435 U.S. at 259 (emphasis added); *see Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). To ascertain what process is due to a particular individual to

protect his asserted liberty interest, and whether the government entity has provided it, courts must take account of the *entire* process provided by the state. In other words, there is no way to assess the constitutional adequacy of a state's process for adjudicating a motion for DNA testing if that process has not yet been completed.

In *Osborne*, this Court essentially stated as much. There, a Section 1983 plaintiff complained that Alaska's process for seeking DNA testing was constitutionally inadequate. This Court rejected Osborne's claim, identifying no constitutional deficiencies in Alaska's process and finding it "difficult to criticize the State's procedures when Osborne has not invoked them." *Osborne*, 557 U.S. at 71. Indeed, this Court chastised Osborne for attempting to "sidestep state process through a new federal lawsuit," noting that "[i]f he simply seeks the DNA through the state's discovery process, he might well get it." *Id.*

Applying that logic here compels the conclusion that although the Texas trial court ruled against Reed on his Article 64 motion in November 2014, he did not yet have a "complete and present cause of action," *Wallace*, 549 U.S. at 388, for a procedural due process claim. Although the initial denial by the trial court frustrated Reed's request for DNA evidence, that denial might have turned out to be merely a temporary roadblock: Reed could not definitively assert that the process for seeking DNA evidence under state law was inadequate until his request was fully adjudicated by the state courts. Indeed, on appeal, the Texas Court of Criminal Appeals might have recognized that the trial court had *misconstrued* Article 64, adopted the interpretation of the statute that Reed advanced, and actually *granted* his request for DNA testing. Reed, unlike Osborne, did see the state process through to its

completion before rushing to federal court to challenge that process.

By failing to tailor its accrual analysis to Reed's specific constitutional claim, the court below erroneously focused on the initial denial of Reed's asserted right to DNA testing instead of focusing on the point at which the finality of that denial definitively deprived him of liberty without due process of law. In the context of procedural due process claims, "[t]he constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Zinermon*, 494 U.S. at 126. That process was complete only when the Court of Criminal Appeals issued its final decision construing Article 64 and denied Reed's request for rehearing.

IV. The Decision of the Court Below Frustrates the Ability to Vindicate a Procedural Due Process Right Through Section 1983 and Disrespects Principles of Comity and Federalism.

The rule adopted by the court below—that the statute of limitations begins running on a claim for DNA testing as soon as a state trial court denies a request for testing—impedes the ability of plaintiffs like Reed to vindicate their right to procedural due process in federal court and infringes on that constitutional right itself.

This case demonstrates why: Reed could not have suffered an injury to his constitutional right to procedural due process at the point of the trial court's initial denial of his Article 64 motion until his time to appeal had lapsed, rendering the trial court's order a final deprivation of his liberty interest in DNA testing. If he went to federal court to file a Section 1983 lawsuit

before then, a federal court likely would have dismissed his case for failure to allege an actionable constitutional injury, holding that a deprivation of a liberty interest without procedural due process could not have possibly occurred while the state process was still ongoing and the process to which Reed claimed he was entitled might still be provided. *See Osborne*, 557 U.S. at 71 ("without trying [the state post-conviction DNA testing procedures], Osborne can hardly complain that they do not work in practice"). So perversely, under the rule of the court below, Reed is required to forego a crucial part of the state process—appeals to the higher state courts—in order to preserve his ability to vindicate his right to procedural due process in federal court. The right to a constitutionally adequate process is meaningless if the only way to effectively vindicate that right is to sacrifice part of the state process itself.

And by crafting a procedural rule that effectively prevents plaintiffs who claim harm arising out of state law as construed by state authorities from filing Section 1983 actions, the court below also undermines Section 1983 itself. As discussed above, Section 1983 was enacted to ensure the primacy of "federally secured rights," *Smith*, 461 U.S. at 34, and give plaintiffs "a private right of action to vindicate violations of rights, privileges, or immunities secured by the Constitution," *Rehberg*, 566 U.S. at 361 (quotation marks omitted). That statute is rendered a hollow promise for plaintiffs like Reed if, by the time they know their rights have been violated, it is too late to go to federal court.

At the same time, the decision of the court below also manages to tread upon the principles of federalism and comity that are designed to protect the interests of *states* and their courts. Under the Fifth Circuit's interpretation of Reed's Section 1983 claim, he

would have had to run to federal court by November 2016—"just a few months after the Court of Criminal Appeals remanded for further fact-finding and nearly a year before it would finally resolve Reed's motion." Pet. 24. As this Court recently cautioned, "the parallel civil litigation that would result [under such circumstances] would run counter to core principles of federalism, comity, consistency, and judicial economy." *McDonough*, 139 S. Ct. at 2158. And just as "stays and ad hoc abstention" were not sufficient in *McDonough*, so too here: "there is no reason to put the onus to safeguard comity on district courts exercising case-by-case discretion—particularly at the foreseeable expense of potentially prejudicing litigants and cluttering dockets with dormant, unripe cases." *Id.*

In sum, the failure of the court below to follow this Court's precedents and take account of the particular constitutional right at stake in Reed's case led it down an illogical path, resulting in a decision that frustrates core constitutional principles, as well as the plan of the Forty-Second Congress that enacted Section 1983. It should not be permitted to stand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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