No. 21-442

IN THE

Supreme Court of the United States

RODNEY REED,

Petitioner,

v.

BRYAN GOERTZ, ET AL.,

Respondents.

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

BRIEF OF TEXAS EXONEREES MICHAEL MORTON AND ANTHONY GRAVES, THE INNOCENCE NETWORK, AND THE CONSTITUTION PROJECT AT THE PROJECT ON GOVERNMENT OVERSIGHT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae submit this brief in support of Petitioner Rodney Reed, pursuant to Supreme Court Rule 37.1.[1]

Michael Morton spent nearly 25 years in prison for the murder of his wife before he was exonerated by post-conviction DNA testing. The State relied on the unsupported forensic testimony of pathologist Dr. Bayardo to establish that Morton's wife died when he was with her. But Dr. Bayardo was wrong about the time of death. In Reed's criminal trial, the State also relied on now-discredited testimony from Dr. Bayardo that the victim died when Reed was with her. Morton advocates for increased transparency and fairness in criminal prosecutions. In 2014, Texas passed the Michael Morton Act, which requires prosecutors to disclose evidence to defense attorneys regardless of its materiality to guilt or punishment under *Brady v. Maryland*.

Anthony Charles Graves is the 138th exonerated death row inmate in the United States. Graves was wrongfully convicted of murdering a family of six in Somerville, Texas. Graves was convicted based on the testimony of the true killer, who falsely named Graves as an accomplice. After Graves spent 18 years on death

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[1] No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund the preparation or submissions of the brief; and no person other than *amici* or counsel contributed money intended to fund the preparation or submission of the brief. Counsel for *amici* provided Petitioner and Respondents with timely notice of their intent to file this brief, and Petitioner and Respondents have consented to the filing of this brief under Supreme Court Rule 37.2.

row, the Fifth Circuit set aside his conviction and concluded that the prosecutor failed to provide exculpatory evidence to the defense, including many contradictory statements by the actual killer. In 2016, the Texas Board of Disciplinary Appeals upheld the disbarment of the prosecutor for concealing exculpatory evidence, presenting false testimony, and other misconduct during Graves' trial. Like Reed, Graves was tried before Judge Harold R. Towslee of Texas' 335th Judicial District Court of Bastrop, Texas. Graves was also represented at trial by the same court-appointed counsel who represented Reed. Graves has established the Anthony Graves Foundation, which promotes criminal justice reform. The Foundation's Humane Investigation Project investigates prisoners' claims of innocence and works with attorneys and investigators to free the wrongfully convicted.

The Innocence Network (the Network) is an association of independent organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 68 current members of the Network represent hundreds of prisoners with innocence claims in 49 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Brazil, Canada, Ireland, Israel, Italy, the Netherlands, the United Kingdom, and Taiwan. The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which our criminal system convicted innocent persons, the Network advocates for the improvement of the truth-seeking functions of the

criminal justice system to ensure that future wrongful convictions are prevented.

The Constitution Project at the Project On Government Oversight (the Project) advocates for due process and fairness in the criminal legal system as a key part of its mission to protect constitutional rights when threatened by the government's exercise of its national security or domestic policing powers. The Constitution Project is deeply concerned with preserving our fundamental constitutional guarantees and ensuring that those guarantees are respected and enforced by all three branches of government. Accordingly, the Project regularly files amicus briefs in this Court and other courts in cases, like this one, that implicate its nonpartisan positions on constitutional issues to better apprise courts of the importance and broad consequences of those issues. In May 2001, the Project's Death Penalty Initiative convened a blue-ribbon committee including supporters and opponents of the death penalty, Democrats and Republicans, former judges, prosecutors, defense lawyers, victim advocates, and others, to examine issues related to the administration of the death penalty. The committee issued reports in 2001, 2005, and 2014, the most recent of which makes 39 recommendations essential to reducing the risk of wrongful capital convictions and executions.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

A century ago, Judge Learned Hand described criminal procedure as having "been always haunted by the ghost of the innocent man convicted," but he dismissed the concern as an "unreal dream." *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923). Modern advancements in forensic DNA technology, however, have revealed that it is not an unreal dream at all. In fact, hundreds are known to have experienced the nightmare of a wrongful conviction. At least 375 people in the United States have been exonerated by DNA.[2] But DNA testing's "unparalleled ability . . . to exonerate the wrongly convicted and to identify the guilty," *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne*, 557 U.S. 52, 55 (2009), cannot be fully realized if the state erects unjust barriers to access such testing.

Amici urge the Court to grant Rodney Reed's petition for certiorari. Reed seeks DNA testing of key evidence, *including the murder weapon* (which has never been DNA tested), that Texas has unjustifiably refused to permit. This case presents the exceptionally important question of when the limitations period for a § 1983 action seeking exculpatory DNA testing of crime-scene evidence begins to run. As the petition demonstrates, the circuits are split on this question—a split that has nationwide implications because all 50 states have post-conviction DNA-testing statutes. And the Fifth Circuit's wrong decision below certainly has

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[2] The Innocence Project, *DNA Exonerations in the United States*, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited Oct. 21, 2021).

life-or-death consequences for Reed and others with convictions that "remain[] so mired in doubt." *Reed v. Texas*, 140 S. Ct. 686, 690 (2020) (Sotomayor, J., respecting the denial of certiorari).

This case presents an excellent vehicle for resolving the question. There is substantial reason to believe that Reed is innocent of the capital murder of Stacey Stites and that the DNA testing that Texas has denied him would prove that innocence. The petition, and Justice Sotomayor's statement respecting the denial of certiorari in *Reed*, *id.* at 687, provide excellent overviews of the non-DNA exculpatory evidence Reed has gathered over the last two decades. *Amici* write separately on this point to explain in greater detail the reliable and extensive body of evidence supporting Reed's actual innocence, including evidence that Stites's fiancé confessed to the murder while serving ten years in prison for kidnapping and assaulting a young woman.

This substantial non-DNA evidence supports Reed's claim for DNA testing because it raises the specter of an innocent man being executed and provides a strong basis for believing that the DNA evidence will in fact exonerate him. Among the items for which Reed sought, but was erroneously denied, DNA testing is the murder weapon, which inexplicably has never been DNA tested. Reed was also denied testing of the clothing Stites was wearing when she was killed, a name tag left on her body that the killer almost certainly handled, and items from the truck she was in shortly before her death. This critical evidence should have been, but was not, thoroughly tested at the time. There is every reason to believe it contains DNA evi-

dence that could be decisive and, given the other exculpatory evidence, strong reason to believe that it will exonerate Reed.

This Court should grant certiorari and reject the Fifth Circuit's unfounded accrual rule, so that it does not improperly prevent Reed from vindicating his constitutional rights to due process and access to the courts, particularly given "the pall of uncertainty over Reed's conviction" and "the irreversible consequence of setting that uncertainty aside." *Id.* at 690.

ARGUMENT

I. THE QUESTION PRESENTED IMPACTS THE ABILITY OF WRONGFULLY CONVICTED PERSONS TO PROVE THEIR INNOCENCE.

The question Reed's petition presents is exceptionally important to wrongfully convicted defendants and to our constitutional system.

The Fifth and Seventh Circuits' holding—that the limitations period for a § 1983 claim seeking DNA testing begins to run the moment the state trial court denies DNA testing—effectively closes the doors of federal court to innocent people, like Reed, whose constitutional rights to adequate DNA testing have been violated by a state court's authoritative construction of the state's DNA-testing statute. *See Skinner v. Switzer*, 562 U.S. 531, 525 (2011).

The harm cognizable under § 1983 in this context is not the state court's adverse judgment, but its authoritative construction of the DNA-testing statute in a way that deprives the plaintiff of his rights to constitutionally adequate DNA testing. A plaintiff diligently seeking post-conviction testing cannot know whether

a lower trial court (1) misapplied a state's constitutionally adequate DNA-testing statute or (2) correctly applied a state's constitutionally inadequate DNA-testing statute until an appellate court weighs in. *See* Pet. 16–17. Under the Fifth and Seventh Circuits' erroneous approach, by the time a state appellate court informs a would-be plaintiff that it is the latter, the limitations period likely will have expired.

It is no hyperbole that this rule will prevent the exoneration of wrongfully convicted, innocent people. The decision of the Texas Court of Criminal Appeals below, which engrafted requirements that violate Reed's constitutional rights, will not be the last time a state court violates due process in construing and applying a DNA-testing statute.

And the effects of these two circuits' rules are far reaching. Illinois and Texas rank second and third, respectively, in the number of known persons wrongfully sentenced to die.[3] Texas exoneree and *amicus curiae*, Anthony Graves, spent 18 years on death row—12 of them in solitary confinement—for a crime he did not commit. Graves was tried before the same judge and represented by the same court-appointed counsel as Reed. Innocent Black people are seven times more likely to be wrongfully convicted of murder than innocent white people,[4] and the judicial system failed

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[3] Death Penalty Information Center, *Facts about the Death Penalty* (Oct. 6, 2021), https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf.

[4] Daniele Selby, *8 Facts You Should Know About Racial Injustice in the Criminal Legal System*, The Innocence Project (Feb.

Graves, a Black man, whose conviction was secured by prosecutorial misconduct.

The question presented is also exceptionally important because Texas and Illinois rank first and second, respectively, in the total number of DNA exonerations.[5] *Amicus curiae* Michael Morton, who spent nearly twenty-five years in prison after being wrongfully convicted of murdering his wife Christine is living proof of the importance of access to DNA testing.

In affirming the jury's verdict against Morton on direct appeal, the Texas Court of Appeals summarized the "chilling" evidence at trial against the innocent Morton. *Morton v. State*, 761 S.W.2d 876, 877 (Tex. Ct. App. 1988). That evidence was: (1) a note from Morton to his wife expressing his disappointment with her romantic rebuff; (2) the testimony of Dr. Bayardo—the Chief Medical Examiner of Travis County—that based on her stomach contents Morton's wife must have been killed within four hours of her last meal at 9:30 p.m., *i.e.*, when Morton was home; and (3) semen and pubic hair found in the bed Morton shared with his wife. *See id.* at 877–78. Based on this evidence, the State convinced the jury that Morton "beat [his wife] to death with a billy club[and] masturbated onto the sheet next to her dead body." *Id.* at 877. On direct appeal, Morton argued that the State did not introduce sufficient evidence that he was present when his wife was killed.

5, 2021), https://innocenceproject.org/facts-racial-discrimination-justice-system-wrongful-conviction-black-history-month/.

[5] The National Registry of Exonerations, *Exonerations by State, Exonerations Total by Year*, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Oct. 20, 2021).

Id. at 879–80. In rejecting Morton's argument, the Court of Appeals relied on Dr. Bayardo's expert opinion that Morton's wife was killed before 1:30 a.m., when Morton was home with her. *Id*.

In 2005, Morton sought DNA testing on items of evidence from the crime scene, including a bloody bandana found at a construction site near the Morton's home.[6] As in Reed's case, Texas officials refused to cooperate, stating the DNA testing would "muddy the waters." The court ordered DNA testing of some items, but not the bloody bandana. Five years later, in 2011, the court finally ordered DNA testing on the bandana. The test revealed the DNA of both Christine and an unknown male. Investigators matched the unknown DNA profile to Mark Norwood, a convicted felon from California who lived in Texas when Christine was murdered. Norwood had gone on to murder another woman, Debra Masters Baker, while Michael Morton was in prison. Morton was released on October 4, 2011, after spending nearly 25 years in prison. Morton's freedom is the direct result of DNA testing that Reed has been wrongfully denied.

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[6] Pamela Colloff, *The Innocent Man, Part Two*, Tex. Monthly (Dec. 2012), http://www.texasmonthly.com/articles/the-innocent-man-part-two.

II. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE CIRCUIT SPLIT BECAUSE A SUBSTANTIAL BODY OF EVIDENCE CASTS DOUBT ON REED'S CONVICTION.

Reed's post-conviction evidence "casts doubt on the veracity and scientific validity of the evidence on which Reed's conviction rests." *Reed*, 140 S. Ct. at 689 (Sotomayor, J., respecting the denial of certiorari). Doubts these significant "should not be brushed aside even in the least consequential of criminal cases; certainly they deserve sober consideration when a capital conviction and sentence hang in the balance." *Id*. Here, "sober consideration" of Reed's non-DNA evidence reveals substantial grounds for Reed's actual innocence. The extensive and compelling non-DNA evidence also provides a strong basis to believe that the DNA testing Reed seeks will definitively confirm the conclusion that the non-DNA already points to—that Reed is actually innocent.

A. The investigation into Stites's murder.

On the morning of April 23, 1996, Stacey Stites, a 19-year-old white woman, failed to show up for her 3:30 a.m. shift at the Bastrop H-E-B grocery store. *Ex parte Reed*, 271 S.W.3d 698, 702, 703 (Tex. Crim. App. 2008). Her coworkers grew concerned. *Id.* Elsewhere in Bastrop, at 5:23 a.m. a patrolman observed the pickup truck of Stites's fiancé, a white police officer named Jimmy Fennell, parked at Bastrop High School. *Id*. The officer noted a piece of a broken belt on the ground next to the driver's side door. *Id*.

Stites's partially disrobed body was found on a country road shortly before 3:00 p.m. later that day. *Id.*

at 704. Stites's H-E-B name tag was placed in the crook of her leg. *Id*. A member of the Texas Department of Public Safety Crime Laboratory (DPS crime lab) identified semen in her underwear. *Id*. at 705. Marks on Stites's neck suggested she had been strangled by her belt. *Id*. at 706. The DPS Crime Lab team also collected two Busch beer cans, a white T-shirt, and another piece of Stites's belt from the area surrounding her body. *Id*. at 705–06.

Pathologist Dr. Bayardo—the same pathologist whose unsupported expert testimony regarding Christine Morton's time of death secured her husband's wrongful conviction—conducted the autopsy on Stites's body. *Id*. at 705. He estimated that Stites died on April 23 around 3:00 a.m. *Id*. Dr. Bayardo also confirmed that Stites was strangled with the webbed belt that was collected from the crime scenes. *Id*. at 706. Dr. Bayardo took vaginal swabs and found a few intact sperm. *Id*. In addition, he asserted that his observation "that her anus was dilated and that there were some superficial lacerations on the posterior margin . . . was consistent with penile penetration." *Id*.

Stites's fiancé Fennell was the last known person to have seen her alive and a suspect from the outset. *Id*. at 708. Two polygraphs conducted during the investigation into Stites's death indicated Fennell was deceptive when he denied strangling, striking, or hitting Stites. *Id*. at 738. Fennell then invoked the Fifth Amendment, refusing to further cooperate with investigators. *Id*. Authorities eliminated Fennell as a suspect purportedly because they failed to uncover evidence of his involvement. *Id*. at 708.

Months after her death, officers determined through DNA testing that the few sperm collected from Stites were that of Rodney Reed, a Black man. *Id.* at 709. He initially denied knowing Stites, but later admitted they were having an affair. *Id.* at 709–10. In 1997, the State charged Reed with Stites's murder based on the few intact sperm found in Stites's body. *Id.* at 709–10. No other physical or testimonial evidence—eyewitness testimony, fingerprints, footprints, hair, or DNA—connected Reed to the murder.

B. The State's case against Reed.

The State's case against Reed rested on the theory that he abducted, sexually assaulted, and murdered Stites around 3:00 a.m. on April 23, 1996. *See Reed v. State*, No. 73,135 (Tex. Crim. App. Dec. 6, 2000). Without any physical evidence besides Reed's three sperm, "the State's case centered on the estimated time of Stites' death and the estimated time during which the spermatozoa could have been deposited." *Reed*, 140 S. Ct. at 687 (Sotomayor, J., respecting the denial of certiorari). The State therefore set out to prove that Reed deposited the three sperm around the time Stites died.

The purported timeline for Stites's death was largely supplied by Fennell. Waiving his prior invocation of the Fifth Amendment, Fennell testified at trial that, on the evening of April 22, he coached a youth baseball game, returned home to watch television with Stites, took a shower with her, and went to sleep. *Ex parte Reed*, 271 S.W.3d at 702–03. Although he said he was asleep when she left, Fennell testified that Stites usually left for work around 3:00 a.m. *See id.* at 702, 721. Under this timeline, because Fennell's truck and

a piece of the belt used to strangle Stites were discovered at 5:23 a.m., Stites must have been murdered between 3:00 a.m. and 5:23 a.m. *Id.* at 740. Dr. Bayardo provided the testimony pinpointing the time of death at or near 3:00 a.m. *Id.* at 705.

The second prong of the State's theory centered on the testimony of Dr. Bayardo and two other experts that—based on (1) the time the investigators collected the sperm and (2) the typical decomposition of sperm cells—Reed's sperm must have been deposited at or around Stites's time of death at 3:00 a.m. *See id.* at 705–06, 710. A State's expert "testified that spermatozoa remains intact inside a vaginal tract for at most 26 hours." *Reed*, 140 S. Ct. at 687 (Sotomayor, J., respecting the denial of certiorari). This scientific evidence thus undermined Reed's chief defense that he and Stites were having a consensual affair and had sex the day before she died. *See Ex Parte Reed*, 271 S.W.3d at 750.

The evidence at trial "thus 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 [and had sex with Reed] after Fennell claimed to have seen her last)." *Reed*, 140 S. Ct. at 687 (Sotomayor, J., respecting the denial of certiorari).

The all-white jury convicted Reed of Stites's murder and sentenced him to death almost entirely based on the presence of a few of Reed's sperm and testimony that those sperm must have been deposited around Stites's time of death. *Id.* The State presented no eyewitness testimony connecting Reed to the murder; no fingerprint or DNA evidence suggesting Reed was ever

in the truck; no other evidence placing him at the scene of the crime; and no reason other than unfounded speculation or improper bias to believe that Reed had any motive to commit a heinous murder.

C. Reed's considerable body of exculpatory evidence.

Never wavering in his pursuit to prove his innocence, Reed has accumulated "a substantial body of evidence that, if true, casts doubt on the veracity and scientific validity of the evidence on which Reed's conviction rests." *Reed*, 140 S. Ct. at 687, 689 (Sotomayor, J., respecting the denial of certiorari).

a. Evidence exculpating Reed.

Numerous witnesses—all strangers to Reed—have provided accounts supporting Reed's contention that he and Stites were engaged in a consensual affair. Three coworkers of Stites submitted sworn declarations that Stites told them she was "sleeping with" Reed. 2019 Pet. App. 422a–34a. Stites's cousin, Calvin "Buddy" Horton, also reported seeing Stites with Reed at a Dairy Queen in late 1995. *Id.* at 433a. And Charles Wayne Fletcher, a police officer and good friend of Fennell and Stites at the time of the murder, recounted that Fennell said Stites was "f***ing a n****r." Plaintiff's Advisory Regarding Federal Habeas Filings, *Reed v. Goertz*, No. 19-cv-00794 (W.D. Tex. Nov. 14, 2019), Doc. 29-2 at 67.

In addition, three of the nation's most experienced and respected pathologists—Drs. Michael Baden, Werner Spitz, and LeRoy Riddick—each determined that the State's theory was medically and scientifically impossible. 2019 Pet. App. 202a–27a.

The experts concluded that the decomposition and rigor mortis of Stites's body indicates she "was murdered prior to midnight on April 22, 1996 (the night before her body was found)." Advisory Regarding Federal Habeas Filings, *Reed*, No. 19-cv-00794, Doc. 29-2 at 11. The lividity—or red-purple discoloration from blood pooling after death—on the front of Stites's body "scientifically proves that she was dead in a different position from that which she was found for a period of at least 4–5 hours" and "[i]t is impossible that this lividity occurred at the scene in the position the body was found because Stites's body was found on her back." *Id.* Thus, "Stites could not have been both murdered *and* dumped . . . at the scene in the two-hour time frame [3:00 a.m. to 5:23 a.m.] asserted by the State at trial." *Id.* at 11–12. The experts estimated her time of death to be in the evening of April 22—when Fennell testified they were together. *Ex parte Reed*, 271 S.W.3d at 702–03.

Each expert also opined that intact sperm can be found in the vagina for 3 days or more after intercourse. *See* Advisory Regarding Federal Habeas Filings, *Reed*, No. 19-cv-00794, Doc. 29-2 at 12 (Spitz); *id.* at 19 (Baden); *id.* at 29 (Riddick). The "few sperm" collected from Stites's body were thus "entirely consistent with consensual intercourse" with Reed the day before she was murdered. *Id.* at 19. Dr. Spitz further opined that the fact that "[v]ery few sperm were found on autopsy smears" actually indicates Stites was not recently sexually assaulted because "[a] normal sperm count is considered to be 15 million spermatozoa per milliliter." *Id.* at 12.

The experts were also unanimous that "[t]here is no forensic evidence that Ms. Stites was sexually assaulted in any manner." *Id*. at 19. At trial, Dr. Bayardo testified that he believed Stites was sexually assaulted because his autopsy revealed lacerations on, and dilation of, her anus. *Id*. at 30. But "the observation of dilation of the anus at the time of Dr. Bayardo's autopsy does not indicate anal sexual assault." *Id*. Because the autopsy occurred more than 36 hours after Stites died, rigor mortis likely caused the dilation. *Id*. at 30–31. And the autopsy report noted only "abrasions," or scrapes, which "can be caused by a hard bowel movement" and "are not necessarily associated with anal intercourse." *Id*. at 31.

Dr. Bayardo himself retracted or clarified in Reed's favor key trial testimony. He submitted a declaration stating that his time-of-death estimate "was only an estimate, and should not have been used at trial as an accurate statement of when Ms. Stites died." 2019 Pet. App. 198a. He emphasized that "[i]f the prosecuting attorneys had advised [him] that they intended to use [his] time of death estimate as a scientifically reliable opinion of when Ms. Stites died, [he] would have advised them not to do so." *Id*. at 198a–99a.

Dr. Bayardo also retracted his trial testimony that the sperm he found in Stites's vaginal cavity had been deposited there "quite recently," because he is "personally aware of medical literature finding that spermatozoa can remain intact in the vaginal cavity for days after death." *Id*. at 199a. Thus, "the spermatozoa [he] found in Ms. Stites's vaginal cavity could have been deposited days before her death." *Id*. And—in agreement with Dr. Spitz—Dr. Bayardo averred that the fact that he found "very few" sperm actually suggests

the sperm "*was not* deposited less than 24 hours before Ms. Stites's death." *Id.* (emphasis added). Again, "[i]f the prosecuting attorneys had advised me that they intended to present testimony that spermatozoa cannot remain intact in the vaginal cavity for more than 26 hours, and argue that Ms. Stites died within 24 hours of the spermatozoa being deposited, I would have advised them that *neither the testimony nor the argument was medically or scientifically supported*." *Id.* (emphasis added).

b. Evidence inculpating Fennell.

The post-conviction evidence also necessarily exculpated Reed by inculpating Fennell. In 2008, then-Officer Fennell kidnapped and sexually assaulted a 20-year-old woman while on police duty. He was sentenced to 10 years' imprisonment. In October 2019, fellow inmate Arthur Snow declared in a sworn affidavit that Fennell stated his ex-fiancée "had been sleeping around with a black man behind his back." *Reed*, 140 S. Ct. at 687, 688 (Sotomayor, J., respecting the denial of certiorari). Fennell then, in a "confident[]" manner, stated he "had to kill my n***r-loving fiancé[e]." *Id.* (citation omitted). Snow believed that Fennell "felt safe" and "proud" confessing to Snow "because [Snow] was a member of the Aryan Brotherhood." *Id.* (citation omitted).

Three individuals who were police officers at the time of Stites's murder also contributed to the mounting evidence against Fennell.

Wayne Fletcher worked at the Bastrop County Sheriff's Office from 1992–1996 and was friends with both Stites and Fennell. In March 1996, a month be-

fore Stites's murder, Fletcher visited Stites and Fennell at their apartment. He "remember[s] clearly that Jimmy said that he believed Stacey was 'f*****g a n****r." Advisory Regarding Federal Habeas Filings, *Reed*, No. 19-cv-00794, Doc. 29-2 at 67. He "chose to have no further interaction or communication with" Fennell after observing his "cold, empty, and emotionless" behavior at Stites's funeral and "question[ing] whether he was involved in Stacey's death." *Id*. He was not previously "outspoken about [his] experiences" because he did not want to be "perceived" as "going against local law enforcement." *Id*.

James Clampit, a now-retired Lee County Sheriff's Officer who worked with Fennell, attended Stites's funeral. Clampit stood next to Fennell in the viewing room and was "completely shocked and floored" by what he observed. "[D]irecting his comment at Ms. Stites's body," Fennell "said something along the lines of, 'You got what you deserved.'" *Id*. at 101. Clampit "knew that [he] would not be able to live with [him]self if [he] did not come forward." *Id*.

Curtis Davis, a Criminal Investigator for the Bastrop County Sherriff's Office, testified that he was with Fennell on the day Stites's body was discovered and that morning Fennell provided Davis with an account of his recent whereabouts and activities that differed starkly from Fennell's account at Reed's trial. Fennell told Davis that he "had a few beers" and came home "later that night" after Stites "was asleep." *Id*. at 74–75. Fennell also revealed to Davis that he was supposed to drive Stites to work in his truck, but Stites ended up driving herself. *Id*. at 73. (Stites's mother also stated that "Jimmy said he was going to take Stacey to work the next morning because he wanted

his truck." *See id.* at 114). Fennell exercised the Fifth Amendment when confronted with Davis's statement. *See id.* at 81–83.

Neutral witnesses have also come forward describing Fennell and Stites's relationship as abusive. Brent Sappington—whose father lived in the apartment beneath that of Fennell and Stites—recalled hearing "loud arguing and fighting" from their apartment. *Id.* at 94. And Sappington's wife, Vicki, declared that her father-in-law told her that the noises he heard led him to believe that Fennell was verbally and physically abusing Stites. *Id.* at 98–99.

Rebecca Peoples, who worked with Stites at the H-E-B, also swore that Stites told her "she was afraid of her fiancé." *Id.* at 60. Another coworker, Lee Roy Ybarra, recounted in a declaration that "the few times that [Stites's] fianc[é] entered the store to visit her, she would become a nervous wreck" and "there were times that Stacey would deliberately hide so that she didn't have to talk to him." *Id.* at 63.

The State's case—that Stites was killed by Reed, a stranger, as she drove to work—crumbles under the weight of the post-conviction evidence (1) discrediting the State's key theory that Stites's time of death necessarily coincided with the time Reed's sperm was deposited and (2) establishing Fennell's self-proclaimed motive and opportunity to murder Stites.

III. DNA TESTING COULD EXONERATE REED.

Like Morton's, Reed's conviction rested on paltry physical evidence and false testimony about the victim's time of death from pathologist Dr. Bayardo. Decades after his conviction, Morton's access to DNA testing on a bloody handkerchief on a construction site

near his home—otherwise not known to be connected to his wife's murder—proved his innocence and led to the identification, prosecution, and imprisonment of the true murderer.

Reed likewise deserves the opportunity to prove his innocence through DNA testing. Reed not only seeks DNA testing on crime-scene items to determine *if* those items contain exculpatory DNA evidence. Reed also seeks to have crime-scene items known to have been used by the killer—including *the murder weapon*—DNA tested for the first time. DNA testing could prove Reed's innocence.

1. The Texas Court of Criminal Appeals (CCA) denied Reed's request for testing without even reaching whether the vast majority of the requested items could yield probative, exculpatory results. Rather, the CCA—in violation of Reed's constitutional rights to due process and access to the courts—construed the DNA-testing statute's chain-of-custody requirement to demand proof that the evidence not only is what it purports to be, but also has not been contaminated by *the State's* poor storage procedures or ungloved handlers in court. 2021 Pet. App. 54a. Thus, despite the custodian of the evidence testifying it was "under lock and key," *id*. at 49a, CCA denied testing on the ground that certain evidence in the State's custody had been improperly stored together in a single container and handled in the courtroom at trial. *Id.* at 54a. But undisputed testimony from Reed's experts demonstrated that advanced methods of DNA testing and analysis could "obtain[] probative results" from evidence stored and handled in such a manner. *Id.* at 46a. Moreover, the CCA's decision means that the State could defeat requests for potentially exculpatory DNA testing by

contaminating the evidence. The CCA authoritatively construed Texas's DNA-testing statute to make its procedures fundamentally unfair.

DNA testing on these items could exonerate Reed:

The belt. It is undisputed that Stites was strangled to death with her own webbed belt, with such force that the woven belt was "torn not cut" into two pieces. *Ex parte Reed*, 271 S.W.3d at 705. Investigators recovered one piece of the belt near Stites's body and the other piece of belt next to the driver's side door of Fennell's truck. *Id*. Neither piece of the murder weapon, which the killer undoubtedly touched, has ever been subjected to DNA testing.

The name tag. After Stites's body was roughly handled, dressed, and dragged after her death, her employee name tag was placed in the crook of her knee. Advisory Regarding Federal Habeas Filings, *Reed*, No. 19-cv-00794, Doc. 29-2 at 35–36. The name tag was almost certainly touched by Stites's killer but never subjected to DNA testing.

Stites's clothing. The bulk of Stites's clothing—her pants, underwear, shoes, socks, bra, and t-shirt—were likely handled by her killer when the killer moved Stites's body. *See id.* Besides one small stain on her underwear, *Ex parte Reed*, 271 S.W.3d at 706, these items have never been subjected to DNA testing.

Cigarette lighter. Law enforcement collected several items from Fennell's truck, including a cigarette lighter. 2021 Pet. App. 65a. The killer likely handled the lighter because Stites—a non-smoker—had "a burn from a cigarette on her arm." *Ex Parte Reed*, 271 S.W.3d at 705. Yet the lighter has not been tested.

2. For a few items, the CCA concluded they were properly stored by the State and reached whether Reed showed that he would not have been convicted had the jury known about the exculpatory DNA results. *See* 2021 Pet. App. 61a. However, the CCA interpreted the statute as requiring the court to assume the jury would have credited the State's non-DNA evidence, even if that non-DNA evidence has since been recanted, discredited, or proven false. *See* 66a–67a. Thus, the CCA credited the State's now-recanted and discredited testimony that Reed sexually assaulted Stites around the time of her death, asking whether the discovery of a redundant DNA profile would have likely resulted in Reed's acquittal even if the jury also believed Reed raped Stites right before she died. Against this fundamentally unfair standard, Reed never stood a chance.

Considering the exculpatory non-DNA evidence undermining the State's theory that Reed assaulted Stites shortly before she died, the remaining items could also exculpate Reed:

Beer cans. The latent-fingerprint examiner collected two beer cans across the road from where Stites's body was discovered. *Id*. at 64a. Curtis Davis declared that Fennell said he was drinking beer with friends the evening Stites died. *See supra* p. 18. Previous, decades-old DNA testing indicated that Stites and two police officers, one of whom was a close friend of Fennell, were potential matches to DNA on the beer cans. *See Ex parte Reed*, 271 S.W.3d at 705. Reed's request that the cans be tested again using the more precise methods available today could exculpate Reed by revealing a DNA match with both Stites and her true killer.

Used condom. A resident recovered the used condom from nearby the crime scene. 2021 Pet. App. 39a. It has never been subjected to DNA testing. *Id.* If the DNA of Stites is on the outside of the condom, and the DNA of a person other than Reed is on the inside of the crime-scene condom, then that person—and not Reed—is the likely killer.

DNA testing is warranted here. Reed could be exculpated by the absence of his DNA on items Stites's killer would have necessarily touched. Or Reed could be exculpated by the presence of Fennell's DNA on the murder weapon, name tag, condoms, and other items collected from the location where Stites's body was left. Or Reed could be exculpated if, as in Morton's case, the DNA of a yet-unknown person turns up on the murder weapon and that DNA is matched to a violent criminal who targets young women other than Fennell.

* * *

The compelling non-DNA evidence points to Reed's innocence, and provides strong grounds to believe DNA-testing evidence would too. But the State refused to permit Reed to test key pieces of evidence. Reed timely sought judicial relief, but the CCA construed Texas's DNA-testing statute to deny Reed due process and rejected the request largely because *the State* mishandled evidence. Reed sought relief in federal court, but the Fifth Circuit refused to reach the merits of his constitutional claims because it erroneously held that Reed should have appealed before he was even aware he had been harmed by the CCA's construction and application of the statute.

This Court should grant certiorari here to not only answer the exceptionally important question presented, but also to ensure that these repeated denials of justice do not result in Reed's wrongful execution and "allow the most permanent of consequences to weigh on the Nation's conscience." *Reed*, 140 S. Ct. at 690 (Sotomayor, J., respecting the denial of certiorari).

CONCLUSION

The Court should grant Mr. Reed's petition for certiorari.

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Respectfully submitted,

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