OCTOBER TERM, 2023

Nos. 23-7809, 23A1160

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN GUTIERREZ,
Petitioner,

v.

LUIS V. SAENZ, Cameron County District Attorney;
FELIX SAUCEDA, Chief, Brownsville Police Department,
Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR STAY OF EXECUTION

— CAPITAL CASE —
EXECUTION SCHEDULED FOR JULY 16, 2024

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I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE FIFTH CIRCUIT'S DECISION REWRITES THIS COURT'S DECISION IN *REED*.

A. The Fifth Circuit Did Not Simply Apply *Reed* to This Case.

Respondents repeatedly argue that the Fifth Circuit "straightforwardly applied" the standing test articulated in *Reed v. Goertz*, 598 U.S. 230 (2023). BIO 12, 13, 14, 22, 23. But the Fifth Circuit's own opinion belies this assertion. The majority opinion acknowledged that by premising Article III standing on the state court record, it went well beyond the analysis this Court established in *Reed:* "It gives us some pause that the Supreme Court in *Reed* did not mention examining the state court's decision for whether it might affect the prosecutor's likely actions . . . ." A13 n.3.

As the Fifth Circuit acknowledged, it grafted onto *Reed* an additional requirement to parse the state court record to predict whether state defendants will in fact comply with a declaratory judgment. The ruling below is not a straightforward application of *Reed*, and it is not the standing analysis performed by the Eighth or the Ninth Circuits. *See Johnson v. Griffin*, 69 F.4th 506 (8th Cir. 2023); *Redd v. Guerrero*, 84 F.4th 874 (9th Cir. 2023).

B. *Reed* Does Not Require Federal Courts to Scour the State Court Record to Predict Whether State Actors Will Comply with Federal Declaratory Judgments.

Picking apart Gutierrez's state court record with an even finer-toothed comb than the Fifth Circuit, Respondents argue that standing analyses are individualized, that "standing is not dispensed in gross," and that "standing must be maintained as to each claim." BIO 20, 24, 26, 28, 29, 30.

Gutierrez does not dispute that standing depends on the individual plaintiff and each of his claims. But the Fifth Circuit's analysis goes far beyond that inquiry by resting the redressability determination on the idiosyncratic inclinations of an individual defendant state actor to assess whether that actor will comply with a federal court's declaratory judgment. If that were the proper analysis, identically situated plaintiffs would have different standing outcomes depending on the identities, personalities, and politics of Texas officials named as defendants. This Court has never suggested such an inquiry is appropriate. Indeed, just the opposite. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) ("*[W]e may assume* it is substantially likely" that executive officials "would abide by an authoritative interpretation" of federal law) (emphasis added).

It does not help Respondents to cite *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), and *Murthy v. Missouri*, --- S. Ct. ---, 2024 WL 3165801 (June 26, 2024), for the proposition that "standing is not dispensed in gross." BIO 20, 24, 30. *TransUnion* involved a class of 8,185 plaintiffs; the Court held that only the 1,853 class members who had suffered a concrete harm could establish standing, while the other 6,332 could not obtain standing "in gross." 594 U.S. at 417. Similarly, *Murthy* involved a group of plaintiffs—two states and five individuals—who sued "dozens of Executive Branch officials and agencies." 2024 WL 3165801, at *4. The Court held that in this "sprawling suit," the Fifth Circuit "erred by treating the defendants, plaintiffs, and platforms each as a unified whole," *id.* at *9, and ultimately concluded that plaintiffs

had not established redressability where the harm was not traceable to defendants in the first place, *id.* at *10–16.

Again, Gutierrez does not contest that the standing inquiry must be individually conducted as to him and his claims. But because this Court has already held that an identically situated plaintiff has standing, so too does Gutierrez—just like the 1,853 similarly situated class members in *TransUnion*. In both *Reed* and *Gutierrez*, the Texas courts denied the prisoner access to physical evidence for DNA testing. In both cases, the physical evidence was retained by state officials who refused to release it for testing. In both cases, the plaintiff sought a federal declaratory judgment that the Texas framework under which he had been denied access to evidence violates due process. And in both cases the plaintiff has standing because it is reasonably likely that state officials will comply with a federal judgment instead of violating it. *See Johnson*, 69 F.4th at 513 (Stras, J., concurring) ("Although the Supreme Court did not say much [in *Reed*], what it did tell us resolves everything we have to decide here.").

C. Even under Respondents' Misguided Record-Scouring Approach, the Present Case Is Not Distinguishable from This Court's Opinion in *Reed*, the Eighth Circuit's Opinion in *Johnson*, or the Ninth Circuit's Opinion in *Redd*.

Respondents attempt to distinguish *Reed* by citing a footnote from the district court opinion to argue that, unlike Gutierrez, if Reed were to win a declaratory judgment, it would "eliminate Respondents' justification for refusing access to the evidence." BIO 28–29. But Respondents' argument fails even under the exacting review that its approach requires.

The state court in *Reed* specifically held that unreasonable delay precluded Reed's statutory claim for DNA testing—an infirmity independent of his claimed due process violation concerning the chain of custody requirement. Cert Pet. 18–19. Respondents now argue that, because Reed also challenged the state court's delay finding in federal court, a declaratory judgment in his favor would eliminate all the district attorney's justifications for denying access to the evidence: "If Reed succeeds on an appeal in showing both the chain-of-custody requirements and the unreasonable delay provisions are unconstitutional, the defendant [in Reed] would have nothing to fall back on . . . ." BIO 28. This does not distinguish *Reed* from *Gutierrez* at all.

Respondents' own argument to the Fifth Circuit in *Reed* characterized his unreasonable delay challenge just as they now characterize Gutierrez's innocence-of-the-death-penalty challenge:

> The CCA applied a case-specific review to determine whether Reed's Chapter 64 motion was timely. *The court specifically addressed—and rejected—Reed's assertion that he could not have sought touch DNA testing earlier than he did.* Reed's disagreement with the CCA's conclusions belies any assertions that he is making a broad attack on the constitutionality of Chapter 64's procedures. Instead, he merely disagreed with the CCA's fact findings and conclusions founded upon those facts.

Appellee's Br., *Reed v. Goertz*, No. 19-70022 (5th Cir.), Doc. 38-1 at 31 (Feb. 24, 2020) (emphasis added; internal citations omitted). This is the same argument that Respondents make here: "that because the state court has already spoken on the very defect purportedly redressed by the district court's declaratory judgment, Gutierrez lacked standing to seek the declaratory judgment." BIO 12. In effect, Respondents

argue that states can preclude redressability, and thereby defeat federal standing, by denying relief under a statute alleged to be unconstitutional. Letting states predetermine such a purely federal question would turn Article III standing on its head.

Equally unavailing is Respondents' attempt to distinguish the Eighth Circuit's opinion in *Johnson*. Respondents argue that in *Johnson*, "[t]he plaintiff alleged in federal court that Arkansas's postconviction DNA testing statute, as authoritatively construed, violated his constitutional rights because it imposed too high a materiality standard." BIO 31. They go on to argue that "a favorable judgment in federal court would have, in fact, eliminated the justification for refusing access to evidence for testing based on the challenged provision of state law." *Id.* This analysis misstates the circumstances of *Johnson*.

Johnson's claim was that the Arkansas statute violated due process by requiring him to prove his innocence in order to obtain the very DNA evidence that would prove his innocence. *See Johnson*, 69 F.4th at 510 (explaining that Johnson "alleges that Arkansas courts have arbitrarily denied him the very right to DNA testing that [the statute] purports to create") (quotation omitted). The Arkansas Supreme Court in *Johnson* thus did virtually the same thing the CCA did in Gutierrez's case. *See Johnson v. State*, 591 S.W.3d 265, 271–72 (Ark. 2019). The court concluded: "[N]one of the evidence that might result from the proposed testing could advance Johnson's claim of actual innocence or raise a reasonable probability that he did not murder Carol Heath." *Id.* In other words, even if the constitutional infirmity

that Johnson alleged were cured, and he got the testing he wanted, the Arkansas court said his request for relief would still fail because the results would not establish a reasonable probability that he did not commit the murder. And the court said so with considerably more reasoning than the conclusory opinion by the CCA here. *See* A79–A80.

None of this was lost on the Eighth Circuit, which recited the Arkansas Supreme Court's holding that the evidence sought by Johnson would not tend to show his innocence. *See Johnson*, 69 F.4th at 509. The Eighth Circuit nevertheless applied *Reed* to hold that Johnson had standing because a declaratory judgment would "significantly increase" the likelihood that state officials would relinquish the evidence. *Id.* at 511–12. There is simply no way to reconcile the standing analysis in *Reed* and *Johnson* with the analysis undertaken below.

Respondents also fail in their attempt to distinguish the Ninth Circuit's ruling in *Redd*, urging that the case did not involve a challenge to a state's post-conviction DNA statute. BIO 13 n.7, 32. This difference is irrelevant. Nothing in the Fifth Circuit's heightened standing test would limit it to DNA challenges. Private parties frequently seek declaratory judgments against state-affiliated defendants who are not directly obligated to comply with their terms. *Redd* specifically referred to this Court's standing analysis in *Reed* to determine that Redd had standing. *See* 84 F.4th at 884. The Ninth Circuit did not parse the record of state court proceedings to forecast how the specific defendants would respond to a declaratory judgment. The court instead recognized that Redd had standing because he was similarly situated

to *Reed*. *Id.* A declaratory judgment would change the legal relationship between the parties, with the "practical consequence" of a "significant increase in the likelihood" that the defendants would afford plaintiff the relief he sought. *Id.* (quoting *Reed*, 598 U.S. at 238). Far from parsing every jot and tittle of the parties' legal history, the Ninth Circuit followed this Court's guidance and "assumed it is substantially likely" that state officials would comply with a federal court's "authoritative interpretation" of federal constitutional law. *Id.* at 885 (quoting *Franklin*, 505 U.S. at 808).

The circuit split created by the Fifth Circuit is not confined to DNA cases, and will undoubtedly grow if not addressed by this Court. Indeed, this Court has repeatedly had to correct the Fifth Circuit's standing decisions in recent years. *See California v. Texas*, 593 U.S. 659 (2021); *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367 (2024); *Murthy*, --- S.Ct. ---, 2024 WL 3165801. In this case, the Fifth Circuit has failed in its obligation to "always hear the case of a litigant who asserts the violation of a legal right." A. Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 885 (1983). This Court should grant certiorari and restore declaratory judgment standing to its straightforward pre-*Gutierrez* status.

II. THE COURT SHOULD STAY GUTIERREZ'S EXECUTION.

Gutierrez satisfies all the requirements for a stay: he has shown likely success on the merits, he did not bring his claim for purposes of delay, and he will suffer irreparable injury absent a stay.

A. Gutierrez Is Likely to Succeed on the Merits.

Gutierrez is likely to prevail on the merits. This Court's decision in *Reed*, its other standing jurisprudence, and the weight of authority from the United States Courts of Appeals establish that Gutierrez—just like other state prisoners challenging the constitutionality of post-conviction relief statutes—has standing to allege that Chapter 64 violates due process. The Fifth Circuit's contrary ruling stands alone by adding a new barrier to federal standing, one that, perversely, invites state official defendants to preclude Article III standing merely by disclaiming redressability. The Fifth Circuit's novel test is likely to be overturned on review.

Moreover, Gutierrez's claim challenging the constitutionality of Chapter 64 has merit. The substantive rights respectively created by Article 11.071 and Chapter 64 are protected by procedural due process. *See District Attorney's Office for the Third Judicial District v. Osborne*, 557 U.S. 52, 68 (2009) (holding that a criminal defendant has a "liberty interest in demonstrating his innocence with new evidence under state law"). But, as the district court in this case observed, these two statutory provisions are irreconcilable: A person sentenced to death in Texas cannot meet the threshold showing required to file a habeas petition under Article 11.071—that is, he cannot show he is ineligible for the death penalty—because that person cannot obtain DNA testing under Chapter 64 to establish that he is ineligible for the death penalty.

Although there is no freestanding substantive "right to collateral proceedings at all," BIO 37, a state's DNA procedures nevertheless must comply with baseline constitutional protections, *Osborne*, 557 U.S. at 52. Furthermore, Respondents' contention that Article 11.071 does not codify the *Sawyer* doctrine on "actual

innocence" of the death penalty, BIO 37, is erroneous. The CCA has stated explicitly that "Section 5(a)(3) of Article 11.071 represents the Legislature's attempt to codify something very much like this federal doctrine of 'actual innocence of the death penalty' for purposes of subsequent state writs." *Ex parte Blue*, 230 S.W.3d 151, 160 (Tex. Crim. App. 2007).

Respondents' argument about "ineligibility" versus "unsuitability" for the death penalty is confusing at best and does not cast doubt on the merit of Gutierrez's claim. BIO 38. Gutierrez does not dispute that evidence demonstrating ineligibility for the death penalty is different from additional mitigation evidence that might impact a jury's discretion to impose death. This case involves the former type of evidence. Gutierrez seeks to obtain DNA evidence that would show he is ineligible for the death penalty because he does not meet the requirements of subsection (b) of Article 37.071, which requires the State to prove beyond a reasonable doubt that "the defendant actually caused the death of the decedent or did not actually cause the death of the deceased but intended to kill the deceased or anticipated that a human life would be taken." Tex. Code Crim. Proc. Ann. art. 37.071(b)(2); *see* § 37.071(c) ("The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted under Subsection (b) of this Article."). DNA evidence that identifies perpetrators but excludes Gutierrez would establish that Gutierrez was not present inside the trailer where the murder took place and did not participate in the murder. This evidence thus would show that Gutierrez had *not* "actually caused the death of

the decedent or . . . intended to kill the deceased or anticipated that a human life would be taken." Tex. Code Crim. Proc. Ann. art. 37.071(b)(2).

B. Gutierrez Has Not Delayed in Bringing His Claim.

As Respondents acknowledge, this Court held in *Reed* that the two-year statute of limitations on Reed's § 1983 claim began to run "when the state litigation ended and deprived Reed of his asserted liberty interest in DNA testing." *Reed*, 598 U.S. at 236. Specifically, "the state litigation ended . . . when the Texas Court of Criminal Appeals denied Reed's motion for rehearing." *Id.* Here, Gutierrez's state litigation ended when the CCA affirmed the denial of Gutierrez's request for DNA testing on February 26, 2020. A62. Gutierrez timely filed his § 1983 claim in the district court well before that date, on September 26, 2019.

Respondents argue that the state litigation ended not in 2020, but instead in 2011 when the CCA affirmed the denial of an earlier request for DNA testing. BIO 35. That prior request, however, is not the operative request. The operative request is Gutierrez's 2019 request for DNA testing because it was based on new legal and factual grounds arising after Gutierrez's prior request was denied.

Gutierrez's 2019 request was based on an amended version of Chapter 64; unlike his earlier request, Gutierrez's 2019 request came after Chapter 64 was amended to eliminate the "at fault" provision of the prior statute. That provision, which required a defendant to show that the absence of DNA testing at the time of trial was "through no fault of the convicted person," formed part of the basis for the trial court's previous denial of Gutierrez's request for DNA testing. *See* A48, A53. The "at fault" provision was removed when the statute was amended, thereby removing

that rationale for denying Gutierrez's request. *See* Tex. Crim. Proc. Code Ann. art. 64.01(b)(1)(B) (West 2017).

Gutierrez's 2019 request was also based on new facts and evidence. Prior to 2019, Respondents denied having custody of the hair found in the decedent's hand. After undersigned counsel's repeated requests to examine physical evidence in the State's possession, the State made the evidence available for review on May 21, 2019. Upon review of the evidence, counsel discovered that the hair was in fact preserved in a sealed envelope in the district attorney's files. Gutierrez's 2019 motion thus requested testing of the newly discovered hair—a critical piece of evidence in light of the evidence at trial suggesting that the decedent had struggled with her assailant(s).

Further, Gutierrez's 2019 request was also based on recent advances in DNA testing that have increased the likelihood of obtaining DNA evidence from the items in question. These advances allow for obtaining DNA samples even from small, damaged, or degraded samples. For instance, under earlier testing methods, the hair found in the decedent's hand would need to contain a root in order to yield a DNA profile, whereas a genetic profile can now be obtained using mitochondrial DNA testing even without a root. New developments in DNA technology also make it reasonably likely that testing could yield touch DNA left on the decedent's nightgown by her assailant(s). Gutierrez's 2019 motion requested testing based on these recent advances in DNA science.

Because the 2019 request was based on both new legal and new factual developments, it presented a separate and distinct request for testing. The CCA

evidently viewed it that way, as it addressed and ruled on the merits of the new issues raised in the 2019 motion.[1] *See* A70–A80. The denial of the 2019 request thus initiated a new accrual period. Gutierrez timely brought his claim within that new accrual period and has not delayed pursuit of this claim. This case comes before the Court under the time constraints of an impending execution not because of any action by Gutierrez, but because the State sought an execution date while this matter was still in active litigation.

C. Gutierrez Will Suffer Irreparable Injury Absent a Stay.

Throughout his trial and in the proceedings since, Gutierrez has maintained that he did not kill Escolastica Harrison, and that he had no knowledge that others were going to assault or kill her. None of the items collected during the investigation of this case has ever been subjected to DNA testing. Absent a stay and grant of certiorari, Gutierrez faces not only the denial of process that he has repeatedly and consistently sought for over a decade, but moreover, execution for a crime he did not commit. No one has any interest in a wrongful execution.

[1] The trial court initially granted the 2019 request. One week later, however, the trial court filed two orders: one order withdrawing the order granting DNA testing, and another order denying the 2019 request. A59–A61.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari and stay Gutierrez's execution, which was not scheduled when the Fifth Circuit proceedings began. It should then either set the case for full briefing, or summarily vacate the Fifth Circuit's judgment and remand for further proceedings.

Respectfully submitted,

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