

**SUPREME COURT  
OF THE UNITED STATES**

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN GUTIERREZ, )  
Petitioner, )  
v. ) No. 23-7809  
LUIS SAENZ, ET AL., )  
Respondents. )

Pages: 1 through 108  
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 Petitioner, )  
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 )  
 LUIS SAENZ, ET AL., )  
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 Respondents. )

Monday, February 24, 2025

WILLIAM F. COLE, Deputy Solicitor General, Austin,  
Texas; on behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument this morning in Case 23-7809, Gutierrez  
5 versus Saenz.

6 Ms. Fisher.

7 ORAL ARGUMENT OF ANNE E. FISHER

8 ON BEHALF OF THE PETITIONER

9 MS. FISHER: Mr. Chief Justice, and  
10 may it please the Court:

11 This Court recently held that Texas  
12 prisoner Rodney Reed has standing to challenge  
13 certain -- certain procedures contained in the  
14 Texas post-conviction statute known as Chapter  
15 64 because a declaratory judgment that those  
16 procedures were unconstitutional would redress  
17 Mr. Reed's injury by eliminating the  
18 prosecutor's reliance on those same procedures  
19 as a reason to deny testing.

20 This Court should hold that  
21 Mr. Gutierrez has standing for the same reason.  
22 The injury here is redressable because a  
23 declaratory judgment that finds certain  
24 procedures in Chapter 64 unconstitutional  
25 eliminates those statutory procedures as a

1     lawful reason for Respondents to forbid testing.

2             But, even if this Court should apply a  
3     more searching inquiry, Mr. Gutierrez would  
4     still have standing. It is important to  
5     remember that the declaratory judgment at issue  
6     here does more than simply focus on the  
7     availability of DNA testing to show death  
8     ineligibility. It recognizes the inherent  
9     conflict between the Chapter 64 statute and the  
10    habeas death ineligibility statute, and it  
11    requires that the procedures for obtaining DNA  
12    testing do not obstruct the right that Texas has  
13    given prisoners to seek habeas relief based on  
14    newly developed evidence.

15            The CCA has never considered what  
16    procedures in Chapter 64 are necessary to cure  
17    the constitutional infirmity found by the  
18    district court, nor has it ever determined  
19    whether Mr. Gutierrez would be able to access  
20    DNA evidence under a constitutional version of  
21    the statute.

22            None of the reasons given by  
23    Respondents for denying access to the evidence  
24    are independent of the due process violation  
25    found by the district court. They are part and

1 parcel of decisions by the CCA made under an  
2 unconstitutional version of the statute,  
3 applying procedures found to be inadequate to  
4 vindicate the right at the heart of the  
5 declaratory judgment.

6 The district court's declaratory  
7 judgment would eliminate all the reasons  
8 Respondents rely on to deny testing and redress  
9 Mr. Gutierrez's injury.

10 I welcome your questions.

11 JUSTICE THOMAS: Didn't the CCA  
12 consider the testing after the declaratory  
13 judgment?

14 MS. FISHER: No, Your Honor. By the  
15 time Mr. Gutierrez brought his case to the CCA,  
16 the Fifth Circuit had already taken away the  
17 declaratory judgment, a point the CCA was very  
18 clear to make in their opinion. So the binding  
19 effect of that declaratory judgment wasn't  
20 present and the CCA did not apply it. So the  
21 CCA has actually never decided this case with  
22 the declaratory judgment in hand.

23 JUSTICE THOMAS: So what else would  
24 you have to do if this goes -- if you -- if the  
25 declaratory judgment is reinstated? What else

1 would you have to do at the CCA level?

2 MS. FISHER: If we were to win the --

3 JUSTICE THOMAS: Yes.

4 MS. FISHER: -- if the Fifth Circuit  
5 were to uphold the declaratory judgment, we  
6 would first go to Respondents and see if they  
7 would turn over the DNA assume -- under a  
8 constitutional version of the statute.

9 If not, we would file another Chapter  
10 64 motion, which would have the binding res  
11 judicata effect by binding the parties to the  
12 constitutional version of the declaratory  
13 judgment, which requires adequate procedures to  
14 vindicate the right in the habeas statute, and  
15 we would ask the CCA to apply that res judicata  
16 effect and we would ask for testing.

17 JUSTICE THOMAS: But short of a court  
18 order, it -- would the district attorney --  
19 isn't it -- the prosecutor, isn't that  
20 discretionary?

21 MS. FISHER: -- without a court order,  
22 it is discretionary, Your Honor. But, as this  
23 Court decided in Reed, the -- the district  
24 attorneys simply averring that they won't turn  
25 over DNA evidence isn't enough to defeat

1 standing.

2 The district attorney in Reed also  
3 made that argument, and this Court rejected that  
4 argument.

5 JUSTICE SOTOMAYOR: Can I get us back  
6 to the question presented?

7 MS. FISHER: Yes, Your Honor.

8 JUSTICE SOTOMAYOR: Was does Article  
9 III standing require a -- I'm reading the  
10 question presented -- particularized  
11 determination of whether a specific state  
12 official will redress the plaintiff's injury by  
13 following a favorable declaratory judgment?

14 So I thought this case was only about  
15 standing because the court before didn't get to  
16 the due process arguments, did it?

17 MS. FISHER: I completely agree this  
18 case is here about standing. And our answer to  
19 the question presented would be that you don't  
20 need to look to whether a -- a particular  
21 district attorney would grant relief. Instead,  
22 you would --

23 JUSTICE SOTOMAYOR: Well, you need  
24 likelihood of success that they might. And we  
25 assume that an official whose reasons are



1 declared unconstitutional wouldn't rely on them,  
2 correct?

3 MS. FISHER: That's correct, Your  
4 Honor.

5 JUSTICE SOTOMAYOR: All right. So,  
6 really, I thought this case was simply about was  
7 Texas right in dismissing it for lack of  
8 standing.

9 MS. FISHER: By Texas -- well, the --

10 JUSTICE SOTOMAYOR: I'm sorry. Was  
11 the court below right by dismissing this on --  
12 by -- because of lack of standing?

13 MS. FISHER: Yes, Your Honor. The  
14 Fifth Circuit was not correct to dismiss this  
15 for lack of standing because they basically  
16 applied a new standard, a new test. Reed simply  
17 applied the -- the Lujan test, the same test  
18 that was in Utah versus Evans. We don't believe  
19 that the standing determination in Reed was --  
20 was designed to create some sort of new test.

21 But the Fifth Circuit saw it that way,  
22 and, as they said in their footnote, they chose  
23 to go beyond what this Court did in Reed and  
24 look at the state record. And --

25 JUSTICE ALITO: Well, the -- I'm

1       sorry.  The -- the defendant in this case is the  
2       district attorney, right?

3               MS. FISHER:  That's correct, Your  
4       Honor.

5               JUSTICE ALITO:  And so would you agree  
6       that you have to show that what you seek,  
7       obtaining access to evidence for DNA testing,  
8       would be redressed by a declaratory judgment  
9       that applies to the district attorney?

10              MS. FISHER:  We would have to --

11              JUSTICE ALITO:  Has to be redressed  
12       through the district attorney?

13              MS. FISHER:  Yes, Your Honor.  
14       However, the district attorney isn't bound by a  
15       declaratory judgment.  What they would be bound  
16       by is the res judicata effect of the declaratory  
17       judgment on the parties.

18              Should the district attorney choose  
19       not to give the DNA, we could then go back to  
20       state court and would have the declaratory  
21       judgment in hand, and the -- the state court  
22       would be bound by the determination of the --

23              JUSTICE ALITO:  Well, let me ask it  
24       this way.  Is this -- do you think the standing  
25       argument is different because you sought a

1     declaratory judgment as opposed to an  
2     injunction?

3             MS. FISHER: Well, we were not able to  
4     seek an injunction. The -- we tried to seek an  
5     injunction in this case, and -- and we lost.  
6     But we seek a declaratory judgment just like  
7     Rodney Reed sought a declaratory judgment, just  
8     like --

9             JUSTICE ALITO: Well, would there be  
10    standing if you sought an injunction?

11            MS. FISHER: There would be --

12            JUSTICE ALITO: That you'd -- you  
13    would to have show that you could vindicate what  
14    you seek by means of an order directed to the  
15    defendant, that is, the attorney general?

16            MS. FISHER: Yes. We would have --  
17    standing if we sought an injunction. If the  
18    court had power to order the district  
19    attorney -- attorney to turn over the evidence,  
20    we would have standing to seek that.

21            JUSTICE KAVANAUGH: And some of the --

22            JUSTICE KAGAN: And you asked for  
23    that, didn't you? I mean, in -- if I read  
24    paragraph 97 of your complaint, that asks, among  
25    other things, for an injunction to the district

1 attorney, is that correct?

2 MS. FISHER: That's correct, Your  
3 Honor.

4 JUSTICE KAGAN: And is there still a  
5 possibility of getting that or not?

6 MS. FISHER: No, Your Honor.

7 JUSTICE KAGAN: Because?

8 MS. FISHER: Well, we lost that --  
9 we -- we weren't granted relief on that claim  
10 and we did not appeal that claim, and so we're  
11 not seeking relief on that claim through an  
12 appellate process.

13 JUSTICE KAVANAUGH: Some of the  
14 awkwardness, I suppose, of the procedure here  
15 stems really from Osborne and Skinner itself --

16 MS. FISHER: Mm-hmm.

17 JUSTICE KAVANAUGH: -- in that it  
18 recognized a 1983 right in a context where,  
19 arguably, habeas, that, certainly, the  
20 dissenters pointed that out, but we are where we  
21 are on that, and that seems to me to -- to  
22 undergird some of the awkwardness here.

23 MS. FISHER: I couldn't agree more,  
24 Your Honor. I think it's a -- it is a bit of a  
25 sort of awkward construct to sue the district

1 attorney when it's a -- discretionary based on a  
2 declaratory judgment, but that's what Osborne  
3 and Skinner and now Reed have said that you do.

4 And the idea, I believe, is that the  
5 declaratory judgment, while it wouldn't bind  
6 or -- it wouldn't force the district attorney to  
7 turn over the evidence, it would be a legal  
8 ruling from a federal court that the procedures  
9 in question were unconstitutional. And we  
10 believe that the district attorney, if they were  
11 ordered by the Court to turn it over,  
12 wouldn't -- would, of course, turn it over in  
13 the state court or that they wouldn't rely on an  
14 unconstitutional statute.

15 CHIEF JUSTICE ROBERTS: Well --

16 JUSTICE KAVANAUGH: Now, when you get  
17 back to state court -- say you won and the Fifth  
18 Circuit said it's a procedural due process  
19 problem. You get back to state court, it's not  
20 turned over by the prosecutor.

21 The state court would presumably go  
22 through the -- Chapter 64 proceeding, right,  
23 and -- and figure out, okay, does this -- is he  
24 entitled to the testing, or would it be, in  
25 essence, harmless error even if he were entitled

1 to the testing, which is akin to what they've  
2 done already, I guess.

3 MS. FISHER: Well, our position, Your  
4 Honor, is that the CCA has never actually  
5 decided whether Mr. Gutierrez should get testing  
6 under a constitutional version of the statute.

7 JUSTICE KAVANAUGH: Mm-hmm.

8 MS. FISHER: You are correct. We  
9 would go back to state court. We would file  
10 another Chapter 64 motion with a  
11 constitutional -- asking for the court to apply  
12 the constitutional determination made by the  
13 federal district court.

14 JUSTICE KAVANAUGH: And by  
15 "constitutional," just so I'm under -- you mean  
16 a system where you can bring a Chapter 64 not  
17 just to show you're innocent of -- innocent of  
18 the underlying crime but that you're ineligible  
19 for the death penalty? That's where the  
20 procedural due process issue is?

21 MS. FISHER: It's that plus more,  
22 though, because it's not simply sort of slapping  
23 on death eligibility to the current Chapter 64  
24 statute, because the current Chapter 64 statute  
25 is designed to figure out who should get DNA

1 testing to determine who's actually innocent of  
2 the crime.

3 So all of the procedures that are  
4 baked into Chapter 64, by -- by necessity, it's  
5 logical, I'm sure Texas had reasons for doing  
6 this, are designed to decide who should get DNA  
7 testing to show they're actually innocent.

8 JUSTICE GORSUCH: Ms. -- Ms. Fisher,  
9 that -- that's -- I'd just like to follow up on  
10 that because, in the June order from the TCCA,  
11 looking at Joint Appendix 478 and 479 -- and I'm  
12 sure you're familiar with it -- they say, even  
13 if 64 -- Chapter 64 does apply to the question  
14 of death eligibility, that your client still  
15 wouldn't receive relief because, effectively, as  
16 Justice Kavanaugh pointed out, harmless error  
17 here.

18 And -- and -- and what do we do about  
19 that? They seem to have anticipated this --  
20 this very issue because it was before the  
21 district court, though, you're right, the Fifth  
22 Circuit came out the other way. But this  
23 issue's been lingering in the case for a long  
24 time, and the TCCA has said now, I think twice,  
25 that whether 64 applies to the death stage --

1 death penalty stage or not, your client would  
2 not seek -- be eligible for relief.

3 Thoughts?

4 MS. FISHER: Yes, Your Honor. The  
5 provision that -- when the CCA made that ruling,  
6 they weren't considering the due process  
7 violation found by the district court, which,  
8 again, goes beyond simply asking does Chapter 64  
9 in its current iteration allow for death  
10 ineligibility.

11 What the due process violation found  
12 by the district court addresses are the  
13 procedures within Chapter 64 and whether or not  
14 they're adequate to vindicate the right --

15 JUSTICE GORSUCH: Well, I -- I -- I'm  
16 sorry to interrupt you there, but the TCCA said,  
17 given the evidence presented, the statute did  
18 not operate unconstitutionally as to Appellant  
19 because -- harmless error, effectively. I'm  
20 summarizing, but that's the gist of it.

21 Are you saying your due process claim  
22 would preclude a court from applying a harmless  
23 error test?

24 MS. FISHER: No, Your Honor. What I  
25 am saying is that that determination by the



1 Texas CCA was not saying that the procedures in  
2 Chapter 64 are inadequate and we need to look  
3 how -- what -- what will make them adequate.

4 By limiting their determination to the  
5 record evidence -- and you'll see -- I'm -- I'm  
6 sure you've seen -- they simply sort of cut and  
7 paste and recite the two sentences, the "even  
8 if" determination --

9 JUSTICE GORSUCH: Yeah.

10 MS. FISHER: -- back from 2011.

11 JUSTICE GORSUCH: That they'd  
12 previously said, yeah.

13 MS. FISHER: Right. That  
14 determination does not actually consider how to  
15 make Chapter 64 a test that will vindicate the  
16 right in a way that isn't illusory, and that's  
17 because the --

18 JUSTICE GORSUCH: I guess I'm -- I'm  
19 struggling to understand what you would have  
20 them do besides say 64 applies to the death  
21 penalty stage. What's your due process  
22 complaint besides that?

23 MS. FISHER: They would have to  
24 consider a broader scope of evidence. The key  
25 words in that "even if" holding that they had or

1 the -- what Your Honor cited is when they say  
2 they limit it to the trial evidence or the  
3 record evidence.

4 That limitation is a limitation that  
5 was designed with the procedures in Chapter 64  
6 that were supposed to figure out who's going to  
7 get DNA to show they're actually innocent. And  
8 that's because, if you add DNA to the mix of  
9 trial evidence, you can pretty easily figure out  
10 if DNA is going to show someone is actually  
11 innocent.

12 CHIEF JUSTICE ROBERTS: Well, but  
13 that's -- that's added to this, and you're sort  
14 of figuring out, well -- well, how -- how much  
15 is the weight of the evidence. Would it -- how  
16 much would it take? Like a tiny thimbleful of  
17 additional evidence? I mean, how is a court  
18 supposed to figure that out?

19 MS. FISHER: Well, this -- the -- a  
20 petitioner could go before a federal court and  
21 argue a due process claim because they had just  
22 a little bit of new evidence, but I would  
23 suspect that that petitioner would be turned  
24 down because of a 12(b)(6) ruling. So it would  
25 still have to be meaningful evidence.

1           No court has considered this evidence,  
2     and it really is the scope of evidence that's  
3     critical here because those prior decisions by  
4     the CCA didn't look at the right that was being  
5     squelched in the due -- in the habeas petition.

6           JUSTICE KAVANAUGH:   When you're  
7     bringing --

8           JUSTICE JACKSON:   But I thought --

9           JUSTICE ALITO:   Are -- are --

10          JUSTICE KAVANAUGH:   -- when you're  
11     bring --

12          JUSTICE ALITO:   No, go ahead.

13          JUSTICE KAVANAUGH:   When you're  
14     bringing the new claim, you're going to argue, I  
15     gather, and have argued that there's more than  
16     just DNA since the trial?

17          MS. FISHER:   That's exactly it.   To  
18     file a -- a claim that a petitioner is  
19     death-ineligible --

20          JUSTICE KAVANAUGH:   And can you  
21     explain what that is?   I'd be interested in you  
22     listing what that is.

23          MS. FISHER:   Yes.   So what  
24     Mr. Gutierrez would need to present in his claim  
25     to show that he's death-ineligible would be two

1 different types of new evidence. It would need  
2 the DNA because he'd have to show that he wasn't  
3 actually in the home and that he didn't actually  
4 kill the decedent.

5 But he'd also have to show evidence to  
6 show that he wasn't a major participant of the  
7 crime. This is the Enmund/Tison liability.

8 That evidence is not going to be in  
9 the form of record evidence or DNA. That's  
10 going to be -- newly developed evidence like we  
11 have found, which would include things like --  
12 and this is not an exhaustive list -- but it  
13 would include things like a -- a statement from  
14 the primary suspect, Avel Cuellar's nephew, that  
15 Mr. Cuellar, whom everyone in the trailer park  
16 believed had killed her when this happened, had  
17 actually -- approached him about committing this  
18 very crime two weeks before the crime and that  
19 after the crime he had hundreds of thousands of  
20 dollars buried in the trailer park near his  
21 home, and there were hundreds of thousands of  
22 dollars that were not accounted for after this  
23 crime occurred.

24 JUSTICE ALITO: But --

25 MS. FISHER: They would have to do a

1 lie detector test that the -- was -- wasn't  
2 discovered by trial counsel.

3 All things that would go to his role  
4 because Mr. Gutierrez was tried under the law of  
5 parties.

6 JUSTICE ALITO: What does that have to  
7 do with the question whether the limitation in  
8 the Texas statute to evidence that shows  
9 innocence as opposed to death ineligibility is  
10 constitutional?

11 That's a separate question, isn't it?  
12 Whether it's -- you're -- are you arguing that  
13 it's a violation of his constitutional rights  
14 for Texas to say that in this context -- for the  
15 Texas courts to say, in this context, we are  
16 only considering evidence that's already in the  
17 record?

18 MS. FISHER: No, Your Honor. We  
19 wouldn't argue it separately because it's part  
20 of the procedures that don't -- that make the  
21 right to file the habeas illusory, and if I may  
22 explain.

23 The limitation is designed to limit  
24 the access to evidence to people who can show  
25 they're actually innocent who weren't also a

1 party to the crime.

2           The law of parties actually really is  
3 critical here because the reason Mr. Gutierrez  
4 was told by the CCA that he couldn't access  
5 evidence to show that he didn't actually kill  
6 the decedent -- or, excuse me, wasn't in the  
7 house was because he was still -- there was  
8 enough record evidence to show he was still a  
9 party to the crime.

10           And so it didn't really matter if he  
11 was the person who killed the decedent or was in  
12 the home. There was enough evidence to show he  
13 was a party. And if he was a party, then DNA  
14 evidence wouldn't exonerate him.

15           JUSTICE ALITO: Well, I understand --

16           JUSTICE BARRETT: Counsel --

17           JUSTICE ALITO: -- I understand all  
18 that. But, when you talk about this other  
19 evidence, you're raising all sorts of other  
20 issues. It's -- is it newly discovered  
21 evidence? Could you have had access to this  
22 evidence at the time of trial? Does it meet all  
23 of the other requirements of newly discovered  
24 evidence? To what extent, if any, is any of  
25 that constitutionally required?

1           Your -- that -- that doesn't seem to  
2     have anything to do with the question whether  
3     this differentiation under Texas law between  
4     evidence that shows lack of guilt and evidence  
5     that shows death ineligibility is  
6     constitutional.

7           MS. FISHER: Justice Alito, adding DNA  
8     evidence simply to the record evidence will  
9     almost never show that someone's not a major  
10    participant of the crime, which is what someone  
11    needs to show to show that they're  
12    death-ineligible. It's that other part of the  
13    evidence that I was addressing with Justice  
14    Kavanaugh.

15           And so, because the 5(a)(3) section,  
16    this habeas section on death ineligibility,  
17    requires -- is -- is a section designed to show  
18    death ineligibility based on newly developed  
19    evidence, when the Chapter 64 test for who  
20    should get evidence doesn't consider that same  
21    scope of evidence, the right to file the chap --  
22    the subsequent habeas petition remains illusory.

23           JUSTICE BARRETT: Ms. Fisher, can I  
24    bring you back to standing? So you sued the  
25    DA -- I just want to make sure that I understand

1 exactly what you want out of this. Is it your  
2 position that the DA -- even though the decision  
3 whether to give DNA evidence is discretionary  
4 when made on the part of the DA, is it your  
5 position that a declaratory judgment would  
6 influence that judgment because the DA takes  
7 Article 64 into account in making that decision,  
8 even if it doesn't bind him, that he would take  
9 it into account and it would be a factor, and  
10 so, if it were unconstitutional, it would be  
11 taken out of the bundle of factors that might  
12 influence the DA's discretionary decision? Is  
13 that your position?

14 MS. FISHER: I -- I -- if I'm  
15 understanding Your Honor correctly, yes in the  
16 sense that it's not that it would influence them  
17 but that the reasons they have cited are tied in  
18 to the unconstitutional --

19 JUSTICE BARRETT: "They" have cited?  
20 The DA has cited?

21 MS. FISHER: The reasons Respond --

22 JUSTICE BARRETT: Because you sued the  
23 DA. This can't be about the Texas courts.

24 MS. FISHER: The reasons the  
25 Respondents have cited in their merits brief



1     are -- are -- for not turning over the evidence  
2     are not simple recalcitrance. They didn't  
3     simply say, well, we really just don't want to  
4     turn over the DNA. They cited reasons that were  
5     found within the statute.

6             And if those reasons, those statutory  
7     reasons, were found to be unconstitutional, we  
8     believe that the District Attorney's Office  
9     wouldn't rely on those.

10            JUSTICE BARRETT: So it would be the  
11     equivalent -- you sought an injunction  
12     initially, as you told Justice Kagan, trying to  
13     get the DNA evidence. That's off the table.

14            MS. FISHER: Yes.

15            JUSTICE BARRETT: Now, if we imagine  
16     this as an injunction, it would be an injunction  
17     enjoining the DA from taking account of the  
18     merits reasons that you say he cites, which  
19     really kind of go back to Article 64?

20            MS. FISHER: Well, it always goes back  
21     to Article 64, Your Honor, because of the  
22     discretionary nature. And I --

23            JUSTICE BARRETT: But Article 64 is a  
24     jurisdictional provision that binds the court.  
25     So I'm trying to tie up -- you have to have a

1 redressability argument to the DA. And in Reed,  
2 I think that's the way to understand Reed, that  
3 it was going to the DA's discretionary  
4 determination that the DA could not consider --  
5 all of this is assuming at the pleading stage,  
6 right, that the DA, if it was unconstitutional,  
7 couldn't take that into account even if it  
8 didn't bind him because it was an  
9 unconstitutional reason in the same way, say,  
10 race would be an unconstitutional reason.

11 So I am trying to figure out what you  
12 want out of the DA.

13 MS. FISHER: It's the same thing in  
14 Reed. The reasons that they're saying they  
15 won't turn over the -- the -- the DNA now are  
16 also based on unconstitutional reasons. The --

17 JUSTICE BARRETT: Article 64?

18 MS. FISHER: Not in its entirety. The  
19 procedures that barricade the right to develop  
20 the habeas -- separately --

21 JUSTICE BARRETT: Does the DA have to  
22 consider Article 64? Could the DA deny evidence  
23 for reasons entirely apart from Article 64?

24 MS. FISHER: I would say no, Your  
25 Honor, because the whole purpose of a 1983 is to

1 prevent state actors from acting in ways that  
2 violate constitutional rights. And if a  
3 provision -- if a federal court found that  
4 provisions in 1983 -- I'm sorry, in Chapter 64  
5 were unconstitutional and violated due process  
6 and the district attorney decided to rely on  
7 those same unconstitutional issues --

8 JUSTICE BARRETT: No. No, no, no, no,  
9 no, no. I said not -- I -- the question that I  
10 asked you was could the DA deny access to the  
11 DNA evidence, just putting Article 64 entirely  
12 aside, just saying, listen, I don't believe in  
13 giving DNA evidence, you can go to the court and  
14 try to get it, but it's the policy of this  
15 office not to hand it over.

16 MS. FISHER: Yes, the DA could here,  
17 and the DA could in Reed as well.

18 JUSTICE BARRETT: Okay.

19 JUSTICE JACKSON: But would that  
20 defeat standing? I mean, what -- I don't  
21 understand that to be an argument for you not to  
22 be able to press forward in this situation where  
23 the DA, you say, has relied on 64.

24 MS. FISHER: Exactly. If they were to  
25 just simply say we're not turning it over, that

1 wouldn't impact our standing in this case.

2 That's the argument that Reed's -- that the  
3 district attorney in Reed made to this Court  
4 both in oral argument and briefing. Reed --  
5 the --

6 JUSTICE JACKSON: And it seems to be  
7 the argument that is propelling the Fifth  
8 Circuit here. In other words, to the extent  
9 that there are other bases for the DA to deny  
10 this evidence, it's not redressable. That's  
11 what I sort of understood to be the core of  
12 their analysis, and I -- I'm worried about that.

13 MS. FISHER: Absolutely. And, again,  
14 that's why 1983 is the right tool for this,  
15 because, if they're going to rely on reasons  
16 other than Chapter 64, a constitutional version  
17 of Chapter 64, to deny evidence, well, then  
18 that's basically the argument that -- that the  
19 district attorney in Reed brought to this Court  
20 and this Court rejected.

21 The district attorney in Reed briefed  
22 and argued that a declaratory judgment will not  
23 make it more likely that they will turn it over.  
24 They will not --

25 JUSTICE JACKSON: Because there were

1       these other reasons.

2                   MS. FISHER:   Yes.

3                   JUSTICE JACKSON:   And the Court said  
4       that's not -- in this situation -- I mean, I --  
5       let me just go back to your initial statement  
6       about whether or not you see Reed as setting up  
7       a new test or just re-articulating  
8       redressability as it has traditionally been  
9       understood.

10                  I thought that was the case, that Reed  
11       was not suggesting that now redressability is  
12       evaluated based on a determination of how likely  
13       it is that the person will actually get the  
14       relief that they are seeking, meaning there are  
15       no other bases that would preclude them from  
16       getting that relief.

17                  Am I right about that?

18                  MS. FISHER:   You are right, Your  
19       Honor.   And the -- the position that we've taken  
20       is that Reed doesn't change the test.   We  
21       believe that it's the Fifth Circuit and  
22       Respondents who are arguing that Reed somehow  
23       created this higher bar and that now you have to  
24       do things you didn't have to do before to show  
25       standing.

1                   But our position is that when you  
2     apply Reed as it's written, we fit exactly under  
3     that category because it's the Chapter 64  
4     reasons, as it was in Reed, that are the reasons  
5     the district attorney are denying access to the  
6     evidence. And if they applied a constitutional  
7     version of the statute, then they couldn't rely  
8     on those same reasons. They would eliminate  
9     those reasons.

10                  JUSTICE KAGAN: But, if I could go  
11     back to, I think, the -- the -- the -- the  
12     thrust of Justice Barrett's question, I mean,  
13     suppose that the DA here said, you know,  
14     notwithstanding what anybody says about Chapter  
15     64, we're just not turning this over, you know,  
16     and pounds the table 10 times so you know that  
17     they're serious.

18                  Does that defeat your standing?

19                  MS. FISHER: May I answer, Your Honor?

20                  CHIEF JUSTICE ROBERTS: Sure.

21                  MS. FISHER: That would not defeat  
22     standing because the declaratory judgment would  
23     still have the res judicata effect of binding  
24     the party to the determination that the statute  
25     was unconstitutional.

1                   We could then go to the state court  
2     and argue that they would have to respect that  
3     declaratory judgment. And so we would have a  
4     mechanism, and the declaratory judgment would be  
5     the key to that mechanism because that's what  
6     would change, to use the words of Reed, the  
7     legal status between the parties. It's the  
8     binding effect of the declaratory judgment in  
9     state court that could get around their  
10    recalcitrance by simply saying we just don't  
11    want to turn it over.

12                  CHIEF JUSTICE ROBERTS: If your theory  
13    is correct, are you saying that -- are you  
14    looking for a requirement that the government  
15    exercise discretion in light of this evidence or  
16    say they don't have any discretion but to grant  
17    relief?

18                  MS. FISHER: No -- we're not looking  
19    for something to force or compel the district  
20    attorney to turn it over. The declaratory  
21    judgment just doesn't have that power.

22                  But that doesn't -- that doesn't  
23    defeat Article III standing, and it doesn't --

24                  CHIEF JUSTICE ROBERTS: Well, I guess  
25    it -- my question would, it -- it could, though,

1     couldn't it? I mean, if the district attorney  
2     said, look, the way I see the case, the way the  
3     evidence looks at it, this DNA evidence is not  
4     going to have any effect whatever, and if it's  
5     not going to have any effect whatever, that's  
6     not enough to get standing. Standing may not  
7     require much, but it requires something.

8             MS. FISHER: If they were saying that  
9     based on -- not on Chapter 64 reasons, well,  
10    that wouldn't implicate the standing in our --  
11    in our lawsuit to -- to declare Chapter 64 --  
12    certain provisions of Chapter 64  
13    unconstitutional because our 1983 puts Chapter  
14    64 at the center of the unconstitutional  
15    actions.

16            CHIEF JUSTICE ROBERTS: Thank you.  
17            Justice Thomas?

18            JUSTICE THOMAS: Is Texas required to  
19    have a -- constitutionally to have a procedure  
20    like Chapter 64?

21            MS. FISHER: No, Your Honor. There's  
22    no substantive right to DNA testing.

23            JUSTICE THOMAS: So, if it was  
24    completely discretionary, what would your case  
25    look like?



1 MS. FISHER: You mean if Chapter 64  
2 didn't exist?

3 JUSTICE THOMAS: Was completely  
4 discretionary with the -- with the DA.

5 MS. FISHER: And if -- if Chapter  
6 60 -- if the ability to turn over DNA evidence  
7 was completely discretionary to the district  
8 attorney, we would have to rely on what the  
9 district attorney would do.

10 JUSTICE THOMAS: So how is it any  
11 different now where the court has said that you  
12 have not complied with the requirements, the  
13 other requirements of Chapter 64? The CCA?

14 MS. FISHER: Because the CCA has never  
15 considered if we should get testing under a  
16 version of the statute that cures the  
17 constitutional infirmity found by the district  
18 court.

19 JUSTICE THOMAS: So it's a  
20 constitutionally infirmity in a -- procedure  
21 that's not constitutionally required.

22 MS. FISHER: Well, once the State of  
23 Texas chooses to give that right, then due  
24 process attaches.

25 JUSTICE THOMAS: So what -- what's

1     your objective? What do you ultimately intend  
2     to show with the DNA?

3             MS. FISHER: What we hope to show with  
4     the DNA is that if we combine DNA with our other  
5     newly developed evidence, that the court will  
6     find that we make -- that the CCA will find that  
7     we make the threshold showing under 5(a)(3) that  
8     Mr. Gutierrez is death-ineligible. We may not  
9     win that.

10            JUSTICE THOMAS: Because? He's  
11     death-ineligible because?

12            MS. FISHER: Because he wasn't a major  
13     participant in the crime, because he didn't  
14     actually kill, attempt to kill, or anticipate a  
15     life would be taken. And he -- and he doesn't  
16     meet the --

17            JUSTICE THOMAS: So how would it show  
18     that? How would the DNA show that?

19            MS. FISHER: The DNA would be one  
20     component because the -- the -- Texas's theory  
21     in this case is that Mr. Gutierrez was not  
22     inside the house initially and didn't intend for  
23     anyone to get hurt. They admitted this in their  
24     penalty phase --

25            JUSTICE THOMAS: But Mr. Gutierrez

1       said he was in the house.

2               MS. FISHER:  Yes.  Well, the DNA would  
3       also show that that -- that statement which he  
4       has maintained is -- is not true.  It would --  
5       it would bolster that argument that he's been  
6       making.

7               But, if I may, Justice Thomas, and  
8       I -- I -- I say this respectfully, we don't have  
9       to show that we would ultimately win that  
10      lawsuit.  That's not required to show that we  
11      have standing.

12              CHIEF JUSTICE ROBERTS:  Justice Alito?

13              JUSTICE ALITO:  What if it were  
14      absolutely -- if it were absolutely clear that a  
15      decision that Chapter 64 is unconstitutional in  
16      the way the district court found would have no  
17      effect whatsoever on the district attorney?  
18      Would you have standing?  Would you satisfy  
19      redressability?

20              MS. FISHER:  Yes.  And, again, that's  
21      the position the district attorney took in Reed  
22      because the binding effect --

23              JUSTICE ALITO:  Well, how would it  
24      be -- how would you satisfy redressability?

25              MS. FISHER:  Because the binding

1 effect of the declaratory judgment would allow  
2 us to go back into state court and ask the state  
3 court to give effect to the determination of the  
4 federal court that Chapter 64 is  
5 unconstitutional in the way that the procedures  
6 block the ability to develop a subsequent habeas  
7 petition.

8 JUSTICE ALITO: So you just -- you  
9 think you have standing because a -- a  
10 declaratory judgment would do you some good even  
11 though it would have no effect whatsoever on the  
12 district attorney who was the defendant in this  
13 case? That's your position?

14 MS. FISHER: Yes, because it -- it --  
15 it would be a tool that we would use in the  
16 state proceedings under a new Chapter 64 motion,  
17 which is no different than Rodney Reed. It's --

18 JUSTICE ALITO: What if you had sued  
19 the mayor of Brownsville? We're suing the mayor  
20 of Brownsville because we think that -- that my  
21 client's due process rights were violated by the  
22 denial of DNA testing.

23 A declaratory judgment there that that  
24 was unconstitutional would give you the same  
25 weapon you want here.

1                   MS. FISHER: Well, we wouldn't -- we  
2     would have a traceability problem then, Your  
3     Honor, because the mayor wouldn't be involved in  
4     denying access to the evidence that we need. So  
5     we would fail Article -- sorry, prong 2 of the  
6     standing test in Your Honor's hypothetical.

7                   JUSTICE ALITO: What if the district  
8     attorney held a news conference and he swore on  
9     a stack of Bibles that a declaratory judgment --  
10    that the declaratory judgment that you want  
11    would have absolutely no effect on my decision  
12    to turn over DNA evidence because I agree with  
13    the Texas Court of -- Criminal Appeals that it  
14    would not influence the decision on death  
15    eligibility. Plus, I also agree with the trial  
16    court that all of this was done for purposes of  
17    delay.

18                  Would you have standing?

19                  MS. FISHER: If that was simply a  
20    declaration made by the district attorney, we  
21    would -- if the statute were to be found  
22    unconstitutional, because we would still have a  
23    right to take the constitutional version of the  
24    statute as declared by the federal court and the  
25    res judicata effect, that it would bind the

1 parties to that determination, to state court.

2 And that's exactly the position that  
3 Rodney Reed is in.

4 JUSTICE ALITO: Let me just take you  
5 back briefly to the questions Justice Thomas was  
6 asking about the DNA evidence.

7 The most that you could possibly show  
8 from this DNA evidence -- I mean, correct me if  
9 I'm wrong because you know the facts of this  
10 case inside out and backwards. I don't. But I  
11 gather that what you want to prove with the DNA  
12 evidence is that other people were in the home.

13 MS. FISHER: With the DNA evidence,  
14 we'd want -- that's correct.

15 JUSTICE ALITO: Okay. How would that  
16 make your client death-ineligible? How would  
17 that tend to show that he's death-ineligible?

18 MS. FISHER: Because --

19 JUSTICE ALITO: Suppose somebody else  
20 was -- suppose that you get -- it wouldn't be  
21 surprising if you found Cuellar's DNA on --  
22 on -- on some of this, right? He found the --  
23 he -- he found the victim.

24 Anyway, suppose you can prove other  
25 people were there. How does that help your

1 client?

2 MS. FISHER: Because, to show that  
3 Mr. Gutierrez is death-ineligible in a 5(a)(3)  
4 subsequent habeas, we have to show two things.  
5 We'd have to show both that he wasn't in the  
6 house, and the DNA would help with that, but we  
7 also have to show his role as one that was not a  
8 major participant, and --

9 JUSTICE ALITO: Well, the DNA can't  
10 show that he wasn't there.

11 MS. FISHER: And that --

12 JUSTICE ALITO: At most, it could show  
13 that other people were there.

14 MS. FISHER: Yes, but that would be  
15 one component. And that's exactly why a test in  
16 Chapter 64 that limits the evidence to the  
17 record evidence isn't looking at the right  
18 that's being squelched when, in 5(a)(3), you can  
19 present both types of evidence.

20 And, again, Your Honor, we wouldn't  
21 have to actually show, to show that we have  
22 redressability and standing, that we're going to  
23 win the subsequent habeas.

24 JUSTICE ALITO: No, I understand that,  
25 but I'm just wondering how long has -- this

1     litigation has been going on for more than 25  
2     years, right? I mean, how much I -- I just am  
3     interested in knowing whether it's going  
4     anywhere.

5                 MS. FISHER: Although it may feel that  
6     way, Your Honor, Mr. Gutierrez filed for his  
7     first Chapter 64 -- motion before his federal  
8     habeas in 2011. He has done nothing but utilize  
9     the procedures offered to him by the Texas  
10    courts.

11                When he filed a second motion in 2019,  
12    after current counsel came on, there were  
13    substantial factual and legal changes in Chapter  
14    64 that led him to file a second Chapter 64  
15    motion, including the at-fault provision from  
16    Chapter 64, which was one of the reasons he  
17    wasn't allowed to have testing. That was  
18    removed. So the law changed and the facts  
19    changed.

20                One of the reasons that he was denied  
21    testing is he wanted testing --

22                JUSTICE ALITO: I -- I -- I  
23    understand. Thank you very much.

24                MS. FISHER: Thank you.

25                CHIEF JUSTICE ROBERTS: Justice



1 Sotomayor?

2 JUSTICE SOTOMAYOR: I'm trying to  
3 break this case down in my own head, so can I  
4 take it a step at a time?

5 MS. FISHER: Please, Your Honor.

6 JUSTICE SOTOMAYOR: There were, I  
7 think, scrapings under the fingernails of the  
8 victim.

9 MS. FISHER: Yes.

10 JUSTICE SOTOMAYOR: There was a hair  
11 that was in -- twined in her finger or somewhere  
12 on -- on -- on her body.

13 MS. FISHER: Correct.

14 JUSTICE SOTOMAYOR: There were other  
15 things that suggest that DNA testing might not  
16 just show that Mr. Cuellar was there but might  
17 show that both Garcia brothers were there,  
18 correct?

19 MS. FISHER: Not only is that correct,  
20 the CCA found in two -- 2011 that if the DNA in  
21 those highly probative biological materials that  
22 were covered -- recovered for the very  
23 purpose --

24 JUSTICE SOTOMAYOR: That they weren't  
25 Mr. Gutierrez's.

1 MS. FISHER: If that -- yep.

2 JUSTICE SOTOMAYOR: All right. I  
3 don't want to eat up a lot of time on this.

4 But, if the evidence were to show that  
5 the other two were present, then that would give  
6 some support to your client's claim or would  
7 support your client's claim that he wasn't the  
8 one who entered the apartment to do the killing?

9 MS. FISHER: Yes, Your Honor.

10 JUSTICE SOTOMAYOR: All right. So,  
11 putting that aside, you answered -- I -- I'm not  
12 sure what your answer was to Justice Barrett or  
13 to Justice Thomas.

14 The Texas Code of -- Article 64.03  
15 permits the court to order forensic testing.

16 MS. FISHER: Oh. That --

17 JUSTICE SOTOMAYOR: So the court could  
18 order the DNA -- could order the DA to do it,  
19 correct? It chose not to here. You asked for  
20 injunction.

21 MS. FISHER: Yes, yes.

22 JUSTICE SOTOMAYOR: So -- so --

23 MS. FISHER: If that was a cure, yes.

24 JUSTICE SOTOMAYOR: -- so you had  
25 standing. It is a right given to you under

1 Texas law to go in and ask for an injunction, so  
2 you had standing to do that?

3 MS. FISHER: Yes.

4 JUSTICE SOTOMAYOR: Answer my  
5 questions, okay?

6 MS. FISHER: Yes.

7 JUSTICE SOTOMAYOR: You didn't win,  
8 but you didn't win because you continue, I  
9 think, to argue two points. One, that you can  
10 seek testing for just death eligibility. And  
11 the district court said you're right, you don't  
12 have to prove that you were actually innocent of  
13 the crime. You just have to prove that you were  
14 not eligible or not guilty of the death penalty,  
15 correct?

16 MS. FISHER: No, Your Honor. The --  
17 the previous -- the -- the unconstitutional  
18 version of Chapter 64, under which Mr. Gutierrez  
19 filed for DNA testing, only allows it to go to  
20 whether or not you're actually innocent. It  
21 didn't allow you to test to show that you were  
22 death-ineligible.

23 JUSTICE SOTOMAYOR: That's my point.  
24 All right. So -- but there's a second component  
25 to your due process, that this declaratory

1 judgment, you say, includes -- I'm not quite  
2 sure how -- but that includes -- by the way,  
3 before I go on to that, Justice Thomas asked you  
4 about is there a constitutional right to DNA  
5 testing. Osborne and Skinner say that there's a  
6 constitutional right if the state elects to give  
7 you testing, correct?

8 MS. FISHER: Exactly. The --

9 JUSTICE SOTOMAYOR: So that was  
10 Justice Kavanaugh's first question to you, that  
11 once they elect to do it, then you have the  
12 right to have a constitutional version of it,  
13 correct?

14 MS. FISHER: That's exactly correct,  
15 Your Honor.

16 JUSTICE SOTOMAYOR: All right. And  
17 you claim it's on -- not constitutional for two  
18 reasons. One, as it's been construed or as  
19 applied by somebody, okay, that it doesn't  
20 permit death eligibility. And, two, it doesn't  
21 permit new evidence to show that you're not --  
22 that you're innocent of the death eligibility,  
23 correct?

24 MS. FISHER: Those are two components  
25 of the same due process violation. And the

1 reasons they're two components of the same due  
2 process violation is because the due process  
3 violation encompasses the ways Chapter 64  
4 limits -- access to the testing, because Chapter  
5 64 --

6 JUSTICE SOTOMAYOR: So let me go back  
7 there, okay? Slow down. I'm not trying to hurt  
8 you. I'm trying to clarify things, okay?

9 (Laughter.)

10 JUSTICE SOTOMAYOR: Justice Gorsuch  
11 asked you why the statement by the TCCA that  
12 says, even if we spot you, they said, our  
13 statute can reach just death eligibility, the  
14 record evidence would still make you liable.

15 And you're saying that's not true  
16 because the new evidence would show that you are  
17 not death-eligible, correct?

18 MS. FISHER: Correct, Your Honor.

19 JUSTICE SOTOMAYOR: And what you're  
20 saying, I think, is that that issue is the issue  
21 that hasn't been looked at by the DA.

22 MS. FISHER: I see what you're saying,  
23 Your Honor. Yes, that's correct.

24 JUSTICE SOTOMAYOR: So that if you go  
25 back to the DA with this wealth of new evidence

1     which he hasn't really looked at and he says to  
2     you, even if I spot you the new evidence, it's  
3     not convincing for A, B, and C reason, you might  
4     lose, correct?

5                 MS. FISHER:  We -- well, he could  
6     certainly say that, and then we would file a  
7     Chapter 64 motion --

8                 JUSTICE SOTOMAYOR:  And -- and  
9     contravene that, you would have standing to say  
10    he's wrong about that.

11                MS. FISHER:  That's right.  We would  
12    ask the court to determine if we would be  
13    eligible for testing with the new evidence.

14                JUSTICE SOTOMAYOR:  Exactly.  And so  
15    then you would still come back into court and  
16    you could then ask the court for that injunction  
17    again?

18                MS. FISHER:  Yes, that's correct.

19                JUSTICE SOTOMAYOR:  Looking at the new  
20    evidence?

21                MS. FISHER:  Yes, exactly.

22                JUSTICE SOTOMAYOR:  All right.  Thank  
23    you.

24                MS. FISHER:  Yes.

25                CHIEF JUSTICE ROBERTS:  Justice Kagan?

1 Justice Gorsuch?

2 JUSTICE GORSUCH: Ms. Fisher, sorry to  
3 belabor the point, but there's a hypothetical  
4 we've been kind of dancing around in a lot of  
5 the questions, and that is let's suppose that  
6 the record were entirely clear that the district  
7 attorney and the TCCA would have multiple other  
8 grounds on which to deny relief even assuming  
9 Articles 64 -- Chapter 64 applied to death  
10 eligibility.

11 Would -- would it be redressable then?

12 MS. FISHER: It depends if those other  
13 grounds were wrapped up in the due process  
14 violation or not. And the issue --

15 JUSTICE GORSUCH: Let's say they  
16 aren't, okay?

17 MS. FISHER: Oh -- oh.

18 JUSTICE GORSUCH: Undue delay, for  
19 example, wouldn't be wrapped up in anything,  
20 okay? So let's just hypothesize again there are  
21 multiple independent grounds. Redressable?

22 MS. FISHER: If -- well, our injury  
23 would still be redressable in federal court. We  
24 would just lose in the --

25 JUSTICE GORSUCH: How -- how is that?

1 MS. FISHER: Well, because we wouldn't  
2 know if it was for undue delay until --

3 JUSTICE GORSUCH: No, no, let's say we  
4 know. That -- you're fighting the hypothetical,  
5 counsel, a little bit. We know. Let's just  
6 hypothesize that right now we would know that  
7 there are multiple independent grounds on which  
8 your -- your request would be denied that are  
9 independent of the thing you're complaining  
10 about. Redressable?

11 MS. FISHER: I'm trying to imagine  
12 Your Honor's hypothetical with the undue delay  
13 example.

14 JUSTICE GORSUCH: It's an example.

15 MS. FISHER: If that determination  
16 were made at the time of the filing of the new  
17 motion under the constitutional version, then we  
18 would lose at the --

19 JUSTICE GORSUCH: I -- I -- I'm saying  
20 let -- we know. Let's say the -- that the  
21 district attorney and the trial court in -- in  
22 Texas has said 17 times -- just hypothesize with  
23 me -- that even if Chapter 64 applied, there's  
24 undue delay here, wouldn't be entitled to  
25 anyway, end of case.



1                   And let's say I have six other  
2     independent reasons. Just hypothesize with me.  
3     I wouldn't think that there would be  
4     redressability in that case if we knew those  
5     facts to be so.

6                   MS. FISHER: If the independent  
7     reasons were not part of the due process  
8     violation, then Your Honor would be correct.

9                   JUSTICE GORSUCH: Thank you.

10                  CHIEF JUSTICE ROBERTS: Justice  
11     Kavanaugh?

12                  JUSTICE KAVANAUGH: A few questions.

13                  First, on how long this has -- you  
14     know -- been going on and just the history, my  
15     understanding is, in 2015 and for several years,  
16     Texas did not oppose the DNA testing. Is that  
17     under -- is that correct?

18                  MS. FISHER: That's correct, Your  
19     Honor. Mr. Gutierrez filed a -- a -- a motion  
20     with his -- prior counsel that was entitled  
21     Motion for Miscellaneous Relief, where the only  
22     thing that we asked for in that motion was DNA  
23     testing to basically show he was  
24     death-ineligible.

25                  At that time, District Attorney Saenz

1 wrote a -- a two-page response and said that  
2 because of how severe and important these issues  
3 are, they would not oppose testing.

4 JUSTICE KAVANAUGH: Okay. Second, on  
5 the question raised by Justice Thomas -- and  
6 Justice Sotomayor touched on this -- they could  
7 have a completely discretionary system, but if  
8 you have a system that sets up a right, then  
9 they have to have fair procedures. That's  
10 Osborne and Skinner, right?

11 MS. FISHER: Absolutely. Just because  
12 a procedure didn't exist, if the state chooses  
13 to give that right and there's a liberty  
14 interest, then they must provide due process.

15 JUSTICE KAVANAUGH: Yeah. And then,  
16 third, Justice Barrett's questions, what I think  
17 are the prosecutor as defendant -- and this goes  
18 back to my first question on -- that -- that's  
19 the awkwardness of Osborne and Skinner. It's  
20 very unusual. Reed tried to do the best it  
21 could with that without -- if you -- Reed went  
22 the other way. It totally eviscerates Osborne  
23 and Skinner, I think.

24 I mean -- but that leads to some  
25 awkward questions about what the prosecutor will

1 do. And I just don't think -- this is more  
2 something to react to -- I don't see how we can  
3 say something's not redressable just because the  
4 prosecutor is going to say I'm not going to  
5 comply with a court order. You know, if  
6 President Nixon said, I'm not going to come turn  
7 over the tapes no matter what, you wouldn't say,  
8 oh, I guess we don't have standing to hear the  
9 executive privilege case. I mean, it just -- it  
10 doesn't work, I don't think, to say a  
11 recalcitrant defendant can defeat redressability  
12 in that way.

13 MS. FISHER: My react --

14 JUSTICE KAVANAUGH: I assume you agree  
15 with that.

16 MS. FISHER: My reaction is I could  
17 not agree with you more, Justice Kavanaugh.

18 JUSTICE KAVANAUGH: Yeah.

19 On the other grounds, if there are  
20 other grounds, those probably go to the merits,  
21 but, I mean, that's -- that's what we have to  
22 figure out here down the road.

23 You could lose down the road because  
24 there might not be a procedural due process  
25 problem. If there is a procedural due process

1     issue with the statute, you may not win -- the  
2     DNA testing might not show.

3             MS. FISHER:   We might not.   We may not  
4     win DNA testing.

5             JUSTICE KAVANAUGH:   And then, on the  
6     DNA testing, just to get to this on Justice  
7     Sotomayor's questions because I think this is --  
8     there is -- if -- if Cuellar, Garcia, and  
9     Gracia, if I have the names correct --

10            MS. FISHER:   You do.

11            JUSTICE KAVANAUGH:   -- are the people  
12     with the blood in the trailer, particularly  
13     Cuellar, that's going to be problematic for the  
14     state's theory, not defeat it but problematic or  
15     more problematic for the state's theory that  
16     Gutierrez was in the trailer, correct?

17            MS. FISHER:   Yes, a -- a fact  
18     recognized even by the CCA.

19            JUSTICE KAVANAUGH:   And that goes to  
20     the fingernail scrapings, the hair on the  
21     finger, the blood-stained shirt?

22            MS. FISHER:   Yes.

23            JUSTICE KAVANAUGH:   Right?

24            MS. FISHER:   Yep.

25            JUSTICE KAVANAUGH:   If -- if -- if

1 Gutierrez is nowhere to be found, again, I think  
2 that doesn't defeat the state's theory, but  
3 that -- that's -- it's not inconsistent, but  
4 it -- it undermines a little bit how they  
5 perceived all this to have transpired in the  
6 trailer.

7 MS. FISHER: It does. And it would be  
8 part -- and that is why it's part of what we  
9 would need to present in a death ineligibility  
10 habeas.

11 JUSTICE KAVANAUGH: And what did the  
12 state -- what was the state's theory at trial  
13 about what Cuellar's role was?

14 MS. FISHER: Well, Cuellar was the  
15 initial suspect. If you look at the evidence  
16 bags, they all --

17 JUSTICE KAVANAUGH: Right. Just on  
18 the question, sorry. I'm taking too long.

19 MS. FISHER: They believed that --  
20 that he -- they -- at trial, what the state  
21 argued was that Cuellar was her nephew, and  
22 while he was a -- a drunk who was dependent on  
23 her and fought with her often, his only role in  
24 this was that he found her.

25 JUSTICE KAVANAUGH: The state's theory

1 at trial was that Cuellar was not in the trailer  
2 during the crime, correct?

3 MS. FISHER: Absolutely correct.

4 JUSTICE KAVANAUGH: Okay. And if the  
5 blood under the fingernail, if the scrapings and  
6 the hair are Cuellar, that's a problem for their  
7 theory?

8 MS. FISHER: Yes. There would be no  
9 reason for his DNA to be under her fingernails.

10 JUSTICE KAVANAUGH: Got it. Okay.  
11 Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Barrett?

14 JUSTICE BARRETT: Okay. I just want  
15 to go back to my questions earlier and -- and  
16 follow up and clarify because Justice Kavanaugh  
17 makes some good points about the awkwardness of  
18 Osborne and Skinner and how this plays out.

19 Because of Skinner and Osborne, when  
20 you -- you know, Texas has to provide fair  
21 procedure. That means that the DA is the  
22 defendant in an Article 64 suit like the one  
23 that you would file, like the one you did file,  
24 saying that this violates procedural due  
25 process. He's the correct defendant, is that

1 correct?

2 MS. FISHER: Correct.

3 JUSTICE BARRETT: So it would give  
4 meaning to the right and to your procedural due  
5 process claim to have him be the defendant in  
6 the Article 64 proceeding and be able to raise  
7 that procedural due process claim in the context  
8 of that proceeding, right?

9 MS. FISHER: Yes.

10 JUSTICE BARRETT: Okay. Are you  
11 arguing outside -- so we are outside of that  
12 Article 64 proceeding, obviously, right now.

13 I'm just trying to understand the  
14 nature of your argument because Reed says that  
15 the reason why there was standing there -- and I  
16 joined Reed -- it's substantially likely that  
17 the state prosecutor would abide by such a court  
18 order. That's Justice Kavanaugh's point. I  
19 agree with that.

20 That there would be a significant  
21 increase in the likelihood that the state  
22 prosecutor would grant access to the requested  
23 evidence.

24 So, to me, that's going to the state  
25 prosecutor's discretionary decision whether to

1 hand over the evidence, which might be  
2 influenced by application and his understanding  
3 of -- Article 64, right?

4 MS. FISHER: I would not say it goes  
5 to his discretion, Your Honor, because the  
6 district attorney in Reed came before this  
7 Court --

8 JUSTICE BARRETT: Okay. I don't want  
9 to talk about the arguments. I want to talk  
10 about the case. And -- and are you arguing --  
11 let -- let me just phrase it a different way.

12 Are you arguing that it's redressable  
13 because of the preclusive effect of the judgment  
14 if you went to another proceeding? Is that your  
15 basic argument for redressability?

16 MS. FISHER: Yes, Your Honor.

17 JUSTICE BARRETT: You're sure?

18 (Laughter.)

19 JUSTICE BARRETT: Okay. Okay. All  
20 right. I'll take that answer.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Jackson?

23 JUSTICE JACKSON: So I guess I was  
24 quite surprised at your response to Justice  
25 Gorsuch -- Gorsuch's questions about the



1 independent grounds and the way in which they  
2 might deny your redressability claim.

3 And I -- I -- I guess I'm a little  
4 bit -- no, a lot -- concerned that that is  
5 actually a different conception of  
6 redressability than has been historically  
7 understood and at least as I understood it.

8 I thought redressability related to  
9 whether the injury could be remedied by court  
10 order, that is, whether the court order was the  
11 kind of thing that could remedy the injury that  
12 is being claimed.

13 But that conception seems to suggest  
14 that the question of redressability is whether  
15 the court's order will actually remedy this  
16 plate -- plaintiff's injury, that is, whether  
17 there is anything else in the universe that  
18 would prevent the plaintiff from getting relief.

19 I had not understood -- redressability  
20 to amount to that, and the real concern, I  
21 think, is that it imports into the threshold  
22 standing jurisdictional analysis merits  
23 discussions about all the defenses and other  
24 things that a defendant might be able to raise  
25 in the context of a motion to dismiss.

1                   So I -- I think that under just --  
2     under the hypothetical that Justice Gorsuch  
3     posited, if there was a statute-of-limitations  
4     problem, that the defendant could argue that the  
5     person had no standing under redressability  
6     because they still would not be able to get  
7     relief under that -- concept of redressability.

8                   And I had not perceived all of those  
9     other things -- standing, undue delay, et  
10    cetera, et cetera -- to be issues that the Court  
11    had to resolve as a matter of their jurisdiction  
12    upfront in this way.

13                  So I'm worried about that.

14                  MS. FISHER: Justice Jackson, I  
15     completely agree with your initial  
16     understanding, and to the extent that I asked --  
17     answered Justice Gorsuch's question to imply  
18     otherwise, I did not intend to.

19                  The hypothetical of his undue delay  
20     could -- the way --

21                  JUSTICE JACKSON: I mean, isn't undue  
22     delay a -- a merits -- I mean, we would -- we  
23     would fight on the merits.

24                  MS. FISHER: Yes.

25                  JUSTICE JACKSON: We would litigate

1       whether or not there was undue delay.

2               MS. FISHER:   Yes.

3               JUSTICE JACKSON:   And if that becomes  
4       a standing question, I'm now very confused --

5               MS. FISHER:   It's --

6               JUSTICE JACKSON:   -- about the theory  
7       that is operating here to determine standing.

8               MS. FISHER:   No, it's not a standing  
9       question, and I didn't mean to imply so.

10              The -- the statutory reasons are the  
11      focus.  You don't have to prove that -- that  
12      nothing can come up that will defeat your  
13      ability to win the claim.

14              JUSTICE JACKSON:   And that's what they  
15      seem to be saying.

16              MS. FISHER:   That's exactly what  
17      they're saying, and that's what we're fighting  
18      against.  And to the extent, with no disrespect  
19      to Justice Gorsuch, that I answered it in that  
20      way, I didn't intend to.

21              JUSTICE JACKSON:   Thank you.

22              CHIEF JUSTICE ROBERTS:   Thank you,  
23      counsel.

24              Mr. Cole.

25

1                   ARGUMENT OF WILLIAM F. COLE  
2                   ON BEHALF OF THE RESPONDENTS

3                   MR. COLE: Thank you, Mr. Chief  
4 Justice, and may it please the Court:

5                   The district court's declaratory  
6 judgment did not redress Mr. Gutierrez's injury,  
7 which is the denial of access to DNA testing  
8 evidence.

9                   Under Reed, the redressability  
10 question turns on whether the declaratory  
11 judgment would eliminate the state prosecutor's  
12 justification for denying the testing and  
13 thereby make it significantly -- increase the  
14 likelihood -- significantly increase the  
15 likelihood that the prosecutor would hand over  
16 the evidence.

17                   But, here, it would not. Unlike in  
18 Reed, here, there are several independent state  
19 law grounds that the prosecutor has relied on to  
20 deny access to the evidence, and those grounds  
21 are unaffected by the district court's narrow  
22 declaratory judgment here.

23                   This case may also be moot, and we  
24 know that not through supposition or through  
25 speculation but because, after Mr. Gutierrez

1     obtained that judgment, he took it to state  
2     court and tried to use it as a basis to compel  
3     District Attorney Saenz to hand over the  
4     evidence.

5             But, because of those independent  
6     state law grounds grounded in Chapter 64, he  
7     refused, and the Court of Criminal Appeals  
8     upheld that decision for a third time.

9             That means the declaratory judgment  
10    will not and did not redress his injury.

11            Gutierrez responds by first redefining  
12    the scope of his injury in fact and then  
13    attempting to refashion the scope of the  
14    district court's narrow declaratory judgment.  
15    But neither can establish jurisdiction.

16            From his operative complaint right  
17    through his opening merits brief in this Court,  
18    Mr. Gutierrez has consistently defined his  
19    injury as the denial of access to DNA testing.  
20    And his attempt in reply to refashion the scope  
21    of the district court's declaratory judgment is  
22    contrary to that -- the letter of that judgment  
23    at J.A. 61A. And it's -- and the CCA has  
24    already rejected that.

25            Because the Court lacks jurisdiction

1 twice over, it should affirm. And I welcome the  
2 Court's questions.

3 JUSTICE THOMAS: Let's say there are  
4 multiple justifications for not providing the  
5 DNA testing and the declaratory judgment  
6 eliminates several of those.

7 Wouldn't it make it more likely that  
8 the testing would be available?

9 MR. COLE: The question, Justice  
10 Thomas, is whether it would get him access to  
11 the evidence because the injury he's asserted  
12 here and has continued to assert is denial of  
13 access to the evidence. And, under state law,  
14 there are several statutory grounds he has to  
15 jump through to get them.

16 So, if you eliminate a couple, but  
17 some still remain, then, no, it would not  
18 redress the injury, which, again, is the denial.

19 JUSTICE KAGAN: I -- I think that that  
20 was true in Reed too. I mean, if you just look  
21 at page 233, which is the page before the  
22 critical paragraph in Reed, it talks about how  
23 the Court reasoned in denying Reed's motion, and  
24 then it says that there were two reasons. One  
25 was that there wasn't this adequate chain of

1 custody, and the second was that Reed didn't  
2 demonstrate that he would have been acquitted if  
3 the DNA results were exculpatory.

4 And, essentially, that functioned in  
5 the exact same way. In other words, it's like,  
6 even if the specific claim that Reed is making  
7 were knocked off the table, we have a backup way  
8 to defeat his request for evidence.

9 And the Court obviously thought that  
10 that was irrelevant because, you know, a page  
11 later, the Court makes no reference to that in  
12 explaining why it is that Reed has standing.

13 MR. COLE: So here's why I think this  
14 case is just not Reed, Justice Kagan.

15 First, Reed, of course, was a pleading  
16 stage challenge. He actually at that point, as  
17 you rightly point out, had several live  
18 challenges to various grounds under the statute.

19 In fact, at that point, he may well  
20 have prevailed on those grounds and thereby  
21 eliminated the justification. In fact, those  
22 grounds are currently pending live before the  
23 Fifth Circuit right now.

24 JUSTICE KAGAN: Yeah, it's the same  
25 thing as, you know, I think Justice Gorsuch

1     called it.  There's a kind of harmlessness  
2     backup.  And so too there was in Reed, as the  
3     Court noted.

4                 MR. COLE:  The difference, though,  
5     Justice Kagan is, in Reed, Mr. Reed was  
6     challenging all the justifications.  Here,  
7     Mr. Gutierrez is simply not.  He has not  
8     challenged in his complaint several of the  
9     independent statements.

10                JUSTICE JACKSON:  But -- but I don't  
11     under --

12                JUSTICE KAGAN:  Yeah, I think that  
13     that's a -- a -- a pretty nit-picking way to  
14     read this complaint.  And I think that  
15     Ms. Fisher talked about this when she was up  
16     there.

17                I mean, you can go through and you can  
18     pick the, you know, oh, he's really challenging  
19     the sentence-versus-conviction point.  But, at a  
20     deeper level, he's challenging the whole realm  
21     of procedures that prevents him from getting  
22     access to DNA testing.

23                And it's most clear -- I'm going to  
24     tell you -- in paragraph 81 if I can find it --  
25     because he says:  By refusing to release the



1 biological evidence for testing, you've deprived  
2 Gutierrez of his liberty interests in using  
3 state procedures to obtain a reduction of his  
4 sentence, in violation of his right to due  
5 process of law.

6 So that says to me that there is -- if  
7 you read the complaint with any degree of  
8 generosity, there's just a claim here that a set  
9 of procedures that would deprive this man in  
10 these circumstances of DNA evidence is a set of  
11 procedures that's violative of due process.

12 MR. COLE: Well, with respect, Justice  
13 Kagan, that is not how I read the complaint.  
14 That's not how the district court read the  
15 complaint.

16 I mean, there's a reason the district  
17 court looked at the two grounds he alleged. The  
18 one ground was a challenge to the  
19 preponderance-of-the-evidence standard, which is  
20 too high. The second ground was this  
21 sentence-versus-conviction distinction.

22 And if you back up one page, it --

23 JUSTICE KAGAN: There are certainly  
24 these specific things. I don't mean to say for  
25 a moment that there aren't those specific things

1 addressed in his complaint. But there's also a  
2 kind of more general argument, which is like,  
3 wow, you put all these procedures together,  
4 we're in a world -- and -- and we're in --  
5 and -- and they somehow manage to deprive this  
6 person of DNA testing, that's violative of due  
7 process.

8 And, you know, it's very similar what  
9 I'm saying. You've heard the argument before  
10 because it's very similar to Judge Higginson's  
11 argument below, where Judge Higginson is saying,  
12 you know, Reed did not, like, pick apart every  
13 aspect of the complaint and say exactly how this  
14 aspect related to this Texas Court of Criminal  
15 Appeals holding. I mean, if it had done what  
16 you're suggesting, it probably would have  
17 reached a different answer. It didn't do that.

18 MR. COLE: Well, two responses,  
19 Justice Kagan.

20 The first is that in Reed, that was a  
21 complaint. You're quite right to say so. Here,  
22 it's final judgment. So we know the scope of  
23 his claims.

24 The other thing is, again, in Reed,  
25 those claims were live. They're still live

1     today, in fact. So there is a chance that the  
2     declaratory judgment would, in fact, redress his  
3     injury and get him the evidence.

4             Here, I -- I just -- I don't read the  
5     complaint in the same way as you perhaps.

6             JUSTICE BARRETT: So, counsel, will  
7     you please --

8             JUSTICE JACKSON: Can we just -- go  
9     ahead.

10            JUSTICE BARRETT: Will you please  
11     explain to me how the process works in the DA's  
12     office when there is a request for DA -- DNA  
13     evidence made?

14            MR. COLE: Sure. So there's --  
15     there's two ways, as -- and I think Justice  
16     Thomas's dissent points this out in Reed.  
17     There's two ways. There is the Chapter 64 way.

18            JUSTICE BARRETT: Right.

19            MR. COLE: You go and get a court to  
20     force them. And then there can be -- it's  
21     essentially a species of prosecutorial  
22     discretion. There could be an agreement to give  
23     up the evidence. But -- and I want to be very  
24     careful about this because I think there was  
25     some mixing and matching at the top-side

1 argument. The discretionary component is just  
2 simply not at issue here. His complaint is very  
3 clearly putting at issue Chapter 64, the  
4 procedures.

5 And -- and this Court has said --

6 JUSTICE BARRETT: But do the -- I  
7 guess my question is -- I -- I understand all  
8 that. My question is, understanding that  
9 Article 64 doesn't bind the prosecutor's  
10 exercise of discretion, I mean, surely, it would  
11 make sense for the prosecutor to have an eye  
12 towards Article 64 knowing that that's the next  
13 stop, right, and so to be making some sort of  
14 judgments about whether Article 64 would permit  
15 access to the evidence or not.

16 So what I'm asking is, what does the  
17 prosecutor take into account? What is the  
18 policy? Is Article 64 in the background as part  
19 of the policy?

20 MR. COLE: The -- yes, the prosecutor  
21 considers Article 64. As the Court put it in  
22 Osborne, it's the state legislature who really  
23 is the primary determinant of the grounds under  
24 which a convict might be entitled to DNA  
25 testing.

1 But, again --

2 JUSTICE JACKSON: And, here, didn't  
3 the prosecutors rely on Article 64 in denying  
4 this? I mean, didn't --

5 MR. COLE: Yes.

6 JUSTICE JACKSON: -- he say Article 64  
7 is one of the reasons?

8 MR. COLE: Those are the -- in -- to  
9 put it in the terms of Reed, those are the  
10 justifications that led --

11 JUSTICE JACKSON: In -- in this case.

12 JUSTICE BARRETT: But in the  
13 discretion -- just let me finish this one. But  
14 in the -- in the discretionary phase is what  
15 we're talking about, right? So, as Justice  
16 Jackson just said, that was a reason that the DA  
17 denied access to the evidence on track  
18 prosecutor, not track court?

19 MR. COLE: So there's no evidence in  
20 the record about that discretionary phase  
21 because, again, that is just not at issue here.  
22 And I want -- it's not put at issue in the  
23 complaint. He's not saying it's a procedural  
24 due process violation for the prosecute to --  
25 prosecutor to exercise or not discretion. This

1 is wholly bound up in Chapter 64.

2 And you can see that throughout his  
3 complaint, and the most evident pages are  
4 paragraphs 79 through 81 at J.A. --

5 JUSTICE BARRETT: So what did the  
6 prosecutor consider in denying the evidence?

7 MR. COLE: Well, we have the  
8 justifications because we've had them since  
9 2011.

10 JUSTICE BARRETT: Okay.

11 MR. COLE: We have -- again, we have  
12 the identity factor, which the Court of Criminal  
13 Appeals ruled against him. We have the delay  
14 factor. And we have the alternative  
15 conclusions.

16 JUSTICE BARRETT: But those are  
17 looking towards 64?

18 MR. COLE: Those are in 64, yes,  
19 again, because that's what he's challenging in  
20 this case.

21 JUSTICE JACKSON: All right.

22 JUSTICE BARRETT: Right. But just to  
23 be clear, you're saying -- you're not talking --  
24 I don't want to talk about track court. I just  
25 want to talk about track prosecutor. And what

1     you're saying is that we have evidence of what  
2     the prosecutor -- the reason why the prosecutor  
3     denied access to the evidence?

4             MR. COLE:  The evidence in the context  
5     of Chapter 64, yes.  Those are the reasons that  
6     have been argued.

7             JUSTICE BARRETT:  Okay.  But are you  
8     talking about track court or track prosecutor?

9             MR. COLE:  So, if track prosecutor  
10    means the -- the internal deliberations in the  
11    office, of course, there's no evidence of that  
12    because it's not relevant to this case.  He's  
13    not challenging the discretion.

14            JUSTICE JACKSON:  So, Mr. --

15            JUSTICE SOTOMAYOR:  I have a question  
16    because -- if I might try to clarify this.

17            JUSTICE BARRETT:  Sure.  Yeah.

18            JUSTICE SOTOMAYOR:  There's always a  
19    discretion of a prosecutor to do this and  
20    sometimes it happens outside of formal process.  
21    But we're not -- you're -- you're -- am I taking  
22    you to be saying that under Article 64, if --  
23    don't argue that they haven't -- if they met all  
24    of the prerequisites, would you have a right to  
25    say no to the court, I'm not going to give the

1 evidence?

2 MR. COLE: Of course not, Justice  
3 Sotomayor. If -- if the convicting court orders  
4 the evidence, of course, we would provide that  
5 evidence.

6 JUSTICE SOTOMAYOR: So, if they met  
7 Article 64, you would feel bound to follow it,  
8 correct?

9 MR. COLE: Oh, of course. The court  
10 would --

11 JUSTICE SOTOMAYOR: All right.

12 JUSTICE BARRETT: Counsel -- I -- I  
13 think you're misunderstanding Justice Sotomayor.  
14 You might be.

15 I -- not if the Court orders it.  
16 Obviously, the DA's going to comply with a court  
17 order. If the DA concluded, yeah, you know, you  
18 satisfy everything about Article 64 and if we  
19 went to court, in my judgment, it's pretty  
20 evident that the trial court would give you the  
21 evidence. In that instance, would you turn over  
22 the evidence?

23 MR. COLE: I suspect so. I mean, but,  
24 again, that's not at issue.

25 JUSTICE GORSUCH: I -- if I understand



1     it, though, Chapter 64 has a lot of things in  
2     it, right?

3                 MR. COLE:   Yes, Your Honor.

4                 JUSTICE GORSUCH:   And the one thing  
5     that's been challenged is whether it applies to  
6     the death penalty stage.

7                 MR. COLE:   Quite right, Justice  
8     Gorsuch.

9                 JUSTICE GORSUCH:   All right.   And so,  
10    getting past that hurdle, you still have the  
11    other independent grounds.   They're in Chapter  
12    64 too.

13                MR. COLE:   Quite right.

14                JUSTICE GORSUCH:   Right?   And so I --  
15    I just want to make sure I understand the nature  
16    of what you're saying.   You're saying, oh, an  
17    independent prosecutor making his or her own  
18    decision would take into account, of course,  
19    if -- if a court were to hold that the --  
20    that -- that it applies to death penalty  
21    proceedings, he'd abide by that, but he'd still  
22    have independent grounds that have been  
23    litigated and resolved on which to deny the  
24    request?

25                MR. COLE:   That's correct in this

1 case.

2 JUSTICE GORSUCH: In this case.

3 MR. COLE: Of course, we -- I want to  
4 be clear about this.

5 JUSTICE GORSUCH: Yeah.

6 MR. COLE: This prosecutor is a public  
7 official. He follows state and federal court  
8 orders.

9 JUSTICE GORSUCH: Of course.

10 MR. COLE: And we are not --

11 JUSTICE GORSUCH: Yeah.

12 JUSTICE JACKSON: Mr. Cole --

13 JUSTICE SOTOMAYOR: Now, counsel --

14 JUSTICE JACKSON: -- can I ask you --  
15 because I'm just trying to understand the theory  
16 of redressability here because I -- I think I  
17 have a different concept and I'm just wanting to  
18 make sure that I understand yours.

19 Why isn't it enough for redressability  
20 purposes that a declaratory judgment would  
21 eliminate some of the justifications that a  
22 prosecutor has set forward as the reason why he  
23 didn't -- denied the evidence?

24 I mean, traditionally, traditionally,  
25 I would think, the way I conceive of

1 redressability, you might have an argument if  
2 the declaratory judgment didn't eliminate any of  
3 them. We'd be sort of ships passing in the  
4 night. The prosecutor says, here are my  
5 justifications to include this aspect of Article  
6 64 or whatever. And the person is asking for a  
7 declaratory judgment that doesn't speak to that  
8 at all. Fine. You might say no redressability.

9 But what you seem to be saying here is  
10 no, we could have a declaratory judgment that  
11 speaks to some of the justifications that the  
12 prosecutor has put forward for denying the  
13 evidence, but unless we have a situation in  
14 which there is no other justification that could  
15 possibly, you know, support this, you have no  
16 redressability.

17 And I don't understand that piece of  
18 it.

19 MR. COLE: So here's why, Justice  
20 Jackson. It turns on the injury he's asserting.  
21 The injury he's asserting is denial of the  
22 access to the evidence. That's -- binary.

23 JUSTICE JACKSON: But that's not the  
24 way they --

25 MR. COLE: Either you get it or your

1 don't.

2 JUSTICE JACKSON: But that's not the  
3 way he has, at least in the briefing,  
4 articulated it. I thought the injury was  
5 consideration of his access to the evidence  
6 using an unconstitutional process.

7 MR. COLE: That is his constitutional  
8 claim, but his injury -- and I would direct you  
9 to paragraph 81 of his operative complaint at  
10 Joint Appendix 457A. I think this nicely lays  
11 that out because he says at the beginning, by  
12 refusing to release the biological evidence for  
13 testing. So that's the conduct of the defendant  
14 that he wants to remedy through the prosecutor.

15 JUSTICE JACKSON: Yeah, but in a  
16 discretionary world, if that's your concept of  
17 injury, you would never have discretion -- you'd  
18 never have redressability because the prosecutor  
19 could always save the very narrow circumstance  
20 in which the court, I guess, orders them to do  
21 that very thing. They could always say, well, I  
22 wouldn't give it to you anyway, no matter what.

23 MR. COLE: No, this -- so this isn't  
24 about discretion, and let me go to the  
25 redressability component specifically within

1     declaratory judgments.  This Court said in  
2     Brackeen that what saves declaratory judgments  
3     from the advisory opinion problem is that they  
4     are afforded preclusive effect in later imminent  
5     litigation.  So, really, the -- the redress he  
6     needs through this is that the declaratory  
7     judgment will be afforded --

8                 JUSTICE JACKSON:  Yes, but Brackeen  
9     was talking about parties versus non-parties.  I  
10    guess what I'm really, really worried about is  
11    that this case, which seems very small and  
12    narrow and about, you know, a particular guy  
13    and -- and DNA testing and the interpretation of  
14    this statute, could actually have major  
15    implications for how we understand standing  
16    because redressability, which has traditionally  
17    not been where all the action is in terms of our  
18    standing analysis, it has not been a major  
19    hurdle for the Court to have to get over, under  
20    your view comes -- comes out to be a situation  
21    in which the Court has to essentially decide all  
22    these other issues about whether or not the  
23    person could ever get relief in order to  
24    determine whether or not this claim is  
25    redressable.

1                   MR. COLE: I don't think so, Justice  
2 Jackson, and here's why. This goes not to some  
3 sort of discretion. This is not like we're  
4 saying the district attorney -- this case  
5 concerns the district attorney pulling ideas out  
6 of thin air.

7                   Again, in the context of a Chapter 64  
8 proceeding --

9                   JUSTICE JACKSON: Let me just ask you  
10 this hypothetical. If there was a  
11 statute-of-limitations problem, could that be  
12 used by the defendant in this circumstance,  
13 the -- the -- the state, the state attorney, to  
14 argue no redressability?

15                  MR. COLE: A federal statute of  
16 limitations? No, because that wouldn't be a  
17 just -- a state law justification.

18                  JUSTICE JACKSON: Make it a -- no, I  
19 mean a state -- a state law justificate -- the  
20 state has a statute of limitations, and that's  
21 the problem or one of the problems. He includes  
22 statute of limitations as a part of the list of  
23 things as to why this person is not going to get  
24 the testing.

25                  Are you saying that that

1 statute-of-limitations question could be  
2 imported into the standing analysis as a grounds  
3 for lack of redressability?

4 MR. COLE: So, in Reed, if it is a  
5 justification -- and, again, the -- the  
6 declaratory judgment has to eliminate the  
7 justification.

8 JUSTICE JACKSON: I understand.

9 MR. COLE: Then, yes. Then, yes.

10 JUSTICE JACKSON: Yes. All right.

11 MR. COLE: If that is a state law  
12 ground that is a justification, then --

13 JUSTICE JACKSON: So any other state  
14 law ground that would preclude this person from  
15 getting the relief they're seeking becomes a  
16 redressability issue in -- under your theory?

17 MR. COLE: So there is a finite set  
18 of -- of facts here. This is not like they're  
19 going to be coming out of nowhere. It's in the  
20 statute. It's in the common law. Again, this  
21 is Chapter 64. So it's not like he's going to  
22 be coming up with a bunch of obscure things out  
23 of left field.

24 JUSTICE JACKSON: No, but in my  
25 hypothetical, I'm just talking about theory.

1 MR. COLE: Mm-hmm.

2 JUSTICE JACKSON: You're -- you're  
3 setting up redressability to require the  
4 exclusion of any other ground for relief.

5 So I'm saying -- I'm just testing that  
6 by saying any other ground for relief under your  
7 theory would count as a redressability problem.

8 MR. COLE: Because the injury that  
9 must be redressed in this case is the denial of  
10 evidence. Again, it's binary.

11 JUSTICE JACKSON: Yeah.

12 MR. COLE: He has to get the evidence  
13 or not.

14 JUSTICE KAVANAUGH: Well, you say --  
15 I'm just going to push on that.

16 MR. COLE: Sure.

17 JUSTICE KAVANAUGH: I mean, I think  
18 some of your answers are really collapsing the  
19 merits into redressability, but -- so I think  
20 that's a concern.

21 But I understood the complaint and the  
22 thrust of the argument to be the denial of fair  
23 procedures with respect to the underlying right.

24 And we've long said -- I mean, Justice  
25 Scalia's opinion in Lujan. If this case is



1     about fair procedures, Justice Scalia's opinion  
2     in Lujan said: "There's much truth to the  
3     assertion that 'procedural rights' are special:  
4     The person who has been accorded a procedural  
5     right to protect his concrete interests can  
6     assert that right without meeting all the normal  
7     standards for redressability and immediacy."

8             And I think procedural rights have  
9     always been different because, if you could just  
10    say, well, who cares about the procedures,  
11    they're not going to win anyway, you're not  
12    going to be able to get into court to argue for  
13    the fair procedures. And that seems to be on  
14    point here. Tell me why it's not.

15            MR. COLE: So I don't think so,  
16    Justice Kavanaugh, for this reason. He is not  
17    asserting a procedural injury here. J.A. 430A,  
18    J.A. 432A, J.A. 452A, J.A. 453A --

19            JUSTICE KAVANAUGH: No, you -- you've  
20    said --

21            MR. COLE: -- that is his complaint.

22            JUSTICE KAVANAUGH: -- you've said  
23    over and over again -- I've read the complaint.  
24    He -- you've said over and over again that he's  
25    complaining about the denial of access to the

1 evidence. That is the ultimate goal, obviously.

2 But the complaint is that Chapter 64,  
3 as interpreted, is unconstitutional and a  
4 violation of procedural due process to the  
5 extent it only allows you to challenge your  
6 conviction for the underlying crime and not your  
7 ineligibility for the death penalty.

8 The argument is that that violates  
9 procedural due process. That may be a winning  
10 argument, it may be a losing argument, but  
11 that's a down-the-road argument, it strikes me.  
12 But that's the challenge.

13 MR. COLE: So that seems to me to be  
14 his theory of why the Constitution is violated.  
15 But, when you go to the injury, when you're  
16 asking what's the defendant's conduct here --

17 JUSTICE KAVANAUGH: Well, you  
18 always -- this is, again, in the same footnote  
19 in Justice Scalia's opinion, in the whole  
20 opinion. You always have a connected  
21 substantive interest at the end to stop the  
22 project, for example, in the environmental case.

23 But your argument is that they didn't  
24 comply with the procedures in order to stop the  
25 project. And you can't come in and say: Oh,

1 the project's going forward anyway, so who cares  
2 about the procedures, you're not -- you don't  
3 get redressability.

4 I mean, that's just a stone-cold  
5 loser, as -- as Justice Scalia said.

6 MR. COLE: Well, again, I -- I don't  
7 think his injury is -- is the procedural point.  
8 I just don't view this as a procedural injury  
9 case in the same way that say an APA case would  
10 when there's a right to notice and comment or  
11 something like that.

12 Again, I go -- I -- I would just go  
13 back to his complaint and his -- his theory.

14 JUSTICE SOTOMAYOR: I -- I'm sorry --

15 MR. COLE: It was all about the --

16 JUSTICE KAVANAUGH: Can I ask one --  
17 one more question --

18 MR. COLE: Yeah.

19 JUSTICE KAVANAUGH: -- just to make  
20 sure. And I don't think you're arguing this,  
21 but I just want to make sure.

22 Are you arguing that if you said we  
23 will never turn over the DNA evidence, that that  
24 declaration by you, the defendant, would defeat  
25 redressability?

1                   MR. COLE: No, of course not, because,  
2                   again, the question is whether the declaratory  
3                   judgment could then be taken into state court  
4                   and accorded preclusive effect. The Court --  
5                   again, the Court here under Chapter 64 is the  
6                   one who would order that. And so, obviously, we  
7                   would -- we would abide by the Court's order.

8                   JUSTICE KAVANAUGH: By a court order.  
9                   Are you saying we will never -- if we say we  
10                  will never comply absent a future court order,  
11                  that that defeats redressability now for this  
12                  kind of suit? Are you arguing that?

13                  MR. COLE: I -- I guess I -- I'm not  
14                  sure of the context. You're saying if -- if he  
15                  just makes a declaration that --

16                  JUSTICE KAVANAUGH: Yeah. We will  
17                  never exercise our discretion to turn it over  
18                  absent a court order. We will never do it  
19                  absent a court order down the road. But there  
20                  is no court order yet, so, therefore, you  
21                  have -- you, federal court, right now do not --  
22                  there's -- it's not a redressable case.

23                  MR. COLE: So I think the distinction  
24                  here is that --

25                  JUSTICE KAVANAUGH: I think you are

1     arguing that.

2                 MR. COLE:   So -- but the distinction  
3     here, he's not challenging discretion.   So this  
4     is not a case about whether the -- the district  
5     attorney exercises discretion or not.   This is  
6     purely a question under Chapter 64 whether he  
7     can be compelled to hand over the evidence,  
8     again, through the preclusive effect of a  
9     declaratory --

10                JUSTICE KAVANAUGH:   That's -- that's  
11     a -- that's a -- fair -- I mean, the discretion  
12     is -- that's a fair point.   And it's the oddity  
13     or awkwardness of -- of the prosecutor as -- as  
14     a defendant.

15                MR. COLE:   Yeah.

16                JUSTICE KAVANAUGH:   I'll -- I'll stop  
17     there.

18                JUSTICE SOTOMAYOR:   Counsel, maybe  
19     this is an unfair question to you.   You can push  
20     back, okay?

21                We've now spent so much time on  
22     whether you should test or not.   And at one  
23     point, you decided that you wouldn't object to  
24     doing it, but now you're fighting it tooth and  
25     nail.

1                   It seems odd to be fighting it tooth  
2     and nail when they have more evidence about the  
3     potential culpability of Mr. Cuellar, including  
4     that he failed the polygraph that was an  
5     affirmative misstatement earlier in the case  
6     that he had passed it.

7                   They now have evidence that he had  
8     money or was tied to money. It would seem that  
9     somehow we're fighting a legal issue that really  
10    is less legal than it is -- don't you want to  
11    know you got the -- you're -- you're convicting  
12    the right person for the right thing? I mean,  
13    he's going to spend time in jail no matter what  
14    because he admits to being at least an accessory  
15    to the robbery or a part of the robbery.

16                  But at what point does this legal  
17    maneuvering become counterproductive to the  
18    state? If you -- if you are sure of your  
19    conviction and your theory, why not do the  
20    testing?

21                  MR. COLE: So a couple of responses,  
22    Justice -- Justice Sotomayor.

23                  The first is that, again, the Texas  
24    legislature has set the requirements for DNA  
25    testing, and --

1 JUSTICE SOTOMAYOR: But you told me  
2 earlier that there's always prosecutorial  
3 discretion outside of Article 64. I'm not in  
4 Article 64. I'm in: At what point do you  
5 exercise your discretion? Because you have it.

6 MR. COLE: So a couple of responses.  
7 So, first, they have presented some of  
8 this evidence already to the CCA in a successive  
9 habeas petition, which was rejected.

10 JUSTICE SOTOMAYOR: Then -- and part  
11 of their due process argument is that the court  
12 is limiting itself to the record evidence and  
13 not looking at what was developed later and that  
14 that's a part of the due process.

15 MR. COLE: And if I might address that  
16 piece because I think that is important. They  
17 have not challenged that record facts  
18 requirement. Other plaintiffs have. Mr. Reed  
19 is challenging that currently in the Fifth  
20 Circuit.

21 JUSTICE SOTOMAYOR: Well, they -- they  
22 could -- they could go back to the district  
23 court under Rule 60(b) and argue that you're  
24 still not abiding by due process and they should  
25 reopen. So they could do that.

1           MR. COLE: It's hard to see how that  
2       would redress the injury because, again, they --  
3       they did not prevail on final judgment on  
4       their -- their challenge to the preponderance of  
5       the evidence, but let me --

6           JUSTICE SOTOMAYOR: Well, now that you  
7       know that they can challenge the death penalty  
8       and that means that they can prove they were  
9       actually innocent of the death penalty, you  
10      might -- that might have been a new circumstance  
11      to justify them going back to the district court  
12      and saying: Look, they're doing what we told  
13      you they were doing. They're relying on only  
14      trial record evidence, but that's a violation of  
15      due process. They should look at the new  
16      evidence too.

17          MR. COLE: Well, they just haven't  
18      said that. I suppose they could in the future,  
19      but that doesn't give them redress here.

20          JUSTICE SOTOMAYOR: Well, but the  
21      point is that it's only a possibility, but  
22      that's all they need to have standing.

23          MR. COLE: And let me go to your --  
24      your -- your main thrust of your argument --

25          JUSTICE SOTOMAYOR: Yes.



1                   MR. COLE:  -- or your -- your  
2                   question, though, so we don't get sidetracked on  
3                   that.

4                   Mr. Gutierrez had the opportunity to  
5                   do testing at the beginning of trial.  It was  
6                   made available to him.  And the Court of  
7                   Criminal Appeals said he made a strategic choice  
8                   not to test the evidence.

9                   You point to the 2015 period where  
10                  there was this -- this three-year period  
11                  where -- and this is at -- I would direct you to  
12                  J.A. --

13                  JUSTICE SOTOMAYOR:  What he did at  
14                  trial was already present in 2015, and the  
15                  prosecutor agreed to test then.

16                  MR. COLE:  And -- and he did not take  
17                  advantage of that there.  But the other thing is  
18                  the Court of Criminal Appeals, as Justice  
19                  Gorsuch was pointing at the -- at the top-side  
20                  argument, is that they've already said that even  
21                  if the evidence were exculpatory, it would not  
22                  change his sentence because, again, he -- his  
23                  statement puts him in the room.

24                  JUSTICE SOTOMAYOR:  That's if they  
25                  believe -- he's been complaining that that

1 statement that put him in the room was coerced  
2 because he had --

3 MR. COLE: And no court --

4 JUSTICE SOTOMAYOR: -- he had two or  
5 three -- statements before that. In each of  
6 them, he was only an accessory to the robbery.

7 MR. COLE: And no court in the country  
8 has ever accepted that theory. In fact, the  
9 trial court at the presuppression hearing had an  
10 evidentiary hearing where she had Mr. Gutierrez  
11 and she had the officer, and they --

12 JUSTICE SOTOMAYOR: But, if they had  
13 Cuellar being more the actor, it might change  
14 that calculus.

15 MR. COLE: I don't see how it would  
16 unsettle the -- the finding that this was a  
17 voluntary confession. I mean, again, the  
18 baseline, the best he's got, is that he was  
19 there and he was watching his friend stab Ms. --  
20 Ms. Harrison while he was robbing her.  
21 That's -- that's the baseline.

22 You asked, I think, at the top side  
23 would Cuellar's D -- DNA be there. But, as  
24 Justice Alito pointed out, he was living there.  
25 He was the nephew.

1 JUSTICE SOTOMAYOR: But, if it was --

2 MR. COLE: His DNA was probably there.

3 JUSTICE SOTOMAYOR: --- in under her  
4 fingernails and that was his hair, that would be  
5 a very different case.

6 MR. COLE: Well, if his hair -- it  
7 wouldn't be very surprising because he found her  
8 and he was apparently very drunk when he found  
9 her and so was not very careful. He was  
10 touching the body. He got blood all over him.

11 The main point, though, is the Court  
12 of Criminal Appeals has three times already  
13 held, even if you assume the evidence he wanted  
14 to test, which, again, this is a DNA testing  
15 case, even if you were to assume it's  
16 exculpatory, it would not change the sentence  
17 because he is eligible for the death penalty  
18 under Enmund/Tison.

19 JUSTICE GORSUCH: Mr. Cole, when we --  
20 when we assess redressability in procedural due  
21 process cases, Justice Kavanaugh is absolutely  
22 right that that's a -- that's a -- that's a  
23 different animal. Why isn't this a procedural  
24 due process claim that the procedures that the  
25 TCCA used were unfair?

1                   I -- I mean, I -- I understand your  
2 point is it's not a procedural claim; it's a  
3 substantive one. He wants access to this  
4 evidence. But you've heard some points in  
5 the -- in the complaint -- pointed out,  
6 paragraph 81, for example, and I just want to  
7 get your reactions.

8                   MR. COLE: Yeah, I -- I'd be happy to,  
9 Justice Gorsuch. So the -- I understand him to  
10 say: I'm not able to access the -- the habeas  
11 right under 11.071. That seems to me to be  
12 collapsing the things that this Court decoupled  
13 in Skinner. Justice Ginsburg's opinion for the  
14 Court says no, no, no, we only focus on the  
15 Article 64 procedures. We separate -- separate  
16 out the habeas issues so that we avoid the Heck  
17 bar.

18                   So, if he's complaining about his  
19 access to the state -- to access state habeas,  
20 that's just, I think, a separate issue here.

21                   JUSTICE KAGAN: No, no, no. I mean, I  
22 think that the question is why don't you -- a  
23 fair reading of this complaint is you look at  
24 the body of procedures that are in Chapter 64  
25 and they're preventing me from getting testing

1 at this moment in time.

2 And so that is essentially a  
3 procedural claim. I mean, of course, he wants  
4 the testing. All complaints about procedures  
5 are because you want something that the  
6 procedures are going to lead to.

7 But, in chap -- in paragraph 81 and  
8 other places, it's really clear. It's like --  
9 like the body of procedures here -- and he  
10 mentions some of them specifically. The body of  
11 procedures here are preventing me from getting  
12 testing.

13 MR. COLE: Okay.

14 JUSTICE KAGAN: That's a violation of  
15 due process.

16 MR. COLE: So I think he does have to  
17 identify those procedures, though. And he's  
18 only identified a couple of them. That's the  
19 main problem. He has not challenged all the  
20 procedures that he needs to to get the remedy  
21 for the injury.

22 Other plaintiffs may well have done  
23 that, and some -- some, including Mr. Reed, are  
24 challenging those today. It's just I think some  
25 of the idiosyncratic choices of this particular

1 litigant in this case that's -- that's --

2 JUSTICE GORSUCH: Can -- can you --  
3 that -- that's what I want to get at, though. I  
4 mean, that -- it's one thing to say I -- I don't  
5 know whether I'm entitled to it or not, but I  
6 didn't get a fair day in court. Got it.  
7 Another thing to say I'm entitled to this  
8 evidence.

9 MR. COLE: Mm-hmm.

10 JUSTICE GORSUCH: Okay? Those are two  
11 different injuries.

12 What's your best evidence that this  
13 case, this complaint, should be read in the  
14 second category?

15 MR. COLE: Well, again, I -- I would  
16 go back to several cites that I was reading off  
17 earlier from his complaint where he says he was  
18 requesting an order declaring that defendants'  
19 withholding of the evidence -- again, it's all  
20 about access to the evidence. J.A. 430, J.A.  
21 432A, J.A. 452, 453, 457. It's all over his  
22 complaint. That is what he's alleging.

23 JUSTICE JACKSON: What about 456,  
24 asserting that -- at least according to counsel  
25 on the other side's representations, he was

1     asserting that the CCA's construction of Chapter  
2     64 prevents Gutierrez from establishing that  
3     he's ineligible for the death penalty?

4             MR. COLE:  Yeah, I think that's the  
5     conviction-versus-sent -- sentence distinction  
6     that he's alleging.  I mean, that's his theory  
7     about why it's unconstitutional.  But his injury  
8     is, again, denial of access to the evidence.

9             CHIEF JUSTICE ROBERTS:  Thank you,  
10    counsel.

11            Justice Thomas, anything further?

12            JUSTICE THOMAS:  Just so it's clear,  
13    how does the Chapter 64 proceeding work?  How  
14    does it begin, and who adjudicates it?

15            MR. COLE:  So the defendant would  
16    file -- or the -- the convict would file a  
17    motion in state court and it would go before the  
18    convicting court, who would then adjudicate it,  
19    and then there's a direct right of appeal  
20    directly to the CCA.

21            JUSTICE THOMAS:  So the oddity here is  
22    that we are not dealing with a direct appeal of  
23    a denial from the TCCA?

24            MR. COLE:  That's right.  And he could  
25    have done that.  He could have filed a cert

1 petition under 28 U.S.C. 1257(a).

2 JUSTICE THOMAS: Now how does the  
3 discretionary process work?

4 MR. COLE: I think it's not relevant  
5 here. I mean, it -- it works as an --

6 JUSTICE THOMAS: I understand that,  
7 but how would it normally work?

8 MR. COLE: Well, I suppose they  
9 would -- the -- the convict might go to the  
10 DA -- his lawyers would go to the DNA -- ask for  
11 a turnover of the evidence, and it would just be  
12 informal like that. I mean, it's essentially a  
13 prosecutorial discretion issue. It might vary  
14 from DA office to DA office because it is a -- a  
15 measure of prosecutorial discretion.

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Alito?

18 JUSTICE ALITO: I take -- I take Reed  
19 as -- at face value, and I understand Reed to  
20 say that there was redressability there because  
21 there was a chance that a decision would lead  
22 the district attorney to turn over the DNA  
23 evidence. Is that correct?

24 MR. COLE: That's how I understand it,  
25 Justice -- Justice Alito, yes.



1                   JUSTICE ALITO: All right. So, here,  
2     the district attorney is the defendant, and  
3     there are multiple grounds on which the district  
4     attorney could refuse to turn over the evidence.  
5     The district attorney could rely -- could --  
6     could say, I think that the -- the distinction  
7     between using the evidence to prove lack of  
8     guilt and using the evidence to prove death  
9     eligibility is sound. All right? That would be  
10    effected by the declaratory judgment that's  
11    sought.

12                   But there are other grounds that  
13    have -- that were mentioned by the Court of  
14    Criminal Appeals and by the trial level court.  
15    And I take -- I mean, the district attorney is  
16    here. The district attorney could turn over  
17    this evidence. The district attorney is  
18    resisting it and citing to us the reasons that  
19    were given by the Texas courts why the evidence  
20    is not -- doesn't have to be turned over under  
21    Article 64.

22                   It's really hard for me to see for  
23    that reason how a decision on this distinction  
24    between death eligibility and guilt could make a  
25    difference in the -- in the district attorney's

1 decision.

2 MR. COLE: I agree with you, Justice  
3 Alito, and we already know how it would turn out  
4 because he -- he took the declaratory judgment  
5 to state court, the one that he got and the most  
6 relief he could get, and he still was unable to  
7 get the redress.

8 JUSTICE ALITO: We're not concerned  
9 here about the -- the question of what good the  
10 DNA evidence might do, but some of my colleagues  
11 have gone into that in some depth. So a couple  
12 of things would be -- it would -- helpful to me  
13 just in my understanding of the case to have  
14 clarification on a couple of things.

15 The state's theory was that there were  
16 three people involved here, right?

17 MR. COLE: Three people in the overall  
18 scheme, yes.

19 JUSTICE ALITO: In the overall scheme.  
20 And -- and where did that come from? That came  
21 from -- did it come from any place other than  
22 Mr. Gutierrez's confession?

23 MR. COLE: It was his confession.  
24 There was also -- these weren't entered in  
25 trial, but they came in in the Article 64

1 proceeding.

2 JUSTICE ALITO: Yeah, but as far as  
3 the evidence at trial was concerned, the idea  
4 that there were only three people came from  
5 Mr. Gutierrez himself?

6 MR. COLE: That's right.

7 JUSTICE ALITO: So establishing that  
8 more than three people were involved in some way  
9 in this would only affect the portion of  
10 Mr. Gutierrez's confession that said that only  
11 three people were involved?

12 MR. COLE: Yes.

13 JUSTICE ALITO: Okay. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Sotomayor?

16 Justice Kagan?

17 JUSTICE KAGAN: I want to make sure,  
18 Mr. Cole, I -- I understand your distinction of  
19 Reed, and as you said it to Justice Alito, it is  
20 that there is this backup argument that even if  
21 the evidence were exculpatory --

22 MR. COLE: Mm-hmm.

23 JUSTICE KAGAN: -- it's not going to  
24 avail him anything.

25 And -- and we went -- we -- we --

1 we -- we went over this before, but I want to  
2 make sure I understand it because Reed had the  
3 identical backup argument, right? There's the  
4 first the argument about chain of custody, but  
5 then the state trial court had said, look, he  
6 just didn't demonstrate that he would have been  
7 acquitted even if the DNA results were  
8 exculpatory.

9 MR. COLE: Mm-hmm.

10 JUSTICE KAGAN: And the court clearly  
11 did not care about that, that there was a backup  
12 argument that could have done all the work in  
13 the same way that you're saying your backup  
14 argument could do all the work.

15 So what are we to make of that? Did  
16 we just forget about it between page 233 and  
17 234?

18 MR. COLE: No, it not -- that's not  
19 what I'm suggesting, Justice Kagan, and here's  
20 why I think the distinction is -- here's where I  
21 think the distinction lies. Mr. Reed was  
22 challenging in his complaint all of the  
23 justifications, and a declaratory judgment may  
24 well have eliminated it. And so I think the  
25 court rightly said, yeah, it would -- it would

1       eliminate those justifications.

2               The difference here is Mr. Gutierrez  
3       has not done that.

4               JUSTICE KAGAN:   Well, I -- I -- I  
5       mean, maybe -- I -- I -- I'm not sure I do  
6       understand that because, if you looked at Reed's  
7       complaint, it was really, I -- I thought, pretty  
8       similar to this in the sense of -- and -- and  
9       the court says this in the next paragraph.  
10      It -- it says, you know, the law -- what Reed  
11      argued primarily was that the law's stringent  
12      chain-of-custody requirement was  
13      unconstitutional in the same way that what  
14      Mr. Gutierrez is arguing primarily is that  
15      Chapter 64 is unconstitutional because it  
16      doesn't apply to sentencing.

17              So there is a primary argument that  
18      focuses on one procedure, but there's also a  
19      sort of --

20              MR. COLE:   Mm-hmm.

21              JUSTICE KAGAN:   -- back -- you know,  
22      broad claim that if at this point in these  
23      circumstances for this person the Chapter 64  
24      procedures are preventing him from getting  
25      testing, that's a violation of due process.

1                   MR. COLE: So I -- I guess probably  
2                   the -- the minor disagreement we're having is  
3                   how broadly you construe his claim. It seems to  
4                   me that the -- all of the courts in this case  
5                   have construed it, you have to -- you have to  
6                   eliminate the justifications. And there are  
7                   independent justifications. The statute is  
8                   conjunctive. And when you marry that up with  
9                   his injury, which is you've got --

10                  JUSTICE KAGAN: Yeah, but then -- but  
11                  then Reed loses too if that's the case.

12                  MR. COLE: I don't think so because it  
13                  was at the -- at the -- it was at the pleading  
14                  stage. And he -- again, he was challenging all  
15                  of the justifications. Mr. Gutierrez has not  
16                  challenged all the justifications.

17                  And that is the difference because you  
18                  have to challenge all the justifications to get  
19                  the access to the evidence.

20                  JUSTICE KAGAN: Thank you.

21                  CHIEF JUSTICE ROBERTS: Justice  
22                  Gorsuch?

23                  Justice Kavanaugh?

24                  JUSTICE KAVANAUGH: Just a couple.

25                  You mentioned that the declaratory

1 judgment was taken to the state court and didn't  
2 affect the state court's decision. But hadn't  
3 the declaratory judgment been vacated by the  
4 Fifth Circuit by the time that happened?

5 MR. COLE: It had, but that was not a  
6 factor in the court's decision at all.

7 JUSTICE KAVANAUGH: That's a -- I  
8 mean, that's a key point, though.

9 MR. COLE: I --

10 JUSTICE KAVANAUGH: Anyway -- anyway.  
11 In 2015, when the state said we're okay with the  
12 DNA testing, what happened? I'm a little murky  
13 on that. It sounds like the state trial court  
14 just didn't act for quite a while?

15 MR. COLE: Yeah. So the record's a  
16 little spotty about that, but here's what it --  
17 it appears to me had happened. There was this  
18 Motion for Miscellaneous Relief which may well  
19 have been a procedurally improper motion, but  
20 setting that aside, it appears that -- and --  
21 and I would direct you to --

22 JUSTICE KAVANAUGH: But the -- well,  
23 it might have been procedurally improper, but  
24 the state said we're okay with the DNA testing,  
25 correct?

1                   MR. COLE: Well, so I would direct you  
2                   to J.A. 731 to 732. The state said: We're not  
3                   going to agree to it, but we're not going to  
4                   oppose it.

5                   JUSTICE KAVANAUGH: Okay.

6                   MR. COLE: And then it appears that it  
7                   just never got adjudicated for whatever reason.  
8                   The record doesn't say why.

9                   JUSTICE KAVANAUGH: Okay. And then --  
10                  that's it. Thank you.

11                  CHIEF JUSTICE ROBERTS: Justice  
12                  Barrett?

13                  Justice Jackson?

14                  JUSTICE JACKSON: Can I just be clear  
15                  on the bottom line from sort of a bird's-eye  
16                  view here. I understand your argument to be  
17                  that as a plaintiff, you have to propose an  
18                  order that would eliminate all of the  
19                  justifications for the denial in order to have  
20                  standing to challenge any one of them. Is that  
21                  right?

22                  MR. COLE: To remedy your injury,  
23                  which is the denial of access to the evidence,  
24                  you have to eliminate the justifications.

25                  JUSTICE JACKSON: As you've stated.



1 If -- would you concede that if the plaintiff  
2 stated the injury in a more granular way, if  
3 they said the injury was to -- the -- the injury  
4 here was that Chapter 64 is procedurally infirm  
5 and it is preventing me from establishing what I  
6 need to establish in order to get this relief,  
7 if that's the statement of the injury, what --

8 MR. COLE: I --

9 JUSTICE JACKSON: -- what result?

10 MR. COLE: Well, I'm not sure how that  
11 would be the injury because, again, they need to  
12 identify what's the conduct of the defendant  
13 there.

14 JUSTICE JACKSON: No, the injury is we  
15 have this provision of law that is preventing me  
16 from being able to make my claim. That's the --  
17 that -- that -- you're saying that can't be an  
18 injury?

19 MR. COLE: What I'm saying is that it  
20 has to be conduct of the defendant. I mean, we  
21 need redress against a particular defendant.  
22 And so what I'm saying is what's -- what is  
23 the -- what is the defendant's conduct.

24 JUSTICE JACKSON: And to the extent  
25 the -- to -- to -- to the extent that the

1     defendant is relying on that provision of law to  
2     ultimately deny me relief, what I'm saying is I  
3     see you, defendant, relying on this provision of  
4     law, but that provision of law has a procedural  
5     due process problem.

6             MR. COLE: But there -- but what is  
7     the end result of the lawsuit is what I'm  
8     getting at because, again, what he -- if he  
9     wants -- access to the evidence, which is  
10    what -- is basically what a Skinner claim is --

11            JUSTICE JACKSON: It just seems so  
12    complicated to me in a world where standing  
13    theory is typically pretty clear. I mean, we --  
14    we fight about whether or not there -- this --  
15    this thing is an actual injury. We fight about,  
16    you know, the extent that the defendant caused  
17    it.

18            You're not claiming any of that.  
19    You're sort of focusing in on this sleeper area  
20    of standing law that is, you know, in a way  
21    that's very odd to me.

22            MR. COLE: Well, we're just trying to  
23    be faithful to Reed, and as I read the Reed  
24    case, it says -- it establishes a clear test.  
25    It says it has to eliminate the justification --

1 JUSTICE JACKSON: So you agree that  
2 you -- that you're reading Reed to establish a  
3 new test. The test is that you have to  
4 eliminate all other avenues of relief?

5 MR. COLE: That's -- that's what Reed  
6 said and so we take that at face value. I'm not  
7 sure that it --

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Rebuttal, Ms. Fisher?

12 REBUTTAL ARGUMENT OF ANNE E. FISHER

13 ON BEHALF OF THE PETITIONER

14 MS. FISHER: Thank you, Your Honor.  
15 Very briefly.

16 Mr. Gutierrez has never changed his  
17 theory that this is a procedural injury and that  
18 it's the denial of access to DNA evidence to use  
19 in a 5(a)(3). That's clear throughout his  
20 complaint.

21 What has changed is the Respondents'  
22 reason why he doesn't have standing. And so  
23 these new issues that came up, like this -- the  
24 point of the in the alternative holding was  
25 raised for the first time by Respondents in

1     their 28(j) letter in the Fifth Circuit after  
2     all the briefing has been completed. And they  
3     raise these two new -- supposedly independent  
4     grounds in their merits brief for the very first  
5     time.

6             Now they're allowed to do that because  
7     it's a jurisdictional argument, but it's not  
8     Mr. Gutierrez who keeps switching his position.  
9     We are simply reacting to the brand-new  
10    arguments that Respondents have come up with  
11    late in the process as to why we don't have  
12    standing. None of these arguments were  
13    mentioned in the district court, in response to  
14    our complaint, or in our Fifth Circuit briefing.

15            My second point is simply that the  
16    Fifth Circuit itself said that they went beyond  
17    Reed. When you look at Footnote 3, it said it  
18    gives us pause that we are doing -- and I'm  
19    going to paraphrase a little bit here -- but it  
20    gives us pause that we are going beyond what  
21    this Court did in Reed.

22            If you follow that new rule that the  
23    Fifth Circuit -- imposed and basically force a  
24    plaintiff to prove that they're going to win the  
25    case just to show that it's redressable, that

1 would turn Article III standing on its head.

2 And with that, I -- I rest and thank  
3 this Court.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 The case is submitted.

7 (Whereupon, at 11:39 a.m., the case  
8 was submitted.)

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## Official

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