OCTOBER TERM, 2023

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RUBEN GUTIERREZ,
Petitioner,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

— CAPITAL CASE —
EXECUTION SCHEDULED FOR JULY 16, 2024

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CAPITAL CASE

QUESTION PRESENTED

In *Reed v. Goertz*, 598 U.S. 230, 234 (2023), this Court held that Rodney Reed has standing to pursue a declaratory judgment that Texas's post-conviction DNA statute was unconstitutional because "Reed suffered an injury in fact," the named defendant "caused Reed's injury," and if a federal court concludes that Texas's statute violates due process, it is "substantially likely that the state prosecutor would abide by such a court order."

In this case, a divided panel of the United States Court of Appeals for the Fifth Circuit refused to follow that ruling over a dissent that recognized that this case was indistinguishable from *Reed*. The majority formulated its own novel test for Article III standing, which requires scouring the record of the parties' dispute and any legal arguments asserted, to predict whether the defendants in a particular case would actually redress the plaintiff's injury by complying with a federal court's declaratory judgment. *Gutierrez v. Saenz*, 93 F.4th 267, 274 (5th Cir. 2024).

The Fifth Circuit's new test conflicts with *Reed* and creates a circuit split with the United States Courts of Appeals for the Eighth and Ninth Circuits, which have applied the standing doctrine exactly as this Court directed in *Reed*. *See Johnson v. Griffin*, 69 F.4th 506 (8th Cir. 2023); *Redd v. Guerrero*, 84 F.4th 874 (9th Cir. 2023). The question presented is:

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

RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

Southern District of Texas, *Gutierrez v. Saenz*, 565 F. Supp. 3d 892 (S.D. Tex. 2021).

Fifth Circuit Court of Appeals, *Gutierrez v. Saenz*, 93 F.4th 267 (5th Cir. 2024).

RELATED PROCEEDINGS IN STATE COURT

Texas Court of Criminal Appeals:

Ex parte Gutierrez, 337 S.W.3d 883 (Tex. Crim. App. 2011).

Gutierrez v. State, No. AP-77, 2020 WL 918669 (Tex. Crim. App. Feb. 26, 2020).

Gutierrez v. State, 663 S.W.3d 128 (Tex. Crim. App. 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ruben Gutierrez respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit vacating the district court's judgment.

OPINIONS BELOW

The opinion of the court of appeals vacating the district court's declaratory judgment (A2–A16) is reported at 93 F.4th 267 (5th Cir. 2024). The order of the district court granting the declaratory judgment (A17–A42) is reported at 565 F. Supp. 3d 892 (S.D. Tex. 2021).

JURISDICTION

The court of appeals issued its opinion vacating the declaratory judgment on February 8, 2024. The court of appeals denied a petition for rehearing and rehearing en banc on May 29, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Title 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws,

> shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Article 64.03(a)(2)(A) of the Texas Code of Criminal Procedure provides, in pertinent part:

> A convicting court may order forensic DNA testing under this chapter only if the convicted person establishes by a preponderance of the evidence that the person would not have been convicted if exculpatory results had been obtained through DNA testing . . . .

Article 11.071 § 5(a)(3) of the Texas Code of Criminal Procedure provides, in pertinent part:

> If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless that application contains sufficient specific facts establishing that by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial . . . .

INTRODUCTION

This Court has never found that a prisoner lacks Article III standing to bring a constitutional challenge against state DNA statutes that limit access to potentially exculpatory evidence. *See Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67–68 (2009); *Skinner v. Switzer*, 562 U.S. 521, 525 (2011); *Reed v. Goertz*, 598 U.S. 230, 234 (2023). In *Reed*, the only case to address the question explicitly, this Court made clear that the standing requirements are not onerous in this context:

> Reed sufficiently alleged an injury in fact: denial of access to the evidence. The state prosecutor, who is the named defendant, denied access to the evidence and thereby caused Reed's injury. And if a federal court concludes that Texas's post-conviction DNA testing procedures violate due process, that court order would eliminate the state prosecutor's justification for denying DNA testing. It is "substantially likely" that the state prosecutor would abide by such a court order.

Id. at 234 (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)).

Gutierrez, a condemned man, also sought and was denied post-conviction DNA testing, and, like Reed, filed a § 1983 action alleging that Texas's post-conviction DNA statute violated due process. In Gutierrez's case, however, a divided panel of the Fifth Circuit grafted onto *Reed* an additional layer of standing analysis that led to the opposite result. Specifically, the majority scrutinized the state court record, including briefing by the parties, and speculated that, in this case, state officials would not permit DNA testing even in the face of a federal court judgment because, in earlier proceedings, the Texas Court of Criminal Appeals ("CCA") commented that favorable DNA test results would not prove Gutierrez innocent of the death penalty. Therefore,

the majority concluded, Gutierrez could not meet the redressability prong of Article III standing.

Judge Higginson dissented, observing that *Reed* dictates that Gutierrez has standing:

> Instead of conducting a fact-specific inquiry and delving into what District Attorney Goertz himself would do, the Court determined that a declaratory judgment invalidating Texas's DNA testing procedure would significantly increase the likelihood that the state prosecutor would grant access to the requested DNA testing. Because the standing analysis of *Reed* applies here, Gutierrez, also facing execution, has standing to bring suit.

A16.

Gutierrez is indistinguishable from Reed in terms of standing. The standing analysis this Court conducted in *Reed* could have and should have applied here. The Fifth Circuit's decision to fashion a new, burdensome test has created a circuit split with the Eighth and Ninth Circuits, both of which applied *Reed* to cases with plaintiffs in situations virtually identical to those of Reed and Gutierrez. This Court should grant certiorari to resolve the circuit split and to ensure fidelity to its precedent.

STATEMENT OF THE CASE

Ruben Gutierrez was convicted of capital murder and related offenses in the killing of Escolastica Harrison and was sentenced to death in 1999. The prosecution's theory at trial was that Gutierrez and two others planned to lure Harrison out of her mobile home where she kept large amounts of cash and then steal the cash from her empty dwelling. The evidence showed that two men entered the mobile home and that Harrison was stabbed to death with two screwdrivers. Gutierrez's appellate,

state post-conviction, and federal habeas challenges were denied. *See Gutierrez v. Stephens*, 590 F. App'x 371, 373–75 (5th Cir. 2014).

For the last thirteen years, Gutierrez—who maintains that he neither entered Harrison's home nor knew anyone would be harmed—has been seeking DNA testing under Texas Code of Criminal Procedure Article 64 ("Chapter 64") of items recovered from the crime scene, including a blood-stained shirt belonging to Harrison's nephew and housemate, nail scrapings from Harrison, a loose hair wrapped around one of her fingers, and various blood samples from within the mobile home. These items were collected from the crime scene by detectives and continue to be preserved because they contain biological material that can reveal who was in Harrison's home during the crime. Yet this critical evidence has never been tested.

Because of Texas's expansive law of parties, even those who do not actually kill, intend to kill, or anticipate someone would be killed can be guilty of capital murder. Tex. Penal Code Sec. 7. But not all who are guilty under the law of parties are eligible for the death penalty. *See Johnson v. State*, 853 S.W.2d 527, 535 (Tex. Crim. App. 1992) ("The Texas capital murder scheme does not allow an individual to be put to death for merely being a party to a murder."). Gutierrez was prosecuted and convicted under Texas's law of parties. He has fought for over a decade to test the biological evidence collected at the crime scene to establish that he did not actually kill, intend to kill, or anticipate someone would be killed.

Texas statutes embrace the fact that "[m]odern DNA testing can provide powerful new evidence unlike anything known before." *Dist. Attorney's Office v.*

Osborne, 557, U.S. at 62. Since the time of Gutierrez's trial, Texas has changed its DNA testing protocol to require mandatory testing of all items with biological material in capital cases where the State pursues the death penalty. Tex. Code Crim. Proc. Ann. art. 38.43. If this crime were committed today, DNA testing of these items would have already happened, and Gutierrez never would have been sentenced to death.

Gutierrez's first attempt to get DNA testing of the biological material collected in his case was denied by the trial court and the CCA in 2011. A43–A58. The CCA relied heavily on the law of parties, holding that even if Gutierrez proved that he did not participate in the assault on Harrison, there were no reasonable grounds for testing under Chapter 64 because, as one of the parties, he was still guilty of capital murder. A51–A52, A55–A58. The CCA further held that Gutierrez was "at fault" for not seeking DNA testing at trial and that one of the pieces of evidence he sought to test—the hair around the victim's finger—was not in State custody and could not be tested. A53–A56. Finally, it ruled that testing is not available under Chapter 64 to show that a death-sentenced prisoner is innocent of the death penalty. A58. The court then commented that, "even if Chapter 64 did apply to evidence that might affect the punishment stage as well as conviction, appellant still would not be entitled to testing. Appellant would still have been death-eligible because the record facts satisfy the *Enmund*/*Tison* culpability requirements." *Id.* (referencing *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987)).

Following additional proceedings, newly appointed federal habeas counsel in 2019 obtained access to files at the Cameron County District Attorney's Office. Counsel filed a new motion for DNA testing. Several factors distinguished this motion from previous efforts: (1) Texas had repealed the "no fault" provision of Chapter 64, eliminating that as a basis for denying testing; (2) habeas counsel located the loose hair, previously thought lost, in a sealed envelope in the District Attorney's files; (3) advances in DNA testing made it possible to obtain usable DNA from degraded samples and "touch" DNA from items with which a perpetrator has come into contact; and (4) counsel discovered significant new evidence casting doubt on Gutierrez's role in the crime, including evidence that the lead detective had lied about the time of death, lied about the main alternative suspect passing a lie detector test (he actually failed); and lied about whether an eyewitness identified Gutierrez (she identified another man as the suspect, not Gutierrez). A72.

The trial court initially granted the DNA motion, but after the State filed a response and proposed order denying the testing, the trial court reversed course and signed the State's proposed order. A59–A61. The CCA affirmed the denial of relief. A62–A81. Tracking its prior analysis, the court ruled that Gutierrez could not show that he would have been acquitted if exculpatory DNA results had been obtained because of the law of parties, and that testing is not available under Chapter 64 to show innocence of the death penalty. A73–A80. The court then quoted its prior opinion that, "even if Chapter 64 did apply to evidence that might affect the punishment stage," Gutierrez "would still have been death-eligible." A80.

On September 26, 2019, Gutierrez filed a complaint under § 1983 in the district court. The complaint challenged the constitutionality of Texas's post-conviction DNA testing procedures, as well as the constitutionality of Texas's execution protocol which, at the time, did not allow a spiritual advisor to be in the execution chamber with the condemned. A18. Following a stay of execution and a remand from this Court on the spiritual advisor claim, *see Gutierrez v. Saenz*, 141 S. Ct. 1260, 1261 (2021), the district court issued a partial declaratory judgment in Gutierrez's favor on the DNA challenge. A17–A42.

Although the district court rejected many of Gutierrez's claims, it concluded that Chapter 64 violated Gutierrez's due process rights in one significant respect. The district court observed that Chapter 64 has been construed as allowing DNA testing only to establish innocence of a crime, not innocence of the death penalty. A38–A39. At the same time, however, Texas grants death-sentenced prisoners the substantive right to obtain relief by a successive post-conviction petition based on newly discovered or available evidence showing that the prisoner is innocent of the death penalty. A39 (citing Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(3)). The district court cited this Court's history of finding that "[a] process which amounts to a 'meaningless ritual' is historically and contemporarily disproved of by the courts." A40 (citing *Douglas v. People of State of Cal.*, 372 U.S. 353, 358 (1963); *Burns v. United States*, 501 U.S. 129, 136 (1991); *Griffin v. Illinois*, 351 U.S. 12, 17 (1956)). Granting the right to a successive habeas petition to show innocence of the death penalty while denying access to the evidence that could vindicate that right was found

to be such an empty ritual. The district court thus held that the two statutory provisions "are irreconcilable." A40. Accordingly, the district court held that Chapter 64, as construed by the CCA, violated due process, A41, and granted declaratory relief, A42.

Following the district court's ruling and based on the declaratory judgment, Gutierrez again filed a motion pursuant to Chapter 64 in state court seeking DNA testing to establish his innocence of the death penalty. The trial court denied the motion, ruling that it lacked jurisdiction. A82. On appeal, the State contended that the new motion was barred by the CCA's previous opinions regarding Gutierrez's death eligibility. The CCA did not accept those arguments, overruled the lower court's finding of no jurisdiction, and remanded for de novo consideration of the DNA testing motion to show innocence of the death penalty. A91. On remand, the trial court denied the motion on procedural grounds and declined to address the merits. A92. Gutierrez timely appealed to the CCA, and that appeal is currently pending before the CCA. No. AP-77,108.

In the § 1983 litigation, the federal district court granted the State's motion for partial final judgment on the DNA claims. The State then appealed. On February 8, 2024, in a split decision, the Fifth Circuit reversed the district court's judgment, holding that Gutierrez lacks standing. A2–A16. The majority distinguished *Reed* based on its mistaken belief that, there, the CCA had not held that Reed's request for DNA testing "would still fail" even if Chapter 64 violated federal law. A13. Judge

Higginson dissented, concluding that Gutierrez has standing because his case cannot be distinguished from *Reed*. A16.

The Fifth Circuit denied Gutierrez's Petition for Panel Rehearing and Petition for Rehearing *En Banc* on May 29, 2024. A1.

Gutierrez has timely and diligently pursued the litigation in this case. Nevertheless, despite the ongoing nature of litigation in both state court and the Fifth Circuit, on April 5, 2024, the State filed a motion requesting an execution date be set. Gutierrez opposed that motion and asked the court to wait for this litigation, including this Court's review, to be completed before setting a date. The trial court rejected Gutierrez's request and signed the execution warrant on April 8, 2024, ordering that his execution be set for July 16, 2024. *Texas v. Gutierrez*, No. 98-CR-1391. Because of the State's actions in seeking an execution date while this matter was still in litigation, this case comes before this Court under the time constraints of an impending execution, rather than in the ordinary course of litigation.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision fashions a rule that undercuts *Reed* and creates a circuit split on a question of law settled by this Court. *See Johnson v. Griffin*, 69 F.4th 506 (8th Cir. 2023); *Redd v. Guerrero*, 84 F.4th 874 (9th Cir. 2023). This split will continue to grow if not addressed and curtailed by this Court. The question of Article III standing is a threshold matter in every federal case, and private parties frequently seek declaratory judgments against state-affiliated defendants who are not directly obligated to comply with their terms.

What is more, the Fifth Circuit's decision is both wrong and pernicious. The Fifth Circuit has ignored this Court's clear precedent and gone out of its way to create an impractical, burdensome standing test requiring federal courts to probe the parties' dispute and litigation history with a fine toothcomb in order to foretell the future, contingent actions of state officials. This novel requirement is unworkable and contradicts the Court's recent analysis of redressability in *Food & Drug Admin. v. All. for Hippocratic Med.*, No. 23-235, 2024 WL 2964140 (U.S. June 13, 2024), and *Reed*, 598 U.S. 230.

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT BY REOPENING A QUESTON THAT THIS COURT SOUGHT TO SETTLE IN *REED*.

Certiorari review is crucial when courts of appeals disagree about an area of federal law. *See* Sup. Ct. R. 10(a); *see also Reed*, 598 U.S.at 234 (certiorari granted to resolve circuit split regarding "when the statute of limitations begins to run for a § 1983 suit regarding a State's post-conviction DNA testing procedures"). The need to resolve the circuit split in this case is particularly important because this Court had already settled the precise standing issue before the Fifth Circuit, yet the Fifth Circuit opinion conflicts with that holding and creates an awkward new rule for standing, requiring a pre-jurisdictional mini-trial to forecast the conduct of state officials in response to a not-yet-issued declaratory judgment. *See* Sup. Ct. R. 10(c).

The Fifth Circuit panel majority's rewriting of this Court's clearly established law should be addressed before additional circuit courts of appeals are faced with cases brought by plaintiffs in § 1983 actions seeking declaratory judgments, and cases looking to apply *Reed*'s standing analysis generally.

A. The Eighth Circuit

The majority's opinion directly conflicts with *Johnson v. Griffin*, 69 F.4th 506 (8th Cir. 2023). *Johnson* is the only other federal appellate opinion to apply *Reed* in the context of a prisoner challenging a state post-conviction DNA statute as unconstitutional because it violates due process. Johnson, like Reed and Gutierrez, is on death row, and sued the prosecuting attorney in his Arkansas county pursuant to a § 1983 action, seeking a declaratory judgment that the State's post-conviction DNA testing statute violated due process.

The Eighth Circuit held that Johnson had standing under circumstances that are all but identical to those here. After recognizing the defendant's argument that standing was not specifically addressed in either *Osborne* or *Skinner*, the Eighth Circuit stated: "[A]ny lingering doubt about a prisoner's standing to bring the distinct procedural due process claim recognized by those two cases was dispelled by the Supreme Court's recent decision in *Reed v. Goertz*." *Johnson*, 69 F.4th at 511. The Eighth Circuit held that "Johnson's injury is redressable because, as explained in *Reed*, 'if a federal court concludes [Arkansas's] post-conviction DNA testing procedures violate due process, that court order would eliminate' the Prosecuting Attorney's 'justification for denying DNA testing.'" *Id.* (quoting *Reed*, 598 U.S. at 234).

Contrary to the Fifth Circuit's majority's reasoning, the Eighth Circuit's finding of standing was unaffected by the Arkansas Supreme Court's prior holding in Johnson's motion for DNA testing that Arkansas's statute allows DNA testing only if it will "significantly advance" the prisoner's claim of innocence, and that "none of the evidence that might result from the proposed testing could advance Johnson's claim

of actual innocence." *Id.* at 508 (quoting state court decision). The Eighth Circuit, like Judge Higginson, simply followed *Reed* and applied it to the legal posture of the case.

B. The Ninth Circuit

The ruling below also contravenes the Ninth Circuit's application of *Reed*. In *Redd v. Guerrero*, 84 F.4th 874 (9th Cir. 2023), Redd filed a § 1983 action against judges in the state court system, alleging that California's system of appointing counsel violated his due process rights. "[T]he State Officers contended that Redd lacks standing because his injury is not redressable by a decision in its favor." *Id.* at 884. The Ninth Circuit concluded: "Once a court issues a declaratory judgment, that order effectuates a change in the legal status between the parties such that 'the practical consequences of that change would amount to a significant increase in the likelihood' that the plaintiff 'would obtain relief that directly redresses the injury suffered.'" *Id.* (*citing Reed*, 598 U.S. at 234 (additional internal quotations omitted)).

The Ninth Circuit did not stop there:

> In *Reed*, for example, a Texas prisoner filed a section 1983 action claiming the state's postconviction DNA procedures violated procedural due process. . . . The "only relief" sought was "a declaration that the [state court's] interpretation and application of state law was unconstitutional." The Supreme Court held that a declaratory judgment against the state prosecutor would redress that state's denial of DNA testing. The declaration sought "would eliminate the state prosecutor's justification for denying DNA testing" and make it "substantially likely" that the state prosecutor would abide by the court's decision.

Id. (quoting *Reed*, 598 at 234) (additional internal quotations omitted). The Ninth Circuit thus did not undertake an individualized standing analysis to predict whether the state defendants would actually give Redd the relief he sought if he prevailed in federal court. The court instead recognized that Redd had standing because he was

similarly situated to Reed—exactly as the Eighth Circuit did in *Johnson* and as Judge Higginson did in his dissent here.

II. THE FIFTH CIRCUIT'S DECISION CONTRADICTS THIS COURT'S DECISION IN *REED*.

Both Ruben Gutierrez and Rodney Reed sit on death row in Texas. Both men petitioned their respective Texas district courts for post-conviction DNA testing pursuant to Chapter 64, and both men were denied testing. Both men appealed to the CCA, and the CCA affirmed in both cases. The CCA told both men that, even if they got the DNA testing they wanted, they would still ultimately be unable to obtain the relief they sought. *See Reed v. State*, 541 S.W.3d 759, 777–78 (Tex. Crim. App. 2017); A79.

Both men filed § 1983 lawsuits in federal district court seeking declaratory judgments that Texas's Chapter 64 violates their due process rights. Reed argued that Chapter 64 violates his due process rights because the chain-of-custody requirements were too demanding. Gutierrez argued that Chapter 64 violates his due process rights because he could not move for testing to show he was innocent of the death penalty, despite a clear right to file a subsequent habeas petition on that ground under Texas Article 11.071 § 5(a)(3). Both men named the local District Attorneys as defendants. Both District Attorneys opposed DNA testing and continue to oppose DNA testing.

Both men were found by the district courts to have Article III standing. Gutierrez prevailed in district court and obtained a declaratory judgment in his favor. A42. The district court in Reed's case dismissed his § 1983 action under Rule 12(b)(6)

for failing to establish Chapter 64 violated due process. *Reed v. Goertz*, No. A-19-CV-0794-LY, 2019 WL 12073901, at *3 (W.D. Tex. Nov. 15, 2019). The losing parties in both cases appealed to the Fifth Circuit.

Here, the men's paths diverged. The Fifth Circuit did not question that Reed had standing to bring his § 1983 lawsuit but found the action untimely. *Reed v. Goertz*, 995 F.3d 425 (5th Cir. 2021). On certiorari review, this Court rejected Texas's argument that Reed lacked standing and instead ruled that a favorable federal judgment "would eliminate the state prosecutor's justification for denying DNA testing" and create a substantial likelihood of compliance by the State. *Reed*, 598 U.S. at 234. This Court then reversed the Fifth Circuit's timeliness ruling and remanded for further proceedings. *Id*. at 237.

In Gutierrez's case, however, a divided panel of the Fifth Circuit grafted onto *Reed* an additional layer of standing analysis that led to the opposite result. The majority scoured the state court record, including briefing by the parties, and speculated that, in this case, state officials would not permit DNA testing even in the face of a federal court judgment because, in earlier proceedings, the CCA commented that favorable DNA test results would not prove Gutierrez innocent of the death penalty. Therefore, the majority concluded, Gutierrez could not meet the redressability prong of Article III standing.

The panel majority recognized that it went well beyond the analysis this Court established in *Reed:* "It gives us some pause that the Supreme Court in *Reed* did not mention examining the state court's decision for whether it might affect the

prosecutor's likely actions . . . ." A13 n.3. The majority justified its departure from *Reed* based on the principle that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided." *Id.* (quoting *Johnson v. Halstead*, 916 F.3d 410, 419 n.3 (5th Cir. 2019) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). The majority opined, in other words, that this Court did not parse the state court record in *Reed* because that record simply escaped this Court's attention.

"The fundamentals of standing are well-known and firmly rooted in American constitutional law." *All. for Hippocratic Med.*, 2024 WL 2964140, at *6. To establish standing, a plaintiff must show that (i) he has suffered an injury in fact, (ii) the injury likely was caused by the defendant, and (iii) the injury likely would be redressed by the requested judicial relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). This Court recently explained that "[t]he second and third standing requirements—causation and redressability—are often flip sides of the same coin. If the defendant's actions cause an injury, enjoining that action or awarding damages for the action will typically redress that injury." *All. for Hippocratic Med.*, 2024 WL 2964140, at *6 (internal quotations omitted).

This Court applied that clear connection between causation and redressability in its analysis of Reed's standing in challenging the constitutionality of Texas's post-conviction DNA statute. Justice Kavanaugh, writing for the Court, straightforwardly explained:

> Reed sufficiently alleged an injury in fact: denial of access to the requested evidence. The state prosecutor, who is the named defendant,

> denied access to the evidence and thereby caused Reed's injury. And if a federal court concludes that Texas's post-conviction DNA testing procedures violate due process, that court order would eliminate the state prosecutor's justification for denying testing. It is substantially likely that the state prosecutor would abide by such a court order.

Reed, 598 U.S. at 234 (quotation omitted). The Court concluded that "the practical consequences of that change [in law] would amount to a significant increase in the likelihood that the state prosecutor would grant access to the requested evidence." *Id.* (quotation omitted). Justice Kavanaugh's analysis of Reed's standing was clear, direct, and easy to apply.

This Court has advised that when courts have unanswered questions about standing, they should look to similarly situated defendants for guidance: "'The 'absence of precise definitions' has not left courts entirely at sea in applying the law of standing. Like 'most legal notions, the standing concepts have gained considerable definition from developing case law.'" *All. for Hippocratic Med.*, 2024 WL 2964140, at *8 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). "In 'many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases.'" *Id.* (quoting *Allen*, 468 U.S. at 751–52).

The dissent below recognized that Gutierrez's case was in virtually the same position as *Reed*. A16. The dissent's analysis was simple and followed this Court's directive that, when it comes to standing, similarly situated litigants should be treated the same.

In contrast, the panel majority did not look at the allegations in Gutierrez's complaint and compare them to the allegations in Reed's complaint, despite both parties having filed 28(j) letters with the Fifth Circuit to address the impact of *Reed* here. If it had, the majority would have seen that the allegation in *Gutierrez*—that Chapter 64 violates due process—was identical to the allegation in *Reed*. Moreover, the defendants in both cases were equivalent state officials, and the requested relief was identical. The majority nonetheless failed to follow this Court's clear directive to answer the standing question "chiefly by comparing the allegations of the particular complaint to those made in prior standing cases." *Allen,* 468 U.S. at 751–52. The majority instead dispensed with the principle that standing applies equally to similarly situated parties and replaced it with a burdensome requirement that will hereupon individualize a plaintiff's standing. Under the majority's approach, standing will now depend on how particular state officials—or any federal defendants—may act in the future following a judgment in the plaintiff's favor.

What is especially egregious about the Fifth Circuit's attempt to distinguish *Reed*, however, is that the court's premise that Reed's posture in the CCA was different than Gutierrez's posture is glaringly wrong. The panel majority postulated that, "[i]f *Reed* is to be distinguished from this case, we need to determine if the Court of Criminal Appeals held, even if chain-of-custody limitations violated federal law, that Reed's claim would fail." A13. The majority then concluded that the CCA had been silent on this question and distinguished *Reed* on the ground that "[t]he Texas

court made no holding in *Reed* comparable to its holding in *Gutierrez*." A13–A14 n. 4. The majority erred because its chosen distinction contradicts the events of *Reed*.

In order to obtain DNA testing, Reed, like Gutierrez here, would still need to satisfy all the requirements of Chapter 64, including that "the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice." Tex. Code Crim. Proc. Ann. art. 64.03(a)(2)(B). The trial court found that Reed did *not* meet this requirement for seven distinct reasons. *See Reed v. State*, 541 S.W.3d 759, 777–78 (Tex. Crim. App. 2017). On appeal, the CCA affirmed, "hold[ing] that Reed failed to establish that his request is not made to unreasonably delay the execution of his sentence or the administration of justice." *Id.* at 778. The CCA's analysis of why Reed cannot get relief because he cannot satisfy § 64.03(a)(2)(B) spans three pages—far beyond the two sentences of dicta in the CCA's *Gutierrez* opinions that the Fifth Circuit relied on here. The CCA thus squarely held that Reed cannot obtain DNA testing for reasons that have nothing to do with the DNA statute's chain-of-custody limitations that Reed challenged in federal court. This Court nonetheless held that Reed had standing because his complaints about Chapter 64 were potentially redressable. The record in *Reed* thus refutes the majority's attempt to distinguish it from this case.

The Fifth Circuit may not disregard this Court's determinations and legal precedents to strain for a result that it prefers. *See, e.g., United States v. Martinez-Cruz*, 736 F.3d 999, 1006 (D.C. Cir. 2013) (Kavanaugh, J., dissenting) ("As a lower court in a system of absolute vertical stare decisis headed by one Supreme Court, it

is essential that we follow both the words and the music of Supreme Court decisions."); *Winslow v. FERC*, 587 F.3d 1133, 1135 (D.C. Cir. 2009) (Kavanaugh, J.) ("Vertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by 'one supreme Court.'" (quoting U.S. Const. art. III § 1)).

Reversal of the Fifth Circuit is necessary to ensure adherence to this Court's constitutional holdings, consistent application of a bedrock legal standard, and fidelity to the rule of law. *See, e.g., James v. City of Boise*, 577 U.S. 406, 307 (2016) (granting summary reversal and emphasizing that lower courts are "bound by this Court's interpretation of Federal law"); *Wearry v. Cain*, 577 U.S. 385, 395 (2016) (per curiam) (noting that this Court "has not shied away from deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law"); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012) (per curiam) (granting summary reversal where lower court's interpretation of federal law "was both incorrect and inconsistent with clear instruction in the precedents of this Court"). In creating a novel requirement that conflicts with *Reed*, the Fifth Circuit majority has ignored established Supreme Court precedent and created a circuit split where none should exist. This Court should grant certiorari.

CONCLUSION

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

Respectfully submitted,

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