No. 23-7809

IN THE
Supreme Court of the United States

RUBEN GUTIERREZ,
Petitioner,
v.
LUIS SAENZ, ET AL.,
Respondents.

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

REPLY BRIEF

LISA EVANS LEWIS
Chief Federal Defender
ANNE ELIZABETH FISHER
Counsel of Record
JOSEPH W. LUBY
JOANNE M. HEISEY
JESSICA TSANG
FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
601 WALNUT STREET
Suite 545 West
Philadelphia, PA 19106
(215) 928-0520
ANNIE_FISHER@FD.ORG

Counsel for Petitioner

TABLE OF CONTENTS

ARGUMENT...1

I. GUTIERREZ HAS STANDING UNDER *REED* TO BRING HIS DUE PROCESS CLAIM BECAUSE A FAVORABLE JUDGMENT WOULD REDRESS HIS INJURY. 2

II. RESPONDENTS' REDRESSABILITY ARGUMENTS LACK MERIT..................................5

A. Respondents Misunderstand the Nature of Gutierrez's Constitutional Claim and the Effect of a Declaratory Judgment Sustaining That Claim...6

1. Gutierrez has not "reformulated" his claim as Respondents suggest..................................6

2. A declaratory judgment that Chapter 64 is unconstitutional would bind Respondents in state-court proceedings and thus redress Gutierrez's injury. 8

B. Respondents Will Be Unable to Rely on Any Independent, Constitutional State-Law Grounds to Withhold the Evidence if Gutierrez Prevails on His Due Process Claim. 12

1. Respondents cannot rely on any CCA decision to deny DNA testing, because no CCA decision has ever considered whether Gutierrez is entitled to testing under a

constitutional version of Chapter 64 that cures the defect found by the district court. 13

2. The CCA's 2011 conclusion that identity was not at issue depends on an unconstitutional reading of Chapter 64 and thus would not be a lawful ground on which to deny DNA testing............................15

3. Chapter 64's "unreasonable delay" requirement is not an independent ground on which to deny DNA testing........................17

III. THIS CASE IS NOT MOOT..............................17

CONCLUSION 21

TABLE OF AUTHORITIES

Federal Cases

Cardinal Chem. Co. v. Morton Intern., Inc.,
508 U.S. 83 (1993) 18

Chafin v. Chafin,
568 U.S. 165 (2013) 18–19

Ctr. for Biological Diversity v. EPA,
861 F.3d 174 (D.C. Cir. 2017) 5

D.C. Ct. of Appeals v. Feldman,
460 U.S. 462 (1983) 20

District Attorney's Office for Third Judicial Dist. v. Osborne,
557 U.S. 52 (2009) 3, 6

Douglas v. People of State of Cal.,
372 U.S. 353, 358 (1963) 7, 13

Genesis Healthcare Corp. v. Symczyk,
569 U.S. 66 (2013) 18

Glover v. United States,
531 U.S. 198 (2001) 12

Griffin v. Illinois,
351 U.S. 12 (1956) 7, 13

Haaland v. Brackeen,
599 U.S. 255 (2023) 8, 10

Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.,
590 U.S. 405 (2020) 9

MOAC Mall Holdings LLC v. Transform Holdco LLC,
598 U.S. 288 (2023) 18

Reed v. Goertz,
598 U.S. 230 (2023) 1–3, 10, 15

Retirement Plans Cmte. of IBM v. Jander,
589 U.S. 49 (2020) 12

Rocha v. Thaler,
626 F.3d 815 (5th Cir. 2010) 14

Rooker v. Fid. Trust Co.,
263 U.S. 413 (1923) 20

Sawyer v. Whitley,
505 U.S. 333 (1992) 14

Skinner v. Switzer,
562 U.S. 521 (2011) 20

Tison v. Arizona,
481 U.S. 137 (1987) 16

United States v. Juvenile Male,
564 U.S. 932 (2011) 11

Utah v. Evans,
536 U.S. 452, 464 (2002) 2, 3, 5

Federal Statutes

42 U.S.C. § 1983 1

State Cases

Eagle Props., Ltd. v. Scharbauer,
807 S.W.2d 714 (Tex. 1990) 9

Ex Parte Blue,
230 S.W.3d 151 (Tex. Crim. App. 2007) 13

Holberg v. State,
425 S.W.3d 282 (Tex. Crim. App. 2014) 15

Reed v. State,
541 S.W.3d 759 (Tex. Crim. App. 2017) 17

State Statutes

Tex. Code Crim. Proc. Ann.
art. 11.071 § 5(a)(3) 1–7, 9, 11–16, 20

Tex. Code Crim. Proc. Ann.
art. 64...1–9, 11–17, 19–20

ARGUMENT

Gutierrez has standing to bring his 42 U.S.C. § 1983 claim because a favorable judgment would redress his injury. The district court below held that Chapter 64 offends due process by restricting a Texas prisoner's statutory right to file a subsequent state habeas petition demonstrating ineligibility for the death penalty under Article 11.071 § 5(a)(3). Under this Court's holding in *Reed v. Goertz*, 598 U.S. 230 (2023), the redressability analysis is simple and straightforward: Gutierrez seeks DNA testing under Chapter 64 to demonstrate his death ineligibility, and the declaratory judgment redresses his injury by eliminating Chapter 64's restrictions as a basis for Respondents to deny testing. This Court should apply the same straightforward analysis here that it did in *Reed*.

But even if this Court should apply a more searching inquiry, as Respondents suggest, Gutierrez's injury would still be redressable. The purportedly "independent" state-law grounds on which Respondents rely to deny testing are not at all "independent" of the due process violation the district court found. According to the district court, Chapter 64 obstructs a prisoner from developing the evidence needed for a death-ineligibility claim under Section 5(a)(3). Redress of that injury requires adequate procedures in Chapter 64 to vindicate the substantive rights provided under Section 5(a)(3). It is insufficient, for example, if the DNA statute conditions testing on the "record facts" of trial, as opposed to the totality of DNA and non-DNA evidence

that would govern a successive habeas claim. The Texas Court of Criminal Appeals (CCA) has never attempted to reconcile the two statutes. Every alternative state-law ground Respondents rely on stems from and perpetuates the due process violation that the district court found—that the procedures in Chapter 64 are inadequate to vindicate the rights in Section 5(a)(3). The declaratory judgment therefore eliminates these as lawful grounds to deny DNA testing.

I. GUTIERREZ HAS STANDING UNDER *REED* TO BRING HIS DUE PROCESS CLAIM BECAUSE A FAVORABLE JUDGMENT WOULD REDRESS HIS INJURY.

The question of standing is simpler than Respondents suggest. The plaintiff in *Reed* pleaded an injury in fact and sued the appropriate party: he was denied access to DNA evidence by the state prosecutor who had custody over it. *Reed*, 598 U.S. at 234. A federal declaratory judgment that "Texas's post-conviction DNA testing procedures violate due process" would redress Reed's claim because it would "eliminate" the prosecutor's reliance on those same Texas procedures as the reason to deny testing. *Id.* *Reed* therefore satisfied the test for redressability: it was "substantially likely" that the prosecutor would abide by the court's judgment. *Id.* (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)). This Court determined Reed's injury was redressable despite Respondent Goertz's argument that "the relief Reed seeks would not require any change in conduct from district attorney Goertz, nor is it likely to bring about

such change." Resp. Br. *Reed v. Goertz*, No. 21-442 at 38–39.

Gutierrez has standing for the same reasons. He asked Respondents to allow DNA testing of evidence they hold so that he can develop additional post-conviction claims, and they refused for the stated reason that Gutierrez cannot satisfy Chapter 64's requirements. Gutierrez then sought, and obtained, a declaratory judgment that he has a substantive right to bring a claim of death ineligibility on a successive habeas corpus petition under Section 5(a)(3), that due process requires Texas to provide adequate procedures by which a prisoner can vindicate that right, and that Chapter 64's procedures stymie that right instead of sustaining it. *See District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68–69 (2009); JA 56a–61a, 448a, 456a–458a.

As in *Reed*, the injury is redressable because the declaratory judgment eliminates Chapter 64 as a lawful reason for Respondents to forbid testing. *Reed*, 598 U.S. at 234. The declaratory judgment binds Respondents because they were parties to the federal suit. The judgment's "practical consequence" is a "change in [] legal status" that would result in a "'significant increase in the likelihood' that the state prosecutor would grant access to the requested evidence." *Id.* (quoting *Evans*, 536 U.S. at 464).

Respondents advance three state-law reasons for denying testing, two of which they raise for the first time in their merits brief. All three reasons originate from the state courts' prior Chapter 64 rulings, even

though the state courts have never applied any version of Chapter 64 that adequately serves a condemned prisoner's interest in bringing a death-ineligibility claim under Section 5(a)(3). If Gutierrez were to succeed on the merits of Respondents' appeal, as the Court must assume, the declaratory judgment would eliminate all three of Respondents' grounds.

First, Respondents argue that the CCA has already considered a hypothetical version of Chapter 64 that allows penalty-related claims. But the CCA retained Chapter 64's limitation of evidence to the "record facts" of trial rather than the totality of post-trial exculpatory evidence that would govern a death-ineligibility claim under Section 5(a)(3), rendering the right provided under 5(a)(3) "illusory" and violating due process. *See* Argument II.B.1, *infra*. Second, the CCA's 2011 ruling that "identity" was not an issue in the case concerned Gutierrez's actual innocence of the crime rather than the question of death eligibility that he would litigate under Section 5(a)(3), and thus violates the district court's declaratory judgment in the same way. *See* Argument II.B.2, *infra*. Third, the trial court's finding of undue delay in 2019—on the second of Gutierrez's three Chapter 64 motions for DNA testing—is a motion-specific finding that has no preclusive effect on any future request for DNA testing. *See* Argument II.B.3, *infra*.

At the very least, the parties dispute whether the state courts' rulings dispose of Gutierrez's due process claim. That dispute does not undermine redressability, because the state-law grounds on which Respondents rely do not "pos[e] an absolute

legal barrier to relief" in the form of DNA testing, let alone a successive death-ineligibility claim. *Evans*, 536 U.S. at 463. As in the similar context of procedural rights cases, even a "serious possibility" that Respondents will continue to oppose DNA testing does not defeat redressability. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 185 (D.C. Cir. 2017). "[T]here remains at least the possibility that [Respondents] could reach a different conclusion" after a declaratory judgment, and redressability requires nothing more. *Id*.

II. RESPONDENTS' REDRESSABILITY ARGUMENTS LACK MERIT.

Gutierrez alleged a due process violation for Chapter 64's failure to provide adequate procedures to vindicate his right to pursue state habeas relief from his death sentence under Section 5(a)(3). The district court sustained that claim. JA 56a–61a.

As explained below, the declaratory judgment redresses Gutierrez's injury for two reasons. First, it precludes Respondents from relying in any future state proceedings on any version of Chapter 64 that is unconstitutional for its failure to accommodate Gutierrez's right to challenge his death eligibility on a successive habeas claim. Second, the judgment renders unconstitutional all of Respondents' asserted "independent" state-law grounds to deny DNA testing.

A. Respondents Misunderstand the Nature of Gutierrez's Constitutional Claim and the Effect of a Declaratory Judgment Sustaining That Claim.

Gutierrez has consistently argued that Chapter 64 violates due process because it is inadequate to allow prisoners to vindicate their right to prove they are not death eligible under Section 5(a)(3). Respondents attempt to miscast this claim and, thereby, the implications of a declaratory judgment sustaining it.

1. Gutierrez has not "reformulated" his claim as Respondents suggest.

Texas affords prisoners the right to seek sentencing relief by assembling clear and convincing evidence that they are ineligible for the death penalty under Section 5(a)(3). As the district court held, the substantive right created by Section 5(a)(3) is protected by procedural due process. JA 58–59a (citing *Osborne*, 557 U.S. at 62). The procedures afforded to vindicate the substantive rights under Section 5(a)(3) cannot "transgress any recognized principle of fundamental fairness in operation." JA 59a (quoting *Osborne*, 557 U.S. at 62 (internal alterations omitted)); *see also Osborne*, 557 U.S. at 68 (state-created rights can "beget yet other rights to procedures essential to the realization of the parent right").

The district court held that Chapter 64, as construed by the CCA, is inadequate to vindicate the right provided by Section 5(a)(3) and thus violates due process. JA 58a (Chapter 64 restricts a Texas

prisoner's "substantive right to file a second habeas petition with a clear and convincing showing of innocence of the death penalty [under] Article 11.071"); *see also* JA 59a (Chapter 64's limitations "render[] Article 11.071 § 5(a)(3) illusory"). The injury here thus sounds in the "irreconcilab[ility]" between Chapter 64 and Section 5(a)(3). JA 58a; *see also* JA 60a ("A stark conflict exists between Chapter 64 and Article 11.071."). The district court explained that this "conflict . . . between laws" requires that they "be interpreted to preserve the substantive rights" offered by each. JA 59a (citing *Douglas v. People of State of Cal.*, 372 U.S. 353, 358 (1963); *Griffin v. Illinois,* 351 U.S. 12, 17 (1956)).

Respondents quote selectively from lower court filings to accuse Gutierrez of "reformulating" his injury. Resp. Br. 33. But the injury for which Gutierrez seeks redress is the same injury that he has asserted all along, and that the district court credited. *See* JA 456a (complaint asserting that CCA's construction of Chapter 64 prevents Gutierrez from "establish[ing] that he is ineligible for the death penalty"); Brief of Plaintiff-Appellee 18, *Gutierrez v. Saenz*, No. 21-8009 (5th Cir. Aug. 1, 2022) (Respondents have used Chapter 64 to "block Mr. Gutierrez's efforts to access DNA testing, . . . thus frustrating Mr. Gutierrez's ability to meaningfully utilize § 5(a)(3)'s habeas procedures to obtain relief"). Gutierrez has not "reformulated" his injury.

2. A declaratory judgment that Chapter 64 is unconstitutional would bind Respondents in state-court proceedings and thus redress Gutierrez's injury.

Respondents mischaracterize Gutierrez's standing argument as hoping that District Attorney Saenz "will suddenly have a change of heart" and allow access to testing, or that the declaratory judgment's "persuasive force" might sway him. Resp. Br. 29, 32. Invoking *Haaland v. Brackeen*, 599 U.S. 255 (2023), Respondents insist that any relief must come from the court's exercise of judicial power rather than "the persuasive or even awe-inspiring effect" of its reasoning. Resp. Br. 23, 29.

Gutierrez does not rely on mere persuasion to establish redressability. Unlike the non-party state officials who were not bound by the declaratory judgment in *Brackeen*, Respondents were a party to the declaratory judgment below. The very purpose of a declaratory judgment "is to establish a binding adjudication that enables the parties to enjoy the benefits of reliance and repose secured by res judicata." *Brackeen*, 599 U.S. at 293 (quoting 18A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4446 (3d ed. Supp. 2022)).

The declaratory judgment at issue here serves that purpose. Subject to Respondents' appeal, the declaratory judgment is res judicata. But for the Fifth Circuit's reversal, the district court's declaratory judgment is binding on the parties in "all other

courts," as Respondents conceded when they opposed Gutierrez's post-judgment Chapter 64 motion. JA 496a–497a. The judgment binds the parties to the court's determination that Chapter 64's limitations violate due process by barricading a condemned prisoner's ability to bring a successive death-eligibility petition under Section 5(a)(3). JA 56a–61a. In the event of future Chapter 64 proceedings, in which Gutierrez could invoke his due process entitlement to develop his successive death-eligibility habeas petition by obtaining DNA testing, the Texas courts would apply federal standards of res judicata to the federal judgment. *See Eagle Props., Ltd. v. Scharbauer*, 807 S.W.2d 714, 718 (Tex. 1990).

It makes no difference that "state courts are not bound by the decisions of the lower federal courts." JA 480a (CCA opinion). Whether or not a state court chooses to follow a federal decision as precedent, res judicata precludes *a party* from relitigating a federal issue that it lost in an earlier suit. *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, 590 U.S. 405, 411 (2020). That includes the issue decided here, which Respondents would be unable to contest in the face of a post-judgment petition for DNA testing.

Here, the CCA has never considered the res judicata effect of the declaratory judgment on the parties. By the time of Gutierrez's last appeal to the CCA, the Fifth Circuit had vacated the declaratory judgment, eliminating the res judicata effect Gutierrez had asserted below. JA 3a. As a result, the CCA has never considered Gutierrez's request for

DNA testing with the benefit of the declaratory judgment's preclusive effect.

In any event, Gutierrez agrees with Respondents: "It is the 'preclusive effect' of a declaratory judgment that binds parties to that judgment and 'saves proper declaratory judgments from a redressability problem.'" Resp. Br. 41 (quoting *Brackeen*, 599 U.S. at 293). No such problem exists here. Because Respondents are bound by the district court's declaratory judgment, that judgment brings a "significant increase in the likelihood" that Respondents will agree to DNA testing. *Reed*, 598 U.S. at 234.

Respondents also cite *Brackeen* to argue that Gutierrez cannot base redressability on the effects that a favorable declaratory judgment would have on a "future state habeas application." Resp. Br. at 32–33, 36. But Respondents overlook the fact that they are a party to both the underlying suit and any future one. That is quite unlike *Brackeen*, in which the plaintiffs hoped that a federal declaratory judgment against federal officials would be persuasive in a later state-court lawsuit against state officials. 599 U.S. at 293–94. This case thus does not present the danger that "redressability would be satisfied whenever a decision might persuade actors who are not before the court—contrary to Article III's strict prohibition on 'issuing advisory opinions.'" *Id.* at 294 (quoting *Carney v. Adams*, 592 U.S. 53, 58 (2020)).

Respondents rely on *United States v. Juvenile Male*, 564 U.S. 932, 937 (2011), for the related argument that redressing Gutierrez's injury depends on the hypothetical outcome of some future lawsuit. Resp. Br. 32–33. Respondents' reliance on *Juvenile Male* is misplaced. In that case, where the defendant's federal sex offender registry requirement had already expired, his asserted collateral consequence stemming from a Montana state-law registration requirement was not redressable where the state-law requirement was "not contingent" on the federal order. *Juv. Male*, 564 U.S. at 937. The possibility that a favorable decision might prove useful in a "hypothetical lawsuit challenging Montana's registration requirement on *ex post facto* grounds" was insufficient to avoid mootness. *Id.*

Here, by contrast, Gutierrez's efforts to develop a state habeas claim of death ineligibility do not sound in a "hypothetical" "future lawsuit" "indirectly" related to the claim at issue here. Rather, Chapter 64's frustration of Gutierrez's ability to assert a claim for state habeas relief from his death sentence is the very essence of the due process violation the district court found. *See* JA 59–60a (Chapter 64 "barricades" Gutierrez from "bring[ing] a subsequent habeas action under Article 11.071 § 5(a)(3)").

B. Respondents Will Be Unable to Rely on Any Independent, Constitutional State-Law Grounds to Withhold the Evidence if Gutierrez Prevails on His Due Process Claim.

Respondents allege three "independent" state-law grounds on which Saenz might deny testing even if Gutierrez prevails on his due process claim. Resp. Br. 24–27. Those arguments fail because they reflect the very due process injury that the district court sustained: inadequate procedures in Chapter 64 to vindicate the substantive right in Section 5(a)(3). If Gutierrez prevails on his due process claim, which the Court must presume in assessing standing, Saenz will not be able to rely on any of his asserted state-law grounds to deny DNA testing.

In addition, the latter two of Respondents' state-law grounds are asserted for the first time in their merits brief. This Court does not ordinarily decide issues that were neither raised nor resolved below. *See, e.g.*, *Retirement Plans Cmte. of IBM v. Jander*, 589 U.S. 49, 52 (2020); *Glover v. United States*, 531 U.S. 198, 205 (2001). There is no reason to deviate from that practice here. A remand would allow the parties to be fully heard on the issues and to litigate any related factual disputes.

1. Respondents cannot rely on any CCA decision to deny DNA testing, because no CCA decision has ever considered whether Gutierrez is entitled to testing under a constitutional version of Chapter 64 that cures the defect found by the district court.

Respondents cannot rely on the CCA's alternative holding that Gutierrez would not be entitled to DNA testing even if Chapter 64 applied to death-eligibility claims, Resp. Br. 25, because the CCA applied an unconstitutional version of Chapter 64 in reaching that conclusion. Chapter 64 as construed by the CCA does not afford adequate procedures to vindicate the substantive rights Texas affords in Section 5(a)(3). As the district court explained, the inherent "irreconcilab[ility]" between Chapter 64 and Section 5(a)(3) requires that they "be interpreted to preserve the substantive rights" offered by each. JA 58a–59a (citing *Douglas,* 372 U.S. at 358; *Griffin*, 351 U.S. at 17). The CCA has never attempted to make Chapter 64 compatible with Section 5(a)(3) or otherwise to cure the defects found by the district court.

In ruling that Gutierrez would still be death eligible even if Chapter 64 applied to questions of death eligibility, the CCA based this conclusion on only the "record facts" of trial. JA 478a, 564a–565a, 603a. But the right given under Section 5(a)(3) contemplates the totality of trial and post-trial evidence. *Ex Parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007); Tex. Code Crim. Proc. Ann. art.

11.071 § 5(a)(3); *see also Rocha v. Thaler*, 626 F.3d 815, 822 (5th Cir. 2010) (CCA considers whether "the facts and evidence contained in the successive habeas application, if true, would make a clear and convincing showing that the applicant is actually innocent of the death penalty"); *Sawyer v. Whitley,* 505 U.S. 333, 346 (1992) (same standard, "based on the evidence proffered plus all record evidence"). The post-trial evidence in this case includes, but is not limited to, evidence that Avel Cuellar—who was the victim's nephew and the initial suspect in her murder—hatched a plan to rob Ms. Harrison, lied to police about his involvement in the offense, and later bragged about having cash buried in the trailer park where the crime occurred. JA 701a–706a. This evidence, combined with DNA evidence, would be used assert a claim under Section 5(a)(3) that Gutierrez neither killed Ms. Harrison nor was a "major participant" in her death.

By limiting its consideration of Gutierrez's Chapter 64 motion to the record facts of trial, the CCA did not "interpret" Chapter 64 "to preserve the substantive rights" afforded by Section 5(a)(3). JA 59a. Use of Chapter 64 to develop a claim under 5(a)(3) necessarily requires consideration of the same scope of evidence in order to adequately vindicate the right encompassed in 5(a)(3). In other words, the CCA's constriction on the scope of evidence is itself unconstitutional because it makes the substantive rights of Section 5(a)(3) illusory. This is the heart of the constitutional injury the district court found and redressed. *Id.*

Respondents insist that the CCA "was *required* under state law to consider only those record facts when adjudicating Gutierrez's right to DNA testing under Chapter 64." Resp. Br. at 19 (emphasis in original; citing *Holberg v. State*, 425 S.W.3d 282, 285 (Tex. Crim. App. 2014)). But that is exactly Gutierrez's point. By limiting its review to the "record facts," the CCA failed to apply Chapter 64 consistently with the substantive rights afforded by Section 5(a)(3), in violation of the district court's declaratory judgment. Because the declaratory judgment requires procedures that are adequate to develop a successive habeas claim of death ineligibility, it "eliminates" Respondents' primary "justification for denying DNA testing." *Reed*, 598 U.S. at 234.

2. The CCA's 2011 conclusion that identity was not at issue depends on an unconstitutional reading of Chapter 64 and thus would not be a lawful ground on which to deny DNA testing.

Respondents' reliance on the CCA's 2011 conclusion that "identity was not an issue," Resp. Br. 26, fails for the same reason: that conclusion was inextricably bound with the court's holding that Chapter 64 cannot be used to challenge death eligibility. In the CCA's view at the time, Chapter 64 could be used only to challenge a prisoner's conviction. The CCA therefore held that identity was not an issue because "[t]his case was tried under the law of parties, and the identity of the parties . . . was not an issue." JA 586a. In other words, "identity" was not at issue as

to whether Gutierrez could be convicted of the underlying crime.

The CCA has never decided whether identity was at issue as to whether Gutierrez was a "major participant" in the crime who can constitutionally be sentenced to death. *See Tison v. Arizona*, 481 U.S. 137, 158 (1987) (defendants who are guilty of capital murder as parties to an underlying felony but are not "major participants" in the offense are ineligible for the death penalty). In fact, when Gutierrez argued in his 2019 motion that identity was at issue with respect to his death eligibility, the CCA declined to even consider that question. *See* JA 557a ("[W]e need not determine whether identity is an issue in this case because appellant has failed to establish that he *would not have been convicted* if exculpatory results had been obtained through DNA testing." (emphasis added)).

By holding Gutierrez to a standard of proving that identity was at issue as to his *actual innocence*, such an application of Chapter 64 stymies Gutierrez from developing a *death-ineligibility* claim under Section 5(a)(3). This is the very constitutional injury the district court found—that the limitations of Chapter 64 are inadequate to vindicate the rights under 5(a)(3). Far from being "independent" of the constitutional injury found by the district court, the CCA's 2011 "identity" holding is redressed by it.

3. Chapter 64's "unreasonable delay" requirement is not an independent ground on which to deny DNA testing.

Neither can Respondents rely on the trial court's 2019 "unreasonable delay" finding. Resp. Br. 26. Under Chapter 64, the question of delay depends on a motion-specific and fact-bound inquiry. The trial court's finding of unreasonable delay as to the 2019 motion—a finding that was not endorsed by the CCA on appeal—is not preclusive as to whether Gutierrez unreasonably delayed in filing any future motion. That inquiry is assessed anew each time.

The CCA has explained that the "unreasonable delay" inquiry "consider[s] the circumstances surrounding the request," including "the promptness of the request, the temporal proximity between the request and the sentence's execution, or the ability to request the testing earlier." *Reed v. State*, 541 S.W.3d 759, 762, 778 (Tex. Crim. App. 2017). This assessment is "inherently fact-specific and subjective," *id.* at 778, which explains why the trial court made this finding on Gutierrez's 2019 motion, but not on his 2010 or 2021 motions. JA 605a, 750a–52a. Respondents' argument that they could rely on the trial court's 2019 finding as grounds to deny a future request for DNA testing thus holds no water.

III. THIS CASE IS NOT MOOT.

Respondents argue for the first time in their merits brief that this case is moot. Resp. Br. 42–46. Specifically, Respondents claim that an "intervening

circumstance" has deprived Gutierrez of a "personal stake in the outcome" because "Gutierrez already attempted to use the district court's declaratory judgment to compel Saenz to hand over the evidence for testing, and Saenz refused." Resp. Br. 42–44 (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013)). This argument is meritless.

The party asserting mootness bears the burden of establishing that a once-live case has become moot. *Cardinal Chem. Co. v. Morton Intern., Inc.*, 508 U.S. 83, 98 (1993). As Respondents concede, "a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." Resp. Br. 43 (quoting *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (internal quotations omitted)). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin*, 568 U.S. at 172 (internal quotations omitted). Further, this Court has "decline[d] to act as a court of 'first view'" to assess a party's "contention that no relief remains legally available." *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 296 (2023) (citing *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *see also id.* at 295 ("Our cases disfavor these kinds of mootness arguments.").

In *Chafin*, this Court held that a father's appeal from an order directing his daughter's return to Scotland under the International Child Abduction Remedies Act was not rendered moot even where the daughter had already returned to Scotland, and even assuming Scotland "would simply ignore" any order to

return the child to the United States. 568 U.S. at 174. This Court explained, "[c]ourts often adjudicate disputes where the practical impact of any decision is not assured," listing as examples default judgments against defendants who fail to appear, claims for damages against insolvent defendants, and cases against foreign nations "whose choices to respect final rulings are not guaranteed." *Id.* at 175–76; *see also id.* at 175 ("[U]ncertainty" as to enforcement "does not typically render cases moot.").

Still, Respondents argue that it is "impossible" for the district court to grant any "effectual relief" because Gutierrez has already sought DNA testing with the benefit of the district court's declaratory judgment, and Saenz has already refused to allow it. Resp. Br. 44. Respondents further rely on the CCA's "agree[ment] with Saenz" that the declaratory judgment "did nothing to alter Gutierrez's ultimate ineligibility for DNA testing." *Id.* But as addressed in Argument II.A.2, *supra*, because the Fifth Circuit vacated the district court judgment before the CCA ruled on Gutierrez's most recent Chapter 64 appeal, the CCA has never considered the res judicata effect of the declaratory judgment on the parties here. And as addressed in Argument II.B., *supra*, neither Saenz nor the CCA has ever considered Gutierrez's request for DNA testing in a manner that cures the constitutional defect identified by the district court. That injury has yet to be redressed, and Gutierrez's concrete interest in the outcome remains live.

The same reasoning disposes of Respondents' *Rooker-Feldman* objection. *See* Resp. Br. 45; *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462 (1983). Gutierrez has not asked any federal court to review the correctness of the CCA's rulings that he would not qualify for DNA testing even if Chapter 64 permitted death-eligibility testing. His showing, instead, is that the CCA has never afforded adequate procedures under Chapter 64 to permit him to vindicate his right to develop a death-ineligibility claim under Section 5(a)(3), which is the defect found by the district court. Gutierrez's federal suit is permissible, because he brings a federal challenge to "a statute or rule governing the [state-court] decision" and not to the decision itself. *Skinner v. Switzer*, 562 U.S. 521, 532 (2011).

CONCLUSION

The Court should reverse the judgment below and remand for further proceedings.

Respectfully submitted,

LISA EVANS LEWIS
Chief Federal Defender
ANNE ELIZABETH FISHER
Counsel of Record
JOSEPH W. LUBY
JOANNE M. HEISEY
JESSICA TSANG
FEDERAL COMMUNITY
DEFENDER OFFICE
FOR THE EASTERN
DISTRICT OF
PENNSYLVANIA
601 WALNUT STREET
Suite 545 West
Philadelphia, PA 19106
(215) 928-0520
ANNIE_FISHER@FD.ORG

Counsel for Petitioner