

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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LUIS SAENZ, ET AL.,)

Respondents.)

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Washington, D.C.

Monday, February 24, 2025

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

ANNE E. FISHER, Assistant Federal Defender, Philadelphia, Pennsylvania; on behalf of the Petitioner.

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

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P R O C E E D I N G S

(10:04 a.m.)

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

Ms. Fisher.

ORAL ARGUMENT OF ANNE E. FISHER

ON BEHALF OF THE PETITIONER

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

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

This Court should hold that Mr. Gutierrez has standing for the same reason. The injury here is redressable because a declaratory judgment that finds certain procedures in Chapter 64 unconstitutional 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, it
22 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 state court would be
22 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. 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 sand -- standing if we sought an injunction. If
18 the 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 in
16 that it recognized a 1983 right in a context
17 where, arguably, habeas, that, certainly, the
18 dissenters pointed that out, but we are where we
19 are on that, and that seems to me to -- to
20 undergird some of the awkwardness here.

21 MS. FISHER: I couldn't agree more,
22 Your Honor. I think it's a -- it is a bit of a
23 sort of awkward construct to sue the district
24 attorney when it's a -- discretionary based on a
25 declaratory judgment, but that's what Osborne

1 and Skinner and now Reed have said that you do.

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

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

18 The state court would presumably go
19 through the Chapter 64 proceeding, right, and --
20 and figure out, okay, does this -- is he
21 entitled to the testing, or would it be, in
22 essence, harmless error even if he were entitled
23 to the testing, which is akin to what they've
24 done already, I guess.

25 MS. FISHER: Well, our position, Your

1 Honor, is that the CCA has never actually
2 decided whether Mr. Gutierrez should get testing
3 under a constitutional version of the statute.

4 JUSTICE KAVANAUGH: Mm-hmm.

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

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

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

25 So all of the procedures that are

1 baked into Chapter 64, by -- by necessity, it's
2 logical, I'm sure Texas had reasons for doing
3 this, are designed to decide who should get DNA
4 testing to show they're actually innocent.

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

15 And -- and -- and what do we do about
16 that? They seem to have anticipated this --
17 this very issue because it was before the
18 district court, though, you're right, the Fifth
19 Circuit came out the other way. But this
20 issue's been lingering in the case for a long
21 time, and the TCCA has said now, I think twice,
22 that whether 64 applies to the death stage --
23 death penalty stage or not, your client would
24 not seek -- be eligible for relief.

25 Thoughts?

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

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

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

18 Are you saying your due process claim
19 would preclude a court from applying a harmless
20 error test?

21 MS. FISHER: No, Your Honor. What I
22 am saying is that that determination by the
23 Texas CCA was not saying that the procedures in
24 Chapter 64 are inadequate and we need to look
25 how -- what -- what will make them adequate.

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

6 JUSTICE GORSUCH: Yeah.

7 MS. FISHER: -- back from 2011.

8 JUSTICE GORSUCH: That they'd
9 previously said, yeah.

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

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

20 MS. FISHER: They would have to
21 consider a broader scope of evidence. The key
22 words in that "even if" holding that they had or
23 the -- what Your Honor cited is when they say
24 they limit it to the trial evidence or the
25 record evidence.

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

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

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

23 No court has considered this evidence,
24 and it really is the scope of evidence that's
25 critical here because those prior decisions by

1 the CCA didn't look at the right that was being
2 squelched in the due -- in the habeas petition.

3 JUSTICE KAVANAUGH: When you're
4 bringing --

5 JUSTICE JACKSON: But I thought --

6 JUSTICE ALITO: Are -- are --

7 JUSTICE KAVANAUGH: -- when you're
8 bring --

9 JUSTICE ALITO: No, go ahead.

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

14 MS. FISHER: That's exactly it. To
15 file a claim that a petitioner is
16 death-ineligible --

17 JUSTICE KAVANAUGH: And can you
18 explain what that is? I'd be interested in you
19 listing what that is.

20 MS. FISHER: Yes. So what
21 Mr. Gutierrez would need to present in his claim
22 to show that he's death-ineligible would be two
23 different types of new evidence. It would need
24 the DNA because he'd have to show that he wasn't
25 actually in the home and that he didn't actually

1 kill the decedent.

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

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

21 JUSTICE ALITO: But --

22 MS. FISHER: They would have to do a
23 lie detector test that the -- wasn't discovered
24 by trial counsel.

25 All things that would go to his role

1 because Mr. Gutierrez was tried under the law of
2 parties.

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

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

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

20 The limitation is designed to limit
21 the access to evidence to people who can show
22 they're actually innocent who weren't also a
23 party to the crime.

24 The law of parties actually really is
25 critical here because the reason Mr. Gutierrez

1 was told by the CCA that he couldn't access
2 evidence to show that he didn't actually kill
3 the decedent -- or, excuse me, wasn't in the
4 house was because he was still -- there was
5 enough record evidence to show he was still a
6 party to the crime.

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

12 JUSTICE ALITO: Well, I understand --

13 JUSTICE BARRETT: Counsel --

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

23 Your own -- that doesn't seem to have
24 anything to do with the question whether this
25 differentiation under Texas law between evidence

1 that shows lack of guilt and evidence that shows
2 death ineligibility is constitutional.

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

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

19 JUSTICE BARRETT: Ms. Fisher, can I
20 bring you back to standing? So you sued the
21 DA -- I just want to make sure that I understand
22 exactly what you want out of this. Is it your
23 position that the DA -- even though the decision
24 whether to give DNA evidence is discretionary
25 when made on the part of the DA, is it your

1 position that a declaratory judgment would
2 influence that judgment because the DA takes
3 Article 64 into account in making that decision,
4 even if it doesn't bind him, that he would take
5 it into account and it would be a factor, and
6 so, if it were unconstitutional, it would be
7 taken out of the bundle of factors that might
8 influence the DA's discretionary decision? Is
9 that your position?

10 MS. FISHER: I believe -- I -- if I'm
11 understanding Your Honor correctly, yes in the
12 sense that it's not that it would influence them
13 but that the reasons they have cited are tied in
14 to the unconstitutional --

15 JUSTICE BARRETT: "They" have cited?
16 The DA has cited?

17 MS. FISHER: The reasons Respond --

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

20 MS. FISHER: The reasons the
21 Respondents have cited in their merits brief
22 are -- are -- for not turning over the evidence
23 are not simple recalcitrance. They didn't
24 simply say, well, we really just don't want to
25 turn over the DNA. They cited reasons that were

1 found within the statute.

2 And if those reasons, those statutory
3 reasons, were found to be unconstitutional, we
4 believe that the District Attorney's Office
5 wouldn't rely on those.

6 JUSTICE BARRETT: So it would be the
7 equivalent -- you sought an injunction
8 initially, as you told Justice Kagan, trying to
9 get the DNA evidence. That's off the table.

10 MS. FISHER: Yes.

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

16 MS. FISHER: Well, it always goes back
17 to Article 64, Your Honor, because of the
18 discretionary nature. And I --

19 JUSTICE BARRETT: But Article 64 is a
20 jurisdictional provision that binds the court.
21 So I'm trying to tie up -- you have to have a
22 redressability argument to the DA. And in Reed,
23 I think that's the way to understand Reed, that
24 it was going to the DA's discretionary
25 determination that the DA could not consider --

1 all of this is assuming at the pleading stage,
2 right, that the DA, if it was unconstitutional,
3 couldn't take that into account even if it
4 didn't bind him because it was an
5 unconstitutional reason in the same way, say,
6 race would be an unconstitutional reason.

7 So I am trying to figure out what you
8 want out of the DA.

9 MS. FISHER: It's the same thing in
10 Reed. The reasons that they're saying they
11 won't turn over the -- the DNA now are also
12 based on unconstitutional reasons. The --

13 JUSTICE BARRETT: Article 64?

14 MS. FISHER: Not in its entirety. The
15 procedures that barricade the right to develop
16 the habeas separately --

17 JUSTICE BARRETT: Does the DA have to
18 consider Article 64? Could the DA deny evidence
19 for reasons entirely apart from Article 64?

20 MS. FISHER: I would say no, Your
21 Honor, because the whole purpose of a 1983 is to
22 prevent state actors from acting in ways that
23 violate constitutional rights. And if a
24 provision -- if a federal court found that
25 provisions in 1983 -- I'm sorry, in Chapter 64

1 were unconstitutional and violated due process
2 and the district attorney decided to rely on
3 those same unconstitutional issues --

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

12 MS. FISHER: Yes, the DA could here,
13 and the DA could in Reed as well.

14 JUSTICE BARRETT: Okay.

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

20 MS. FISHER: Exactly. If they were to
21 just simply say we're not turning it over, that
22 wouldn't impact our standing in this case.
23 That's the argument that Reed's -- that the
24 district attorney in Reed made to this Court
25 both in oral argument and briefing. Reed --

1 the --

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

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

17 The district attorney in Reed briefed
18 and argued that a declaratory judgment will not
19 make it more likely that they will turn it over.
20 They will not --

21 JUSTICE JACKSON: Because there were
22 these other reasons.

23 MS. FISHER: Yes.

24 JUSTICE JACKSON: And the Court said
25 that's not -- in this situation -- I mean, I --

1 let me just go back to your initial statement
2 about whether or not you see Reed as setting up
3 a new test or just re-articulating
4 redressability as it has traditionally been
5 understood.

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

13 Am I right about that?

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

22 But our position is that when you
23 apply Reed as it's written, we fit exactly under
24 that category because it's the Chapter 64
25 reasons, as it was in Reed, that are the reasons

1 the district attorney are denying access to the
2 evidence. And if they applied a constitutional
3 version of the statute, then they couldn't rely
4 on those same reasons. They would eliminate
5 those reasons.

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

13 Does that defeat your standing?

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

15 CHIEF JUSTICE ROBERTS: Sure.

16 MS. FISHER: That would not defeat
17 standing because the declaratory judgment would
18 still have the res judicata effect of binding
19 the party to the determination that the statute
20 was unconstitutional.

21 We could then go to the state court
22 and argue that they would have to respect that
23 declaratory judgment. And so we would have a
24 mechanism, and the declaratory judgment would be
25 the key to that mechanism because that's what

1 would change, to use the words of Reed, the
2 legal status between the parties. It's the
3 binding effect of the declaratory judgment in
4 state court that could get around their
5 recalcitrance by simply saying we just don't
6 want to turn it over.

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

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

17 But that doesn't -- that doesn't
18 defeat Article III standing, and it doesn't --

19 CHIEF JUSTICE ROBERTS: Well, I guess
20 my question was, it -- it could, though,
21 couldn't it? I mean, if the district attorney
22 said, look, the way I see the case, the way the
23 evidence looks at it, this DNA evidence is not
24 going to have any effect whatever, and if it's
25 not going to have any effect whatever, that's

1 not enough to get standing. Standing may not
2 require much, but it requires something.

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

11 CHIEF JUSTICE ROBERTS: Thank you.
12 Justice Thomas?

13 JUSTICE THOMAS: Is Texas required to
14 have a -- constitutionally to have a procedure
15 like Chapter 64?

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

18 JUSTICE THOMAS: So, if it was
19 completely discretionary, what would your case
20 look like?

21 MS. FISHER: You mean if Chapter 64
22 didn't exist?

23 JUSTICE THOMAS: Was completely
24 discretionary with the -- with the DA.

25 MS. FISHER: And if -- if Chapter

1 60 -- if the ability to turn over DNA evidence
2 was completely discretionary to the district
3 attorney, we would have to rely on what the
4 district attorney would do.

5 JUSTICE THOMAS: So how is it any
6 different now where the court has said that you
7 have not complied with the requirements, the
8 other requirements of Chapter 64? The CCA?

9 MS. FISHER: Because the CCA has never
10 considered if we should get testing under a
11 version of the statute that cures the
12 constitutional infirmity found by the district
13 court.

14 JUSTICE THOMAS: So it's a
15 constitutional infirmity in a procedure that's
16 not constitutionally required.

17 MS. FISHER: Well, once the State of
18 Texas chooses to give that right, then due
19 process attaches.

20 JUSTICE THOMAS: So what -- what's
21 your objective? What do you ultimately intend
22 to show with the DNA?

23 MS. FISHER: What we hope to show with
24 the DNA is that if we combine DNA with our other
25 newly developed evidence, that the court will

1 find that we make -- that the CCA will find that
2 we make the threshold showing under 5(a)(3) that
3 Mr. Gutierrez is death-ineligible. We may not
4 win that.

5 JUSTICE THOMAS: Because? He's
6 death-ineligible because?

7 MS. FISHER: Because he wasn't a major
8 participant in the crime, because he didn't
9 actually kill, attempt to kill, or anticipate a
10 life would be taken. And he does -- and he
11 doesn't meet the --

12 JUSTICE THOMAS: So how would it show
13 that? How would the DNA show that?

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

20 JUSTICE THOMAS: But Mr. Gutierrez
21 said he was in the house.

22 MS. FISHER: Yes. Well, the DNA would
23 also show that that -- that statement which he
24 has maintained is -- is not true. It would --
25 it would bolster that argument that he's been

1 making.

2 But, if I may, Justice Thomas, and
3 I -- I -- I say this respectfully, we don't have
4 to show that we would ultimately win that
5 lawsuit. That's not required to show that we
6 have standing.

7 CHIEF JUSTICE ROBERTS: Justice Alito?

8 JUSTICE ALITO: What if it were
9 absolutely -- if it were absolutely clear that a
10 decision that Chapter 64 is unconstitutional in
11 the way the district court found would have no
12 effect whatsoever on the district attorney?
13 Would you have standing? Would you satisfy
14 redressability?

15 MS. FISHER: Yes. And, again, that's
16 the position the district attorney took in Reed
17 because the binding effect --

18 JUSTICE ALITO: Well, how would it
19 be -- how would you satisfy redressability?

20 MS. FISHER: Because the binding
21 effect of the declaratory judgment would allow
22 us to go back into state court and ask the state
23 court to give effect to the determination of the
24 federal court that Chapter 64 is
25 unconstitutional in the way that the procedures

1 block the ability to develop a subsequent habeas
2 petition.

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

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

13 JUSTICE ALITO: What if you had sued
14 the mayor of Brownsville? We're suing the mayor
15 of Brownsville because we think that -- that my
16 client's due process rights were violated by the
17 denial of DNA testing.

18 A declaratory judgment there that that
19 was unconstitutional would give you the same
20 weapon you want here.

21 MS. FISHER: Well, we wouldn't -- we
22 would have a traceability problem then, Your
23 Honor, because the mayor wouldn't be involved in
24 denying access to the evidence that we need. So
25 we would fail Article -- sorry, prong 2 of the

1 standing test in Your Honor's hypothetical.

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

13 Would you have standing?

14 MS. FISHER: If that was simply a
15 declaration made by the district attorney, we
16 would -- if the statute were to be found
17 unconstitutional, because we would still have a
18 right to take the constitutional version of the
19 statute as declared by the federal court and the
20 res judicata effect, that it would bind the
21 parties to that determination, to state court.

22 And that's exactly the position that
23 Rodney Reed is in.

24 JUSTICE ALITO: Let me just take you
25 back briefly to the questions Justice Thomas was

1 asking about the DNA evidence.

2 The most that you could possibly show
3 from this DNA evidence -- and correct me if I'm
4 wrong because you know the facts of this case
5 inside out and backwards. I don't. But I
6 gather that what you want to prove with the DNA
7 evidence is that other people were in the home.

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

10 JUSTICE ALITO: Okay. How would that
11 make your client death-ineligible? How would
12 that tend to show that he's death-ineligible?

13 MS. FISHER: Because --

14 JUSTICE ALITO: Suppose somebody else
15 was -- suppose that you get -- it wouldn't be
16 surprising if you found Cuellar's DNA on --
17 on -- on some of this, right? He found the --
18 he -- he found the victim.

19 Anyway, suppose you can prove other
20 people were there. How does that help your
21 client?

22 MS. FISHER: Because, to show that
23 Mr. Gutierrez is death-ineligible in a 5(a)(3)
24 subsequent habeas, we have to show two things.
25 We'd have to show both that he wasn't in the

1 house, and the DNA would help with that, but we
2 also have to show his role as one that was not a
3 major participant, and --

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

6 MS. FISHER: And that --

7 JUSTICE ALITO: At most, it could show
8 that other people were there.

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

15 And, again, Your Honor, we wouldn't
16 have to actually show, to show that we have
17 redressability and standing, that we're going to
18 win the subsequent habeas.

19 JUSTICE ALITO: No, I understand that,
20 but I'm just wondering how long has -- this
21 litigation has been going on for more than 25
22 years, right? I mean, how much -- I just am
23 interested in knowing whether it's going
24 anywhere.

25 MS. FISHER: Although it may feel that

1 way, Your Honor, Mr. Gutierrez filed for his
2 first Chapter 64 motion before his federal
3 habeas in 2011. He has done nothing but utilize
4 the procedures offered to him by the Texas
5 courts.

6 When he filed a second motion in 2019,
7 after current counsel came on, there were
8 substantial factual and legal changes in Chapter
9 64 that led him to file a second Chapter 64
10 motion, including the at-fault provision from
11 Chapter 64, which was one of the reasons he
12 wasn't allowed to have testing. That was
13 removed. So the law changed and the facts
14 changed.

15 One of the reasons that he was denied
16 testing is he wanted testing --

17 JUSTICE ALITO: All right. I -- I
18 understand. Thank you very much.

19 MS. FISHER: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Sotomayor?

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

25 MS. FISHER: Please, Your Honor.

1 JUSTICE SOTOMAYOR: There were, I
2 think, scrapings under the fingernails of the
3 victim.

4 MS. FISHER: Yes.

5 JUSTICE SOTOMAYOR: There was a hair
6 that was entwined in her finger or somewhere
7 on -- on -- on her body.

8 MS. FISHER: Correct.

9 JUSTICE SOTOMAYOR: There were other
10 things that suggest that DNA testing might not
11 just show that Mr. Cuellar was there but might
12 show that both Garcia brothers were there,
13 correct?

14 MS. FISHER: Not only is that correct,
15 the CCA found in two -- 2011 that if the DNA in
16 those highly probative biological materials that
17 were covered -- recovered for the very
18 purpose --

19 JUSTICE SOTOMAYOR: That they weren't
20 Mr. Gutierrez's.

21 MS. FISHER: If that -- yep.

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

24 But, if the evidence were to show that
25 the other two were present, then that would give

1 some support to your client's claim or would
2 support your client's claim that he wasn't the
3 one who entered the apartment to do the killing?

4 MS. FISHER: Yes, Your Honor.

5 JUSTICE SOTOMAYOR: All right. So,
6 putting that aside, you answered -- I -- I'm not
7 sure what your answer was to Justice Barrett or
8 to Justice Thomas.

9 The Texas Code of -- Article 64.03
10 permits the court to order forensic testing.

11 MS. FISHER: Oh. That --

12 JUSTICE SOTOMAYOR: So the court could
13 order the DNA -- could order the DA to do it,
14 correct? It chose not to here. You asked for
15 injunction.

16 MS. FISHER: Yes, yes.

17 JUSTICE SOTOMAYOR: So -- so --

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

19 JUSTICE SOTOMAYOR: -- so you had
20 standing. It is a right given to you under
21 Texas law to go in and ask for an injunction, so
22 you had standing to do that?

23 MS. FISHER: Yes.

24 JUSTICE SOTOMAYOR: Answer my
25 questions, okay?

1 MS. FISHER: Yes.

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

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

18 JUSTICE SOTOMAYOR: That's my point.
19 All right. So -- but there's a second component
20 to your due process, that this declaratory
21 judgment, you say, includes -- I'm not quite
22 sure how -- but that includes -- by the way,
23 before I go on to that, Justice Thomas asked you
24 about is there a constitutional right to DNA
25 testing. Osborne and Skinner say that there's a

1 constitutional right if the state elects to give
2 you testing, correct?

3 MS. FISHER: Exactly. The --

4 JUSTICE SOTOMAYOR: So that was
5 Justice Kavanaugh's first question to you, that
6 once they elect to do it, then you have the
7 right to have a constitutional version of it,
8 correct?

9 MS. FISHER: That's exactly correct,
10 Your Honor.

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

19 MS. FISHER: Those are two components
20 of the same due process violation. And the
21 reasons they're two components of the same due
22 process violation is because the due process
23 violation encompasses the ways Chapter 64 limits
24 access to the testing, because Chapter 64 --

25 JUSTICE SOTOMAYOR: So let me go back

1 there, okay? Slow down. I'm not trying to hurt
2 you. I'm trying to clarify things, okay?

3 (Laughter.)

4 JUSTICE SOTOMAYOR: Justice Gorsuch
5 asked you why the statement by the TCCA that
6 says, even if we spot you, they said, our
7 statute can reach just death eligibility, the
8 record evidence would still make you liable.

9 And you're saying that's not true
10 because the new evidence would show that you are
11 not death-eligible, correct?

12 MS. FISHER: Correct, Your Honor.

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

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

18 JUSTICE SOTOMAYOR: So that if you go
19 back to the DA with this wealth of new evidence
20 which he hasn't really looked at and he says to
21 you, even if I spot you the new evidence, it's
22 not convincing for A, B, and C reason, you might
23 lose, correct?

24 MS. FISHER: We -- well, he could
25 certainly say that, and then we would file a

1 Chapter 64 motion --

2 JUSTICE SOTOMAYOR: And -- and
3 contravene that, you would have standing to say
4 he's wrong about that.

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

8 JUSTICE SOTOMAYOR: Exactly. And so
9 then you would still come back into court and
10 you could then ask the court for that injunction
11 again?

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

13 JUSTICE SOTOMAYOR: Looking at the new
14 evidence?

15 MS. FISHER: Yes, exactly.

16 JUSTICE SOTOMAYOR: All right. Thank
17 you.

18 MS. FISHER: Yes.

19 CHIEF JUSTICE ROBERTS: Justice Kagan?
20 Justice Gorsuch?

21 JUSTICE GORSUCH: Ms. Fisher, sorry to
22 belabor the point, but there's a hypothetical
23 we've been kind of dancing around in a lot of
24 the questions, and that is let's suppose that
25 the record were entirely clear that the district

1 attorney and the TCCA would have multiple other
2 grounds on which to deny relief even assuming
3 Article 64 -- Chapter 64 applied to death
4 eligibility.

5 Would -- would it be redressable then?

6 MS. FISHER: It depends if those other
7 grounds were wrapped up in the due process
8 violation or not. And the issue --

9 JUSTICE GORSUCH: Let's say they
10 aren't, okay?

11 MS. FISHER: Oh --

12 JUSTICE GORSUCH: Undue delay, for
13 example, wouldn't be wrapped up in anything,
14 okay? So let's just hypothesize again there are
15 multiple independent grounds. Redressable?

16 MS. FISHER: If -- well, our injury
17 would still be redressable in federal court. We
18 would just lose in the --

19 JUSTICE GORSUCH: How -- how is that?

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

22 JUSTICE GORSUCH: No, no, let's say we
23 know. That -- you're fighting the hypothetical,
24 counsel, a little bit. We know. Let's just
25 hypothesize that right now we would know that

1 there are multiple independent grounds on which
2 your -- your request would be denied that are
3 independent of the thing you're complaining
4 about. Redressable?

5 MS. FISHER: I'm trying to imagine
6 Your Honor's hypothetical with the undue delay
7 example.

8 JUSTICE GORSUCH: It's an example.

9 MS. FISHER: If that determination
10 were made at the time of the filing of the new
11 motion under the constitutional version, then we
12 would lose at the --

13 JUSTICE GORSUCH: I'm saying we know.
14 Let's say the -- that the district attorney and
15 the trial court in -- in Texas has said 17
16 times -- just hypothesize with me -- that even
17 if Chapter 64 applied, there's undue delay here,
18 wouldn't be entitled to anyway, end of case.

19 And let's say I have six other
20 independent reasons. Just hypothesize with me.
21 I wouldn't think that there would be
22 redressability in that case if we knew those
23 facts to be so.

24 MS. FISHER: If the independent
25 reasons were not part of the due process

1 violation, then Your Honor would be correct.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: A few questions.

6 First, on how long this has been --
7 been going on and just the history, my
8 understanding is, in 2015 and for several years,
9 Texas did not oppose the DNA testing. Is that
10 under -- is that correct?

11 MS. FISHER: That's correct, Your
12 Honor. Mr. Gutierrez filed a -- a -- a motion
13 with prior counsel that was entitled Motion for
14 Miscellaneous Relief, where the only thing that
15 we asked for in that motion was DNA testing to
16 basically show he was death-ineligible.

17 At that time, District Attorney Saenz
18 wrote a -- a two-page response and said that
19 because of how severe and important these issues
20 are, they would not oppose testing.

21 JUSTICE KAVANAUGH: Okay. Second, on
22 the question raised by Justice Thomas -- and
23 Justice Sotomayor touched on this -- they could
24 have a completely discretionary system, but if
25 you have a system that sets up a right, then

1 they have to have fair procedures. That's
2 Osborne and Skinner, right?

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

7 JUSTICE KAVANAUGH: Yeah. And then,
8 third, Justice Barrett's questions, which I
9 think are the prosecutor as defendant -- and
10 this goes back to my first question -- that --
11 that's the awkwardness of Osborne and Skinner.
12 It's very unusual. Reed tried to do the best it
13 could with that without -- if you -- Reed went
14 the other way. It totally eviscerates Osborne
15 and Skinner, I think.

16 MS. FISHER: Absolutely.

17 JUSTICE KAVANAUGH: I mean -- but that
18 leads to some awkward questions about what the
19 prosecutor will do. And I just don't think --
20 this is more something to react to -- I don't
21 see how we can say something's not redressable
22 just because the prosecutor is going to say I'm
23 not going to comply with a court order. You
24 know, if President Nixon said, I'm not going to
25 come turn over the tapes no matter what, you

1 wouldn't say, oh, I guess we don't have standing
2 to hear the executive privilege case. I mean,
3 it just doesn't -- it doesn't work, I don't
4 think, to say a recalcitrant defendant can
5 defeat redressability in that way.

6 MS. FISHER: My reaction --

7 JUSTICE KAVANAUGH: I assume you agree
8 with that.

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

11 JUSTICE KAVANAUGH: Yeah.

12 On the other grounds, if there are
13 other grounds, those probably go to the merits,
14 but, I mean, that's -- that's what we have to
15 figure out here down the road.

16 You could lose down the road because
17 there might not be a procedural due process
18 problem. If there is a procedural due process
19 issue with the statute, you may not win -- the
20 DNA testing might not show.

21 MS. FISHER: We might not. We may not
22 win DNA testing.

23 JUSTICE KAVANAUGH: And then, on the
24 DNA testing, just to get to this on Justice
25 Sotomayor's questions because I think this is --

1 there is -- if -- if Cuellar, Garcia, and
2 Gracia, if I have the names correct --

3 MS. FISHER: You do.

4 JUSTICE KAVANAUGH: -- are the people
5 with the blood in the trailer, particularly
6 Cuellar, that's going to be problematic for the
7 state's theory, not defeat it but problematic or
8 more problematic for the state's theory that
9 Gutierrez was in the trailer, correct?

10 MS. FISHER: Yes, a fact recognized
11 even by the CCA.

12 JUSTICE KAVANAUGH: And that goes to
13 the fingernail scrapings, the hair on the
14 finger, the blood-stained shirt?

15 MS. FISHER: Yes.

16 JUSTICE KAVANAUGH: Right?

17 MS. FISHER: Yep.

18 JUSTICE KAVANAUGH: If -- if -- if
19 Gutierrez is nowhere to be found, again, I think
20 that doesn't defeat the state's theory, but
21 that -- that's inconsistent -- it's not
22 inconsistent, but it undermines a little bit how
23 they perceived all this to have transpired in
24 the trailer.

25 MS. FISHER: It does. And it would be

1 part -- and that is why it's part of what we
2 would need to present in a death ineligibility
3 habeas.

4 JUSTICE KAVANAUGH: And what did the
5 state -- what was the state's theory at trial
6 about what Cuellar's role was?

7 MS. FISHER: Well, Cuellar was the
8 initial suspect. If you look at the evidence
9 bags, they all --

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

12 MS. FISHER: They believed that --
13 that he -- they -- at trial, what the state
14 argued was that Cuellar was her nephew, and
15 while he was a drunk who was dependent on her
16 and fought with her often, his only role in this
17 was that he found her.

18 JUSTICE KAVANAUGH: The state's theory
19 at trial was that Cuellar was not in the trailer
20 during the crime, correct?

21 MS. FISHER: Absolutely correct.

22 JUSTICE KAVANAUGH: Okay. And if the
23 blood under the fingernail, if the scrapings and
24 the hair are Cuellar, that's a problem for their
25 theory?

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

3 JUSTICE KAVANAUGH: Got it. Okay.
4 Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: Okay. I just want
8 to go back to my questions earlier and -- and
9 follow up and clarify because Justice Kavanaugh
10 makes some good points about the awkwardness of
11 Osborne and Skinner and how this plays out.

12 Because of Skinner and Osborne, when
13 you -- you know, Texas has to provide fair
14 procedure. That means that the DA is the
15 defendant in an Article 64 suit like the one
16 that you would file, like the one you did file,
17 saying that this violates procedural due
18 process. He's the correct defendant, is that
19 correct?

20 MS. FISHER: Correct.

21 JUSTICE BARRETT: So it would give
22 meaning to the right and to your procedural due
23 process claim to have him be the defendant in
24 the Article 64 proceeding and be able to raise
25 that procedural due process claim in the context

1 of that proceeding, right?

2 MS. FISHER: Yes.

3 JUSTICE BARRETT: Okay. Are you
4 arguing outside -- so we are outside of that
5 Article 64 proceeding, obviously, right now.

6 I'm just trying to understand the
7 nature of your argument because Reed says that
8 the reason why there was standing there -- and I
9 joined Reed -- it's substantially likely that
10 the state prosecutor would abide by such a court
11 order. That's Justice Kavanaugh's point. I
12 agree with that.

13 That there would be a significant
14 increase in the likelihood that the state
15 prosecutor would grant access to the requested
16 evidence.

17 So, to me, that's going to the state
18 prosecutor's discretionary decision whether to
19 hand over the evidence, which might be
20 influenced by application and his understanding
21 of Article 64, right?

22 MS. FISHER: I would not say it goes
23 to his discretion, Your Honor, because the
24 district attorney in Reed came before this
25 Court --

1 JUSTICE BARRETT: Okay. I don't want
2 to talk about the arguments. I want to talk
3 about the case. And -- and are you arguing --
4 let -- let me just phrase it a different way.

5 Are you arguing that it's redressable
6 because of the preclusive effect of the judgment
7 if you went to another proceeding? Is that your
8 basic argument for redressability?

9 MS. FISHER: Yes, Your Honor.

10 JUSTICE BARRETT: You're sure? Okay.
11 Okay. All right. I'll take that answer.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: So I guess I was
15 quite surprised at your response to Justice
16 Gorsuch -- Gorsuch's questions about the
17 independent grounds and the way in which they
18 might deny your redressability claim.

19 And I -- I -- I guess I'm a little
20 bit -- no, a lot -- concerned that that is
21 actually a different conception of
22 redressability than has been historically
23 understood and at least as I understood it.

24 I thought redressability related to
25 whether the injury could be remedied by court

1 order, that is, whether the court order was the
2 kind of thing that could remedy the injury that
3 is being claimed.

4 But that conception seems to suggest
5 that the question of redressability is whether
6 the court's order will actually remedy this
7 plate -- plaintiff's injury, that is, whether
8 there is anything else in the universe that
9 would prevent the plaintiff from getting relief.

10 I had not understood redressability to
11 amount to that, and the real concern, I think,
12 is that it imports into the threshold standing
13 jurisdictional analysis merits discussions about
14 all the defenses and other things that a
15 defendant might be able to raise in the context
16 of a motion to dismiss.

17 So I -- I think that under just --
18 under the hypothetical that Justice Gorsuch
19 posited, if there was a statute-of-limitations
20 problem, that the defendant could argue that the
21 person had no standing under redressability
22 because they still would not be able to get
23 relief under that concept of redressability.

24 And I had not perceived all of those
25 other things -- standing, undue delay, et

1 cetera, et cetera -- to be issues that the Court
2 had to resolve as a matter of their jurisdiction
3 upfront in this way.

4 So I'm worried about that.

5 MS. FISHER: Justice Jackson, I
6 completely agree with your initial
7 understanding, and to the extent that I asked --
8 answered Justice Gorsuch's question to imply
9 otherwise, I did not intend to.

10 The hypothetical of his undue delay
11 could -- the way --

12 JUSTICE JACKSON: I mean, isn't undue
13 delay a -- a merits -- I mean, we would -- we
14 would fight on the merits.

15 MS. FISHER: Yes.

16 JUSTICE JACKSON: We would litigate
17 whether or not there was undue delay.

18 MS. FISHER: Yes.

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

21 MS. FISHER: It's --

22 JUSTICE JACKSON: -- about the theory
23 that is operating here to determine standing.

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

1 The -- the statutory reasons are the
2 focus. You don't have to prove that -- that
3 nothing can come up that will defeat your
4 ability to win the claim.

5 JUSTICE JACKSON: And that's what they
6 seem to be saying.

7 MS. FISHER: That's exactly what
8 they're saying, and that's what we're fighting
9 against. And to the extent, with no disrespect
10 to Justice Gorsuch, that I answered it in that
11 way, I didn't intend to.

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Cole.

16 ARGUMENT OF WILLIAM F. COLE
17 ON BEHALF OF THE RESPONDENTS

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

20 The district court's declaratory
21 judgment did not redress Mr. Gutierrez's injury,
22 which is the denial of access to DNA testing
23 evidence.

24 Under Reed, the redressability
25 question turns on whether the declaratory

1 judgment would eliminate the state prosecutor's
2 justification for denying the testing and
3 thereby make it significantly -- increase the
4 likelihood -- significantly increase the
5 likelihood that the prosecutor would hand over
6 the evidence.

7 But, here, it would not. Unlike in
8 Reed, here, there are several independent state
9 law grounds that the prosecutor has relied on to
10 deny access to the evidence, and those grounds
11 are unaffected by the district court's narrow
12 declaratory judgment here.

13 This case may also be moot, and we
14 know that not through supposition or through
15 speculation but because, after Mr. Gutierrez
16 obtained that judgment, he took it to state
17 court and tried to use it as a basis to compel
18 District Attorney Saenz to hand over the
19 evidence.

20 But, because of those independent
21 state law grounds grounded in Chapter 64, he
22 refused, and the Court of Criminal Appeals
23 upheld that decision for a third time.

24 That means the declaratory judgment
25 will not and did not redress his injury.

1 Gutierrez responds by first redefining
2 the scope of his injury in fact and then
3 attempting to refashion the scope of the
4 district court's narrow declaratory judgment.
5 But neither can establish jurisdiction.

6 From his operative complaint right
7 through his opening merits brief in this Court,
8 Mr. Gutierrez has consistently defined his
9 injury as the denial of access to DNA testing.
10 And his attempt in reply to refashion the scope
11 of the district court's declaratory judgment is
12 contrary to that -- the letter of that judgment
13 at J.A. 61A. And it's all -- and the CCA has
14 already rejected that.

15 Because the Court lacks jurisdiction
16 twice over, it should affirm. And I welcome the
17 Court's questions.

18 JUSTICE THOMAS: Let's say there are
19 multiple justifications for not providing the
20 DNA testing and the declaratory judgment
21 eliminates several of those.

22 Wouldn't it make it more likely that
23 the testing would be available?

24 MR. COLE: The question, Justice
25 Thomas, is whether it would get him access to

1 the evidence because the injury he's asserted
2 here and has continued to assert is denial of
3 access to the evidence. And, under state law,
4 there are several statutory grounds he has to
5 jump through to get them.

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

9 JUSTICE KAGAN: I think that that was
10 true in Reed too. I mean, if you just look at
11 page 233, which is the page before the critical
12 paragraph in Reed, it talks about how the Court
13 reasoned in denying Reed's motion, and then it
14 says that there were two reasons. One was that
15 there wasn't this adequate chain of custody, and
16 the second was that Reed didn't demonstrate that
17 he would have been acquitted if the DNA results
18 were exculpatory.

19 And, essentially, that functioned in
20 the exact same way. In other words, it's like,
21 even if the specific claim that Reed is making
22 were knocked off the table, we have a backup way
23 to defeat his request for evidence.

24 And the Court obviously thought that
25 that was irrelevant because, you know, a page

1 later, the Court makes no reference to that in
2 explaining why it is that Reed has standing.

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

5 First, Reed, of course, was a pleading
6 stage challenge. He actually at that point, as
7 you rightly point out, had several live
8 challenges to various grounds under the statute.

9 In fact, at that point, he may well
10 have prevailed on those grounds and thereby
11 eliminated the justification. In fact, those
12 grounds are currently pending live before the
13 Fifth Circuit right now.

14 JUSTICE KAGAN: Yeah, it's the same
15 thing as, you know, I think Justice Gorsuch
16 called it. There's a kind of harmlessness
17 backup. And so too there was in Reed, as the
18 Court noted.

19 MR. COLE: The difference, though,
20 Justice Kagan is, in Reed, Mr. Reed was
21 challenging all the justifications. Here,
22 Mr. Gutierrez is simply not. He has not
23 challenged in his complaint several of the
24 independent statements.

25 JUSTICE JACKSON: But -- but I don't

1 know that --

2 JUSTICE KAGAN: Yeah, I think that
3 that's a -- a -- a pretty nit-picking way to
4 read this complaint. And I think that
5 Ms. Fisher talked about this when she was up
6 there.

7 I mean, you can go through and you can
8 pick the, you know, oh, he's really challenging
9 the sentence-versus-conviction point. But, at a
10 deeper level, he's challenging the whole realm
11 of procedures that prevents him from getting
12 access to DNA testing.

13 And it's most clear -- I'm going to
14 tell you -- in paragraph 81 if I can find it --
15 because he says: By refusing to release the
16 biological evidence for testing, you've deprived
17 Gutierrez of his liberty interests in using
18 state procedures to obtain a reduction of his
19 sentence, in violation of his right to due
20 process of law.

21 So that says to me that there is -- if
22 you read the complaint with any degree of
23 generosity, there's just a claim here that a set
24 of procedures that would deprive this man in
25 these circumstances of DNA evidence is a set of

1 procedures that's violative of due process.

2 MR. COLE: Well, with respect, Justice
3 Kagan, that is not how I read the complaint.
4 That's not how the district court read the
5 complaint.

6 I mean, there's a reason the district
7 court looked at the two grounds he alleged. The
8 one ground was a challenge to the
9 preponderance-of-the-evidence standard, which is
10 too high. The second ground was this
11 sentence-versus-conviction distinction.

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

13 JUSTICE KAGAN: There are certainly
14 these specific things. I don't mean to say for
15 a moment that there aren't those specific things
16 addressed in his complaint. But there's also a
17 kind of more general argument, which is like,
18 wow, you put all these procedures together,
19 we're in a world -- and -- and we're in --
20 and -- and they somehow manage to deprive this
21 person of DNA testing, that's violative of due
22 process.

23 And, you know, it's very similar what
24 I'm saying. You've heard the argument before
25 because it's very similar to Judge Higginson's

1 argument below, where Judge Higginson is saying,
2 you know, Reed did not, like, pick apart every
3 aspect of the complaint and say exactly how this
4 aspect related to this Texas Court of Criminal
5 Appeals holding. I mean, if it had done what
6 you're suggesting, it probably would have
7 reached a different answer. It didn't do that.

8 MR. COLE: Well, two responses,
9 Justice Kagan.

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

14 The other thing is, again, in Reed,
15 those claims were live. They're still live
16 today, in fact. So there is a chance that the
17 declaratory judgment would, in fact, redress his
18 injury and get him the evidence.

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

21 JUSTICE BARRETT: So, counsel, will
22 you please --

23 JUSTICE JACKSON: Can we just -- go
24 ahead.

25 JUSTICE BARRETT: Will you please

1 explain to me how the process works in the DA's
2 office when there is a request for DA -- DNA
3 evidence made?

4 MR. COLE: Sure. So there's --
5 there's two ways, as -- and I think Justice
6 Thomas's dissent points this out in Reed.
7 There's two ways. There is the Chapter 64 way.

8 JUSTICE BARRETT: Right.

9 MR. COLE: You go and get a court to
10 force them. And then there can be -- it's
11 essentially a species of prosecutorial
12 discretion. There could be an agreement to give
13 up the evidence. But -- and I want to be very
14 careful about this because I think there was
15 some mixing and matching at the top-side
16 argument. The discretionary component is just
17 simply not at issue here. His complaint is very
18 clearly putting at issue Chapter 64, the
19 procedures.

20 And -- and this Court has said --

21 JUSTICE BARRETT: But do -- I guess my
22 question is -- I -- I understand all that. My
23 question is, understanding that Article 64
24 doesn't bind the prosecutor's exercise of
25 discretion, I mean, surely, it would make sense

1 for the prosecutor to have an eye towards
2 Article 64 knowing that that's the next stop,
3 right, and so to be making some sort of
4 judgments about whether Article 64 would permit
5 access to the evidence or not.

6 So what I'm asking is, what does the
7 prosecutor take into account? What is the
8 policy? Is Article 64 in the background as part
9 of the policy?

10 MR. COLE: The -- yes, the prosecutor
11 considers Article 64. As the Court put it in
12 Osborne, it's the state legislature who really
13 is the primary determinant of the grounds under
14 which a convict might be entitled to DNA
15 testing.

16 But, again --

17 JUSTICE JACKSON: And, here, didn't
18 the prosecutors rely on Article 64 in denying
19 this? I mean, didn't --

20 MR. COLE: Yes.

21 JUSTICE JACKSON: -- he say Article 64
22 is one of the reasons?

23 MR. COLE: Those are the -- and to put
24 it in the terms of Reed, those are the
25 justifications that led --

1 JUSTICE JACKSON: In -- in this case.

2 JUSTICE BARRETT: But in the
3 discretion -- just let me finish this one. But
4 in the -- in the discretionary phase is what
5 we're talking about, right? So, as Justice
6 Jackson just said, that was a reason that the DA
7 denied access to the evidence on track
8 prosecutor, not track court?

9 MR. COLE: So there's no evidence in
10 the record about that discretionary phase
11 because, again, that is just not at issue here.
12 And I want -- it's not put at issue in the
13 complaint. He's not saying it's a procedural
14 due process violation for the prosecute to --
15 prosecutor to exercise or not discretion. This
16 is wholly bound up in Chapter 64.

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

20 JUSTICE BARRETT: So what did the
21 prosecutor consider in denying the evidence?

22 MR. COLE: Well, we have the
23 justifications because we've had them since
24 2011.

25 JUSTICE BARRETT: Okay.

1 MR. COLE: We have -- again, we have
2 the identity factor, which the Court of Criminal
3 Appeals ruled against him. We have the delay
4 factor. And we have the alternative
5 conclusions.

6 JUSTICE BARRETT: But those are
7 looking towards 64?

8 MR. COLE: Those are in 64, yes,
9 again, because that's what he's challenging in
10 this case.

11 JUSTICE JACKSON: All right.

12 JUSTICE BARRETT: Right. But just to
13 be clear, you're saying -- you're not talking --
14 I don't want to talk about track court. I just
15 want to talk about track prosecutor. And what
16 you're saying is that we have evidence of what
17 the prosecutor -- the reason why the prosecutor
18 denied access to the evidence?

19 MR. COLE: The evidence in the context
20 of Chapter 64, yes. Those are the reasons that
21 have been argued.

22 JUSTICE BARRETT: Okay. But are you
23 talking about track court or track prosecutor?

24 MR. COLE: So, if track prosecutor
25 means the -- the internal deliberations in the

1 office, of course, there's no evidence of that
2 because it's not relevant to this case. He's
3 not challenging the discretion.

4 JUSTICE JACKSON: So, Mr. --

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

7 JUSTICE BARRETT: Sure.

8 JUSTICE SOTOMAYOR: There's always a
9 discretion of a prosecutor to do this and
10 sometimes it happens outside of formal process.
11 But we're not -- you're -- you're -- am I taking
12 you to be saying that under Article 64, if --
13 don't argue that they haven't -- if they met all
14 of the prerequisites, would you have a right to
15 say no to the court, I'm not going to give the
16 evidence?

17 MR. COLE: Of course not, Justice
18 Sotomayor. If -- if the convicting court orders
19 the evidence, of course, we would provide that
20 evidence.

21 JUSTICE SOTOMAYOR: So, if they met
22 Article 64, you would feel bound to follow it,
23 correct?

24 MR. COLE: Oh, of course. The court
25 would --

1 JUSTICE SOTOMAYOR: All right.

2 JUSTICE BARRETT: I -- I think you're
3 misunderstanding Justice Sotomayor. You might
4 be.

5 I -- not if the Court orders it.
6 Obviously, the DA's going to comply with a court
7 order. If the DA concluded, yeah, you know, you
8 satisfy everything about Article 64 and if we
9 went to court, in my judgment, it's pretty
10 evident that the trial court would give you the
11 evidence. In that instance, would you turn over
12 the evidence?

13 MR. COLE: I suspect so. I mean,
14 again, that's not at issue.

15 JUSTICE GORSUCH: If I understand it,
16 though, Chapter 64 has a lot of things in it,
17 right?

18 MR. COLE: Yes, Your Honor.

19 JUSTICE GORSUCH: And the one thing
20 that's been challenged is whether it applies to
21 the death penalty stage.

22 MR. COLE: Quite right, Justice
23 Gorsuch.

24 JUSTICE GORSUCH: All right. And so,
25 getting past that hurdle, you still have the

1 other independent grounds. They're in Chapter
2 64 too.

3 MR. COLE: Quite right.

4 JUSTICE GORSUCH: Right? And so I
5 just want to make sure I understand the nature
6 of what you're saying. You're saying an
7 independent prosecutor making his or her own
8 decision would take into account, of course,
9 if -- if a court were to hold that the -- that
10 it applies to death penalty proceedings, he'd
11 abide by that, but he'd still have independent
12 grounds that have been litigated and resolved on
13 which to deny the request?

14 MR. COLE: That's correct in this
15 case.

16 JUSTICE GORSUCH: In this case.

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

19 JUSTICE GORSUCH: Yeah.

20 MR. COLE: This prosecutor is a public
21 official. He follows state and federal court
22 orders.

23 JUSTICE GORSUCH: Of course.

24 MR. COLE: And we are not --

25 JUSTICE GORSUCH: Yeah.

1 JUSTICE JACKSON: Mr. Cole --

2 JUSTICE SOTOMAYOR: Now, counsel --

3 JUSTICE JACKSON: -- can I ask you --
4 because I'm just trying to understand the theory
5 of redressability here because I -- I think I
6 have a different concept and I'm just wanting to
7 make sure that I understand yours.

8 Why isn't it enough for redressability
9 purposes that a declaratory judgment would
10 eliminate some of the justifications that a
11 prosecutor has set forward as the reason why he
12 didn't -- denied the evidence?

13 I mean, traditionally, traditionally,
14 I would think, the way I conceive of
15 redressability, you might have an argument if
16 the declaratory judgment didn't eliminate any of
17 them. We'd be sort of ships passing in the
18 night. The prosecutor says, here are my
19 justifications to include this aspect of Article
20 64 or whatever. And the person is asking for a
21 declaratory judgment that doesn't speak to that
22 at all. Fine. You might say no redressability.

23 But what you seem to be saying here is
24 no, we could have a declaratory judgment that
25 speaks to some of the justifications that the

1 prosecutor has put forward for denying the
2 evidence, but unless we have a situation in
3 which there is no other justification that could
4 possibly, you know, support this, you have no
5 redressability.

6 And I don't understand that piece of
7 it.

8 MR. COLE: So here's why, Justice
9 Jackson. It turns on the injury he's asserting.
10 The injury he's asserting is denial of the
11 access to the evidence. That's binary.

12 JUSTICE JACKSON: But that's not the
13 way they --

14 MR. COLE: Either you get it or your
15 don't.

16 JUSTICE JACKSON: But that's not the
17 way he has, at least in the briefing,
18 articulated it. I thought the injury was
19 consideration of his access to the evidence
20 using an unconstitutional process.

21 MR. COLE: That is his constitutional
22 claim, but his injury -- and I would direct you
23 to paragraph 81 of his operative complaint at
24 Joint Appendix 457A. I think this nicely lays
25 that out because he says at the beginning, by

1 refusing to release the biological evidence for
2 testing. So that's the conduct of the defendant
3 that he wants to remedy through the prosecutor.

4 JUSTICE JACKSON: Yeah, but in a
5 discretionary world, if that's your concept of
6 injury, you would never have discretion -- you'd
7 never have redressability because the prosecutor
8 could always save the very narrow circumstance
9 in which the court, I guess, orders them to do
10 that very thing. They could always say, well, I
11 wouldn't give it to you anyway, no matter what.

12 MR. COLE: So this isn't about
13 discretion, and let me go to the redressability
14 component specifically within declaratory
15 judgments. This Court said in Brackeen that
16 what saves declaratory judgments from the
17 advisory opinion problem is that they are
18 afforded preclusive effect in later imminent
19 litigation. So, really, the -- the redress he
20 needs through this is that the declaratory
21 judgment will be afforded --

22 JUSTICE JACKSON: Yes, but Brackeen
23 was talking about parties versus non-parties. I
24 guess what I'm really, really worried about is
25 that this case, which seems very small and

1 narrow and about, you know, a particular guy
2 and -- and DNA testing and the interpretation of
3 this statute, could actually have major
4 implications for how we understand standing
5 because redressability, which has traditionally
6 not been where all the action is in terms of our
7 standing analysis, it has not been a major
8 hurdle for the Court to have to get over, under
9 your view comes -- comes out to be a situation
10 in which the Court has to essentially decide all
11 these other issues about whether or not the
12 person could ever get relief in order to
13 determine whether or not this claim is
14 redressable.

15 MR. COLE: I don't think so, Justice
16 Jackson, and here's why. This goes not to some
17 sort of discretion. This is not like we're
18 saying the district attorney -- this case
19 concerns the district attorney pulling ideas out
20 of thin air.

21 Again, in the context of a Chapter 64
22 proceeding --

23 JUSTICE JACKSON: Let me just ask you
24 this hypothetical. If there was a
25 statute-of-limitations problem, could that be

1 used by the defendant in this circumstance,
2 the -- the -- the state, the state attorney, to
3 argue no redressability?

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

7 JUSTICE JACKSON: Make it a -- no, I
8 mean a state -- a state law justifica- -- the
9 state has a statute of limitations, and that's
10 the problem or one of the problems. He includes
11 statute of limitations as a part of the list of
12 things as to why this person is not going to get
13 the testing.

14 Are you saying that that
15 statute-of-limitations question could be
16 imported into the standing analysis as a grounds
17 for lack of redressability?

18 MR. COLE: So, in Reed, if it is a
19 justification -- and, again, the -- the
20 declaratory judgment has to eliminate the
21 justification.

22 JUSTICE JACKSON: I understand.

23 MR. COLE: Then, yes. Then, yes.

24 JUSTICE JACKSON: Yes. All right.

25 MR. COLE: If that is a state law

1 ground that is a justification, then --

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

6 MR. COLE: So there is a finite set
7 of -- of facts here. This is not like they're
8 going to be coming out of nowhere. It's in the
9 statute. It's in the common law. Again, this
10 is Chapter 64. So it's not like he's going to
11 be coming up with a bunch of obscure things that
12 he'll appeal.

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

15 MR. COLE: Mm-hmm.

16 JUSTICE JACKSON: You're -- you're
17 setting up redressability to require the
18 exclusion of any other ground for relief.

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

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

25 JUSTICE JACKSON: Yeah.

1 MR. COLE: He has to get the evidence
2 or not.

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

5 MR. COLE: Sure.

6 JUSTICE KAVANAUGH: I mean, I think
7 some of your answers are really collapsing the
8 merits into redressability, but -- so I think
9 that's a concern.

10 But I understood the complaint and the
11 thrust of the argument to be the denial of fair
12 procedures with respect to the underlying right.

13 And we've long said -- I mean, Justice
14 Scalia's opinion in Lujan. If this case is
15 about fair procedures, Justice Scalia's opinion
16 in Lujan said: There's much truth to the
17 assertion that procedural rights are special.
18 The person who has been accorded a procedural
19 right to protect his concrete interests can
20 assert that right without meeting all the normal
21 standards for redressability and immediacy.

22 And I think procedural rights have
23 always been different because, if you could just
24 say, well, who cares about the procedures,
25 they're not going to win anyway, you're not

1 going to be able to get into court to argue for
2 the fair procedures. And that seems to be on
3 point here. Tell me why it's not.

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

8 JUSTICE KAVANAUGH: No, you've said --

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

10 JUSTICE KAVANAUGH: -- you've said
11 over and over again -- I've read the complaint.
12 He -- you've said over and over again that he's
13 complaining about the denial of access to the
14 evidence. That is the ultimate goal, obviously.

15 But the complaint is that Chapter 64,
16 as interpreted, is unconstitutional and a
17 violation of procedural due process to the
18 extent it only allows you to challenge your
19 conviction for the underlying crime and not your
20 ineligibility for the death penalty.

21 The argument is that that violates
22 procedural due process. That may be a winning
23 argument, it may be a losing argument, but
24 that's a down-the-road argument, it strikes me.
25 But that's the challenge.

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

5 JUSTICE KAVANAUGH: Well, you
6 always -- this is, again, in the same footnote
7 in Justice Scalia's opinion, in the whole
8 opinion. You always have a connected
9 substantive interest at the end to stop the
10 project, for example, in the environmental case.

11 But your argument is that they didn't
12 comply with the procedures in order to stop the
13 project. And you can't come in and say: Oh,
14 the project's going forward anyway, so who cares
15 about the procedures, you're not -- you don't
16 get redressability.

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

19 MR. COLE: Well, again, I don't think
20 his injury is -- is the procedural point. I
21 just don't view this as a procedural injury case
22 in the same way that say an APA case would when
23 there's a right to notice and comment or
24 something like that.

25 Again, I go -- I -- I would just go

1 back to his complaint and his -- his theory.

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

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

4 JUSTICE KAVANAUGH: Can I ask one --
5 one more question just to make sure. And I
6 don't think you're arguing this, but I just want
7 to make sure.

8 Are you arguing that if you said we
9 will never turn over the DNA evidence, that that
10 declaration by you, the defendant, would defeat
11 redressability?

12 MR. COLE: No, of course not, because,
13 again, the question is whether the declaratory
14 judgment could then be taken into state court
15 and accorded preclusive effect. The Court --
16 again, the Court here under Chapter 64 is the
17 one who would order that. And so, obviously, we
18 would -- we would abide by the Court's order.

19 JUSTICE KAVANAUGH: By a court order.
20 Are you saying we will never -- if we say we
21 will never comply absent a future court order,
22 that that defeats redressability now for this
23 kind of suit? Are you arguing that?

24 MR. COLE: I guess I'm not sure of the
25 context. You're saying if -- if he just makes a

1 declaration that --

2 JUSTICE KAVANAUGH: Yeah. We will
3 never exercise our discretion to turn it over
4 absent a court order. We will never do it
5 absent a court order down the road. But there
6 is no court order yet, so, therefore, you
7 have -- you, federal court, right now do not --
8 there's -- it's not a redressable case.

9 MR. COLE: So I think the distinction
10 here is that --

11 JUSTICE KAVANAUGH: I think you are
12 arguing that.

13 MR. COLE: So -- but the distinction
14 here, he's not challenging discretion. So this
15 is not a case about whether the -- the district
16 attorney exercises discretion or not. This is
17 purely a question under Chapter 64 whether he
18 can be compelled to hand over the evidence,
19 again, through the preclusive effect of a
20 declaratory --

21 JUSTICE KAVANAUGH: That's a fair -- I
22 mean, the discretion is -- that's a fair point.
23 And it's the oddity or awkwardness of -- of the
24 prosecutor as -- as defendant.

25 MR. COLE: Yeah.

1 JUSTICE KAVANAUGH: I'll -- I'll stop
2 there.

3 JUSTICE SOTOMAYOR: Counsel, maybe
4 this is an unfair question to you. You can push
5 back, okay?

6 We've now spent so much time on
7 whether you should test or not. And at one
8 point, you decided that you wouldn't object to
9 doing it, but now you're fighting it tooth and
10 nail.

11 It seems odd to be fighting it tooth
12 and nail when they have more evidence about the
13 potential culpability of Mr. Cuellar, including
14 that he failed the polygraph that was an
15 affirmative misstatement earlier in the case
16 that he had passed it.

17 They now have evidence that he had
18 money or was tied to money. It would seem that
19 somehow we're fighting a legal issue that really
20 is less legal than it is -- don't you want to
21 know you got -- you're -- you're convicting the
22 right person for the right thing? I mean, he's
23 going to spend time in jail no matter what
24 because he admits to being at least an accessory
25 to the robbery or a part of the robbery.

1 But at what point does this legal
2 maneuvering become counterproductive to the
3 state? If you -- if you are sure of your
4 conviction and your theory, why not do the
5 testing?

6 MR. COLE: So a couple of responses,
7 Justice -- Justice Sotomayor.

8 The first is that, again, the Texas
9 legislature has set the requirements for DNA
10 testing, and --

11 JUSTICE SOTOMAYOR: But you told me
12 earlier that there's always prosecutorial
13 discretion outside of Article 64. I'm not in
14 Article 64. I'm in: At what point do you
15 exercise your discretion? Because you have it.

16 MR. COLE: So a couple of responses.

17 So, first, they have presented some of
18 this evidence already to the CCA in a successive
19 habeas petition, which was rejected.

20 JUSTICE SOTOMAYOR: And part of their
21 due process argument is that the court is
22 limiting itself to the record evidence and not
23 looking at what was developed later and that
24 that's a part of the due process.

25 MR. COLE: And if I might address that

1 piece because I think that is important. They
2 have not challenged that record facts
3 requirement. Other plaintiffs have. Mr. Reed
4 is challenging that currently in the Fifth
5 Circuit.

6 JUSTICE SOTOMAYOR: Well, they
7 could -- they could go back to the district
8 court under Rule 60(b) and argue that you're
9 still not abiding by due process and they should
10 reopen. So they could do that.

11 MR. COLE: It's hard to see how that
12 would redress the injury because, again, they --
13 they did not prevail on final judgment on
14 their -- their challenge to the preponderance of
15 the evidence, but let me --

16 JUSTICE SOTOMAYOR: Well, now that you
17 know that they can challenge the death penalty
18 and that means that they can prove they were
19 actually innocent of the death penalty, you
20 might -- that might have been a new circumstance
21 to justify them going back to the district court
22 and saying: Look, they're doing what we told
23 you they were doing. They're relying on only
24 trial record evidence, but that's a violation of
25 due process. They should look at the new

1 evidence too.

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

5 JUSTICE SOTOMAYOR: Well, but the
6 point is that it's only a possibility, but
7 that's all they need to have standing.

8 MR. COLE: Let me go to your --
9 your -- your main thrust of your argument --

10 JUSTICE SOTOMAYOR: Yes.

11 MR. COLE: -- or your -- your
12 question, though, so we don't get sidetracked on
13 that.

14 Mr. Gutierrez had the opportunity to
15 do testing at the beginning of trial. It was
16 made available to him. And the Court of
17 Criminal Appeals said he made a strategic choice
18 not to test the evidence.

19 You point to the 2015 period where
20 there was this -- this three-year period
21 where -- and this is at -- I would direct you to
22 J.A. --

23 JUSTICE SOTOMAYOR: What he did at
24 trial was already present in 2015, and the
25 prosecutor agreed to test then.

1 MR. COLE: And -- and he did not take
2 advantage of that there. But the other thing is
3 the Court of Criminal Appeals, as Justice
4 Gorsuch was pointing at the -- at the top-side
5 argument, is that they've already said that even
6 if the evidence were exculpatory, it would not
7 change his sentence because, again, he -- his
8 statement puts him in the room.

9 JUSTICE SOTOMAYOR: That's if they
10 believe -- he's been complaining that that
11 statement that put him in the room was coerced
12 because he had --

13 MR. COLE: And no court --

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

17 MR. COLE: And no court in the country
18 has ever accepted that theory. In fact, the
19 trial court at the presuppression hearing had an
20 evidentiary hearing where she had Mr. Gutierrez
21 and she had the officer, and they --

22 JUSTICE SOTOMAYOR: But, if they had
23 Cuellar being more the actor, it might change
24 that calculus.

25 MR. COLE: I don't see how it would

1 unsettle the -- the finding that this was a
2 voluntary confession. I mean, again, the
3 baseline, the best he's got, is that he was
4 there and he was watching his friend stab Ms. --
5 Ms. Harrison while he was robbing her.
6 That's -- that's the baseline.

7 You asked, I think, at the top side
8 would Cuellar's D -- DNA be there. But, as
9 Justice Alito pointed out, he was living there.
10 He was the nephew.

11 JUSTICE SOTOMAYOR: But, if it was --

12 MR. COLE: His DNA was probably there.

13 JUSTICE SOTOMAYOR: --- in under her
14 fingernails and that was his hair, that would be
15 a very different case.

16 MR. COLE: Oh, his hair wouldn't be
17 very surprising because he found her and he was
18 apparently very drunk when he found her and so
19 was not very careful. He was touching the body.
20 He got blood all over him.

21 The main point, though, is the Court
22 of Criminal Appeals has three times already
23 held, even if you assume the evidence he wanted
24 to test, which, again, this is a DNA testing
25 case, even if you were to assume it's

1 exculpatory, it would not change the sentence
2 because he is eligible for the death penalty
3 under Enmund/Tison.

4 JUSTICE GORSUCH: Mr. Cole, when we --
5 when we assess redressability in procedural due
6 process cases, Justice Kavanaugh is absolutely
7 right that that's a -- that's a -- that's a
8 different animal. Why isn't this a procedural
9 due process claim that the procedures that the
10 TCCA used were unfair?

11 I mean, I -- I understand your point
12 is it's not a procedural claim; it's a
13 substantive one. He wants access to this
14 evidence. But you've heard some points in
15 the -- in the complaint pointed out, paragraph
16 81, for example, and I just want to get your
17 reactions.

18 MR. COLE: Yeah, I'd be happy to,
19 Justice Gorsuch. So the -- I understand him to
20 say: I'm not able to access the -- the habeas
21 right under 11.071. That seems to me to be
22 collapsing the things that this Court decoupled
23 in Skinner. Justice Ginsburg's opinion for the
24 Court says no, no, no, we only focus on the
25 Article 64 procedures. We separate -- separate

1 out the habeas issues so that we avoid the Heck
2 bar.

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

6 JUSTICE KAGAN: No, no, no. I mean, I
7 think that the question is why don't you -- a
8 fair reading of this complaint is you look at
9 the body of procedures that are in Chapter 64
10 and they're preventing me from getting testing
11 at this moment in time.

12 And so that is essentially a
13 procedural claim. I mean, of course, he wants
14 the testing. All complaints about procedures
15 are because you want something that the
16 procedures are going to lead to.

17 But, in chap -- in paragraph 81 and
18 other places, it's really clear. It's like the
19 body of procedures here -- and he mentions some
20 of them specifically. The body of procedures
21 here are preventing me from getting testing.
22 That's a violation of due process.

23 MR. COLE: So I think he does have to
24 identify those procedures, though. And he's
25 only identified a couple of them. That's the

1 main problem. He has not challenged all the
2 procedures that he needs to to get the remedy
3 for the injury.

4 Other plaintiffs may well have done
5 that, and some -- some, including Mr. Reed, are
6 challenging those today. It's just I think some
7 of the idiosyncratic choices of this particular
8 litigant in this case that's -- that's --

9 JUSTICE GORSUCH: Can -- can you --
10 that's what I want to get at, though. I mean,
11 that -- it's one thing to say I -- I don't know
12 whether I'm entitled to it or not, but I didn't
13 get a fair day in court. Got it. Another thing
14 to say I'm entitled to this evidence. Okay?
15 Those are two different injuries.

16 What's your best evidence that this
17 case, this complaint, should be read in the
18 second category?

19 MR. COLE: Well, again, I would go
20 back to several cites that I was reading off
21 earlier from his complaint where he says he was
22 requesting an order declaring that defendants'
23 withholding of the evidence -- again, it's all
24 about access to the evidence. J.A. 430, J.A.
25 432A, J.A. 452, 453, 457. It's all over his

1 complaint. That is what he's alleging.

2 JUSTICE JACKSON: What about 456,
3 asserting that -- at least according to counsel
4 on the other side's representations, he was
5 asserting that the CCA's construction of Chapter
6 64 prevents Gutierrez from establishing that
7 he's ineligible for the death penalty?

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas, anything further?

16 JUSTICE THOMAS: Just so it's clear,
17 how does the Chapter 64 proceeding work? How
18 does it begin, and who adjudicates it?

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

25 JUSTICE THOMAS: So the oddity here is

1 that we are not dealing with a direct appeal of
2 a denial from the TCCA?

3 MR. COLE: That's right. And he could
4 have done that. He could have filed a cert
5 petition under 28 U.S.C. 1257(a).

6 JUSTICE THOMAS: Now how does the
7 discretionary process work?

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

10 JUSTICE THOMAS: I understand that,
11 but how would it normally work?

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

21 JUSTICE THOMAS: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 JUSTICE ALITO: I take -- I take Reed
24 at -- at face value, and I understand Reed to
25 say that there was redressability there because

1 there was a chance that a decision would lead
2 the district attorney to turn over the DNA
3 evidence. Is that correct?

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

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

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

1 It's really hard for me to see for
2 that reason how a decision on this distinction
3 between death eligibility and guilt could make a
4 difference in the -- in the district attorney's
5 decision.

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

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

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

21 MR. COLE: Three people in the overall
22 scheme, yes.

23 JUSTICE ALITO: In the overall scheme.
24 And -- and where did that come from? That came
25 from -- did it come from any place other than

1 Mr. Gutierrez's confession?

2 MR. COLE: It was his confession.
3 There was also -- these weren't entered in
4 trial, but they came in in the Article 64
5 proceeding.

6 JUSTICE ALITO: Yeah, but as far as
7 the evidence at trial was concerned, the idea
8 that there were only three people came from
9 Mr. Gutierrez himself?

10 MR. COLE: That's right.

11 JUSTICE ALITO: So establishing that
12 more than three people were involved in some way
13 in this would only affect the portion of
14 Mr. Gutierrez's confession that said that only
15 three people were involved?

16 MR. COLE: Yes.

17 JUSTICE ALITO: Okay. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 Justice Kagan?

21 JUSTICE KAGAN: I want to make sure,
22 Mr. Cole, I -- I understand your distinction of
23 Reed, and as you said it to Justice Alito, it is
24 that there is this backup argument that even if
25 the evidence were exculpatory, it's not going to

1 avail him anything.

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

11 MR. COLE: Mm-hmm.

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

17 So what are we to make of that? Did
18 we just forget about it between page 233 and
19 234?

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

1 it. And so I think the court rightly said,
2 yeah, it would -- it would eliminate those
3 justifications.

4 The difference here is Mr. Gutierrez
5 has not done that.

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

18 So there is a primary argument that
19 focuses on one procedure, but there's also a
20 sort of back -- you know, broad claim that if at
21 this point in these circumstances for this
22 person the Chapter 64 procedures are preventing
23 him from getting testing, that's a violation of
24 due process.

25 MR. COLE: So I guess probably the --

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

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

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

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

19 JUSTICE KAGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: Just a couple.

24 You mentioned that the declaratory
25 judgment was taken to the state court and didn't

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

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

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

8 MR. COLE: I --

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

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

21 JUSTICE KAVANAUGH: Well, it might
22 have been procedurally improper, but the state
23 said we're okay with the DNA testing, correct?

24 MR. COLE: Well, so I would direct you
25 to J.A. 731 to 732. The state said: We're not

1 going to agree to it, but we're not going to
2 oppose it.

3 JUSTICE KAVANAUGH: Okay.

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

7 JUSTICE KAVANAUGH: Okay. And then --
8 that's it. Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 Justice Jackson?

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

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

23 JUSTICE JACKSON: As you've stated it.
24 Would you concede that if the plaintiff stated
25 the injury in a more granular way, if they said

1 the injury was to -- the injury here was that
2 Chapter 64 is procedurally infirm and it is
3 preventing me from establishing what I need to
4 establish in order to get this relief, if that's
5 the statement of the injury, what --

6 MR. COLE: I --

7 JUSTICE JACKSON: -- what result?

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

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

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

22 JUSTICE JACKSON: And to the extent
23 the -- to -- to -- to the extent that the
24 defendant is relying on that provision of law to
25 ultimately deny me relief, what I'm saying is I

1 see you, defendant, relying on this provision of
2 law, but that provision of law has a procedural
3 due process problem.

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

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

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

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

23 JUSTICE JACKSON: So you agree that
24 you -- that you're reading Reed to establish a
25 new test. The test is that you have to

1 eliminate all other avenues of relief?

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

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Rebuttal, Ms. Fisher?

9 REBUTTAL ARGUMENT OF ANNE E. FISHER

10 ON BEHALF OF THE PETITIONER

11 MS. FISHER: Thank you, Your Honor.

12 Very briefly.

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

18 What has changed is the Respondents'
19 reason why he doesn't have standing. And so
20 these new issues that came up, like this -- the
21 point of the in the alternative holding was
22 raised for the first time by Respondents in
23 their 28(j) letter in the Fifth Circuit after
24 all the briefing has been completed. And they
25 raise these two new supposedly independent

1 grounds in their merits brief for the very first
2 time.

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

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

19 If you follow that new rule that the
20 Fifth Circuit imposed and basically force a
21 plaintiff to prove that they're going to win the
22 case just to show that it's redressable, that
23 would turn Article III standing on its head.

24 And with that, I -- I rest and thank
25 this Court.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 The case is submitted.

4 (Whereupon, at 11:39 a.m., the case
5 was submitted.)

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