No. 21–442

IN THE

Supreme Court of the United States

RODNEY REED

Petitioner,

-against-

BRYAN GOERTZ,

Respondent.

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

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Founded in 1940 by Justice Thurgood Marshall, the NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights. LDF has long been concerned about the pernicious influence of race on the administration of criminal justice and has a long history of challenging the unconstitutional imposition of the death penalty. LDF has served as counsel of record or filed amicus briefs in numerous capital cases, including *Furman v. Georgia*, 408 U.S. 238 (1972); *Coker v. Georgia*, 433 U.S. 584 (1977); *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Banks v. Dretke*, 540 U.S. 668 (2004); *Roper v. Simmons*, 543 U.S. 551 (2005); and *Buck v. Davis*, 137 S. Ct. 759 (2017).

Consistent with its opposition to the discriminatory and unreliable administration of justice, including in the imposition of the death penalty, LDF submits this amicus brief in support of Rodney Reed.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* certify that *Amicus* and their counsel authored this brief in its entirety, and no party or its counsel, nor any person or entity other than *Amicus* or their counsel, made a monetary contribution to this brief's preparation or submission. All parties have provided written consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Rodney Reed is likely innocent of the crime that sent him to death row. The State's key piece of evidence against Mr. Reed, a Black man, was the presence of his sperm inside the body of Stacey Stites—the white victim in this case. During trial, the defense presented evidence that Mr. Reed and Ms. Stites were romantically involved. Nevertheless, in a cross-racial capital rape case, the white prosecutors argued to the all-white jury that the prospect of Ms. Stites engaging in a consensual relationship with "this guy" was "ludicrous" and "preposterous." 56 RR 61:24–62:9.

Far from being "preposterous," there is considerable evidence that the two were romantically involved and that Ms. Stites's fiancé, Jimmy Fennell, a local police officer, was the actual perpetrator. When Mr. Fennell was later sent to prison for kidnapping and sexually assaulting another woman while on duty, he told a member of the Aryan brotherhood, "I had to kill my n***r-loving fiancé[e]'" who "had been sleeping around with a black man." *Reed v. Texas*, 140 S. Ct. 686, 688 (2020) (statement of Sotomayor, J., respecting the denial of certiorari).

In cases like Mr. Reed's, where racial bias or other arbitrary factors undermine the reliability of a conviction, DNA evidence is a critical means of remedying wrongful convictions. This Court has recognized that "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to

identify the guilty." *Dist. Att'y's Off. for Third Jud. Dist. v. Osborne,* 557 U.S. 52, 55 (2009). The overwhelming majority of incarcerated persons exonerated through DNA evidence since its introduction in 1989 have been people of color, and primarily Black men.

In *Skinner v. Switzer,* the Court held that those denied post-conviction DNA testing may turn to federal courts under 42 U.S.C. § 1983 to plead that "the governing state law denies [them] procedural due process," 562 U.S. 521, 525 (2011), solidifying an important safeguard for the wrongfully convicted by ensuring fair access to scientific evidence where state procedures fall short. The court below eroded that safeguard. By holding that the statute of limitations for *Switzer* claims begins to run the moment that the state trial court denies DNA testing—despite any ongoing appeal—the Fifth Circuit created an illogical barrier to relief that undermined the "unparalleled ability," *Osborne*, 557 U.S. at 55, of DNA testing to identify wrongful convictions. The decision will disproportionately harm Black people and other people of color, who are more likely to be wrongfully convicted and must rely on access to DNA evidence to prove their innocence.

The Seventh Circuit's decision in *Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006), whose reasoning the Fifth Circuit adopted in the decision below, is instructive. In *Savory*, the Seventh Circuit refused even to consider Mr. Savory's challenge to a state's post-conviction DNA procedures based on its

calculation of the statute of limitations. The result was that Mr. Savory was denied an opportunity to show that the state's procedures were fundamentally unfair, and that access to DNA evidence would establish he was innocent of the crime for which he had been sentenced to 40–80 years in prison. It was not until 10 years later that Mr. Savory was finally able to return to state court and convince a county circuit court judge to order DNA testing that exonerated him. Justice was long delayed and nearly denied.

For Mr. Reed, the value of DNA evidence is clear. He has requested testing of items found at the scene of the crime, including clothing worn by Ms. Stites on the day of her death, a name tag left on her body likely touched only by her killer, and her belt—the uncontested murder weapon. None of those items have been tested for DNA evidence, a shortcoming that forensic experts have found "troubling." *Ex Parte Reed*, 271 S.W.3d 698, 744 (Tex. Crim. App. 2008). Mr. Reed seeks an opportunity to show that the state procedures that have denied him access to that evidence are inconsistent with basic principles of due process. The Fifth Circuit's unsound accrual determination denies him that opportunity.

The harm is not only to Mr. Reed. By leaving serious questions about Ms. Stites's murder unanswered—and leaving in place a death sentence that appears influenced by racial discrimination—the decision below risks "poison[ing] public confidence in the judicial process," and injuring "the law as an

institution," as well as "the community at large." *Buck v. Davis*, 137 S. Ct. 759, 779 (2017) (cleaned up).

ARGUMENT

I. Empirical Evidence Demonstrates the Nexus Between Racial Bias and Wrongful Convictions.

Racial discrimination is a significant factor contributing to wrongful convictions in both capital and non-capital cases. This "arbitrary and capricious" factor, *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976), undermines the presumption of innocence, perverts the prism through which evidence is assessed, and distorts rational inferences.[2] Of the 185 people exonerated from death row[3] since the death

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[2] For every 8.3 people who have been executed post-*Gregg v. Georgia*, 428 U.S. 153 (1976), one person has been identified as innocent and exonerated. *See* DEATH PENALTY INFO. CTR., *DPIC Adds Eleven Cases to Innocence List, Bringing National Death-Row Exoneration Total to 185*, (Feb. 18. 2021), available at https://deathpenaltyinfo.org/news/dpic-adds-eleven-cases-to-innocence-list-bringing-national-death-row-exoneration-total-to-185. As researchers with the National Registry of Exonerations have explained, death sentences have a far higher rate of exoneration than other crimes, and we have more detailed data on them than any other category of criminal sentences. Samuel Gross, *et al.*, *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*. 111 (20) PROC. NAT'L ACAD. SCI., 7230, 7230 (2014).

[3] DEATH PENALTY INFO. CTR., *DPIC Special Report: The Innocence Epidemic*, 1, 21 (February 18, 2021), available at https://documents.deathpenaltyinfo.org/pdf/The-Innocence-

penalty was reinstated after *Gregg v. Georgia*, 428 U.S. 153 (1976), 53 percent have been Black.[4]

The risk that the arbitrary influence of race diminishes the reliability of a conviction is compounded in cases involving murder and sexual assault.[5] Half of all defendants exonerated for murder are Black, meaning that, relative to their share of the general population, innocent Black people are seven times more likely to be wrongfully convicted of murder.[6] A Black prisoner serving time for sexual assault is three-and-a-half times more likely to be innocent than a white person convicted of the same crime.[7] As outlined below, each of those stark disparities is even greater when the victim or accuser is white.[8]

Epidemic.pdf (reporting on a comprehensive study of state, federal, and military death sentences imposed in the United States since *Furman v. Georgia*, 408 U.S. 238, 239 (1972)).

[4] *See* DEATH PENALTY INFO. CTR., *Exonerations by Race*, available at https://deathpenaltyinfo.org/policy-issues/innocence/exonerations-by-race (last visited May 23, 2022). Notably, Black people have comprised approximately 13 percent of the United States population over that time.

[5] Niraj Chokshi, *Black People More Likely to Be Wrongfully Convicted of Murder, Study Shows,* N.Y. TIMES, Mar. 7, 2017.

[6] Samuel R. Gross, et al., *Race and Wrongful Convictions in the United States*, NAT'L REGISTRY OF EXONERATIONS 3 (2017), available at https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf (showing that 380 out of 782 murder exonerees are Black, despite Black people making up just 13 percent of the population of the United States).

[7] *Id*. at 11.

[8] *Id*. at 4–5.

Racial bias also shapes the appellate and post-conviction process. Even among those who eventually prove their innocence, "post sentencing proceedings exacerbate, rather than remediate, the problems of arbitrariness identified at earlier stages of the criminal proceedings."[9] As a result, it takes innocent Black exonerees on death row about 45 percent longer to secure relief than innocent white people, a disparity that holds true across different types of convictions.[10] Outside of the capital context, Black people "wrongly convicted of murder [in cases where the death penalty is not imposed] spend an average of three more years in prison than white people."[11] In sexual assault cases, Black exonerees spend an "average of almost four-and-a-half years longer in prison before exonerations."[12] Of recent exonerees for whom the postconviction process

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[9] Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.C.L.L. REV. 585, 588 (2020).

[10] Daniele Selby, *8 Facts You Should Know About Racial Injustice in the Criminal Legal System*, THE INNOCENCE PROJECT (Feb. 5, 2021), available at https://innocenceproject.org/facts-racial-discrimination-justice-system-wrongful-conviction-black-history-month/https://innocenceproject.org/facts-racial-discrimination-justice-system-wrongful-conviction-black-history-month.

[11] *Race and Wrongful Convictions in the United States*, *supra* note 6, at 7. *See also,* Ngozi Ndulue, *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty,* DEATH PENALTY INFO. CTR. 1, 48 (September 2020) ("Defendants of color are over-represented among those wrongfully convicted of capital murder, and they spend on average four years longer on death row than white defendants before being exonerated.'") (Internal citations omitted.)

[12] *Race and Wrongful Convictions in the United States*, *supra* note 6, at 14.

took thirty or more years, twelve out of thirteen were Black.[13] As the National Registry of Exonerations concluded in a leading study, Black defendants "faced greater resistance to exoneration, even in cases in which they are ultimately released."[14]

II. Mr. Reed's Trial Illustrates the Nexus Between Racial Bias and Wrongful Convictions.

Rodney Reed's case is representative of the role that racial discrimination can play in securing wrongful convictions. Mr. Reed, a Black man, was tried for the rape and murder of nineteen-year-old Stacey Stites, a white woman. In the weeks following Ms. Stites's death, the police identified a suspect: Jimmy Fennell. Mr. Fennell, who is white, was Ms. Stites's fiancé at the time of her death and a police officer in the small southern town. When Ms. Stites was murdered, the evidence against Jimmy Fennell was substantial: Mr. Fennell was the last known person to see Ms. Stites alive; polygraph tests indicated that he was deceptive when denying strangling Ms. Stites; his account of the night of the murder changed substantially between the immediate aftermath and trial; and he repeatedly refused to cooperate in the investigation of his fiancée's death,

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[13] *Special Report: The Innocence Epidemic*, *supra* note 3, at 23.

[14] *Race and Wrongful Convictions in the United States*, *supra* note 6, at 15.

invoking the Fifth Amendment.[15] And, in the years that have followed, multiple law enforcement officers have come forward to reveal still more troubling evidence known to them throughout the investigation—including that a month before the murder, Mr. Fennell complained that Ms. Stites was "f*** a n***."[16]

Despite Mr. Fennell being the initial suspect in his fiancée's murder and compelling evidence of his guilt, the State turned its focus to Mr. Reed. The prosecution's case ultimately relied on one piece of evidence: three intact spermatozoa deposited inside of Ms. Stites's vaginal canal at some point before her death. Described repeatedly as "the smoking gun"[17] or "the one horse [to ride],"[18] this evidence was the only evidence potentially connecting Rodney Reed to Stacey Stites's murder. The prosecution presented no other physical or testimonial evidence connecting Mr. Reed to the murder; the fingerprints and handprints left on the car were not a match for Mr. Reed, nor was a hair found on Ms. Stites's back. No eyewitness testimony placed Mr. Reed at the scene of the crime. And multiple items connected to the murder—including

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[15] 2019 App. 325a–26a, 328a–31a, 344a–46a; *Reed v. Texas*, 140 S. Ct. at 688 (2020) (statement of Sotomayor, J., respecting the denial of certiorari); *Ex parte Reed*, 271 S.W.3d at 708, 738.

[16] *Reed*, 140 S. Ct. at 688 (statement of Sotomayor, J., respecting the denial of certiorari).

[17] 56 RR 140:14–20.

[18] 56 RR 128:15–18 ("The one horse in this case is there was semen in Stacey's body and it's his. It got there at the time of her death. There's the horse to ride.")

the undisputed murder weapon—were not tested for DNA evidence. The prosecution found no reason for further investigation; the theory was simple: "[T]here was semen in Stacey's body and it's his."[19]

Confronted with Mr. Reed's defense, that he was having a consensual relationship with Ms. Stites, prosecutors repeatedly argued that it was "ludicrous," "preposterous," and even "offensive"[20] to think that Ms. Stites would consent to a relationship with "this guy."[21] The prosecution also deployed dehumanizing language to claim Mr. Reed was "preying"[22] on young white women. At the time of the murder, Mr. Reed worked the night shift. He had no car, and often had to walk home late at night or in the early morning alongside the railroad tracks by his home.[23] Yet, the prosecution described his walks home from work as nightly prowls, asserting that Ms. Stites had "to drive through his territory every night" while he was "wandering around."[24] And during the punishment phase, District Attorney Penick, went further: "What

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[19] 56 RR 128:16–17.

[20] 56 RR 61:24–62:9 ("It's ludicrous. And, frankly, in light of everything, it's offensive to think that they'll come here and argue that there was some secret affair between the two of them. It's utterly preposterous.")

[21] 56 RR 72:23–73:1 ("We come [to] trial and then what happens, if you're Jimmy? You get to hear that your fiancée is off having a secret affair with this guy.")

[22] Trial Tr., Punishment Phase, 27:17–28:13 (May 28, 1998) ("He has been preying on the weak and innocent for eleven years, and you think he's going to change now? Does it scare you?")

[23] *See generally, Ex parte Reed,* 271 S.W.3d at 709.

[24] 56 RR 49:5–7.

the evidence is in this case, is that criminal over there is an evil, murdering, raping, sadistic, crackhead."[25]

In this way, the prosecution's theory of the case—that the relationship between Rodney Reed and Stacey Stites could not have been consensual—played into the presumption of guilt assigned to Black men when it comes to interracial sexual relations throughout our nation's history.[26] Historically, throughout the South, the definition of Black-on-white "rape" was so broad that it required no allegation of force. Such an expansive definition resulted from legal institutions rejecting the very defense presented in this case: that a white woman willingly consented to sex with a Black man.[27]

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[25] Trial Tr., Punishment Phase, 63:14–20 (May 28, 1998).

[26] As recognized by one Texas Judge in the decade prior to Mr. Reed's conviction, "the most likely person to receive the death penalty in Texas is a black man convicted of the rape homicide of a white woman." *Ex parte Brandley,* 781 S.W.2d 886, 925–26 (Tex. Crim. App. 1989) (McCormack, J., dissenting). In fact, "the probability of being executed in Texas is increased five-fold for a black man convicted of the rape homicide of a white woman." *Id.* (outlining the findings of fact made by the hearing Judge, Perry D. Pickett). *See also, Enduring Injustice, supra* note 11, at 16 (2020) ("An examination of death sentencing for rape in Texas between 1924 and 1972 concluded that 'when a Black offender was convicted of raping a white woman, he was virtually assured of a death sentence.'") (Internal citations omitted.)

[27] This racist belief was so widespread that when the journalist Ida B. Wells published an editorial challenging the myth of widespread Black-on-white sexual violence and pointing out that consensual interracial sex did occur, white mobs burned her

That the prosecution's racially charged theory of guilt was directed to an all-white jury, makes the risk of race-based bias influencing the verdict especially significant. Every decisionmaker involved in the case was white—from the prosecutors to the judge to each member of the jury. And Mr. Reed's trial took place in a predominately white town known for being hostile to racial minorities—a hostility so pervasive that at least one witness, a co-worker of Ms. Stites who identified as Hispanic, cited fear of law enforcement as the reason he chose not to come forward with evidence that implicated Jimmy Fennell at the time of the trial.[28]

III. In View of the Substantial Risk of Bias and Error, Fair Procedures for Access to DNA Evidence Are Essential to Remedying Wrongful Convictions.

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newspaper's offices and threatened to lynch her. *See* EQUAL JUST. INITIATIVE, *Lynching in America: Confronting the Legacy of Racial Terror* (3d Ed. 2017), available at https://lynchinginamerica.eji.org/report/, citing Ida B. Wells-Barnett, *On Lynchings* 14, 29–30 (2002). It was not until 1967 when this Court held, in *Loving v. Virginia*, 388 U.S. 1 (1967), that anti-miscegenation laws were unconstitutional, that Texas's ban on interracial marriage was nullified.

[28] Evid. Hr'g Tr. 183: 5–8 (July 20, 2021) (testimony of Paul Espinoza) ("Well, for me, in a lot of small Southern or Texas towns, minorities get a bad wrap [sic]. And it's different. I've never been in trouble, but I've always just been scared."); *See* TEXAS DEMOGRAPHIC CENTER, *Decennial Census 2000 Summary File 1*, https://demographics.texas.gov/data/decennial/2000/SummaryFile (last accessed July 1, 2022).

Since 1989, the year of the first DNA exoneration, DNA evidence has played a role in proving the innocence of an estimated 552 exonerees,[29] and served as the primary basis for exoneration for an estimated 375 of those individuals.[30] In the past decade, reports show that 71 percent of death-row exonerations involved DNA evidence.[31] The state with the most wrongful convictions remedied through DNA: Texas.[32] Texas also ranks third in the number of known persons wrongfully sentenced to death.[33]

DNA evidence has played a particularly powerful role in combatting racial bias in our justice system.[34] Roughly sixty-five percent of those

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[29]See NAT'L REGISTRY OF EXONERATIONS, Exonerations by Year, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year (last visited May 26, 2022).

[30] THE INNOCENCE PROJECT, *DNA Exonerations in the United States,* available at https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited on May 26, 2022).

[31] *Special Report: The Innocence Epidemic, supra* note 3, at 23.

[32] *See,* NAT'L REGISTRY OF EXONERATIONS, *Exonerations by State, Exonerations Total by Year,* available at *https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx* (last visited on June 16, 2022); THE INNOCENCE PROJECT, *Reducing Wrongful Convictions in Texas,* (Sept. 7, 2010), available at https://innocenceproject.org/reducing-wrongful-convictions-in-texas/.

[33] *Special Report: The Innocence Epidemic, supra* note 3, at 7.

[34] As the Supreme Court has long maintained death is different. Therefore, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson,* 428 U.S. at

exonerated primarily through DNA evidence were people of color and over 50 percent were Black.[35] And, of the more than 550 people for whom DNA evidence has played a role in exoneration, 80 percent have been people of color and almost 65 percent have been Black.[36] A study of the first 325 DNA exonerations revealed that "just under half of the crimes were cross-racial in nature" and of those, "the overwhelming majority were crimes with Black defendants and white victims."[37] Likewise, a 2018 study of DNA exonerations showed that, for cases involving allegations of rape, innocent Black defendants are two and a half times more likely to be wrongfully convicted.[38] In fact, 75 percent of all persons

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305. Texas has recognized that the punishment of the actually innocent violates the Due Process Clause of the Fourteenth Amendment. *See e.g., Ex parte Elizondo,* 947 S.W. 2d 202, 204–205 (Tex. Crim. App. 1996). And the Fifth Circuit has held that "Texas has created a right to post-conviction DNA testing in Article 64 of the Texas Code of Criminal Procedure" and that "as a result, the state provided procedures must be adequate to protect the substantive rights provided." *See, e.g.*, *Emerson v. Thaler*, 544 F. App'x 325, 327–28 (5th Cir. 2013).

[35] *Special Report: The Innocence Epidemic, supra* note 3, at 19.

[36] Brandon Garrett, *Race and DNA Exonerations,* DUKE LAW: FORENSICS FORUM, (June 5, 2020), available at https://sites.law.duke.edu/forensicsforum/2020/06/05/race-and-dna-exonerations (last accessed on May 26, 2022).

[37] Emily West & Vanessa Meterko, *Innocence Project: DNA Exonerations, 1989–2014: Review of Data and Findings from the First 25 Years,* 79 ALBANY. L. REV. 717, 728 & fig.6 (2016).

[38] David Bjerk & Eric Hellend, *What Can DNA Exonerations Tell Us About Racial Differences in Wrongful Conviction Rates*, INST. LAB. ECON., IZA Discussion Papers No. 11837, 1, 1 (Sept. 2018), available at https://www.econstor.eu/bitstream/10419/185297/1/dp11837.pdf.

exonerated for rape by DNA evidence are Black or Latino.[39]

Yet, despite its critical role in correcting unjust and racially biased convictions, roadblocks to DNA testing persist. Frequently, state statutes pose substantial limitations to DNA access, including through bars on access to DNA testing in cases involving a confession, even though 102 documented DNA exonerations involved false (and often coerced) confessions.[40] Other states refuse to allow access to DNA testing where it could support an affirmative defense to the conviction, such as self-defense.[41] In Florida, a state that has placed more innocent men on death row than any other, a Tampa Bay Times Investigation found that state courts have denied three out of every four requests for DNA testing made from death row.[42]

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[39] *Race and DNA Exonerations, supra* note 36.

[40] THE INNOCENCE PROJECT, *DNA Exonerations in the United States*, *supra* note 30.

[41] For example, in New Mexico, Gregory Marvin Hobbs sought DNA evidence to prove that he and the decedent struggled for the gun before he fired the shots that killed him. The testing showed the decedent's DNA on the ejection port of the handgun, evidence which tends to support Mr. Hobbs' description of a struggle for the gun and his claim that at the time of the shooting, he was in fear of death or great bodily harm. *See State v. Hobbs*, 2020–NMCA–44, 472 P.3d 1276 (N.M. Ct. App. 2020) cert. granted, 504 P.3d 535 (N.M 2020).

[42] *See* DEATH PENALTY INFO. CTR., *Florida Attorney General Appeals Ruling Allowing DNA Testing for Prisoners Who Have Been on Death Row More than 40 Years*, (Nov. 5, 2021), available at https://deathpenaltyinfo.org/news/florida-attorney-general-appeals-ruling-allowing-dna-testing-for-prisoners-who-have-been-on-death-row-more-than-40-years.

Likewise, though the Texas legislature has repeatedly clarified the need for broad access to DNA testing under Article 64,[43] Texas state courts have proven reluctant to permit such testing.[44] The case of James Curtis Williams and Raymond Jackson illustrates the difficulty of overcoming these barriers.

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[43] In 2011, the legislature removed requirements that biological evidence be previously unavailable, *see* 2011 TEX. SESS. LAW SERV. Ch. 366 (S.B. 122). In 2015, Gov. Greg Abbott signed into law Senate Bill 487, clarifying that courts may grant testing of evidence that has a reasonable likelihood of containing biological material. 2015 TEX. SESS. LAW SERV. Ch. 70 (S.B. 487).

[44] *See, e.g., Ramirez v. State*, 621 S.W.3d 711, 722–23 (Tex. Crim. App. 2021) (affirming denial of testing where Article 64.03(b), as amended, "only prohibits" a finding that identity was not an issue at trial "solely on the basis that the defendant . . . made a confession or similar admission" and "does not preclude the convicting court from considering a convicted person's confession or similar admission" in determining whether petitioner has established that he would not have been convicted if exculpatory results were obtained); *Joseph v. State*, No. 03–16–00404–CR, 2017 WL 3471038, at *5 (Tex. Ct. App. Aug. 9, 2017) (denying appointment of counsel under Article 64.01(c) based on, appellants failure to present "reasonable grounds" for a motion to be filed where appellant asserted claim of actual innocence); *State v. Swearingen,* 478 S.W.3d 716, 721 (Tex. Crim. App. 2015) (reversing repeatedly a lower court's order for DNA testing on the ground that evidence supporting the possibility of a "cold hit" for an alternative suspect is too attenuated); *Holberg v. State*, 425 S.W.3d 282, 285 (Tex. Crim. App. 2014) ("Moreover, this Court will not consider post-trial evidence when deciding whether or not the appellant has carried her burden to establish by a preponderance of the evidence that she would not have been convicted had exculpatory results been obtained through DNA testing."); *See also, Gutierrez v. Sanz*, CIVIL NO. 1:19–CV–185, 2021 WL 5915452 (S.D. Tex. Mar. 23, 2021) (holding that Texas's procedures to be unconstitutional to the extent that this requirement bars DNA testing to prove innocence of the death penalty, such as innocence of an aggravating factor).

An all-white jury convicted Mr. Williams and Mr. Jackson, two Black men, of the rape of a white woman in 1983. Both men lost their appeals and spent the three decades that followed unsuccessfully seeking DNA testing through the courts.[45] In 2011, after initially rejecting their claims, the Dallas County Conviction Integrity Unit,[46] agreed to testing of crime scene evidence which excluded both men and inculpated two others—both of whom had gone on to commit other crimes as a result of which their DNA was maintained in a Texas database. When declaring Mr. Williams and Mr. Jackson "actually innocent," State District Judge Susan Hawk lamented that "justice was not served in this courtroom for you."[47]

In Mr. Reed's case, the Texas Court of Criminal Appeals erected several barriers to testing, including by applying a novel interpretation of the standard chain of custody requirement. Specifically, the Court created a non-contamination requirement, defining Article 64 as requiring a more stringent procedure for evidence preservation than that required at trial—a wholly new construction of the law. Though the

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[45] *See* THE NAT'L REGISTRY OF EXONERATIONS, *Raymond Jackson,* (July 23, 2012), available at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3902 (last accessed on June 16, 2022).

[46] It is worth noting that Bastrop County does not have a Conviction Integrity Unit (CIU). In fact, these units are exceedingly rare: only five of Texas's 254 counties have a CIU. *See* THE NAT'L REGISTRY OF EXONERATIONS, *Conviction Integrity Units*, https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx (last visited June 10, 2022).

[47] *See* THE NAT'L REGISTRY OF EXONERATIONS, *Raymond Jackson, supra* note 45.

Bastrop District Court Clerk Etta Wiley, the custodian of the evidence, testified that the evidence had "not [been] substituted, replaced, tampered with, or materially altered,"[48] as required by Article 64, the Court found that the Chain of Custody requirement had not been met as a result of then customary storage methods used by state officials (storing all evidence in a box), and the routine handling of such evidence at trial.[49]

Further, in Texas, Article 64 requires that petitioners prove—before testing has occurred—that, if the results were presented at trial, the petitioner would not have been convicted.[50] This means that petitioners must show the exculpatory strength of DNA evidence before that evidence can be used to search for alternative suspects. And Texas courts have interpreted this requirement strictly, requiring a greater than 51 percent chance of acquittal if DNA results were admitted at the time of trial,[51] and to bar testing where, as here, petitioner alleges that DNA testing could result in a "cold hit" which would

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[48] *Reed v. State*, 541 S.W.3d 759, 767 (Tex. Crim. App. 2017).

[49] *Id*. at 769–770.

[50] Article 64 of the Texas Code of Criminal Procedure provides that a convicting court may order DNA testing upon motion if and only if the petitioner establishes by a preponderance that "the person would not have been convicted if exculpatory results had been obtained[.]" TEXAS CODE CRIM. PROC. ANN. art. 64.03(a)(C)(2).

[51] *See e.g., Swearingen v. State,* 303 S.W.3d 728(Tex. Crim. App. 2010).

exonerate him.[52] At the same time, the Texas Court of Criminal Appeals' construction of Article 64 ignores non-DNA evidence that tends to exculpate,[53] and erroneously[54] applies a presumption that the jury would credit other evidence presented by the State at trial—even where that evidence has since been recanted, discredited or proven false.[55]

Moreover, while "many states use statutes to standardized how biological evidence is preserved,"[56] some states including Texas,[57] fail to include clear

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[52] *See e.g., State v. Swearingen,* 478 S.W.3d 716, 721–22 (Tex. Crim. App. 2015) (rejecting a lower court's determination that access to DNA evidence should be granted based on the petitioner's identification of "several alternative suspects as well as known killers active in the area at the time" who might be inculpated by DNA evidence noting that relying on "ramifications of hypothetical matches . . . eviscerate[s] Chapter 64's requirements" and "it is even more attenuated to assume hypothetical confessions and false denials of contact stemming from hypothetical DNA matches").

[53] *See e.g., Holberg*, 425 S.W.3d at 285.

[54] *C.f., House v. Bell*, 547 U.S. 518, 538 (2006) (noting that when evaluating an actual innocence claim, the habeas court must consider "'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial'") (quoting *Schlup v. Delo,* 513 U.S. 298, 327–28 (1995)).

[55] *See* 2021 Pet. App. 66a–67a.

[56] NAT'L CONF. OF STATE LEGISLATURES, *Post-Conviction DNA Testing,* (2013), 1, 2 available at ncsl.org/Documents/cj/PostConvictionDNATesting.pdf.

[57] Though, years after Mr. Reed's trial, Texas enacted a provision requiring preservation of evidence in death penalty cases, a report by the Texas Capital Punishment Assessment Team found that this provision "is not without significant

procedural directives or adequate safeguards, such as sanctions for government officials whose recklessness results in such destruction.[58] This failing is pivotal where studies show that across the nation, prosecutors opposed DNA testing in "almost one out of five" DNA exonerations.[59] In opposition to postconviction testing, officials in some jurisdictions, including Harris County, Texas have failed to preserve—or actively destroyed—DNA evidence.[60] And an internal review of closed cases over a 10-year period at the Innocence

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shortcomings." AM. BAR ASS'N., *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report*, i, xxiv (Sept. 2013), available at https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.pdf. For example, "the statute fails to specify who is responsible for preserving biological evidence or to require each county to adopt policies to delineate these responsibilities." *Id.* Indeed, "anecdotal accounts suggest that the failure to delineate responsibility has led to inadvertent destruction of evidence in some cases." *Id.*

[58] *Compare,* MASS. GEN. LAWS Ch. 278A § 17(b) (2012) (allowing contempt charges against government officials when evidence is destroyed due to recklessness).

[59] Shaila Dewan, *Prosecutors Block Access to DNA Testing for Inmates,* N.Y. TIMES, May 17, 2009, available at https://www.nytimes.com/2009/05/18/us/18dna.html.

[60] THE JUSTICE PROJECT, *Improving Access to Post-Conviction DNA Testing,* 1, 2 (2008), available at https://prisonlegalnews.org/media/publications/justice_project_improving_access_to_post_conviction_dna_testing.pdf; *See also,* Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239 (2005).

Project revealed that nearly one third of cases[61] "were closed because of lost or destroyed evidence."[62]

This background underscores the importance of this Court's precedent recognizing that state prisoners may seek relief in federal court when state DNA testing procedures are fundamentally unfair. In *District Attorney's Office for Third Judicial District v. Osborne,* the Court recognized that "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty," 557 U.S. 52, 55 (2009). And, in *Skinner v. Switzer,* this Court held that those denied post-conviction DNA testing under state statutes may turn to federal courts under § 1983 to plead their case that "the governing state law denies [them] procedural due process." 562 U.S. 521, 525 (2011). In this way, the Court affirmed an important safeguard for the wrongfully convicted, ensuring recourse for accessing scientific evidence where state procedures fall short.

The decision below erodes this important safeguard. For the reasons explained by Petitioner, a § 1983 action claiming that available state-law

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[61] At least 28 additional cases resulting in DNA exoneration were nearly closed because of preservation deficiencies before DNA evidence was ultimately uncovered. For example, in Bronx, New York, Allan Newton spent 22 years wrongfully incarcerated before a rape kit was tested and the results proved his innocence. Mr. Newton had "first requested DNA testing over a decade earlier, but had been told [falsely and] repeatedly that the evidence in his case had been lost or destroyed." *DNA Exonerations, 1989–2014, supra* note 37, at 775.

[62] THE INNOCENCE PROJECT, *DNA Exonerations in the United States, supra* note 30.

procedures for DNA testing are constitutionally inadequate cannot accrue before the state courts have construed the very state law that the prisoner seeks to challenge. Indeed, the prisoner does not even know the process he is entitled to receive, or whether he will be granted DNA testing, until he obtains the CCA's authoritative construction of Article 64, which means he does not have "'a complete and present cause of action.'" *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (citations omitted). The Fifth Circuit's contrary decision not only misapplies basic accrual principles, but undermines comity, federalism, and judicial economy. The decision also creates an arbitrary barrier to the DNA testing that plays an essential role in remedying wrongful, and often racially biased, convictions.

The story of Johnnie Savory reveals the consequences of such a rule: Wrongfully convicted of a double murder in 1977, at the age of fourteen, Mr. Savory spent 29 years in prison. Although he was paroled in December of 2006, he remained under the supervision of the criminal justice system until 2015, when he was pardoned after a Peoria County Circuit Court judge ordered DNA testing, which excluded him as a perpetrator of the crime.[63]

Relief could have come nearly a decade sooner. After three Illinois courts denied Mr. Savory's motion

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[63] THE NAT'L REGISTRY OF EXONERATIONS, Johnnie Savory, available at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4630 (last visited July 1, 2022).

seeking DNA testing of physical evidence, he filed suit pursuant to § 1983 alleging a violation of his due process rights and the right to prove actual innocence. The Seventh Circuit refused to even consider his due process claim, holding it untimely under the same reasoning adopted by the Fifth Circuit here: In the Seventh Circuit's view, the statute of limitations began to run on "the date on which the Illinois circuit court denied Savory's request for DNA testing under Illinois law."[64] Yet, before the state appellate court had addressed the issue, Mr. Savory's claim could not have "realistically be[en] brought," *McDonough v. Smith*, 139 S. Ct. 2149, 2155 (2019), creating an arbitrary impediment to relief that added a decade to his wrongful conviction.

Such long periods of incarceration prior to exoneration are especially prevalent in cases involving DNA-based innocence claims: "[DNA evidence is] present in just 7.1% of exonerations that are completed in less than a decade" however "[w]hen exonerations occurred more than ten years after conviction, exculpatory DNA evidence is present approximately one-quarter of the time."[65] In other words, DNA evidence helps to exonerate a greater proportion of persons who have already served lengthy sentences.

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[64] *Savory v. Lyons*, 469 F.3d 667, 672 (7th Cir. 2006).

[65] *Special Report: The Innocence Epidemic, supra* note 3, at 23.

Years are lost to court delays[66]—years during which both the wrongly convicted and public safety pay the price.[67] In fact, as of 2014 alone, "[t]he real perpetrators were identified in nearly half of all DNA exonerations"[68] most often by a "cold hit" to a database, a search that could not have been conducted without DNA evidence.[69] In the intervening years, many such perpetrators go on to commit additional violent crimes.[70] The exoneration of Henry McCollum is illustrative. Mr. McCollum was convicted of rape and murder following his coerced confession at age nineteen. He spent three decades on death row—

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[66] *See e.g.,* Vanessa Meterko, *Strengths and Limitations of Forensic Science: What DNA Exonerations Have Taught Us and Where to Go From Here*, 119 W. VA. L. REV. 639, 646 (2016) ("An internal Innocence Project analysis of over 10 years' worth of closed client cases revealed that, on average, it takes: (1) over a year and a half for an innocent person to be convicted; (2) 10 years for them to write to the Innocence Project for help; (3) four years for their case to be evaluated and accepted (the demand for representation is far greater than the capabilities of the community of innocence advocates and, at least at the Innocence Project, there is a backlog); and (4) nearly six more years to find and test evidence, litigate, and secure exoneration and release.")

[67] As noted above, these delays are particularly and troublingly lengthy for Black prisoners: "[T]wo-thirds of white death-row exonerees are freed within 10 years of conviction, while 56% of cases in which Black exonerees who are wrongfully convicted and sentenced to death require more than a decade to resolve." *Special Report: The Innocence Epidemic, supra* note 3, at 24.

[68] *DNA Exonerations, 1989–2014, supra* note 37, at 730–731.

[69] *Id.*

[70] In total, 77 rapes, 34 homicides, and 31 other violent crimes were committed by 68 individuals who would likely have been incarcerated but for the wrongful conviction of another. That these numbers are based on conviction data indicates that these estimates may also be conservative. *Id.*

fighting to prove his innocence and seeking DNA testing. Despite decades of litigation, Mr. McCollum was only released in 2014 after the North Carolina Innocence Inquiry Commission agreed to test previously untested DNA evidence, from a cigarette butt found at the crime scene, which proved that Roscoe Artis, a "serial rapist and murderer," was the true perpetrator.[71] After committing the crime for which Mr. McCollum was wrongfully convicted, Mr. Artis went on to rape and strangle to death an 18-year-old girl.[72]

IV. Failing to Provide Fair Procedures for DNA Testing Undermines the Integrity of Mr. Reed's Conviction and the Courts.

For Mr. Reed, the value of DNA evidence is clear. He is requesting testing of the items found at the scene of the crime, including clothing worn by Ms. Stites on the day of her death, a name tag left on her body likely touched only by her killer, and several items from her truck, as well as the uncontested murder weapon, Ms. Stites's belt. None of these items were previously tested for DNA evidence, including the murder weapon—an oversight which consulting forensics experts for Mr. Reed found "troubling." *See*

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[71] CENTER FOR DEATH PENALTY LITIGATION, Saved From The Executioner: The Unlikely Exoneration of Henry McCollum, 1, 3, (June 2017) available at http://www.cdpl.org/wp-content/uploads/2017/06/SAVED-FROM-EXECUTION-web-final1.pdf.

[72] *See State v. Artis*, 384 S.E.2d 470 (N.C. 1989); Saved From The Executioner: The Unlikely Exoneration of Henry McCollum, *supra* note 71.

Ex Parte Reed, 271 S.W.3d at 744.[73] Notably, if Mr. Reed had been tried today—after the passage of Article 38.43 to the Texas Code of Criminal Procedure ("Article 38")[74]—Texas law would have required that this evidence[75] be tested before the trial even commenced.

Yet, despite failing to test critical crime-scene evidence such as the murder weapon, the State did rest its case on *select* DNA. As the prosecution repeatedly stated during closing arguments, its key evidence was the presence of three spermatozoa inside the victim's body, DNA which matched Rodney Reed. The District Attorney's Office claimed that this "objective evidence" was the "smoking gun"[76] and the

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[73] These forensic consultants were Dr. Leroy Riddick, a medical examiner for the State of Alabama, and Ronald Singer, who worked in the Tarrant County Medical Examiner's Office Criminalistics Laboratory.

[74] TEX. CODE CRIM. PROC. ANN. art. 38.43 (i) ("Before a defendant is tried for a capital offense in which the state is seeking the death penalty, subject to Subsection (j), the state shall require either the Department of Public Safety through one of its laboratories or a laboratory accredited under Article 38.01 to perform DNA testing, in accordance with the laboratory's capabilities at the time the testing is performed, on any biological evidence that was collected as part of an investigation of the offense and is in the possession of the state.")

[75] *Id.* at 38.43 (j) (noting also that if the state and defendant do not agree as to what constitutes biological evidence within the meaning of the statute the defense is entitled to a rebuttable presumption that the evidence is required to be tested).

[76] 56 RR 140:14–20 ("Now, Mr. Garvie characterizes the semen as the State's favorite subject, and he's right, it is our favorite

"equivalent to the slipper in the Cinderella story."[77] The prosecution also repeatedly and misleadingly claimed that Mr. Fennell—and "everybody else"[78]—had been "excluded by DNA"[79] since he was not a match for the sperm.

The State further argued that "[w]e're relying on scientific, credible, tested and retested evidence,"[80] and that such scientific evidence eliminated the risk of racial bias affecting the trial. In the prosecutor's words: "And the DNA and the physical evidence is so important because . . . [i]t doesn't rely [on] and have biases for or against people [and] . . . it doesn't take

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subject because, as I said before, it is the smoking gun, and it most certainly is because you know from the objective evidence that it is the thing that links you to the defendant. The objective evidence.")

[77] 56 RR 40:16–20 ("I characterized it at opening as the smoking gun. You can also think of it sort of like as equivalent to the slipper in the Cinderella story. Here we had it, we just had to find who it fit.").

[78] 56 RR 62:14–19 ("[I]t's kind of a blessing in disguise that it took them a year to focus in on the real killer, because it gave them the opportunity to take blood from everybody else and get them excluded. We know it couldn't have been them.").

[79] 56 RR 75:23–25.

[80] 56 RR 141:19–22. *See also,* 56 RR 56:1–5 ("See that's the kind of strength of DNA evidence. DNA evidence is so powerful when you're talking about semen in a dead girl's body. . . ."); 56 RR 22:13–22:25 ("The evidence that has been brought to you is DNA evidence, basically. I mean, that's the State's case. . . . One in 5.5 billion odds that it's somebody other than that criminal defendant over there. That is overwhelming evidence. That is evidence beyond a reasonable doubt. It is the strongest circumstantial evidence you can have in a case.").

race into account…"[81] In this way, the State was able to create a false impression of fairness and objectivity at trial. Yet, for over two decades, it has objected to Mr. Reed having access to potentially exculpatory scientific evidence. It is profoundly unjust for the State to be allowed to rest on the value of DNA evidence at trial, while denying Mr. Reed access to the DNA evidence that could exonerate him—particularly where, as outlined below, Mr. Reed has, against the odds, established a strong actual innocence claim.

There is a "considerable body of evidence," *Reed v. Texas*, 140 S. Ct. 686, 687 (2020) (statement of Sotomayor, J., respecting the denial of certiorari), that Mr. Reed is innocent. Witnesses who have no connection to Mr. Reed but who knew Ms. Stites confirmed that the two had a romantic relationship. 2019 Pet. App. 422a–34a. Another police officer at the time of Ms. Stites's murder swore that Mr. Fennell told him in the weeks leading up to the crime that she was "f***king a n***r." *Reed*, 140 S. Ct. at 688 (statement of Sotomayor, J., respecting the denial of certiorari). Another officer swore that, at Ms. Stites's funeral, Mr. Fennell looked at her body and said, "You got what you deserved." *Id*. When Mr. Fennell himself was in prison (he was sentenced in 2008 to 10 years for kidnaping and sexually assaulting a woman while on duty), he told a member of the white supremacist organization, the Aryan brotherhood, "I had to kill my n***r-loving fiancé[e]'" because she "had been sleeping around with a black man." *Id*. And during a post-conviction hearing

[81] 56 RR 145:15–146:3.

exposing significant contradictions in Mr. Fennell's version of events from the night of the murder, he invoked his Fifth Amendment right against self-incrimination. 2019 Pet. App. 325a–26a.

Moreover, three highly credentialed pathologists determined that Ms. Stites was murdered before midnight (and therefore during the time when Mr. Fennell said they were together); that she was not sexually assaulted; and that Mr. Reed's DNA was deposited at least 24 hours before her murder. *Id.* at 202a–207a. By contrast, the prosecution's trial expert, who estimated the time of death after 3:00 a.m., lamented in post-conviction proceedings that his estimate "should not have been used at trial as an accurate statement of when Ms. Stites died." *Id.* at 198a. The State's own experts have likewise conceded that available scientific evidence—both now and at the time of Mr. Reed's conviction—supports the finding that the small number of spermatozoa found inside of Ms. Stites indicates that the pair had sexual relations a full day before the murder, *Id.* at. 199a, as Mr. Reed has long maintained.

In sum, the record demonstrates that Mr. Reed's conviction was based on false or misleading forensic evidence—a fact which makes the barriers to post-conviction DNA testing in this case even less

tolerable.[82] There is no escaping the "pall of uncertainty over Reed's conviction," *Reed*, 140 S. Ct. at 690 (statement of Sotomayor, J., respecting the denial of certiorari), and meaningful access to DNA testing is critical here as it has been in hundreds of wrongful conviction cases.

Under these circumstances, the Fifth Circuit's erroneous refusal even to consider Mr. Reed's constitutional challenge to the application of Texas's DNA testing procedures would harm not only Mr. Reed, but also public confidence in the rule of law. Capital punishment evokes strong views on both sides, but it is common ground that "the unique nature of the death penalty" demands "heightened reliability . . . in the determination whether the death penalty is appropriate in a particular case." *Sumner v. Shuman*, 483 U.S. 66, 72 (1987). Far from satisfying the heightened reliability standard, this is a case defined by doubt and the specter of racial bias.

By refusing to consider the merits of Mr. Reed's § 1983 claim seeking DNA testing the decision below risks "poison[ing] public confidence in the judicial process," injuring "not just the defendant, but the law as an institution," and "the community at large." *Buck v. Davis*, 137 S. Ct. 759, 779 (2017) (cleaned up). Executing a likely innocent person destroys the ability

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[82] "[F]alse and misleading" forensic evidence was present in 31.9 percent of death-row exoneration cases and a staggering 71.4 percent of death-row exonerations based on DNA evidence. *See e.g. Special Report: The Innocence Epidemic, supra* note 3, at 23.

to exonerate Mr. Reed if DNA supports his innocence, which is all the more reason to remove barriers to such testing. In the words of Justice Sotomayor, this Court must "not allow the most permanent of consequences to weigh on the Nation's conscience while Reed's conviction remains so mired in doubt." *Reed*, 140 S. Ct. at 690 (statement of Sotomayor, J., respecting the denial of certiorari).

CONCLUSION

For these reasons, amicus curiae the NAACP Legal Defense and Educational Fund, Inc. respectfully asks this Court to reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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July 8, 2022