No. 21-442

In the Supreme Court of the United States

RODNEY REED, PETITIONER

v.

BRYAN GOERTZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU FOUNDATION OF TEXAS, INC., THE CATO INSTITUTE AND THE RUTHERFORD INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[*]

Amicus curiae National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year, in this Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Amicus curiae The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution. Since its founding more than 100 years ago, the ACLU has appeared before this Court in numerous cases, both as

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed a blanket consent to the filing of briefs *amici curiae*.

direct counsel and as amicus curiae. *Amicus curiae* The ACLU Foundation of Texas, Inc. is a statewide affiliate of the national ACLU.

Amicus Curiae The Cato Institute ("Cato") is a nonpartisan public policy research foundation founded in 1977 dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Amicus curiae The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

Amici believe that DNA testing has an "unparalleled ability" to improve the truth-seeking function of our judicial system, including "to exonerate the wrongly convicted." *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 55 (2009); *see also, e.g.*, The Innocence Project, *DNA Exonerations in the United States*, https://innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited July 7, 2022) (DNA evidence has exonerated at least 375 Americans). The

present case presents a critical issue regarding access to post-conviction DNA testing that *amici* believe is essential to exonerating wrongly convicted persons.

INTRODUCTION AND SUMMARY OF ARGUMENT

Each of the 50 states, the federal government, and the District of Columbia have passed laws granting convicted individuals access to DNA testing under specified circumstances. *See* Ian J. Postman, Note, *Re-Examining Custody and Incarceration Requirements in Postconviction DNA Testing Statutes*, 40 CARDOZO L. REV. 1723, 1729 & n.36 (2019) (collecting laws). Emphasizing DNA testing's "unparalleled ability . . . to exonerate the wrongly convicted," this Court in *District Attorney's Office for Third Judicial District v. Osborne*, 557 U.S. 52, 55 (2009), and *Skinner v. Switzer*, 562 U.S. 521, 530 (2011), recognized an individual's right to challenge the constitutionality of his state's post-conviction DNA testing procedures.

Specifically, if the state courts deny an individual's state law claim for post-conviction DNA testing, he or she may bring a 42 U.S.C. § 1983 claim that the state's law "as construed by the [state's] courts" violates his right to due process as guaranteed by the Fourteenth Amendment. *Skinner*, 562 U.S. at 530 (internal quotation marks omitted). In this case, the Fifth Circuit joined the Seventh Circuit in holding that the statute of limitations for such a § 1983 claim begins to run "the moment the [state] trial court" initially denies the request for post-conviction DNA testing. *Reed v. Goertz*, 995 F.3d 425, 431 (5th Cir. 2021); *see Savory v. Lyons*, 469 F.3d 667, 670, 672–74 (7th Cir. 2006).

This Court should reject that approach for two principal reasons. First, it would require plaintiffs to file their § 1983 claims parallel to their state appeals, even though those appeals are likely to moot or materially alter

the federal constitutional claim. In these circumstances, filing parallel federal litigation would achieve nothing positive because federal courts generally would stay such proceedings under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) (*Pullman*) or other precedent. Absent a stay, the federal courts would risk rendering a constitutional decision that would not only be potentially unnecessary but also based on a non-dispositive and potentially erroneous construction of state law. That sort of decision would not only undermine judicial economy, but also federalism, comity, and the principle of constitutional avoidance.

Second, while the Fifth and Seventh Circuits' rule brings no discernable benefit, it comes with significant costs, especially for plaintiffs whose claims have already been denied by state trial courts. These litigants seeking to vindicate their constitutional rights may find that the federal courthouse doors closed long before they even reasonably expected them to open.

Because a § 1983 claim of the type at issue here challenges the adequacy of state procedures—and, specifically, the state courts' construction of state law in pending appeals, "there is no reason to put the onus to safeguard [federalism and] comity on district courts exercising case-by-case discretion—particularly at the foreseeable expense of potentially prejudicing litigants and cluttering dockets with . . . unripe cases." *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019). This Court should reverse the Fifth Circuit and hold that a § 1983 post-conviction DNA testing claim arising out of state proceedings does not accrue until the state courts have resolved all appeals and issued their final construction of the state law at issue. Unlike the rule below, this rule would "respect[] the autonomy of state courts" and avoid

unnecessary "costs to litigants and federal courts." *Id.* at 2159.[1]

ARGUMENT

I. THE FIFTH AND SEVENTH CIRCUITS' RULE WOULD REQUIRE § 1983 PLAINTIFFS TO INITIATE PARALLEL FEDERAL LITIGATION, CONTRARY TO JUDICIAL ECONOMY, FEDERALISM, COMITY, AND THE PRINCIPLE OF CONSTITUTIONAL AVOIDANCE.

A. Federal Courts Generally Would Stay A Parallel § 1983 Action Under *Pullman*.

As the present case demonstrates, if the applicable statute of limitations for a § 1983 claim challenging a state court construction of post-conviction DNA testing law begins to run at the moment the state trial court denies DNA testing, then the period would frequently expire before the conclusion of those same state proceedings. Thus, the Fifth and Seventh Circuits' accrual rule, if adopted by this Court, will often force plaintiffs to initiate federal litigation challenging the constitutionality of a state law governing post-conviction DNA testing before that law has been definitively construed in pending state litigation.

Such parallel federal litigation is likely to be stayed under the *Pullman* doctrine. *See Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941). That doctrine instructs federal courts to abstain when state law is "susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." *Bellotti v. Baird*, 428 U.S.

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[1] *Amici* endorse Petitioner Rodney Reed's thorough discussion of when such a claim accrues (*see generally* Pet. Br. at 24–36, 46–50), and will not repeat those points here. *Amici* instead focus on the "consequences that would follow from" the Fifth and Seventh Circuits' approach. *McDonough*, 139 S. Ct. at 2158.

132, 147 (1976) (internal quotation marks omitted).[2] Premised on federal courts' "scrupulous regard for the rightful independence of the state governments" (*Pullman*, 312 U.S. at 501 (internal quotation marks omitted)), *Pullman* abstention permits state courts—which have the "[t]he last word on the meaning of" state law—to speak first. *Id.* at 499–500. This avoids needless friction between federal and state courts and reduces the likelihood of erroneous interpretations of state law by federal courts. Notably, this Court has "regularly ordered abstention" when "there is an action pending in state court that will likely resolve the state-law questions underlying the federal claim." *Harris Cty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 83 (1975).

If a party in Petitioner Rodney Reed's situation filed a § 1983 action before state-court appeals regarding his or her request for DNA testing were complete, the federal district court would likely abstain for two reasons. First, if the state appellate courts were to reverse and grant the plaintiff's request for DNA testing, then that would make it unnecessary for the federal district court to reach the federal constitutional question presented in the § 1983 action. Second, even if the plaintiff were unsuccessful in convincing the state appellate courts to rule completely in his or her favor, those courts could hand him or her a partial victory that would change the construction of the

[2] This Court has consistently applied the doctrine in analogous cases. *See, e.g.*, *Carey v. Sugar*, 425 U.S. 73, 78–79 (1976) (per curiam); *Boehning v. Ind. State Emps. Ass'n, Inc.*, 423 U.S. 6, 7–8 (1975) (per curiam); *Harris Cty. Comm'rs Ct. v. Moore*, 420 U.S. 77, 83–85 (1975); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 44 (1970) (per curiam); *Reetz v. Bozanich*, 397 U.S. 82, 87 (1970); *Martin v. Creasy*, 360 U.S. 219, 224–25 (1959); *City of Meridian v. S. Bell Tel. & Tel. Co.*, 358 U.S. 639, 640–41 (1959) (per curiam); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229 (1957); *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 104–05 (1944); *City of Chicago v. Fieldcrest Dairies*, 316 U.S. 168, 171–73 (1942).

state law at issue in the § 1983 action. For instance, the state appellate courts could order further fact-finding in connection with applying the state law or construe the state law in a manner different from the trial court or even existing state precedent. Any of those scenarios would materially change the federal constitutional analysis of a challenge to the adequacy of the state's procedures "*as construed by* the [state's] courts." *Skinner*, 562 U.S. at 530 (internal quotation marks omitted; emphasis added).

On these points, *Ford Motor Co. v. Meredith Motor Co.*, 257 F.3d 67 (1st Cir. 2001), is illustrative. There, the plaintiff challenged the retroactive application of a state law in state administrative proceedings and, when unsuccessful there, did so again in state court. *Id.* at 69–71. During the state administrative proceedings, the plaintiff also brought a federal action arguing that the retroactive application of the state law would violate federal due process. *Id.* After losing in the federal district court, the plaintiff appealed. *Id.* at 70. Applying *Pullman*, the First Circuit stayed its proceedings in deference to parallel state proceedings that could have "moot[ed] the federal issues in two ways." *Id.* at 72.

As the First Circuit explained, the state courts could have concluded that the state law did not apply retroactively or otherwise ruled in the plaintiff's favor on the merits. *Id.* "In either case, a federal ruling on the state law claims" would have been "a forecast rather than a determination" of the state's final answer. *Id.* (quoting *Pullman*, 312 U.S. at 499, 500) (internal quotation marks omitted). Such "a tentative answer" on state law by the federal court that could be "displaced tomorrow by a state adjudication" was not an appropriate basis for a federal constitutional ruling. *Id.*; *see also Waldron v. McAtee*, 723 F.2d 1348, 1354–55 (7th Cir. 1983). So too here.

Amici recognize that *Pullman* abstention is "the exception, not the rule." *Colo. River Water Conservation*

Dist. v. United States, 424 U.S. 800, 813 (1976) (*Colorado River*). Where it "cannot be fairly concluded that the underlying state statute is susceptible of an interpretation that might avoid the necessity for constitutional adjudication, abstention would amount to shirking the solemn responsibility of the federal courts to 'guard, enforce, and protect'" federal constitutional rights. *Kusper v. Pontikes*, 414 U.S. 51, 55 (1973) (citation omitted). But "[a]bstention is appropriate in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Colorado River*, 424 U.S. at 815 (discussing *Pullman* doctrine) (internal quotation marks omitted). This is the case when plaintiffs simultaneously pursue state appeals and federal § 1983 actions resting on the inadequacy of the state's procedures, as the Fifth and Seventh Circuits' rule would require.

First, construing the various state post-conviction DNA testing laws will present novel and unsettled issues. As *Osborne* emphasized, "'[t]he States are currently engaged in serious, thoughtful examinations,' of how to ensure the fair and effective use of this testing within the existing criminal justice framework." 557 U.S. at 62 (citation omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)). Given the rapid rise of DNA testing and the states' response, these laws are likely to be recently enacted, recently amended, or both. And they are therefore likely to present questions of interpretation and application that are susceptible to multiple answers.

Second, the state appellate courts' decisions will affect the federal constitutional analysis because the § 1983 due process claim challenges the adequacy of state law "*as construed by* the [state's] courts." *Skinner*, 562 U.S. at 530 (internal quotation marks omitted; emphasis added).

The proceedings in this case show why it makes no sense to require a party in Reed's position to file a § 1983 claim after the initial denial of DNA testing by the state trial court. After the state trial court initially denied his claim in November 2014, Reed appealed. Pet. App. 131a–133a. The Texas Court of Criminal Appeals (CCA) then remanded for further factfinding because the trial court had failed to address every element of Article 64 of the Texas Code of Criminal Procedure, the Texas law governing motions for post-conviction DNA testing. Pet. App. 104a–06a. After the state trial court adopted the state's proposed findings of fact on the relevant issues, Reed again appealed. Pet. App. 76a–103a. The CCA affirmed and denied rehearing in October 2017, making final its decision that authoritatively construed Article 64. Pet. App. 135a.

Reed bases his § 1983 claim on the CCA's final construction, asserting that the CCA interpreted Article 64 to add unfair hurdles to obtaining relief: a "non-contamination" requirement, a likelihood of exoneration test, and an unreasonable delay element. *See* Pet. Br. at 14–15; J.A. 31–32 & n.5. Accordingly, at the time Reed would have been required to file his federal claim under the Fifth and Seventh Circuits' rule (November 2016), the CCA's statutory construction that Reed's § 1983 claim challenges did not even exist.

Had Reed brought a § 1983 claim earlier, and the district court ruled on it, the district court would have undertaken a constitutional analysis of a state court's statutory construction that later "materially change[d]." *Bellotti*, 428 U.S. at 147 (federal courts should abstain when state court construction of a state statute is likely to "materially change" the federal constitutional issue). That would have been inefficient at a minimum. Worse, if the state courts had ultimately granted Reed's request for DNA testing, the district court would have unnecessarily

ruled that the state trial court's construction of was unconstitutional.

While failure to abstain would cause significant problems, there would be little concern in a situation like this about the possible drawbacks of *Pullman* abstention: (a) delay of federal adjudication of federal issues for a litigant who has invoked federal jurisdiction and (b) piecemeal litigation. A § 1983 plaintiff who files a parallel federal action solely to preserve his claim would not be concerned about delayed federal adjudication of that claim. Because § 1983 plaintiffs are not required to exhaust state remedies, that plaintiff would be pursuing his or her state court appeal by choice.[3]

In addition, abstention in this situation would not cause piecemeal litigation but instead efficient litigation. That is because the already pending state appeal presents a readily available forum for dispositive resolution of the state law issues. In these circumstances, federal courts should disfavor duplicative litigation, recognizing the straightforward principle that state proceedings should be completed before the federal courts consider whether state law, as construed in those state proceedings, violates the federal constitution.

B. Federal Courts Also May Stay A Parallel § 1983 Action for Declaratory Relief.

Even in cases in which the district court does not abstain under the *Pullman* doctrine, the law governing

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[3] This Court recognized that the plaintiff in *Osborne* was not required to exhaust state remedies, but noted that he was in a "very awkward position": "criticiz[ing]" the state's procedures after "attempt[ing] to sidestep state process." 557 U.S. at 71. In contrast, this Court commented in *Skinner* that the plaintiff there, who had (like Reed) pursued the state's procedures, was "better positioned to urge in federal court the inadequacy of the state-law procedures available to him in state postconviction relief." 562 U.S. at 530 n.8 (internal quotation marks omitted).

declaratory relief actions would guide the court to stay the parallel § 1983 action. *See* J.A. 40 (Reed's complaint seeks a declaratory judgment that the CCA's construction of Article 64 denies him due process).

The federal courts have broad discretion to stay claims "for declaratory relief where parallel proceedings, presenting opportunity for ventilation of the same state law issues, [are] underway in state court." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 290 (1995); *see also Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 496–97 (1942). In *Wilton*, this Court declined "to delineate the outer boundaries of this discretion," including in "cases raising issues of federal law." 515 U.S. at 290. But several recognized factors would support a stay in these circumstances. "In exercising their discretion," district courts should "evaluate whether principles of federalism, comity, judicial efficiency, and avoidance of federal-state conflicts" support exercising jurisdiction or staying the case. *See generally* 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §57.42[4] & n.38 (2022) (collecting cases).

First, staying the parallel § 1983 case would allow the state courts—in the earlier-filed litigation—to address questions of state law that implicate important state interests. As Justice Alito has written,

> DNA evidence creates special opportunities, risks, and burdens that implicate important state interests. Given those interests—and especially in light of the rapidly evolving nature of DNA testing technology—this is an area that should be (and is being) explored through the workings of normal democratic processes in the laboratories of the States. (*Osborne*, 557 U.S. at 79 (Alito, J., concurring) (internal quotation marks omitted))

Second, as explained above, the state courts' resolution of those questions may moot or materially alter the federal

constitutional question. Thus, a stay would avoid needless friction between federal and state courts and reduce the likelihood of erroneous interpretations of state law by federal courts. Accordingly, even if the federal district court were to conclude that *Pullman* abstention is not called for, it may well stay its proceedings in a parallel action for declaratory relief.

C. If Federal Courts Do Not Stay A Parallel § 1983 Action, They Risk Making Constitutional Decisions Unnecessarily Or Based On Erroneous Interpretations of State Law.

As just shown, the Fifth and Seventh Circuits' approach would require plaintiffs to file § 1983 actions in federal court before their state proceedings are complete, only to have those actions stayed in most instances. But it is possible that some of these § 1983 cases would not be stayed and thereby create significant problems.

That scenario creates the risk of inconsistent interpretations of state law by federal and state courts, because the federal court would be relying upon a state trial court's construction of state law that could be modified by the state's appellate courts. Indeed, even if the state trial court's result were to remain unchanged, the state appellate courts' interpretation of state law could still differ.

As a result, the federal court may render "a constitutional determination" that "may be discredited at any time—thus essentially rendering the federal-court decision advisory and the litigation underlying it meaningless." *Moore v. Sims*, 442 U.S. 415, 428 (1979). This would not only upset "the harmonious relation between state and federal authority" (*Pullman*, 312 at 501), but also contravene this Court's "long-standing policy of avoiding unnecessary constitutional decisions." *Elkins v. Moreno*, 435 U.S. 647, 661 (1978).

II. THE FIFTH AND SEVENTH CIRCUITS' RULE IS UNWORKABLE AND HAS NO DISCERNIBLE BENEFIT, DESPITE ITS SIGNIFICANT COSTS.

Recently, in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), this Court considered an analogous question and concluded that the accrual date of a § 1983 fabricated-evidence claim arising out of state criminal proceedings is the date those proceedings conclude. As relevant here, *McDonough* rejected the lower court's rule because it "would [have] impose[d] a ticking limitations clock on criminal defendants as soon as they become aware that fabricated evidence ha[d] been used against them," and it would have created "practical problems in jurisdictions where prosecutions regularly last nearly as long as—or even longer than—the relevant civil limitations period." *Id.* at 2158. Specifically, the Court rejected the notion that "ad hoc abstention" would have been "sufficient to avoid the problems of two-track litigation":

> When, as here, a plaintiff's claim "necessarily" questions the validity of a state proceeding, there is no reason to put the onus to safeguard comity on district courts exercising case-by-case discretion—particularly at the foreseeable expense of potentially prejudicing litigants and cluttering dockets with dormant, unripe cases. Cf. *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007) (noting that a scheme requiring "conscientious defense attorneys" to file unripe suits "would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any"). (*McDonough*, 139 S. Ct. at 2158–59) (some citations omitted))

Here, too, the Court should reject the rule below, which would have similar costs and no benefit.

A. The Fifth and Seventh Circuits' Rule is Unworkable.

The Fifth and Seventh Circuit's rule would give rise to practical problems. Given the nature of the claim at issue—a challenge to the adequacy of the state's procedures and, specifically, the state courts' construction of state law in parallel state proceedings—the plaintiff could not practically bring his or her § 1983 claim before conclusion of the state proceedings. In describing § 1983 due process actions challenging the fairness of state procedures, this Court has explained,

> The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. (*Zinermon v. Burch*, 494 U.S. 113, 126 (1990))

Accordingly, even if a state trial court's construction of state law governing postconviction DNA testing would otherwise violate due process, it would be premature for the federal courts to conclude that the state had denied the plaintiff due process *while the plaintiff is simultaneously pursuing the very procedures* afforded to him by the state that are intended to correct erroneous trial court decisions. After all, how could the federal courts review the adequacy of the state's process before it is complete?

Relatedly, the plaintiff's claim is likely to fundamentally change with each round of subsequent proceedings in the state court. Thus, it would be premature for the federal courts to conclude that the state had denied the plaintiff due process because the trial court cannot authoritatively construe state law.

For these reasons, the § 1983 plaintiff likely could not satisfy standing and ripeness requirements. The individual's § 1983 claim is inherently contingent upon the outcome of the state court proceedings, and a claim "is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted). And, as discussed, the state courts could subsequently alter the relevant construction of state law *or* grant the plaintiff's DNA testing request, which would cause him or her to lose standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563 (1992) ("[T]he injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.") (internal quotation marks omitted).

In an analogous situation, the Federal Circuit has held that an action arising out of an adverse trial court's decision is not ripe for adjudication while an appeal of that decision is pending. In *Shinnecock Indian Nation v. United States*, 782 F.3d 1345 (Fed. Cir. 2015), the Nation first brought an action against the State of New York in the Eastern District of New York challenging a taking of land through legislation enacted in 1859. The Eastern District of New York dismissed the case, holding that the action was barred by laches. *Id.* at 1347. After appealing this decision to the Second Circuit, the Nation brought a second action against the United States in the Court of Federal Claims seeking damages. In that action, the Nation alleged that the Eastern District of New York's dismissal of the first action had violated trust obligations under federal law. *Id.* at 1347–48.

After the Court of Federal Claims dismissed the second action, the Nation appealed to the Federal Circuit. *Id.* at 1348. The Federal Circuit affirmed dismissal of the second action on the ground that the Nation's claim, which

was based upon the first dismissal that was being reviewed by the Second Circuit, was not ripe for adjudication. *Id.* It explained, "Until the Second Circuit—and possibly the Supreme Court—have had an opportunity to review, and possibly reverse or revise, the district court's judgment [in the first action], it would be premature to determine whether the United States breached any trust obligation . . . ." *Id.* at 1349.

So too here. A plaintiff's § 1983 due process challenge to a state law as construed by a state trial court is not ripe for adjudication until all subsequent state proceedings have concluded.

B. The Fifth and Seventh Circuits' Rule Delivers No Benefit.

At the same time, the Fifth and Seventh Circuits' rule offers "no clear advantage." *McDonough*, 139 S. Ct. at 2159 (quoting *Panetti*, 551 U.S. at 943). Generally, statutes of limitations ensure that plaintiffs diligently pursue their claims and mitigate the challenges of preserving and accessing evidence over time. But in these cases, there would be no question of diligence: by challenging the state trial court's decision on appeal, the plaintiff would be actively pursuing his rights, and the state would be actively defending its construction of state law. Additionally, there would be little to no evidentiary concerns because the § 1983 claim is likely to turn solely on the record of the state proceedings—a moving target so long as state appeals remain pending.

C. The Fifth and Seventh Circuit Rule Imposes Significant Costs.

1. *As in McDonough, ad hoc abstention is not a solution here.* Even if federal courts were to stay their proceedings in most cases, ad hoc abstention is "poorly

suited to the type of claim at issue here." *McDonough*, 139 S. Ct. at 2158.[4]

Under the Fifth and Seventh Circuits' rule, even the best-case scenario—that federal district courts stay their proceedings pending the resolution of the parallel state proceedings—would simply "clutter[] dockets with dormant, unripe cases." *McDonough*, 139 S. Ct. at 2158. Plaintiffs would be forced to draft and file complaints based on unripe claims that are likely to fundamentally change with each round of subsequent proceedings in state courts, as explained immediately above. *See* Section II(A), *infra*. The state would then be required to draft and file a response, at which point the parties might be required to brief, and the court to address, the standing and ripeness issues.

And, until one of the parties or the court raises the prospect of a stay, all would face the challenges of reviewing the state court's construction of state law while also forecasting the authoritative construction that the state's highest court is likely to be render. Once the prospect of a stay is raised, those issues would need thorough briefing and consideration, as well.

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[4] In *Wallace v. Kato*, 549 U.S. 384 (2007), this Court held that § 1983 false imprisonment claims accrue when an arrestee appears before the examining magistrate and is held over for trial. In its decision, the Court acknowledged that these claims may be filed parallel to state criminal proceedings. *Id.* at 393–94. While ad hoc abstention may be sufficient in the false imprisonment context, it is not here. For one, § 1983 false imprisonment claims do not present the accrual, standing, and ripeness issues discussed in Section II(A), *supra*. And, as also described in Section II(A), *supra*, the § 1983 claim here—which challenges the adequacy of state procedures, including state courts' construction of state law—"questions the validity of [the] state proceeding[s]," similar to the fabricated evidence claim at issue in *McDonough*, 139 S. Ct. at 2158.

Further, even if the federal proceedings were stayed and the state appellate courts uphold the state trial court's denial of DNA testing, the plaintiff would likely need to restart the process in federal court by amending his or her complaint to allege all the facts of the subsequent state court proceedings, including his or her theory of how the state's highest court's authoritative construction violates due process. These pointless exercises would bring no benefit while imposing substantial burdens.

Meanwhile, if the proceedings are not stayed, the federal court risks erroneously interpreting state law and/or unnecessarily rendering a constitutional decision. *See* Section I(C), *supra*. In these circumstances, the Fifth and Seventh Circuits' rule would "run counter to core principles of federalism, comity, consistency, and judicial economy." *McDonough*, 139 S. Ct. at 2158.

2. *The rule would have harsh effects on plaintiffs seeking to vindicate their constitutional rights.* The Fifth and Seventh Circuit's approach would exact harsh effects on § 1983 plaintiffs seeking to vindicate their constitutional rights, and unreasonably so.

First, when a state trial court initially denies a request for post-conviction DNA testing, the plaintiff would not expect the clock on his or her § 1983 claim to start ticking. Consistent with the *Rooker-Feldman* doctrine and the general policy disfavoring parallel litigation, the plaintiff would reasonably first seek reversal on appeal to the state courts, rather than seek relief from the federal district court. *Skinner*, 562 U.S. at 531–32 (federal district court has no power to review state court decision) (citations omitted); *see generally Rooker v. Fidelity Tr. Co.*, 263 U.S. 413 (1923); *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The plaintiff would expect his or her § 1983 claims, if any, to accrue only upon resolution of the state proceedings, which—as this case demonstrates—would often be *after* the

expiration of the limitations period under the Fifth and Seventh Circuits' rule.

Second, a plaintiff in Reed's position might reasonably doubt his standing and the ripeness of his or her § 1983 claim prior to completion of the state proceedings. *See* Section II(A), *supra*. In response, the plaintiff *could* pursue his or her § 1983 action *in lieu of* a direct appeal in the state courts, which would eliminate standing and ripeness concerns. But that would put the plaintiff in the "very awkward position" of "criticiz[ing]" the state's procedures while "sidestep[ping]" the appellate process the state afforded the plaintiff. *Osborne*, 557 U.S. at 71. Out of respect to "the role of state courts as the final expositors of state law" (*England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 415 (1964)), this Court should allow the plaintiff to exercise his right to state adjudication of state law issues before submitting any federal constitutional questions to the federal courts' review.

* * *

In sum, a rule requiring plaintiffs to file parallel § 1983 actions solely for preservation purposes serves no purpose other than to trap the unwary. And it would have particularly harsh effects on the many plaintiffs who are prisoners proceeding pro se. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) ("[T]he right to appointed counsel extends to the first appeal of right, and no further."). Also, because this Court's civil decisions generally apply retroactively (*see Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993)), the rule's consequences would be severe for those whose state law claims have already been denied by trial courts, including Mr. Reed. As a result, an untold number of plaintiffs with otherwise meritorious claims would be denied the ability to vindicate their federal constitutional right to due process about a matter of the gravest import: actual innocence.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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