No. 19-789

IN THE

# Supreme Court of the United States

MAGHREB PETROLEUM EXPLORATION, S.A. AND MIDEAST FUND FOR MOROCCO LIMITED,

*Petitioners,*

*v.*

JOHN PAUL DEJORIA,

*Respondent.*

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

## REPLY BRIEF


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## INTRODUCTION

Respondent DeJoria does not deny the facts showing that, after he lost in the Fifth Circuit in 2015, he used his significant wealth and influence to lobby the Texas legislature to change the law and make it retroactive for his benefit in this case. Instead, DeJoria scoffs at the notion of this Court reviewing the unconstitutional application of the law and erects straw men and sets them ablaze. DeJoria attempts to prevail using procedure over substance, ignoring this Court's practice to review issues passed upon by the appellate court. DeJoria repeatedly conflates Texas's revised statute itself with its constitutionally infirm retroactive application that robbed Petitioners of their right to have the Moroccan judgment recognized. DeJoria's assertion that the Fifth Circuit's about-face on the standard of review was not dispositive is just wrong—the Fifth Circuit expressly stated that the appeal's outcome turned on the standard of review.

## THE PETITION SHOULD BE GRANTED

### I. A Circuit Split Exists

A circuit split is not the only key to this Court's doors. Even so, the *DeJoria-II* decision does create a split between the Fifth Circuit's review of foreign country money judgments and that of other circuits. In *Midbrook Flowerbulbs Holland B.V.* v. *Holland America Bulb Farms, Inc.*, 874 F.3d 604, 612 (9th Cir. 2017), the Ninth Circuit reviewed *de novo* the district court's decision to enforce a Dutch judgment under Washington's version of the 2005 Uniform Act. The issue in the Ninth Circuit, as here, was whether the "specific proceeding" provided the

judgment debtor with due process. *Ibid.*; see also *Naoko Ohno* v. *Yuko Yasuma*, 723 F.3d 984, 1002 (9th Cir. 2013) (reviewing *de novo* the district court's decision to enforce a Japanese judgment under California's version of the 2005 Uniform Act's "public policy" ground).

*DeJoria-II* said that "much of the confusion surrounding the standard of review arises from this case's odd posture" and noted that "the district court did not rule on a motion for summary judgment or conduct a bench trial." App.13a. The proceedings below most resembled summary judgment, with both parties creating a record with documents and declarations. Other circuit courts have applied *de novo* review in foreign-country money-judgment recognition cases arising out of summary-judgment proceedings. See *Society of Lloyd's* v. *Reinhart*, 402 F.3d 982, 993 (10th Cir. 2005) (reviewing *de novo* recognition of an English judgment); *Commissions Import Expert S.A.* v. *Rep. of the Congo*, 757 F.3d 321, 325 (D.C. Cir. 2014) (same); *Iraq Middle Market Development Foundation* v. *Harmoosh*, 848 F.3d 235, 238 (4th Cir. 2017) (same as to Iraqi judgment). *DeJoria-II* breaks with these circuits' approach, too.

## II. Due Process Violations and Abuses of Power Demand Review

### A. The Fifth Circuit Passed Upon Retroactivity

Judicial review of retroactive laws constitutes "an essential thread in the mantle of protection that the law affords the individual citizen." *Lynce* v. *Mathis*, 519 U.S. 433, 439 (1997). DeJoria argues that Petitioners did not raise their argument below, Resp. 11, and invites this

Court to rubber-stamp this disruption of the "existing social arrangements" and permit evisceration of what Justice Gorsuch labeled the "sacred principle" that "ensures that people have fair warning of the law's demands." *Sveen* v. *Melin*, 138 S. Ct. 1815, 1826 (2018) (Gorsuch, J., dissenting).

Petitioners' retroactivity arguments below do implicate federal constitutional concerns. In *Landgraf* v. *USI Film Products*, 511 U.S. 244, 266 (1994), this Court reiterated that the "antiretroactivity principle finds expression in several provisions of our Constitution," including the Due Process Clause, which "protects the interests in fair notice and repose that may be compromised by retroactive legislation." Having raised such concerns below, Petitioner's federal constitutional question is properly presented. *See Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."). Even if Petitioners had not raised a federal retroactivity challenge, this Court's practice "permit[s] review of an issue not pressed *as long as it has been passed upon*." *Ibid.* (emphasis added); *U.S.* v. *Williams*, 504 U.S. 36, 41 (1992) (rejecting dismissal argument because the court of appeals "decided the substantive issue presented"); *Stevens* v. *Dep't of Treasury*, 500 U.S. 1, 8 (1991) (same). Here, *DeJoria-II*'s sanctioning DeJoria's mid-game rule-changing necessarily (and incorrectly) resolved the underlying federal concerns about fair notice and repose in his favor and rendered the issue ripe for review.

DeJoria argues that Petitioners briefing below "focused entirely" on *Robinson* v. *Crown Cork & Seal Co.*, 335 S.W.3d 126 (Tex. 2010). Resp. 12. DeJoria omits that *Robinson* itself draws significantly from *Landgraf* and related cases. *Robinson* begins by invoking *Landgraf*: "There exists in this country, as the United States Supreme Court observed in *Landgraf v. USI Film Products,* a 'presumption against retroactive legislation [that] is deeply rooted in our jurisprudence[ ] and embodies a legal doctrine centuries older than our Republic.... [T]he 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.'" 335 S.W.3d at 137 (quoting 511 U.S. at 265).

*Robinson* then looks to Justice Scalia's concurrence in *Kaiser Aluminum & Chem. Corp. v. Bonjorno,* noting that the principle highlighted in *Landgraf* "was recognized by the Greeks, by the Romans, by English common law, and by the Code Napoleon. It has long been a solid foundation of American law.... Justice Story said that "retrospective laws are ... generally unjust; and ... neither accord with sound legislation nor with the fundamental principles of the social compact." 335 S.W.3d at 136 (quoting 494 U.S. 827, 855 (1990)). And while *Robinson* acknowledges that the U.S. Constitution does not expressly prohibit retroactive laws, it recognizes that "the retroactivity principle finds expression in its prohibition of bills of attainder, ex post facto laws, and state laws impairing the obligation of contracts." *Id.* at 137 (citing *U.S. Trust Co. of N.Y. v. N.J.,* 431 U.S. 1, 17 n. 13 (1977)).

*Robinson* also relied on *Landgraf* to highlight the "two fundamental objectives" served by the presumption

against retroactivity: first, "elementary considerations for fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly" and that "settled expectations should not be lightly disrupted;" second, the legislature's "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Id*. at 139 (citing 511 U.S. at 265-66). *Robinson* is thus equally about *federal* constitutional limits as it is about any limits imposed by the Texas Constitution. DeJoria cannot divorce Petitioners' arguments below from their federal constitutional underpinnings.

### B. Respondent's Straw Men Do Not Rebut Petitioners' Arguments

DeJoria downplays the unconstitutional retroactivity for which he lobbied by saying the issue "is framed tightly around the facts of this case." Resp. 12. The facts of the case will nearly always bear on retroactive application's constitutionality. This Court recognized that "retroactivity provisions often serve entirely benign and legitimate purposes whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." *Landgraf*, 511 U.S. at 267-268. Whether retroactive application serves such "benign and legitimate purposes" is, of course, a question "framed tightly around the facts of a case."

DeJoria asks this Court blindly to defer to Texas's legislature and argues that "the U.S. Constitution broadly

allows retroactive provisions of the sort at issue here, absent some direct conflict with a specific constitutional provision." Resp. 12. This Court warned in *Lynce* that "the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects." 519 U.S. at 440. Enforcing these constitutional limits is squarely within the province of this Court, especially when a billionaire litigant like DeJoria procured a new law *and its retroactive application* in order to influence the litigant's own pending case. DeJoria's conduct offends the Due Process Clause (and any legitimate sense of justice) and, if unchecked by this Court, invites other litigants and courts to do the same.

DeJoria says the 2017 Texas Act "merely incorporates into state law the Constitution's due-process protections for judgment debtors," Resp. 13, but he omits that the prior version of the Act provided the full gamut of constitutional due process protections, including personal and subject matter jurisdiction, due process procedures, impartial forum, notice and service of process, and more. *See* Tex. Civ. Prac. Rem. Code §36.005. Applying the 2017 Texas Act retroactively to this pending case undid Texas's default rule in favor of recognition and relieved judgment debtor DeJoria of his burden to prove a ground of non-recognition. Pet. 19-20.

DeJoria says the Due Process Clause is "inapplicable" here "on its face." Resp. 13. Rubbish. The presumption against retroactivity is inexorably intertwined with the Due Process Clause. *Landgraf* described the presumption as reflected in "several provisions of our Constitution," including the Due Process Clause, which "protects the interests in fair notice and repose that may

be compromised by retroactive legislation." 511 U.S. at 265, 267. If the Due Process Clause applies anywhere, it applies here.

Retroactively applied legislation that does (and is intended to) affect pending lawsuits undermines the courts. Pet. 17. DeJoria shrugs this off as "novel" and argues "the separation-of-powers doctrine is not a ground to invalidate state statutes." Resp. 14. Of course, it is. In *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995), this Court held unconstitutional a federal statute because it violated separation-of-powers by "depriving judicial judgments of the conclusive effect that they had when they were announced." DeJoria cites no authority for his proposition that state laws that similarly negate judgments are exempt from *Plaut's* rule. Even admirable intentions—none here—do not rescue such a law. "Not favoritism, nor even corruption, but power is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons…." *Id.* (emphasis in original). By countenancing rank abuse of legislative power to undo *DeJoria-I* and by permitting DeJoria to relitigate decided issues, *DeJoria-II* invites the very interference that the separation-of-powers doctrine is designed to prevent. This, too, demands this Court's review.

### C. The Fifth Circuit Misapplied the Law

DeJoria incorrectly says that *DeJoria-II* correctly decided the "pure question of state law" before it. Resp. 15. The issue of retroactivity implicates federal law as much as, if not more so than, state law. *See supra*. Petitioners

do not seek fact-bound error correction—there are larger issues at play—but the Fifth Circuit's decision purposefully overlooks questions resolved by *DeJoria-I* and reaches a result at odds with the record. *See* Pet. 17-20.

DeJoria echoes the Fifth Circuit's statement that "it cannot be said that a state's desire to provide immediate protection to the due process rights of its citizens is not compelling." Pet. 15-16. This is mere lip service. Neither the Fifth Circuit nor DeJoria identify any due-process rights left unprotected by the Original Act or explain what additional protections are afforded by retroactive application of the 2017 Texas Act. The only interests served were those of a wealthy citizen. The Fifth Circuit in *DeJoria-II* said "the vindication of fundamentally unfair proceedings is why the 2005 Uniform Act recognizes an absence of due process as one of the rare situations when an American court may not recognize a foreign judgment." App. 11a. But it then credited the same record of speculation and innuendo that its predecessor panel had expressly rejected.

DeJoria repeats the Fifth Circuit's incorrect notion that Petitioners' only impinged right was to "automatic recognition of a judgment obtained in proceedings that denied the judgment debtor fundamental fairness." Resp. 16. The Petition debunked this premise, demonstrated that there was nothing "automatic" about this years-long recognition dispute, and showed how *DeJoria-II* turned the recognition procedure on its head and allowed DeJoria to escape his burden of proof to establish a statutory ground for non-recognition. Pet. 19-20.

DeJoria challenges Petitioners' view that this case was all but over after *DeJoria-I*. Resp. 16-17. DeJoria's actions speak volumes. His loss in *DeJoria-I* and his dim prospects afterwards are the reasons that DeJoria lobbied for legislative interference. DeJoria had no confidence in the post-*DeJoria-I* arguments he identifies at page 17 of his Response. *DeJoria-I* held that he "waived" them—which is exactly why he sought to "change the rules of the game midway through the proceedings." App. 12a. DeJoria calls the legislature's reaction to *DeJoria-I* "far from extraordinary" because the new law seeks to "more fully protect" citizens' rights, but he omits that he is *the only* citizen to benefit from retroactivity.

* * *

Retroactive application of the 2017 Texas Act violated Petitioners' constitutional rights. It denied Petitioner fair warning of the law's demands and destroyed the existing social arrangement in violation of the Due Process Clause. The Constitution's "limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects" is a "basic principle" that "protects not only the rich and the powerful." *Lynce*, 519 U.S. at 440. This Court should decline Respondent's invitation to permit such a rank abuse of power and wealth.

## III. The Incorrect Standard of Review Determined the Outcome

The Fifth Circuit expressly stated that that "the appeal's outcome largely turns on" and "ends up being resolved on" the "clear error" standard of review. App. 13a, 23a. DeJoria ignores this and says a different standard of

review would not have affected the outcome. Resp. 18-19. DeJoria is wrong, and the outcome determinative nature of appropriate standard of review deserves this Court's review.

The *DeJoria-I* Court correctly held that Texas law supplies the standard of review and noted that, under Texas law, whether a judgment debtor has met his burden to prove a statutory ground for non-recognition is reviewed *de novo*. App. 94a-95a; *Reading & Bates Constr. Co.* v. *Baker Energy Res. Corp.*, 976 S.W.2d 702 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Presley* v. *N.V. Masureel Verdeling*, 370 S.W.3d 425 (Tex. App.—Houston [1st Dist.] 2012, no pet.). If *DeJoria-II* had followed *DeJoria-I* and Texas law and applied *de novo* review, then DeJoria would have lost again.

*DeJoria-II*'s departure from established law (and from *DeJoria-I*) results in a schism between federal and state courts and different outcomes depending on the forum.. Litigation in federal court "should be substantially the same, so far as legal rules determine the outcome of a litigation," as it would be in state court. *Guaranty Trust Co.* v. *New York*, 326 U.S. 99, 109 (1945). *DeJoria-II* opens the door to the forum shopping and inequitable administration of the laws that this rule seeks to avoid. *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965).

DeJoria notably does not respond to this argument, let alone deny *DeJoria-II's* obvious contravention of *Guaranty Trust* and *Hanna*. Instead, DeJoria says that Petitioners "would have the Fifth Circuit instead find facts itself under a *de novo* standard of review" and complains that "Petitioners identify no other court of

appeals that applies a *de novo* review of factual findings, in judgment recognition cases or otherwise." Resp. 18. No. Petitioners would have the Fifth Circuit undertake a *de novo* review of the record evidence before it, just as it did in *DeJoria-I*, just as Texas appellate courts do, just as the Ninth Circuit does, and just as appellate courts nationwide do in the context of summary judgment, the most analogous procedure to that below. Petitioners would have the *DeJoria-II* Court honor the express holdings in *DeJoria-I* and its rejection of burden-inverting and counter-factual speculation.

DeJoria tries to excuse the Fifth Circuit's departure from state law and its own precedent by falsely limiting *DeJoria-I* to "legal determinations." Resp. 19. *DeJoria-I* and DeJoria's own evidence-based arguments disprove this contrivance. *DeJoria-I* held "the record here does not establish that any judgment rendered by a Moroccan court is to be disregarded as a matter of course" and that "the record does not establish that the King actually exerted any improper influence on the Moroccan court in this case." App.102a. The prior panel also found that "DeJoria could have litigated entirely through counsel without returning to Morocco." App.116a. After losing in *DeJoria-I,* DeJoria himself argued that "*de novo* review allowed the Fifth Circuit to weigh the facts in the first instance," complained that *DeJoria-I* "reweighed" evidence and was not "deferential…to the district court's findings," and said "reweighing of disputed evidence and inferences is illustrated by [DeJoria-I's] treatment of the availability of counsel in the Moroccan proceedings." Pet. 27.

DeJoria says that *DeJoria-II* double-checked itself by looking to Texas law "to see if anything counsels in a different direction." Resp. 20. DeJoria cannot (and does not) explain why *DeJoria-II* omitted the seminal Texas cases on this exact issue, *Reading & Bates* and *Presley,* and forgot about *The Courage Corp.* v. *Chemshare Corp.*, 93 S.W.3d 323, 331 (Tex. App.—Houston [14th Dist.] 2002, pet. denied), in which the Texas appeals court reviewed "findings and conclusions" *de novo*.

DeJoria wrongly relies exclusively on *Mariles* v. *Hector*, 2018 WL 3723104, at *6 (Tex. App.—Dallas Aug. 6, 2018, pet. denied). The trial court in *Mariles* conducted an evidentiary hearing, *id.* at *2, both parties agreed the de novo review applied, *id.* at *6, and the court vacillated between the *de novo* and abuse of discretion standards, *id.* That Texas appeals court did not resolve the issue because "under either standard," it would defer to the trial court's credibility and evidentiary determinations. *Id.* DeJoria omits that, in this case, there was no evidentiary hearing or live or deposition testimony—just a "cold written record." The magistrate judge's ruling was not entitled to deference, and certainly should not have been allowed to supplant the holdings in *DeJoria-I*.

## CONCLUSION

The petition should be granted.

Respectfully submitted.

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