No. _____

In the Supreme Court of the United States

October Term 2022

DAVID SANTIAGO RENTERIA,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

MICHAEL WISEMAN
WISEMAN & SCHWARTZ, LLP
718 Arch Street, Suite 702 North
Philadelphia, PA 19106
215-450-0903
wiseman@wisemanschwartz.com

MAUREEN FRANCO
Federal Public Defender
Western District of Texas
*TIVON SCHARDL
Florida Bar No. 73016
Capital Habeas Unit Chief
TIMOTHY GUMKOWSKI
Texas Bar No. 24104788
Assistant Federal Defender
Federal Defender Office
919 Congress, Suite 950
Austin, Texas 78701
737-207-3007 (tel.)
512-499-1584 (fax)
*Counsel of Record

*****EXECUTION SCHEDULED FOR NOV. 16, 2023 AT 6:00 PM**

CAPITAL CASE

QUESTION PRESENTED

1. Should an important federal law from the Reconstruction Era—the removal act for criminal cases, 28 U.S.C. § 1443(1)—be given its original public meaning or should it remain a virtual dead-letter due to the gloss this Court placed on its text based on what its legislative history indicated about Congress's intent?

2. Must a federal court have authority in prior interpretive decisions of other courts before give the statutory phrase "at a later time," 28 U.S.C. § 1455(b)(1), its plain meaning?

CORPORATE DISCLOSURE STATEMENT

Petitioner David Santiago Renteria, a death-sentenced Texas inmate scheduled for execution on November 16, 2023, at 6:00 pm, was the appellant in the United States Court of Appeals for the Fifth Circuit. The State of Texas was the appellee in that court.

LIST OF PROCEEDINGS

State v. Renteria, 20020D00230 (41st Dist. Ct., El Paso County, Tex.) (convicted and sentenced to death Oct. 2, 2003)

Renteria v. State, 206 S.W.3d at 689, 710 (Tex. Crim. App. 2006) (reversing death sentence)

State v. Renteria, 20020D00230 (41st Dist. Ct., El Paso County, Tex.) (resentenced to death May 14, 2008)

Renteria v. State, No. AP-74,829, 2011 WL 1734067 (Tex. Crim. App. May 4, 2011) (affirming death sentence)

Renteria v. Texas, 565 U.S. 1263 (Mar. 19, 2012) (denying petition for writ of certiorari)

Ex parte Renteria, Nos. WR-65,627-01, -02, & -03 (Tex. Crim. App., Dec. 17, 2014) (denying state habeas applications)

Renteria v. Davis, No. 3:15-cv-00062-FM, 2019 WL 611439 (W.D. Tx., Feb. 12, 2019) (denial of the Writ of Habeas Corpus)

Renteria v. Davis, No. 19-70009, 814 F. App'x 827 (5th Cir. May 21, 2020) (affirming District Court's denial of the Writ of Habeas Corpus)

Renteria v. Lumpkin, 141 S. Ct. 1412 (2021) (denying writ of certiorari on federal habeas)

In re State ex rel. Hicks, No. WR-95,092-01, 2023 WL 6074482, at *1 (Tex. Crim. App. Sept. 18, 2023), *reh'g denied* (Oct. 26, 2023) (writ of mandamus issued to trial court)

Renteria v. Lumpkin, No. 3:23-CR-2080-1 (W.D. Tex. Oct. 20, 2023), *re-consideration denied* (Oct. 31, 2023) (remanding removal proceeding to state court)

Renteria v. Lumpkin, No. 23-70007 (5th Cir. Nov. 14, 2023) (affirming remand to state court) In re State ex rel. Hicks, No. WR-95,092-01, 2023 WL 6074482, at *1 (Tex. Crim. App. Sept.

Ex parte Renteria, No. WR-65,627-05 (Tex. Crim. App.) (subsequent habeas application and motion for stay of execution pending)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner, David S. Renteria, is a condemned prisoner in the custody of the Texas Department of Criminal Justice, Correctional Institution Division. His execution is scheduled for November 16, 2023, at the State Penitentiary at Huntsville.

He seeks certiorari review of two questions related to the operation of the federal removal statute. After initially granting removal the District Court denied it and remanded the matter to state court. The District Court then denied reconsideration.

The Court of Appeals affirmed the denial of removal.

OPINIONS BELOW

The November 13, 2023, per curium opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of removal is not reported. A copy of the slip opinion is attached.

The District Court's October 20, 2023, Order remanding the matter to Texas and October 31, 2023, Order denying reconsideration are not reported. They are attached.

JURISDICTION

The District Court had jurisdiction over the removal proceedings pursuant to 28 U.S.C. §1433(1) and 28 U.S.C. §1455.

The Court of Appeals had jurisdiction over the appeal of the denial of removal under 28 U.S.C. §1291, 28 U.S.C. §1447(d).

The judgment of the Court of Appeals was entered on November 14, 2023.

This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The federal removal statute, 28 U.S.C. §1433(1) states:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> **(1)** Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof.

The Procedure for removal of criminal prosecutions, 28 U.S.C. §1455, states in relevant part:

> (b) **Requirements** (1) A notice of removal of a criminal prosecution shall be filed not later than 30 days after the arraignment in the State court, or at any time before trial, whichever

> is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

STATEMENT OF THE CASE

I. State Court Trial and Direct Appeal

Petitioner David Renteria was convicted of capital murder for his confessed role in the kidnapping of Alexandra Flores in November 2001, in El Paso, Texas. Renteria has steadfastly maintained that members of the Barrio Azteca cross-border drug gang ordered him to lure Ms. Flores from a Walmart in El Paso or face violent reprisals against him and his family.[1]

In 2002, Texas commenced a criminal prosecution solely against Renteria for the capital murder of Alexandra Flores. ROA.29.[2] He was convicted in 2003 and sentenced to death, *State v. Renteria*, No. 20020D00230, 2003 WL 25704119 (Tex. 41st Dist. Ct. Oct. 28, 2003).

[1] Renteria has admitted to his role in the abduction and the placement of her body after she was murdered by members of the Barrio Azteca. He has always maintained he was coerced into participating in the abduction and had no reason to believe it would result in her murder. Accordingly, he is not eligible for the death penalty. *See Tison v. Arizona*, 481 U.S. 137 (1987).

[2] For ease of review, Petitioner cites to the Record on Appeal that accompanied his Fifth Circuit Appeal, which is available on PACER.

That sentence was vacated on appeal because the trial court wrongly excluded evidence of Renteria's remorse. *State v. Renteria*, 206 S.W.3d 689 (Tex. Crim. App. 2006).

Texas secured a second death sentence against Renteria in 2008, which was upheld on direct appeal. *See State v. Renteria*, No. AP-74,829, 2011 WL 1744067 (Tex. Crim. App. May 4, 2011).

II. Warrant Proceedings Against Renteria Leading to the Equal Protection Violation

Texas law gives convicting courts the exclusive authority to set execution dates. Tex. Code Crim. P. arts. 43.141 & 43.15. State law limits the trial court's discretion in choosing a date in only two ways: (1) the execution date cannot be set before the conclusion of direct appeal and review of a timely application for collateral review, *id.*, art. 43.141(a)-(b); and (2) the "execution date may not be earlier than the 91st day after the date the convicting court enters the order setting the execution date," *id.*, art. 43.141(c).

The Texas Court of Criminal Appeals ("TCCA") has stated that under Article 43.141, "a trial court has a ministerial duty to *carry out* a sentence imposed[, but] a trial court is *not required* to *set* an execution

date immediately" after the events that must be complete before an execution may be set. *In re State ex rel. Ogg*, No. WR-93,812-01, 2022 WL 2344100 (Tex. Crim. Ct. App. June 29, 2022) at *2 (emphasis added). That is, the setting of an execution date is a ministerial duty, but trial courts have discretion as to *when* to schedule an execution. After *Ogg* "a question remains as to how broad a trial court's discretion is in deciding when to set an execution date." *Ibid.*

In May 2023, prosecutors in El Paso County contacted counsel for two men who had been sentenced to death in El Paso to advise that the State would be seeking an execution date: Tony Ford, who was sentenced to death in 1993,[3] and whose second round of post-conviction review concluded in 2019,[4] and David Renteria, who was sentenced to death in 2008, and whose only post-conviction review proceedings concluded in 2021.[5] ROA.96; ROA.99-100 at ¶¶ 3-4; ROA.101-102 at ¶¶ 17-18. Both Ford and Renteria maintain they are innocent of the death penalty under *Tison v. Arizona*, 481 U.S. 137 (1987), because they did not kill the victims in their

[3] *See Ford v. State*, 919 S.W.2d 107 (Tex. Crim. App. 1996).
[4] *See Ex parte Ford*, No. 49,011-03 (Tex. Crim. App. Sep. 11, 2019).
[5] *See Renteria v. Davis*, 814 Fed. App'x. 827 (5th Cir. May 21, 2020), *cert. denied*, 141 S. Ct. 1412 (2021).

respective cases and acted without reason to suspect that the actual killers would use deadly force. *See Ford v. Cockrell*, 315 F. Supp. 2d 831, 835 (W.D. Tex. 2004).

The attorneys for both Ford and Renteria requested an opportunity to meet with counsel for the State before it moved for an execution date. Prosecutors agreed to meet with Ford's attorney but refused to meet with Renteria's attorney. ROA.101 at ¶ 17. As a result of the meeting in Mr. Ford's case, the prosecution did not seek an execution date for him, and they permitted Ford's counsel the opportunity to inspect his prosecution file. ROA.101-102 at ¶ 18.

On May 15, 2023, prosecutors filed a motion requesting that the trial court set November 16, 2023, as the date for Renteria's execution. ROA.89-93. The prosecution maintained that the trial court merely had a "ministerial duty" to sign the prosecutor's proposed order, *i.e.*, the court had no discretion to refuse to do so. ROA.89-93; ROA.109 (State's motion, "it is this Court's ministerial duty to sign the order setting [Renteria's] execution date" as presented by the State); *id*. at 6 ("entering the order" presented by the State is the "fulfillment of [the court's] ministerial duty").

Renteria opposed the motion and requested a hearing. Hearings on such motions are not uncommon in Texas and can result in courts rejecting the prosecution's motion in whole or in part. In 2020, the same court that convicted Renteria, the 41st District Court for El Paso County, held a hearing on the prosecution's motion to set a date for Mr. Ford to be executed. Based on the evidence and argument presented in that hearing, the trial court denied the prosecutor's motion. ROA.113-114. The district attorney petitioned the TCCA for a writ of mandamus that would require the trial court to sign and enter the prosecution's proposed execution order against Ford. ROA.116-133. The TCCA conducted a preliminary review of the petition, *see* Tex. R. App. P. 72.2, and denied the district attorney leave to file a petition for writ of mandamus. ROA.135.

Before the trial court acted on the prosecution's motion in this case,[6] Renteria's counsel requested the same opportunity to inspect the files in the State's possession that Ford's counsel, and other similarly situated defendants in El Paso, received. ROA.137. The State first ignored Renteria's requests, then tersely rejected them, ROA.141, then contrived

[6] In May 2023, responsibility for Renteria's case was transferred from the 41st District Court in El Paso to the 327th District Court, the Honorable Monique Velarde Reyes, presiding.

a post-hoc rationalization for that denial, then modified its explanation several times. ROA.143-144; ROA.66 (trial court's findings).

On June 9, 2023, the trial court rubberstamped the prosecution's proposed execution order, and the clerk of court issued the warrant. ROA.146-148.

On June 27, 2023, prosecutors filed a motion to vacate the execution date. ROA.150-153. The prosecution asserted that there was no actual defect in the execution order or warrant and no basis in law to question the validity of either document. ROA.159-162. Nonetheless, the prosecutors wanted the date-setting process repeated for its own convenience: to avoid anticipated litigation by Renteria.[7] ROA.161. Notably, while the prosecution had already asserted that signing the execution order was a "ministerial act," it relied in this instance on a trial court's inherent powers under the Texas Constitution to control its own judgments, a position contrary to what it would later argue when Petitioner sought reconsideration of the date-setting. ROA.161-162.

[7] There has never been any evidence that Renteria was considering such litigation, and no court has so much as suggested he was.

On July 5, 2023, without hearing from Renteria, the trial court granted the prosecution's motion to vacate the execution order and withdraw the death warrant due to the defect that the State claimed was no impediment to the existing order of execution. ROA.172-173.

The following day, the prosecution filed another motion to set the same execution date, ROA.175-179, which the trial court rubberstamped a few hours later, again without hearing from Renteria. ROA.182-184.

III. The Trial Court Finds an Equal Protection Violation

On July 12, 2023, Renteria filed a motion asking the trial court to reconsider the second execution order. ROA.186-196. He argued and presented evidence showing that he had been denied "fair and equal treatment before the law." ROA.188; *see generally* ROA.189-192. He demonstrated that the prosecution had subjected him "to disparate and arbitrary deprivation of a custom and practice it has afforded other capital litigants—namely access to that Office's case file." ROA.193. He further argued that the prosecutors' actions violated his rights under the Equal Protection Clause of the Fourteenth Amendment by making him "a 'class of one,' … [who] has been intentionally treated differently from others

similarly situated [with] no rational basis for the difference in treatment." ROA.195 (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

After receiving a response from the prosecution and additional evidence, on August 28, 2023, the trial court held a hearing on Renteria's motions. Petitioner presented proof in support of his equal protection claim. The prosecution presented nothing. The rubber-stamped order was then set aside. The trial court judge, Judge Monique Velarde Reyes, explained that the execution order had been entered under the belief that the "defense still had access to the file" because that would happen in "any other case." ROA.65. Judge Velarde Reyes looked for the prosecutors' reasoning and found only a prosecutor's "email, short and succinct, 'We … decline your request.'" ROA.66 (corrected). But, the court found, "the actions in other cases differ from that," *ibid*., because counsel identically situated to Renteria's counsel were given access to the prosecution's file. ROA.101-102. The evidence of arbitrariness and disparate treatment "scare[d the court] because that's going down [a] slippery slope of being able to pick and choose which attorneys are going to be able to look at discovery." ROA.66-67.

Judge Velarde Reyes also found grounds for her decision in the prosecutors' delay tactics. The District Attorney's Office allowed six months of the warrant period to lapse while it arbitrarily denied Renteria the same process afforded similarly situated defendants. ROA.68; ROA.33. The prosecution's delay prejudiced Renteria because Texas law requires that a clemency application be filed twenty-one days before an execution date[8] and that a subsequent writ application be filed eight days before an execution date. Tex. Ct. Crim. App. Misc. R. 11-003. *See* ROA.33.

For those reasons, Judge Velarde Reyes ruled from the bench that she was withdrawing the execution order and ordering immediate disclosure of the prosecution's files. ROA.67; ROA.32-33.

Immediately following the ruling from the bench, the next words from the prosecution was that it would seek reconsideration. ROA.70. On August 31, 2023, prosecutors filed a motion asking the trial court to reconsider its order.

[8] 37 Tex. Admin. Code § 143.57(b) (2023) (Tex. Board Pardons & Paroles, Commutation of Death Sentence to Lesser Penalty).

IV. The Mandamus Action – Renteria Cannot Enforce his Equal Protection Rights in Texas's Criminal Courts

The trial court never had the opportunity to rule on the motion to reconsider because, on September 6, 2023, the District Attorney filed in the TCCA a motion to stay the trial court proceedings. After Renteria's counsel filed a preliminary response to the stay motion, the TCCA stayed the trial court's discovery order. ROA.199.

Texas law expressly prohibits the TCCA from granting mandamus relief before the respondent or real-party-in-interest has filed a response. Tex. R. App. P. 72.2 (any case that "should be filed and set for submission … will then be handled and disposed of in accordance with Rule 52.8"); Tex. R. App. P. 52.8(b)(1) (if court tentatively finds petition meritorious, "court must request a response if one has not been filed"). The rules require a two-stage process: (1) review of the petition and a vote to determine whether "five judges tentatively believe that the case should be filed and set for submission," Tex. R. App. P. 72.2; and (2) an order granting leave to file the petition, and the process dictated Rule 52.8(b)(1), *i.e.*, a request for a response if one has not been filed. The TCCA failed to afford

Renteria his rights under either Rule. It granted the petition on September 18, 2023, without calling for a response to the merits of the mandamus action. ROA.76-83.

In granting the petition for mandamus, the TCCA held that the trial court in this case has "no freewheeling jurisdiction to seek to safeguard Renteria's Fourteenth Amendment Rights" including his rights under the Equal Protection Clause. ROA.82.

Renteria moved for reconsideration (or more aptly, consideration, since he was not initially permitted to be heard) on October 5, 2023. Reconsideration was denied on October 25.

The TCCA is the highest state court in Texas with jurisdiction over Renteria's case. *See* Tex. Const. art. V, § 5(a)(b). The TCCA has interpreted state law to give it exclusive jurisdiction over original writs (*e.g.*, writs of prohibition and mandamus) concerning such cases. *See State ex rel. Honorable Court of Appeals for Third Dist.*, 885 S.W.2d 389, 392-96 (Tex. Crim. App. 1994) (en banc). Consequently, Renteria argued below that the TCCA's holding in this case that the state district court has no "freewheeling jurisdiction to seek to safeguard Renteria's Fourteenth Amendment Rights" constitutes a final and "formal expression of state

law," 28 U.S.C. § 1443(1); *Winters v. New York*, 333 U.S. 507, 514 (1948), barring him from enforcing – in the words of the removal statute – "a right under any law providing for equal civil rights of citizens of the United States." 28 U.S.C. § 1443(1).

Renteria argued the TCCA's denigration of his right to equal protection of the laws as a "freewheeling" pursuit, coupled with the court's refusal to let him enforce his rights in the TCCA itself, meant he has no state forum to enforce those rights – rights that the only jurist to have ruled on the merits of this question found had been violated. Renteria argued that the process the TCCA relied on to conclude that the trial court lacked jurisdiction to enforce his rights under the Equal Protection Clause denied him the equal protection of the Texas Rules of Appellate Procedure. Although Rules 72.2 and 52.8(b)(1) expressly required notice that the court deemed the case worthy of submission and an opportunity for either Renteria or the trial court to respond, the TCCA ignored both rules.

The TCCA's substantive holding on the trial court's lack of jurisdiction, coupled with the TCCA's decision to preclude Renteria from arguing

for his equal civil rights in the TCCA itself, conclusively establish the prerequisites for removal under § 1443(1).

V. The Removal Proceedings

Chapter 89 of the United States Judicial Code, 28 U.S.C. §§ 1441-1455, gives defendants the right to remove certain cases from state court to federal court. Sections 1443(1) and 1455 spell out the criteria and process for removal in criminal cases like this one. Section 1443(1) provides that "[a]ny … criminal prosecutions, commenced in a State court may be removed by the defendant" to the appropriate federal court when the prosecution was brought "[a]gainst any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States." 28 U.S.C. § 1443(1).

This Court has construed the statute to create a two-pronged test. "First, it must appear that the right allegedly denied the removal petitioner arises under a federal law 'providing for specific civil rights stated in terms of racial equality.'" *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975) (quoting *State of Ga. v. Rachel*, 384 U.S. 780, 792 (1966)). "Second, it must appear, in accordance with the provisions of s 1443(1), that the

removal petitioner is 'denied or cannot enforce' the specified federal rights 'in the courts of (the) State.'" *Ibid.* (quoting *Rachel* at 803).

The statute also includes a timing provision. As relevant to this case, if a notice is not filed within thirty days of arraignment, or an earlier date before trial, the defendant must show "good cause … [for] an order granting the defendant … leave to file the notice at a later time." 28 U.S.C. § 1455(b)(1).

The notice need contain only "a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action." *Id.*, § 1455(a).

Unless "it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted," *id.*, § 1455(b)(4), the district court must "order an evidentiary hearing to be held promptly," *id.*, § 1455(b)(5). If the district court determines that removal is permitted, "it shall so notify the State court in which prosecution is pending, which shall proceed no further." If the court decides the statutory criteria have not been met, it must remand the case back to the state court. *Id.*, §§ 1455(a) & (b).

As part of this process, the statute requires that the district court "shall issue its writ of habeas corpus" directing the State to relinquish custody of the defendant to the United States marshal. *Id.*, § 1455(c).

On October 18, 2023, Petitioner filed a *Notice of Removal and Supporting Brief* in the United States District Court for the Western District of Texas. ROA.4-21; *Texas v. Renteria*, No. 3:23-CR-2080-1 (W.D. Tex.). As the pleading met all of the removal statute's requirements, the district court followed the statute, and on October 19, 2023, issued a *writ of habeas corpus* ordering that Renteria be produced at a hearing to be held on November 6, 2023. ROA.245.

Also on October 20, 2023, Texas filed a Motion to Remand to State Court. ROA.247-270.

Roughly ninety-two minutes later, and without referring to the State's 23-page motion, the district court reversed course and remanded. The court based its decision on a simple syllogism: "'Congress eliminated post-judgment removal when it enacted [section] 641 of the Revised Statutes of 1874.' *State of Ga. v. Rachel*, 384 U.S. 780, 795 (1966)," ROA.273; "Renteria now seeks post-judgment removal of his criminal case, which is not permitted. *Rachel*, 384 U.S. at 795." ROA.274.

On October 25, 2023, counsel for Renteria filed a Motion for Reconsideration ROA.277-287, and the next day filed a Supplemental Memorandum, ROA.303-306.

The district court denied the Motion for Reconsideration on October 31, 2023. ROA.323-336.

Renteria perfected his appeal of this decision to the Court of Appeals for the Fifth Circuit when he filed a Notice of Appeal on November 3, 2023. ROA.337. He filed his opening brief on November 8, 2023. The State filed its answering brief on November 13, 2023. Renteria replied on November 14, 2023. The Court denied the appeal about six hours following receipt of the reply brief.

The Fifth Circuit categorically ruled that removal is never proper in a post-judgment criminal prosecution, which the court conflated with criminal cases that were in post-conviction *review*. While the Fifth Circuit said that there is ample authority against post-judgment removal, it mustered only three non-precedential circuit court decisions to support this categorical statement.[9]

[9] The Fifth Circuit cited: *Williams v. Corrigan*, No. 22-2096, 2023 WL 3868657 (6th Cir. May 12, 2023) (attempted removal of post-conviction review case); *Kansas v. Gilbert*, Nos. 22-3213 & 22-3230, 22-3229 & 22-3249,

The Fifth Circuit also held that the removal statute only applies to a deprivation of civil rights that is racially motivated because "[o]nly rights arising 'under a federal law providing for specific civil rights stated in terms of racial equality' qualify." *See slip op.*, at 5 (quoting *Johnson*, 421 U.S. at 219 (cleaned up in original)).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Decision Turned on This Court's Construction of an Important Federal Law that was Based on Legislative History, Not the Text of the Law or its Original Public Meaning

While there is no doubt that the enactment of the removal statute was motivated by a desire to protect the civil rights of racial minorities, that legislative history does not justify rewriting the law so that "[o]nly rights arising 'under a federal law providing for specific civil rights *stated in terms of racial equality*' qualify." If the Fifth Circuit's ruling is correct there would exist no mechanism for the enforcement of federal civil

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2023 WL 2397025 (10th Cir. Mar. 8, 2023) (attempted removal of state habeas review cases and closed criminal prosecutions); *Delaware v. Desmond*, 792 F. App'x 241 (3d Cir. 2020) (court concluded: "there does not appear to have been a valid basis for the removal, particularly at the post-conviction stage"). None of these non-precedential decisions categorically held that the post-judgment proceedings in a live capital case are not eligible for removal.

rights, like the right to equal protection, for a litigant who is denied that right after his trial is complete.

Renteria argued below that the Fourteenth Amendment's Equal Protection of Law Clause satisfies Congress's requirement that a defendant in a removal case assert "a right under *any law* providing for the equal civil rights of citizens of the United States." 28 U.S.C. § 1443(1) (emphasis added). The Court of Appeals rejected that argument because this Court said in a case involving 18 U.S.C. § 245 that "any law" means "a federal law 'providing for specific civil rights stated in terms of racial equality.'" (quoting *Johnson v. Mississippi*, 421 U.S. 213, 219 (1975), in turn quoting *State of Ga. v. Rachel*, 384 U.S. 780, 792 (1966)).

To be sure, the Court of Appeals was obliged to follow this Court's precedent. However, this Court has been at pains recently to better align precedents with the plain language of United States statutes. That is because this Court's "judicial duty under Article III" includes reconsideration of "'decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law.'"[10]

[10] *Ramos v. Louisiana*, 140 S. Ct. 1390, 1421-22 (2020) (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Gorsuch J., concurring)). *See also June Medical*

Renteria's counsel could find no case in which a court held in a published opinion that the Equal Protection Clause is not a "law providing for equal civil rights." In *City of Greenwood v. Peacock*, 384 U.S. 808 (1975), the removal petitioners relied upon the Equal Protection Clause. 384 U.S. at 811 n.3. But this Court did not find that provision inapplicable under § 1443(1). Rather, the Court held the petitioners failed to show their equal protection rights would be denied by the state courts. *Id.* at 827-828.

The Fifth Circuit relied exclusively on *Johnson v. Mississippi*, *supra*, but the words "equal protection" do not appear in that case. In *Johnson*, the removal petitioners relied on 18 U.S.C. § 245. 421 U.S. at 215, 217.

This Court required that a removal petitioner assert a right arising under a federal law that (a) provides for *specific civil rights* and that (b) is stated in terms of racial equality in *Rachel* and its companion case, *Peacock*. *Rachel*, in particular, delineated the "narrow circumstances" in

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Services L.L.C. v. Russo, 591 U.S. ___, 140 S. Ct. 2103, 2152 (2020) (Thomas, J., dissenting) ("we exceed our constitutional authority whenever we apply demonstrably erroneous precedent instead of the relevant law's text") (cleaned up).

which the law would function "against the historic backdrop of the statute." *Peacock*, 384 U.S. at 832. *Rachel* traced the current language of the law to the Revised Statutes of 1874 that have recently generated much discussion.[11]

Today, "[t]his Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock v. Clayton County, Georgia*, 590 U.S. ___, 140 S. Ct. 1731, 1738 (2020). But that was not so at the time of *Rachel*. Instead of considering the original public meaning—or indeed any public meaning—of the phrase "any law providing for … equal civil rights," the *Rachel* Court tried to divine the intent of Congress. The Court determined that "Congress' choice of the open-ended phrase 'any law providing for … equal civil rights' was clearly appropriate to permit removal in cases involving 'a right under' both existing and future statutes that provided for equal civil rights." *Rachel*, 384 U.S. at 789.

[11] *See*, *e.g.*, *Rogers v. Jarrett*, 63 F.4th 971, 980-981 (5th Cir. 2023) (Willett, J., concurring) (discussing Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023); *See also* Tobias Dorsey, *On Not Reading Statutes*, 10 Green Bag 2d 283.

But *Rachel* did not stop there. The Court believed its duty was to determine whether "that the general language of § 641 of the Revised Statutes was intended to expand the kinds of 'law' to which the removal section referred." *Ibid*. When the removal law first appeared in the Civil Rights Act of 1866 if "provided for removal by 'persons who are denied or cannot enforce … the rights secured to them by the first section of th[at] act.'" *Ibid*. (quoting 14 Stat. 27). The reviser's reshuffling of statutes meant "Congress could no longer identify the rights for which removal was available by using the language of the original Civil Rights Act." *Ibid*. Hence, the phrase "any law providing for … equal civil rights."

The *Rachel* Court recognized "the potential breadth of the phrase," but, finding "no substantial indication" that Congress intended it to be more expansive than the text in 1866, the Court said "it seems clear that … Congress intended … only to include laws comparable in nature to the Civil Rights Act of 1866." *Id*. at 789-790. That was true "even though the Fourteenth and Fifteenth Amendments had been adopted and Congress had broadly implemented them in other major civil rights legislation." *Id*. at 790.

After concluding that the Civil Rights Act of 1866 provided "the model for the phrase 'any law providing for … equal civil rights,'" the Court jumped back to "[t]he legislative history *of the 1866 Act*," which it found "clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Ibid.* (emphasis added). Thus, the legislative history of the model for the current law—not even the legislative history of the current law—compelled the conclusion "that the phrase 'any law providing for … equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality." *Id.* at 792.

As Justice Thomas recently recounted, this Court has consistently held since *The Slaughter-House Cases*, 83 U.S. 36 (1873), that although the "'prevailing purpose'" of Equal Protection Clause was "'the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him,'" "the Fourteenth Amendment's equality guarantee applied to members of all races." *Students for Fair Admissions, Inc. v. President and Fellows of*

Harvard College, 600 U.S. 181, 244-245 (2023) ("*Students*") (quoting *Slaughter-House* at 67-72). As Justice Thomas said there, under the

> most commonly held view today … the [Fourteenth] Amendment was designed to remove any doubts regarding Congress' authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses.

Id. at 241. It is entirely inconsistent with that understanding to deem the Equal Protection Clause anything other than a "law providing for the equal civil rights of citizens." 28 U.S.C. § 1443(1).

Section 1 of the Fourteenth Amendment expressly did two things relevant to this case: it made "[a]ll persons born or naturalized in the United States … citizens of the United States," and it prohibited each State from "denying to **any person** within its jurisdiction the equal protection of the laws." The text of the Fourteenth Amendment, like its object and purpose, came from the Civil Rights Act of 1866. *Bell v. State of Md.*, 378 U.S. 226, 292 (1964). The removal statute came from the same enactment. *Rachel*, 384 U.S. at 786. And this Court has repeatedly said the Equal Protection Clause, and the enactments of Congress to enforce it, are there to protect against racial discrimination—regardless of the race of the petitioner. *Students*, *supra*, 600 U.S. at 202.

This Court should grant review in order to restore the text of § 1443(1) to its original public meaning.

II. The Fifth Circuit's Opinion Decided an Important Question of Federal Law that has not been, but should be, settled by this Court

The Fifth Circuit declined to give the phrase "at a later time" in 28 U.S.C. § 1455(b)(1) its original public meaning because other courts found it did not apply to cases that were either in the process of state post-conviction review (state habeas) or in which the judgment had been executed. Mr. Renteria contends that when a State gives its convicting courts discretion to decide when a death judgment will proceed to execution, that law must be applied evenhandedly and the refusal to do so constitutes "good cause" to petition for removal at that "later time."

The statute states that a criminal defendant must file his notice of removal:

> not later than 30 days after the arraignment in the State court, or at any time before trial, whichever is earlier, except that for good cause shown the United States district court may enter an order granting the defendant or defendants leave to file the notice at a later time.

28 U.S.C. § 1455(b)(1). The Fifth Circuit's characterization of Renteria's attempt at removal as "decades late," *slip op.*, 5-9, ignores the plain wording of the statute permitting later removal upon a showing of good cause.

Renteria does not contend that the "good cause" exception in § 1455(b)(1) gave him or any other petitioner carte blanche to remove his case at any time since he was found guilty in 2003, or in post-conviction pro proceedings, as in state habeas review. Quite the opposite: there was no right to removal in this case until September 18, 2023, when the CCA announced that Renteria's trial court had "no freewheeling jurisdiction to seek to safeguard Renteria's Fourteenth Amendment Rights," ROA.82, and ordered the trial court to rescind its order finding that the "State's disparate treatment of Defendant … prejudiced his ability to investigate potential grounds for relief from the courts and clemency authorities." ROA.32.

Renteria argued in his notice that he had good cause under § 1455(b)(1) due to the TCCA's "very recent and novel ruling that Texas criminal courts lack jurisdiction to enforce the Equal Protection Clause after they set an execution date." ROA.18. The CCA's ruling fit so well

into the removal act's provision for jurisdiction when a criminal defendant "is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States," 28 U.S.C. § 1443(1), that it almost appears written with Renteria's case in mind. And so, thirty days after he received that ruling, Renteria filed his notice of removal. Thus, his removal application was timely filed.

The Court of Appeal's categorical ruling that "good cause" cannot refer to any period after trial, *Slip op.*, 7 ("Renteria's broad construction of "at a later time" fails to comport with the rest of the statute's language ...") does not explain how that phrase can be construed as referring to a post-trial period.

The Court's critique of Renteria's plain-meaning interpretation of the "good cause" exception as ignoring the intent and meaning of "later time" swallows this exception reading the exception out of the law altogether. St. Br. 22. "This 'blue pencil' method of statutory interpretation—omitting all words not part of the clauses deemed pertinent to the task at hand—impermissibly ignores the relevant context in which statutory

language subsists." *Massachusetts Mu. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985).

The Court should not accept this revision. Indeed, "this Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment." *Bostock*, 140 S. Ct. at 1738. Under this Court's normal practice, then, the question here is whether the ordinary public meaning of "at a later time" in 1977 was at a time later than the pretrial periods referred to in the part of 28 U.S.C. § 1455(b)(1) that precede that phrase. But the Court of Appeals did not even consider the ordinary public meaning of "at a later time" in 1977. Instead, it declared, *ipse dixit*, that Renteria's interpretation of this plain phrase "does not hold water." *Slip. Op.*, 7. But, its failure to hold water in the Fifth's Circuit's eyes is that the statute was designed only to apply pre-trial. It is the Court's reasoning that is leaky.

"Congress intended" "at a later time" to mean "any time before trial" other than the "earlier" of the two specified. If, as the Court of Appeals held Congress intended "at a later time" to mean "at a later time before trial," it would have made much more sense in ordinary English to use that phrase. This Court has been adamant that it is the job of courts "to

apply faithfully the law Congress has written," meaning that the courts "cannot replace the actual text with speculation as to Congress' intent." *Luna Perez v. Sturgis Pub. Sch.*, 143 S. Ct. 859, 865 (2023) (internal quotation marks and citation omitted).

Relatedly, the Court of Appeals rejected Renteria's assertion that because this is a capital case, that his case is not final. Here, the Court failed to engage in sound judicial reasoning. It says simply that this argument does not "pass muster," because it "conflates finality of a capital judgment with its execution" *Slip Op.*, 7. But, the Court has no answer for the obvious gap its interpretation leaves in the protection of a capital prisoner's civil rights that occur on the run-up to an execution date.

Finally, the Court supported its statutory misinterpretation by casting the removal notice in this case as "an impermissible attempt to use the federal court to nullify the TCCA's mandamus judgment," which it asserts violates the *Rooker-Feldman* doctrine. *Slip Op.*, 8. This is wrong.

The *Rooker-Feldman* doctrine "has been applied by this Court only twice, *i.e.,* only in the two cases from which the doctrine takes its name: first, *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 ... (1923), then 60 years

later, *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 ... (1983)." *Skinner v. Switzer*, 562 U.S. 521, 531 (2011). This Court has emphasized that it a "narrow" doctrine, and "is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers ... inviting district court review and rejection of [the state court's] judgments." *Id.*, at 532. *See also Exxon Mobil Corp. v. Saudi Basic Industries Corp.,* 544 U.S. 280, 284 ... (2005); *Lance v. Dennis*, 546 U.S. 459, 460 (2006).

To the contrary, *Rooker-Feldman* does not prevent recourse to the federal courts where, as here, the litigant contends that his federal constitutional rights **were violated by the state court action**. Thus viewed, Renteria was not simply a "loser" in state court. His constitutional rights were violated in the process. Moreover, his rights were trampled when the TCCA granted mandamus without hearing from him, in contravention of its own rules.

More to the point, he invoked a federal statute that permits removal for just such state court "losers." If *Rooker-Feldman* applies, as held by the Court of Appeals, there can never be removal. In every removal case under section 1433(1), there was a state court loser – the litigant whose

civil rights were violated and for whom there is no remaining remedy in state court.

CONCLUSION

The Court of Criminal Appeals holding that the convicting court had no "freewheeling jurisdiction" to enforce Mr. Renteria's rights under the Equal Protection Clause, and the Fifth Circuit's holding that the removal act does not cover such a decision should not stand. This Court should grant review and reverse.

Respectfully submitted,

MICHAEL WISEMAN
WISEMAN & SCHWARTZ, LLP
718 Arch Street, Suite 702 North
Philadelphia, PA 19106
215-450-0903
wiseman@wisemanschwartz.com

MAUREEN FRANCO
Federal Public Defender
Western District of Texas

TIVON SCHARDL
Chief, Capital Habeas Unit
919 Congress Ave., Suite 950
Austin, Texas 78701
(737) 207-3008
tivon_schardl@fd.org

Counsel for Petitioner

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