No. _____ (CAPITAL CASE)

In the Supreme Court of the United States

HECTOR ACOSTA,

Petitioner,

vs.

TEXAS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether the State violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution when it invokes a defendant's nationality and ethnicity to obtain a death sentence.

2. Whether Texas's application of the contemporaneous objection rule to deny review of a federal constitutional claim that a death sentence was obtained on the basis of a defendant's race, ethnicity, or national origin is an adequate state ground of disposition that precludes jurisdiction in this Court.

PARTIES TO THE PROCEEDINGS BELOW

All parties appear on the cover page in the caption of the case.

LIST OF PROCEEDINGS

- *State v. Acosta*, 396th District Court, No. 1513043D (Nov. 13, 2019)
- *Acosta v. State*, Court of Criminal Appeals of Texas, No. AP-77,092 (June 5, 2024)

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The opinion of the Court of Criminal Appeals of Texas ("TCCA") affirming the trial court's judgment was issued on June 5, 2024. The opinion is unpublished but is available at *Acosta v. State*, No. AP-77,092, 2024 WL 2845498 (Tex. Crim. App. June 5, 2024). It is also attached as Appendix 1.

JURISDICTION

The TCCA issued a judgment affirming the judgment of the trial court on June 5, 2024. On August 23, 2024, Justice Alito extended the time for filing this petition to October 3, 2024. *See Acosta v. Texas*, No. 24A194 (Aug. 23, 2024). The Court has jurisdiction to review the TCCA's opinion affirming the trial court's judgment pursuant to its authority to issue writs of certiorari. 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, in relevant part, provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Hector Acosta was convicted of capital murder in Tarrant County, Texas, for the murder of more than one person in the same transaction and sentenced to death.

Mr. Acosta is a native of Monterrey, Mexico. 32 RR 54.[1] His nationality was a prominent feature of his trial. He is a Spanish speaker and was unable to communicate with law enforcement in English following his arrest. 1 CR 37, 322. Consequently, he required an interpreter to communicate with interrogators during his custodial interview, which was presented to the jury as an exhibit at his trial. 2 RR 94; State's Ex. 3. He also required an interpreter at trial in order to understand his trial proceedings. 2 RR 8–9. Ultimately, the State relied on Mr. Acosta's nationality for an improper purpose. It presented evidence to the jury that linked Mr. Acosta's nationality to dangerousness and consequently encouraged the jury to consider Mr. Acosta's nationality as a factor in determining the appropriateness of the death penalty.

Trial

Mr. Acosta was arrested on September 7, 2017, for the murders of Erick Zelaya and Iris Chirinos. From nearly the moment he was arrested, Mr. Acosta's status as a foreign national was leveraged against him. After his arrest, he was interrogated by two officers from the Arlington Police Department—Grant Gildon and Michael Barakat, the latter of whom acted as an informal interpreter despite the fact he was not 100 percent proficient in Spanish. 2 RR 76–77; 26 RR 191–92. Prior to questioning, Barakat purported to read Mr. Acosta his *Miranda* rights in Spanish. State's Ex. 3. However, Barakat did not tell Mr. Acosta that he had a right to a free

[1] We cite the trial record as follows, with X representing the volume number and # representing the page number. The Reporter's Record is cited as X RR #. The Clerk's Record is cited as X CR #.

attorney, as is required by the fourth *Miranda* warning. *Miranda v. Arizona*, 384 U.S. 436, 473 (1966). Instead, per the State's own translation, Barakat informed Mr. Acosta, "If you cannot hire an attorney, you have the right to have an attorney hired to advise with you before and during the interview." State's Ex. 3.

Additionally, because Mr. Acosta is a Mexican national, the detectives were also required to inform him of his right to have the Mexican Consulate notified of his arrest. *See* Vienna Convention on Consular Relations ("VCCR") art. 36, Apr. 24, 1963, 596 U.N.T.S. 261. Gildon testified that he was aware that the Vienna Convention separately requires that the consulate be notified of the arrest of a Mexican citizen. 2 RR 127. Despite both detectives' awareness of Mr. Acosta's status as a Mexican citizen, neither informed Mr. Acosta of his rights under the VCCR. *Id.* at 127–28, 133; 3 RR 33. Jose Ortiz-Chavolla, a consular official at the Mexican Consulate in Dallas, testified that the consulate learned of Mr. Acosta's arrest through media reports on September 8, 2017. 2 RR 20. He testified the consulate never received a consular notification from the Arlington Jail and received no consular notification at all until the Tarrant County Magistrate Court sent a notification on September 15, 2017. *Id.* at 19.

Unaware of his rights under *Miranda* or the Vienna Convention, Mr. Acosta agreed to speak with the detectives. State's Ex. 3. By leveraging Mr. Acosta's weak English comprehension and his unfamiliarity with the American legal system against

him, the State obtained a detailed, albeit inconsistent,[2] confession. *See id*. Mr. Acosta was convicted of capital murder based largely on his tainted confession.

To obtain a death sentence at the sentencing phase of trial, Texas law required the State to prove that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," or, colloquially, whether he would be a future danger. Tex. Code Crim. Proc. art. 37.071, § 2(b)(1). The State sought to prove Mr. Acosta would be a future danger by drawing on the perceived dangers he posed as a Mexican. Specifically, the State sought to establish that Mr. Acosta was a member of a gang and then later joined a drug cartel while in Mexico, though its allegations concerning his cartel involvement were largely erroneous.[3] Mr. Acosta does not dispute that evidence of gang (or cartel) activities

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[2] For example, Mr. Acosta initially told interrogating officers that he acted alone over the course of the offense. State's Ex. 306. However, upon further questioning, he admitted to the involvement of other individuals. *Id.* Moreover, he was unable to explain multiple stab wounds on Mr. Zelaya. *Id.* Further, Mr. Acosta's account that he sold the revolver used in the offense at an apartment complex was inconsistent with the testimony at trial that the revolver was sold at a tattoo parlor. *Id.*; 27 RR 181–83.

[3] Both the State and the defense accepted as fact that Mr. Acosta became involved with a gang in Nuevo Leon, Mexico, and with the Cartel del Noreste while he was living in Mexico, because Mr. Acosta allegedly self-reported his involvement to an officer at the Tarrant County Jail. 32 RR 61, 73. However, the Cartel del Noreste, the drug cartel to which Mr. Acosta purportedly belonged, did not yet exist when Mr. Acosta was living in Mexico. *See* Def. Ex. 80A (Mr. Acosta moved to the United States in 2010); Drug Enforcement Agency, DEA Intelligence Report: 2015 Assessment of Most Significant Drug Trafficking Organizations Operating in Mexico at 9 (May 2016), https://nsarchive.gwu.edu/sites/default/files/documents/20515974/39-dea-20160500-zetasassessment.pdf (stating that members of Los Zetas "rebrand[ed]" as the Cartel del Noreste in late 2015). Indeed, post-conviction investigation has indicated that Mr. Acosta was in fact a victim of the drug war in Mexico and was forced under the threat of death to work for a cartel against his will. Initial Application for Writ of Habeas

may, if relevant and not unduly prejudicial, be considered by a jury as a part of its future dangerousness determination. However, the State exceeded the permissible bounds of this type of evidence by portraying Mr. Acosta's purported gang and cartel affiliation as particularly dangerous because the groups he allegedly belonged to were Mexican. Moreover, the State presented photographs taken from a Facebook page[4] depicting images of violence by unknown people and elicited impermissible testimony—with no evidentiary basis—that the scenes displayed in those photographs were typical of scenes in Mexico. 32 RR 168–69. In its closing argument, the State emphasized in its plea for death that Mr. Acosta's alleged membership in "Mexican" drug cartels should "strike fear in [jurors'] hearts." 36 RR 16. The overarching theme of this testimony and argument was that people from Mexico are uniquely dangerous and violent.

Corpus at 239–42, 266, *Ex parte Acosta*, No. 1513043D (396th Dist. Ct., Tarrant Cty., Tex. Jan. 25, 2023). He had no involvement with the cartel after escaping Mexico several years before his arrest. *See id.* at 309–10, 458. This investigation is consistent with Mr. Acosta's statements during his interrogation. Mr. Acosta told interrogating officers that he was selling marijuana in Monterrey. State's Ex. 3. When Los Zetas cartel arrived in Monterrey, they began taking over the neighborhoods. *Id.* When they discovered that Mr. Acosta was selling marijuana without working for them, they captured and tortured him. *Id.*

[4] The records from the Facebook account were introduced through Gildon, who testified that he "had identified a Facebook page with a profile I believed to be Hector Acosta." 31 RR 17. Gildon obtained a warrant based on information he could view publicly on the page. *Id.* The username on the page was "Cholo dot Monterrey or Monterrey dot Cholo." *Id.* at 18. The State never established at trial that the page belonged to Mr. Acosta or, if it did, that he alone had access to it. While some of the some of the pictures did show Mr. Acosta, some of the photos used by the State depicted people who were unidentifiable or who were not Mr. Acosta.

The evidentiary foundation for the State's theme came from two Tarrant County Sheriff's Office ("TCSO") "gang experts," who emphasized Mr. Acosta's ties to Mexico and the alleged dangers of Mexicans in their testimony. One of those purported experts, Corporal Ruben Martinez, was a "gang officer" with the TCSO at the Tarrant County Jail at the time of Mr. Acosta's arrest. 32 RR 29. The basis for Martinez's knowledge about gangs and cartels in Mexico was growing up "around gang culture" in Chicago and his attendance at a 40-hour "gang conference" in San Antonio, Texas. *Id.* at 33. Martinez's testimony offered no details about what topics were covered at this conference, including whether any information about drug cartels was presented.

Despite the court qualifying him as an expert in "gangs" and being questioned by the State about drug cartels in Mexico, Martinez knew very little about either. For example, he testified that he thought Nuevo Leon was a "city in Mexico." *Id.* at 61. In fact, Nuevo Leon is a large state in Mexico that borders Texas. He also incorrectly testified that cartels "come from Mexico" and agreed with the prosecutor that a cartel is "a Mexican type of gang[.]" *Id.* at 47. In fact, cartels are not specific to Mexico and exist in countries around the world.[5] He also did not appear to know, despite being a

[5] For example, the United Nations has described South America and Southeast Asia as areas "notorious for drug trafficking, with diverse criminal organizations collaborating with armed groups." U.N. Office on Drugs and Crime, World Drug Report 2024, Key Findings and Conclusions 12 (2024), https://www.unodc.org/documents/data-and-analysis/WDR_2024/WDR24_Key_findings_and_conclusions.pdf; *see also Interview: Policing One of the World's 'Biggest Drug Trafficking Corridors'*, UNODC Regional Office for Southeast Asia and the Pacific (June 29, 2023), https://www.unodc.org/roseap/en/2023/06/biggest-drug-trafficking-

purported expert on the subject, that the cartel Mr. Acosta purported to be a member of—the Cartel del Noreste—did not exist when Mr. Acosta was living in Mexico. *See* note 3, *supra*.

Martinez flagged Mr. Acosta as a potential gang or cartel member when he was booked into the Tarrant County jail based largely on stereotypes, including his ethnicity, tattoos, and clothing. 32 RR 44. He agreed with the prosecutor that it is "common for a lot . . . of gang members to not be fluent in English," *id.* at 46, improperly suggesting that Mr. Acosta was more likely to be a gang member based on his native language.

Martinez testified that he also flagged Mr. Acosta as a gang member in part because he was wearing a belt buckle depicting the fictional character Tony Montana from the movie "Scarface."[6] *Id.* at 52–53. The State elicited testimony that the Tony Montana character was "[a] particularly violent drug lord." *Id*. at 53. Counsel objected that the testimony did not relate to Mr. Acosta specifically—arguing that testimony comparing Mr. Acosta and the fictional Tony Montana violated the Eighth

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corridors/story.html (describing Southeast Asia as "one of the biggest drug trafficking corridors in the world" with "a huge surge in synthetic drugs produced by organized crime networks . . . [that] can operate with relative impunity"). Further, Martinez appeared to believe the broad term "cartel" applied only and specifically drug cartels, but this is incorrect, as a cartel is merely "[a] combination of producers or sellers that join together to control a product's production or price," no matter the industry. *Cartel*, Black's Law Dictionary (12th ed. 2024). One would expect a purported expert on drug cartels—in Mexico and other parts of the world—to understand this.

[6] The belt buckle, which references a very popular movie, is readily available on websites such as eBay. *Compare* State's Ex. 461 *with SCARFACE AL PACINO MOVIE GANGSTER white suit Columns universal belt buckle*, eBay, https://www.ebay.com/itm/295711697385 (last visited Oct. 3, 2024).

Amendment principle of individualized sentencing—but the objection was overruled. The State then asked Martinez to opine on "what types of criminals or what types of gang members might affiliate themselves with Tony Montana," to which Martinez generically responded, "cartel members." *Id.* at 55. Martinez never established any connection between Tony Montana and membership in the cartel he alleged Mr. Acosta belonged to.

According to Martinez, Mr. Acosta told him he was involved with gangs and cartels in Mexico. *Id.* at 73. Martinez pointed to information Mr. Acosta provided about his tattoos to support his claim that Mr. Acosta was a bona fide cartel member. For example, Mr. Acosta has a tattoo on the back of his neck that reads "818." State's Ex. 463. Martinez testified that he did not know what that tattoo signified. 32 RR 54. He asked Mr. Acosta, who told him that it was the area code of his native city of Monterrey. *Id.* Martinez then testified that it is "very common" for gang members to have a tattoo "on their body indicating where they're from." *Id.* at 55–56.[7] Similarly, he testified that the tattoo of an AK-47 above Mr. Acosta's right ankle is one "affiliated with cartel members" and indicates a "ranking of a member." *Id.* at 64–66. He provided no basis for any of these opinions.[8]

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[7] Area code tattoos are often used to disproportionately stigmatize people of Latin origin as gang members. *See* Beth Caldwell, *Reifying Injustice: Using Culturally Specific Tattoos as Markers of Gang Membership*, 98 Wash. L. Rev. 787, 816–20 (2023).

[8] The State also introduced pictures and messages from the above-described Facebook account through translator Manuel Murillo. Murillo testified that the photographs contained images of "drugs and drug use, weapons, things like that[.]" 31 RR 44–45. Despite an apparent lack of any expertise regarding gangs, the translator testified that one of the photographs from the account, State's Ex. 372,

After Martinez testified, the State called David Grantham, TCSO's "director of intelligence," whose role appeared to be to tie the underlying offense to Mr. Acosta's purported cartel membership, even though the State produced no evidence that the offense was related to cartels. Like Martinez, and despite being qualified by the court as an expert on drug cartels, Grantham did not appear to know that the Cartel del Noreste did not exist at the time Mr. Acosta was living in Mexico, *see* note 3, *supra*, testifying that he "had a high degree of confidence that [Mr. Acosta] was either currently associated or had been associated with that cartel." 32 RR 167. [9]

Much of Grantham's information was based on interviews he conducted with Mr. Acosta without notifying Mr. Acosta's attorneys. *Id*. at 131–32. Upon objection from defense counsel, the court did not allow Grantham to testify to information he had learned in those interviews but did allow him to testify to what he had learned from other sources—primarily Martinez's interview with Mr. Acosta. *Id*. at 152.

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showed "a bunch of young men . . . throwing up gang signs." *Id.* at 45; *see also* State's Ex. 372.

[9] Grantham's claim to have expertise about drug cartels in Latin America generally and Mexico specifically is belied by the fact that he did not seem to have a strong understanding of Mexico or Mexican culture. He incorrectly agreed with the prosecutor that "Santa Muerte"—the Mexican counter-cultural religious symbol, which he could not initially identify—was spelled and pronounced "Santo Muerta," reflecting less than a basic knowledge of the symbol itself. 32 RR 169–70. He also incorrectly stated that Santa Muerte is a "god of the drug trafficker." *See id.* at 169; Kate Kingsbury & R. Andrew Chestnut, *Holy Death in the Time of Coronavirus: Santa Muerte, the Salubrious Saint*, 4 Int'l J. of Latin Am. Religions 194, 196, 214 (2020) (noting that referring to Santa Muerte as "a narco-saint, that is to say a saint venerated solely by narco-traffickers" is erroneous, as Santa Muerte is a folk saint with broad appeal and "one of the most important healers in the Mexican religious landscape"). Further, as a supposed expert on Latin America, he also could not translate a simple Spanish sentence when asked. 32 RR 170.

Counsel argued the limitation was insufficient to cure the constitutional violations in Grantham's illicit conversations with Mr. Acosta because Grantham could not "delineate" the sources of particular information. *Id*. at 148. Nevertheless, the court allowed Grantham to present inflammatory testimony that relied on stereotypes about Mexicans.

Grantham's testimony was not based on activities that Mr. Acosta had engaged in; rather, his testimony insinuated that Mr. Acosta was a danger to society based on photographs found on the Facebook page that allegedly belonged to him. According to Grantham, those photographs that depicted violence or threats of violence by unknown persons portrayed scenes that typified acts that occur in Mexico. *See* 31 RR 19–22; 32 RR 152. In other words, Grantham's testimony communicated to the jury that Mexicans are uniquely dangerous and therefore that Mr. Acosta, being Mexican, posed a unique threat of violence in the future.

Specifically, in an attempt to connect the capital murder to Mexican drug cartels, Grantham prefaced his testimony by agreeing with the prosecutor that, generally, it is "very common" for cartels to "make spectacles of what they do, like to send messages." 32 RR 167. The State and Grantham focused on one photo from the disputed Facebook page that depicted a masked person holding a rifle and a handgun, sitting above two people whose hands and feet were zip-tied. State's Ex. 326.

The State's implication was that the person in the photograph was Mr. Acosta, but the person in the mask is not identifiable. The thrust of Grantham's testimony about the photograph, however, was that the person was engaging in tradecraft

characteristic of specifically *Mexican* crime. Grantham told the State that he had "absolutely" "seen stuff like that [depicted in the photograph] before[.]" 32 RR 168. When the prosecutor asked him "Where?", Grantham replied "Mexico. Or at least I should say in photos." *Id.* Grantham did not point to anything in the photograph having to do with Mexico specifically. Nor is there any relevance to his testimony that he had seen images like this in photos of Mexico other than to depict Mexicans, like Mr. Acosta, as particularly dangerous.

In the same line of questioning about what is typical in Mexico, the State asked about two other photographs that had no obvious connection to actions by Mr. Acosta. One of the photographs depicts a group of men, some of whom are masked, holding rifles in front of several pick-up trucks. State's Ex. 361. The State presented no evidence Mr. Acosta is in the photograph. The second is a photograph of a man who has been taped to what appears to be the base of a streetlight, with a sign taped to him that reads "Esto me paso por rata."[10] State's Ex. 363. Grantham testified that these two images depict common behaviors of *Mexican* drug cartels. There was no testimony that all Mexican drug cartels engage in the same types of behavior or that

[10] The prosecutor asserted, and Grantham agreed, that "rata" means "rat." 32 RR 170. He then testified that a rat "in the criminal community" is "[s]omebody who is cooperating with the police." *Id.* This was inaccurate, assumed that the English colloquial meaning of "rat" translates directly to Spanish, and further demonstrated Grantham's lack of familiarity with Mexican culture. In Spanish, "rata" can mean thief. *See Rata*, Longman's Online Dictionary, https://www.ldoceonline.com/dictionary/spanish-english/rata (last visited Oct. 3, 2024). Indeed, investigation conducted in state habeas proceedings indicated that State's Ex. 361 is a publicly available photograph of a town thief, and the sentence in question accurately translates to, "This happened to me for being a thief." Initial Application for Writ of Habeas Corpus, *supra note* 3, at 329–30.

tied these images specifically to the cartel Mr. Acosta was purportedly a member of, or even that connected the images to Mr. Acosta at all, again demonstrating that the State's purpose in eliciting this testimony from Grantham was not to demonstrate Mr. Acosta's dangerousness based on his own prior acts. Instead, it was to demonstrate his dangerousness based on his ethnicity.

Mr. Acosta does not contend that the State could not present evidence that attempted to establish that he was affiliated with a cartel that engaged in violence. Nor does he contend that, if the State had actually established that the Facebook page belonged to him and that he was responsible for all of the pictures posted to it, the State could not present the jury with evidence about violent images he selected and displayed there, so long as the photos were relevant, not unduly prejudicial, and comported with constitutional requirements.[11] What is not permissible is characterizing images with no proven connection to Mr. Acosta's activities as "typically" Mexican in order to insinuate a heightened propensity for violence based on the fact that Mr. Acosta is Mexican. But that is precisely what the State did by broadly painting these images as distinctly Mexican.

[11] For example, the TCCA has held the State may not introduce evidence of a defendant's rap videos and lyrics at the guilt phase when doing so is unduly prejudicial. *See Hart v. State*, 688 S.W.3d 883, 896–97 (Tex. Crim. App. 2024); *see also United States v. Varela-Rivera*, 279 F.3d 1174, 1179–80 (9th Cir. 2002) (holding that expert testimony concerning "the structure, organization and modus operandi of drug trafficking enterprises and the fees generally paid to drug couriers" should have been excluded when it was not relevant to the specific charges against the defendant and unfairly connected the defendant to a drug trafficking organization).

The testimony that the activities depicted in the photos occurred in Mexico had no bearing on Mr. Acosta's capacity for future dangerousness other than to convince jurors that Mr. Acosta was particularly dangerous because he is Mexican. Yet, the State then relied on Grantham's testimony to argue at closing that Mr. Acosta would pose a future danger to society precisely because the offense showed a connection to "Mexican" drug cartels, even though no such link was ever established. *See* 36 RR 16. The State further argued that Mr. Acosta's alleged membership in "Mexican" drug cartels should "strike fear in [jurors'] hearts." *Id.* at 16.

Trial counsel did not contemporaneously object to the State's subtle but effective use of Mr. Acosta's Mexican nationality as evidence of future dangerousness. It is possible that counsel did not object because they did not recognize the stereotypes of Mexico and Mexican culture contained in Grantham's testimony. Indeed, the defense team conducted no investigation in Mexico, even though doing so was essential to understand Mr. Acosta's life history and present an effective mitigation case at trial, because lead counsel "made it very clear to my team early on, quite frankly, that I think it's too dangerous to go to Mexico." 2 RR 58. Counsel further called Monterrey, Mexico, "impossibly dangerous." 1 CR 323. The defense team's Spanish-speaking mitigation specialist similarly testified that he feared death or kidnapping if he were to go to Monterrey. 2 RR 36. While Monterrey was once a very dangerous city, it "is no longer as violent as it was at the start of the decade." Duncan Tucker, *'I Can't Believe How I Used to Live': From Gang War to Peace Treaties in Monterrey*, The Guardian (Feb. 22, 2017),

https://www.theguardian.com/cities/2017/feb/22/gang-war-peace-treaties-monterrey-mexico. Indeed, state habeas counsel did safely conduct a full life-history investigation in Mexico not long after trial counsel refused to conduct such an investigation, when conditions were similar to the conditions trial counsel described as impossibly dangerous. *See generally* Initial Application for Writ of Habeas Corpus at 222–81, *Ex parte Acosta*, No. 1513043D (396th Dist. Ct., Tarrant Cty., Tex. Jan. 25, 2023).

After the State repeatedly invoked Mr. Acosta's nationality, the jury answered the special issues,[12] including the future dangerousness special issue, in a way that required imposing a death sentence. 36 RR 69–72.

Appeal

On appeal, Mr. Acosta raised seventeen points of error. Among these were allegations that the State's invocation of his nationality as evidence of future dangerousness violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution and that the State's invocation of his nationality as evidence of future dangerousness was prosecutorial misconduct that violated due process. Brief of Appellant at 80–93, *Acosta v. State*, No. AP-77,092, 2024 WL 2845498 (Tex. Crim. App. 2024).

Mr. Acosta recognized that in most cases the TCCA will not review a claim if trial counsel failed to contemporaneously object. *Id.* at 90 n.35. However, Mr. Acosta argued that the TCCA should nevertheless reach the issue and conclude that

[12] Tex. Code Crim. Proc. art. 37.071, § 2(b)(1), (e)(1).

discrimination on the basis of an immutable characteristic like race, ethnicity, or national origin is so odious that claims concerning such discrimination cannot be waived even with partisan consent, much less forfeited by simple inaction. *Id.* Mr. Acosta argued that this Court has, in recent years, recognized that procedural barriers must give way when racial discrimination infects the justice system. *Id.* In the alternative, Mr. Acosta argued that the TCCA should reach the issue in the interest of justice because the error was constitutional in nature and committed by the State's lawyers, who knew or should have known it was improper and a form of misconduct, and because the error offended traditional notions of fair play and substantial justice.

On June 5, 2024, the TCCA issued an opinion affirming Mr. Acosta's conviction and death sentence. The TCCA stated that it "cannot review" Mr. Acosta's claims concerning the invocation of his nationality at sentencing. App. 1 at 71. The court rejected Mr. Acosta's invitation to review his claim despite the procedural bar, choosing instead to continue to require that litigants comply with the contemporaneous objection rule in order to have claims concerning racial discrimination in the criminal process reviewed. *Id.* at 67–71.

Although the court wrote that it could not review the merits of Mr. Acosta's claims concerning the invocation of his nationality, it also stated that "[a]s a preliminary matter" it "disagree[d]" that the State offered evidence or argued that Mr. Acosta "was a future danger because he is Mexican or from Mexico." *Id.* at 62. In this cursory denial, the court did not meaningfully engage with Grantham's or the

prosecutor's statements, including Grantham's otherwise irrelevant statement that photographs introduced into evidence by the State depicting violence or threats of violence portrayed something that looked like what he had seen in photographs of Mexico. *See id.* at 62–65; 32 RR 168.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari to protect against the administration of the death penalty on the basis of a defendant's nationality, because failure to do so would not only result in the execution of a man for patently impermissible, and unconstitutional, reasons, but also poison public confidence in the integrity of the judicial system as a whole.

I. The Court Should Remedy the State's Impermissible Reliance on Mr. Acosta's Race, Ethnicity, and National Origin to Obtain a Death Sentence Against Him.

The only plausible purpose for the connection drawn by the State between violent images of unknown origin and the country of Mexico was to tie Mr. Acosta's race, ethnicity, and national origin[13] to his capacity for future dangerousness in a

[13] The discrimination at issue in this case—bias against Mr. Acosta as a Mexican man—might be best "described as bias based on national origin or ethnicity," though this Court has analyzed such discrimination in the same way as discrimination based on race. *See Peña-Rodriguez v. Colorado*, 580 U.S. 206, 237 n.1 (2017) (Alito, J., dissenting) (quotations omitted) ("The bias at issue in this case was a bias against Mexican men. . . . This might be described as bias based on national origin or ethnicity. . . . However, no party has suggested that these distinctions make a substantive difference in this case."); *see also Graham v. Richardson,* 403 U.S. 365, 372 (1971) (stating that classifications based on race, nationality, and alienage are all "inherently suspect" under the Equal Protection clause and "subject to close judicial scrutiny"); *Rice v. Cayetano*, 528 U.S. 495, 514 (2000) ("Ancestry can be a proxy for race."). Thus, this Petition will reference case law concerning race discrimination to support Mr. Acosta's reasons for granting the writ.

capital case. The injection of race, ethnicity, and national origin into Mr. Acosta's trial violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution.

This Court has held that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Reliance on race to impose a criminal penalty "undermines our criminal justice system and poisons public confidence in the evenhanded administration of justice." *See Davis v. Ayala*, 576 U.S. 257, 285 (2015). Indeed, this Court has stated that distributing punishment based on race—or in Mr. Acosta's case, national origin—"injures not just the defendant, but 'the law as an institution, … the community at large, and … the democratic ideal reflected in the processes of our courts.'" *Buck v. Davis*, 580 U.S. 100, 124 (2017) (quoting *Mitchell*, 443 U.S. at 556). Accordingly, this Court has stated that "[i]t would be patently unconstitutional for a State to argue that a defendant is liable to be a future danger because of his race." *Id.* at 119; *see also McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987) ("The Constitution prohibits racially biased prosecutorial arguments.").

This Court has recognized that "[p]erhaps today . . . discrimination takes a form more subtle than before," but that this does not mean it is "less real or pernicious." *Mitchell*, 443 U.S. at 559. This Court has further noted that "[m]ore subtle, less consciously held racial attitudes" can be amplified in capital sentencing, where "[f]ear of" a racial group that "could easily be stirred up by the violent facts of [the] crime, might incline a juror to favor the death penalty." *Turner v. Murray*, 476

U.S. 28, 35 (1986) (plurality op.). Accordingly, even small or subtle references to the defendant's race or national origin are prohibited because "[s]ome toxins can be deadly in small doses." *Buck*, 580 U.S. at 122. Testimony is particularly potent when, as Grantham's testimony did in this case, it "appeal[s] to a powerful racial stereotype," such as that men from a particular racial group are "'violence prone.'" *Id.* at 121 (quoting *Turner*, 476 U.S. at 35 (plurality op.)).

The stereotype the prosecutor and Grantham appealed to in this case—linking violence to Mexico and Mexicans—is regrettably pervasive in American society.[14] Like the stereotype of Black men as violence prone that this Court addressed in *Buck*, "Latino men in particular are perceived as more prone to violence and criminality and more of a danger to society." Brief of *Amicus Curiae* LatinoJustice PRLDEF in Support of Petitioner at 11, *Cruz v. Arizona*, 598 U.S. 17 (2023) (No. 21-846). "Researchers have found that jury-eligible participants strongly associated Latino men with 'Danger' and white men with 'Safety,' and that they held similar dangerousness stereotypes for Latino men as they do for Black men." *Id.* at 12.

[14] At the time of Mr. Acosta's trial, this harmful stereotype was particularly prevalent in American societal discourse, as the President of the United States had told Americans just a few years earlier that undocumented Mexican men who had come to the United States were "bringing drugs. They're bringing crime. They're rapists." Gregory Korte & Alan Gomez, *Trump Ramps Up Rhetoric on Undocumented Immigrants: 'These Aren't People. These Are Animals.'*, USA Today (May 16, 2018), https://www.usatoday.com/story/news/politics/2018/05/16/trump-immigrants-animals-mexico-democrats-sanctuary-cities/617252002. He similarly said undocumented immigrants "aren't people. These are animals." *Id.* Grantham's prejudicial statements about Mr. Acosta's ethnicity and nationality were especially potent given the societal animus demonstrated against undocumented Latino men, like Mr. Acosta, at the time of his trial.

Because stereotypes concerning a defendant's race and national origin are so harmful in the administration of criminal justice, courts have found references to a defendant's national origin in criminal proceedings unconstitutional even when the government has not explicitly tied the defendant's national origin to their criminal responsibility but instead makes a more subtle connection designed to appeal to prejudice. For example, in *United States v. Vue*, the appellants challenged the admission of expert testimony tying their Hmong ancestry to drug dealing. 13 F.3d 1206, 1211–13 (8th Cir. 1994). There, the Eighth Circuit Court of Appeals held that this testimony was an error of constitutional dimension and that "the injection of ethnicity into the trial clearly invited the jury to put the [appellant's] racial and cultural background into the balance in determining their guilt." *Id.* at 1213; *see also United States v. Doe,* 903 F.2d 16, 20 (D.C. Cir. 1990) (holding that evidence was irrelevant where "testimony that Jamaicans were taking over the retail drug trade had no bearing upon any claimed defense or other issue at trial, and was openly allusive in linking the drug charges to appellants solely on the basis of the ancestry of two of them"); *United States v. Rodriguez Cortes*, 949 F.2d 532, 542 (1st Cir. 1991) ("The admission of [the appellant's foreign identification] card as an exhibit made it more likely that whatever preconceived notions the jury might have had about Colombians and drug trafficking would infect the deliberative process.").

Similarly, at Mr. Acosta's trial, the State elicited testimony to highlight Mr. Acosta's nationality when his nationality did not—and could not—bear relevance to the punishment to be assessed. The State then used that testimony to make

arguments that only served to suggest that because Mr. Acosta is Mexican, he is more likely to be a future danger. Specifically, the fact that Grantham had allegedly seen photos like those posted to a Facebook page in other photographs from Mexico served no purpose except to suggest that Mexicans as a class are particularly dangerous. Put simply, the State tied random photographs it believed the jurors would find frightening to "Mexico" and "Mexicans." "Mexico" or "Mexican" was not a benign-yet-accurate descriptor of the photos here; it was used to appeal to jurors' potential prejudices against Mexicans.[15]

Further, the prosecutor and Grantham continuously referenced "Mexico" and "Mexican" drug cartels instead of solely invoking name of the cartel the State alleged Mr. Acosta was a member of, the Cartel del Noreste. *See* note 3, *supra*. If the State were making a good faith attempt to link Mr. Acosta to a particular entity that engaged in organized violence, it presumably would have attempted to develop and present specific—and far more relevant—testimony about any dangers posed by the

[15] There is a long history of racially profiling and discriminating against Mexicans in the United States—particularly in Texas and in the criminal justice system. *See Hernandez v. Texas*, 347 U.S. 475, 479–80 (1954); *id.* at 482 (holding that Jackson County, Texas, discriminated against Mexicans in the grand jury system). Indeed, the first woman legally executed in Texas was a Spanish-speaking Tejana woman named Chipita Rodriguez, who posthumously received recognition from the Texas Legislature that she did not receive a fair trial. Manuel Flores, *Chipita Rodriguez's Unjust Hanging Haunts Texas*, Corpus Christi Caller-Times (Oct. 16, 2017), https://www.caller.com/story/news/columnists/2017/10/16/chipita-rodriguezs-unjust-hanging-haunts-texas/769883001/; *see also* Simon Romero, *Lynch Mobs Killed Latinos Across the West. The Fight to Remember These Atrocities Is Just Starting.*, N.Y. Times (Mar. 2, 2019), https://www.nytimes.com/2019/03/02/us/porvenir-massacre-texas-mexicans.html (describing the extra-judicial executions of Mexicans and Mexican-Americans by the Texas Rangers and other armed groups).

Cartel del Noreste in particular. Given the State's allegations that Mr. Acosta was a member of a particular cartel, there was no reason for the prosecutor or Grantham to be vague in referencing "Mexico" or "Mexican drug cartels." The references to "Mexico" and "Mexican" drug cartels elicited by the State, rather than to the cartel itself, demonstrate that the State believed that invoking Mr. Acosta's nationality would be more effective than referencing the cartel by name in convincing jurors that Mr. Acosta, as a Mexican man, was "'violence prone'" and would be a future danger to society. *See Buck*, 580 U.S. at 121 (quoting *Turner*, 476 U.S. at 35 (plurality op.)). If the State had sought, as it has claimed,[16] to invoke only Mr. Acosta's purported membership in a violent cartel, rather than his nationality, then it *would have* exclusively invoked the cartel and focused on organized violence the cartel perpetrated rather than his nationality. It did not.[17]

The discrimination Mr. Acosta faced may not have included explicit testimony that he was more dangerous because he was Mexican, but that does not make it "less

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[16] State's Brief at 113–17, *Acosta v. State*, No. AP-77,092, 2024 WL 2845498 (Tex. Crim. App. 2024).

[17] Since 2012, the Tarrant County District Attorney's Office ("TCDAO") has seen nine death penalty cases through trial, resulting in six death sentences. All nine defendants have been people of color. *See Reports*, TCADP, https://tcadp.org/reports (last visited Oct. 3, 2024); Paul Livengood, *Texas Man Sentenced to Death for Strangling Ex-Girlfriend and Her 10-Year-Old Daughter*, WFAA (Apr. 24. 2025), https://www.wfaa.com/article/news/crime/paige-terrell-lawyer-sentence-euless-texas/287-12cb9472-bcc3-48f9-867d-19a3377f1943. Despite being the exclusive target of the TCDAO's death penalty prosecutions since 2012, people of color make up only 57.13% of Tarrant County's population. *See Tarrant County, Texas*, U.S. Census Bureau, https://data.census.gov/profile/Tarrant_County,_Texas?g=050XX00US48439 (last visited Oct. 3, 2024).

pernicious" for the State to invoke racialized stereotypes to obtain a death sentence. *See Mitchell*, 443 U.S. at 559. Despite its subtlety, Grantham's testimony was a clear invocation of Mr. Acosta's nationality meant to "appeal[] to a powerful racial stereotype," of Latino men as "'violence prone,'" violating Mr. Acosta's right to equal protection and due process under the law. *See Buck*, 580 U.S. at 121 (quoting *Turner*, 476 U.S. at 35 (plurality op.)).

Because Mr. Acosta's death sentence was impermissibly imposed based on prejudice concerning his race, ethnicity, and national origin, this Court should grant the writ to protect the integrity of the judicial system.

II. This Court Should Establish That Texas's Contemporaneous Objection Rule Is Not an Adequate State Ground to Bar Review of a Claim That the State Obtained a Death Sentence on the Basis of a Defendant's Race, Ethnicity, or National Origin.

Although Mr. Acosta was impermissibly sentenced to death on the basis of his race, ethnicity, and national origin, the TCCA stated that it "cannot" review his claim, which argued that this violated the Fourteenth Amendment, because of a state procedural bar, as counsel failed to contemporaneously object to the violation. App. 1 at 71; *but see supra* at 13–14 (noting that counsel's own misconceptions about Monterrey, Mexico, may have been a factor in counsel's failure to recognize the constitutional error).

Generally, federal courts "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman*

v. Thompson, 501 U.S. 722, 729 (1991). This is so whether the state law ground is substantive or procedural. *Id.*

"[T]he adequacy of state procedural bars to the assertion of federal questions is itself a federal question." *Douglas v. Alabama*, 380 U.S. 415, 422 (1965). The adequacy question invokes the Supremacy Clause of the U.S. Constitution and the supremacy of federal law. *See Doan v. Brigano*, 237 F.3d 722, 728 (6th Cir. 2001) (quotations omitted) ("The Supremacy Clause states that the "Constitution … shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' U.S. Const. art. VI, cl. 2. . . . Thus, [s]tate law obviously is not adequate to support the result when there is a claim that the state law itself violates the United States Constitution.").

Generally, a state procedural bar is adequate if it is "clear, consistently applied, and well-established at the time of the petitioner's purported default." *Melendez v. Pliler*, 288 F.3d 1120, 1124 (9th Cir. 2002) (quotations omitted). However, this Court has held that there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 376 (2002).

Even the long-utilized contemporaneous objection rule is not adequate to preclude review of a federal claim in every context. *See Henry v. Mississippi*, 379 U.S. 443, 449 (1965) (quotations omitted) ("[G]iving effect to the contemporaneous-objection rule for its own sake would be to force resort to an arid ritual of meaningless

form."). Ultimately, "[w]hether a state procedural rule is 'adequate and independent' generally requires an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims." *Clifton v. Carpenter*, 775 F.3d 760, 764 (6th Cir. 2014) (quotations omitted); *see also Henry*, 379 U.S. at 447–48 ("In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights."). States do not have a legitimate interest in enforcing a death sentence that has been imposed based on flatly impermissible factors, such as race, ethnicity, and nationality. *See Buck*, 580 U.S. at 126 (declaring the State's interest in finality to "deserve[] little weight" once "the infusion of race" into criminal proceedings has been recognized).

Mr. Acosta does not dispute that, in the vast majority of cases, Texas's contemporaneous objection rule is likely to be applied in an adequate manner. However, this Court should grant a writ of certiorari to clarify that contemporaneous objection rules, like Texas's, are not adequate to bar review of a claim that the government obtained a criminal conviction or penalty—and particularly a death sentence—based, at least in part, on the defendant's race, ethnicity, or national origin.

Such a rule would be in keeping with this Court's recent decisions. In two recent cases—*Buck v. Davis* and *Peña-Rodriguez v. Colorado*[18]—this Court has held that ordinary rules of procedure, even longstanding procedural rules, must give way

[18] 580 U.S. 206 (2017).

to ensure a person is not delivered a criminal sanction based in part on their race, ethnicity, or national origin.

In *Buck*, the defendant was sentenced to death after a defense expert testified and wrote in a report that was admitted into evidence that he was more likely to be a danger in prison because he was Black. *Buck*, 580 U.S. at 107. His conviction and sentence were affirmed on direct appeal, and his first state habeas petition, which did not include any claims about the expert testimony, was denied. *Id.* at 108–09. Buck later filed a new state habeas petition arguing that his trial counsel was ineffective for introducing the expert testimony and report, but it was dismissed as an abuse of the writ. *Id.* at 110. He sought habeas review in federal court, arguing that notwithstanding his procedural default, the claim should be reviewed because failure to do so would result in a miscarriage of justice. *Id.* However, the federal courts denied relief. *Id.* at 111.

Buck subsequently filed a Rule 60(b) motion to reopen proceedings, which ultimately led to this Court's ruling. *Id.* at 112. Buck argued that, *inter alia*, invocation of his race in his capital sentencing hearing was an "extraordinary circumstance[]" that justified reopening the case. *Id.* at 112–13 (quotations omitted). The federal district court denied relief, and the Fifth Circuit denied a certificate of appealability. *Id.* at 114–15. This Court then granted certiorari and reversed. *Id.* at 115, 128.

In determining that Buck had shown that there existed extraordinary circumstances to reopen his case notwithstanding strict finality rules in habeas

corpus cases, the Court held that concerns about racism poisoning the judicial process "are precisely among those we have identified as supporting relief under Rule 60(b)(6)." *See id.* at 124. This is because relying on race to impose a criminal penalty "injures not just the defendant, but 'the law as an institution, ... the community at large, and ... the democratic ideal reflected in the processes of our courts.'" *Id.* (quoting *Mitchell*, 443 U.S. at 556). While the procedural barriers present in the federal habeas corpus statute generally play the necessary role of preserving the finality of state court judgments, the interest in finality falls by the wayside when the judgment has been obtained on the basis of race. *See id.* at 126 (declaring the State's interest in finality to "deserve[] little weight" once "the infusion of race" into criminal proceedings has been recognized).

Similarly to *Buck*, this Court held in *Peña-Rodriguez* that a traditional evidentiary rule—Colorado's no-impeachment rule—must yield to allow for review of a claim concerning the injection of race and national origin into the criminal process. In *Peña-Rodriguez*, after the defendant was found guilty of unlawful sexual contact and harassment, two jurors informed defense counsel and signed affidavits stating that another juror "had expressed anti-Hispanic bias" toward the defendant and his alibi witness. *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 212 (2017). The juror stated that his experience as an ex-law enforcement officer led him to believe the defendant was guilty because, in his view, "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." *Id.* He further stated that he believed "Mexican men are physically controlling of women because of their sense

of entitlement" and said, "I think he did it because he's Mexican and Mexican men take whatever they want." *Id.* at 213. He also told his fellow jurors that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." *Id.* Additionally, the juror stated that he did not find the defendant's alibi witness credible "because, among other things, the witness was 'an illegal.'" *Id.* (also noting the witness was a legal resident of the United States).

Peña-Rodriguez filed a motion for a new trial based on the juror's bias, but the trial court denied the motion, because jurors' deliberations are protected from inquiry under the ubiquitous "no-impeachment" rule. *Id.* The intermediate appellate court and Colorado Supreme Court affirmed the conviction. *Id.* at 214. This Court "granted certiorari to decide whether there is a constitutional exception to the no-impeachment rule for instances of racial bias," and ultimately held that there is. *Id.* at 214, 229.

In holding that the no-impeachment rule cannot pose an impediment to the review of a claim of racial bias, the Court noted that racial bias is particularly threatening to a fair justice system. *See id.* at 222 ("In the years before and after the ratification of the Fourteenth Amendment, it became clear that racial discrimination in the jury system posed a particular threat both to the promise of the Amendment and to the integrity of the jury trial."). For this reason, state legislatures cannot have the final word in determining whether rules of evidence and criminal procedure are sufficient to root out racial bias in the justice system. *See id.* ("The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this

Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system.").

The Court noted that the no-impeachment rule's foundation in the American legal system is rock-solid, so much so that it can bar review of claims concerning jurors' "troubling and unacceptable" behavior. *Id.* at 224. But the Court understood racial discrimination to be different—it is not just unacceptable but rather "a familiar and recurring evil that, *if left unaddressed*, would risk systemic injury to the administration of justice." *Id.* (emphasis supplied). While "[a]ll forms of improper bias pose challenges to the trial process . . . there is a basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.* at 225. In sum, the Court was clear that its holding "removes [the procedural] bar" to relief when evidence comes to light of racial bias in the jury room. *Id.* at 227; *see also id.* ("When jurors disclose an instance of racial bias as serious as the one involved in this case, the law must not wholly disregard its occurrence.").

Just like the normally ironclad procedural barriers to relief gave way in *Buck* and *Peña-Rodriguez* because of the nature of the substantive claims they were blocking—specifically, claims that racial bias had infected the criminal justice process—Texas's contemporaneous objection rule should not stand in the way of this Court's review of Mr. Acosta's claim that his death sentence was based on the State's

invocation of his race, ethnicity, and national origin as evidence of dangerousness. Contemporaneous objection rules like Texas's are longstanding in the American criminal justice system, and like the no-impeachment rule and the statutory framework for federal habeas corpus cases, it serves an important purpose. However, many jurisdictions do permit review of such claims even when not preserved for appellate review. *See, e.g.*, *State v. Haithcox*, 447 P.3d 452, 460–61 (Mont. 2019) (reviewing claim raised for the first time on appeal that prosecutor "repeated and emphasized racial slurs" used by the defendant and another and "evok[ed] racial stereotypes to inflame the jury"); *State v. Kirk*, 339 P.3d 1213, 1215–19 (Idaho Ct. App. 2014) (reviewing claim and requiring new trial despite lack of contemporaneous objection where the prosecutor incorporated lines from the song "'Dixie' . . . an anthem of the Confederacy," into closing argument in trial of a Black defendant); *State v. Monday*, 257 P.3d 551, 557–58 (Wash. 2011) (declining to find that the contemporaneous objection rule precludes review of a claim that the prosecutor injected race into the trial, because such conduct "fundamentally undermines the principle of equal justice and is so repugnant to the concept of an impartial trial that its very existence demands that appellate courts set appropriate standards to deter such conduct"); *Tate v. State*, 784 So. 2d 208, 214–216 (Miss. 2001) (reviewing claim that prosecutor improperly highlighted race in questioning and argument, despite lack of contemporaneous objection to some of the race-related testimony); *Reynolds v. State*, 580 So. 2d 254, 255 (Fla. Dist. Ct. App. 1991) (reviewing claim and reversing conviction despite lack of contemporaneous objection because the prosecutor made

"egregious and pervasive" comments "injecting" race into the trial); *People v. Thomas*, 514 N.Y.S.2d 91, 93 (N.Y. App. Div. 1987) (reversing conviction "in the interest of justice" despite lack of defense objection where the prosecutor's argument could "serve no purpose other than to arouse racially prejudiced attitudes"); *State v. Dana*, 406 A.2d 83, 86 (Me. 1979) (quotations omitted) ("[A] prosecutor's injecting racially prejudicial comments in oral argument, although not objected to, would be reviewable on appeal as obvious (error) affecting substantial rights. . . . If the purpose of an argument is to impugn the standing of a defendant before the jury and to intimate that such a defendant would be more likely than those of other races to commit the crime charged, we would have no hesitancy in holding such argument to be improper and prejudicial.").

This Court's reasoning in its decision to circumvent even well-established procedural rules to provide extraordinary relief in *Buck* and *Peña-Rodriguez* should equally apply in determining the adequacy of the contemporaneous objection rule here. The thrust of the "adequacy" inquiry is not just the importance of the procedural rule, but also the stakes of the substantive claim and its impact on the integrity of the judicial system. *See Henry*, 379 U.S. at 447–48.

As this Court has now demonstrated on multiple occasions, claims of racial bias are "distinct," and it treats claims alleging "racial bias" in criminal trials "with added precaution." *Peña-Rodriguez*, 580 U.S. at 224–25. In choosing to give "effect to the contemporaneous-objection rule for its own sake," the TCCA rendered it "an arid ritual of meaningless form," *Henry*, 379 U.S. at 449, and failed to adequately "enforce

the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Peña-Rodriguez*, 580 U.S. at 222. This Court should grant certiorari to clarify that because racial bias is particularly pernicious, claims concerning the injection of race, ethnicity, and nationality into the criminal process cannot be waived by the failure of counsel to contemporaneously object at a capital trial.

CONCLUSION

For the foregoing reasons, the Court should either summarily reverse the TCCA's judgment or grant certiorari to decide the questions presented.

Respectfully submitted,

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