No. 24-5713 (CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

HECTOR ACOSTA,

PETITIONER,

V.

STATE OF TEXAS,

RESPONDENT.

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

RESPONDENT'S BRIEF IN OPPOSITION

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THIS IS A CAPITAL CASE

QUESTIONS PRESENTED

Petitioner Hector Acosta is a self-proclaimed member of Cartel del Noreste, a cartel originating from the country of Mexico. During the punishment phase of his capital murder trial, the State—without specific reference to Acosta's nationality—presented evidence that Acosta's membership in this dangerous criminal organization, as well as his association with other Mexican cartels and gangs, rendered him a future danger to society. On direct appeal of his conviction and death sentence, Acosta argued that references to "Mexico" and "Mexican cartels" at the punishment phase of his trial violated his rights to equal protection and due process under the Fourteenth Amendment. Applying Texas's contemporaneous-objection rule, the Texas Court of Criminal Appeals (TCCA) held that Acosta procedurally defaulted these claims by failing to object to any such references at trial. This procedural posture gives rise to the following questions:

Given that Acosta did not assert a violation of his equal protection or due process rights when the State presented evidence of his cartel membership and the common behaviors of cartels from Mexico and in light of the numerous state interests supported by Texas's contemporaneous-objection rule, does the TCCA's application of the rule in this case satisfy the independent and adequate state ground doctrine preventing this Court from reviewing Acosta's claims?

When a defendant happens to be a member of a dangerous and violent cartel originating from Mexico, do references to "Mexican cartels" and conduct associated with cartels from Mexico, without reference to the defendant's own nationality, improperly invoke the defendant's nationality in sentencing?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Hector Acosta was found guilty and sentenced to death for the capital murders of Erick Zelaya and Iris Chirinos during the same criminal transaction. *See* Clerk's Record, Volume 1, Page 14 (CR 1:14). The TCCA affirmed Acosta's conviction and punishment on direct appeal in an unpublished opinion issued on June 5, 2024. *Acosta v. State*, No. Ap-77,092, 2024 WL 2845498 (Tex. Crim. App. June 5, 2024) (per curium) (unpublished). Acosta seeks certiorari review of the TCCA's opinion. Because review is barred by the independent and adequate state law ground doctrine and otherwise without merit, certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Offense

The TCCA summarized the facts of Acosta's offense in its opinion affirming his conviction and death sentence on direct appeal:

> [Acosta], known by the street name "Cholo," was living at a residence on Truman Street in Arlington, Texas. One night, the residence was subject to a drive-by shooting. [Acosta] was not injured, but a friend who also lived at the residence was shot three times and nearly died. [Acosta] later discovered that another friend of his, Erick Zelaya, known by the street name "Diablo," had been involved in the drive-by shooting. Months after the drive-by shooting, [Acosta] moved to a new residence on Burton Drive which was in the same neighborhood as the Truman Street residence. Also staying at the Burton Drive residence were Zelaya and his seventeen-year-old girlfriend, Iris Chirinos.
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> On September 2, 2017, law enforcement responded to a call from a local resident who found a severed head in a wooded area near [Acosta's] previous residence on Truman Street. The head was on a dirt path behind an apartment complex and beside the head was a homemade sign that read, in Spanish, "La Raza Se Restreta y Faltan 4,"

which translates to "respect the race and there are four more." A black plastic bag, which appeared to have been burned, was located near the head. Grant Gildon, a homicide detective with the Arlington Police Department, reported to the scene as police canvassed the immediate area attempting to identify the severed head. An officer informed Gildon that Mariano Sanchez-Pina, who had been arrested on an unrelated burglary charge, might have information about the severed head. Gildon, along with Detective Michael Barakat, met with Sanchez-Pina several times at the police station.[2][1] Sanchez-Pina identified the severed head as belonging to "Diablo" and provided information about where the rest of his body could be found. Sanchez-Pina also said that [Acosta], whom he knew by the name "Cholo," was involved in Zelaya's murder. The detectives met with two other witnesses who provided information connecting [Acosta] and Sanchez-Pina to Zelaya's murder and dismemberment. Additionally, police received two anonymous Crime Stoppers tips connecting [Acosta] to the murder.

Based on the information received from these informants, Gildon obtained and executed a search warrant for [Acosta's] Burton Drive residence. Inside the residence, police discovered blood splatters, droplets of blood, and smeared bloodstains throughout the house. In a bedroom, police discovered a machete and bloodstains that had soaked through the floor. Police also found trash bags in the living room that contained several .22-caliber casings, human teeth, some human hair, a blood-stained shirt, a blood-stained towel, and a cement block with blood on it. In the backyard, police discovered multiple items that appeared to have blood on them as well as a sword sheath and shell casings. Police also found an area of disturbed dirt with a pickaxe, a spade, and a shovel nearby. Underneath the dirt, a rug covering a hole was discovered and, as more dirt was removed, a human foot was exposed. At that point, Gildon obtained an arrest warrant for [Acosta].[3][2] Eventually, the excavation revealed two bodies that were later identified as being Zelaya and Chirinos.

Autopsies of Zelaya and Chirinos revealed that both suffered multiple fatal gunshot wounds along with other injuries. Zelaya had a total of six gunshot wounds—three to the head, two [to] the torso, and

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[1] TCCA footnote 2: "Barakat was assigned to the gang unit. He was asked to assist in the investigation because officers initially responding to the severed head saw a tattoo on the lip that led them to believe that the decapitation could be gang related."

[2] TCCA footnote 3: "When Gildon obtained the arrest warrant for [Acosta], the police had not yet discovered both bodies, so the arrest was for the charge of murder. The charge was later changed to capital murder based on the discovery of the second body."

one to the back—and nineteen stab wounds, which included wounds related to the decapitation, chopping-type wounds down the side of his head, multiple stab wounds on his upper back and the back of his neck, and cutting wounds on his extremities. Chirinos's injuries included a gunshot wound to the chest, which may not have immediately been fatal, two gunshot wounds to the head, and blunt force trauma to the head. Both deaths were deemed to be homicide.

[Acosta] was arrested on September 7, 2017. Gildon and Barakat interviewed [Acosta] at the police station a few hours after his arrest.[3] During the interview, [Acosta] confirmed that his nickname was "Cholo" and upon being questioned about his history with Zelaya and Chirinos, [Acosta] confessed to murdering them: "If you want to know the truth, uh, I did kill him, I killed him." He then described how he murdered Zelaya and Chirinos.

[Acosta] described the gun he used in the offense and admitted to shooting both Zelaya and Chirinos before decapitating Zelaya with a machete. He told the detectives that after the murders he sold the gun to a man that he did not know. He stated that he placed Zelaya's head near the Truman Street residence to send a message to the other people he believed to be involved in the drive-by shooting. To emphasize his message, [Acosta] placed a sign next to Zelaya's decapitated head that translated to, "the race is to be respected and there are four more." [Acosta] said he showed the bodies to several people who knew he wanted revenge for the Truman Street shooting and afterwards, he buried the bodies in his backyard. He told the detectives that his friend, Mariano Sanchez, helped him move and bury the bodies and that another friend cleaned the house while he dug the hole in the backyard. Throughout the interview, [Acosta] maintained that he alone committed the murders.

Acosta, 2024 WL 2845798, at **1–2.

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[3] In his Petition, Acosta alleges that the *Miranda* warnings read to him were insufficient, the detectives failed to inform him of his right to have a Mexican consulate present, and the detectives leveraged his "weak English comprehension" and "unfamiliarity with the American legal system against him." *See* Petition at 2–3. He further states, "[u]naware of his rights under *Miranda* or the Vienna Convention, Mr. Acosta agreed to speak with the detectives." *See* Petition at 3. As such, Acosta impliedly argues to this Court that he did not validly waive his *Miranda* rights and his confession was otherwise involuntary. *See* Petition at 2–4. Acosta presented these claims to the TCCA on direct appeal and they were rejected on the merits. *See Acosta*, 2024 WL 2845798, at **9–19. Acosta does not seek review of the TCCA's opinion regarding his confession; therefore, any statements suggesting that his confession was obtained unlawfully are misstatements of the record before his Court.

II. Evidence of Acosta's Mexican Cartel Membership at Punishment and the State's Closing Argument

During the punishment phase of Acosta's trial the State presented evidence of Acosta's self-proclaimed membership in several Mexican cartels and gangs. First, Corporal Ruben Martinez, a Sheriff's deputy with the Tarrant County Sheriff's Office, testified about his experience booking Acosta into jail and, more generally, his experience with gangs. Corporal Martinez testified that he was familiar with cartels, which he agreed were "a Mexican type of gang." Reporter's Record, Volume 32, Page 47 (RR 32:47). He described his training and experience identifying members of cartels. RR 32:48. Based on Acosta's clothing and tattoos, he identified Acosta as a potential cartel member when Acosta was booked into jail in September 2017. RR 32:47–49. Corporal Martinez testified about Acosta's tattoos, noting that many of them were associated with Mexican cartels. *See generally*, RR 32:55–66. Based on his observations, and for the safety and security of the jail, Corporal Martinez interviewed Acosta during the book-in process. RR 32:49.

Corporal Martinez explained to the jury that during his interview with Acosta, Acosta said that he was affiliated with Cartel del Noreste. RR 32:72; 42:176 (State's Exhibit 480: Intake Form). More specifically, Acosta told Corporal Martinez that he started as a member of Los Carnalitos gang, and then became a member of the Cartel del Noreste cartel. RR 32:72, 78. Corporal Martinez testified that the Cartel del Noreste operates across Mexico, with a central command center, scouts, and foot soldiers. RR 32:75–76. Acosta told Corporal Martinez that he was a member of "la

operative" or operations with the cartel. RR 32:74. Acosta also said that he was a "sicario," or hitman, for the cartel. RR 32:74.

The State also presented the testimony of David Grantham, the Director of Intelligence for the Tarrant County Sheriff's Office.[4] Dr. Grantham is an expert in international criminal organizations, particularly those in Latin America and the Middle East. RR 32:158. Dr. Grantham testified that he has studied Mexican cartels, Columbian cartels, and terrorist organizations both academically and professionally. RR 32:158. He noted that while these criminal organizations are international, they are also present in the United States, including in Tarrant County, Texas. RR 32:158. Dr. Grantham explained that cartels are different from gangs; cartels are more like a structured, illicit business that extends outside their geographic area of control, whereas gangs are more local in nature and come together for a particular reason. RR 32:159.

Dr. Grantham testified that Acosta went into great detail in his interview with Corporal Martinez regarding his gang and cartel memberships, indicating that he was not exaggerating or lying about his memberships. RR 32:162. Dr. Grantham testified that he was familiar with the Cartel del Noreste, the cartel Acosta professed membership in. RR 32:163. He stated that Cartel del Noreste is an actively operating cartel, and is a subsidiary or offshoot of Los Zetas cartel. RR 34:165-66. Dr. Grantham

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[4] Throughout Acosta's petition he cites to and relies on evidence allegedly obtained through "post-conviction investigation" regarding the validity of Corporal Martinez and Dr. Grantham's testimony, as well as Acosta's own statements regarding his gang and cartel membership. *See* Petition at 4 n. 3, 7 n.6, 8 n.7, 9 n.9, 11 n.10. This evidence is outside the record on direct appeal, was not before the TCCA during its review of the case, and is improperly presented in the present proceedings before this Court.

confirmed that cartel members like to make spectacles of what they do and to send a message with their actions. RR 32:67. Dr. Grantham also testified that it was common among Mexican cartels to do lineup photographs, like the one the State presented from Acosta's Facebook page. RR 32:170-71; 42:19 (State's Exhibit 161).

Dr. Grantham also testified that, in determining whether someone is actively involved in a cartel, it would be important to know whether they committed an offense in a manner such as how Acosta committed the present offense, namely, by displaying the victim's head after commission of the murder. RR 32:171–72. Dr. Grantham explained that this would be a particularly important detail to connect the individual to a Mexican cartel, *as opposed to other international criminal organizations*, because Mexican cartels tend to want to make examples of people. RR 32:171–72.

But this was not the only evidence of Acosta's cartel involvement. Dr. Puente, a defense psychological expert, testified that Acosta self-reported that he first became involved in gangs and cartels when, as a teenager in Mexico, he joined Los Carnalitos. RR 34:245. After that, Acosta said that he became a member of the Noreste cartel for a time and then he joined the Zetas. RR 34:182. Acosta reported to Dr. Puente that he was a sicario in the Zetas. RR 34:182. Dr. Minagwa, another defense psychological expert, testified regarding Acosta's gang membership as a teenager and how it influenced his upbringing. RR 35:34-36

In closing argument, the State emphasized the violence involved in the offense of conviction. RR 36:16. The State also connected the violence of Acosta's actions with that of the Mexican drug cartels in which Acosta professed membership. RR 36:16.

The State went on to argue that Acosta will not stop his criminal actions because he wants to be a commander in his cartel. RR 36:16-17 ("He has worked his way up in the organization, but he doesn't want to stop there. As you know from the Facebook records, he wants to be a comandante, he wants to be a commander in the organization.").

At no point during trial did the State or any witness refer to Acosta's race, nationality, or ethnicity in connection to his likelihood of future dangerousness. And Acosta did not object to the trial testimony referring to "Mexico" or "Mexican cartels," nor did he object to any such references during the State's closing jury argument.

III. Procedural History

A Tarrant County jury found Acosta guilty of capital murder for the shooting deaths of Erick Zelaya and Iris Chirinos in the same criminal transaction. CR 2:152; RR 30:62. In accordance with the jury's answers to the special issues, the trial court sentenced Acosta to death on November 13, 2019. CR 2:175, 179–80; RR 36:72.

On direct appeal to the TCCA, Acosta raised seventeen points of error challenging his conviction and sentence. *Acosta*, 2024 WL 2845498, at *1. Through three points of error Acosta argued that the State improperly elicited evidence of, and improperly referenced in jury argument, his nationality during the punishment phase of trial; Acosta's claims were based on his rights to equal protection and due process under the Fourteenth Amendment. *Id.* at **27–31. On direct appeal, Acosta acknowledged that he did not object to either the evidence or jury argument at trial. *Id*. at **29–30. Applying Texas's contemporaneous-objection rule, the TCCA held that Acosta failed to preserve his complaints, thus forfeiting review of his claims on direct

appeal. *Id.* at *31. Finding Acosta's remaining points either unpreserved or without merit, the TCCA affirmed his conviction and sentence on June 5, 2024. *Id.* at *41. The instant petition follows.

REASONS FOR DENYING THE WRIT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. As such, this Court only grants petitions for a writ of certiorari for "compelling reasons." Sup. Ct. R. 10. Compelling reasons to grant review of a state court opinion include a state court deciding an important federal question in a way that conflicts with the decisions of another state or federal court, or the state court deciding an important question of federal law that has not been decided by this Court. Sup. Ct. R. 10. Here, the TCCA did no such thing. The TCCA's opinion rests on an independent and adequate state procedural rule; it did not address the federal question presented in Acosta's direct appeal. Therefore, the present petition presents no compelling reasons for this Court to certiorari.

I. Texas's Contemporaneous-Objection Rule Is an Independent and Adequate State Law Ground Disposing of Acosta's Claims and Barring Review by this Court.

"This Court 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). "In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* "The jurisdictional concern is that [this Court] not render an advisory opinion, and if the

same judgment would be rendered by the state court after [this Court] corrected its views of federal laws, [its] review could amount to nothing more than an advisory opinion." *Michigan v. Long*, 463 U.S. 1032, 1042 (1983) (internal quotation omitted).

The independent and adequate state law ground doctrine applies whether the state law ground is substantive or procedural. *Id.* (citing, e.g., *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Herndon v. Georgia*, 295 U.S. 441 (1935)). A state's contemporaneous-objection rule is an independent procedural state law ground that can bar review of a federal question.[5] *Id.* at 376–77; s*ee also Osborne v. Ohio*, 495 U.S. 103, 123 (1990); *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977); *Henry v. Mississippi*, 379 U.S. 443, 447–48 (1965).

Whether a state's procedural bar, including a state's contemporaneous-objection rule, is adequate to prevent review of a federal question "is itself a federal question." *Douglas v. State of Alabama*, 380 U.S. 415, 422 (1965). Generally,

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[5] Though the TCCA disposed of Acosta's claims on procedural grounds, it "disagree[d] with [Acosta's] characterization of the record" regarding references to Mexico and Mexican cartels. *Acosta*, 2024 WL 2845498, at *27. The TCCA summarized the state of the evidence as follows:

> The State presented evidence and argued to the jury that [Acosta] was a future danger for several reasons, including his affiliation with Mexican drug cartels and his role as a hitman for them. However, though the evidence showed that [Acosta] was from Mexico, the State did not offer specific evidence of [Acosta's] nationality as evidence of future dangerousness, nor did the State argue that [Acosta] was a future danger because he is Mexican or from Mexico.

Id. The fact that the TCCA commented on the merits of Acosta's claims does not prevent its explicit holding that Acosta procedural defaulted his claims from being an independent basis that bars review by this Court. *Allen v. Stephens*, 805 F.3d 617, 636 (5th Cir. 2015) (citing *Cotton v. Cockrell*, 343 F.3d 746, 754 (5th Cir. 2003)); *see also Long*, 463 U.S. at 1042 (a state court's opinion that contains a "plain statement" that its decision rests upon adequate and independent state grounds will trigger the adequate and independent state ground rule).

"violation of firmly established and regularly followed state rules … will be adequate to foreclose review of a federal claim." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (internal quotations omitted). In determining whether a state procedural rule is an adequate ground to bar review, the question is "whether the enforcement of a procedural forfeiture serves [a legitimate] state interest." *Henry*, 379 U.S. at 447. If so, the defendant's procedural default will prevent review of his federal claim; if not, the state procedural rule may not bar review of the federal claim. *Id.* at 447–48.

A. Application of Texas's Contemporaneous-Objection Rule Serves Legitimate State Interests in this Case.

The TCCA held that Acosta procedurally defaulted his equal protection and due process claims because he failed to comply with Texas's contemporaneous-objection rule, that is, he failed to object to the admission of evidence referencing Mexico or Mexican cartels and to the State's closing argument at trial. *Acosta*, 2024 WL 2845498, at *29, *30. Texas's contemporaneous-objection rule is a well-established procedural rule in the state. *See* Tex. R. App. P. 33.1. As the TCCA recognized, it has consistently held that error in the trial court is subject to this procedural default, even when the error involves a constitutional right. *Acosta*, 2024 WL 2845498, at *29 (citing *Darcy v. State*, 488 S.W.3d 325, 329 (Tex. Crim. App. 2016); *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008)). The Fifth Circuit Court of Appeals has "'consistently upheld [Texas's contemporaneous-objection rule] as an independent and adequate state ground that procedurally bars'" review of federal claims. *Allen v. Stephens*, 805 F.3d 617, 635 (5th Cir. 2015), *abrogated on other*

grounds, *Ayestas v. Davis*, 584 U.S. 28 (2018) (quoting *Rowell v. Dretke*, 398 F.3d 370, 374 (5th Cir. 2005)).

Not only is Texas's contemporaneous-objection rule well-established and consistently applied, but it furthers important and legitimate state interests. *Acosta*, 2024 WL 2845498, at *29 (citing *Martinez v. State*, 91 S.W.3d 331, 336 (Tex. Crim. App. 2002)); *see also Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002). The contemporaneous-objection rule "promote[s] the prevention and correction of errors." *Saldano*, 70 S.W.3d at 887; *see also Allen*, 805 F.3d at 635 ("Texas's contemporaneous[-]objection rule … [gives] trial courts the chance to correct their own errors."). In doing so, it ensures that the parties have a lawful trial, which in turn alleviates the burden on the judicial system by limiting appeals and retrials. *Id.*; *see also Young v. State*, 826 S.W.2d 141, 149 (Tex. Crim. App. 1991) (Campbell, J., dissenting) (recognizing judicial economy as the "principle rationale" for the rule).

This Court has likewise recognized the important state interests that are served by contemporaneous-objection rules. *Wainwright*, 433 U.S. at 88; *see also Osborne*, 495 U.S. at 123; *Henry*, 379 U.S. at 448. A contemporaneous objection permits the trial judge who observes the proceedings to make the factual determinations necessary for deciding a federal constitutional question. *Id.*; *Henry*, 379 U.S. at 448. In doing so, it allows for the record to be fully developed at the time of the proceeding. *Id*. The rule also ensures that defense counsel does their part in preventing error in the trial court and discourages "sandbagging" by defense counsel. *Puckett v. United States*, 556 U.S. 129, 134 (2009) (explaining "sandbagging" as

"remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor"). In addition, the contemporaneous-objection rule contributes to the finality of criminal litigation. *Wainwright*, 433 U.S. at 88.

The few exceptional cases in which this Court has found a state's contemporaneous-objection rule inadequate to bar consideration of a federal question have involved situations where the state's interest in enforcing the rule had been served or was otherwise diminished. *See, e.g., Lee*, 534 U.S. at 376; *Osborne*, 495 U.S. at 123; *see also Henry*, 379 U.S. at 448 (recognizing that the purpose of a contemporaneous-objection rule "may have been substantially served" by a motion for a directed verdict and, "if this is so" enforcement of the rule would serve no substantial state interest); *Douglas*, 380 U.S. at 422 (state's procedural waiver rule did not preclude review of constitutional claim because "[n]o legitimate state interests would have been served by requiring repetition of a patently futile objection").

For example, in both *Lee* and *Osborne*, this Court found that the respective states' contemporaneous-objection rules should not prevent its review of federal claims of jury charge error because the defendants had raised the same or similar complaints through motions presented in the trial court. *Lee*, 534 U.S. at 377–78 (arguments presented in motion to dismiss, which was overruled just before trial, and the trial judge rejected argument "in no uncertain terms"); *Osborne*, 495 U.S. at 124 (arguments presented to the trial court through motion to dismiss indictment, heard immediately prior to jury charge conference). In *Osborne*, this Court noted that the unique "sequence of events" in the case demonstrated that the jury charge issue had

been presented to the state trial court and enforcing the state's contemporaneous-objection rule under the circumstances would not further any state interest. 495 U.S. at 124). The "special circumstances" presented in *Lee* resulted in the same conclusion. 534 U.S. at 387 (noting the case fell into the "limited category" in which a state procedural ground is inadequate to stop consideration of a federal question).

Such exceptional and atypical circumstances do not exist here. The State presented—without reference to Acosta's nationality—evidence that he was a member in or associate of criminal cartels and gangs originating from Mexico. The State used his membership with these groups to demonstrate Acosta's own violent behaviors and his desire to move up the ranks within the cartel as proof as his future dangerousness. As the State presented this evidence and argued as much in closing argument, Acosta did not raise any objection to references to "Mexican cartel" or "Mexico." There is nothing in the record to indicate that Texas's interests in enforcing its contemporaneous-objection rule in this case were served in any manner.[6] Rather, the record demonstrates that Texas's interests in error correction, judicial economy, ensuring defense counsel does their part in preventing error, and finality of this conviction are all served in applying the contemporaneous-objection rule in this case. Therefore, Texas's contemporaneous-objection rule is an independent and adequate state law ground barring review of Acosta's equal protection and due process claims.

[6] Notably, in *Osborne*, this Court declined to review a second omission error in a jury charge because the defendant had not raised it at any point during trial and applying the state's procedural default rule "serve[d] the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." 495 U.S. at 123.

B. This Court's Holdings in *Buck v. Davis*[7] and *Pena-Rodriguez v. Colorado*[8] Do Not Warrant Abandoning the Independent and Adequate State Law Ground Doctrine in this Case.

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." *See* Petition at 24. Instead, he argues that enforcement of the rule is inadequate in light of the specific federal claim he presents. *See* Petition at 24–25. As he did in the TCCA, Acosta argues that this Court's holdings in *Buck v. Davis* and *Pena-Rodriguez v. Colorado* support his position that Texas's contemporaneous-objection rule is not an adequate state ground to bar review of his claims. *See* Petition at 24–30. "However, neither of the cases [Acosta] cites addresses procedural default due to the failure to comply with the contemporaneous-objection rule." *Acosta*, 2024 WL 2845498, at *29. When these cases are viewed in the proper procedural light and the direct link between the defendants' race on the verdicts in those cases is taken into consideration—a situation that did not occur here—they do not support Acosta's argument.

In *Buck*, defense counsel called an expert to testify during the punishment phase of his capital murder trial and elicited testimony that linked Buck's race with the likelihood of future violence; defense counsel also put into evidence the expert's report which stated that Buck's race presented an "increased probability" of future dangerousness. 580 U.S. at 119. Noting that the focus of the punishment proceedings

[7] 580 U.S. 100 (2017).

[8] 580 U.S. 206 (2017).

was on the future dangerousness question, this Court found that the "unusual confluence of factors" in the case could support the jury in "making a decision on life or death on the basis of race." *Id*. at 121–22. In light of the unique circumstances presented, this Court held that Buck's ineffective assistance of counsel claim presented the type of "extraordinary circumstances" that justified reopening his federal habeas case under Federal Rule of Civil Procedure 60(b)(6).[9] *Id*. at 128.

In so holding, the Court acknowledged the State's interest in finality of judgments but stated that "the whole purpose" of Rule 60(b) was "to make an exception to finality." *Id*. at 126. And, considering the context of *Buck*, in which the State had confessed error in five other cases involving the same expert's testimony directly linking the defendant's race to the future dangerousness issue in capital sentencing, the State's interest in finality in Buck's case "deserve[d] little weight." *Id*. That said, *Buck* did not announce "any new principles of law[,]" (*Id*. at 786 (Thomas, J., dissenting)), and it does not stand for the proposition that any claim alleging an impermissible reference to a defendant's race, ethnicity, or national origin may overcome a state's legitimate interests in enforcing its rules of procedural default.

Similarly, in *Pena-Rodriguez*, this Court issued the narrow holding "that where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider

[9] Federal Rule of Civil Procedure 60(b)(6) provides: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reason[]: … any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6).

the evidence of the juror's statement and any resulting denial of the jury trial guarantee." 580 U.S. at 225. Importantly, in *Pena-Rodriguez* this Court was not analyzing whether Colorado's no-impeachment rule was an independent and adequate state ground barring this Court's review of a federal claim. Rather, in affirming Pena-Rodriguez's conviction, the Colorado Supreme Court had relied on precedent from this Court which rejected "constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias." *Pena-Rodriguez*, 580 U.S. at 215. This Court granted review on the purely federal question of "whether there is a constitutional exception to the no-impeachment rule for instances of racial bias." *Id.*

While this Court recognized that "there is a sound basis to treat racial bias with added precaution[,]" the *Pena-Rodriguez* decision did not create a blanket exception to the application of state procedural rules for claims of racial bias. *Id.* Indeed, this Court's limited holding permits a claim of racial bias to overcome no-impeachment rules only when there is a showing of "overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict[] … [and] the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id.* at 225–26.

As the TCCA recognized, *Buck* and *Pena-Rodriguez* "rightly aim at removing improper considerations of race in the criminal justice system," but they "do not alter or eliminate a state's ability to require compliance with the contemporaneous-objection rule to preserve error, even with respect to error impacting constitutional

rights." *Acosta*, 2024 WL 2845498, at *29. In particular, these cases do not permit well-established and consistently applied procedural rules to give way any time a defendant raises equal protection and due process violations based on race, ethnicity, or national origin.

C. Because this Court Lacks Jurisdiction to Review Acosta's Constitutional Claims, Certiorari Should Be Denied.

Texas's contemporaneous-objection rule is well-established, regularly enforced, and supports several important state interests. Based on this Court's precedent, it qualifies as an independent and adequate state law ground preventing review of Acosta's federal equal protection and due process claims. Though this Court has carved out a constitutional exception to the no-impeachment rule when the record demonstrates "overt racial bias" and has recognized that the "infusion of race" can be an exceptional circumstance warranting reopening a federal habeas, the record in this case does not support a similar departure from standard procedures. As discussed further in Point II, *infra*, the State presented evidence of Acosta's membership in violent and dangerous criminal organizations, which happen to originate from Mexico, as evidence of his future dangerousness. Acosta's nationality was not invoked as evidence against him. The record here does not justify abandoning the standard procedural requirements established by Texas's contemporaneous-objection rule. Because the TCCA disposed of Acosta's equal protection and due process claims on an independent and adequate state procedural ground, this Court lacks jurisdiction to review his present claims. Therefore, this Court should deny a writ certiorari in this case.

II. The State Did Not Invoke Acosta's Race, Ethnicity, or National Origin to Obtain a Death Sentence; Therefore, There Is Nothing for this Court to Remedy.

Acosta argues that his rights to equal protection and due process were violated when the State elicited evidence of Acosta's nationality, through references to "Mexico" and "Mexican drug cartel," to appeal to racial stereotypes and "convinc[e] jurors that Mr. Acosta, as a Mexican man, was 'violence prone' and would be a future danger to society." Petition at 21; *see also* Petition at 19–22. At the outset, the record demonstrates that the State did not present evidence that Acosta would be a future danger because he is, as he phrases it, a "Mexican man." Rather, the State presented evidence that he would be a future danger because he is associated with violent and dangerous criminal organizations.

Discrimination based on race, ethnicity, or national origin is prohibited by the due process and equal protection clauses of the Fourteenth Amendment.[10] *Pena-Rodriguez*, 580 U.S. at 224–23; *see also Strauder v. State of West Virginia*, 100 U.S. 303, 306–07 (1879). "[R]acial discrimination in the jury system pose[s] a particular threat … to the integrity of the jury trial." *Id.* at 222. Likewise, the "Constitution prohibits racially biased prosecutorial arguments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987). But, while discrimination on the basis of race, ethnicity, or national origin is "odious in all aspects, [and] especially pernicious in the administration of

[10] The State agrees with the sentiments in Petition Footnote 13, namely, that the alleged discrimination in this case may be "described as discrimination based on national origin or ethnicity." *See* Petition at 16 n.13 (quoting *Pena-Rodriguez*, 580 U.S. at 237 n.1). The State likewise agrees that case law concerning discrimination based on race, national origin, and ethnicity is applicable to the claims presented by Acosta.

justice" (*Pena-Rodriguez*, 580 U.S. at 868), not all references to a defendant's race, ethnicity, or national origin are improper. *See, e.g.*, *Matter of Sandoval*, 408 P.3d 675, 688 (Wash. 2018) (en banc).

Acosta is a self-proclaimed member of the Mexican cartel Cartel del Noreste, and he has been associated with the gang Los Carnalitos in Mexico and the Mexican cartel Los Zetas. RR 32:72, 78; *see also* RR 42:176 (State's Exhibit 480: Intake Form). Acosta's self-identification as a member or associate of these organizations was presented by both the State *and Acosta* during the punishment phase of his trial.[11] RR 32: 712, 78 (Corporal Martinez's testimony); RR 34:182, 245; 35:34–36 (defense experts' testimony).

To give the jury context of type of organizations Acosta professed membership in or association with, the State presented evidence that the term "cartel" is used to describe a type of criminal organization which operates like a business. RR 32:159. Specifically, Dr. Grantham testified as follows regarding cartels:

> [A] cartel would be considered more -- you could liken it to a business. They have structure that extends outside of the area of control. So if there's a major city that they have their top leaders in, they also have presence and power in other places and they move -- when I say move, they transport products, almost always illicit products for sale and distribution elsewhere in the world.

RR 32:159. As an expert in international criminal organizations, Dr. Grantham noted that he has studied cartels from various countries, including cartels from Mexico and cartels from Columbia. RR 32:158. Dr. Grantham's testimony also indicated that

[11] In fact, Acosta's own defense team utilized the term "Mexican cartel" to describe the organization he was a part of. *See, e.g.,* RR 34:90.

cartels from different countries operate in different ways. RR 32:171 (noting common characteristics among cartels from Mexico and pointing out activities that are particularly associated with cartels from Mexico). Having established that cartels exist from numerous countries, when Dr. Grantham was discussing cartels originating from Mexico, he referred to them as "Mexican cartels" to simply clarify the country of origin of the specific type of cartel he was discussing. *See, e.g.,* RR 32:158 (noting that many drug cartels from Mexico have a presence in Texas).

The country of origin of the gangs and cartels that Acosta professed membership in is Mexico. RR 32:165–66. While Acosta stated he was a member of a particular cartel, Cartel del Noreste, Dr. Grantham opined that cartels from Mexico engaged in similar violent behaviors and criminal conduct. RR 32:171. Thus, Dr. Grantham and the State's practice, when addressing cartels associated with Acosta, of modifying "cartel" with the country of their origin is reasonable in light of Dr. Grantham's other testimony, and it did not "invoke" Acosta's ethnicity or national origin. *See, e.g, United States v. Alvarez*, 708 Fed. Appx. 334, 335 (9th Cir. 2017) (mem. op.) (district court's comments regarding defendant's involvement "with a Mexican cartel" did not violate defendant's due process rights or demonstrate that the district court relied on his nationality in sentencing); *United States v. Valdez*, 529 Fed. Appx. 396, 397 (5th Cir. 2013) ("This case arises from Clemente Valdez, Jr.'s [] involvement with the Mexican Gulf Cartel"); *see also State v. Leon*, 27 Wash. App. 2d 1045 (Aug. 1, 2023), *as amended* (Aug. 8, 2023), *as amended on denial of reconsideration* (Sept. 26, 2023), *review denied*, 542 P.3d 575 (Wash. 2024) (references

to "Mexican" narcotics trafficking and purported characteristics of "Hispanic" drug dealers, though possibly viewed as "stereotyping," did not demonstrate an appeal to racial bias).

The State presented Acosta's membership in these organizations as evidence of his future dangerousness, which is consistent with Texas's long-standing recognition that evidence of a defendant's gang membership is relevant to the issue of future dangerousness. *See Soliz v. State*, 432 S.W.3d 895, 901 (Tex. Crim. App. 2014) (citing *Williams v. State*, 273 S.W.3d 200, 230 (Tex. Crim. App. 2008); *Mason v. State*, 905 S.W.2d 570, 577 (Tex. Crim. App. 1995)).

However, such evidence is only relevant if the State showed both "proof of the group's violent and illegal activities" and "the defendant's membership in the organization." *Mason*, 905 S.W.2d at 577. Because Acosta's membership in these organizations was not corroborated by any other witness's testimony, the State needed to present corroborating evidence to support his professed membership to make his membership relevant. To that end, Dr. Grantham testified that Acosta's description of Cartel del Noreste was consistent with the information that he knew about the cartel and, based on the details Acosta provided, he had a high degree of confidence that Acosta was either currently, or had been, associated with that cartel. RR 32:162, 167. The State also introduced photograph evidence from Acosta's Facebook page depicting violent acts and drug activities, and Dr. Grantham opined that the images were similar to pictures he had seen associated with Mexican cartels

and drug traffickers.[12] RR 32:168–72.[13] The photographs demonstrated that Acosta was actively involved in activities that were associated with cartels originating from Mexico, thus supporting both his membership in such cartels and that the group engaged in violent and criminal activities. *See Mason*, 905 S.W.2d at 577.

Acosta's nationality was not used by the State as evidence of future dangerousness. Rather, it was Acosta's membership in organizations known to exhibit violent retaliative behaviors, as depicted in Acosta's photographs and discussed by Dr. Grantham, that the State used to demonstrate his potential for future violence. *The State could have made the same arguments regarding membership in such organizations, regardless of Acosta's own nationality*. It is this fact that distinguishes the State's use of the phrase "Mexican cartels" from references to the defendants' national origin in the cases relied on by Acosta. *See* Petition at 19 (citing *United States v. Vue*, 13 F.3d 1206 (8th Cir. 1994); *United States v. Doe*, 903

[12] Acosta argues that State did not prove that the photographs admitted were from Acosta's Facebook page, thus furthering harmful stereotypes of violence in Mexico and improperly associating it with Acosta. *See* Petition at 5 n.5. However, at trial the photographs were identified as having come from Acosta's Facebook records. RR 31:20–21 (State's offer of State's Exhibits 324–367). Acosta objected to some of the photographs as unfairly prejudicial based on Texas Rule of Evidence 403, and he objected that some were irrelevant. RR 31:21–22. Acosta did not object that the photographs were not properly authenticated as having come from his Facebook profile. RR 31:21–22. Having failed to raise an objection to the authenticity of the photographs at trial, it is improper for Acosta to now claim that the photographs are not what the State purported them to be.

[13] Though Dr. Grantham testified that he had seen images like the one depicted in State's Exhibit 326—a photograph of a man with a mask brandishing a firearm and sitting over two individuals whose hands and feet are bound and their pants pulled down—in photos from "Mexico," the context of Dr. Grantham's testimony and his status as an expert in the field of narcotic organizations, drug cartels, and criminal cartel organizations would imply to the jury that Dr. Grantham was referring to photographs from Mexican cartels, not Mexico generally. *See, e.g.*, *State v. Zamora*, 512 P.3d 512, 521–22 (Wash. 2022) (en banc) (recognizing remarks or questions implicating a defendant's ethnicity are reviewed in light of the context of the trial).

F.2d 16 (D.C. Cir. 1990); *United States v. Rodriguez Cortes*, 949 F.2d 532 (1st Cir. 1991)).

In each of the cases relied on by Acosta, the defendants' nationality *and nothing more* was used as evidence that the defendant committed the charged offense. *See Vue*, 13 F.3d at 1213 (in opium drug case, testimony that individuals of the Hmong descent accounted for 95% of opium smuggling in the area improperly highlighted ethnicity of defendants and invited jury to consider the defendants' race in determining guilt); *Doe*, 903 F.2d at 20 (testimony that Jamaican individuals had monopolized the local drug market improperly suggested that defendants were guilty because they were Jamaican); *Rodriguez Cortes*, 949 F.2d at (defendant's Columbian identification card had no relevance to case and its admission invited jurors to find the defendant guilty of drug trafficking by reason of his national origin). The same can be said about the use of race and ethnicity in *Buck* and *Pena-Rodriguez*. In *Buck* the jury was explicitly told by an expert witness that his race presented an "increased probability" that he would be a future danger, answering a key question the jury would be asked to decide. 580 U.S. at 119. In *Pena-Rodriguez*, a juror admitted that he believed Pena-Rodriguez was guilty because he was a Mexican man. 580 U.S. at 212. In both cases, the record demonstrated that the defendant's race or ethnicity—and nothing more—directly contributed to the jurys' verdicts. That is not the case here.

The evidence of Acosta's cartel and gang membership, presented by both the State and Acosta, did not suggest that Acosta would be a future danger because of his

nationality. Acosta's nationality was not addressed by the State's evidence in any manner at punishment. The evidence demonstrated that Acosta is a member of a drug cartel, and it so happens that the cartel originates in Mexico. This fact, and the State's reference to Mexican cartels and gangs, does not transform the State's evidence or prosecutor's comments into an invocation of Acosta's nationality as evidence of his future dangerousness. *See Alvarez*, 708 Fed. Appx. at 335; *Valdez*, 529 Fed. Appx. at 397.

The State's evidence and prosecutor's comments described the cartels and gangs Acosta professed membership in or association with as what they are: criminal organizations originating from Mexico. The State properly presented evidence of Acosta's membership in violent criminal organizations in support of its burden to prove that Acosta would be a future danger to society after conviction. *Soliz*, 432 S.W.3d at 901; *see also* Tex. Code Crim. Proc. art. 37.071, §§ 2(b)(1), 2(c). Because the State did not invoke Acosta's race, ethnicity, or national origin in the punishment phase of his trial, this Court should deny a writ certiorari in this case.

CONCLUSION

Acosta is a self-proclaimed member of a violent and dangerous criminal organization, Cartel del Noreste, and he has been associated with other dangerous criminal groups, Los Carnalitos and Los Zetas. The State rightly used this evidence to demonstrate his likelihood of future dangerousness at the punishment phase of his capital murder trial. The State's evidence and jury argument related to his membership and associations was admitted without objection by Acosta. The TCCA's

holding that Acosta procedurally waived any complaint to this evidence or the State's closing argument is an independent and adequate state law ground barring this Court from reviewing Acosta's present claims. Even so, because the State did not invoke Acosta's nationality against him in presenting such evidence, Acosta's claims are without merit. For the foregoing reasons, this Court should deny certiorari review.

Respectfully submitted,

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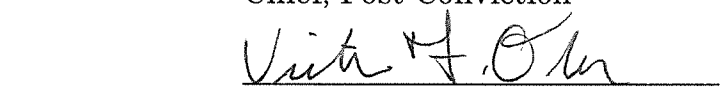

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