No. 24-5713 (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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Hector Acosta is a native of Monterrey, Mexico, and a Spanish speaker who was unable to communicate in English at the time of his arrest or at trial. 32 RR 54; 1 CR 37, 322; 2 RR 8–9. The State of Texas leveraged Mr. Acosta's nationality against him by linking it to his capacity for future dangerousness, encouraging the jury to consider his nationality as a factor in determining the appropriateness of the death penalty.

The State called two purported experts at the penalty phase of Mr. Acosta's trial to ostensibly testify about the dangers associated with a drug cartel that it alleged he was a member of, but it also presented testimony that Mr. Acosta was dangerous because of his association with Mexico. Most egregiously, when asked about a photo of a masked person holding a rifle and a handgun sitting next to two people whose hands and feet were zip-tied—found on a Facebook page alleged but not confirmed to belong to Mr. Acosta[1]—David Grantham, the "director of intelligence" at the Tarrant County Sheriff's Office ("TCSO"), testified based on no apparent foundation that he had "absolutely" seen scenes like that depicted in the photograph in "Mexico. Or at least I should say in photos." 32 RR 168. Grantham did not point to anything in the photograph that had to do with Mexico specifically. His testimony could serve no purpose but to convince jurors that Mexicans are uniquely dangerous

[1] *See* Pet. at 5 n.4. Regardless of who the Facebook page belonged to, the State is not permitted to argue that a person will be a future danger due to their ties to a particular photo that an expert claims "looks like" Mexico—or photos of Mexico. The "Mexican" origin of the photo can have no relevance other than to impermissibly connect Mexico, broadly, to dangerousness.

and that Mr. Acosta, a Mexican man, is a dangerous person who should be sentenced to death. This was not the only time Grantham and another purported expert, Ruben Martinez, a "gang officer" with the TCSO, impermissibly invoked Mr. Acosta's nationality in order to help the State obtain a death sentence. *See* Section A, *infra*; Pet. at 6–12.

Counsel for Mr. Acosta did not contemporaneously object to the improper invocations of Mr. Acosta's nationality, perhaps because counsel themselves had an incorrect preconceived notion of Monterrey, Mexico, as "impossibly dangerous." 1 CR 323; Pet. at 13–14. However, Mr. Acosta urged this Court to grant certiorari and reverse the Texas Court of Criminal Appeals ("TCCA") below notwithstanding the state procedural bar to relief created by the lack of a contemporaneous objection, because this Court has previously reviewed the merits of claims involving the injection of race and nationality into proceedings despite the existence of procedural obstacles to relief. *See* Pet. at 22–31 (citing, *inter alia*, *Buck v. Davis*, 580 U.S. 100 (2017), and *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017)).

In its Brief in Opposition, Texas argues that this Court should decline certiorari review because: 1) Texas applied an independent and adequate state law ground to bar review of Mr. Acosta's claims, and 2) the State of Texas did not invoke Mr. Acosta's race, ethnicity, or national origin to obtain a death sentence. These arguments fail to meaningfully engage with the most damaging invocations of Mr. Acosta's nationality, obfuscate this Court's clear intention to root out racial

discrimination from the criminal justice system, and rely on prejudicial information asserted by the State's experts that was irrelevant to the issues before the jury.

A. Texas Argues That It Sought to Prove Mr. Acosta's Future Dangerousness Through His Alleged Cartel Membership but Largely Ignores Comments Touching Only on Mr. Acosta's Nationality.

Texas argues in its Brief in Opposition that it did not rely on Mr. Acosta's nationality to obtain a death sentence, but that it instead "presented evidence that he would be a future danger because he is associated with violent and dangerous criminal organizations." Br. in Opp'n at 23.[2] Notwithstanding the fact that Mr. Acosta's drug cartel membership was questionable at best, Texas fails to meaningfully engage with its invocation of Mr. Acosta's nationality, which was not connected with the activities of the Cartel del Noreste or other criminal organizations to which he allegedly belonged.[3]

Specifically, during its direct examination of Grantham, the State 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

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[2] Texas also states in its Brief in Opposition that the prosecution "connected the violence of Acosta's actions with that of the Mexican drug cartels in which Acosta professed membership." Br. in Opp'n at 11. The State presented no evidence that the offense for which Mr. Acosta was convicted had any connection to any drug cartel.

[3] Texas notes that there is some evidence Mr. Acosta was a member of a street gang, Los Carnalitos, and the drug cartel Los Zetas. Br. in Opp'n. at 24. Notably, Mr. Acosta became associated with Los Zetas when members of the cartel captured and tortured him. Pet. at 4 n.3. However, Texas's primary allegation against Mr. Acosta was that he was a member of the Cartel del Noreste. *See* 32 RR 167 (Grantham testified that he "had a high degree of confidence that he was either currently associated or had been associated with" the Cartel del Noreste.").

Mr. Acosta, but the person in the mask was not identifiable, and the State did not otherwise prove it was him. The thrust of Grantham's testimony about the photograph, however, was that the person depicted was engaging in behavior that is specifically *Mexican*. 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.

Nothing about this question and answer references the activities of a drug cartel Mr. Acosta allegedly belonged to. The only purpose Grantham's testimony served was to tie a photograph of a person engaged in frightening behavior to Mexico to suggest that Mexicans as a class are dangerous. Texas argues that Grantham only used "Mexican" or "Mexico" to "clarify the country of origin of the specific type of cartel he was discussing." Br. in Opp'n at 25.[4] It is unclear why the State believes it was

[4] It is a mischaracterization of the record to say that Grantham only used "Mexican" or "Mexico" as a modifier to "clarify" the location of drug cartels. For example, in one instance Grantham appears to reference many different "criminal organizations," without reference to their location, but specifically references "Mexican cartels," as well. *See* 32 RR 171–72 ("The international criminal organizations, particularly Mexican cartels, when they want to make a statement, they will often – say often, they will make an example of people."). If anything, Grantham was making sweeping generalizations about international criminal organizations in general. He was not describing specific characteristics applicable to all Mexican cartels vis a vis cartels from other countries (if such characteristics even exist). This suggests that the location of a criminal organization was not an important

necessary to clarify the cartel's country of origin. It is the violent activities of a cartel—and a defendant's involvement in those activities—that may make membership relevant to future dangerousness. But the location of a cartel's origin has no relevance to a question before the jury at sentencing—unless the State believed that the jury would associate that place with violence. Regardless, the State's justification for why it invoked Mr. Acosta's nationality plainly does not apply to Grantham's testimony in this instance. Indeed, in this instance, Grantham's testimony did not pertain to a cartel at all.

The State's post hoc rationalization for this testimony—that "context . . . would imply to the jury that Dr. Grantham was referring to photographs of Mexican cartels, not Mexico generally," *id.* at 27 n.13—is belied by the fact that the prosecutor did not ask Grantham whether the Cartel del Noreste—the cartel Mr. Acosta was alleged to be a member of—engaged in similar behavior. Instead, the prosecutor asked "where" such behavior could be found. 32 RR 168. Grantham, in turn, invoked only photographs of Mexico, not anything related to cartel activity. *See id.* Moreover, it would also be improper for the State to do what it suggests in its Brief in Opposition and elicit testimony about the activities of "Mexican cartels" in general without any evidence that the cartel Mr. Acosta purportedly belonged to engaged in those actions. Indeed, the State acknowledges in its Brief in Opposition that gang or cartel membership is "only relevant if the State showed both 'proof of the group's violent

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feature of Grantham's testimony and instead, the term "Mexican cartels" was utilized in his testimony to, as the prosecution argued in closing arguments, "strike fear in [jurors'] hearts." *See* 36 RR 16.

and illegal activities' and 'the defendant's membership in the organization.'" Br. in Opp'n at 26 (quoting *Mason v. State*, 905 S.W.2d 570, 577 (Tex. Crim. App. 1995)). Therefore, by the State's own admission, testimony about "Mexican cartels" generally does not meet the standard for relevance in capital sentencing under Texas law. Texas cannot invoke a defendant's nationality to obtain a death sentence and then rely on its own imprecision as an excuse for doing so.

Further, Texas's assertion that "Mexican," as used in Grantham's testimony and its closing arguments, was merely a modifier of "cartel" falls flat. *See* Br. in Opp'n at 25. Grantham testified that Mr. Acosta was a member of Cartel del Noreste. 32 RR 167. Had he and the prosecution made a good faith effort to tie Mr. Acosta to the violent activity of a particular cartel, as Texas states, he would have used the name of that cartel. Indeed, if references to Mexico are as benign as Texas now argues, tying Mr. Acosta to a specific cartel and its activities would have made a stronger case that he would be violent because of that connection. Instead, the State elicited the vague description of "Mexican" drug cartels, likely because it believed "Mexican" as a descriptor 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. *See Buck*, 580 U.S. at 121 (quoting *Turner v. Murray*, 476 U.S. 28, 35 (1986) (plurality op.)).[5] In this case, the use of "Mexican" as a modifier was avoidable, but

[5] In referencing Mexico and "Mexican" cartels, Texas was capitalizing on not only stereotypes about Mexican men, *see* Pet. at 18, but also on an American fascination with drug cartels and Mexico that views the country as particularly violent. For example, television shows about drug cartels in Mexico are very popular in the United States but "exaggerat[e] . . . the problem of drug trafficking in Mexico."

Grantham used it anyway, inviting the jury to impose a harsher sentence based on Mr. Acosta's nationality.[6] *See United States v. Ramirez-Fuentes*, 703 F.3d 1038, 1045 (7th Cir. 2013) (holding that a DEA agent improperly made "unnecessary and avoidable references" to "Mexican methamphetamine . . . made by Mexican nationals" in a drug prosecution); *see also id.* at 1046 ("[T]he references to 'Mexican methamphetamine' invited the jury, albeit implicitly, to consider [the defendant's]

Karol Suárez, *'Fascinated by Death': Why Americans Can't Get Enough of Vicious Drug Cartel Drama*, Courier-Journal (Nov. 30, 2021), https://www.courier-journal.com/story/news/crime/2021/11/30/why-americans-infatuated-with-drug-cartel-dramas-like-narcos/8754397002/. Perhaps this is why Texas sought to prove Mr. Acosta's alleged dangerousness not by presenting testimony concerning the violent activities of a particular cartel but by invoking Mexico and "Mexican cartels" generally, because it knew it could play on jurors' preconceived views of Mexico and faceless "Mexican cartels" as violent.

[6] In defense of its conduct, Texas states the defense team also "utilized the term 'Mexican cartel' to describe the organization [Mr. Acosta] was a part of." Br. in Opp'n at 24 n.11 (citing 34 RR 90). First, this citation references a time that *the prosecutor*, not defense counsel, invoked the term "Mexican drug cartel" in questioning a defense expert. *See* 34 RR 90 (the prosecutor, Kevin Rousseau, passes the witness shortly after asking the question).

But even if the term were invoked by defense counsel, this highlights Texas's fundamental misunderstanding of the problem with its numerous references to "Mexico" and "Mexican" drug cartels. In a vacuum, references to Mr. Acosta's nationality or country of origin are not unconstitutional. However, these references became problematic when they were elicited to prove that Mr. Acosta would be a future danger and should be sentenced to death. Nothing prohibits defense counsel from referencing "a Mexican drug cartel" in the context of the mitigation presentation, for example. However, had defense counsel argued or elicited testimony that conceded Mr. Acosta was dangerous based on frightening photos that "looked like photos of Mexico," or had the defense conceded that Mr. Acosta's nationality (as opposed to membership in a specific cartel) was a relevant factor in assessing dangerousness, this would have been improper. *See Buck*, 580 U.S. at 122 (holding that defense counsel is constitutionally ineffective for eliciting testimony that a defendant's race makes them more likely to be a future danger). Even if the example cited by Texas were a statement by defense counsel, its attempt to equate the example it raised and the testimony cited by the State rings false.

nationality in reaching its decision in the case."). The fact that "Mexican" was, grammatically, a modifier of "drug cartel" in these instances does not change the fact that its clear purpose was to invoke fear in jurors in a way the name "Cartel del Noreste" could not. Texas's multiple invocations of Mr. Acosta's nationality, however subtle, were unconstitutional. *See Buck*, 580 U.S. at 122 (noting that "[s]ome toxins can be deadly in small doses"); *see also id.* at 121 (noting that testimony is particularly harmful when it "appeal[s] to a powerful racial stereotype," such as that men from a particular racial group are "'violence prone'") (quoting *Turner*, 476 U.S. at 35 (plurality op.)).

Finally, Texas seeks to justify Grantham's testimony about the dangers of "Mexico" and "Mexican" drug cartels by stating on numerous occasions that Mr. Acosta is a "self-proclaimed" member of gangs and cartels, most relevant here the Cartel del Noreste. Br. in Opp'n at 24. While Mr. Acosta did claim to officers that he was a cartel member, 32 RR 73, he also told law enforcement that he had been a victim of cartel violence, State's Ex. 3 at 67–68. And there is good reason to believe his claims of cartel membership were untrue. *See* Pet. at 4 n.3 (noting that Mr. Acosta moved to the United States in 2010, but the Cartel del Noreste, which was the focus of Grantham's testimony, was not formed until 2015). Regardless, even *if* Mr. Acosta's claims were true, that would not give Texas carte blanche to invoke stereotypes about Mr. Acosta's nationality in connection with the cartel.

Texas was constitutionally permitted to prove that Mr. Acosta would be a future danger to society due to the violent activities of a particular drug cartel of

which he was a member, but this is not what the State did. Instead, the State chose to seek a death sentence by making, and eliciting, vague references to "Mexican" cartels and references to "Mexico" unrelated to cartels at all because it knew references to Mr. Acosta's nationality could play on stereotypes of violence that his frankly minimal—and arguably mitigating—ties to actual drug cartels could not. Texas's use of Mr. Acosta's nationality to obtain a death sentence violated his rights to equal protection and due process under the Fourteenth Amendment.

B. When the Court Displaces State Procedural Bars to Review Claims of Discrimination It Does So Based Not on How Direct the Invocation of the Defendant's Race or Nationality Was at Trial but on the Impact of the Improper Comments.

Texas argues that this Court should not review the merits of Mr. Acosta's claims concerning the improper invocation of his nationality at sentencing because the state's application of its contemporaneous objection rule in this instance is an adequate procedural bar to federal review. Br. in Opp'n at 13–22. Texas acknowledges, as it must, that in exceptional cases, even well-established state procedural bars are inadequate to preclude review of a federal claim. *See id.* at 17. However, Texas attempts to distinguish the issue presented for review by Mr. Acosta from the principles espoused by this Court in prior cases concerning the adequacy of procedural bars. Its efforts fail for two reasons.

First, Texas acknowledges that this Court has indeed reviewed claims concerning racial bias notwithstanding procedural or evidentiary bars to that review—most recently in *Buck* and *Peña-Rodriguez*—but argues that those cases could be differentiated in large part because the link between race and the verdict

was more "direct." *Id.* at 19; *see also id.* at 20, 28. Texas does not define or explain its new direct-indirect test; while the State's experts did not explicitly link Mr. Acosta's nationality to the future dangerousness special issue in the Texas capital sentencing scheme,[7] the link between his nationality and dangerousness more broadly was quite direct. But this test focused on how directly a comment links race or nationality and future dangerousness has no grounding in this Court's case law. Rather, this Court has always focused on the impact of race and nationality on a trial, regardless of how directly any comment links race or nationality and the outcome of the trial.

The Court has recognized that a comment need not be direct to be improper, because even though "today . . . discrimination takes a form more subtle than before," that does not mean it is "less real or pernicious." *Rose v. Mitchell*, 443 U.S. 545, 559 (1979). "More subtle, less consciously held racial attitudes" are particularly likely to 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*, 476 U.S. at 35 (plurality op.). A subtle comment—or similarly, an indirect comment—invoking a defendant's race of nationality still impermissibly taints any criminal sentence it played a role in obtaining. *See Buck*, 580 U.S. at 122 (noting that even small references to the defendant's race or national origin are prohibited because "[s]ome toxins can be deadly in small doses"); *see also*

[7] Jurors are asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071 § 2(b)(1).

id. (stating that testimony that references the defendant's race only twice in a capital sentencing proceeding "cannot be dismissed as '*de minimis*'").

Mr. Acosta's case may not be an exact analog to the facts of *Buck* or *Peña-Rodriguez*, and in some ways the references to his nationality are more subtle than in those cases. However, the direct nature of the offending comments is not the relevant issue. Rather, the question is whether any legitimate state interest is served by applying the contemporaneous objection rule to foreclose review in this context. This requires considering the impact of the testimony at issue—particularly likely to be heightened in capital sentencing. Like in *Buck* and *Peña-Rodriguez*, foreclosing federal review would prevent the Court from "enforc[ing] the Constitution's guarantee against state-sponsored racial discrimination . . . ." *Peña-Rodriguez*, 580 U.S. at 222.

Second, Texas argues that the contemporaneous objection rule serves an important state interest, and that this is not an exceptional case like those this Court has recognized require review notwithstanding certain impediments. *See* Br. in Opp'n at 15–18. As an initial matter, Mr. Acosta recognized in his Petition that, in the vast majority of cases, the contemporaneous objection rule is likely to be applied in an adequate manner. Pet. at 24. It can and usually does serve important interests in the standard case. However, this Court has specifically held that the state's interest in finality of criminal judgments "deserves little weight" once an "infusion of race" into criminal proceedings has been recognized. *Buck*, 580 U.S. at 126; *contra* Br. in Opp'n

at 17 (stating that the contemporaneous objection rule furthers a valid state interest because the rule "contributes to the finality of criminal litigation").

Texas recognizes that in certain cases, this Court has held that the contemporaneous objection rule, or other similar waiver rules, are inadequate to bar federal reviews. *See* Br. in Opp'n at 17 (citing, *inter alia*, *Lee v. Kemna*, 534 U.S. 362 (2002); *Osborne v. Ohio*, 495 U.S. 103 (1990); *Henry v. Mississippi*, 379 U.S. 443 (1965)). The guiding principle of this line of cases is that "exorbitant application of a generally sound rule renders [a] state [procedural bar] inadequate to stop consideration of a federal question." *Lee*, 534 U.S. at 376. This is because "giving effect to the contemporaneous-objection rule for its own sake would be to force resort to an arid ritual of meaningless form." *Henry*, 379 U.S. at 449 (quotations omitted). "Whether 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).

Texas seeks to elide those broad principles—which support a finding that the contemporaneous objection rule should not block review of a claim concerning the injection of race or national origin into a death penalty case—and instead contrast the facts of *Lee* and *Osborne* with the facts of this case. *See* Br. in Opp'n at 17–18 (comparing the "special circumstances" present in *Lee* and *Osborne* to the facts of this case). But this fact-bound comparison is the exact approach the Court condemned in *Lee*. *See Lee*, 534 U.S. at 378–79 (faulting the dissent for "striv[ing] mightily to

distinguish *Osborne*" in "an intricate discussion of *Osborne* longer than the relevant section of *Osborne* itself," and focusing on specific facts of *Osborne* unrelated to the issues in *Lee*). Both *Lee* and *Osborne* recognized that a rule may be "unassailable in most instances, *i.e.,* it ordinarily serves a legitimate governmental interest; in rare circumstances, however, unyielding application of the general rule would disserve any perceivable interest." *Id.* at 379–80. Because Texas has no interest in upholding a death sentence obtained due to the "infusion of race" into the proceedings, the principle espoused in *Lee* and *Osborne* counsels toward the Court reaching the merits of Mr. Acosta's claims despite the existence of the state procedural bar. *See Buck*, 580 U.S. at 126.

C. David Grantham's Imprecise Testimony Creates an Inference That Discrimination Rather than Expertise Lay at the Heart of His Testimony.

One would expect that a putative expert on drug cartels would provide accurate and detailed context to the information Mr. Acosta provided in his jail interview and to the evidence the State had collected. One would also expect that expert to provide details about the activities of that cartel that were relevant to the issues before the jury. Grantham did not, or could not, do this. As noted above, there is good reason to believe Mr. Acosta was not in fact a member of the cartel Grantham claimed he was, as that cartel did not exist while Mr. Acosta lived in Mexico. *See supra* at p.8. Regardless, Grantham seemed to lack expertise about Cartel del Noreste—or at least the State declined to elicit any detailed testimony about the cartel and its activities, despite recognizing that such evidence was necessary for Mr. Acosta's purported

cartel membership to be admissible. Br. in Opp'n at 26. Grantham's only testimony specific to Cartel del Noreste was that it was an offshoot of Los Zetas and that it was still operating. 32 RR 164–66. After eliciting these minimal details, the State then moved on to ask Grantham questions about Mexican cartels and cartel members generally, with no foundation to show that this testimony was applicable to the cartel Mr. Acosta purportedly belonged to. *See id.* at 167.

The State's failure to attempt to prove any dangerous or violent activities by the cartel Mr. Acosta purportedly belonged to demonstrates that its invocation of Mr. Acosta's nationality through Grantham was a feature of his testimony rather than an innocent byproduct of accurate and precise expert testimony. Put simply, Texas could have presented accurate expert testimony about Cartel del Noreste but instead relied on a quasi-expert who used his professed expertise to push a subtle but effective narrative that Mr. Acosta would be a danger because of his Mexican nationality. The State's invocation of Mr. Acosta's nationality to demonstrate his alleged dangerousness was unconstitutional regardless of its intent. However, Grantham's imprecise testimony alone is reason to believe Texas was concerned not with finding an expert to testify about the violent activities of a specific drug cartel tied to Mr. Acosta but rather someone with a veneer of expertise who could launder an invocation of Mr. Acosta's nationality into what appeared to be legitimate testimony about Mr. Acosta's capacity for future dangerousness.

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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