

NO.

In the
Supreme Court of the United States

JOSE DE LA CRUZ,

Petitioner,

v.

ALAN KAILER and
HUNTON & WILLIAMS LLP,

Respondents.

*On Petition for Writ of Certiorari
to the Supreme Court of Texas*

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution prohibits the Supreme Court of Texas from disproportionately denying discretionary review to natural persons while granting such review to similarly situated corporate entities without a rational basis for doing so.

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED BELOW

The Supreme Court of Texas's denial of the petition for review in this case was unpublished but is reproduced here at A-1. The Supreme Court of Texas's denial of the motion for rehearing of the petition for review in this case was unpublished but is reproduced here at A-3.

STATEMENT OF JURISDICTION

The Supreme Court of Texas denied review in this matter on December 1, 2017 and then denied rehearing on February 16, 2018. *See* A-1 & A-3, respectively. This Petition for Writ of Certiorari was filed within 90 days from the date the Supreme Court of Texas denied the motion for rehearing of the petition for review. *See* Sup. Ct. R. 13.1, 13.3. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

The Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Under Texas law, "[t]he supreme court has appellate jurisdiction, except in criminal

law matters, of an appealable order or judgment of the trial courts if the court determines that the appeal presents a question of law that is important to the jurisprudence of the state." Tex. Gov't Code Ann. § 22.001(a). "A case over which the court has jurisdiction under Subsection (a) may be carried to the supreme court by petition for review." *Id.* § 22.001(b). "The supreme court may act on petitions for review when the court deems it expedient." *Id.* § 22.007(a).

STATEMENT OF THE FACTS AND PROCEEDINGS BELOW

As is relevant to this Petition, the facts of the case are quite simple and straightforward.

The Petitioner, a natural person, brought a civil suit against the Respondents in a Texas state trial court. The trial court ultimately granted summary judgment in favor of the Respondents. The Petitioner timely appealed to the Texas Court of Appeals, which affirmed the decision below. The Petitioner then timely filed a petition for review in the Supreme Court of Texas, which was summarily denied without explanation. *See* A-1. The Petitioner then timely filed a motion for rehearing of the petition. *See* A-5.

As part of the Petitioner's motion for rehearing before the Supreme Court of Texas, the Petitioner asserted that the denial of the petition for review would violate the Equal

Protection Clause. *See* A-15 to A-16. In short, the Petitioner argued that the Supreme Court of Texas's recent history of disproportionately denying petitions for review filed by natural persons when compared to petitions for review filed by corporate persons, coupled with the court's unfettered and wholly subjective discretion in deciding which cases to accept for review, violates equal protection. *See id.*; *see also* A-22 to A-64 (providing detailed statistics and expert testimony to support the factual aspect of the claim).

The Supreme Court of Texas summarily denied the Petitioner's motion for rehearing without explanation. *See* A-3. Thereafter, the Petitioner timely filed the instant Petition for Writ of Certiorari. *See supra* Statement of Jurisdiction.

REASONS FOR GRANTING THE WRIT

Under Texas law, an appeal to the Supreme Court of Texas in a civil matter is discretionary, but there are no applicable statutes or rules to provide any parameters for exercising such discretion. An examination of numerous recently submitted petitions for review evidences an extreme disparity between the court's grant of petitions filed by natural persons and petitions filed by corporate entities. This extreme disparity, coupled with a complete absence of explanation or criteria, leads to the inescapable conclusion that the

court's decisions arbitrarily favor corporate persons over natural persons.

If this pattern and practice is permitted to continue, it will have widespread and detrimental effects on the ability of all natural persons to have a full and fair final result in civil litigation within the Texas state judiciary. Accordingly, this case presents a recurring question of exceptional importance, potentially affecting all natural persons who are or may become subject to the jurisdiction of the Texas judiciary in a noncriminal matter.

**I. EQUAL PROTECTION
MANDATES THAT SIMILARLY
SITUATED PERSONS, WHETHER
NATURAL OR CORPORATE
PERSONS, BE TREATED ALIKE
BY STATE ACTORS, INCLUDING
THE COURTS**

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). "[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper

execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)).

As is applicable here:

A class-of-one equal-protection claim lies "where the plaintiff alleges that [it] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000). "Typically, a class of one involves a discrete group of people, who do not themselves qualify as a suspect class, alleging the government has singled them out for differential treatment absent a rational basis." *Wood v. Collier*, No. 16-20556, 836 F.3d 534, 541, 2016 WL 4750879, at *4, 2016 U.S. App. LEXIS 16693 at *12 (5th Cir. Sept. 12, 2016). Such a theory of recovery includes "forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Id.* (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S.

591, 603, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008)).

Integrity Collision Ctr. v. City of Fulshear, 837 F.3d 581, 586 (5th Cir. 2016).

In the instant case, the Petitioner contends that he, as a natural person, was denied equal protection of the right of review in the Supreme Court of Texas when said Court denied his petition but much more frequently grants such petitions from similarly situated corporate entities. *See* A-15 to A-16.

A. The Mandate Of Equal Protection Applies To Judicial Action

"It is beyond doubt that the constitutional mandate of equal protection extends to discriminatory executive or administrative conduct as well as to discriminatory legislation." *Jackson v. Marine Exploration Co.*, 583 F.2d 1336, 1347 (5th Cir. 1978) (citing, inter alia, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886)).

Furthermore, the mandate of equal protection also applies to judicial action. *See, e.g., Bush v. Gore*, 531 U.S. 98, 105-10 (2000) (holding that manual recounts ordered by the Florida Supreme Court, without specific standards to implement its order to discern the "intent of the voter," did not satisfy the minimum requirement for nonarbitrary

treatment of voters necessary under Equal Protection Clause to secure the right to vote).

Accordingly, the Supreme Court of Texas's decision on whether to grant discretionary review is subject to attack on equal protection grounds.

B. The Mandate Of Equal Protection Applies To Corporate Entities

As Chief Justice Marshall observed nearly two centuries ago, "[a] corporation is an artificial being . . . existing only in contemplation of law." *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819); *see also Carden v. Arkoma Assocs.*, 494 U.S. 185, 187-88 (1990) (observing that "[a] corporation is the paradigmatic artificial 'person'").

Moreover, a corporate entity is considered a "person" within the meaning of the Equal Protection Clause. *See* 14 William M. Fletcher, *Fletcher Cyclopedica of the Law of Corporations* § 7.15 (Westlaw database updated Sept. 2017) ("A corporation is a 'person' within the meaning of the last clause of section 1 of the Fourteenth Amendment of the federal Constitution, and it follows that it . . . is entitled to the equal protection of the law in the same manner as other persons in the same situation."); *Frost v. Corp. Comm'n of Okla.*, 278 U.S. 515, 522 (1929) ("[A] corporation is as much entitled to

the equal protection of the laws as an individual.").

And as is particularly relevant here:

The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415 [(1920).]

Frost, 278 U.S. at 522.

Accordingly, the Petitioner's claim that the Supreme Court of Texas favors corporate persons over natural persons is subject to attack on equal protection grounds.

C. The Two Classes At Issue Here Are Similarly Situated

The phrase "similarly situated" is a term of art in equal protection jurisprudence, which means that the litigant and the comparator(s)

are "similar in all relevant respects." *Paterek v. Village of Armada*, 801 F.3d 630, 650 (6th Cir. 2015). "The test is whether a prudent person, looking objectively at the [two classes of persons], would think them roughly equivalent"; "[e]xact correlation" is not required. *Tapalian v. Tusino*, 377 F.3d 1, 6 (1st Cir. 2004) (internal quotation marks omitted).

Here, the two classes at issue are (1) natural persons seeking discretionary review of a civil case in the Supreme Court of Texas, and (2) corporate persons seeking discretionary review of a civil case in the Supreme Court of Texas. *See* A-15 to A-16. For purposes of the instant case, the mere fact that the subject matter in each case presented for discretionary review may differ is not relevant to the analysis of similarly situated persons. *See Paterek*, 801 F.3d at 650 (requiring "similar[ity] in all *relevant* respects" (emphasis added)). Rather, the only two relevant criteria for comparison are whether the case is civil, thus implicating the discretionary review process, and whether the petitioner is a corporate or natural person.

Accordingly, the Petitioner's claim that the Supreme Court of Texas disproportionately grants discretionary review to corporate persons when compared to natural persons is subject to attack on equal protection grounds.

II. THE SUPREME COURT OF TEXAS FREQUENTLY GRANTS DISCRETIONARY REVIEW TO CORPORATE PERSONS BUT FAR LESS FREQUENTLY GRANTS DISCRETIONARY REVIEW TO SIMILARLY SITUATED NATURAL PERSONS

A. The Supreme Court Of Texas Has Virtually Unfettered Discretion In Deciding Whether To Grant Or Deny A Petition For Review In A Civil Case

The Supreme Court of Texas has discretionary appellate jurisdiction in civil matters. *See* Tex. Gov't Code Ann. § 22.001(a) ("if the court determines that the appeal presents a question of law that is important to the jurisprudence of the state" (emphasis added)); *id.* § 22.007(a) ("The supreme court *may* act on petitions for review when the court deems it expedient." (emphasis added)); *Pederal Energy, LLC v. Bruington Eng'g, Ltd.*, 536 S.W.3d 487, 492 (Tex. 2017) ("May," when used in a statute, indicates that the provision is discretionary."); *If*, *Random House Dictionary*, www.dictionary.com ("in case that" and "on condition that").

The only parameters for the court's exercise of discretion is whether the supreme court deems the question presented

"important," Tex. Gov't Code Ann. § 22.001(a), and "expedient," *id.* § 22.007(a). Yet these words are in and of themselves quite broadly defined so as to provide no guidance whatsoever. *See Important, Random House Dictionary* ("of much or great significance or consequence"; "mattering much"); *Expedient, Random House Dictionary* ("tending to promote some proposed or desired object; fit or suitable for the purpose; proper under the circumstances").

Even so, however, the Supreme Court of Texas is not permitted to exercise such broad discretion arbitrarily or unreasonably. *See Pedernal Energy*, 536 S.W.3d at 492 ("But the use of 'may' does not permit trial courts complete discretionary authority: trial courts do not have discretion to make decisions in an arbitrary or unreasonable manner, without reference to guiding rules or principles."); *e.g., In re Pirelli Tire, LLC*, 247 S.W.3d 670 (Tex. 2007) (a statute providing that trial courts may decline to exercise jurisdiction under the doctrine of forum non conveniens gave trial courts "broad discretion," *id.* at 676, but concluding that the trial court in that case abused its discretion because the decision was "arbitrary, unreasonable, [and] contrary to guiding rules and principles," *id.* at 679).

Given the absence of any substantive limitations imposed upon the Supreme Court of Texas regarding petitions for review in civil cases, the Supreme Court of Texas's decisions

on such petitions necessarily involve a vast array of unidentified assessments, which easily lend themselves to discriminatory results. *See infra* Part II.

B. There Is An Extreme Disparity In The Success Rate Of Obtaining Discretionary Review Before The Supreme Court Of Texas Depending On Whether The Petitioner Is A Corporation Or A Natural Person

Examining the history of cases filed in the Texas Supreme Court in 2012, there were a total of 363 petitions for review filed solely by natural persons and 184 petitions for review filed solely by corporate persons. *See* A-55, A-60. Of those petitions for review, only 22 of the petitions filed by natural persons were granted, while 40 of the petitions filed by corporate persons were granted. *See* A-55.

In other words, only 5.71% of the petitions for review filed by natural persons was granted, whereas 17.86% of the petitions for review filed by corporate persons was granted. *See* A-55 to A-56, A-60. Accordingly, corporate persons are three times more likely to be granted review by the Supreme Court of Texas than natural persons. *See id.* Based on a chi-square test, the disparity cannot be attributed solely to random variation. *See* A-56.

Moreover, and even more striking, is that the raw number of successful petitions for corporate persons (40) is almost twice that for natural persons (22), notwithstanding the fact that natural persons filed almost twice as many petitions for review as did corporate persons (363 versus 184). *See* A-55 to A-56, A-60.

Undeniably, then, it is clear that there is an extreme disparity in granting discretionary review between corporate and natural petitioners in the Supreme Court of Texas, which disparity greatly favors corporate persons over natural persons.

**C. There Is No Rational Basis
For The Disparate Treatment
Of Petitioners For Review**

Admittedly, there is no suspect or quasi-suspect class at issue here, and, thus, the Supreme Court of Texas's decisions will pass constitutional muster "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). As such, the Petitioner bears the burden to negate any reasonably conceivable rational basis for the decisions of the Supreme Court of Texas. *See Univ. of Ala. Bd. of Trs. v. Garrett*, 531 U.S. 356, 367 (2001).

Nevertheless, equal protection violations involving natural and corporate persons have been found in a variety of contexts. *See, e.g.,*

Frost, 278 U.S. at 523-25, 528 (a state statute permitting an individual to engage in certain business only upon first showing a public necessity therefor, but exempting a corporation from such showing, held to violate equal protection); *Prudential Health Care Plan, Inc. v. Comm'r of Ins.*, 626 S.W.2d 822, 830-31 (Tex. Civ. App. 1981) (statute that distinguished between corporate HMOs and other HMOs by imposing entire cost of regulation of HMOs on the corporate HMOs denied equal protection); *Ex parte Case*, 20 Idaho 128, 116 P. 1037, 1038 (1911) (a statute prohibiting the employment of aliens by corporations but made no such prohibition as to individuals was held to violate equal protection).

"No doubt there are subjects as to which corporations . . . may be classified separately from individuals and accorded different treatment[.]" *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 493 (1927). However, in those cases where the courts have upheld actions whereby corporate persons were treated differently from natural persons, the various rationales therefor are wholly inapplicable to the instant scenario (discretionary denial of petition for judicial review).

The instant case does not implicate "drawing economic-regulation lines between individuals and corporations." *In re Spookyworld, Inc.*, 346 F.3d 1, 8 (1st Cir. 2003) (denying equal protection challenge on this basis). Nor does this case implicate "social or

economic legislation [for which] the Equal Protection Clause allows the States wide latitude," *Cleburne Living Ctr.*, 473 U.S. at 440, or a classification for tax purposes, *see Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364-65 (1973) (denying equal protection challenge on this basis); *Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 215-16 (1936) (same).

Nor does the instant case implicate a nonsubstantive aspect of a lawsuit, such as venue, *see Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) (holding that venue statute providing different treatment for natural persons and corporations did not violate equal protection, reasoning that "if the protection of fundamental rights by equal laws equally administered is enjoyed, the Constitution does not forbid allowing one person to seek a forum from which another in the same class is excluded"), or the right of self-representation, *see Union Sav. Ass'n v. Home Owners Aid, Inc.*, 23 Ohio St. 2d 60, 62, 262 N.E.2d 558, 560 (1970) (allegedly indigent corporation was not entitled to appear in court in civil proceeding in propria persona through agent who was not attorney at law, notwithstanding that an indigent natural person was entitled to represent him or herself, and such was not a violation of equal protection).¹

¹See also *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194 (1993) (despite text of 28 U.S.C. § 1915, allowing certain "persons" to proceed

Rather, at issue here is a litigant's substantive right to judicial review in the state's court of last resort. *See '21' Int'l Holdings v. Westinghouse Elec. Corp.*, 856 S.W.2d 479, 483 (Tex. Civ. App. 1993) ("[A] decision . . . in which the Supreme Court refuses a writ of error is as binding as a decision of the Supreme Court itself." (citing *Ohler v. Trinity Portland Cement Co.*, 181 S.W.2d 120, 123 (Tex. Civ. App. 1944))).

The right to appellate review has been deemed a valuable, indeed sacred, right in American society. *See Bay v. Mecom*, 393 S.W.2d 819, 820 (Tex. 1965) ("Appellate review of trial court judgments disposing of the substantive rights of litigants is a valuable right and should not be denied[.]"); *Masterson v. Hogue*, 842 S.W.2d 696, 698 (Tex. Civ. App. 1992) ("A party's right to an appeal is a sacred and valuable right."); *see also* 4 C.J.S. *Appeal and Error* § 1 (Westlaw database updated Mar. 2018) ("As a general rule, the law looks with favor on the right of litigants to have their cases reviewed, and it is usually considered an essential right of a party to have his or her rights examined in tribunals superior to those in which he or she considers himself or herself aggrieved.").

in forma pauperis, which term generally includes corporate persons, only natural persons could proceed in forma pauperis under the statute).

In light of the strong right of appeal, it is highly suspect that a disproportionate number of corporate petitioners have been granted discretionary review by the Supreme Court of Texas when compared to petitions filed by natural persons. *See supra* Parts II.A & B. And, as noted above, the several rationales that have justified differential treatment of corporate persons in other contexts simply do not apply here. Thus, one is compelled to conclude that the disparate treatment stems from an arbitrary or irrational preference for corporate petitioners over natural petitioners.

CONCLUSION

In light of the foregoing arguments and authorities cited, Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Texas on the question presented herein.

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