No. _____

In the
Supreme Court of the United States

_____

Luis Alfredo Aparicio,
Petitioner,

v.

State of Texas,
Respondent.

_____

On Petition for a Writ of Certiorari to the
Court of Criminal Appeals of Texas

_____

Petition for Writ of Certiorari

_____

Doug Keller
Lone Star Defenders Office
PO Box 64836
Lubbock, Texas 79464
806.642.0828
dkeller@lsdefense.org

Counsel for Petitioner

QUESTIONS PRESENTED

Three years ago, Texas launched "Operation Lone Star," a multi-billion-dollar initiative to regulate immigration at the state level. As part of the operation, the state charges noncitizens found near the border with criminal trespass. The state chose to use special detention facilities dedicated to the operation, and it decided to use facilities that could house men but not women. Because of its choice of detention space, the state prosecuted only men for trespassing.

One of the thousands of men found trespassing was Petitioner. He was found with a mixed-sex group. Petitioner and the other men found were arrested and prosecuted. But the women were not. Petitioner raised a selective-prosecution claim under the Fourteenth Amendment's equal-protection clause.

The Texas Court of Criminal Appeals rejected Petitioner's claim. The majority held that scrutiny under the equal-protection clause was triggered only when the state distinguished between the sexes "based on a prejudiced viewpoint." (Pet. App. 6a–7a). And the state, the majority reasoned, hadn't refused to prosecute women based on prejudice but based on its choice of detention space. In dissent, Judge Keel contended that the equal-protection clause required scrutiny whenever the state treated the sexes differently, even if those differences didn't stem from a "prejudiced viewpoint." (Pet. App. 12a).

The two questions presented are:

1. Whether the Fourteenth Amendment's equal-protection clause requires scrutiny when the state treats men and women differently for purportedly non-prejudiced reasons.
2. Whether this Court should hold this case pending resolution of *United States v. Skrmetti* (No. 23-477).

STATEMENT OF RELATED PROCEEDINGS

- *Aparicio v. State*, Maverick County Court, Cause No. 3976. Judgment entered on August 8, 2022.
- *Ex parte Aparicio*, Court of Appeals of Texas, San Antonio, Cause No. 04-22-00623-CR. Judgment entered on June 21, 2023.
- *Ex parte Aparicio*, Court of Criminal Appeals of Texas, Cause No. PD-0461-23. Judgment entered on October 9, 2024.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The Fourteenth Amendment's promise of equal treatment embodies a "foundational principle" of our legal system. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 201 (2023) (internal brackets and internal quotation marks removed). Honoring the equal-protection clause's promise is especially crucial in the criminal justice system. Whether someone loses their liberty shouldn't depend on their skin color or their sex.

The State of Texas, however, has disregarded this principle. As part of Operation Lone Star—a state initiative aimed at regulating immigration—the state didn't treat men and women equally. The state prosecuted men but not women when law enforcement found them trespassing near the border. The state did so because it chose to setup facilities for the operation that could house men but not women.

Below, the Texas Court of Criminal Appeals held that the state's decision to prosecute men but not women didn't qualify as "discriminatory" within the meaning of the equal-protection clause. (Pet. App. 8a). According to the court, that clause protects against discrimination only when "based on a prejudiced viewpoint"—that is, "invidious" discrimination. (Pet. App. 6a). And because the state chose to discriminate because of its choice of detention facilities rather than bigotry, the court concluded that the state hadn't discriminated at all. As a result, the state's decision to prosecute men but not women didn't even trigger constitutional scrutiny.

This Court should grant review—or summarily reverse. The lower court's decision conflicts with this Court's cases. This Court has continuously affirmed that state decisions that differentiate between individuals based on protected characteristics *always* trigger heightened scrutiny, even when the state bases the distinctions on purportedly benign considerations. Both "'invidious' and 'benign' discrimination" receive the same treatment under the equal-protection clause, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995), and thus "all gender-

based classifications" receive "heightened scrutiny," *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994).

The lower court's decision also raises an important federal question that will have a significant effect in Texas. The case immediately affects the nearly 4,000 cases in which the state chose to prosecute men but not women as part of Operation Lone Star. Outside the context of the operation, the decision will profoundly distort any race- or sex-based claim raised in a criminal case, including in the *Batson* context.

This petition is also an ideal vehicle to resolve the question presented. This petition squarely raises the question presented. Resolving the question will also likely be outcome determinative to Petitioner's case as well as hundreds if not thousands of other cases.

Alternatively, this Court should hold this petition until it resolves *United States v. Skrmetti* (No. 23-477). That case involves a Sixth Circuit opinion that also limited the equal-protection clause's reach, and this Court's decision in that case will likely reflect principles that conflict with the decision from the court below.

OPINIONS BELOW

The published opinion of the Texas Court of Criminal Appeals (Pet. App. 1a–22a) is not yet available in the South Western Reporter but is available at 2024 WL 4446878. The published opinion of the intermediate court of appeals (Pet. App. 23a–34a) is reported at *Ex parte Aparicio*, 672 S.W.3d 696 (Tex. App.—San Antonio 2023) (en banc). The trial court's oral decision (Pet. App. 57a–60a) is not published.

JURISDICTION

Below, the Texas Court of Criminal Appeals—Texas's "highest court for criminal appeals," *Gonzales v. Thaler*, 565 U.S. 134, 138 (2012)—denied Petitioner's pretrial habeas petition raising a Fourteenth Amendment claim on October 9, 2024. (Pet. App. 1a, 6a–8a). This was a final judgment. Under Texas law, a pretrial habeas

petition is a "separate" action from the "underlying criminal prosecution" that allows defendants to raise constitutional challenges to their criminal case before trial. *Greenwell v. Court of Appeals for Thirteenth Jud. Dist.*, 159 S.W.3d 645, 650 (Tex. Crim. App. 2005). Because a habeas petition creates a separate action, "[a]n order denying relief on the merits" of a habeas petition "is a final judgment *in the habeas corpus proceeding*." *Id.* (quoting Dix & Dawson, Texas Practice: Criminal Practice & Procedure, 2nd ed., Vol. 43B, § 47.51, 219–220 (2001); emphasis in original).

Based on this, this Court has jurisdiction because the petition raises a federal constitutional claim resolved in a "[f]inal judgment[] . . . rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). This petition was also filed within "90 days" after the court below "entered judgment." Sup. Ct. R. 13.1.

RELEVANT CONSTITUTIONAL PROVISION

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Texas officials prosecuted men but not women for trespassing under Operation Lone Star.

In March 2021, the Texas Governor "directed" the Texas Department of Public Safety ("DPS") to "initiate Operation Lone Star" (Pet. App. 1a), "multi-*billion*-dollar operation" to deter illegal border crossings from Mexico, *Ex parte Vazquez-Bautista*, 683 S.W.3d 504, 512 (Tex. App.—San Antonio 2023) (en banc) (emphasis added).

To support the operation, the Governor declared a "disaster" in many Texas counties. (Pet. App. 2a); *see also* Tex. Gov't Code § 418.014(a) (creating governor's

powers to declare disaster). By declaring a disaster, the Governor unlocked emergency powers that allowed him to treat unlawful migration like a natural disaster. *See*, *e.g.*, Tex. Gov't Code §§ 418.015, .016, .017, .018. Among the counties declared a disaster is Maverick County, a county at the Texas-Mexico border where this case arose. (Pet. App. 25a).

The state has used its multi-billion-dollar budget for Operation Lone Star to send a sizable number of state law enforcement officials to border communities, including in Maverick County. (Pet. App. 23a–24a). The disaster proclamation has empowered those officials "to use available resources" to enforce "applicable federal and state laws," including the state prohibition on "criminal trespass" (a misdemeanor under Texas Penal Code § 30.05) and "smuggling" (a felony under Texas Penal Code § 20.05). (Pet. App. 23a–24a). As a result, law enforcement has focused on charging noncitizens found near the border with criminal trespass and those transporting noncitizens near the border with smuggling. (*See* Pet. App. 37a).

The lead agency implementing Operation Lone Star is DPS. (Pet. App. 25a). And a key player at DPS is Captain Joel Betancourt, who has been with the program from its "inception." (Pet. App. 39a). He has collaborated with local stakeholders to implement the operation in various counties. (Pet. App. 39a–40a). In Maverick County, for example, he met with the local judge, sheriff, and prosecutors before the county joined the program. (Pet. App. 40a).

Soon after Operation Lone Star began, Captain Betancourt emailed his "subordinates" about whom to arrest for criminal trespass. (Pet. App. 41a–46a). According to the instructions, law enforcement should arrest (with emphasis in original) a "majority of the ***single adult males***" found trespassing. (Pet. App. 25a). On the other hand, law enforcement should not arrest women. (Pet. App. 43a, 45a–46a, 49a). Instead, law enforcement should "call border patrol" when they come across

women. (Pet. App. 49a). Thus, while men found trespassing were subject to pretrial detention and faced up to one year in jail, women found trespassing were not.

Captain Betancourt's directions were then generally filtered down to DPS troopers in the field and communicated to counties once they joined Operation Lone Star. (*See*, *e.g.*, Pet. App. 26a–27a). And while Captain Betancourt sent his email with arrest instructions before Maverick County joined the operation, the liaison between the Maverick County Attorney's Office and DPS ensured that law enforcement in the county followed the guidance as well. (Pet. App. 26a). According to the liaison, this "directive" was the "last" one that they had received. (Pet. App. 26a).

Data confirmed that troopers followed Captain Betancourt's directions. Every one of the nearly 500 individuals charged in Maverick County with criminal trespass as part of Operation Lone Star are men. (Pet. App. 24a). None are women. (Pet. App. 24a). More broadly, each of the over 4,000 people charged with criminal trespass in counties near the border most heavily involved in the operation—the counties of Webb, Jim Hogg, Maverick, Kinney, and Val Verde—has been a man, though the state has found women trespassing in those counties too. (Pet. App. 24a).

Captain Betancourt tied the decision to arrest men but not women for trespass to the state's choice of detention facilities. Normally, the state detains individuals charged with crimes in Texas in local county facilities. Those facilities can hold both men and women. (Pet. App. 55a). But with Operation Lone Star, the state created operation-specific facilities to detain individuals charged with criminal trespassing. In particular, the state created two processing centers for the operation where arrestees go through the booking process. These "temporary facilit[ies]" are "large tent[s] with cells inside." (Pet. App. 50a). After the state detains and books individuals there, it sends them to a prison facility modified with operation-specific funds to hold Operation Lone Star defendants before trial. (Pet. App. 55a–56a). These facilities were "set up to meet the guidelines for . . . males" only. (Pet. App. 50a, 52a).

The state therefore did not arrest and prosecute women for trespass because the detention centers it chose to use for Operation Lone Star could process men only.

As part of Operation Lone Star, the state also always arrested and prosecuted both sexes for human smuggling. (Pet. App. 46a–47a). The state could do so by not using the operation-specific detention facilities for smuggling cases. When law enforcement arrested women for smuggling, they called the local county jail to see if the facility had space. (*See, e.g.*, Pet. App. 27a). Detention facilities exist "all along the border . . . that allow for the detention of women that commit crimes" (Pet. App. 55a), including in Maverick County (Pet. App. 26a). When law enforcement detained a woman for trespassing, however, law enforcement didn't call the local jail to see if it had capacity. (*See, e.g.*, Pet. App. 26a).

II. Texas chose to prosecute Petitioner for trespassing as part of Operation Lone Star, though not the women found with him.

In May 2022, a DPS trooper found a group of six individuals allegedly committing criminal trespass in Maverick County. (Pet. App. 24a). The group consisted of three men, two women, and a 17-year-old minor (unrelated to anyone in the group). (Pet. App. 24a). One of the men was Petitioner. (Pet. App. 24a).

The trooper arrested the three men, including Petitioner. (Pet. App. 24a). Though the trooper believed that everyone in the group had committed criminal trespass, he did not arrest the women. (Pet. App. 27a). The trooper testified that he did not arrest them because the "jail"—the processing center in the tent—did not "accept females." (Pet. App. 27a). The trooper, however, did not call the local county jail to see if it could accept the women. (Pet. App. 27a).

The state then charged Petitioner with criminal trespass.

Later, Petitioner posted bond, and the state sent him to federal authorities for immigration processing.

III. After the trial court denied Petitioner's equal-protection claim, the intermediate court of appeals reversed, concluding that he had established discriminatory effect and purpose.

Petitioner filed a habeas petition contending that the state's decision to arrest and prosecute him but not the women found with him violated the equal-protection guarantees in the Texas Constitution and the U.S. Constitution. He asked the court to grant relief by dismissing his case.

The court held an evidentiary hearing on the claim. Eight individuals testified:

- Captain Betancourt testified about Operation Lone Star generally as well as the sex-based protocol he provided his subordinates.

- An employee from the nonprofit that exclusively appoints counsel to Operation Lone Star defendants in Maverick County testified that the state has prosecuted nearly 500 people for criminal trespass in the county as part of the operation, all of which were men. She also explained that her organization had appointed counsel to over 4,000 people charged with trespass under the operation more generally, and all of them were men.

- The DPS trooper who arrested Petitioner testified that he didn't arrest the women in the group because the detention facilities for Operation Lone Star couldn't hold women. And while the Maverick County jail could hold women, the trooper didn't call the jail to see if they had room for the women found with Petitioner.

- Three other DPS troopers testified about incidents in which they arrested men but not women after finding mixed-sex groups trespassing as part of Operation Lone Star.

- The liaison between DPS and the Maverick County Attorney's office testified about ensuring that law enforcement followed Captain Betancourt's arrest guidance in Maverick County.

- Petitioner testified about his arrest.

Ultimately, the court denied relief on the merits by concluding that Petitioner had not established sex discrimination. (Pet. App. 57a–60a).

Petitioner appealed. After the parties filed their briefing, the court of appeals sua sponte granted en banc review and reversed the trial court's judgment in a unanimous opinion.

As an initial matter, the court confirmed that Petitioner had properly raised his claim in pretrial habeas, and thus the trial court's denial of the claim constituted an appealable final judgment. (Pet. App. 29a–32a).

On the merits, the court held that Petitioner needed to "show that 'the prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.'" (Pet. App. 32a (quoting *United States v. Armstrong*, 517 U.S. 456, 465 (1996))). The court held that Petitioner had established both.

To establish discriminatory effect, Petitioner had to "show similarly situated individuals of the opposite sex were not prosecuted for the same conduct." (Pet. App. 32a). He did that because "the undisputed evidence at the habeas hearing showed that [he] was found with a group of men and women and that the women were not charged with criminal trespass while the men were so charged." (Pet. App. 32a). "The evidence was also undisputed that state troopers in Maverick County have been routinely charging men with criminal trespass as part of [the operation] and not charging women in the exact same circumstances." (Pet. App. 32a).

To establish discriminatory purpose, Petitioner "had to show that the State's selection of him for prosecution was based on an impermissible consideration like gender." (Pet. App. 32a (citing *Wayte v. United States*, 470 U.S. 598, 610 (1985))). He thus needed to show that his sex was a "motivating factor" in the decision to arrest and prosecute him. (Pet. App. 32a (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977) (emphasis removed))). Petitioner met that burden because it "was undisputed . . . that the decision to prosecute [him], and not the women found allegedly trespassing with him on private property, was motivated by his sex." (Pet. App. 32a). "The trooper who arrested [Petitioner] testified he did not

arrest the women found with [Petitioner] because the detention facility erected pursuant to [Operation Lone Star] would not hold women." (Pet. App. 32a–33a). If Petitioner had been a woman, then, the state would not have prosecuted him. (Pet. App. 32a–33a).

Because Petitioner established that the state had discriminated against him, the "burden shift[ed] to the State to justify the discriminatory treatment." (Pet. App. 34a). But because the trial court didn't reach this issue, the court of appeals chose to remand the case for the trial court to address it in the first instance. (Pet. App. 34a).

IV. The Texas Court of Criminal Appeals denied Petitioner's equal-protection claim because the state had not acted out of "prejudice" when it prosecuted men only.

The state then petitioned for discretionary review in the Texas Court of Criminal Appeals, and that court granted the petition.

The court first agreed with the court of appeals that Petitioner had properly raised his claim in pretrial habeas, and thus the trial court's denial of his claim had created an appealable final judgment. (Pet. App. 5a–7a).

In addressing whether Petitioner had met his burden to prove sex discrimination, the court "agree[d] that the evidence adduced at trial demonstrated some level of a 'discriminatory effect' in that women were not prosecuted (at least under the State offense of criminal trespass)." (Pet. App. 7a). The court thus "assume[d] for the sake of argument" that Petitioner had established a "'discriminatory effect.'" (Pet. App. 7a–8a).

The court held, however, that Petitioner had failed to prove discriminatory purpose. (Pet. App. 8a). According to the court, Petitioner needed to show not only that the state considered sex, but that the state considered sex based on a "prejudiced viewpoint"—that is, he needed to establish the discrimination was "invidious." (Pet. App. 6a–7a). The court held that the state decided to prosecute only men based on

"jail capacity limitations." (Pet. App. 8a) Thus, the state was "motivated" by using its limited resources to detain men, the largest group of offenders, rather than prejudice or bigotry. (Pet. App. 8a).

Accordingly, the court held that Texas's decision to prosecute men but not women shouldn't receive constitutional scrutiny at all because it didn't qualify as discrimination to begin with. (Pet. App. 8a). The court thus affirmed the trial court's denial of Petitioner's claim. (Pet. App. 8a).

Judge Keel dissented. She disagreed "that the discriminatory-purpose element of a selective-prosecution claim means an 'unfair or unjust' prosecution 'based on a prejudiced viewpoint.'" (Pet. App. 12a). She explained that the prong just required Petitioner to prove that the "decision to prosecute . . . was 'deliberately based upon an unjustified standard such as race, religion, or other arbitrary classification.'" (Pet. App. 12a (quoting *Wayte*, 470 U.S. at 608)). This burden required Petitioner to prove that the state "select[ed] or reaffirm[ed] 'a particular course of action in part *because of*, not merely in spite of, its adverse effects upon an identifiable group.'" (Pet. App. 12a (emphasis in original)). "If the government purposefully punishes class members more harshly than others for the same conduct, then it has acted with a discriminatory purpose." (Pet. App. 12a). The Petitioner did not need to prove that the state "harbored hostility" to men. (Pet. App. 12a).

Judge Keel explained that this analysis "mirrors the treatment of other Equal Protection claims," which "do not depend on hostility[.]" (Pet. App. 12a). She pointed out that this Court just last term "held that an affirmative action policy violated the Equal Protection Clause regardless of its 'well-intentioned' or 'good faith' implementation." (Pet. App. 12a (quoting *Students for Fair Admission v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 213 (2023)). While the state's "[g]ood or bad faith" can have relevance to whether it could justify the decision to discriminate, it had nothing to do with whether the state discriminated. (Pet. App. 12a).

Applying the typical equal-protection standard, Judge Keel held that Petitioner had met his burden to prove that sex discrimination had occurred. (Pet. App. 11a–12a).

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

I. This Court should grant plenary review or summarily reverse.

This Court should grant plenary review to resolve whether the Fourteenth Amendment's equal-protection clause protects against unequal treatment that stems from non-prejudiced discrimination. If this Court does not grant plenary review, it should summarily reverse. The lower court's decision should not stand. It reflects a dramatic departure from otherwise settled principles.

A. The decision below conflicts with relevant decisions of this Court.

The lower court's conclusion that the equal-protection clause only protects against unequal treatment that stems from a "prejudiced viewpoint"—that is, "invidious" discrimination"—conflicts with this Court's precedent. (Pet. App. 6a–7a). This Court should thus grant review to bring the lower court's jurisprudence in line with this Court's decisions.

1. Under settled principles, Petitioner's undisputed evidence established that he met his burden to prove that he was discriminated against based on his sex, just like the intermediate court of appeals unanimously held in its en banc decision. (Pet. App. 32a–33a).

While a state has wide discretion to choose when to enforce its criminal laws, this discretion remains "subject to constitutional constraints." *United States v. Batchelder*, 442 U.S. 114, 124–25 (1979). One limit is found in the Fourteenth Amendment's equal-protection clause, which prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend.

XIV. This guarantee ensures that states don't exercise their discretion "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," *Oyler v. Boles*, 368 U.S. 448, 456 (1962), including sex, *see*, *e.g.*, *Craig v. Boren*, 429 U.S. 190, 457–58 (1976).

Selective-prosecution claims require courts to apply "ordinary equal protection standards." *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)). No special equal-protection principles govern the substance of these claims. To prove a claim, then, a defendant must show that the "prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *Id.* (quoting *Wayte*, 470 U.S. at 608–09).

Petitioner easily satisfied his burden to prove both discriminatory effect and purpose.

To prove "discriminatory effect," a defendant must show that similarly situated individuals of a different [sex] were not prosecuted." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 608). Petitioner met that burden because the women found trespassing with him were *identically* situated to him, and the state did not arrest or prosecute them. (Pet. App. 24a, 27a).

To establish "discriminatory purpose," a defendant must show that the state "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte*, 470 U.S. at 610 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). This standard requires the defendant to prove that "a discriminatory purpose has been a motivating factor in the decision" to prosecute rather than the "sole[]" reason. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). Petitioner met that burden too. If he were a woman, he wouldn't have been prosecuted, just like the women found with him. (Pet. App. 24a, 27a). His sex, then, was "a motivating factor" in the decision to prosecute him. *Arlington Heights*, 429 U.S. at 265–66.

Thus, Petitioner presented a textbook example of sex discrimination. And because he met his burden under the equal-protection clause, the burden shifted to the state to justify its decision to discriminate based on sex under "intermediate scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). This required the state to prove that its decision to prosecute men but not women was "substantially related to the achievement" of "important objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (internal quotation marks omitted).

2. In rejecting Petitioner's claim, the Texas Court of Criminal Appeals didn't subject the state's decision to prosecute men but not women to *any* form of scrutiny at all. Instead, the court held that Petitioner had failed to meet his initial burden to prove sex discrimination. (Pet. App. 8a).

To reach that conclusion, the court explained there were two ways to understand "the word 'discriminatory'" in this Court's equal-protection cases. (Pet. App. 6a). It could be understood as "treating a distinct group or group member in an unfair or unjust way based on a prejudiced viewpoint[.]" (Pet. App. 6a). Or it could be understood as "merely differentiating or discerning between choices as an act of good judgment." (Pet. 6a). The court determined that the equal-protection clause only protected against the former—ugly bigotry—which was fatal to Petitioner's claim. He could not prove that the State prosecuted only men based on "prejudice"; instead, the state prosecuted men because of detention capacity. (Pet. App. 7a–8a). Thus, the court didn't need to apply scrutiny—heightened or otherwise—to the state's decision to discriminate because it hadn't actually discriminated (in the sense protected by the equal-protection clause) at all. (Pet. App. 7a–8a).

In holding that the equal-protection clause protects against unequal treatment that stems from a "prejudiced viewpoint" only (Pet. App. 6a), the lower court heavily relied on *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), this Court's first selective-enforcement case. In that case, a county ordinance made it a crime to operate a

laundromat without the permission of a board of supervisors. *Id.* at 357. The board, however, refused to give permission to anyone from China, including the petitioner. *Id.* at 359. After the petitioner was convicted of violating the ordinance, this Court held that the county had violated the equal-protection clause. This Court described enforcing the clause as preventing the enforcement of the law in an "unequal and oppressive" way. *Id.* at 373. This Court added that the equal-protection clause protected against applying a statute "with an evil eye and an equal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances[.]" *Id.* at 373–74.

The lower court relied on the above language from *Yick Wo* to suggest that Petitioner needed to show prejudice—or bad faith of some sort—to prove an equal-protection violation. (Pet. App. 6a). But *Yick Wo* didn't address—nor did it purport to address—whether the equal-protection clause *only* protected against discrimination based on prejudice. 118 U.S. at 373. The lower court read something into *Yick Wo* that simply isn't there.

In other cases, this Court has *directly* addressed whether the equal-protection clause requires scrutiny of purportedly non-prejudiced discrimination. And in those cases, this Court has repeatedly held that it does, as Judge Keel pointed out in her dissent below (Pet. App. 12a). "'[A]ll gender-based classifications today,'" this Court wrote nearly three decades ago, "warrant 'heightened scrutiny.'" *Virginia*, 518 U.S. at 555 (quoting *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994)).

This Court most squarely rejected the argument that different equal-protections standards apply to "good" and "bad" discrimination in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), a case involving a government program that provided a financial incentive for contractors to consider race in hiring subcontractors, *id.* at 204. The government didn't create the program to be an "engine of oppression." *Id.* at 229 (internal quotation marks omitted). Instead, it was meant

to "foster equality in society," a "benign" reason. *Id.* at 229 (internal quotation marks omitted). This benign purpose led the government to argue that the Court should not evaluate its program under the usual scrutiny—strict—but should apply a lesser form of scrutiny. *Id.* at 212–13.

This Court rejected the government's argument. In responding to the suggestion that the Court should "differentiate between 'invidious' and 'benign' discrimination," *Adarand*, 515 U.S. at 229, the Court explained that "consistency" required applying the same constitutional scrutiny under the Equal Protection Clause "whenever the government treats any person unequally because of his or her race," *id.* at 229–30. This conclusion not only flowed from a "principle of consistency," *id.* at 230, but from the basic idea underlying the equal-protection clause: that governments should generally treat individuals as individuals rather than as members of a particular race or sex, *id.* at 224–27.

This basic idea—that courts should treat benign discrimination differently than prejudiced discrimination—is a distinction that this Court has necessarily rejected in its affirmative-action cases. For example, this Court applied the typical "scrutiny under the Equal Protection Clause" to a university's policy of admitting only women to a nursing school, a form of "educational affirmative action." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723, 727 (1982). And just last term, this Court applied heightened scrutiny to university affirmative-action programs, even though the programs furthered "commendable goals" and were "implemented in good faith." *Students for Fair Admissions*, 600 U.S. at 214. Even though neither program was created based on prejudice, this Court subjected them to equal-protection scrutiny because state actors had treated individuals as members of a particular race or sex rather than as individuals. *See id.*; *Mississippi Univ. for Women*, 458 U.S. at 723, 727.

More generally, many of this Court's sex-discrimination cases have involved discrimination that does not stem from ugly prejudice. And in those cases, this Court has *still* subjected those policies to equal-protection scrutiny. This too highlights that the lower court departed from settled principles by holding that the equal-protection clause is not triggered whenever a state actor distinguishes between men and women.

Take *Craig v. Boren*, 429 U.S. 190 (1976), a case involving an Oklahoma criminal statute that permitted women to drink beer with a low alcohol content at age 18 but made men wait until they were 21. *Id.* at 197. Oklahoma legislatures didn't pass this statute based on bigotry but based on statistics that showed that men aged 18 to 20 were more likely than women to drink and drive. *Id.* at 200. Data from other jurisdictions also supported the conclusion that men in this age range were more likely to drink and drive. *Id.* at 200–01. Still, this Court held that these "classifications" based on sex triggered "scrutiny under the Equal Protection Clause." *Id.* at 197 (internal quotation marks omitted).

A similar analysis can be seen in *Nguyen v. INS*, 533 U.S. 53, 64 (2001), a case involving a statute that took into account "biological difference[s] between" men and women. There, this Court addressed a federal statute with different standards for acquiring citizenship for someone born outside the country to one U.S. citizen parent and one non-U.S. citizen; the standard was harder to meet if the U.S. citizen parent was a man rather than woman. *Id.* at 56–57. The basis for this sex-based distinction didn't follow from prejudice. Instead, it recognized, among other things, that the mother's relationship with the child is "verifiable from the birth itself." *Id.* at 62. By contrast, the father was not, since "he need not be present at the birth[.]" *Id.* Still, this Court subjected the statute to equal-protection scrutiny because it used a "gender-based classification." *Id.* at 60–61.

Accordingly, the lower court's claim that the equal-protection clause only protects against discrimination stemming from a "prejudiced viewpoint" flatly

conflicts decades of this Court's caselaw. (Pet. App. 6a). This Court has repeatedly applied the clause to state actions that draw distinctions between the sexes, even when the choice flows from "biological difference[s]" between the sexes, *Nguyen*, 533 U.S. at 64; statistical differences between the sexes documented by studies, *Craig*, 429 U.S. 200–01; and benign concerns about helping one sex, *Mississippi University for Women*, 458 U.S. at 723. Accordingly, when the state created Operation Lone Star and decided to use its billions to use male-only detention facilities, its subsequent choice to not arrest and prosecute women based on that choice triggered heightened scrutiny. The state chose to treat men and women as members of a group rather than as individuals.

3. Faced with this mountain of authority, the Texas Court of Criminal Appeals has little response. Instead, in a footnote, the court summarily claimed that "selective prosecution and enforcement claims are different from Equal Protection cases involving affirmative action or other official rules/policies that are *on their face* intending to treat different classes differently." Pet. App. 18a (emphasis in original).

The court offered no explanation for this distinction. Nor is one apparent. A facial statutory policy or explicit rule will inevitably make proving discrimination easier. But whether a policy exists in a statute doesn't affect whether discrimination occurred. The guarantee of equal protection doesn't morph in that way. If the statute at issue in *Craig*, for example, had been facially neutral but Oklahoma enforced it selectively against men because they are more likely to drink and drive, it would make little sense to claim that the non-statutory policy now didn't discriminate. *See* 429 U.S. at 197. But that's the result that the lower court's opinion requires.

The court's distinction also makes little sense in the context of this case. While the trespassing statute facially applies to both sexes, the state still used a "facial" policy of not prosecuting women that stemmed from the state's decision to use male-only housing for those (like Petitioner) arrested for criminal trespassing in Maverick

County. The trooper who arrested Petitioner, in fact, testified that he chose to arrest Petitioner but not the women found with him because of the state's use of a male-only detention facility for the operation for trespass defendants. (Pet. 24a, 27a).

In any event, this Court has had little issue holding that distinctions based on protected characteristics trigger heightened scrutiny even when there is no official policy, let alone one memorialized in statute. In *Johnson v. State*, 543 U.S. 499, 502 (2005), for example, this Court addressed "an unwritten policy of racially segregating prisoners[.]" While there was no official policy, "the chances of an inmate being assigned a cellmate of another race [was] pretty much close to zero percent." *Id.* at 502 (cleaned up). Moreover, separating inmates based on race didn't stem from prejudice. Instead, prison officials thought it helped "prevent violence caused by racial gangs." *Id.* Even though this Court normally uses a "deferential standard" to address the actions of prison officials, this Court held that strict scrutiny still applied to the race-based policy. *Id.* at 505–06. "We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications[.]" *Id.* at 505. This Court reasoned that even benign classifications can unwittingly perpetuate stereotypes and that treating people as groups of individuals based on protected characteristics rather than individuals raises equal-protection concerns. *Id.* at 507–08. That said, this Court reiterated that these distinctions didn't necessarily violate the equal-protection clause. The state could still try to justify its actions under strict scrutiny—something it could try to do on remand. *Id.* at 515.

The same conclusion is appropriate in this case. The state's decision to prosecute men but not women is subject to heightened scrutiny, and the state's decision to prosecute Petitioner (but not the women found with him) is constitutional only if the state can sufficiently justify its decision. The lower court failed to follow this Court's precedent when it concluded differently.

4. In limiting the equal-protection clause's reach, the lower court also relied on *Michael M. Superior Court of Sonoma County*, 450 U.S. 464 (1981) and *Parham v. Hughes*, 441 U.S. 347 (1979). The lower court suggested that those cases held that the equal-protection clause only protects against "invidious" discrimination. (*See* Pet. App. 6a–7a, 16a–18a). But the court misunderstood the holdings in those cases—and overstated their precedential effect.

In *Parham*, a four-justice plurality held that a statute that provided for different rules for when a mother or father could sue for a child's wrongful death didn't violate the equal-protection clause. 441 U.S. at 350–58. The plurality pointed out that the statute did not "invidiously discriminate." *Id.* at 357. The plurality, however, did not think that non-invidious discrimination was free of constitutional scrutiny altogether. Instead, it held that rational-basis review applied to that type of discrimination and upheld the statute. *Id.* at 357–58.

Justice Powell concurred in the judgment and provided the necessary fifth vote to affirm. While he agreed that the statute was constitutional, he rejected the plurality's application of rational-basis review to non-invidious discrimination. *Parham*, 441 U.S. at 359. Taking "a route somewhat different from that taken by" the plurality, he applied intermediate scrutiny and determined the statute was substantially related to important government interests. *Id.* at 359–61. Thus, a majority of this Court did not endorse the idea that non-invidious discrimination should receive only rational-basis review, let alone the idea that non-invidious discrimination should receive no scrutiny at all.

In *Michael M.*, another four-justice plurality addressed a statutory-rape law that distinguished between male and female defendants. 450 U.S. at 466. The plurality pointed out that the statutory distinction rested on the biological fact that only females can get pregnant; the distinction did not rest on invidious discrimination. *Id.* at 467–70. But the plurality didn't suggest the non-invidious basis

for the sex-based distinction meant the statute shouldn't receive any constitutional scrutiny. Instead, the plurality—this time joined by Justice Powell—recognized that intermediate scrutiny applied. *Id.* at 468–69. And using that standard, the plurality held that the statute was "sufficiently related to the State's objective to pass constitutional muster." *Id.* at 473; *see also Virginia*, 518 U.S. at 559 (recognizing *Michael M.* as one among many in which this Court has applied intermediate scrutiny to a sex-based distinction).

In citing *Parham* and *Michael M.*, the lower court misses that both were plurality opinions. (*See* Pet. App. 16a–18a). The lower court also misses that neither plurality opinion held that non-invidious discrimination didn't constitute discrimination. Instead, even the plurality opinions recognized that non-invidious discrimination still triggers constitutional scrutiny. For this reason, the lower court's claim that *Parham* and *Michael M.* support its holding that the equal-protection clause only protects against non-invidious (or non-prejudiced) discrimination is misguided.

The lower court's reliance on cases like *Parham* and *Michael M.* also undermines the court's attempt to differentiate discrimination claims involving a facial statutory claim from the claim at issue here. Both *Parham* and *Michael M.* involve facial statutory policies. Thus, if the lower court were right about the meaning of those cases, facial statutory claims that distinguished between the sexes should also receive a free pass from equal-protection scrutiny if the distinction rested on something other than prejudice. This Court's cases, however, are to the contrary, *see*, *e.g.*, *Nguyen*, 533 U.S. 60–61, further confirming that the lower court's opinion departs dramatically from this Court's precedent.

* * *

In sum, this Court should grant review and reaffirm that a state discriminates based on sex under the equal-protection clause when it distinguishes between the

sexes. It doesn't matter whether the distinction flows from prejudice or something else. "[A]ll gender-based classifications" must receive "heightened scrutiny." *J.E.B.*, 511 U.S. at 136. While the basis for the discrimination can have relevance to whether the state action survives heightened scrutiny, it has no relevance to whether the state discriminated in the first place.[1]

B. The question presented raises an important federal issue.

This Court should also grant review because whether the equal-protection clause covers purportedly non-prejudiced discrimination is an important federal issue that deserves immediate resolution by this Court.

1. According to the data presented in the trial court, the state prosecuted over *4,000* men for criminal trespassing without prosecuting women as part of Operation Lone Star. (Pet. App. 24a). As a result, the lower court's decision and its misguided constitutional analysis has immediate relevance to thousands of cases. The court below recognized these stakes. One judge noted that Petitioner's claim

---

[1] The lower court also pointed out that the state also didn't prosecute based on other (non-protected) characteristics such as an individual's age and health. (Pet. App. 8a). The lower court suggested that this might insulate the state's decision to prosecute men only from equal-protection scrutiny. (Pet. App. 8a). But a state actor often isn't "motivated solely by a single concern." *Arlington Heights*, 429 U.S. at 265. Still, "[w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision," even if not the "sole[]" reason, courts subject the decision to constitutional scrutiny. *Id.* at 265–66. It matters not, then, that the state considered several factors when deciding whom to prosecute. That sex was a "motivating factor in the decision" proves a discriminatory purpose. *Id.* at 266. Indeed, this Court just last term held that two university's affirmative-action programs flunked an equal-protection audit even though those programs considered race as one among *many* factors. *See Students for Fair Admissions*, 600 U.S. at 192–97. The lower court's point also defies common sense. Under the lower court's view, a state could prosecute only Asian people or Muslim people for particular crimes as long as the state didn't prosecute all members of those groups. But no sensible view of the equal-protection clause would suggest that the choice to prosecute only healthy Asian people or Muslim adults lacked a discriminatory purpose. As Judge Keel put it in her dissent, "[d]iscrimination is not justified by more discrimination." (Pet. App. 12a).

"could apply to hundreds or thousands of other cases." (Pet. App. 11a). Indeed, there are currently over 200 cases on appeal in the Texas state courts that raise this issue. There are countless more pending in trial courts.

2. The decision below will also resonate beyond the immediate Operation Lone Star context and allow Texas to permit a significant amount of discrimination.

Consider the *Batson* context. Under the decision below, a Texas prosecutor in a case with a black defendant could strike prospective black jurors based on the non-prejudiced rationale that black jurors are more likely to side with the defense in such a case. *See* S. Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017, 1019 (2012) (finding that "the presence of even one or two blacks in the jury pool results in significantly . . . *lower* conviction rates for black defendants" (emphasis in original)). Or a Texas prosecutor could strike all the male jurors in a domestic-violence case with a male defendant based on the non-prejudiced rationale that men are more likely to side with a male defendant in such a case. Under the lower court's view, those sorts of strikes wouldn't even trigger equal-protection scrutiny anymore.

The decision also more generally permits widespread discrimination against men in the criminal justice system in Texas. At bottom, the court's decision takes facts common to the criminal justice system—men commit more crimes than women; men cannot be housed with women; and resources are limited—and blesses a decision to not arrest and prosecute women when those conditions are true. If that's enough to prosecute men not women, any county in Texas could prosecute men only for any crime.

Again, consider the facts from *Craig*. In that case, the state introduced statistics that showed that men were more likely to drink and drive than women. *Craig*, 429 U.S. at 200. Under the court's decision below, a Texas county could lawfully prosecute men but not women for drinking and driving if it wanted to save money on jail costs for women. In fact, the county wouldn't even need to justify its

decision to discriminate because it wouldn't have discriminated at all. That can't be right—and it underscores how radical and wrong the court's decision is.

3. The court's decision will also make it much easier for state actors to discriminate based on prejudice too. The court's decision has provided those actors with a clear path to cover their decision making: a relevant state actor can just assert a non-prejudiced justification for their decision to discriminate, regardless of their actual intention. It will typically be hard, if not impossible, for a defendant to provide countervailing evidence of the state actor's subjective intent.

For these reasons, this Court should grant review. The lower court's decision on an important federal issue should not stand. It significantly undermines the integrity of the criminal justice system in Texas, and it is an affront to fundamental principles of fairness in thousands of cases.

C. This petition presents an ideal vehicle to resolve the question presented.

1. By granting review, this Court will be able to resolve the question presented. This case squarely presents the question presented, and it is properly preserved. The court below rejected Petitioner's claim based on its conclusion that he had failed to prove the state's choice to prosecute men like him but not women was based on prejudice. (Pet. App. 8a). Indeed, Judge Keel in dissent recognized this and focused on that issue. (Pet. App. 12a).

2. Resolving the question presented will also likely be outcome determinative to Petitioner's case as well as hundreds if not thousands of other cases. If prosecuting men but not women qualifies as discriminatory, the only question remaining will be whether the state can satisfy "intermediate scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). When other Texas appellate courts have reached the justification issue, they have had little trouble concluding that the state can't meet its burden. *See*, *e.g.*, *Ex parte Vazquez-Bautista*, 683 S.W.3d 504, 513–14 (Tex. App.—

San Antonio 2023) (en banc) (concluding that state failed to prove its policy of prosecuting men but not women as part of Operation Lone Star satisfied intermediate scrutiny); *Ex parte Marcos-Callejas*, 692 S.W.3d 817, 826–27 (Tex. App.—San Antonio 2024) (same).

At bottom, the state's contention is that it chose to discriminate because it didn't want to use its "multi-billion dollar" budget to allocate detention space for women. *Vazquez-Bautista*, 683 S.W.3d at 512–13 (internal quotation marks omitted). The state has also continually failed to "present any evidence of the feasibility" of bearing "the financial burden of arresting, housing, and prosecuting women, as it did by modifying its existing facilities to house male detainees." *Id.* at 513. Indeed, in Petitioner's case, the State introduced no evidence at all on this issue. The state, then, cannot meet its burden to justify its decision to discriminate. *Id.* at 513–14.

The State also failed to explain why it just couldn't use existing local capacity to detain women. Captain Betancourt affirmatively admitted in the trial court that the state has capacity to detain women all along the border. (Pet. App. 26a). The state, for example, used local facilities to detain women for smuggling cases, and the state presented no evidence why it couldn't do the same for trespass cases. (*See* Pet. App. 27a, 45a–47a).This too means the state failed to meet its burden.

For this reason, if this Court rules for Petitioner on the question presented, the result will almost certainly be that he succeeds on his claim. And, as the court below held, success on this claim would require his case to be dismissed. (Pet. App. 5a–6a).

3. Finally, while this petition does not raise a split of court authority, this issue doesn't need to further percolate. It is impossible to harmonize this Court's caselaw with the claim that non-prejudiced discrimination is entirely exempt from equal-protection scrutiny. No other court, then, will agree with the Texas Court of Criminal Appeals. This Court should thus grant review now to trim this outlier branch.

II. This Court should at least hold this case until resolving *United States v. Skrmetti* (No. 23-477).

At a minimum, this Court should hold this case until it resolves *United States v. Skrmetti* (No. 23-477), a case out of the Sixth Circuit. *See United States v. Skrmetti*, 144 S. Ct. 2679 (2024). This case raises a somewhat similar issue as that case, and it is likely that any decision in *Skrmetti* will have relevance to this one.

In the Sixth Circuit's decision, the court rejected an equal-protection challenge to a Tennessee statute that "limit[s] certain sex-transition treatments for minors experiencing gender dysphoria." *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 466 (6th Cir. 2023). To reach that conclusion, the majority held that the statute's sex-based classification should not receive heightened constitutional scrutiny. According to the Sixth Circuit, while this Court had always applied heightened scrutiny to sex-based classifications in the past, those cases involved classifications that "perpetuate[d] invidious stereotypes or unfairly allocate[d] benefits and burdens." *Id.* at 483–84. The classification in the Tennessee statute, by contrast, stemmed from "'enduring' differences between men and women." *Id.* at 484.

In resolving *Skrmetti*, this Court will likely address principles relevant to the court's decision below. The Sixth Circuit did not go as far as the court below. The Sixth Circuit held that a lesser form of scrutiny applies to some sex-discrimination claims involving "enduring" differences between the sexes, where the court below held that any purportedly non-prejudiced discrimination (whether based on "enduring" differences or not) receive no scrutiny at all. Still, this Court's resolution of *Skrmetti* will likely have relevance to Petitioner's claim and the lower court's reasoning.

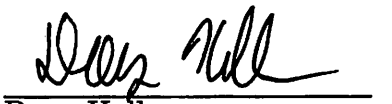
Accordingly, if this Court does not grant plenary review or summarily reverse in this case, it should hold this petition until it resolves *Skrmetti*. Once it issues a decision in *Skrmetti*, it should grant this petition, vacate the decision below, and remand for the lower court to reconsider its decision.

CONCLUSION

This Court should grant plenary review over this petition. Alternatively, this Court should summarily reverse. Otherwise, this Court should hold the petition until resolving *United States v. Skrmetti* (No. 23-477). Once this Court resolves *Skrmetti*, it should grant, vacate, and remand this case for the Texas Court of Criminal Appeals to reconsider its decision.

November 29, 2024

Respectfully submitted,



Doug Keller