Appendix

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Court of Criminal Appeals of Texas.

EX PARTE Luis Alfredo APARICIO, Appellant

NO. PD-0461-23
|
Filed: October 9, 2024

Synopsis

Background: Male noncitizen filed application for pretrial writ of habeas corpus, seeking dismissal of criminal charge of trespassing on private property and alleging that State engaged in selective prosecution of men in violation of federal Equal Protection Clause. The County Court, Maverick County, Mark R. Luitjen, J., denied application. Noncitizen appealed. The San Antonio Court of Appeals, en banc, 672 S.W.3d 696, reversed and remanded, finding noncitizen met his burden to demonstrate prima facie case of selective prosecution based on gender. State filed petition for discretionary review.

Holdings: The Court of Criminal Appeals, Richardson, J., held that:

claim of selective prosecution or enforcement in violation of equal protection was cognizable on pretrial habeas application, but

noncitizen failed to establish policy was motivated by invidious gender discrimination.

Decision of Court of Appeals reversed; denial of writ affirmed.

McClure, J., concurred in the result.

Keller, P.J., filed dissenting opinion in which Keel, J., joined.

Yeary, J., filed dissenting opinion.

Keel, J., filed dissenting opinion.

ON STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS, MAVERICK COUNTY

Attorneys and Law Firms

Kathy Starling, Douglas Keller, Luis Gurrola-Villarreal, Jaime Iracheta, for Appellant.

OPINION

Richardson, J., delivered the opinion of the Court in which Hervey, Newell, Walker, and Slaughter, JJ. joined.

***1** The Texas Department of Public Safety detained and arrested Appellant, Luis Alfredo Aparicio, for criminal trespassing as part of Operation Lone Star in Maverick County. Unlike Appellant, the two women in his group were not arrested but instead transferred to the custody of the U.S. Border Patrol. The question before this Court is whether Appellant's claim of selective arrest and prosecution based on his sex is cognizable under pretrial habeas proceedings. And if so, we must answer whether Appellant met the "demanding" burden in showing a prima facie case of selective enforcement or prosecution. We find that although Appellant's claim is cognizable on pretrial habeas, he failed to meet his burden in showing a prima facie case. For the reasons below, we reverse the court of appeals below and affirm the trial court's denial of relief.

Background

On March 6, 2021, Governor Greg Abbott directed the Texas Department of Public Safety (DPS) in collaboration with the Texas National Guard to initiate Operation Lone Star (OLS) to address the unprecedented influx of illegal border crossings from Mexico to Texas.[1] According to the Governor's office, the purpose of OLS was to "combat the smuggling of people and drugs into Texas."[2] OLS authorized the detention and arrest of individuals crossing the border illegally for state level offenses committed on or near the border. On March 17, 2021, only eleven days into the operation, OLS reported "apprehending" over 35,000 illegal migrants and seizing over

10,000 pounds of drugs crossing the border.[3] By August 30, 2021, OLS expanded to cover 43 counties from the initial 28 counties on or near the border.[4] Disaster declarations for these counties were issued by both the Governor and local county authorities as a means of increasing State resources.[5] By June 24, 2022, Governor Abbott reported that OLS had succeeded thus far in turning back more than 22,000 unauthorized migrants from crossing the border, and made approximately 265,500 "apprehensions," approximately 16,400 criminal arrests, and roughly 13,800 felony charges.[6] Only weeks later, Governor Abbott reported that OLS had "apprehended" 5,000 illegal migrants during the July 4, 2022 weekend alone.

On May 3, 2022, Appellant, Luis Alfredo Aparicio, was "apprehended" in Maverick County by DPS Troopers working as part of OLS.[7] Appellant was spotted by OLS drone operators walking in the dark at 3:18 a.m. in the morning on private land surrounded by a high fence.[8] He was in the company of two other adult males, a juvenile male, and two women.[9] All six were detained but only the three adult males, including Appellant, were arrested for criminal trespass.[10] Because the jails were unable to accept females or juveniles, the juvenile male and two women were transferred to the custody of U.S. Border Patrol.[11]

***2** On July 28, 2022, Appellant filed an application for pretrial writ of habeas corpus with the trial court.[12] Appellant alleged that his arrest (and forthcoming prosecution) for criminal trespass was unconstitutionally selective under both the federal and state constitutions, and sought dismissal. Specifically, Appellant alleged that OLS engaged in prohibited sex discrimination because Appellant, along with the other two adult males in his group, were arrested and charged, while the two women in his group were transferred to the U.S. Border Patrol—who had the authority to refer the matter to the U.S. Attorney's Office for federal prosecution for crossing the border illegally.

On August, 8, 2022, the trial court held a contested pretrial hearing to hear testimony and the arguments of the parties.[13] During the hearing, the court heard testimony from numerous witnesses including a client advocate from the Lubbock Private Defender's Office, Appellant, DPS Captain Betancourt, the prosecutorial liaison for Maverick County, and four DPS Troopers working with OLS in a five-county area of the total 43 counties involved in OLS.[14] Witnesses testified towards the following over the course of the hearing:

- Governor Abbott had declared a state of disaster in the counties of Webb, Jim Hogg, Maverick, Kinney, and Valverde.[15]

- OLS predominantly arrested suspects under two criminal offenses. The primary felony arrest was for "Smuggling of Persons," and the primary misdemeanor arrest was for "Criminal Trespass."[16]

- Suspects arrested in connection with OLS (in the five-county area) were transported to a processing center in Valverde or Jim Hogg county (each servicing their respective areas). The processing centers were essentially a huge air-conditioned tent with holding cells that also housed areas for the booking process, medical process, and mental health screening.[17]

- The Lubbock Private Defender's Office was awarded a grant from the Texas Indigent Defense Commission in order to appoint counsel for any defendant arrested under OLS who was found indigent in the above five counties.[18]

- Anyone arrested under OLS would be prosecuted under the local district attorney. In Maverick County, OLS arrestees would be prosecuted under the local district attorney's office which had not set any prohibitions against arresting or prosecuting females.[19]

- On August 5, 2022, the Lubbock Private Defender's Office ran a report on their case management system in the five-county area. While it found women being arrested for felonies in connection with OLS, it found zero women arrested for criminal trespass out of 4,076 cases.[20]

- The processing centers were not able to house female detainees because they were subject to the policies and procedures required for county jails and could not meet the requirements for housing them. Some of these requirements covered rules regarding the actual structure itself, the security for monitoring prisoners at the cells, monitoring meals, and segregation of the sexes and for juveniles.[21]

- Sometime after processing, detainees would ultimately be moved to two former prisons (Brisco or Segovia units). These former prisons (originally intended to house males only) had undergone various measures of transformation (including the installation of air-conditioning) to convert them into acceptable pretrial detention facilities.[22]

- On August, 12, 2021, DPS Captain Betancourt, emailed members of his team involved in OLS with evolving guidelines based on jail capacities and capabilities. The email was titled "Guidance on arrests for Criminal Trespass." There he directed the following:

  We will continue to arrest those immigrants who are trespassing on ***private*** property (Only in Val Verde and Kinney County) where the landowner has agreed to file a complaint or agreed to have us sign them on their behalf. The criteria has been expanded to include the ***majority*** of ***single adult males***" if they were trespassing on private property. While it would be difficult to cover every single scenario, below are some examples:

  3** Father, Mother, and Child under ***18 – Family Unit. Release to BP [Border Patrol].[23]

  Father, Mother, and Child over 18 ***and*** are trespassing-Male father will be arrested. Mom and adult child will be released to BP.

  Uncle and ***adult*** nephew and are criminal trespassing-Arrest both.

  Uncle and child nephew-Family Unit, refer to BP.

  The basic common denominators are:

  If there is a child who is part of a family. We will refer to BP

  If the family consists of male adults (18 and over) we will arrest, ***if they are trespassing***.[24]

- In another email, Betancourt also explicitly excluded males that were "60-plus or injured."

- Captain Betancourt did not make any note regarding single adult females found trespassing. However, among the examples he provided, anyone excluded was to be referred to border patrol.[25]

- For the felony offense of "human smuggling," both men and women were targeted for arrest.[26]

- Four DPS troopers involved in OLS but operating in different areas of the five-county region testified to various apprehensions of mixed groups (including Appellant's group). While they all testified that the processing center and the jails were not taking females for criminal trespass, some of them called ahead to confirm prior to referring females to border patrol while others did not. Moreover, at least one county in the five-county area did not have a local jail.

- All of the troopers testified that they did not arrest any of the females for criminal trespass because they understood that the jails and processing center would not accept them.[27]

- One DPS trooper testified that the groups illegally crossing the border were predominantly men.[28]

***4** At the conclusion of testimony, the trial court made the following observation regarding Appellant's arguments that women were selectively favored over men:

> The Court: Tell me this, you tried to give [sic] a couple of these young troopers to say something that wasn't true.
>
> When they turn these people over to immigration, they are in custody. They are not free to go. They are then deported or God knows what else they do.
>
> But I mean, face it, you've got, last I heard, over three million people in the last year and half have been coming across our borders illegally and being sent off all over the country.
>
> They think there is about 900,000 that got away that weren't, you know, turning themselves in. And you are concerned about – how many women were not prosecuted?[29]

Following closing arguments, the trial court further observed that while adult women appeared to be benefiting from the OLS arrest guidance by not being formally arrested and charged with trespass, so were certain classes of adult men.[30] Based on this finding, the trial court concluded that there was no sex discrimination and denied both Appellant's pretrial writ and motion to dismiss.[31]

On Appeal at the Intermediate Appellate Court sitting *en banc.*

On appeal, the State first asserted that Appellant's claim of selective enforcement and prosecution was not cognizable on pretrial habeas. Further, the State asserted that even if it were, Appellant failed to meet his burden in showing his arrest (and other arrested adult males) was motivated by impermissible gender discrimination. The State instead argued that "this case is not about gender discrimination, but common sense logistics during a declared emergency."[32]

In response, Appellant maintained that his claim of sex discrimination was cognizable on appeal and that he met his burden in proving a discriminatory intent. In other words, Appellant was targeted and arrested because of, at least in part, his gender while women were not.[33] Accordingly, Appellant argued, that OLS's policy should be subjected to strict scrutiny and Appellant's prosecution should be dismissed.[34]

The Fourth Court of Appeals sitting *en banc* first held that although there was no precedent directly on point, Appellant's claim was cognizable on pretrial habeas writ. According to the court of appeals, the record below was fully developed and that Appellant's right to equal protection would be undermined if not vindicated before trial, and addressing the matter pretrial would further judicial efficiency concerns by eliminating the entry of void judgments.[35]

On the merits of Appellant's claim of selective prosecution,[36] the appellate court found that Appellant had met his burden in demonstrating a *prima facie* case that "his gender was a motivating factor in his arrest."[37] Reversing the trial court's ruling, the Fourth Court then remanded the case to allow the State the opportunity to rebut the presumptive finding of sex discrimination under the strict scrutiny standard required under Texas law.[38]

***5** On discretionary review, the State only challenges the Fourth Court's holding that Appellant's claim is cognizable. Since this ruling, however, numerous cases have been appealed by similarly situated defendants across the border region resulting in a backlog of cases.[39] To enable a complete appellate review and alleviate this backlog, this Court on its own motion granted review on the merits if the Court found the challenge cognizable. After receiving supplemental briefing from the parties, we now review Appellant's case.

The Nature of Appellant's Claim

We note that Appellant is contending that "the State's policy of *arresting and prosecuting* men but not women for trespass" violates Equal Protection principles.[40] Appellant, along with the State, the trial court, the Fourth Court of Appeals, and even this Court in a prior order have repeatedly referred to the claim as a claim of selective prosecution.[41] The dissenting opinions now seek to relabel Appellant's claim as solely one of selective law enforcement with no prosecution component—though no party has made any claim to that effect. Additionally, the dissents seek to distinguish between the selective enforcement and the selective prosecution and treat them differently based on the assertion that enforcement claims do not require dismissal. In support, one of the dissenting opinions selectively quotes from a federal district court case out of the District of Rhode Island.[42] However, the text immediately after that quote contradicts their position and states the following:

> That said, the strong weight of authority suggests that a successful selective enforcement also requires dismissal. *See* [*United States v. Mumphrey*, 193 F. Supp. 3d 1040,] 1055-59 (surveying cases, following the Seventh and Tenth Circuits in holding that a selective enforcement claim requires dismissal); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, [6 S.Ct. 1064, 30 L.Ed. 220] (1886) (requiring discharge of imprisoned petitioners where "public authorities charged with [ordinance] administration," who were not prosecutors, applied the law "with an evil eye and an unequal hand"). In general, this Court agrees that:
>
> > It is difficult to discern why selective prosecution warrants dismissal, but selective enforcement (upon which prosecution is necessarily predicated) would not. Racially selective action by law enforcement inflicts harm whether it is perpetrated by law enforcement in the streets or by a prosecutor in an office—both inflict substantial injury on the victim and society: In addition to violating the victim's rights to equality and liberty, such discriminatory conduct impugns the integrity of the criminal justice system and compromises public confidence therein.[43]

***6** Moreover, relabeling these claims as only "selective enforcement" would be disingenuous to do so given the history of this case. Not only has the claim been referred to as

"selective prosecution" during the entire pendency of the case stretching from the trial court to this Court, the prosecutor has also taken an active role in defending the matter all the way to this Court as well. And because prosecutors also bear discretion in deciding which cases to prosecute, we cannot ignore their knowing adoption of all that happened before for the purposes of this claim.[44] When asked by the trial judge on whether the prosecution would exert any prosecutorial limitations on DPS, the Maverick County Attorney himself responded: "If it comes into my office, I will prosecute them."[45]

Nevertheless, both selective prosecution and selective enforcement claims use the same Equal Protections standards derived from the same line of Supreme Court precedents.[46] Furthermore, both types of claims, often used interchangeably in federal courts, invoke the same analysis since they both impose the same sets of presumptions and burdens on the litigants.[47] And so long as they satisfy the same requirements for cognizability, we risk being legally arbitrary and unjustifiably *selective* ourselves in finding only one cognizable but not the other. Therefore, for the purposes of this opinion, we shall treat both types of claims involving the "collision between equal protection principles and the criminal justice system" as the same.[48] With this in mind, we now turn to the question of whether these claims are cognizable.

Cognizability

***7** "Pretrial habeas, followed by interlocutory appeal, is an 'extraordinary remedy' " available "only in very limited circumstances."[49] In order to prevent unnecessary delay and confusion at the pretrial stage, we have consistently held that pretrial habeas "should be reserved for situations in which the protection of the appellant's substantive rights or the conservation of judicial resources would be better served by interlocutory review."[50] To prevent misuse, we have held pretrial habeas to be unavailable when resolution, "even if resolved in favor of the appellant, would not result in immediate release."[51] Such claims would not be cognizable on interlocutory appeal because, if it were meritorious, its success "would not bar prosecution or conviction."[52]

Similarly, and in order to promote informed judicial rulings before trial, we have observed that "pretrial habeas is unavailable when the resolution of a claim may be aided by the development of a record at trial."[53] Thus, while facial challenges to the constitutionality of a statute under which an appellant is charged are cognizable, "as-applied" challenges to that statute generally are not.[54] Nevertheless, we have recognized certain circumstances to be cognizable (*e.g.*, double jeopardy or bail) "where the rights underlying those claims would be effectively undermined if not vindicated prior to trial."[55] These circumstances may include matters collateral to and distinct from the matters relevant to the guilt or innocence as determined through the course of trial.

With these principles in mind, we turn to the cognizability of Appellant's claim of selective arrest and prosecution utilizing pretrial habeas as its vehicle. In short, we agree with the Fourth Court of Appeals and find that Appellant's claim is cognizable under the unique facts of his case. We agree that failing to adjudicate the issue now would effectively undermine Appellant's right not to be arrested and prosecuted in an unconstitutional fashion. If successful on the merits, his case would be dismissed and barred from prosecution or conviction. As the court of appeals also noted, the record is already fully developed via a pretrial hearing.

The collateral nature of Appellant's claim also weighs in favor of cognizability. The facts necessary to resolve Appellant's claim are largely independent of the facts concerning the question of his guilt or innocence—especially since selective prosecution or selective enforcement are not defenses on the merits to the criminal charge. Moreover, these facts would not naturally arise during the course of a trial giving strength to the conclusion that the rights Appellant seeks to vindicate "would be effectively undermined if not vindicated prior to trial."[56] Thus, a trial court in this situation can conduct a fact-finding proceeding (and develop a record) prior to trial without being inefficiently redundant to the trial itself.[57]

***8** Declaring either type of claim to be non-cognizable would *jeopardize* future claims alleging unconstitutional discriminatory practices by the State. Such a holding would willfully blindfold the judiciary from re*cognizing* potentially grave and even wide-spread injustice. We stress again that this is especially true where the facts necessary to address these claims do not arise naturally through the course of trial. In those scenarios where some part of the State is actually unconstitutionally discriminatory in their conduct, justice would arrive far too late (if at all) to properly vindicate constitutional rights. Sunlight, especially for those scenarios, is the best disinfectant.[58]

Given that all the above considerations weigh in favor of cognizability, we hold that Appellant's claim, at least under these circumstances, to be cognizable for pretrial habeas purposes.

Selective Prosecution and Selective Enforcement

The Governor of the State of Texas is "the Chief Executive Officer of the State."[59] As part of the executive branch under the Governor's direction, the Texas Department of Public Safety is tasked with "enforce[ing] the laws protecting the public safety and provid[ing] for the prevention and detection of crime."[60]

A claim of selective prosecution or enforcement asks a court to "exercise its judicial power" by dismissing criminal charges prior to the onset of trial.[61] The Supreme Court has recognized, prosecutorial discretion is "particularly ill-suited" for judicial review:[62]

> Such factors as the strength of the case, the prosecution's general deterrence value, the Government's *enforcement* priorities, and the case's relationship to the Government's overall *enforcement* plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's *enforcement* policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.[63]

***9** Moreover, the potential remedy to a successful selective prosecution or enforcement claim, a dismissal of the criminal charge, is a drastic one. This is because "a selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution."[64] Thus, Supreme Court cases on selective prosecution have collectively "taken great pains to explain that the standard is a demanding one."[65] Accordingly, " '[t]he presumption of regularity supports' [the Government's] prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.' "[66]

Nevertheless, prosecutorial discretion and the discretion to enforce the law is not "unfettered" because "[s]electivity in the enforcement of criminal laws ... is still subject to constitutional constraints."[67] As the Supreme Court has stated, the decision whether to prosecute may not be "deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification."[68]

In order to succeed in a claim of selective prosecution or selective enforcement, the claimant must prove with "exceptionally clear evidence" that:

1. The prosecutorial policy had a discriminatory effect; and

2. it was motivated by a discriminatory purpose.[69]

***10** The appellant bears the burden initially to "dispel the presumption that the [Government] has not violated equal protection" with "clear evidence to the contrary."[70] Once a prima facie case is established, the burden shifts to the State to justify the discriminatory policy.[71]

The First Prong: The Prosecutorial Policy Had a Discriminatory Effect

Under the "discriminatory effect" prong, the claimant must demonstrate "that similarly situated individuals of a different [arbitrary classification] were not prosecuted."[72] Specific to claims of gender discrimination, the Supreme Court has "recognized that in certain narrow circumstances men and women are *not* similarly situated; in these circumstances, a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon those differences is not unconstitutional."[73]

The Second Prong: The Prosecutorial Policy Was Motivated by a Discriminatory Purpose

Under the second prong, we can only presume that the word "discriminatory" references the characteristic of treating a distinct group or group member in an unfair or unjust way based on a prejudiced viewpoint, as opposed to merely differentiating or discerning between choices as an act of good judgment.[74] Otherwise, penalizing men for knowingly trespassing in the women's bathroom would be unconstitutional. So would having gender-specific prisons and state laws concerning statutory rape.[75] One class is

being singled out and treated differently than another class. Under this definition, the Supreme Court's standard would not make sense. Our definition, on the other hand, is more consistent with selective prosecution and enforcement case law which uses synonyms and synonymous phrases such as "invidious," "with an evil eye and an unequal hand," "no reason for it exists except hostility to the [class]," and "with a mind so unequal and oppressive."[76] Black's Law Dictionary confirms our understanding of the word because it defines "invidious discrimination" as: "Discrimination that is offensive or objectionable, esp. because it involves prejudice or stereotyping."[77]

***11** Accordingly, under the second prong, the claimant must show "an intentional or purposeful discrimination in the enforcement of the statute against him."[78] Moreover, "[a] discriminating purpose will not be presumed; a showing of clear intentional discrimination is required."[79] " 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences."[80] As the Supreme Court stated in a selective prosecution case based solely and exclusively in the racial context:

> There should be certainty to every intent. Plaintiff in error seeks to set aside a criminal law of the state, not on the ground that it is unconstitutional on its face, not that it is discriminatory in tendency and ultimate actual operation as the ordinance which was passed on in the *Yick Wo Case*, but that it was made so by the matter of its administration. This is a matter of proof; and no fact should be omitted to make it out completely, when the power of [the court] is invoked to interfere with the course of criminal justice of a state.[81]

Furthermore, "[a] defendant may demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law."[82]

To be clear, the *guiding principles* applied in these types of claims come from the Equal Protection Clause and not the Fourth Amendment. As the Supreme Court has explicitly established: "[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."[83] And while the Equal Protection Clause should guarantee *equal protection*, it does not provide for the right to commit criminal offenses in violation of *facially neutral* laws of the States.[84] Thus, the Supreme Court has set a rigorous "demanding" burden be met before a defendant is entitled to any remedy. And because the burden is so "demanding," it is not surprising that successful claims of selective prosecution or enforcement claims are extremely rare in contrast to suppression cases under the Fourth Amendment.[85]

Discussion

***12** We agree 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).[86] However, we cannot ignore the fact that these women were transferred to the custody of the U.S. Border Patrol—a federal law enforcement agency with the authority to arrest migrants illegally crossing the border.[87] Those detainees could have been prosecuted under the discretion of the U.S. Attorney's Office. Though it is questionable whether Captain Betancourt's "guidance" email is sufficient to constitute an official policy of the Governor, DPS, OLS, Maverick County, or even the larger entity of the State, it is undisputed that zero women have been charged —at least within the five-county area under DPS—with the misdemeanor of criminal trespass.

We note, however, that although women were not charged with criminal trespass, some were arrested and charged with the far more serious felony of human smuggling.[88] We also observe that though zero women were arrested and charged with criminal trespass by DPS in the five-county area, it was not shown whether women were charged with criminal trespass *by other law enforcement agencies* acting as arms of the State operating in the same area. It was also not shown whether DPS or OLS charged women with criminal trespass in the other 38 out of the total 43 counties cooperating with OLS. Appellant, furthermore, failed to show that women somehow escaped the criminal justice system whereas men did not. And it was not shown that the women and other males turned over to federal authorities were not prosecuted under federal law. As the record shows for at least the five-county area, OLS transferred custody of women, family units, and other men over to federal agents capable of prosecuting migrants for federal offenses. Moreover, it is not certain that the women in question truly qualify as "similarly situated" persons in this context. Women cannot be interchangeably housed *safely* with men in detention facilities designed for men.[89] Nevertheless, although Appellant's evidence may be inappropriate in its scope, we shall assume for the sake

of argument that Appellant has satisfied the first prong in showing a "discriminatory effect" in demonstrating a prima facie case for selective prosecution or enforcement.

However, Appellant's claim faces far more obstacles under the second prong. In alleging that the OLS "policy" and its resulting discriminatory effect was *motivated* by a discriminatory purpose, Appellant had to definitively show that an otherwise facially neutral law is being *administered* in bad faith—that it was "directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive" that equal protection of the law was denied.[90] In *Yick Wo*, the plaintiff was able to demonstrate that a facially neutral ordinance was being enforced "exclusively" against Chinese individuals but not non-Chinese individuals in similarly situated conditions.[91] There, the plaintiff was able to show that his permit was denied *because* he was Chinese.[92] Thus, the underlying motivation behind the policy was demonstrably "unequal and oppressive."

***13** In the instant case, we first note that Appellant has a questionable nexus between the "guidance email" and its alleged effect. The guidance email, by its own language, applied only to Val Verde County and Kinney County—not Maverick County where Appellant was arrested, nor the entire five-county area.[93] To the extent that it influenced DPS arrests in Maverick County, Appellant is unable to show that he is being "invidiously"[94] punished for criminal trespass *because* he is male.[95] Betancourt's guidance email did not target all males but only some males. To that extent that OLS targeted some males, the guidance was not motivated to target them to punish them *because* they were male.[96] Appellant was also unable to show that the criminal trespass law was "directed so *exclusively* against" all males.[97] Betancourt's email explicitly listed examples involving males that DPS Troopers were to turn over to border patrol instead.[98] These included males that were minors or part of a family unit in the company of a minor.[99] Betancourt also added to these with the exemption for adult males who were "60-plus or injured."[100]

Witness testimony suggested that jail capacity limitations within the five-county area during an ongoing state of emergency were the factors actually driving the Betancourt's evolving "guidance."[101] Appellant's own exhibits demonstrated the large numbers of migrants crossing the border illegally. One of *Appellant's own* exhibits from his pretrial habeas brief estimated that more than 265,500 unauthorized migrants had been detained or "apprehended" in the roughly year-long period contemporaneous to Appellant's arrest. As observed by the trial judge, this was a mere fraction out of the estimated "three million" that had illegally crossed the border in the past year-and-half and "couple hundred thousand in Maverick County" alone.[102] The vast majority of these individuals, according to one DPS trooper and as Appellant's best comparator evidence demonstrates, were male.[103]

These substantial disparities in the demography likely have had an outsized influence on the disparities in the outcome.[104] Presuming that the State understands it is operating with limited resources during an ongoing state of emergency and trying to achieve a maximum deterrence value, it would not be illogical nor unreasonable for the State to adjust their strategy on the allocation of existing jail space[105] and the creation of additional jail space.[106] Nor would it be objectively unreasonable nor arbitrary in adjusting their arrest targets as jail availability fluctuates.[107] The evidence demonstrates far more heavily that the necessities of reality during an ongoing emergency (limited resources in the face of "sheer numbers"), rather than gender discrimination, was more likely the *motivation* for any discriminatory effect.[108] Moreover, any person not formally arrested was not released, but instead transferred to the custody of the U.S. Border Patrol—which may very well had criminal consequences.[109]

Conclusion

***14** In summary, Appellant's case is cognizable, but he has failed to meet his burden in demonstrating a *prima facie* case that he is being arrested and prosecuted *because* of his gender. We recognize and are concerned by at least the appearance of a discriminatory impact in the subjects of this case and others in the five-county area. Nevertheless, Appellant's evidence fails to meet the "demanding" standard required for judicial interference in the State's discretion in administering criminal justice policy and priorities.[110] Appellant did not show by "exceptionally clear evidence" that the OLS mindset administering the facially neutral criminal trespass law was "so unequal and oppressive" against him *because* he is male. We reverse the court of appeals and affirm the trial court's denial of Appellant's pretrial writ of habeas corpus on the merits.

McClure, J. concurred in the result.

Keller, P.J. filed a dissenting opinion in which Keel, J. joined.

Yeary, J. filed a dissenting opinion.

Keel, J. filed a dissenting opinion.

DISSENTING OPINION

Keller, P.J., filed a dissenting opinion in which Keel, J., joined.

Although Appellant says the decision to prosecute violated his equal protection rights, the facts he alleges would show not that the *prosecutor* discriminated on the basis of sex, but that *law enforcement* discriminated on the basis of sex. The claim before us is really a "selective enforcement" claim rather than a "selective prosecution" claim. These two claims have much in common, but I would find at least one difference between them to be dispositive: Dismissal of the prosecution is not an appropriate remedy for a "selective enforcement" claim. And because of that, as I shall explain, Appellant's claim is not cognizable on habeas corpus.

Also, although the Court says that Appellant's claim is nuanced, it treats the claim as if it were a "selective prosecution" claim. So I also write briefly to explain why I think that selective-prosecution claims are ordinarily *not* cognizable on pretrial habeas and why, nevertheless, Applicant's claim in this case would be cognizable if it were actually a selective-prosecution claim.

A. Dismissal is not an appropriate remedy for a "selective enforcement" claim, so Appellant's claim is not cognizable on pretrial habeas.

The Supreme Court has held that a prosecuting authority does not violate equal protection by having a "passive" policy of prosecuting only those who report themselves or were reported as having violated the law.[1] The policy of the prosecutors in Appellant's and other cases under Operation Lone Star was a passive policy of prosecuting only those who were arrested by law enforcement. This policy does not discriminate against anyone in violation of equal protection.

But the Supreme Court has recognized that discrimination by law enforcement can give rise to an equal protection claim of selective enforcement.[2] The Seventh Circuit has explained the distinction between how these claims arise, explaining that selective prosecution occurs when, from among the pool of people referred by police, a prosecutor pursues similar cases differently based on a prohibited category such as race, while selective enforcement occurs when police investigate people of one race but not similarly-situated people of a different race, resulting in a constitutional problem that precedes the prosecutor's role.[3]

***15** The Court is correct that the standards for establishing a constitutional violation are the same for selective-prosecution and selective-enforcement claims, but that does not mean that the same *remedy* applies to both types of claims. The remedy question is not settled. The Seventh Circuit issued *dictum* that might suggest dismissal of the case to be appropriate for a selective-enforcement claim,[4] and the Tenth Circuit has assumed that dismissal is an appropriate remedy.[5] But the Sixth Circuit has held that only civil remedies are appropriate for a selective-enforcement claim,[6] the Eighth Circuit has said that it is uncertain that dismissal is an appropriate remedy,[7] and the Fifth Circuit has expressed doubt about whether even suppression of evidence would be an appropriate remedy.[8] Some of the federal circuits have cited *Yick Wo v. Hopkins*[9] as a selective-enforcement case.[10] The remedy in *Yick Wo* was to discharge the defendants from their convictions,[11] which equates to the remedy Appellant seeks. But *Yick Wo* does not appear to be a case of selective enforcement because it involved discrimination by the municipal board of supervisors in issuing permits to operate a laundry. Non-Chinese were given permits, but Chinese nationals were denied permits.[12] So *Yick Wo* was not a case where two different groups of people violated the law and the police arrested only people from one group. Rather, *Yick Wo* involved the administrators of a city creating a situation where only one group would even violate the law.

In *United States v. Armstrong*, the defendant disputed the need to show that others were "similarly situated" to entitle him to discovery in an attempt to establish an equal protection violation.[13] The Supreme Court discussed *Yick Wo* in the context of selective prosecution, but used it only as an example of how a party could prove that others were

"similarly situated."[14] In its discussion about the need for this showing, the Court never suggested that the remedy in *Yick Wo* would apply to a selective-prosecution claim, saying instead, "We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race."[15]

***16** In a decision as recent as 2022, a federal district court, while advocating for dismissal as a remedy for a selective-enforcement claim, acknowledged, "When the racially biased decision is made not by the prosecutor but by another law enforcement officer, the question of whether dismissal is required is not strictly settled."[16] As we see, then, no binding caselaw requires dismissal as a remedy for a selective-enforcement claim, nor is such a remedy supported by even the weight of persuasive authority.

Absent binding or even substantial persuasive authority, we should abide by general principles. "An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction."[17] That principle should not change merely because the illegality is an equal-protection violation instead of a Fourth Amendment violation. The prosecutor is the one responsible for the prosecution, not a law enforcement officer.

Moreover, the prosecutor enjoys absolute immunity from civil damages for any unconstitutionality in bringing the prosecution.[18] So, at least ordinarily, a defendant's only real remedy for a selective-prosecution violation is dismissal of the criminal case. That is not true if a law-enforcement officer selectively enforces a law—the law-enforcement officer would have only qualified immunity, which would likely be defeated if purposeful discrimination were shown.[19]

And once we determine that dismissal is not an appropriate remedy, it necessarily follows that the claim in question is not cognizable. "If the relief sought would not prevent prosecution, pretrial habeas is unavailable."[20]

B. Most "selective prosecution" claims are not cognizable, but this claim would be cognizable *if* it were a "selective prosecution" claim.

An "as applied" constitutional claim is cognizable when the right underlying the claim would be effectively undermined if not vindicated prior to trial.[21] This rationale derives from the Supreme Court's decision in *Abney v. United States*,[22] a double-jeopardy case.[23] The Supreme Court has refused to extend the *Abney* rationale to a vindictive-prosecution claim, holding that it really did not involve the sort of right that is effectively undermined if not vindicated prior to trial.[24] The Ninth Circuit has held that this Supreme Court holding about vindictive-prosecution claims necessarily applies to selective-prosecution claims.[25] Other courts have expressed agreement with the Ninth Circuit's conclusion that selective-prosecution claims do not fall under the *Abney* rationale.[26]

***17** In refusing to extend *Abney* to a vindictive-prosecution claim, the Supreme Court analogized to the right to a speedy trial.[27] The Court saw a difference between a double-jeopardy right not to be tried and the speedy trial right not to have a non-speedy trial. The latter is not really a right not to be tried but is a right to dismissal when the trial is tainted by its lack of speediness: "It is the delay before trial, not the trial itself, that offends against the constitutional guarantee of a speedy trial."[28]

The reason a vindictive-prosecution claim does not involve a right not to be tried seems to be that a right not to be subject to a trial motivated by vindictiveness is not the same as a right not to be tried. It is the vindictive motive of the prosecutor, not the trial itself, that creates the constitutional violation. Likewise, in a selective prosecution, it is the discriminatory motive of the prosecutor, not the trial itself that creates the constitutional violation. A defendant who is guilty of the criminal violation and who has only a valid selective-prosecution claim has not shown any intrinsic reason why he should not be prosecuted and convicted. He instead seeks to avoid criminal liability on an entirely extrinsic basis—the way other violators are treated and the motivation of the prosecuting authorities in treating the defendant differently. Pointedly, if the relevant authority started prosecuting a member of the class that the defendant claims is not being prosecuted (e.g. women), the very basis for defendant's selective-prosecution claim could vanish.

And judicial economy concerns weigh against the pre-trial cognizability of selective-prosecution claims because they are almost always without merit, and this general lack of merit flows inherently from the nature of this type of claim. The claim asks a court to review a prosecutorial or law-enforcement entity's exercise of broad discretionary power

to decide who can be charged, and courts are generally ill-suited to conduct such a review. The inherently low probability of success associated with claims of this type weighs against allowing them to burden the appellate system with interlocutory appeals.

But the claim in this case is different because of its potential for judicial economy. Appellant's claim–that women are not being prosecuted and men are–could apply to hundreds or thousands of other cases. If Appellant had won, a large number of prosecutions would have been terminated (assuming the remedy of dismissal applies). And even in losing, substantial judicial savings might occur because courts could more easily dispose of a mass of identical claims.

Also, the sheer number of cases to which Appellant's claim could apply creates two other factors that would weigh in favor of cognizability. First, it creates a greater likelihood of success because it makes it easier to show a pattern of discrimination. Second, the sheer number of cases also reinforces a conclusion that the claim can be resolved without trying the case. In many selective-prosecution claims, the offense facts could well explain why one person was prosecuted and another was not (e.g. the heinousness of the offense or the relative culpability of the offender). But the number of cases makes it obvious that the facts of the offense here simply do not matter.

So, while selective-prosecution claims are not ordinarily cognizable, the extraordinary nature of the facts before us would make Appellant's claim cognizable if it were in fact a selective-prosecution claim. But I believe that his claim is not in fact cognizable because it is not a selective-prosecution claim but is a selective-enforcement claim, for which dismissal of the case is not a valid remedy.

***18** I would vacate the court of appeals's decision and order that the appeal be dismissed.[29] I respectfully dissent.

Yeary, J., filed a dissenting opinion.

I agree with Presiding Judge Keller about the distinction between selective prosecution and selective enforcement. *See* Dissenting Opinion at —— ("The claim before us is really a 'selective enforcement' claim rather than a 'selective prosecution' claim."). A decision to arrest or detain is distinct from a decision to prosecute. As the Presiding Judge points out, these claims are different, and for the other reasons she explains, selective enforcement claims should not be considered cognizable.

So, I agree with both the Presiding Judge, and Judge Keel, that such claims are not cognizable on pre-trial habeas. But that is all that I think needs to be said about this matter today. I would not go on, as the Presiding Judge's opinion does, to suggest that selective, and vindictive, prosecution claims should not ordinarily be considered cognizable.

This Court has embraced the idea that "certain types of as-applied claims may be raised by pretrial habeas because the particular constitutional right at issue ... is the type that would be effectively undermined if not vindicated prior to trial." *Ex parte Perry*, 483 S.W.3d 884, 896 (Tex. Crim. App. 2016). A prosecution motivated by reasons that are in conflict with an accused's constitutional right to equal protection of the law is an unconstitutional prosecution. *City of Grants Pass Oregon v. Johnson*, —— U.S. ——, 144 S. Ct. 2202, 2220, 219 L.Ed.2d 941 (2024) ("[T]he Constitution provides many additional limits on state prosecutorial power, promising fair notice of the laws and equal treatment under them, *forbidding selective prosecutions*, and much more besides.") (emphasis added). This strikes me as exactly the kind of right that would be undermined if not vindicated before trial. The whole point of claiming selective prosecution is to advance the argument that the defendant would not have been prosecuted but for the selectively motivated decision to prosecute in the first place.

Seeming to address this consideration, Presiding Judge Keller contends that "a right not to be subject to a trial motivated by vindictiveness is not the same as a right not to be tried." Dissenting Opinion at ——. But I am not so sure. After all, it is not just *any trial* that a defendant claiming selective prosecution seeks to prevent. It is, rather, the prosecution that the defendant claims is being pursued *selectively* that he seeks to prevent.

Because I agree that the actual claim that Appellant is making is a non-cognizable selective enforcement claim, it should be dismissed, not denied on the merits. I respectfully dissent.

DISSENTING OPINION

Keel, J., filed a dissenting opinion.

I agree with Part A of the Presiding Judge's opinion: Appellant's selective enforcement claim is not cognizable in

pretrial habeas, and we should dismiss it. I write separately because the majority opinion jeopardizes future claims of selective prosecution in Texas. Contrary to its understanding, the discriminatory-purpose element of selective-prosecution claims does not depend on hostility or bad faith, and discrimination is not justified by more discrimination. I respectfully dissent.

I. Discriminatory Purpose

***19** The majority claims that the discriminatory-purpose element of a selective prosecution claim means "an unfair or unjust" prosecution "based on a prejudiced viewpoint." But it doesn't. Instead, it means a decision to prosecute that was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). Discriminatory purpose requires the State to select or reaffirm "a particular course of action in part *because of,* not merely in spite of, its adverse effects upon an identifiable group." *Casarez v. State*, 913 S.W.2d 468, 485 (Tex. Crim. App. 1994) (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. It does not matter whether it harbored hostility to that class.

This mirrors the treatment of other Equal Protection claims; they do not depend on hostility, either. Last year, for example, the Supreme Court held that an affirmative action policy violated the Equal Protection Clause regardless of its "well-intentioned" or "good faith" implementation. *Students for Fair Admissions v. Harvard*, 600 U.S. 181, 213, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023); *see also Fisher v. Univ. of Tex.*, 570 U.S. 297, 313, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013) (reasoning that "good faith would [not] forgive an impermissible consideration of race."). Similarly, race-based gerrymandering policies are subject to scrutiny "regardless of the motivations underlying their adoption." *Alexander v. NAACP*, 602 U.S. 1, 144 S.Ct. 1221, 218 L. ED. 2d 512, 541 (2024) (citing *Shaw v. Reno*, 509 U.S. 630, 645, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)). And race-based social programs may be discriminatory even when the racial classifications are "benign" or "remedial." *Adarand Constructors v. Pena*, 515 U.S. 200, 225, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Good or bad faith may be relevant to a state-interest justification for the discriminatory policies. *See, e.g., Fisher*, 570 U.S. at 312-14, 133 S.Ct. 2411. But discriminatory purpose does not depend on bad faith.

II. Efforts To Justify Discrimination

The majority tries to justify DPS's arrest policy by citing additional evidence of discrimination. The majority points out that Operation Lone Star's processing centers could house only men, but this shows the enterprise was discriminatory from the start—it does not justify the discrimination. The majority also points out that some males were exempt from arrest for trespass; minors, old men, injured men, and men belonging to a family group were not charged. But those exemptions are irrelevant to deciding whether Appellant was charged, at least in part, because he was male. *See Casarez*, 913 S.W.2d at 485. The fact that he was further discriminated against based on, for example, his age, marital status, or health would not rebut the fact that he was charged because he was a man. Discrimination is not justified by more discrimination.

III. Conclusion

The majority errs by entertaining Appellant's selective-enforcement claim and by jeopardizing future claims of selective prosecution. I respectfully dissent.

All Citations

--- S.W.3d ----, 2024 WL 4446878

Footnotes

1 (1 CR 21) ("Office of the Texas Governor, Press Release, *Governor Abbott, DPS Launch 'Operation Lone Star' to Address Crisis at Southern Border*").

2 (1 CR 21).

3 (1 CR 380).

4 (1 CR 23) ("Office of the Texas Governor, Press Release, *Governor Abbott Renews Border Crisis Disaster Declaration in 43 Counties*").

5 (1 CR 23).

6 (1 CR 29).

7 (2 RR 71).

8 (1 CR 61-62).

9 (2 RR 72).

10 (2 RR 73).

11 (2 RR 74-76).

12 (1 CR 4-16).

13 (2 RR 1).

14 (2 RR 6-7, 27-28). These included the counties of Webb, Jim Hogg, Maverick, Kinney, and Valverde.

15 (2 RR 28). The trial court judicially noticed that Kinney County does not have a functioning jail for pretrial detentions. (2 RR 91-92).

16 (2 RR 7, 27).

17 (2 RR 40-41).

18 (2 RR 6).

19 (2 RR 17, 42-43).

20 (2 RR 10-13).

21 (2 RR 41-42). Part 9 of the Texas Administrative Code (titled "Texas Commission on Jail Standards") provides the statutory requirements that all county pretrial detention and jail facilities must comply with at the bare minimum. Tex. Admin Code ch. 251-301. These statutory requirements include rules on the jail construction and facility design, "life safety rules," housing scheme requirements, staffing requirements, rules on the supervision of inmates, admission and bonding processes, health services, sanitation plan requirements, food services, and access to legal services. *Id.* Incorporated within the interaction of the above requirements, Section 260.112 requires the facility design itself to provide male/female segregation with "[a]dditional segregation ... provided for offenders of different risk/needs classifications." Part 11 of the Texas Administrative Code (titled "Texas Juvenile Justice Department") also provides, in a completely separate statutory scheme, the requirements for housing detained juveniles. Tex. Admin Code ch. 341-385. These requirements diverge from those used to house adult pretrial detainees.

22 (2 RR 45-46).

23 Under 8 U.S.C. § 1325, crossing the border illegally is a federal misdemeanor to which U.S. Border Patrol has federal authority to enforce by arrest under 8 U.S.C. § 1357.

24 Exh. 13. It is unclear what effect the guidance email had in Maverick County given that the email by its language applies to only Val Verde and Kinney counties. According to the DPS liaison to Maverick County, the guidance email was forwarded verbatim to troopers working in the Maverick County area once the county became involved in OLS. (2 RR 81). The liaison testified that she thought it was a directive. However, the testifying troopers who made arrests in Maverick County all consistently testified that their decisions not to arrest females for criminal trespassing were made because neither the

Maverick County Jail nor the regional processing center would accept them. (2 RR 51-54, 57-58, 74-75). One trooper further denied that his decision was based on any policy because he was unaware of any policy in place for OLS arrests in Maverick County. (2 RR 54).

25 Exh. 13; (2 RR 80).

26 (2 RR 36).

27 (2 RR 47-77); *see also* (2 RR 76) ("It's based on the fact that the jail will not allow me to arrest the females. If they did, they would be arrested every single time.").

28 (2 RR 75). This observation is consistent with eight "mixed-sex" groups provided as comparative samples in Appellant's pretrial habeas brief. The eight groups were collectively composed of 26 adult men compared to only 11 adult women. (1 CR 6-7). Similarly, the "similarly situated" mixed-sex groups (including Appellant's group) that the four Troopers testified to were collectively composed of 20 adult males compared to 7 adult females. (2 RR 51-52, 57-58, 61, 72).

29 (2 RR 97).

30 (2 RR 108).

31 (2 RR 108, 111-13).

32 State's Br. at the Fourth Court of Appeals at *9.

33 App. Br. at the Fourth Court of Appeals at *19.

34 *Id.* at *33.

35 *Ex parte Aparicio*, 672 S.W.3d 696, 711-13 (Tex. App.—San Antonio 2023, pet. granted) (en banc).

36 The Fourth Court of Appeals addressed Appellant's claim as a claim of selective prosecution. *Id.* at 707.

37 *Id.* at 714.

38 *Id.* at 716; *see Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 257 (Tex. 2002) (applying strict scrutiny to a state policy where equal treatment was denied "*because* of a person's membership in a protected class").

39 *See e.g.*, *Ex parte Campos*, No. 06-24-00039-CR, 2024 WL 1632040 at *7 (Tex. App.—Texarkana April 16, 2024) (mem. op., not designated for publication) (deciding the case under the Fourth Court of Appeals' precedent *Ex parte Aparicio* after being transferred pursuant to docket equalization efforts: "While the outcome of this case would have been entirely different had we not been required to decide this case in accordance with another district's precedent, faithful application of Rule 41.3 of the Texas Rules of Appellate Procedure requires us to reverse the trial court's order and remand this cause to the trial court for further proceedings consistent with this opinion.").

40 App. Br. at the Fourth Court of Appeals at *8 (emphasis added).

41 The briefs from all parties, by our count, use the phrase "selective prosecution" 114 times while using the phrase "selective enforcement" or "selective enforcement of the law" 9 times in the interchangeable context.

42 Conc. Op., at *5 (Keller, P.J.) (discussing and quoting *T.J. by and through Johnson v. Rose*, 635 F. Supp. 3d 65 (D. R.I. 2022) (mem. op.)).

43 *T.J. by and through Johnson v. Rose*, 635 F. Supp. 3d 65 (D. R.I. 2022) (mem. op.) (quoting *Mumphrey*, 193 F. Supp. 3d at 1055). The concurring opinion's reliance on *United States v. Nichols*, 512 F.3d 789 (6th Cir. 2008) is misguided because it ignores the context of the court's hypothetical musings. There, the Sixth Circuit was rejecting the Appellant's proposition that Fourth Amendment *suppression* was the appropriate remedy for a successful Equal Protections claim.

Nichols, 512 F.3d at 794 ("Indeed, we are aware of no court that has ever applied the exclusionary rule for a violation of the Fourteenth Amendment's Equal Protection Clause.").

44 Although DPS has the discretion to arrest, they must defer to the local district attorney's prosecutorial discretion in each county or district. *State v. Zurawski*, 690 S.W.3d 644, 658-59 (Tex. 2024) (citing *State v. Stephens*, 663 S.W.3d 45, 47, 52 (Tex. Crim. App. 2021)).

45 (2 RR 106).

46 *United States v. Washington*, 869 F.3d 193, 214 (3d Cir. 2017) ("[C]laims of selective prosecution and selective enforcement are generally evaluated under the same two-part test, which is derived from a line of seminal Supreme Court cases about the collision between equal protection principles and the criminal justice system.") (citing *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996); *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524); *United States v. Mason*, 774 F.3d 824, 829 (4th Cir. 2014) ("This court has adopted the standard the Supreme Court has set forth in *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687, (1996), for cases of racially animated law enforcement.... A selective law enforcement claim 'asks a court to exercise judicial power over a special province of the Executive.' In light of the 'great danger of unnecessarily impairing the performance of a core executive constitutional function,' petitioners must demonstrate 'clear evidence' of racially animated selective law enforcement." (internal citations omitted)); *Bryan v. City of Madison*, 213 F.3d 267, 277 (5th Cir. 2000) ("But to successfully bring a selective prosecution or enforcement claim, a plaintiff must prove that the government official's acts were motivated by improper considerations, such as race, religion, ..."); *Farm Labor Organizing Committee v. Ohio State Hwy. Patrol*, 308 F.3d 523, 534 (6th Cir. 2002) ("The Supreme Court has explained that a claimant alleging selective enforcement of facially neutral criminal laws must demonstrate that the challenged law enforcement practice 'had a discriminatory effect and that it was motivated by a discriminatory purpose.' " (citing to *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524)); *United States v. Avery*, 137 F.3d 343, 356 (6th Cir. 1997) (applying the standard for selective prosecution claims to an allegation of selective law enforcement claim arising from a police airport stop); *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002) ("But the same analysis governs both types of claims [claims of selective prosecution and selective law enforcement]: a defendant seeking discovery on a selective enforcement claim must meet the same 'ordinary equal protection standards' that *Armstrong* outlines for selective prosecution claims." (citing *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480)); *Chavez v. Illinois State Police*, 251 F.3d 612, 635-36 (7th Cir. 2001) (applying the selective prosecution standard to traffic stops, detentions, and searches motivated by racial profiling); *United States v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996) ("The Equal Protection Clause precludes selective enforcement of the law based on race. A person claiming unequal enforcement of a facially neutral statute must show both that the enforcement had a discriminatory effect, and that the enforcement was motivated by a discriminatory purpose." (first citing *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996), then citing *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480)); *Benigni v. City of Hemet*, 879 F.2d 473, 478 (9th Cir. 1988) ("An equal protection claim based on selective law enforcement activities is judged according to ordinary standards and the plaintiff must show both a discriminatory effect and discriminatory motivation." (citing *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524)); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1167 (10th Cir. 2003) ("Broad discretion has been vested in executive branch officials to determine when to prosecute, and by analogy, when to conduct a traffic stop or initiate an arrest."; applying the selective prosecution standard in *Armstrong* to a claim of racially selective law enforcement); *see also Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.").

47 *See e.g.*, *Washington*, 869 F.3d at 214 ("A defendant challenging criminal prosecution at either the law enforcement or prosecution inflection points must provide 'clear evidence' of discriminatory effect and discriminatory intent (the latter is sometimes referred to as 'discriminatory purpose').")

48 *Id.*

49 *Ex parte Ellis*, 309 S.W.3d 71, 78 (Tex. Crim. App. 2010); *Ex parte Smith*, 178 S.W.3d 797, 801 (Tex. Crim. App. 2005).

50 *Ex parte Weise*, 55 S.W.3d 617, 620 (Tex. Crim. App. 2001).

51 *Ex parte Couch*, 678 S.W.3d 1, 4 (Tex. Crim. App. 2023) (quoting *Weise*, 55 S.W.3d at 619).

52 *Couch*, 678 S.W.3d at 3-4 (quoting *Smith*, 178 S.W.3d at 801); *Ex parte Smith*, 185 S.W.3d 887, 892 (Tex. Crim. App. 2006) ("[A] claim is cognizable in a pretrial writ of habeas corpus if, resolved in the defendant's favor, it would deprive the trial court of the power to proceed and result in the appellant's immediate release.").

53 *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010).

54 *Ellis*, 309 S.W.3d at 79.

55 *Ex parte Perry*, 483 S.W.3d 884, 896 (Tex. Crim. App. 2016) (citing *Ellis*, 309 S.W.3d at 79).

56 *Perry*, 483 S.W.3d at 896 (citing *Ellis*, 309 S.W.3d at 79).

57 *Weise*, 55 S.W.3d at 620; *Doster*, 303 S.W.3d at 724. In contrast to selective prosecution cases, a successful resolution of a vindictive prosecution case is not likely to affect a broad class of defendants and thereby have an impact on judicial economy. This is because vindictive prosecution cases tend to be individualized to a *specific* defendant because they typically allege State retaliation after a specific defendant has done something such as exercising a right.

58 *See* Emily Wagster Pettus, *Justice Department Opens Civil Rights Probe of Sherriff's Office After Torture of 2 Black Men*, AP News (Sept. 20, 2024, 8:29 AM), https://apnews.com/article/mississippi-civil-rights-police-brutality-goon-squad-2554c21a0c7366849d6119b07855f8c1 (discussing the allegation of pervasive violent racist practices by the Rankin County Sherriff's Department after six law enforcement officers—"so willing to use excessive force they called themselves the Goon Squad"—were convicted after breaking into a home without a warrant and committing a "racist attack that included beatings, repeated use of stun guns and assaults with a sex toy before one of the victims was shot in the mouth" that lasted for hours). By the time plaintiffs were able to file a civil rights claim under 42 U.S.C. § 1983, the "Goon Squad" had already become "so brazen," they had their own Rankin County Sherriff's Department challenge coin complete with a Goon Squad logo on the back. *Jenkins v. Rankin Cty*, No. 3:23-CV-374-DPJ-ASH, 2024 WL 3526903 (S.D. Miss. July 24, 2024) (order); Nate Rosenfield, et al., *Rankin 'Goon Squad' of Law Officers Admit to Hindering Prosecution in Torture Case*, Mississippi Today (Sept. 26, 2024, 3:26 PM), https://mississippitoday.org/2023/08/14/rankin-goon-squad-admits-hiding-evidence-in-tortureof-black-men/. In an official press release from the U.S. Attorney's Office for the Southern District of Mississippi, it was reported that members of the Goon Squad (including additional members) exchanged texts that "routinely discussed extreme, unnecessary uses of force and other ways to dehumanize residents of Rankin County." U.S. Att'y Office for S.D. Miss., Press Release: Remarks of United States Attorney Todd Gee Announcing a Pattern or Practice Investigation of the Ranking County, Mississippi Sheriff's Department and Rankin County (Sept. 19, 2024)

59 Tex. Const. art. IV, § 1.

60 Tex. Gov't Code § 411.002; *see also* Tex. Const. art. IV, §§ I, X (mandating the Governor, as the "Chief Executive Officer of the State" to "cause the laws to be faithfully executed.").

61 *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996); *United States v. Mason*, 774 F.3d 824, 829 (4th Cir. 2014) ("A selective law enforcement claim 'asks a court to exercise judicial power over a special province of the Executive.' " (quoting *Armstrong*, 517 U.S. at 464, 116 S.Ct. 1480)).

62 *Wayte*, 470 U.S. at 607, 105 S.Ct. 1524.

63 *Id.* at 607-08, 105 S.Ct. 1524 (emphasis added). "In the absence of *invidious discrimination*, however, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures." *Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979) (emphasis added). "The People elect legislative and executive branch officials—not judges or 'experts'—to make judgments about the costs and benefits of government action and to balance competing policy goals in light of those judgments." *Abbott v. Harris Cty.*, 672 S.W.3d 1, 5 (Tex. 2023) (quoting *Abbott v. Anti-Defamation League*, 610 S.W.3d 911, 926 (Tex. 2020)) (Blacklock, J., concurring).

64 *Armstrong*, 517 U.S. at 463, 116 S.Ct. 1480.

65 *Id.*; *see Mason*, 774 F.3d at 829 ("In sum, the *Armstrong* burden is a demanding one and Mason has failed to identify any cases at the Supreme Court or in this circuit where an *Armstrong* violation for *selective law enforcement* has been found. Fourth Amendment claims, by contrast, are often successful.... To be sure, the two challenges are not, at least as a technical matter, mutually exclusive. However, one is clearly more likely to be successful than the other." (emphasis added; internal citations omitted)).

66 *Armstrong*, 517 U.S. at 464, 116 S.Ct. 1480 (quoting *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L.Ed. 131 (1926)).

67 *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524; *Bell*, 86 F.3d at 823.

68 *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962).

69 *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524; *Washington*, 869 F.3d at 214; *Farm Labor Organizing Committee*, 308 F.3d at 534; *Bell*, 86 F.3d at 823; *Mason*, 774 F.3d at 829. We note that other Equal Protection cases outside of the criminal enforcement context analyze their respective claims of *gender-based discrimination* in a similar way:

> When a statute gender-neutral on its face is challenged on the ground that its effect upon women are disproportionally adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects *invidious* gender-based discrimination.

Pers. Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 274, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (emphasis added).

70 *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480.

71 *See id.* at 465-68, 116 S.Ct. 1480.

72 *Id.* ("To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."); *Bell*, 86 F.3d at 823.

73 *Michael M. v. Sup. Ct. of Sonoma Cty.*, 450 U.S. 464, 478, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981) (concurring, J. Stewart) (agreeing with the majority that "[t]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situation in certain circumstances." (quoting *Michael M.*, 450 U.S. at 469, 101 S.Ct. 1200 (majority))).

74 *See Discriminatory; *discriminative; discriminating; *discriminant*, Garner's Dictionary of Legal Usage (3d ed. 2009) ("Because *discriminatory* has extremely negative connotations, and *discriminating* quite positive connotations, the noun *discrimination* suffers from a split personality ....").

> The dictionary sense of "discrimination" is neutral while the current political use of the term is frequently non-neutral, pejorative. With both a neutral and non-neutral use of the word having currency, the opportunity for confusion in arguments about racial discrimination is enormously multiplied. For some, it may be enough that a practice is called discriminatory for them to judge it wrong. Others may be mystified that the first group condemns the practice without further argument or inquiry. Many may be led to the false sense that they have actually made a moral argument by showing that the practice discriminates (distinguishes in favor of or against). The temptation is to move from "X distinguishes in favor of or against" to "X discriminates" to "X is wrong" without being aware of the equivocation involved.

Discrimination, Black's Law Dictionary (12th ed. 2024) (quoting Robert K. Fullinwider, The Reverse Discrimination Controversy 11-12 (1980)).

75 Tex. Admin Code § 260.112; Tex. Penal Code § 22.011 (a)(2)(A). *See Michael M. v. Sup. Ct. of Sonoma Cty.*, 450 U.S. 464, 469, 471, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981) (upholding statutory rape statutes targeting only men; "[t]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact

that the sexes are not similarly situation in certain circumstances;" "We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse.").

76 *Gawlik v. State*, 608 S.W.2d 671, 673 (Tex. Crim. App. 1980); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Id.* at 374, 6 S.Ct. 1064; *Armstrong*, 517 U.S. at 464-65, 116 S.Ct. 1480 (quoting *Yick Wo*, 118 U.S. at 373, 6 S.Ct. 1064); *see also Parham v. Hughes*, 441 U.S. 347, 351, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979) ("invidious discrimination").

77 *Invidious discrimination*, Black's Law Dictionary (12th ed. 2024).

78 *Satterwhite v. State*, 726 S.W.2d 81, 84 (Tex. Crim. App. 1986).

79 *Id.*

80 *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282.

81 *Ah Sin v. Wittman*, 198 U.S. 500, 508, 25 S.Ct. 756, 49 L.Ed. 1142 (1905).

82 *Armstrong*, 517 U.S. at 464-65, 116 S.Ct. 1480 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). In the grand jury selection context, purposeful discrimination can be demonstrated by first establishing "that the group is one that is a *recognizable, distinct class, singled out for different treatment* under the laws, as written or applied." *Castaneda v. Partida*, 430 U.S. 482, 494, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977) (emphasis added). The movant must then demonstrate the degree of underrepresentation "by comparing the proportion of the group in the total population called to serve as grand jurors, over a significant period of time." *Id.*

83 *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

84 We note here 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. *See e.g.*, *Students for Fair Admissions v. Harvard Univ.*, 600 U.S. 181, 213, 143 S.Ct. 2141, 216 L.Ed.2d 857 (2023); *see also Fisher v. Univ. of Texas*, 570 U.S. 297, 313, 133 S.Ct. 2411, 186 L.Ed.2d 474 (2013); *Shaw v. Reno*, 509 U.S. 630, 645, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993).

85 *Mason*, 774 F.3d at 829 ("In sum, the *Armstrong* burden is a demanding one and Mason has failed to identify any cases at the Supreme Court or in this circuit where an *Armstrong* violation for *selective law enforcement* has been found. Fourth Amendment claims, by contrast, are often successful.... To be sure, the two challenges are not, at least as a technical matter, mutually exclusive. However, one is clearly more likely to be successful than the other." (emphasis added; internal citations omitted)).

86 *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524.

87 8 U.S.C. § 1325 ("Improper entry by alien"); 8 U.S.C. § 1357 (empowering immigration officers and employees with the ability to arrest migrants "entering or attempting to enter the United States in violation of any law or regulation.").

88 *See* (1 CR 53-59) (documenting the arrest of Monica Martinez for the felony of "Smuggling of Persons" in Kinney County).

89 Under the Eighth Amendment and other derivative state regulations, the State has a legal duty to *safely* house detainees and prisoners, and to protect them from assault from other prisoners. *Farmer v. Brennan*, 511 U.S. 825, 844-45, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).

90 *Armstrong*, 517 U.S. at 464-65, 116 S.Ct. 1480 (quoting *Yick Wo*, 118 U.S. at 373, 6 S.Ct. 1064). We once more note that although OLS was initiated by Governor Abbott, they must defer to the local district attorney's prosecutorial discretion in each county or district. *State v. Zurawski*, 690 S.W.3d 644, 658-59 (Tex. 2024) (citing *State v. Stephens*, 663 S.W.3d 45, 47, 52 (Tex. Crim. App. 2021)).

91 *Armstrong*, 517 U.S. at 464-65, 116 S.Ct. 1480 (quoting *Yick Wo*, 118 U.S. at 373, 6 S.Ct. 1064); *Yick Wo*, 118 U.S. at 373-74, 6 S.Ct. 1064 ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.").

92 *Id.* at 374, 6 S.Ct. 1064 ("No reason for it is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners below, and which, in the eye of the law, is not justified."); *see Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (" 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker ... 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." (internal citations omitted)).

93 Exh. 13. Although there was an expectation that the guidance be followed, it is questionable to immediately label this as an actual policy versus an informational guidance based on Betancourt's knowledge of jail capacities in the five-county region.

94 *See supra* note 77 (defining "invidious discrimination"); *Parham*, 441 U.S. at 351, 99 S.Ct. 1742 (requiring "invidious discrimination" to succeed in an Equal Protections claim).

95 *Gawlik v. State*, 608 S.W.2d 671, 673 (Tex. Crim. App. 1980).

96 *Feeney*, 442 U.S. at 279, 99 S.Ct. 2282.

97 *Armstrong*, 517 U.S. at 464-65, 116 S.Ct. 1480 (quoting *Yick Wo*, 118 U.S. at 373, 6 S.Ct. 1064) (emphasis added); *see also Castaneda*, 430 U.S. at 494, 97 S.Ct. 1272 (requiring under an equal protections claim "the establishment of a recognizable, distinct class, singled out for different treatment under the laws, as written or applied").

98 Exh. 13.

99 *Id.*

100 (2 RR 80).

101 Again, we note that evidence heard by the trial court were limited in scope to the conditions of the processing centers and jails in the five-county area. This was not reflective of processing centers or jails in all 43 counties cooperating with DPS in OLS.

102 (2 RR 112).

103 Out of the 4,076 arrests for criminal trespass, we assume that the "similarly situated" comparator cases that Appellant produced in his brief and elicited through testimony were the *best examples* of unequal treatment of the members of mixed groups. In Appellant's brief, the *best* eight groups provided to the trial court were collectively composed of 26 adult men compared to only 11 adult women. (1 CR 6-7). Similarly, the *best* "similarly situated" mixed-sex groups (including Appellant's group) that the four troopers testified to were collectively composed of 20 adult males compared to 7 adult females. (2 RR 51-52, 57-58, 61, 72).

104 As demonstrated by *Armstrong*, not all disparities in outcome are the result of impermissible discrimination. A group of defendants in *Armstrong* alleged selective prosecution by the federal government based on their race. The *Armstrong* defendants supported their claim with a "study" showing that all 24 other persons adjudicated in 1991 for the same offenses related to cocaine trafficking were also African American. *Armstrong*, 517 U.S. at 459, 116 S.Ct. 1480. Anecdotal affidavits also testified to the existence of many non-black defendants not being prosecuted by the federal government for the same crimes but were instead being prosecuted under more lenient state criminal justice laws. *Id.* at 460-61, 116 S.Ct. 1480.

The appellate court below found in favor of the *Armstrong* defendants, but the Supreme Court reversed them because of a faulty premise: "The Court of Appeals reached its decision because it started with 'the presumption that people of *all* races commit *all* types of crime—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group." *Id.* at 469, 116 S.Ct. 1480 (emphasis in original). After observing that 90% of persons sentenced in 1994 for cocaine trafficking were African American, the Court found the *Armstrong* defendants' study to be insufficient evidence for selective prosecution purposes. *Id.* at 470, 116 S.Ct. 1480.

105 We note that the record demonstrates that the detention centers in question were: (1) originally built well before the beginning of the crisis; (2) designed to *safely* house male prisoners but not women; and (3) converted to detention centers *only in reaction to* the border crisis.

106 We reiterate that the judiciary, without "exceptionally clear evidence" of constitutional abuse, are in a poor position to evaluate the wisdom or folly of the State's exercise of discretion or creation of discretionary policies in regard to the administration of criminal justice. *See Wayte v. United States*, 470 U.S. 598, 607-08, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985).

107 It was consistently asserted, between Captain Betancourt and the other four testifying DPS Troopers, that had jail capability and space been available, both women and men would all be arrested. Nevertheless, Appellant's case might have reached a different result had he been able to demonstrate that the demographical makeup of the population illegally crossing the border had a high percentage of women or that local detention centers had an actual ability and space to house large numbers of women.

108 (2 RR 112) (trial judge observing "it's more a matter of sheer number than anything else"); *see Wayte,* 470 U.S. at 607-08, 105 S.Ct. 1524.

109 *See* 8 U.S.C. § 1325 (a) ("Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading misrepresentation or the willful concealment of a material fact, shall for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.").

110 *Armstrong*, 517 U.S. at 463, 116 S.Ct. 1480.

1 *Wayte v. United States*, 470 U.S. 598, 608-10, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985).

2 *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."); *cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) ("[A]n alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation.").

3 *Conley v. United States*, 5 F.4th 781, 789 (7th Cir. 2021).

4 *Id.* at 789, 797-98 (After the police engage in selective enforcement, "[i]t does not matter if prosecutors then pursue each case equally because the pool of defendants itself was racially selected.") (but rejecting selective-enforcement claim because purposeful discrimination was not shown).

5 *See United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264-65 (10th Cir. 2006) ("To establish a discriminatory effect in a selective-prosecution race case, the claimant must show that similarly-situated individuals of a different race were not prosecuted. The elements are essentially the same for a selective-enforcement claim.... Mr. Alcaraz-Arellano's claims fail on the intent prong of the tests for dismissal and discovery.") (quotation marks, brackets, italics, and citation omitted; ellipsis inserted).

6 *United States v. Nichols*, 512 F.3d 789, 794 (6th Cir. 2008).

7 *United States v. Williams*, 431 F.3d 296, 299 (8th Cir. 2005) (addressing claim that a trooper engaged in racial profiling in making a traffic stop).

8 *United States v. Chavez*, 281 F.3d 479, 486-87 (5th Cir. 2002) ("Neither the Supreme Court nor our Court has ruled that there is a suppression remedy for violations of the Fourteenth Amendment's Equal Protection Clause, and we do not find it necessary to reach that issue here. For even if we assume arguendo that the Fourteenth Amendment does provide such an exclusionary remedy, it is plain that Chavez has failed to offer proof of discriminatory purpose, a necessary predicate of an equal protection violation.").

9 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

10 *See Frederick Douglass Found., Inc. v. District of Columbia*, 82 F.4th 1122, 1144 (D.C. Cir. 2023); *Conley*, 5 F.4th at 789; *Hassan v. City of New York*, 804 F.3d 277, 294 (3d Cir. 2015). *See also Nieves v. Bartlett*, 587 U.S. 391, 414-15, 139 S.Ct. 1715, 204 L.Ed.2d 1 (2019) (Gorsuch, J., dissenting); *T.J. v. Rose*, 635 F. Supp. 3d 65, 70 (D.R.I. 2022); *United States v. Mumphrey*, 193 F. Supp.3d 1040, 1056, 1058 (N.D. Cal. 2016).

11 118 U.S. at 374, 6 S.Ct. 1064.

12 *Id.*

13 517 U.S. 456, 461, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996).

14 *Id.* at 456, 466, 116 S.Ct. 1480.

15 *Id.* at 461 n.2, 116 S.Ct. 1480.

16 *Rose*, 635 F. Supp.3d at 70. *See also id.* at 70-71 (discussing *Mumphrey*, cited *supra* at n.——, as also advocating dismissal as a remedy). The Court claims I "selectively" quote from *Rose*, but I make it clear that the federal district court in that case advocated for dismissal as a remedy. And as for the Court's reliance on *Rose*, the federal district court in that case claimed that the "strong weight of authority" supported dismissal as a remedy, but this supposed strong weight of authority consisted of another federal district court decision, cases from the Seventh and Tenth Circuits, and the Supreme Court's decision in *Yick Wo*. *See id.* My earlier discussion of federal decisions shows that the federal district court's assertion is inaccurate. Given that the court in *Rose* was a trial court, its opinion regarding the "strength" of the authority in favor of its position is of little, if any, persuasive value. The point I am making is that the issue is unsettled, which even the court in *Rose* grudgingly acknowledged.

17 *United States v. Crews*, 445 U.S. 463, 474, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980).

18 *Imbler v. Pachtman*, 424 U.S. 409, 427, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); *Conley*, 5 F.4th at 793.

19 *Conley*, *supra* at 793-94, (citing *Kalina v. Fletcher*, 522 U.S. 118, 126, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997), and *Taylor v. Ways*, 999 F.3d 478, 490 (7th Cir. 2021)) ("And in such a case, qualified immunity would likely not protect the police because the plaintiff has already proven racial animus.... 'Any reasonable official ... would have known that intentional racial discrimination ... was unconstitutional.' ") (first ellipsis inserted, second and third ellipses in *Conley*, citation omitted).

20 *Ex parte Couch*, 678 S.W.3d 1, 4 (Tex. Crim. App. 2023).

21 *Ex parte Perry*, 483 S.W.3d 884, 896 (Tex. Crim. App. 2016) (plurality op.).

22 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977).

23 *Perry*, 483 S.W.3d at 896.

24 *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 267-70, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) ("Even when the vindication of the defendant's rights requires dismissal of charges altogether, the conditions justifying an interlocutory

appeal are not necessarily satisfied.... It is only a narrow group of claims which meet the test of being "effectively unreviewable on appeal from a final judgment," and the claim of prosecutorial vindictiveness is, we hold, not one of them.").

25 *United States v. Sasway*, 686 F.2d 748 (9th Cir. 1982) (noting "the lack of 'substantive difference' between vindictive and selective-prosecution claims" and holding that *Hollywood Motor Car Co.* required the interlocutory appeal involving a selective-prosecution claim to be dismissed).

26 *Jarkesy v. S.E.C.*, 803 F.3d 9, 26 (D.C. Cir. 2015) (The "general rule against interlocutory appeals encompasses selective-prosecution claims, which bear a close resemblance to Jarkesy's class-of-one equal protection challenge."); *Claiborne v. United States*, 465 U.S. 1305, 1306, 104 S.Ct. 1401, 79 L.Ed.2d 665 (1984) (Rehnquist, J., sitting as circuit judge) (denying a stay because the claim appeared "to be a species of 'vindictive' or 'selective' prosecution," and *Hollywood Motor Car Co.* would bar an interlocutory appeal); *United States v. Bird*, 709 F.2d 388 (5th Cir. 1983) (noting that "the lower federal courts have also found nonappealable under the collateral order doctrine denials of motions to dismiss based on selective prosecution").

27 *Hollywood Motor Car Co.*, 458 U.S. at 267, 102 S.Ct. 3081 (quoting *United States v. MacDonald*, 435 U.S. 850, 860-61, 98 S.Ct. 1547, 56 L.Ed.2d 18 (1978)).

28 *Id.*

29 *See Ex parte Doster*, 303 S.W.3d 720, 727 (Tex. Crim. App. 2010).

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672 S.W.3d 696
Court of Appeals of Texas, San Antonio.

EX PARTE Luis Alfredo APARICIO

No. 04-22-00623-CR
|
Delivered and Filed: June 21, 2023
|
Discretionary Review Granted August 23, 2023
|
Discretionary Review Granted January 17, 2024

Synopsis
Background: Noncitizen filed application for writ of habeas corpus, seeking dismissal of criminal charge of trespassing on private property, and alleging that state engaged in selective prosecution of men, and not women, as part of Department of Public Safety (DPS) operation to deter illegal border crossings and protect border communities, in violation of the Equal Protection Clause and the Texas Constitution's Equal Rights Amendment. The County Court, Maverick County, Mark R. Luitjen, J., denied application. Noncitizen appealed.

Holdings: The Court of Appeals, en banc, Rodriguez, J., held that:

noncitizen was "restrained," within the meaning of statute governing use of writ of habeas corpus;

as matter of first impression, noncitizen's selective-prosecution claim was cognizable as pretrial habeas corpus claim;

operation had a discriminatory effect; and

gender was a motivating factor for noncitizen's arrest.

Reversed and remanded.

***700** From the County Court, Maverick County, Texas, Trial Court No. 3976, Honorable Mark R. Luitjen, Judge Presiding[1]

Attorneys and Law Firms

APPELLANT ATTORNEY: Douglas Keller, Lubbock Private Defenders Office, 1401 Crickets Ave., Lubbock, TX 79401, Kathy Starling, Attorney at Law, 1506 Steves Ave., San Antonio, TX 78210.

APPELLEE ATTORNEY: Jaime Iracheta, Maverick County Attorney's Office, 208 Converse St., Eagle Pass, TX 78852, Luis Gurrola-Villarreal, Assistant County Attorney, P.O. Box 3899, Eagle Pass, TX 78853-3899.

Sitting en banc: Rebeca C. Martinez, Chief Justice, Patricia O. Alvarez, Justice, Luz Elena D. Chapa, Justice, Irene Rios, Justice, Beth Watkins, Justice, Liza A. Rodriguez, Justice, Lori I. Valenzuela, Justice

OPINION

Opinion by: Liza A. Rodriguez, Justice

***701** As part of Operation Lone Star, Luis Alfredo Aparicio, a noncitizen, was arrested for trespassing on private property in Maverick County.[2] He filed an application for writ of habeas corpus seeking dismissal of the criminal charge, arguing the State's selective prosecution of him violated the Constitution's Equal Protection Clause and the Texas Constitution's Equal Rights Amendment. *See* U.S. Const. amend. XIV; Tex. Const. art. 1, § 3(a). After holding an evidentiary hearing on the merits, the trial court denied his requested relief. Aparicio appeals, arguing the trial court erred in denying his relief because the State's practice of prosecuting men, and not women, for criminal trespass as part of Operation Lone Star violated his federal and state constitutional rights to equal protection. We reverse the trial court's order and remand for further proceedings consistent with this opinion.

Background

On March 6, 2021, Governor Greg Abbott directed the Texas Department of Public Safety ("DPS") to initiate Operation Lone Star ("OLS") and "devote additional law enforcement resources toward deterring illegal border crossings and protecting [ ] border communities." He directed "DPS to use available resources to enforce all applicable federal and state laws to prevent the criminal activity along the

border, including criminal trespassing, smuggling, and human trafficking, and to assist Texas counties in their efforts to address those criminal activities." As part of OLS, Aparicio was arrested for criminal trespass. *See* Tex. Penal Code § 30.05(a). He then filed a pretrial application for writ of habeas corpus, arguing the State was selectively prosecuting him in violation of his equal protection rights.

At the habeas corpus hearing, Aparicio testified that on May 3, 2022, he was with a group of people when he was arrested in Maverick County for criminal trespass. According to Aparicio, there were six people in his group: two females and four males (one of whom was seventeen years old). The two females and the minor male were separated from his group. Aparicio and the remaining men were arrested and transported to a detention facility in Val Verde County.

Also at the hearing, several witnesses testified about OLS and its implementation. Claudia Molina of the Lubbock Private Defender's Office discussed the process through which an individual who is arrested for criminal trespass under OLS ***702** obtains appointment of counsel. According to Molina's testimony, the Lubbock Private Defender's Office ("LPDO"), in conjunction with OLS, was awarded a grant by the Texas Indigent Defense Commission to appoint counsel to represent individuals who have been brought before a magistrate or are being held at detention facilities. That is, when an individual is arrested and brought before a magistrate, his paperwork is sent to an OLS inbox at LPDO, which then reviews the paperwork and assigns appointed counsel. Molina testified that all individuals arrested under OLS in Webb, Jim Hogg, Maverick, Kinney, and Val Verde counties receive appointed counsel through LPDO. According to Molina, "the primary misdemeanor arrest" in conjunction with OLS is criminal trespass, while "the primary felony arrest" is "smuggling of persons." As part of OLS, LPDO first began appointing counsel to defendants arrested in Maverick County on March 22, 2021.

In preparation for her testimony, Molina ran reports through LPDO's case management system, which she does as part of her regular duties. Molina testified that three days before the habeas hearing, she ran reports on LPDO's case management system and determined that as part of OLS, 470 people had been arrested in Maverick County for misdemeanor offenses. None of the 470 individuals arrested were female.

With regard to the five counties that are part of OLS (Webb, Kinney, Maverick, Jim Hogg, and Val Verde), Molina testified that 4,076 people had been arrested for misdemeanor offenses as part of OLS. Again, none of the 4,076 people arrested for misdemeanor offenses were female.

Molina further testified she ran a report to determine how many women were appointed counsel for misdemeanor offenses during the week of May 3, 2022 (i.e., the week Aparicio was arrested). Again, none of the individuals arrested were female. Molina was then asked:

> Q: So, to be clear, counties participating in Operation Lone Star, from the documentation you reviewed and from your personal experience, arrest and prosecute women for felonies in Operation Lone Star?
>
> A: Yes.
>
> Q: But counties participating in Operation Lone Star, including Maverick County, are choosing not to prosecute women for misdemeanors?
>
> A: Yes.

Molina testified that when a person is arrested under OLS, part of the paperwork forwarded to LPDO includes a probable cause statement, which LPDO reviews "in order to determine how to assign counsel." Molina testified that based on her review of those probable cause statements, it was not uncommon for both women and men to be found on the same private property; however, the women were not prosecuted for criminal trespass.

DPS Captain Joel Betancourt "oversee[s] a district which encompasses nine counties for DPS." Since the inception of OLS in March 2021, Captain Betancourt has been involved in meetings with prosecutors and local officials to plan how to implement and execute OLS. With regard to Maverick County, Captain Betancourt testified he met with Maverick County officials, including the sheriff, the county judge, and members of the prosecutor's office to discuss implementation of OLS. During his testimony, Captain Betancourt agreed with the following facts:

- One reason for OLS was an increase in "crossings from Mexico into Texas."
- One of OLS's purposes was "to deter this unauthorized migration."
- ***703** OLS "tries to deter individuals through prosecuting people for various crimes," including

misdemeanor criminal trespass and the felony offense of human smuggling.

- Many counties at or near the border are involved with OLS, including Maverick, Kinney, Val Verde, Webb, and Jim Hogg counties.
- Governor Abbot has declared a state of disaster in each of those five counties.
- Thousands of individuals have been prosecuted for misdemeanor criminal trespass as part of OLS.
- DPS has a lead role in deciding what resources are employed for OLS.

Captain Betancourt further authenticated an August 12, 2021 email he sent to his "two lieutenants" and an assistant. The subject of the email was "Guidance on Arrests for Criminal Trespass." According to Captain Betancourt, the purpose of the email was "to provide guidance to people about who to arrest for purposes of" OLS and who should instead be sent to immigration authorities. The email, which was admitted in evidence without objection, states the following:

> We will continue to arrest those immigrants who are trespassing on ***private*** property (Only in Val Verde and Kinney County) where the landowner has either agreed to file a complaint or agreed to have us sign them on their behalf. The criteria has been expanded to include the ***majority*** of ***single adult males***. While it would be difficult to cover every single scenario, below are some examples:
>
> Father, Mother, and Child under ***18*** – Family Unit. Release to BP.
>
> Father, Mother, and Child over 18 ***and*** are trespassing-Male father will be arrested. Mom and adult child will be released to BP.
>
> Uncle and ***adult*** nephew and are criminal trespassing-Arrest both.
>
> Uncle and child nephew-Family Unit, refer to BP.
>
> ***The basic common denominators are:***
>
> If there is a child who is part of a family. We will refer to BP.
>
> If the family consists of male adults (18 and over) we will arrest, ***if they are trespassing***.
>
> Please let me know if you have any questions.
>
> Joel A. Betancourt
> Captain
> South Texas Region – Del Rio

(emphasis in original).

Captain Betancourt explained that this email expanded a former policy to include "the rest of the majority of single adult males." He further agreed the policy as stated in the email did not include arresting any women for criminal trespass. With regard to the felony offense of human trafficking, Captain Betancourt testified that both men and women are arrested and prosecuted for human trafficking.

On cross-examination, the State pointed out that Captain Betancourt's email was titled "guidance" and asked Captain Betancourt to explain what "guidance" meant to him. Captain Betancourt testified that guidance meant "a set of rules or set of expectations that should be adhered to or that need to be adhered to." Captain Betancourt then again confirmed that when women are found in a group of individuals who are trespassing, the women are not arrested, but released to the custody of border patrol, while the "men go to the processing center in Val Verde County." Captain Betancourt described the processing center in Val Verde as being a large tent with flooring and air conditioning. Like a county jail, there is a "booking ***704** process, a medical process, mental health screening," and "holding cells." Because there is no segregation at the facility, no women are held there.

On redirect examination, Captain Betancourt was again asked about his "guidance" and whether he expected state troopers working underneath him to follow his guidance. He replied that he did. Defense counsel then asked,

> Q: You expect your guidance here to be followed, correct? The troopers don't have [the] ability to ignore what you have said, correct?
>
> A: That is correct.

Captain Betancourt agreed that there are facilities all along the border that allow for the detention of women who commit crimes. Captain Betancourt further agreed that individuals detained as part of OLS are ultimately sent to two detention facilities, which had been modified by the State to be proper pretrial holding facilities. Neither facility had been designed to hold women.

DPS Trooper Sara Palos, the prosecutorial liaison for Maverick County, testified she is the intermediary between DPS and the county attorney's office. According to Trooper Palos, her direct supervisor is Sergeant Quiroga, which was "basically" "the same thing as working for Captain Betancourt." Trooper Palos testified that on August 12, 2021, she received Captain Betancourt's "guidance" email as part of a long email chain. She was asked if this guidance was followed in Maverick County and replied, "Yes." When asked why Maverick County would be following Captain Betancourt's guidance email when his email refers only to Kinney and Val Verde counties, Trooper Palos explained that when Captain Betancourt first sent his email on August 12, 2021, DPS was not working in Maverick County "as far as criminal trespassing."

Q: And when Maverick County opened up, would you say that's the policy?

A: This is the last directive that we received. That's what we're following.

According to Trooper Palos, "The directive is whenever we have a group, any female that's within that group, that female —I mean, if there [are] any females within that group, females are going to be a referral and turned over to the custody of U.S. Border Patrol." She further explained that DPS does "not transport or hold females in the detention center, in the Val Verde Detention Center." While DPS charges men with criminal trespass, women are not charged and instead referred to border patrol.

In addition to Captain Betancourt and Trooper Palos, several DPS troopers testified at the habeas hearing about misdemeanor arrests they had made pursuant to OLS. Their testimony about the process they followed was consistent. The troopers had, respectively, come across groups of both women and men in Maverick, Kinney, and Jim Hogg counties, whom they believed were trespassing on private property. While the troopers had arrested men under those circumstances for criminal trespass, not a single trooper who testified had ever arrested a woman for criminal trespass—even though the troopers admitted they believed the women had also been committing the offense of trespass. They testified consistently that the men were taken to the holding facilities that had been constructed as part of OLS. The women were "released" to border patrol. None of the troopers memorialized any identifying information about the women in their reports.

When asked why he had not arrested any women for criminal trespass, DPS Trooper Brandon Aquino testified that he ***705** just "follow[s] orders and [his] orders were there is no space for females." "So [he is] not going to overstep all that." He testified that there was no policy that he knew about of not arresting women for criminal trespass, but that if the jail does not accept women, they are then taken to border patrol. Trooper Aquino was then asked the following:

Q: But it's also your testimony you are not calling the Maverick County Jail to see if they will accept a woman who is committing an alleged crime on Maverick County property, is that correct?

A: I did not call Maverick County.

Q: So it is correct you do not call Maverick County to see if they will take the women?

A: I didn't say that. I did not call Maverick County.

Q: I am asking you: Do you call Maverick County when a woman is part of a group that is arrested for Operation Lone Star? Do you call their jail?

A: I don't remember.

Q: Have you ever called their jail?

A: Yes.

Q: For a group of women?

A: Not for a group of women.

Similarly, DPS Trooper Valentin Cantu testified that when he came across a group of three men and one woman in Jim Hogg County, he arrested the men, but not the woman, because the holding facility in Val Verde County would not take women. Instead, Trooper Cantu released the woman to border patrol. He was then asked why he did not take the woman in question to the Jim Hogg County jail. He replied that he would have had to call the Jim Hogg County jail in advance, which he did not do. Trooper Cantu was then asked:

Q: Is it your understanding [that] there is a policy that if a woman were found to be smuggling, she should be arrested?

A: Yes.

Q: And is it your understanding that there is a policy to not, like you say, not put charges on the women [for criminal trespass], but give them to border patrol?

A: That's the guidance we receive.

DPS Trooper Guadalupe Santos testified specifically about arresting Appellant Aparicio on May 3, 2022. He testified he discovered a group of six people, one of which was Aparicio, trespassing in Maverick County. The group consisted of three men, two women, and a juvenile male. Trooper Santos testified the three men, including Aparicio, were arrested for criminal trespass. Even though Trooper Santos testified he believed the two women were also trespassing, they were not arrested. Because Trooper Santos did not arrest the women, he did not put any identifying information about them in his report.

When asked why he had not arrested the women, Trooper Santos stated, "The jail does not accept females; therefore, charging them—I get the jail capacity cannot take females; therefore, charging them is not an option at that point." According to Trooper Santos, women who are believed to be committing felony smuggling are sometimes arrested—"It also depends with jail capacity status as well." Because Trooper Santos had given the explanation of jail capacity, he was asked whether he had called the jail regarding the two women found trespassing with Aparicio on May 3, 2022. Trooper Santos testified he had not called the jail. When asked whose decision it was not to charge the women, Trooper Santos replied, "Well, it's going to be the peace officer's decision."

***706** Q: Have you ever made a decision to charge a female for a criminal trespass under Operation Lone Star?

A: I have not.

Q: And you make that decision based on gender, correct?

A: It's based on the fact that the jail will not allow me to arrest the females. If they did, they would be arrested every single time.

Q: The Maverick County Jail would not allow you to arrest females?

A: Well, they won't take them. They are not taking them into their custody; therefore, I can't do anything with them because they are not going to take them.

Q: So you're saying, I'm okay in Maverick County, the jail is not going to take me, so I'm free and clear. Is that your testimony?

A: Well, that's not my testimony. My testimony is that at the time, the jail would not take them; therefore, they were referred to border patrol—that way they can go through that process.

Trooper Santos was asked the last time he came across a woman trespassing. He replied Saturday. He did not call the Maverick County jail. He did not arrest the woman.

At the end of the hearing, the trial court made the following findings on the record:

(1) "In these five counties, based upon testimony that was received, there had been no females arrested for criminal trespass."

(2) "The next finding is that women are not arrested by ... DPS troopers."

(3) "There are all kinds of different law enforcement agencies around here and I don't know anything about those, just these DPS cases. Women are not released. They are sent to the, I guess, border patrol, from what I heard, and they are in custody at the time they are released by DPS troopers to border patrol."

(4) "The next finding is these—I think you called them central processing or detention centers—do not take women. That there are central processing centers apparently in Val Verde and perhaps in Jim Hogg County."

(5) "That the Defense Exhibit Number 13 indicates that there are exceptions in the DPS troopers—Captain Betancourt's guidance on arrest for criminal trespass. There are exceptions for elderly 60-plus males, or injured males, for example, uncle and child, nephew family unit referred to border patrol. Father, mother, and child under 18. Family unit released to border patrol. But not just defendants like this defendant that are favored, if you will, by this policy. Women in particular are favored."

The trial court then denied Aparicio's requested relief. In explaining its ruling, the trial court relied on the State's argument that charges could still be brought against the women who had been found trespassing:

> But the statute of limitations argument makes [Aparicio's equal protection argument] fail. I mean, it really does. I don't think there is a chance in you know where that he's ever going to prosecute one of these women, but he could if he chose to. And until then, you know, the argument of sex discrimination fails.

Aparicio appealed.

Standard of Review

In reviewing a trial court's decision to grant or deny habeas corpus relief, ***707** we defer to the trial court's assessment of the facts when those facts turn on an evaluation of credibility and demeanor. *See Ex parte Wheeler*, 203 S.W.3d 317, 324 (Tex. Crim. App. 2006); *Ex parte Perusquia*, 336 S.W.3d 270, 274 (Tex. App.—San Antonio 2010, pet. ref'd); *Ex parte Quintana*, 346 S.W.3d 681, 684 (Tex. App.—El Paso 2009, pet. ref'd). Thus, we view the facts in the light most favorable to the court's ruling and will uphold it absent an abuse of discretion. *Ex parte Wheeler*, 203 S.W.3d at 324; *Ex parte Perusquia*, 336 S.W.3d at 274-75; *Ex parte Quintana*, 346 S.W.3d at 684. "We afford almost total deference to the trial court's determination of historical facts that are supported by the record, and to mixed questions of law and fact, when the resolution of those questions turn[s] on evaluations of credibility and demeanor." *Ex parte Perusquia*, 336 S.W.3d at 275. "If the resolution of the ultimate question turns on an application of the law, we review the determination de novo." *Id.*

Selective-Prosecution Claim on the Basis of Equal Protection

In his pretrial writ application, Aparicio argued the State's selective prosecution of him based on his gender violated his rights under the Equal Protection Clause of the United States Constitution and the Equal Rights Amendment to the Texas Constitution. *See* U.S. Const. amend. V, XIV; Tex. Const. art. I, § 3a. The principle of equal protection guarantees that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *see Walker v. State*, 222 S.W.3d 707, 710 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd) (quoting *City of Cleburne*, 473 U.S. at 439, 105 S.Ct. 3249). The same standards for equal protection challenges under the United States Constitution are applied to the Texas Constitution. *Walker*, 222 S.W.3d at 711.

"Prosecutors retain broad discretion in enforcing both the nation's and a state's criminal laws." *Roise v. State*, 7 S.W.3d 225, 243 (Tex. App.—Austin 1999, pet. ref'd) (citing *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985)). "If the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether to prosecute and what charge to file generally rests entirely within his or her discretion." *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004) (citation omitted). Because of this discretion, there is a presumption that a prosecutor has acted within his or her duties and in good faith. *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). Nonetheless, prosecutorial discretion is not absolute and is subject to constitutional constraints, including equal protection principles. *See id.*; *Roise*, 7 S.W.3d at 243. "A defendant may demonstrate that the administration of a criminal law is 'directed so exclusively against a particular class of persons ... with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." *Armstrong*, 517 U.S. at 464-65, 116 S.Ct. 1480 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373, 6 S.Ct. 1064, 30 L.Ed. 220 (1886)). Accordingly, a prosecutor's decision to prosecute "may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.' " *Armstrong*, 517 U.S. at 464, 116 S.Ct. 1480 (quoting *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962)); *Roise*, 7 S.W.3d at 243 (quoting *Oyler*, 368 U.S. at 456, 82 S.Ct. 501). "The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.' " ***708** *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480 (quoting *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524).

"Because we presume that a prosecution for the violation of a criminal law is undertaken in good faith and in a nondiscriminatory fashion, the burden falls on the defendant to establish a prima facie case of selective prosecution." *Robles v. State*, 585 S.W.3d 591, 597 (Tex. App.—Houston [14th Dist.] 2019, pet. ref'd). The defendant must demonstrate that the prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480 (quoting *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524). To establish a discriminatory effect in a case based on gender discrimination, the defendant must show similarly situated individuals of the opposite sex were not prosecuted for the

same conduct. *See Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480 (stating standard with respect to race discrimination); *Robles*, 585 S.W.3d at 597 (applying *Armstrong* standard to gender discrimination). To demonstrate that the prosecution was motivated by a discriminatory purpose, the defendant must show that the government's selection of the defendant for prosecution was based on an impermissible consideration, such as race, religion, or other desire to prevent the exercise of constitutional rights. *Wayte*, 470 U.S. at 610, 105 S.Ct. 1524. Selecting a defendant for prosecution on the basis of sex is an impermissible consideration. *See Robles*, 585 S.W.3d at 597; *Lovill v. State*, 287 S.W.3d 65, 79 (Tex. App.—Corpus Christi-Edinburg 2008), *rev'd on other grounds*, 319 S.W.3d 687 (Tex. Crim. App. 2009); *see also State v. McCollum*, 159 Wis.2d 184, 464 N.W.2d 44, 52 (Wis. Ct. App. 1990) (affirming dismissal of prostitution charges on equal protection grounds where female defendants alleged selective enforcement on the basis of gender).

Once the defendant establishes a prima facie case of selective prosecution in violation of equal protections rights, the burden shifts to the State to justify the discriminatory treatment. *Ex parte Quintana*, 346 S.W.3d 681, 685 (Tex. App.—El Paso 2009, pet. ref'd); *Lovill*, 287 S.W.3d at 79. Because a federal constitutional equal protection claim on the basis of gender discrimination is subject to intermediate scrutiny, the State must demonstrate that the discriminatory classification is substantially related to an important governmental interest. *See Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988); *Casarez v. State*, 913 S.W.2d 468, 493 (Tex. Crim. App. 1995) (op. on reh'g). With regard to an equal protection claim on the basis of gender under the Texas Constitution, the State's discriminatory conduct is subject to strict scrutiny. *See Bell v. Low Income Women of Tex.*, 95 S.W.3d 253, 257 (Tex. 2002).

"A selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *Armstrong*, 517 U.S. at 463, 116 S.Ct. 1480. Because it has no bearing on the determination of actual guilt, "it is an issue for the court to decide, not an issue for the jury." *Galvan v. State*, 988 S.W.2d 291, 295 (Tex. App.—Texarkana 1999, pet. ref'd). With these legal principles in mind, we turn to the threshold issue of whether Aparicio's selective-prosecution claim is cognizable in a pretrial habeas proceeding.[3] *See* ***709** *Ex parte Dominguez Ortiz*, No. 04-22-00260-CR, 2023 WL 1424651, at *1 (Tex. App.—San Antonio Feb. 1, 2023, no pet.) (en banc).

A. Is Aparicio's Pretrial Habeas Claim of Selective Prosecution Cognizable?

"Neither a trial court nor an appellate court should entertain an application for writ of habeas corpus when there is an adequate remedy by appeal." *Ex parte Weise*, 55 S.W.3d 617, 619 (Tex. Crim. App. 2001). "Additionally, an applicant must be illegally restrained to be entitled to relief." *Id.* Here, Aparicio was restrained of his liberty within the meaning of article 11.01 of the Texas Code of Criminal Procedure when he was charged with criminal trespass and released on bond. *See id.*; *Ex parte Zavala*, 421 S.W.3d 227, 230 (Tex. App.—San Antonio 2013, pet. ref'd). Because Aparicio meets the restraint requirement, we next consider whether he is permitted to bring his claim through a pretrial writ application. *See Ex parte Weise*, 55 S.W.3d at 619.

"Pretrial habeas, followed by an interlocutory appeal, is an extraordinary remedy" that is "reserved 'for situations in which the protection of the applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory review.' " *Ex parte Ingram*, 533 S.W.3d 887, 891-92 (Tex. Crim. App. 2017) (quoting *Ex parte Weise*, 55 S.W.3d at 620). "Denial of relief in pretrial habeas implicates the right to an interlocutory appeal, itself an extraordinary remedy." *Ex parte Edwards*, 663 S.W.3d 614, 616 (Tex. Crim. App. 2022). "Consequently, appellate courts take care to foreclose from pretrial habeas 'matters that in actual fact should not be put before appellate courts at the pretrial stage.' " *Id.* (quoting *Ex parte Doster*, 303 S.W.3d 720, 724 (Tex. Crim. App. 2010)).

"In determining whether an issue is cognizable on habeas, '[the court of criminal appeals] ha[s] considered a variety of factors." *Ex parte Weise*, 55 S.W.3d at 619. It has "looked at whether the alleged defect would bring into question the trial court's power to proceed." *Id.*; *see Ex parte Trillo*, 540 S.W.2d 728, 733 (Tex. Crim. App. 1976) (explaining pretrial habeas was appropriate "because it involve[d] a question of the very power of the lower court to proceed and to restrain the appellant's liberty while it does proceed"), *overruled on other grounds by Aguilar v. State*, 621 S.W.2d 781, 785 (Tex. Crim. App. 1981). "Along these same lines, [the court] ha[s] found that a pretrial application is not appropriate when resolution of the question presented, even if resolved in favor of the applicant, would not result in immediate release." *Ex parte Weise*, 55 S.W.3d at 619.

The court of criminal appeals has also considered whether the constitutional protection "would be effectively undermined" if the issue was not cognizable in a pretrial habeas proceeding. *Id.* In holding a claim involving double jeopardy is cognizable in a pretrial habeas proceeding, the court of criminal appeals explained that "the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Ex parte Robinson*, 641 S.W.2d 552, 554 (Tex. Crim. App. 1982). The guarantee ***710** against double jeopardy "thus protects interests wholly unrelated to the propriety of any subsequent conviction" and "would be significantly undermined by postponement of review until after conviction." *Id.* (citing *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982)). Similarly, the court of criminal appeals has allowed pretrial writs to assert constitutional protections with respect to bail. *Ex parte Weise*, 55 S.W.3d at 619-20.

In contrast, the court of criminal appeals has disallowed the use of a pretrial writ to assert "constitutional rights to a speedy trial, challenge a denial of a pretrial motion to suppress, or make a collateral estoppel claim that does not allege a double jeopardy violation." *Id.* at 620. The court reasoned "[t]hese issues are better addressed by a post-conviction appeal." *Id.*

Additionally, the court of criminal appeals has stated that "pretrial habeas is generally unavailable 'when the resolution of a claim may be aided by the development of a record at trial.' " *Ex parte Ingram*, 533 S.W.3d at 892 (quoting *Ex parte Doster*, 303 S.W.3d at 724). According to the court, the "only recognized exception to the general prohibition against record development on pretrial habeas is when the constitutional right at issue includes a right to avoid trial, such as the constitutional protection against double jeopardy." *Id.*

Recently, in *Ex parte Dominguez Ortiz*, 2023 WL 1424651, at *1, we considered whether a noncitizen, who was arrested for trespassing on private property pursuant to OLS and charged with criminal trespass, had brought a cognizable pretrial habeas claim. The appellant had been released on bond and then removed from the United States. *Id.* He filed a pretrial application for writ of habeas corpus, seeking dismissal of his criminal trespass charge because of purported violations of his due process right under the Fifth Amendment and his right to counsel under the Sixth Amendment. *Id.* He argued (1) the State had taken an active role in facilitating his expulsion or deportation, and (2) because of his removal, he was unable to prepare or return to his in-person trial setting without federal authorization. *Id.* Importantly, *Dominguez Ortiz* did not assert a selective-prosecution claim under the Constitution's Equal Protection Clause or the Texas Constitution's Equal Rights Amendment.

In holding that the appellant's pretrial habeas claim was not cognizable, we reasoned that his claims were "as-applied challenges with unresolved factual matters" that would be aided by development of a record. *Id.* at *6. While we recognized the court of criminal appeals had "allowed exceptions for as-applied claims to be asserted in pretrial habeas writs," we emphasized it did so when "the resolution of the claim in the applicant's favor would result in 'immediate release' " and when "the constitutional right at issue include[d] a right to avoid trial." *Id.* (quoting *Ex parte Ingram*, 533 S.W.3d at 892). In looking at these exceptions for as-applied claims, we concluded further factual development of the record was necessary before we could determine whether resolution of the appellant's claim would result in the appellant's immediate release. *See id.* "[E]ven as to remedy, further record development may be necessary, and a tailored remedy may show habeas relief to be improper." *Id.* We noted that "[r]ecord development with a pretrial writ, nevertheless, may be appropriate when 'the particular constitutional right at issue ... is the type that would be effectively undermined if not vindicated prior to trial.' " *Id.* at *6 (quoting *Ex parte Perry*, 483 S.W.3d 884, 896 (Tex. Crim. App. 2016) (plurality op.)). ***711** However, we concluded that the appellant's right to counsel claim under the Sixth Amendment could "be vindicated after trial," and that his due process claim under the Fifth Amendment "is not a type of claim that is 'effectively undermined if not vindicated prior to trial' because the right to prepare for trial does not encompass a right to avoid trial." *Id.* at *7 (quoting *Ex parte Perry*, 483 S.W.3d at 896). Finally, we concluded judicial economy considerations did not weigh in favor of determining the appellant's pretrial habeas claim was cognizable because the "aid of further factual development to resolving appellant's claims suggests judicial economy will benefit our refusal to consider appellant's claims on pretrial habeas." *Id.* at *8. We thus held the appellant's pretrial habeas claim was not cognizable.

Our holding in *Ex parte Dominguez Ortiz* rested on "important facts [being] in dispute or undeveloped." *See id.* at *4. Here, however, the facts are undisputed. The testimony was consistent that the State, for purposes of OLS, had not built detention centers to hold females. DPS, through Captain Betancourt's guidance email, had instructed state

troopers arresting individuals for criminal trespass as part of OLS to not arrest any women. Captain Betancourt testified "guidance" to him meant "a set of rules or set of expectations that should be adhered to or that need to be adhered to." He testified he expected the state troopers working under him to follow his guidance. Further, the statistics provided showed that 4,076 people had been arrested for misdemeanor offenses with respect to OLS and not a single person arrested was female. Similarly, the statistics showed that 470 individuals had been arrested in Maverick County (the county in which Aparicio was arrested) for misdemeanor offenses with respect to OLS; none of the individuals arrested was a woman. Finally, every state trooper who testified was consistent in explaining that he had arrested men for criminal trespass but had never arrested a woman for the same offense. These state troopers consistently explained that they did not arrest women for criminal trespass because the detention facilities modified for purposes of OLS did not hold females. Thus, this record is fully developed and undisputed with regard to the practice of not arresting women for the offense of criminal trespass with respect to OLS.

Further, we note that Aparicio's constitutional right to equal protection would be effectively undermined if not vindicated before trial. *See Ex parte Weise*, 55 S.W.3d at 619-20 (considering whether the constitutional protection "would be effectively undermined" if the issue was not cognizable in a pretrial habeas proceeding). "[A] conviction is void under the Equal Protection Clause if the prosecutor deliberately charged the defendant on account of his race" or other prohibited classification like gender. *Vasquez v. Hillery*, 474 U.S. 254, 264, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986); *see Lovill*, 287 S.W.3d at 81 (applying *Vasquez* in context of gender discrimination). Thus, if Aparicio's selective-prosecution claim on the basis of equal protection has merit, any conviction resulting from a trial would be void, and he would be entitled to release. *See Vasquez*, 474 U.S. at 264, 106 S.Ct. 617; *Lovill*, 287 S.W.3d at 81; *see also In re Aiken Cnty.*, 725 F.3d 255, 264 n.7 (D.C. Cir. 2013) ("If the Executive selectively prosecutes someone based on impermissible considerations, the equal protection remedy is to dismiss the prosecution[.]") (Kavanaugh, J.). In this manner, Aparicio's selective-prosecution claim is similar to a double-jeopardy claim. Like a double jeopardy claim, when a selective-prosecution claim is established, prosecution itself is ***712** forbidden. *See Ex parte Perry*, 483 S.W.3d at 896 (explaining a defendant with a valid double jeopardy claim should not "[be] forced to endure a trial"); *In re Aiken Cnty.*, 725 F.3d at 264 n.7 (noting that remedy in equal protection selective prosecution claim is to dismiss the prosecution); *cf. Ex parte Boetscher*, 812 S.W.2d 600, 604 (Tex. Crim. App. 1991) (dismissing indictment after sustaining pretrial habeas applicant's equal protection claim). Additionally, as any resulting conviction would be void, allowing pretrial writs on selective-prosecution claims would also serve judicial efficiency by avoiding entry of void judgments. *See Vasquez*, 474 U.S. at 264, 106 S.Ct. 617; *In re Aiken*, 725 F.3d at 264. n.7.

Judicial economy will also be served for other reasons. Resolution of Aparicio's pretrial habeas claim will not be aided by the development of a record at trial. *See Ex parte Ingram*, 533 S.W.3d at 892 (explaining that pretrial habeas is generally unavailable when the resolution of a claim may be aided by the development of a record at trial). In his pretrial habeas claim, Aparicio argues he was discriminated against on the basis of sex in violation of his equal protection rights under both the United States and Texas Constitutions. In doing so, he brings a claim of selective prosecution, arguing that the criminal trespass statute was applied selectively against men as opposed to women in violation of his constitutional rights. "[A] selective-prosecution claim is not a defense on the merits to the criminal charge, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *Armstrong*, 517 U.S. at 463, 116 S.Ct. 1480. Thus, whether Aparicio is, in fact, guilty of criminal trespass is irrelevant to his pretrial habeas claim, and the development of a record at trial will not aid the determination of his claim. *See id.* Accordingly, Aparicio's selective-prosecution claim is distinct from an as-applied challenge to a statute, which the court of criminal appeals has held is not cognizable in a pretrial writ. *See Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010). Unlike a claim bringing an as-applied challenge to a statute, the merits of Aparicio's criminal prosecution are irrelevant to his selective-prosecution claim. *See Armstrong*, 517 U.S. at 463, 116 S.Ct. 1480. Thus, even though Aparicio's selective-prosecution claim required development of a record, his claim is more appropriate in a pretrial setting from a standpoint of judicial efficiency.

Indeed, we note the court of criminal appeals has allowed claims to be brought through pretrial habeas even though those claims give rise to evidentiary records. *See Ex parte Perry*, 483 S.W.3d at 902; *Ex parte Nuncio*, 662 S.W.3d 903, 920 (Tex. Crim. App. 2022). For example, an applicant bringing an overbreadth facial challenge to a statute "must demonstrate from its text and from *actual fact* 'that a

substantial number of instances exist in which the Law cannot be applied constitutionally.' " *Ex parte Perry*, 483 S.W.3d at 902 (quoting *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988)) (emphasis added); *see also N.Y. State Club Ass'n*, 487 U.S. at 14, 108 S.Ct. 2225 (explaining it could not hold the statute was substantially overbroad because "no record was made" to demonstrate assertion that substantial number of instances exist in which statute could not be applied constitutionally). Despite the need to develop a record, the court of criminal appeals has held facial overbreadth challenges to statutes are cognizable in a pretrial habeas. *See Ex parte Perry*, 483 S.W.3d at 902; *Ex parte Nuncio*, 662 S.W.3d at 920.

***713** Finally, we note that Aparicio's selective-prosecution claim is also similar to another claim that the court of criminal appeals has determined defendants can raise in a pretrial writ: a facial vagueness challenge to a statute. *See Ex parte Nuncio*, 662 S.W.3d at 914, 921; *see also Ex parte Jarreau*, 623 S.W.3d 468, 471-72 (Tex. App.—San Antonio 2020, pet. ref'd). Like a selective-prosecution claim, a defendant bringing a vagueness challenge may argue that a statute's vagueness has impermissibly resulted in selective enforcement. *See State v. Gambling Device*, 859 S.W.2d 519, 524-25 (Tex. App.—Houston [1st Dist.] 1993, writ denied). Such a statute is unconstitutionally vague when it "encourages arbitrary enforcement" by "fail[ing] to provide reasonably clear guidelines, thereby giving enforcement officials unbounded discretion to apply the law selectively." *Id.* at 525. If a vagueness challenge asserting selective enforcement by law enforcement can be brought in a pretrial writ, we see no principled reason to deny pretrial habeas to an applicant like Aparicio who alleges *actual* selective enforcement of a statute under clear, but unconstitutional guidelines.

For the above reasons, we conclude Aparicio's selective-prosecution claim on the basis of equal protection is the type of claim "in which the protection of the applicant's substantive rights or the conservation of judicial resources would be better served by interlocutory review." *Ex parte Ingram*, 533 S.W.3d at 891-92. Having determined Aparicio's claim is cognizable, we now consider the merits of his appeal.

B. Aparicio's Burden

As noted, to establish a prima facie case of selective prosecution, Aparicio must show "the prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480 (quoting *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524). To establish a discriminatory effect in a case based on gender discrimination, Aparicio had to show similarly situated individuals of the opposite sex were not prosecuted for the same conduct. *See id.* (stating standard with respect to race discrimination); *Robles*, 585 S.W.3d at 597 (applying *Armstrong* standard to gender discrimination). Aparicio met this burden. As noted, the undisputed evidence at the habeas hearing showed that Aparicio 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. The evidence was also undisputed that state troopers in Maverick County have been routinely charging men with criminal trespass as part of OLS and not charging women found in the exact same circumstances. We therefore hold that Aparicio has shown a discriminatory effect.

To demonstrate that the prosecution was motivated by a discriminatory purpose, Aparicio had to show that the State's selection of him for prosecution was based on an impermissible consideration like gender. *See Wayte*, 470 U.S. at 610, 105 S.Ct. 1524; *Lovill*, 287 S.W.3d at 79. " 'Discriminatory purpose' ... implies that the decisionmaker ... 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, 105 S.Ct. 1524 (emphasis added) (quoting *Personnel Administrator v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979)).

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators ***714** are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that *a discriminatory purpose has been a motivating factor in the decision*, this judicial deference is no longer justified.

Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) (emphasis added).

The evidence was undisputed in this case that the decision to prosecute Aparicio, and not the women found allegedly trespassing with him on private property, was motivated by his sex. The trooper who arrested Aparicio testified he

did not arrest the women found with Aparicio because the detention facility erected pursuant to OLS would not hold women. The trooper's testimony was consistent with the other troopers who testified. As part of OLS, they did not arrest women for criminal trespassing because the detention facility would not hold women. Their testimony was consistent that although they could have contacted the county jail in which the women were found, which they admitted did hold women (at least in some circumstances), they did not contact the county jail and instead released the women to border patrol. The record showed their actions were consistent with Captain Betancourt's email, which included instructions not to arrest women for criminal trespassing. As noted, the record is clear that Captain Betancourt's guidance email was followed in practice: as part of OLS, 4,076 people had been arrested for misdemeanor offenses and not a single individual arrested was a woman. In Maverick County, specifically, 470 people had been arrested for misdemeanor offense as part of OLS. None of these 470 people was a woman. We hold Aparicio has met his burden of showing that his gender was a motivating factor in his arrest.

In so holding, we find the following arguments made by the State unpersuasive. First, the State contends it has not discriminated against men because all "violators were taken into custody." According to the State, "[f]emale offenders were released by Texas law enforcement, but they were released to the custody of federal law enforcement so that they could be charged under that particular system." However, that the women were released to federal immigration authorities does not mean that the State treated men and women equally. The men charged face time served in jail under state law; the women do not. *See* Tex. Penal Code §§ 12.50(a), 30.05(a); Tex. Gov't Code § 418.014.

Second, the State argues Aparicio has not met his burden because the record shows that some males were not arrested pursuant to OLS and, like the women, were released to border patrol. In particular, the State emphasizes that men over sixty years of age, underaged males, and males accompanied by minor children were not arrested and charged pursuant to OLS. Thus, according to the State, other factors besides sex were used to classify individuals pursuant to OLS, including age and family units. However, as noted previously, to state his prima facie claim, Aparicio need only show that the State's policy was motivated by an unjustifiable standard. *See Wayte*, 470 U.S. at 608, 105 S.Ct. 1524. Here, regardless of whether the State also discriminated on the basis of age, minority, or family unit, Aparicio has shown that the State expressly discriminated on the basis of sex. With this record, he has met his burden of showing a prima facie case. *See id.*; ***715** *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) ("Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment."); *see also Bostock v. Clayton Cnty.*, —— U.S. ——, 140 S. Ct. 1731, 1748, 207 L.Ed.2d 218 (2020) (refuting mistaken premise that Title VII, which has similar language to the Texas Equal Rights Amendment, "applie[s] only when sex is the sole or primary reason for an employer's challenged adverse employment action").

Finally, we note that the trial court, on the record, based its decision in denying Aparicio's habeas claim on the fact that the State "could" still charge the women with criminal trespass, explaining that the statute of limitations had not yet passed. The trial court then stated it did not "think there [was] a chance" the State would prosecute the women, but emphasized the *possibility* the State could still charge the women in question. We find the trial court's reasoning unpersuasive. First, the record is clear the State has no intention of prosecuting the women found allegedly trespassing as part of OLS. The troopers testified that they had not recorded any identifying information in their reports about the women in question and had merely released the women to border patrol. Second, that the State *could possibly in the future* prosecute these women is irrelevant to Aparicio's gender discrimination claim. The State has *already* treated Aparicio differently from similarly situated women on the basis of his sex by arresting and charging him. *See Gonzales v. Police Dep't*, 901 F.2d 758, 762 (9th Cir. 1990) ("Curative measures simply do not tend to prove that a prior violation did not occur."); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 346 (10th Cir. 1975) (explaining that conduct after the filing of charges "does not constitute cogent evidence of lack of prefiling discrimination" and if "taken into account at all, it might tend to show the existence of prior discrimination and an effort to repair the harm after discovery"). Finally, the trial court's reasoning in this case would eviscerate equal protection rights. When impermissibly discriminating against one group in violation of the Constitution, the State could always justify itself by claiming that it might hypothetically, in the future, treat the rest of the population the same way. This slippery slope could lead to, for example, the State choosing to prosecute only non-Caucasian people for certain crimes while at the same time justifying its actions by arguing it could possibly, in the future, also prosecute Caucasian people. We

have found no case that follows this reasoning and decline to do so. We therefore hold Aparicio met his burden of showing a prima facie case of discriminatory effect and discriminatory purpose. *See Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480 (quoting *Wayte*, 470 U.S. at 608, 105 S.Ct. 1524).

C. State's Burden

As Aparicio met his burden of showing a prima facie claim for selective prosecution on the basis of gender discrimination, the burden shifts to the State to justify the discriminatory treatment. *See Ex parte Quintana*, 346 S.W.3d at 685; *Lovill*, 287 S.W.3d at 79. With regard to Aparicio's federal equal protection claim on the basis of gender discrimination, the State's discriminatory conduct is subject to intermediate scrutiny. *See Clark*, 486 U.S. at 461, 108 S.Ct. 1910; *Casarez*, 913 S.W.2d at 493. Thus, the State must demonstrate that the discriminatory classification is substantially related to an important governmental interest. *See Clark*, 486 U.S. at 461, 108 S.Ct. 1910; *Casarez*, 913 S.W.2d at 493.

***716** With regard to Aparicio's equal protection claim under the Texas Constitution, the State's discriminatory conduct is subject to strict scrutiny. *See Bell*, 95 S.W.3d at 257 (explaining that the Equal Rights Amendment to the Texas Constitution was "designed expressly to provide protection which supplements the federal guarantees of equal treatment" and specifies "sex, race, color, creed, or national origin" as protected classes). Under that standard, "the challenged action cannot stand unless it is narrowly tailored to serve a compelling governmental interest." *In re Dean*, 393 S.W.3d 741, 749 (Tex. 2012) (quoting *Bell*, 95 S.W.3d at 257).

In its brief, the State argues "the emergency situation on Texas's southern border" justifies its discriminatory actions. However, it is clear from the record that the trial court never reached the merits of this issue. The trial court stated on the record that it had determined Aparicio had not met his prima facie burden. Thus, the State was not required at the hearing to justify its discriminatory actions. As the trial court has not had an opportunity to determine whether the State's discriminatory classification was justified under intermediate scrutiny (Aparicio's federal claim) and strict scrutiny (Aparicio's state claim), we reverse the trial court's denial of Aparicio's petition for writ of habeas corpus and remand the cause to the trial court. *See Lovill*, 287 S.W.3d at 82. On remand, the trial court should require the State to respond to both federal and state selective-prosecution claims on the basis of equal protection, and the trial court should make specific findings of fact and conclusions of law setting out its rulings on whether the State meets its burden of proof to justify its discriminatory treatment of Aparicio. *See id.*

Conclusion

Because the trial court erred in finding that Aparicio did not meet his prima facie burden, we reverse the trial court's order denying Aparicio's petition for writ of habeas corpus and remand the cause to the trial court for further proceedings consistent with this opinion. *See id.* at 82-83.

All Citations

672 S.W.3d 696

Footnotes

1 The Honorable Paul Canales presided over the hearing on Luis Alfredo Aparicio's application for writ of habeas corpus. The Honorable Mark R. Luitjen signed the order denying relief on Aparicio's application.

2 Aparicio is going through the asylum process and asserts he is lawfully present in the United States.

3 We have found no case on point where the Texas Court of Criminal Appeals has addressed whether a pretrial habeas claim like the one brought by Aparicio is cognizable. We note that the El Paso Court of Appeals has addressed the merits of an interlocutory appeal from the denial of a pretrial writ of habeas corpus raising the issue of selective-prosecution claim under the Equal Protection Clause. *See Ex parte Quintana*, 346 S.W.3d 681, 685-86 (Tex. App.—El Paso 2009, pet. ref'd). The court, however, did not explain why it determined the claim was cognizable. *See id.*

End of Document

REPORTER'S RECORD
AMENDED VOLUME 2 OF 2 VOLUMES
TRIAL COURT CAUSE NO. 3976
APPELLATE COURT CASE NO. 04-22-00623-CR

EX PARTE)
LUIS ALFREDO APARICIO)

WRIT OF HABEAS CORPUS HEARING

On the 8th day of August, 2022, the following proceedings came on to be held in the above-titled and numbered cause before the Honorable Paul Canales, Visiting Judge, held in Maverick County, Texas.

Proceedings reported by computerized stenotype method.

JOEL A. BETANCOURT,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KELLER:

Q Good afternoon, Captain Betancourt.

A Yes, sir.

THE COURT: Let me warn you about making a bunch noise with that microphone. The court reporter is not going to be happy.

MR. KELLER: Understood, Your Honor.

Q. (BY MR. KELLER) Captain Betancourt, I'm just going to ask you a series of mostly yes or no questions, and I will try to get you out of here as quick as possible.

A Thank you.

Q In your role -- you are a captain with DPS, correct?

A Yes.

Q And in your role at DPS, you were involved with Operation Lone Star?

A Yes, sir.

Q In fact, you met with Maverick County officials to talk about implementing Operation Lone Star?

A Yes, sir.

Q And you've given presentations to ranch owners

about the progress of Operation Lone Star?

A Yes, sir.

Q I want to talk a little bit more about your role first. I just want to get some specifics about Operation Lone Star itself.

In March 2021, Governor Abbot directed DPS to 2aunge Operation Lone Star, correct?

A Correct.

Q And part of the reason he did that is because of increased crossings from Mexico into Texas?

A That's correct.

Q And one of the purposes of Operation Lone Star was to deter this unauthorized migration?

A Correct.

Q And Operation Lone Star tries to deter individuals through prosecuting people for various crimes?

A That's one way, yes, sir.

Q So they prosecute people for human smuggling?

A Yes, sir.

Q And they prosecute them for misdemeanor trespass?

A Correct.

Q Many counties at or near the border are involved with Operation Lone Star, correct?

A Yes, sir.
Q Maverick County? Is that a yes?
A Yes, sir.
Q Kinney County?
A Correct.
Q Valverde County?
A Correct.
Q Webb County?
A Correct.
Q And Jim Hogg County?
A Correct.
Q And, in fact, the governor has declared a state of disaster in each of those five counties, correct?
A Yes.
Q Hundreds of individuals have been prosecuted for misdemeanor trespass as part of Operation Lone Star, correct?
A Yes, sir.
Q Thousands even?
A Correct.
Q Now, we discussed DPS was chosen to initiate Operation Lone Star. It has lead role in deciding what resources to use for Operation Lone Star?
A I'm sorry, say that one more time.
Q Does DPS have a role on deciding what resources

to employ for purposes of Operation Lone Star?

A Yes, sir.

Q It also has a lead role in deciding where to employ those resources, correct?

A That is correct.

Q So I want to get back to your specific role. What exactly is your role with Operation Lone Star?

A So I oversee a district which encompasses nine counties for DPS. And my role is a district commander or captain where we plan, strategize, you know, and conduct, you know -- decisions or make decisions for me, from a perspective which relates to the prosecutor's office, our role in the operations, and as a role of the Texas Military Department.

Q Got it. So you are involved in meetings with the prosecutor to plan how Operation Lone Star is going to implement it?

A Yes, sir.

Q And you strategize with prosecutors to determine how they are going to executed their plan?

A Yes, sir.

Q When did you start working with Operation Lone Star?

A From the inception, March 21st, I believe it was.

Q And that's March 21st, 2021?
A Yes, sir.
Q Okay. As part of your role, as I mentioned, you met with Maverick County officials right around the same time those officials lounged Operation Lone Star in Maverick County, correct?
A We might have met before the launch of Operation Lone Star just to see -- to get a close look at what the office encompasses. You know, get a feeling of how big the staff is and things like that, yes, sir.
Q And that took place about March 2021, correct? I'm sorry, March 2022?
A I don't remember when we met or we met several times. I don't remember the month, though.
Q But you said it was right around the same time Maverick County started Operation Lone Star?
A Probably before.
Q A little before?
A Yes, sir.
Q And so on one meeting in particular, the sheriff was there. Have you had a meeting with the sheriff from Maverick County?
A Yes, sir.
Q You said you met with members of the prosecutor's office?

A Correct.
Q And also the county judge?
A Correct.
MR. KELLER: Your Honor, I would like to show the witness what's been marked as Exhibit 3.
THE COURT: Do you wish to approach, is that what you're saying?
MR. KELLER: Yes. Sorry, that was an unarticulate way of saying that.
I'm sorry I misspoke. It's Exhibit 13.
THE COURT: Defense Exhibit 13?
MR. KELLER: Correct, Your Honor.
Q. (BY MR. KELLER) Captain Betancourt, do you recognize an email that starts at the bottom of the second page sent by you in August?
A Yes, sir.
Q And it starts with the subject "line guidance on arrest for criminal trespass," is that correct?
A That's correct.
Q And that's an email you sent about Operation Lone Star, right?
A Yes, sir.
Q And is that a fair and accurate representation of an email you remember sending?
A Yes, sir.

Q Who did you send that email to?
A I sent that to my two lieutenants and I believe I might have carbon copied my initial assistant on it.
Q And I may have asked you this, but you sent the email I think on August 12, 2021, is that correct?
A August 12th.
Q And you sent this email to provide guidance to people about who to arrest for purposes of Operation Lone Star, correct?
A That's correct.
Q Who should be prosecuted for trespass, correct?
A Who we are going to arrest for criminal trespass.
Q Thank you. Who you are going to arrest from Operation Lone Star for trespass?
A Correct.
Q And who is just going to be sent to immigration, right?
A Correct.
Q And that's part of your role, correct, to provide guidance to your subordinates about who they ought to arrest under Operation Lone Star?
A That's correct.
Q This email memorializes an expansion of the arrest criterion, correct?

A How so? I didn't understand that question.

Q Sure. Let me ask you in a better way. At the top of the email you note that the criterion is quote, "being expanded" for arrest, correct?

And Captain, I will direct you to the first paragraph of your email to refresh your recollection. You wrote the arrest criterion has been quote "expanded," correct?

A Correct.

Q So there was a private policy to this one, correct?

A That is correct.

Q Was that prior policy ever me memorialized in writing?

A No, sir.

Q So with this email, you expanded the criterion to include the rest of the majority of single adult males, correct?

A Correct.

Q So minor about minors shouldn't be arrested, right?

A That's correct.

Q Nothing about women?

A Correct.

Q And you also understand that sometimes mixed

sex groups are apprehended in the field, correct? Both men and women?

A That is correct.

Q And, so when this email you provide the team with examples of how to handle certain types of groups, correct?

A Yes, sir.

Q Including these mixed sex groups, correct?

A Correct.

Q So, for example, you provide guidance on what to do when an adult male, adult female, and adult child were all apprehended together, correct?

A That's correct.

Q So in this situation, to make sure I understand, all three individuals would have been found on private property without consent, correct?

A Correct.

Q So they are all guilty, they have all violated the laws of Texas and committed trespass?

A Correct.

Q And in that situation, the adult male father ought to be arrested, correct?

A In the situation of the trespass?

Q Correct. So it's an adult father, adult mother, and an adult child, all apprehended together.

In that situation, your email sets policies that the adult male father ought to be prosecuted -- I'm sorry, arrested for criminal trespass, correct?

A If you look at the first section, it says, father, mother, and child under 18 considered family unit released to do border patrol.

Q Correct. I'm actually referring to the example right after that that you used.

A Father, mother and child over 18 and are trespassing, male father will be arrested. Mom and adult child will be released to border patrol.

Q So just to be clear then, the adult male father is arrested, correct?

A Correct.

Q And the child and the mother are both sent to immigration, correct?

A Correct.

Q Nowhere on this policy do you describe a situation in which a minor ought to be arrested, correct?

A Correct.

Q And nowhere in this policy do you describe a scenario where a woman or a girl should be arrested, correct?

A Let me see. Correct.
Q And also, this policy only applies to criminal trespass cases, right?
A This specific email, yes.
Q This policy that's in the email doesn't apply to human trafficking cases, right? The human smuggling cases, there is a different policy for those cases?
A I am trying to understand that question.
Q Sure. So the policy memorialized in this email only applies to individuals arrested for criminal trespass, right?
A Correct.
Q It doesn't apply to people by its terms who are arrested for human trafficking, correct?
A Correct.
Q There is a different policy for those individuals?
So, briefly about the human trafficking cases, men are prosecuted for human trafficking, correct?
A Correct.
Q And women are also prosecuted for human trafficking, correct?
A Correct.
Q You are not aware of any policy that prohibits

women for being prosecuted for human trafficking, correct?

A Correct.

MR. KELLER: Your Honor, I would like to admit into evidence Exhibit 13. That would be the email. I realize I didn't move it into evidence. Let me pass it to the State. Actually, I think you already have a copy. I don't know if you have any objections.

(Defendant's Exhibit No. 13 admitted.)

MR. IRACHETA: No objections, Your Honor.

THE COURT: Defendant's Exhibit 13 is received. May I see it?

MR. KELLER: Yes, Your Honor.

I have no further questions, Your Honor.

THE COURT: Counsel?

CROSS-EXAMINATION

Q. (BY MR. KELLER) Captain Betancourt, we know each other, correct?

A Yes, sir.

Q I'm the Maverick County Attorney and we've had prior conversations regarding this operation, is that correct?

A Yes, sir.

Q How long has this operation been in effect?

A I believe it started in March 21st, 2021.

Q Okay. Would you say this is a long time going operation or a brand new operation? What would you say this is?

A I think -- to me, it's an operation that's fairly, fairly recent.

Q So were you given a handbook on this operation of this is exactly what you need to do?

A No, sir.

Q So I know defense counsel over here said the word "policy" about fifty times earlier here. But I want to bring your attention to the exhibit. Do you still have it there in front of you?

A Yes, sir, I have it.

Q Okay. I want you to reference the subject line. Does this indicate policy on arrest for criminal trespass or what does it indicate?

A Guidance.

Q Guidance. What does guidance mean to you?

A Guidance means to me if this is a set of rules or set of expectations that should be adhered to or that need to be adhered to.

Q Are these set in stone?

A No, sir.

Q Okay. Would you say that this is evolving?

A It is.

Q Okay. Captain Betancourt, does your immigration status determine whether you are considered to be trespassing on someone's property in the State of Texas?

A No, sir.

Q Could I trespass on somebody's property?

A Definitely.

Q Okay. I'm the prosecutor for here in Maverick County along with my staff, correct?

A Yes, sir.

Q Can you tell me who to prosecute?

A No, sir.

Q Okay. Can I tell you how to be a law enforcement officer out in the field?

A No, sir.

Q Okay. So, again, why is it that individuals that are detained in multiple groups of either men, women, and children, what happens to the women in these cases?

A On the criminal trespass cases?

Q In the criminal trespass cases, yes, I'm sorry.

A We call border patrol and release them to the custody of border patrol.

Q Okay. Why don't you just release them out where you found them?

A We don't release them to the public. Most of the arrests occur in private ranches, private property, desolate areas.

We are not in the business of leaving individuals out, you know, to fend for themselves.

Q Okay. So would you say you are doing something as a law enforcement officer with these individuals?

A Yes, sir.

Q Okay. Now, where do the men go?

A The men go to the processing center in Valverde County.

Q Okay. Tell me about those processing centers. How is it set up?

A So aesthetically it's a large tent with cells inside. It has air-condition. It has flooring. It has basically what you would see at a county jail, local county jail: A booking process, a medical process, mental health screening section, just as you would see at a jail. And then it has the holding cells as well.

Q I'm glad you said that, that this is an equivalent of a county jail, correct?

A Correct.

Q To your knowledge, do county jails have certain policies and procedures and rules that they have to follow with the State of Texas?

A Yes, sir.
Q Okay. Do you know what some of those rules are?
A I know a little bit of the rules. I don't know enough to, you know, be considered, you know, an expert or anything.
Q Okay. Now, to house an individual in one of these facilities, there has to be certain guidelines met, would you agree?
A Yes, sir.
Q And if you don't have those guidelines in place or those certain provisions met, would you agree that you cannot house somebody there?
A That is correct, you cannot.
Q Okay. Now, these facilities that are currently being used for Operation Lone Star, what guidelines have been met and provisions have been met, to your knowledge?
A So we met several rules regarding the actual structure itself, security, the security for the prisoners at the cells, monitoring meals, and the segregation -- you know, we don't have segregation at the facility itself. It's just strictly filled for --
Q Segregation for what?
A For females or juveniles or anything like.

Q Okay. So then if you don't have the segregation built in or not available yet, what does that mean?

A We cannot take them in there.

Q Okay. Because if you did take them in there, what would happen?

A First, I would lose my job.

Q Because there are certain guidelines that the State has to follow, correct?

A That's correct.

Q So if these were not met, we can't take you there?

A That is correct.

Q Do you agree with that?

A That is correct.

Q Okay. So who are we currently set up to meet the guidelines for?

A For males.

Q Okay. If we were to have those facilities set up for females or children, what would you do differently, to your knowledge?

A We would arrest females and process children.

Q Okay. And is my office telling you not to arrest them?

A No, sir.

Q No. It's because you have rules to follow, correct?

A That is correct.

Q Okay. Would you consider all these individuals to be criminally trespassing?

A Yes, sir.

Q Okay. Are you handing them over to the authority that you are allowed to do at that current time?

A Yes, sir.

MR. IRACHETA: Thank you. No further questions.

REDIRECT EXAMINATION

BY MR. KELLER:

Q Captain Betancourt, I think you called your guidance on arrest "expectations" or "rules." Is that how you view them?

A Yes, sir.

Q You are a captain with DPS, correct?

A That's correct.

Q And that's there is a hierarchy in DPS?

A That is correct.

Q And there are individual who work underneath you?

A That's correct.

Q Including troopers?
A That's correct.
Q And you give them not just guidance, but you order them to do things, correct?
A That's correct.
Q You expect your guidance to be followed?
A That is correct.
Q It's not discretionary?
A So this guidance specifically here --
Q Let me ask a different question to make it easier on you. You expect your guidance here to be followed, correct? The troopers don't have ability to ignore what you have said, correct?
A That is correct.
Q Captain Betancourt, you've arrested people before, correct?
A Yes, sir.
Q Including here in the State of Texas?
A Yes, sir.
Q You've arrested men?
A Correct.
Q You've arrested women?
A Correct.
Q And women, of course, are prosecuted here in Texas, correct?

A That's correct.
Q And women can't be detained here in Texas?
A That's correct.
Q Including in Maverick County, correct?
A Correct.
Q And there are, in fact, facilities all along the border, in the border counties that allow for the detention of women that commit crimes, correct?
A They physically exist, yes.
Q When individuals are arrested for trespass on Operation Lone Star, I think you said they are detained either in Brisco or Segovia, correct?
A I did not say that.
Q Let me ask you that then. When individuals are detained as part of Operation Lone Star ultimately they are sent either to Brisco or Segovia, correct?
A That's correct.
Q And are you familiar with those facilities?
A Yes.
Q Those facilities used to be prisons, correct?
A That is correct.
Q So they were for post conviction individuals?
A Yes, sir.
Q The State of Texas then modified those facilities to make them pretrial facilities, correct?

A Correct.

Q They did a lot of changes to the facilities to make them compliant with the rules for pretrial facilities, correct?

A Correct. Basically what -- how a county jail would operate.

Q So one of the things they added was air-conditioner, correct?

A Correct.

MR. KELLER: No further questions, Your Honor.

MR. IRACHETA: None from the State, Your Honor.

THE COURT: Thank you. Captain, you are excused, if you want to be excused, or you can have a seat out in the gallery.

We are going to take a five-minute break. Call your next witness.

MS. STARLING: I'm going to call Trooper Brandon Aquila.

THE COURT: Five minutes.

(Break taken.)

THE BAILIFF: All rise. Be seated. Thank you.

THE COURT: Moving on. All right.

THE COURT: In other words, if it's not going to come into our office, you are not going to prosecute them?

MR. IRACHETA: There is no way I would know that, Your Honor.

THE COURT: Okay. All right. Anything else?

MR. IRACHETA: Nothing further from the State, Your Honor.

THE COURT: Am I supposed to make findings of fact and conclusions of law? I don't remember.

MR. KELLER: Yes, Your Honor.

COURT'S RULING

THE COURT: All right. Well, my findings of fact are that:

In these five counties, based upon the testimony that was received, there had been no females arrested for criminal trespass.

The next finding is that women are not arrested by -- at least with DPS troopers.

There are all kinds of different law enforcement agencies around here and I don't know anything about those, just these DPS cases. Women are not released. They are sent to the, I guess, border patrol, from what I heard, and they are in custody at

the time they are released by DPS troopers to border patrol.

The next finding is these -- I think you called them central processing or detention centers -- do not take women.

That there are central processing centers apparently in Valverde and perhaps in Jim Hogg County.

That the Defense Exhibit Number 13 indicates that there are exceptions in the DPS trooper's -- Captain Betancourt's guidance on arrest for criminal trespass.

There are exceptions for elderly 60-plus males, or injured males, for example, uncle and child, nephew family unit referred to border patrol.

Father, mother, and child under 18. Family unit released to border patrol.

But not just defendants like this defendant that are favored, if you will, by this policy. Women in particular are favored.

But I do not feel that either level of scrutiny, strict or otherwise, has been met by the defense.

And further, I have considered your motion to dismiss at the same time.

I don't have anything to -- I have nothing

to sign on any of these things.

But for the record, your writ is denied and your motion to dismiss is denied.

It would behoove the troopers people as well as the county attorney, in my opinion -- never mind. It's none of my business. You do what you can do with what you got.

And I'm sorry, I cut you off. Did you have a closing? I apologize.

MR. KELLER: It feels a little weird at this point. I'll just --

THE COURT: I mean, I will listen. If you can change my mind, I will change it.

CLOSING STATEMENT

MR. KELLER: Well, just to clarify, there are, in fact, two processing centers: Jim Hogg and Valverde.

THE COURT: I didn't know. You guys have said that.

MR. KELLER: Correct. I think that everyone arrested in Maverick County, to be clear, goes to the Valverde one. Some individuals from other counties are sent to Jim Hogg. That's sort of the discrepancy there.

I guess I have a few points. I won't want

setting the case -- when the next time you have live docket? October 5th?

THE COORDINATOR: October 5th is another docket call. But we have other dates.

THE COURT: What?

THE COORDINATOR: October 5th is another docket call. But we have other dates set aside if they wanted them to return.

THE COURT: No, reset to October 5th.

THE COORDINATOR: Okay.

COURT'S RULING

THE COURT: Conclusions of law are the writ fails for the reasons I previously stated.

There are several, including the exceptions that were made for other types of males, and the statute of limitations arguments, and the fact that there is no room at the inn.

Anything else? And these two documents are signed. I don't know what we are going to do with them. But I don't have -- there is nothing here to sign. There is no writ order, there is no --

MR. KELLER: There should be.

THE COURT: I mean, this is a dismissal order. You guys find them for me and I will sign them.

MS. STARLING: I don't believe that I

STATE OF TEXAS)
)
COUNTY OF MAVERICK)

I, Dora Canizales, Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $_____and was paid/will be paid by _____

WITNESS MY OFFICIAL HAND on this the 26th day of October, 2022.

/s/Dora M. Canizales
Dora M. Canizales, CSR #5360
Certified Shorthand Reporter
Expiration: 07/31/2024
2112 W. University Dr. #246
Edinburg, Texas 78539
Telephone: 512-579-6800