No. 24-6057

IN THE

Supreme Court of the United States

LUIS ALFREDO APARICIO,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

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

AMICUS CURIAE BRIEF OF THE TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

INGER CHANDLER
1207 S. Shepherd Dr.
Houston, TX 77019
(713) 970-1060
inger@ingerchandlerlaw.com

KYLE THERRIAN
ROSENTHAL, KALABUS & THERRIAN
7200 State Highway 121
Ste 400
McKinney, TX 75070
(972) 369-0577
kyle@texasdefensefirm.com

DAVID GUINN
Counsel of Record
HURLEY, GUINN, SINGH & VONGONTEN
1805 13th Street
Lubbock, TX 79401
(806) 771-0700
david@hurleyguinn.com

ANGELICA COGLIANO
COGLIANO & MIRÓ
505 West 12th St.
Austin, TX 78701
(512) 375-3303
angelica@coglianolaw.com

AARON M. DIAZ
ST. MARY'S UNIVERSITY SCHOOL OF LAW
2507 NW 36th Street
San Antonio, TX 78228
(210) 436-3840
adiaz39@stmarytx.edu

Counsel for Texas Criminal Defense Lawyers Association

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Texas Criminal Defense Lawyers Association (TCDLA) is a non-profit voluntary membership organization dedicated to the protection of those individual rights guaranteed by the state and federal constitutions and to the constant improvement of the administration of criminal justice in the State of Texas.

Founded in 1971, TCDLA currently has a membership of over 3,400 and offers a statewide forum for criminal defense counsel, provides a voice in the state legislative process in support of procedural fairness in criminal defense and forfeiture cases, and assists the courts by acting as amicus curiae.

Neither TCDLA nor any of the attorneys representing TCDLA have received any fee or other compensation for preparing this brief, which complies with all applicable provisions of the Supreme Court Rules, and copies have been served on all parties.

SUMMARY OF THE ARGUMENT

The right to equal protection under the law applies broadly to all state action. In the context of the criminal justice system, equal protection means equal treatment by the government. The State may not impose the burden of criminal prosecution upon a man that it would not impose upon a similarly situated woman. Such selective enforcement falls within the plain-text admonitions of the Equal Protection Clause and is thus presumptively unconstitutional. At a

---

[1] Counsel for *Amicus* has conferred with both counsel for petitioner and counsel for respondent and neither party opposes the filing of this brief. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief nor did they participate in its drafting. *Id.*

minimum, the Clause protects against the inequality of a prosecution based on sex. The text, history, and tradition of the Equal Protection Clause offer no support for the arbitrary application of state power to exclusively prosecute men for violations of the State's criminal trespass laws.

In 2021, Texas Governor Greg Abbott took "historic action" by launching Operation Lone Star ("OLS"), a multi-billion-dollar initiative to address the "record levels of illegal immigrants and deadly drugs" pouring into Texas due to "reckless open border policies." Abbott deployed the Texas National Guard and Texas Department of Public Safety ("TDPS") to the southern border and funded detention facilities for male arrestees. At the direction of TDPS Captain Betancourt, "single adult males," were arrested and charged with misdemeanor criminal trespass if found on the private property of a cooperating landowner. Women found trespassing were neither arrested nor charged but released to the custody of border patrol.

The Texas Court of Criminal Appeals ("TCCA") found no fault with the State's decision to only arrest and prosecute trespassing males, concluding that the policy lacked "invidious discrimination" and proof that Aparicio is being punished *because* he is male. In holding that a *prima facie* case of discrimination under the equal protection clause can only be made if the discriminatory purpose is driven by animus, the TCCA upended this Court's longstanding jurisprudence regarding discrimination under the equal protection clause. Allowing this interpretation to stand would condone widespread sex discrimination in the criminal justice system and have a far-reaching impact on the practice of criminal law.

ARGUMENT

Luis Alfredo Aparicio asked a Texas court to determine whether the government improperly discriminated against him because of his gender. The Texas Court of Criminal Appeals (TCCA) ultimately decided that issue against him. It held that the State's explicit policy of arresting and prosecuting only males caught trespassing in mixed-gender groups is simply *not* discriminatory. In reaching a result contrary to assumption, the TCCA created a requirement of invidious government intent in the context of unequal gender-based enforcement of a law. The corollary of this requirement is what flowed from the CCA's definition of the concept of invidiousness: to do something "with an evil eye and an unequal hand." *Ex parte Aparicio*, No. PD-0461-23, 2024 WL 4446878, at *22 (Crim. App. Oct. 9, 2024). The TCCA's evil intent requirement has no basis in this Court's Equal Protection jurisprudence.

Amicus contends that the TCCA's analysis went awry in its analysis of this Court's opinion in *Parham v. Hughes*, 441 U.S. 347, 99 S.Ct. 1742 (1979).[2] Specifically, the TCCA's opinion results from a disconnect between what this Court meant by "invidious" and what most would assume is meant by "invidious." The *Parham* Court gave the term invidious a specialized legal meaning. The paragraph preceding its usage shows this:

> Not all legislation, however, is entitled to the same presumption of validity. The presumption is not present when a State has enacted legislation whose purpose or effect is to create

[2] Of note are the distinctions between *Parham*, a disparate impact case involving a non-protected class, and the instant case, an unequal enforcement case involving a protected class.

> classes based upon racial criteria, since racial classifications, in a constitutional sense, are inherently "suspect." And the presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes.

Id. at 351 (citations omitted). The sentence that follows is "In the absence of *invidious discrimination*, however . . . [no equal protection problem]." In this grammatical context, "invidious discrimination" means something among the class of examples listed above—things involving intentional sorting. The TCCA erroneously takes invidious to mean evil intent. Because the *Parham* Court frames this discussion as the threshold consideration before applying scrutiny to a law or governmental policy, the TCCA's misinterpretation creates a new condition precedent to challenging unequal unconstitutional treatment. In this regard, Amicus agrees with Judge Keel below:

> 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.

Aparicio, at *42-43.

To this extent, Amicus builds upon what Judge Keel began.

I. By requiring proof of evil intent to establish a prima facie case of discrimination, the TCCA unduly shifts the State's burden onto the individual.

The TCCA determined that Mr. Aparicio did not make a prima facie case of discrimination because there was no evidence that the prosecutorial policy was motivated by a discriminatory purpose. The TCCA's misunderstanding of what that means dictated the thrust of the ensuing analysis: Mr. Aparicio could not prove the government acted with evil intent and his claim is therefore poured out. Flipping the standard on its head, the TCCA expressed a plausible explanation for the government's unequal treatment as a reason not to engage in equal protection scrutiny. The TCCA tied its analysis together with a remark that the State's policy of prosecuting only men was more likely due to "the necessities of reality during an ongoing emergency (limited resources in the face of "sheer numbers"), rather than gender discrimination." *Aparicio,* at *31. But this age-old governmental problem of limited resources and unlimited demand has never been a sufficient justification to reject a claim for equal protection, let alone a basis to not even engage in the analysis.

Whether the government harbors a discriminatory purpose does not depend on bad faith. Discrimination, in the context of this case, means a decision to prosecute based *in part* on an arbitrary classification such as gender. This is how the U.S. Department of Justice explains it in their Legal Manual:

> Some assume that the intentional use of race should be carefully scrutinized only when the intent is to harm a group or an individual defined by race, color, or national origin. That

> is not true: the Supreme Court in *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 493 (1989), and *Adarand Constructors, Inc., v. Pena*, 515 U.S. 200, 226 (1995), established that any intentional use of race, whether for malicious or benign motives, is subject to the most careful judicial scrutiny. ***Accordingly, the record need not contain evidence of "bad faith, ill will or any evil motive*** on the part of the [recipient]." *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).[3]

Judge Keel agrees in her dissent: "[g]ood 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. But discriminatory purpose does not depend on bad faith." *Aparicio*, at *43 (Keel, J., Dissenting). The purported evidence cited by the majority opinion – the jail capacity limitations, large numbers of migrants crossing the border, and limited resources available during an ongoing emergency – was offered for, and is relevant to, the State's attempted justification for their policy. Rather than analyzing the State's arguments in the context of the proper level of scrutiny, the TCCA uses it to shut the door to any consideration. The blame accordingly flowed to Mr. Aparicio for not proving the impossible—that the government meant to be evil.

This new standard relieves the State of its responsibility to justify facially discriminatory policies by shifting the burden of proving "why" onto the

---

[3] *Section VI- proving discrimination- intentional discrimination*. Civil Rights Division,| United States Department of Justice. (2021, February 3). https://www.justice.gov/crt/fcs/T6Manual6

individual. It is unfairly burdensome to require an individual to prove that gender, race, or any other classification was the complete or even primary motivating factor. Government institutions usually act based on a variety of motives. Different legislators have different personal motivations. Attempting to aggregate those motives into one general government intent is a perilous enterprise. With the TCCA's newly defined "invidious discrimination" as the triggering mechanism, the State easily avoids the heightened scrutiny afforded protected classes.[4]

II. Equal protection rights will be significantly weakened should the TCCA's additional condition precedent be allowed to stand.

Judge Keel rightfully laments the future of equal protection and selective prosecution claims in Texas should this new framework created by the TCCA stand. It allows State actors to treat classes of individuals differently so long as it is never overtly specified that they are doing so because of animus and hatred for that class. A local sheriff could decide that only male attorneys may visit their detained clients in-person, so long as he expresses concerns for safety and avoids stating anything disdainful about women. A prosecutor could strike all white jurors based on their race, so long as that choice wasn't grounded in their own repugnant views about white people. In fact, neither of these people would even be called upon to

---

[4] Gender-based discrimination triggers heightened or intermediate scrutiny—a showing of "important governmental objectives" and means "substantially related to the achievement of those objectives." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 3336 (1982).

justify their actions without a prima facie case showing their malicious intent first being made.

This new requirement that the discriminatory-purpose element of an equal protection claim be based on hostility or oppression would open doors to discrimination based solely on negative stereotypes or presumptions. For example, the state could choose to only prosecute white men for the offense of sexual assault, women for shoplifting, black men for drug possession. Discrimination for the purported *benefit* of another would be resurrected. Mississippi University for Women could return to its original mission of providing higher education and training for women – to the exclusion of men. *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). Virginia Military Institute can return to an all-male military school and produce "citizen-soldiers … men prepared for leadership in civilian life and in military service." *U.S. v. Virginia*, 518 U.S. 515 (1996). The TCCA's implicit permission to discriminate– as long as you're doing it for the right reason – would wreak havoc on our system of justice and our constitutionally protected freedoms.

Additionally, government actors are often in control of the scenarios giving rise to a justification they would articulate. They can avoid the imputation of malicious intent by creating circumstances to justify their own discriminatory actions. This is especially true in Mr. Aparicio's case. If jails full of migrant men are too full to accept migrant women, one must ask a question with an obvious answer: how did it get that way? The size of the jail, the facilities acceptable for housing misdemeanants, and the amount of a person's bond are all decisions made by the government. Accepting this much explanation without an articulation of why

resources should be allocated based on gender rather than other factors like the strength of the prosecution, the defendant's role, or the egregiousness of conduct is asking too little. The Government's own-created necessity, and its arbitrary response to it, has never before served as a justification to alter the black letter understanding of the people's protections.

III. A State Court departure from Supreme Court Precedent Frustrates the Practice of Criminal Law and the Sanctity of the Judicial System.

The decision to depart from this Court's precedent and enforce the law in an arbitrary and discriminatory manner has a deleterious effect on judicial economy and finality. More cases will require pretrial and post-conviction litigation to root out and expose true discriminatory purposes and preserve error, increasing costs and efficiency. The decision to prosecute based on class characteristics, absent overt and malicious discrimination, will lead to inconsistent enforcement of the law. Not only will enforcement vary across jurisdictions, but it could vary between district attorneys' offices and law enforcement agencies, frustrating the adjudicatory process for practitioners and stakeholders.

Allowing a State high court to graft onto this Court's precedent additional requirements that arise from arguments rejected by this Court for decades would exacerbate disparities in constitutional law across the country. This Court is the final arbiter of the United States Constitution, and its equal protection jurisprudence is long-standing. If States are allowed to alter the analysis required, citizens – and the lawyers representing them – lose the ability to rely on this Court's precedent.

Finally, requiring a finding of animus calls upon the courts to morally condemn government actors and lawmakers before a citizen can find relief from discrimination. The gravity of lodging and adjudicating such a charge is an unfair obstacle. The avoidance of hatred, animosity, and bias in the making of law and policy is not only a constitutional obligation, it is a moral duty as well. This is part of what Justice Scalia called "our moral heritage." *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting). For a court to accuse lawmakers of violating this duty is a serious charge. In a state where criminal court judges run for office in partisan elections, there is fertile ground for abuse. An incentive for political agendas to dictate the selective enforcement of law and erode fundamental civil rights cannot stand lest we are willing to acquiesce when the winds of change that would reverse our course.

Even when such a serious judicial declaration is warranted and courage prevails, unnecessarily lodging and adjudicating evil governmental motives has a broader impact. As Chief Justice Roberts suggested in his dissenting opinion in *Windsor*, such a declaration almost inevitably "tar[s] the political branches with the brush of bigotry." *United States v. Windsor*, 570 U.S. 744, 776 (2013) (Roberts, C.J., dissenting). Judicial declarations of animus are likely to exacerbate the animosity that infects contemporary American politics, damaging the democratic system that the Constitution is designed to protect.

CONCLUSION

This is a difficult time, but our dilemmas are certainly not more difficult than ones we have encountered before. What flows from this basic premise is what the Court of Criminal Appeals got correct in the month after issuing its opinion in Mr. Aparicio's case: "There is no general exception to [Confrontation] right[s] during other global events such as wars and natural disasters. We believe our founders would not so generally dispense with the very rights—which are divine in nature—in which they risked everything to enshrine." *Finley v. State*, No. PD-0634-22, 2024 Tex. Crim. App. 2024 WL 4897056, at *20 (Crim. App. Nov. 27, 2024). We know this is no less true in the context of equal protection under the law, but it is right now in Texas. This Court should grant certiorari to correct disparities *in the law* and *under the law*.

PRAYER

The Court should grant the petition and set the case for argument.

Respectfully submitted,

INGER CHANDLER
1207 S. Shepherd Dr.
Houston, TX 77019
(713) 970-1060
inger@ingerchandlerlaw.com

KYLE THERRIAN
ROSENTHAL, KALABUS & THERRIAN
7200 State Highway 121
Ste 400
McKinney, TX 75070
(972) 369-0577
kyle@texasdefensefirm.com

DAVID GUINN
Counsel of Record
HURLEY, GUINN, SINGH & VONGONTEN
1805 13th Street
Lubbock, TX 79401
(806) 771-0700
david@hurleyguinn.com

ANGELICA COGLIANO
COGLIANO & MIRÓ
505 West 12th St.
Austin, TX 78701
(512) 375-3303
angelica@coglianolaw.com

AARON M. DIAZ
ST. MARY'S UNIVERSITY SCHOOL OF LAW
2507 NW 36th Street
San Antonio, TX 78228
(210) 436-3840
adiaz39@stmarytx.edu

Counsel for Texas Criminal Defense Lawyers Association