No. 24-6057

In the Supreme Court of the United States

LUIS ALFREDO APARICIO, PETITIONER

v.

STATE OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In our country's criminal-justice system, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined" by a fair and impartial law, "the decision whether or not to prosecute . . . generally rests entirely in his discretion." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Only if a facially neutral criminal law "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" does a decision to prosecute create a "denial of equal justice." *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). But "the standard for proving" a selective-prosecution claim "is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (quoting *United States v. Armstrong*, 517 U.S. 456, 463-65 (1996)).

Here, the Texas Court of Criminal Appeals ("CCA") held that Luis Aparicio failed to supply sufficient evidence to demonstrate that Texas was selectively prosecuting him for criminal trespass because he was male. The CCA therefore denied his application for a *pretrial* writ of habeas corpus. The questions presented are:

1. Whether this Court has jurisdiction under 28 U.S.C. § 1257(a) to review the CCA's interlocutory decision denying Aparicio's pretrial writ of habeas corpus, when section 1257(a) only authorizes this Court to review "[f]inal judgments" of state courts.

2 Whether this Court's review is warranted to consider the CCA's fact-bound conclusion that Aparicio failed to marshal sufficient evidence to show that Texas selectively prosecuted him on the basis of his sex for the state-law crime of trespassing.

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INTRODUCTION

In May 2022, after having apparently crossed the Texas-Mexico border, Petitioner Luis Alfredo Aparicio was apprehended by Texas Department of Public Safety ("DPS") troopers while walking across private land in the dead of night with five other individuals. Aparicio was later criminally charged under Texas law for trespassing on private land. Two months later, before any trial or finding of guilt or innocence, he filed an application for a pretrial writ of habeas corpus, alleging that he was being selectively prosecuted on account of his sex. The trial court conducted an evidentiary hearing before denying Aparicio's pretrial writ, and that ruling was later upheld by the Texas Court of Criminal Appeals ("CCA").

The Court should deny Aparicio's petition. At the outset, the Court lacks jurisdiction to review the CCA's interlocutory decision. Under 28 U.S.C. § 1257(a), this Court's jurisdiction to review state-court decisions extends only to "[f]inal judgments" of a state court of last resort. But this Court has long held that *pre*-trial decisions on selective-prosecution claims are not final judgments within the meaning of section 1257(a). *See Flynt v. Ohio*, 451 U.S. 619 (1981) (per curiam). Even if this Court had jurisdiction, nothing about the CCA's decision warrants this Court's intervention. Aparicio forthrightly concedes that his "petition does not raise a split of court authority." Pet. 24. And on the merits, the CCA correctly applied this Court's century-old precedent and rejected Aparicio's selective-prosecution claim in a fact-bound decision turning on his failure to supply sufficient evidence to show that Texas's criminal-trespass law was applied against him with discriminatory purpose. This petition would also be a poor vehicle to engage in error correction in any event, because, as the CCA has already indicated, Aparicio is unlikely prevail on the other half of the

selective-prosecution test—discriminatory effect—by relying on raw statistical disparities that are "inappropriate in [] scope" and fail to account for relevant factors. Pet.App.7a-8a.

JURISDICTION

This Court lacks jurisdiction. *Infra* Part I.

STATEMENT

I. Factual Background

In 2021, to control the "unprecedented influx of illegal border crossings from Mexico," Texas increased its presence near the State's southern border. Pet.App.1a-2a. On the instruction of Governor Greg Abbott, DPS troopers and the Texas National Guard were authorized to detain and arrest "individuals crossing the border illegally for state level offenses committed on or near the border." Pet.App.1a. The initiative was called Operation Lone Star ("OLS"). Pet.App.1a.

A little over one year later, on May 3, 2022, DPS troopers spotted Luis Alfredo Aparicio and a group of five other individuals "walking in the dark at 3:18 a.m. in the morning on private land surrounded by a high fence" in Maverick County, Texas, a county along the Texas-Mexico border. Pet.App.2a. Aparicio and the group of five individuals he was with—two adult males, two adult females, and one juvenile male—were thereafter detained by DPS troopers. Pet.App.2a. Aparicio and the two adult males were arrested for violating Texas's criminal-trespass law. But "[b]ecause 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" who could refer them to the U.S. Attorney's Office "for federal prosecution." Pet.App.2a. Subsequently, Aparicio "posted bond, and the [S]tate sent him to federal authorities for immigration processing." Pet.6.

II. Procedural Background

Almost three months after his arrest—but well before any criminal trial proceedings began—Aparicio "filed an application for pretrial writ of habeas corpus with the trial court." Pet.App.2a. He argued that his prosecution was unconstitutionally selective under both the federal and state constitutions because he was being prosecuted on account of his sex. Pet.App.2a. Specifically, Aparicio claimed that an email from a DPS captain, Captain Betancourt, to other DPS troopers outlining "evolving guidelines" on "arrests for [c]riminal [t]respass" that were applicable "[o]nly" in two neighboring counties (Val Verde and Kinney) nevertheless established a state discriminatory policy of arresting and prosecuting men, but not women, for trespass. Pet.App.3a-4a.

The trial court held an evidentiary hearing on Aparicio's pretrial habeas application, hearing testimony from numerous witnesses. Pet.App.2a. Those witnesses testified that individuals found crossing the border—who were "predominantly men," Pet.App.3a—were often arrested by DPS troopers for two state criminal offenses: criminal trespass (a misdemeanor) and smuggling of persons (a felony), Pet.App.2a. After DPS troopers arrested suspects in Maverick County, the detainees were transported to one of two processing centers in neighboring counties, which were essentially "a huge air-conditioned tent with holding cells" with certain amenities like medical services and mental-health screening. Pet.App.2a. These processing centers "were not able to house female detainees because they were subject to the policies and procedures required for county jails," which included rules about the structure, security, meals, and segregation of the sexes and juveniles. Pet.App.2a. After processing, detainees were moved to former all-male prisons that had been transformed and converted "into acceptable pretrial detention facilities." Pet.App.3a.

The trial court also heard testimony about Captain Betancourt's email. Pet.App.3a. The email—which applied to two counties, neither of which were Maverick County, where Aparicio was arrested—provided guidance to DPS troopers on what to do in the field. Pet.App.3a. For example, if an adult male was found but was not trespassing on private property, he was to be released to Border Patrol. Pet.App.3a. On the other hand, if an adult male was found and *was* trespassing, he was to be arrested by DPS troopers if the private landowner agreed to file a criminal complaint or to have DPS troopers sign the complaint on his or her behalf. Pet.App.3a. Furthermore, when DPS troopers came across family units (groups of related individuals, *i.e.*, father, mother, and son; uncle and nephew) who were trespassing, arrests and releases to Border Patrol were dependent on the age of the child in the family unit. Pet.App.3a. A later email expressly clarified that adult men "60-plus or injured" who were found trespassing were to be released to Border Patrol. Pet.App.3a.

After noting the vast number of individuals crossing the border at the time—"over three million people in the last year and [a] half," Pet.App.3a—the trial court denied Aparicio's application for a pretrial writ of habeas corpus, Pet.App.3a, finding that "while adult women appeared to be benefitting" from the situation, "so were certain classes of adult men," Pet.App.3a. Texas's Fourth Court of Appeals, sitting en banc, reversed the denial of Aparicio's habeas application and "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." Pet.App.4a.

The CCA granted the State's petition for discretionary review and reversed the Fourth Court of Appeals. The court held that Aparicio "failed to meet his burden in demonstrating a *prima facie* case that he is being arrested and prosecuted *because* of his gender."

Pet.App.8a. The CCA separated its opinion into three parts. First, the court described the nature of Aparicio's selective-prosecution claim, which three dissenting justices viewed as a selective-*enforcement* claim. Per the dissenters—who dissented on the question whether Aparicio's claim was cognizable on pretrial habeas—this distinction altered whether Aparicio's charges would ultimately be dismissed, because a successful selective-prosecution claim would require dismissal of the charges, but a successful selective-enforcement claim would not. Pet.App.4a, 9a-12a. Second, the court held that Aparicio's claim was "cognizable under the unique facts of his case" via a pretrial writ of habeas corpus. Pet.App.5a. The CCA explained that even though pretrial habeas writs are normally reserved for "very limited circumstances," claims "in which the protection of the appellant's substantive rights or the conservation of judicial resources would be better served by interlocutory review." Pet.App.5a. Aparicio's selective-prosecution claim was, "at least under these circumstances," such a claim and therefore "cognizable for pretrial habeas purposes." Pet.App.6a.

Finally, the CCA addressed the merits of Aparicio's claim, holding that he "failed to meet his burden in demonstrating a *prima facie* case that he is being arrested . . . *because* of his gender." Pet.App.8a. The court first observed the "demanding" standard this Court's precedents have emphasized, then laid out the two elements a defendant must establish to succeed on a selective-prosecution claim: (1) the prosecutorial policy had a discriminatory effect; and (2) the policy was motivated by a discriminatory purpose. Pet.App.6a. The CCA explained that a "discriminatory purpose" meant more than just differentiating between the sexes. Pet.App.6a-7a. The term had to mean that any unfair or unjust treatment was "based on a prejudiced viewpoint" to remain consistent and synonymous with other terms

this Court had used to describe the second aspect of a selective-prosecution claim, like "invidious," "with an evil eye and an unequal hand," and "with a mind so unequal and oppressive." Pet.App.6a-7a. Relying on this Court's century-old precedent, the CCA reasoned that, under the second prong, Aparicio needed to show "an intentional or purposeful discrimination in the enforcement of the statute against him." Pet.App.7a (citing *Ah Sin v. Wittman*, 198 U.S. 500, 508 (1905); *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886); and *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996)).

In applying the law to Aparicio's case, the CCA first noted that while Aparicio's evidence demonstrated "some level" of a discriminatory effect on men regarding criminal trespass, the "evidence may be inappropriate in its scope" because it did not show that any of "the women in question truly qualif[ied] as similarly situated." Pet.App.7a-8a. Specifically, Aparicio's evidence failed to account for women being sent to Border Patrol for prosecution by federal authorities, women being charged with human smuggling—a felony charge—and whether women were arrested for trespass by other law-enforcement agencies beyond DPS. Pet.App.7a. The CCA also questioned whether Captain Betancourt's guidance email was "sufficient to constitute an official policy of the Governor, DPS, OLS, Maverick County, or even the larger entity of the State." Pet.App.7a. Despite all this, the CCA "assume[d] for the sake of the argument that" Aparicio had satisfied the first prong of his claim. Pet.App.7a-8a.

But Aparicio "face[d] far more obstacles under the second prong" because he was unable to show that the "otherwise facially neutral law [was] being *administered* in bad faith." Pet.App.8a. First, Captain Betancourt's guidance email had a "questionable nexus" to its alleged effect on Aparicio, namely because the email did not apply to the county in which

Aparicio was arrested. Pet.App.8a. Second, to the extent a connection existed, Aparicio was "unable to show that he [was] being 'invidiously' punished for criminal trespass *because* he is male." Pet.App.8a. The guidance email did not target all males. Pet.App.8a. And of the males it mentioned, the email did not evidence any discriminatory purpose, but instead described situations that DPS troopers might encounter in the field, which included "examples involving males that DPS [t]roopers were to turn over to border patrol instead." Pet.App.8a. Moreover, due to the "substantial disparities in the demography" of individuals crossing the border—the "vast majority of" whom "were male"—"an outsized influence on the disparities in the outcome" were likely to exist. Pet.App.8a. That was not evidence of a discriminatory motivation or purpose. Pet.App.8a. And nothing Aparicio presented eliminated the fact that any person not arrested by DPS was released to the custody of Border Patrol, "which may very well [have] had criminal consequences" of its own. Pet.App.8a.

This petition followed.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction Under 28 U.S.C. § 1257(a).

Aparicio's petition should be denied at the outset because this Court lacks jurisdiction to review the CCA's judgment under 28 U.S.C. § 1257(a). That statute limits this Court's review of state-court decisions to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." *Johnson v. California*, 541 U.S. 428, 429 (2004) (per curiam) (quoting 28 U.S.C. § 1257(a)). But this Court has already held that pretrial decisions on selective-prosecution claims do not constitute "final judgment[s]" within the meaning of section 1257(a). *Flynt*, 451 U.S. at 620. And because none of the four recognized exceptions to this final-judgment rule is present here, *see Cox Broad. Corp. v. Cohn*,

420 U.S. 469, 476-85 (1975), the Court lacks jurisdiction to review the CCA's judgment, *see Flynt* 451 U.S. at 620-23. The Court need not go any further.

A. Aparicio's petition does not challenge a "final judgment" of the CCA.

In 1789, Congress granted this Court authority to review state-court judgments. "For just as long, Congress has limited that power to cases in which the State's judgment is final." *Jefferson v. City of Tarrant*, 522 U.S. 75, 80 (1997) (citing Judiciary Act of 1789, § 25, 1 Stat. 85); 28 U.S.C. § 1257(a)). "This requirement is not one of those technicalities to be easily scorned." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). Rather, section 1257(a) "establishes a firm final judgment rule." *Jefferson*, 522 U.S. at 81. This rule "has been interpreted 'to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Flynt*, 451 U.S. at 620 (quoting *Radio Station WOW*, 326 U.S. at 124). To satisfy this rule, a state-court judgment must be "final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Mkt. St. Ry. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945). In the context of criminal prosecutions, "finality is normally defined by the imposition of the sentence." *Flynt*, 451 U.S. at 620; *see also Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54 (1989); *Arceneaux v. Louisiana*, 376 U.S. 336, 338 (1964) (per curiam).

Under these standards, the CCA's denial of Aparicio's pretrial writ of habeas corpus is not a final state-court judgment within the meaning of section 1257(a). As the CCA observed, Aparicio's appeal of the trial court's denial of his pretrial habeas writ was an "interlocutory appeal," Pet.App.5a—a necessarily "intermediate step[]" in his criminal prosecu-

tion, *Mkt. St.*, 324 U.S. at 551. That means much, if not all, of his case "remains to be determined by a State court." *Flynt*, 451 U.S. at 620. After all, "there has been no finding of guilt and no sentence imposed," which is the relevant marker of finality for a criminal case like Aparicio's. *Id.* Because the CCA's "avowedly interlocutory" order did not "terminate the litigation," *Jefferson*, 522 U.S. at 81, but instead returned "th[e] case for trial" in the lower courts, further litigation in state court remains and the CCA's decision "is not final 'as an effective determination of the litigation,'" *O'Dell v. Espinoza*, 456 U.S. 430, 430 (1982) (per curiam) (quoting *Mkt. St.*, 324 U.S. at 551). Such an order, bound up within the confines of the pretrial status of a state criminal case, is not a final judgment sufficient to confer jurisdiction on this Court under section 1257(a).

This conclusion accords with this Court's standard practice: in selective-prosecution cases in which this Court has reviewed state-court judgments, it has done so *after* conviction but not beforehand. *See Yick Wo*, 118 U.S. at 356 (selective-prosecution claim brought by plaintiff on a post-trial writ of habeas corpus after a state-court conviction); *Ah Sin*, 198 U.S. at 504 (same); *Oyler v. Boles*, 368 U.S. 448, 449 (1962) (same); *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (variation of selective-prosecution claim brought by plaintiff on a post-trial writ of habeas corpus after a state-court conviction). And in the lone selective-prosecution case where this Court granted certiorari review before the criminal trial, this Court later dismissed the case for want of jurisdiction because "the decision of the Ohio Supreme Court was not a final judgment within the meaning of 28 U.S.C. § 1257." *Flynt*, 451 U.S. at 620. Nothing about Aparicio's case requires a departure from this practice, as "[t]here is no reason to treat this selective prosecution claim differently than [this Court] would treat any other claim of selective prosecution." *Id.* at 622-23.

The Court has taken a similar approach when handling selective-prosecution claims asserted in *federal* district courts. *See United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 264 (1982) (per curiam). Although the question stems from a different statute, appealability rests on the same facet of the judgment: finality. *See id*; 28 U.S.C. § 1291. In that context, the Court has held that an interlocutory order rejecting a defendant's selective-prosecution claim was not a final judgment within the meaning of the statute. *Hollywood Motor Car*, 458 U.S. at 264. The "policy of Congress embodied in" section 1291 "is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation," and "this policy is at its strongest in the field of criminal law." *Id.* at 265. Such a policy of finality applies with even more force in section 1257, as federalism concerns strengthen the need for it. *See Jefferson*, 522 U.S. at 81 (quoting *Radio Station WOW*, 326 U.S. at 124) (explaining that the rule of finality in section 1257 "is an important factor in the smooth working of our federal system").

B. None of the *Cox* exceptions to section 1257's rule of finality applies here.

Although this Court has, in limited circumstances, "treated state-court judgments as final for jurisdictional purposes [when] there were further proceedings to take place in the state court," *Flynt*, 451 U.S. at 620-21, no such circumstance is present here. In *Cox*, the Court identified four categories of cases in which this exception to section 1257(a)'s rule of finality might apply, but Aparicio does not invoke any of them in his petition. And like in *Flynt*, none of the *Cox* categories is implicated here. 451 U.S. at 621.

As for the first category, the CCA's ruling on Aparicio's selective-prosecution claim is not "conclusive" of "further proceedings" in his criminal-trespass trial, and nothing about the CCA's decision renders "the outcome of further proceedings" on the distinct trespass

issue "preordained." *Cox*, 420 U.S. at 479. Likewise, the second category—which involves circumstances where "the federal issue . . . will survive and require decision regardless of the outcome of future state-court proceedings," *id.* at 480—is inapplicable because Aparicio might prevail at trial, rendering any decision on the selective-prosecution claim unnecessary. The third category, too—involving circumstances where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case"—does not apply because, just like the host of selective-prosecution cases this Court has dealt with in a post-trial posture, *supra* at 9, Aparicio can re-urge his selective-prosecution claim "if he were to lose on the merits." *Cox*, 420 U.S. at 481. Nothing in "the governing state law" would "preclude" him from doing so. *Id.*[*]

Lastly, *Cox*'s fourth category concerns circumstances where "a refusal . . . to review the state court decision might seriously erode federal policy"—even though "further proceedings [are] pending" in state court where "the party seeking review . . . might prevail on the merits on nonfederal grounds." *Id.* at 482-83. But that category, too, is not implicated here. Like in *Flynt*, "delaying review" of the selective-prosecution claim until Aparicio is "convicted" would not "seriously erode federal policy within the meaning of [this Court's] prior cases." 451 U.S. at 622. "As this case [came] to" the Court, it is "confronted only with a state effort to prosecute an unprotected activity"—trespassing. *Id.* at 622. Consequently,

[*] In holding Aparicio's claim cognizable at the pretrial stage, the CCA did not hold that Aparicio *must* assert his claim before trial through a writ of habeas corpus. Rather, the CCA simply held that, because "the facts would not naturally arise during the course of a trial," his claim was "cognizable" at this stage in the prosecution as a matter of state law, meaning he *could* assert it before trial using a writ. If convicted, Aparicio remains free under Texas law to assert his claim on appeal because he has preserved the issue. *See Gawlik v. State*, 608 S.W.2d 671, 673 (Tex. Crim. App. 1980).

"there is no identifiable federal policy that will suffer if the state criminal proceeding goes forward." *Id.* True, "[t]he question presented for review is whether on this record the decision to prosecute [Aparicio] was selective or discriminatory in violation of the Equal Protection Clause." *See id.* But as in *Flynt*, "[t]he resolution of this question can await final judgment without any adverse effect upon important federal interests." *Id.* Holding otherwise "would permit the fourth exception to swallow the rule" and allow any federal issue decided on interlocutory appeal in the state courts to "qualify for immediate review." *Id.*

II. The Petition Does Not Satisfy Any of this Court's Traditional Certiorari Criteria, Because it Presents a Splitless Bid for Error Correction.

Even if the Court had jurisdiction, Aparicio's petition meets none of this Court's traditional certiorari criteria. Aparicio readily concedes that "this petition does not raise a split of court authority," Pet. 24, so his petition constitutes at most a bid for error correction. Yet this Court is not in the business of ordinary error correction. *See* Sup. Ct. R. 10; S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3) (11th ed. 2019). And even if it were, the CCA correctly resolved Aparicio's selective-prosecution claim by routinely applying this Court's century-old precedent and holding that Aparicio had not supplied the requisite evidence to sustain the claim. There is no reason for the Court to grant certiorari to review the CCA's fact-bound conclusions about the quantum or nature of evidence provided to support a selective-prosecution claim.

A. The CCA correctly rejected Aparicio's selective-prosecution claim.

1. The "decision whether to institute criminal charges is one our Constitution vests in state and federal executive officials, not judges." *Nieves v. Bartlett*, 587 U.S. 391, 417 (2019)

(Gorsuch, J., concurring in part and dissenting in part). That decision "generally rests entirely in" the prosecutor's discretion—a "broad discretion." *Wayte*, 470 U.S. at 607. Inherent in the vesting of discretion in prosecutors is the recognition "that the decision to prosecute is particularly ill-suited to judicial review." *Id.*

But a state prosecutor's discretion is not unfettered: it is "subject to constitutional constraints," *Armstrong*, 517 U.S. at 464, such as the Fourteenth Amendment's Equal Protection Clause, *McCleskey*, 481 U.S. at 292. When a defendant believes that a prosecutor has "deliberately" prosecuted him based upon an "unjustifiable standard such as race, religion, or other arbitrary classification" in violation of the Fourteenth Amendment, he may bring a selective-prosecution claim. *Wayte*, 470 U.S. at 608. Still, "a selective prosecution claim is a *rara avis*." *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999). Because of the separation-of-powers concerns surrounding selective-prosecution claims, "the standard for proving them is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully." *Id.* (quoting *Armstrong*, 517 U.S. at 463-65). And without "clear evidence to the contrary, courts presume that" prosecutors have "properly discharged their official duties." *Armstrong*, 517 U.S. at 464.

Defendants asserting selective-prosecution claims therefore must demonstrate two things about the prosecutorial policy at issue: (1) it had a discriminatory effect; and (2) it was motivated by a discriminatory purpose. *Id.* at 466. This is a very high bar. Relevant here, the second element has been described in various ways, all of which indicate a level of unjust intent that must rise to more than mere awareness of the consequences. *See Wayte*,

470 U.S. at 610 ("Discriminatory purpose implies more than intent as awareness of consequences") (cleaned up). Satisfying that element requires showing that the prosecutor "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." *Id.* Even a passive policy with a discriminatory effect will fall short without evidence "that the Government intended" such a discriminatory result to occur. *Id.* Ultimately, this inquiry turns on "a matter of proof." *Ah Sin*, 198 U.S. at 508.

For example, in one of its earliest selective-prosecution cases, this Court held that a defendant successfully proved his selective-prosecution claim when he showed that the prosecutorial policy at issue was "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive as to amount to a practical denial" of equal protection. *Yick Wo*, 118 U.S. at 373. In *Yick Wo*, the plaintiff, a Chinese national, demonstrated that a San Francisco ordinance concerning laundry-shop operations was applied against Chinese nationals but not against other similarly situated laundry-shop operators. *Id.* at 374; *see also Armstrong*, 517 U.S. at 466. Though the ordinance at issue was facially neutral, the plaintiff established that it was intentionally being applied "with an evil eye and an unequal hand" to Chinese nationals based on a "hostility to the race." *Yick Wo*, 118 U.S. at 373-74. This conclusion was evident from evidence showing that the challenged ordinance was enforced against the plaintiff and "200 others . . . all of whom happen to be Chinese subjects" but not "80 others, [who are] not Chinese subjects." *Id.* at 374.

By contrast, twenty years later, the Court applied a similar rule in *Ah Sin* when it denied a plaintiff's petition for a writ of habeas corpus asserting a selective-prosecution claim.

198 U.S. at 507-08. There, the Court refused to infer discriminatory purpose from a plaintiff's "mere allegation" that a California law regulating gambling was being enforced exclusively against Chinese persons. *Id.* The case turned on "a matter of proof," and the plaintiff there did not even allege that "the conditions and practices to which the ordinance was directed . . . exist[ed] exclusively among the Chinese," or that "there were other offenders against the ordinance than the Chinese, as to whom it was not enforced." *Id.*

2. The CCA properly weighed the evidence in resolving the second prong of Aparicio's selective-prosecution claim. To prevail, Aparicio was required to show "intentional or purposeful discrimination in the enforcement of the statute against him." Pet.App.7a. And just like this Court's precedent demands, the CCA required Aparicio to present "clear evidence," *Armstrong*, 517 U.S. at 465, that the State purposefully administered the facially neutral criminal-trespass law "with a mind so unequal and oppressive," *Yick Wo*, 118 U.S. at 373, against him "because of" his sex, *Wayte*, 470 U.S. at 610; *see* Pet.App.8a.

Aparicio's evidentiary presentation did not measure up for several fact-bound reasons. First, even assuming Captain Betancourt's "guidance e-mail"—which applied "only" in two counties where Aparicio was *not* apprehended—had a causal nexus to Aparicio's prosecution, that document did not "show that the criminal trespass law was 'directed so *exclusively* against' all males" to "target them *because* they were male." Pet.App.8a. Instead, only "some males" were affected. Pet.App.8a. Second, the evidence showed that the "vast majority" of individuals crossing the border and apprehended by DPS in conjunction with OLS "were male." Pet.App.8a. That meant that the "substantial disparities in the demography," "rather than gender discrimination, was more likely the *motivation* for any discriminatory effect." Pet.App.8a; *cf. Wayte*, 470 U.S. at 610 ("Discriminatory purpose implies more than

intent as awareness of consequences" (cleaned up)). Lastly, "any person not formally arrested was not released, but instead transferred to the custody of the U.S. Border Patrol—which may very well have had criminal consequences." Pet.App.8a. Because Aparicio's "*evidence* fail[ed] to meet the 'demanding' standard required for judicial interference in the State's discretion in administering criminal justice policy and priorities," his selective-prosecution claim did not succeed. Pet.App.8a (emphasis added). Nothing about this fact-bound conclusion requires this Court's attention.

B. Aparicio's counterarguments are meritless.

Aparicio makes three arguments for why the CCA's resolution of his selective-prosecution claim warrants this Court's attention, but none has merit.

1. Aparicio first tries to avoid the fact-bound nature of the CCA's holding by arguing (at 14-17) that the CCA's decision flouts several of this Court's cases holding that benign motives for racial or sex discrimination cannot insulate a discriminatory policy from constitutional scrutiny under the Equal Protection Clause. But none involved a selective-prosecution claim. And as the CCA explained, Pet.App.18a n.84, those cases involved admitted racial or sex classifications that often appeared on the *face* of the policy—and the only question in those cases was whether those classifications could meet the relevant standard of constitutional scrutiny. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 208 (2023) ("These cases involve whether a university may make admissions decisions that turn on an applicant's race."); *U.S. v. Virginia*, 518 U.S. 515, 530 (1996) (presenting the question whether "Virginia's exclusion of women from the educational opportunities provided by" the Virginia Military Institute violates the Equal Protection Clause); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 213 (1995) (observing

that the case concerns "classifications based explicitly on race"); *Nguyen v. I.N.S.*, 533 U.S. 53, 60 (2001) (determining whether "a gender-based classification [can] withstand equal protection scrutiny"); *Craig. v. Boren*, 429 U.S. 190, 192 (1976) (deciding whether "a gender-based differential" violates the Equal Protection Clause).

But here the question presented is different: whether any such sex classification exists in the first place. Thus, these cases involving how to apply the appropriate constitutional standard of scrutiny to existing race or sex classifications are not germane for determining *whether* a classification subject to review under the Equal Protection Clause exists.

2. Equally meritless is Aparicio's argument (at 13-14) that the CCA required him to make some kind of heightened showing of "prejudice," "bad faith," or "ugly bigotry" to ultimately prevail on his equal protection claim. It did not. Instead, the CCA applied this Court's longstanding precedent requiring a defendant bringing a selective-prosecution claim to show, "with 'exceptionally clear evidence,'" that a prosecutorial policy "was motivated by a discriminatory purpose." Pet.App.6a (quoting *Wayte*, 470 U.S. at 608). The court further observed that "'[d]iscriminatory purpose' . . . 'implies more than intent as volition or intent as awareness of consequences.'" Pet.App.7a (quoting *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). And it explained that a defendant "may" make this showing by pointing to evidence 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." Pet.App.7a. (quoting *Armstrong*, 517 U.S. at 464-65 (quoting *Yick Wo*, 118 U.S. at 373)). The court simply concluded that Aparicio did not marshal the evidence necessary to make such a demanding showing.

True, in setting out the legal standard the CCA also held that Aparicio "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." Pet.App.8a. But that language is hardly a legal innovation; instead, it is taken straight from *Yick Wo,* this Court's first selective-prosecution case. *See* 118 U.S. at 373. Nothing about the legal standard the CCA described and then applied deviates from this Court's precedent.

3. Finally, Aparicio errs in arguing (at 25) that this Court should hold this case until it resolves *United States v. Skrmetti*, No. 23-477 (U.S.). *Skrmetti* does not involve a selective-prosecution claim. Instead, the question this Court will resolve there is whether a state law forbidding the use of pharmaceuticals to facilitate sex changes for minors violates the Equal Protection Clause. No such issue is remotely present here. And to the extent that the Court reiterates longstanding Equal Protection Clause principles in *Skrmetti*, those principles cannot help Aparicio bridge the fundamental *evidentiary* gap in his case.

III. This Case Is A Poor Vehicle for Reviewing Aparicio's Selective-Prosecution Claim.

Finally, even if Aparicio's petition presented a question over which this Court had jurisdiction and that was worth investing this Court's limited resources, this case is a poor vehicle for addressing it. Aparicio claims that this Court's intervention will "likely be outcome determinative to [his] case as well as hundreds if not thousands of other cases." Pet. 23. Not so. Even assuming this Court were to disagree with the CCA's analysis on the

discriminatory-purpose prong of the selective-prosecution test, other issues within Aparicio's case remain lurking, rendering dubious Aparicio's claim that he "will almost certainly" succeed on his claim. Pet.24.

First, while Aparicio's petition focuses on the second prong of his claim, he must also meet the first prong: discriminatory effect. *Armstrong*, 517 U.S. at 465. And while the CCA "assume[d] for the sake of argument" that Aparicio has demonstrated a discriminatory effect, it expressed some skepticism about whether Aparicio's evidentiary presentation—which it referred to as "inappropriate in its scope"—truly measured up. Pet.App.7a-8a. In support of his effort to show discriminatory effect, Aparicio relied on statistics and testimony about the number of men prosecuted for criminal trespass versus the number of women. But "raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*." *United States v. Bass*, 536 U.S. 862, 864 (2002) (per curiam). And as the CCA explained, his numbers fail to consider a variety of factors. *See Oyler*, 368 U.S. at 456 ("the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation").

For example, Aparicio did not show "whether women were charged with criminal trespass *by other law enforcement agencies*" other than DPS in the same area. Pet.App.7a. He did not show whether women were charged with criminal trespass in thirty-eight other counties participating in OLS. Pet.App.7a. Likewise, he did not show that women sent to Border Patrol were not prosecuted under federal law. Pet.App.7a. And most importantly, he did not establish that women truly qualified as similarly situated to him in this context, given that women "cannot be interchangeably housed *safely* with men in detention facilities." Pet.App.7a. All these gaps in Aparicio's evidence left it "inappropriate in its scope" to

establish a discriminatory effect, save the CCA's assumption for the sake of his argument. Pet.App.7a-8a.

Second, and perhaps more problematic, a prosecutorial policy needs to exist. *See Armstrong*, 517 U.S. at 465 (referencing a "prosecutorial policy"); *Oyler* , 368 U.S. at 456 (referencing a "policy of selective enforcement" amongst prosecutors); *Wayte*, 470 U.S. at 609 (referencing an "enforcement policy" for prosecutions). But here, the CCA found it "questionable" whether Captain Betancourt's guidance email constituted an official policy of any entity of the State—DPS, the Governor, Maverick County, or the State itself. Pet.App.7a. And the CCA later noted that a "questionable nexus" existed between the email and its alleged effect because the guidance did not apply in the county where Aparicio was apprehended. Pet.App.8a. A favorable response to Aparicio's question presented would not, on remand, alleviate him of the need to provide evidence of a policy and its causal connection, something the CCA has already hinted he will not be able to do on this record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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