No. 24-6057

In the
Supreme Court of the United States

Luis Alfredo Aparicio,
Petitioner,

v.

State of Texas,
Respondent.

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

Reply Brief in Support of
Petition for Writ of Certiorari

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INTRODUCTION

The Texas Court of Criminal Appeals resolved an important federal question contrary to this Court's precedent. Over a dissent, the court held that the equal-protection clause doesn't protect against an intentional choice to treat the sexes or the races differently unless the classification is "based on a prejudiced viewpoint." (Pet. App. 6a). Applying that standard, the lower court held that the state hadn't acted with a discriminatory purpose when it chose to prosecute *thousands* of men but no women for committing the same crime. Purposefully treating men and women differently didn't constitute discrimination, the court reasoned, because the decision stemmed from a desire to save money on detention costs. It wasn't motivated by bigotry or animus against men. This Court, however, has repeatedly held that the equal-protection clause requires scrutiny of *all* race- or sex-based distinctions, regardless of whether the state's motivation was based on benign concerns or bigotry. The petition asked this Court to grant review or summarily reverse because the constitutional promise of equal treatment shouldn't operate differently in Texas than the way it operates in every other state.

Still, the state asks this Court to deny review. In doing so, the state argues that this Court lacks jurisdiction. The state contends that the lower court's judgment isn't final—and thus review is premature—because Petitioner hasn't received a sentence (or been convicted) in his case charging him with a crime. But Petitioner hasn't appealed from his criminal case. Instead, he has appealed the denial of relief in his *separate* habeas action, and the lower court's judgment is final in that separate case. This Court, in fact, has long recognized that it has jurisdiction over the denial of relief in a separate pretrial habeas case, even if the defendant's criminal case remains pending. The state overlooks these settled procedural principles.

On the merits, the state acknowledges that this Court has repeatedly held that a government actor can violate the equal-protection clause by making a race- or sex-

based distinction even if prejudice doesn't motivate the distinction. The state argues, however, that the lower court correctly concluded that a special rule applies to selective-prosecution claims, and defendants raising these sorts of claims must show prejudice. But this Court has also repeatedly held that selective-prosecution claims do not require a different kind of evidence compared to any other equal-protection claim. Ordinary equal-protection principles apply to these claims. The state, then, can't reconcile the lower court's opinion with settled precedent.

The state also embraces other portions of the lower court's opinion that will radically rework how equal protection works in Texas. For example, the state (following the lower court's lead) contends that it didn't discriminate because it didn't *only* consider a person's sex in determining whether to arrest and prosecute them for trespassing. It also considered other things like their age and health. Under the lower court's opinion, then, one of Texas's 254 counties could choose to enforce its drug laws against Black men as long as it didn't enforce it against, say, *elderly* Black men. The consideration of age would insulate the decision from equal-protection scrutiny altogether. But this is not how equal-protection works, and this sort of consequence underscores how far the lower court's opinion distorts basic equal-protection norms in Texas. This Court should not allow the decision to stand.

In short, this Court should grant plenary review or summarily reverse. If not, this Court should at least hold this case pending its resolution of *United States v. Skrmetti* (No. 23-477), a pending case involving the equal-protection clause.

ARGUMENT

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

The petition explained that this Court should grant plenary review or summarily reverse. The state disagrees. But its arguments each lack merit.

A. This Court has jurisdiction.

As a threshold issue, the state argues that this Court lacks jurisdiction. (BIO 7–12). This Court can review judgments from state courts only if they are "[f]inal." 28 U.S.C. § 1257(a), and a judgment arising from a criminal prosecution generally qualifies as "final" only once "'sentence'" has been imposed, (BIO 8 (quoting *Flynt v. Ohio*, 451 U.S. 619, 620 (1981)). From that, the state argues that the lower court's judgment is not "final" because Petitioner hasn't received a sentence or even been convicted. (BIO 8). The state's argument, however, is misguided. Its position rests on its erroneous assumption that the lower court's judgment stems from Petitioner's criminal case. But this case stems from his separate habeas case, and the lower court's judgment is final in *that* case. (Cert. Pet. 2–3). This Court thus has jurisdiction.

1. This appeal stems from Petitioner's habeas-corpus action. A "habeas corpus proceeding has always been regarded as separate from the criminal prosecution." *Ex parte Sheffield*, 685 S.W.3d 86, 99 (Tex. Crim. App. 2023) (quoting *Greenwell v. Court of Appeals for Thirteenth Jud. Dist.*, 159 S.W.3d 645, 649 (Tex. Crim. App. 2005)). Indeed, the trial-court cause number for Petitioner's habeas action (No. 3976) differs from his criminal case (No. 30947), and the cases have different records. And "because the habeas proceeding is in fact considered a separate criminal action," "the denial of [habeas] relief marks the end" of that separate action. *Greenwell*, 159 S.W.3d at 650 (internal quotation marks and footnote omitted). The denial of habeas relief is therefore "a final judgment *in the habeas corpus proceeding*." *Id.* at 650 (quoting Dix & Dawson, Texas Practice: Criminal Practice & Procedure, 2nd ed., Vol. 43B, § 47.51, 219–220 (2001); emphasis in original).

Based on those principles, the Texas Court of Criminal Appeals denial of Petitioner's claim in this habeas action constitutes a "[f]inal judgment[]." 28 U.S.C. § 1257(a). The Texas court system has "fully adjudicated" his habeas claim, and the

denial of habeas relief will "not [be] subject to further review by a state court." *Dep't of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 268 (1942). No further hearings will take place in the habeas case, and the case will be closed unless this Court intervenes. That explains why the lower court did not remand for further proceedings but ended its opinion by just "affirm[ing] the trial court's denial of Appellant's pretrial writ of habeas corpus on the merits." (Pet. App. 8a).

This Court has followed these finality principles for habeas cases for almost a century. "In analyzing the finality of a judgment in a habeas corpus . . . proceeding," this Court "has recognized that such proceedings are independent matters," and "a final judgment rendered therein is reviewable regardless of the status of a related prosecution." Stephen M. Shapiro et al., Supreme Court Practice ch. 3, § 9 (11th ed. 2019) (citing *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 70–71 (1928)).

This Court applied these principles in *Zimmerman*, a pretrial habeas case in which this Court held that it had jurisdiction. In *Zimmerman*, a state charged a defendant with violating a state statute. 278 U.S. at 65. With the criminal case pending, the defendant filed a separate pretrial habeas action to challenge whether the penal statute violated the U.S. Constitution's equal-protection clause. *Id.* This Court held that it had jurisdiction to resolve the habeas case even though the separate criminal case remained pending. "[A]n order of [a] state court of last resort refusing to discharge" a habeas petitioner, this Court held, "is a final judgment in that suit." *Id.* at 70. And because the habeas case had a final judgment, that judgment was "subject to review by this court." *Id.*; *see also Moore v. Arizona*, 414 U.S. 25, 25 (1973) (reviewing pretrial writ of habeas corpus).

The same conclusion follows here: the lower court's denial of habeas relief has created a final judgment in the habeas case, and this Court thus has jurisdiction to review that judgment. *See Zimmerman*, 278 U.S. at 70.

2. The state's conflation of separate proceedings leads it to rely on irrelevant cases like *Flynt* to suggest that this Court lacks jurisdiction. (BIO 9, 11–12). In *Flynt*, this Court held that it lacked jurisdiction to review the denial of a defendant's "motion to dismiss" on selective-prosecution grounds. 451 U.S. at 620–22. In doing so, this Court explained that the lower court's judgment did not qualify as final because there had "been no finding of guilt and no sentence imposed." *Id.* at 620.

While *Flynt* raised the same type of claim as Petitioner—and the case is thus superficially like this one—the claim arose in the criminal prosecution itself, not a separate habeas action. 451 U.S. at 620–22. And that procedural difference makes all difference for purposes of jurisdiction, as *Zimmerman* makes clear.

In sum, the judgment here qualifies as final because the habeas case is done. This Court can therefore "review" the "final judgment" stemming from "that suit." *Zimmerman*, 278 U.S. at 70.

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

1. The state also argues that this Court should not grant review because the lower court correctly held that Petitioner failed to prove that the state had discriminated against him based on sex. (BIO 14–18). In doing so, the state defends the lower court's holding that state action should receive scrutiny under the equal-protection clause only if it stems from a "prejudiced viewpoint." (BIO 5–6 (quoting Pet. App. 6a–7a)). The state acknowledges that, outside the selective-prosecution context, this Court has repeatedly held that even "benign" discrimination based on race or sex triggers scrutiny under the equal-protection clause. (BIO 16–17 (listing cases)). According to the state, then, a party must provide a different *type* of evidence—evidence of prejudice—for selective-prosecution claims and selective-prosecution claims only. (BIO 17–18).

The state is wrong. This Court has already affirmed that what it means to discriminate under the equal-protection clause doesn't morph based on the type of claim. When it comes to sex-based discrimination, for example, this Court has held that "*all* gender-based classifications" receive "heightened scrutiny" under the equal-protection clause. *J.E.B. v. Alabama*, 511 U.S. 127, 136 (1994) (emphasis added). This Court affirmed these principles in the selective-prosecution context in *Wayte v. United States*, 470 U.S. 598, 608 (1985), where it held that "[i]t is appropriate to judge selective prosecution claims according to ordinary equal protection standards." This Court again addressed selective-prosecution claims in *United States v. Armstrong*, 517 U.S. 456 (1996), and it echoed *Wayte*'s conclusion that such claims apply "ordinary equal protection standards." *Id.* at 465 (quoting *Wayte*, 470 U.S. at 608). For this reason, the type of discrimination that triggers scrutiny for selective-prosecution claims doesn't differ from any other type of equal-protection claim, a point Judge Keel made in her dissent below. (Pet. App. 12a).

Though the state extensively cites *Armstrong* and *Wayte (see* BIO iv), the state never tries to square the lower court's opinion with the warning in those cases about not applying a unique equal-protection standard to selective-prosecution claims. Instead, the state, following the lower court's lead, plucks out of context comments from *Yick Wo*, which affirmed that law applied "with an evil eye and unequal hand" can violate the equal-protection clause. (BIO 14 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886)). But nowhere did *Yick Wo* suggest that the state is barred from discriminating only if it acted based on prejudice. And, as the petition documents, this Court has repeatedly held that the equal-protection clause doesn't protect against discrimination based on prejudice only. (*See* Cert. Pet. 14–17 (listing cases)).

More generally, the state (like the lower court) gives no reason why the equal-protection clause would be more forgiving of the state's use of sex- and race-based distinctions when taking away someone's liberty than when deciding whether, say,

someone gets into a particular state college. Nor does one make sense. There is only one equal-protection clause, and "consistency" requires courts to treat "'invidious' and 'benign' discrimination" the same, regardless of the type of equal-protection claim raised. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229–30 (1995).

2. The state also tries to defend the lower court's decision under more conventional equal-protection principles. According to the state, the real failing of Petitioner's claim is that he didn't provide the required "clear evidence" of discrimination based on sex, independent of whether the discrimination stemmed from prejudice. (BIO 13 (quoting *Armstrong*, 517 U.S. at 464)). Thus, the state attempts to reduce this case to a "fact bound" dispute about an ambiguous record. (*See* BIO 12). But, as discussed momentarily, the state's arguments are meritless.

As relevant background, while the *kind* of evidence needed to prove a selective-prosecution claim doesn't differ from any other equal-protection claim, this Court has adjusted the *quantity* of evidence needed: a defendant must provide "clear evidence" that race or sex motivated their prosecution, *Armstrong*, 517 U.S. at 465 (internal quotation marks omitted). This clear-evidence requirement ensures that the prosecutorial discretion necessary to enforce criminal laws isn't improperly limited based on speculation resting on bare statistics. *Id.* In *Armstrong*, for example, this Court held that it would not infer a conscious decision to prosecute based on race merely because all twenty-four people charged with a particular drug offense in a district were black. *Id.* at 459, 469–71.

Here, Petitioner didn't argue that bare statistics allowed a court to infer that the state intentionally considered his sex when deciding whether to arrest and prosecute him. Instead, Petitioner provided overwhelming *direct* evidence that the state intentionally chose to prosecute just men but not women.

The most straightforward evidence that the state intentionally treated men like Petitioner differently from similarly situated women came from the arresting

officer. The officer found Petitioner in Maverick County with a group of five other people, including two women, and the officer testified that he believed that everyone in the group was trespassing. (Pet. App. 27a). Thus, the officer found men and women committing the same crime at the same time in the same place in the same way. Still, the officer did not arrest the women, and the state did not prosecute them. (Pet. App. 27a). According to the officer, he purposefully chose not to arrest the women because the facility the state chose to use to hold trespassers as part of the operation in Maverick County "did not accept females." (Pet. App. 27a). Thus, one conscious sex-based decision the state made led it to make another conscious sex-based decision.

This evidence alone is definitive, conclusive proof that the state intentionally discriminated against Petitioner because of his sex. Had Petitioner been a woman, the state would not have arrested him for criminal trespass, let alone prosecuted him.

Petitioner also introduced evidence that demonstrated the breadth of the discriminatory policy. At an evidentiary hearing, Petitioner called a captain in charge of Operation Lone Star in Maverick County (as well as other counties) to testify. (Pet. App. 24a). Captain Betancourt explained that, while there were "facilities all along the border that allow for the detention of women who commit crimes," the state chose not to use those facilities to hold women trespassers as part of the operation. (Pet. App. 25a). Instead, the state chose to create special male-only facilities to hold trespassers as part of the operation. (Pet. App. 24a–25a). And because they were using male-only facilities, Captain Betancourt told troopers—including those in Maverick County—not to arrest women trespassers. (Pet. App. 24a). This further confirms that the state intentionally and purposefully used a sex-based classification.

The state focuses on the email Captain Betancourt sent about his arrest guidance. (BIO 3, 4, 6, 7, 20). The state tries to cast doubt on whether the email set guidance for Maverick County because Captain Betancourt sent the email before the county entered the program. (BIO 20). But Maverick County officials testified that,

even though the email was sent before they joined the program, they followed its guidance in implementing the operation. (Pet. App. 25a–26a). Indeed, Captain Betancourt testified and explained the policy, including that it applied in Maverick County when Petitioner was arrested. (*See generally* Pet. App. 36a–56a).

Petitioner also introduced empirical data to support his claim. He had data covering five counties, including Maverick County. The data stemmed from the organization that appointed counsel to Operation Lone Star clients in those counties. (Pet. App. 24a). Thus, the data was comprehensive. According to the data, the state had arrested more than 4,000 people in those counties as part of the operation for criminal trespassing, and none were female. (Pet. App. 24a). In Maverick County in particular, the state had arrested nearly 500 people, and none were female. (Pet. App. 24a). Additionally, Petitioner introduced evidence that the state had found women trespassing—including in Petitioner's own case—and the state did not arrest or prosecute those women. (Pet. App 24a, 26a–27a).

It is hard to imagine a litigant bringing forth *more* evidence to show that he would not have been arrested and prosecuted but for his sex. The state prosecuted Petitioner "at least in part because of, not merely in spite of," his sex. *Wayte*, 470 U.S. at 610 (internal quotation marks omitted). If he had been a woman, he wouldn't have been prosecuted. For this reason, the state's claim that this case is just about factual insufficiency (rather than about his failure to prove the state discriminated against him based on prejudice) lacks all credibility.

3. The state also embraces other contentions that the lower court made—contentions that are equally misguided and underscore just how out-of-step the lower court's decision is with this Court's precedent.

The state resurrects the lower court's contention that Petitioner failed to meet his burden because the state didn't prosecute *all* men. (BIO 15). The state, for example, chose not to prosecute older men or men in poor health. (Pet. App. 8a).

As the petition explained, however, it matters not that the state considered multiple factors in deciding whom to prosecute. (Cert. Pet. 21 n.1). "When there is a proof that a discriminatory purpose has been a motivating factor in the decision," courts subject the decision to constitutional scrutiny, even if the consideration of race or sex is not the "sole[]" consideration. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977)). This explains why this Court has held that university affirmative-action programs violate the equal-protection clause even though race or sex is one among *many* factors considered. *See*, *e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 192–97 (2023). As Judge Keel put it in her dissent below: "The fact that [Petitioner] was further discriminated against based on, for example, his age, marital status or health [does] not rebut the fact that he was charged because he was a man. Discrimination is not justified by more discrimination." (Pet. App. 12a).

The state's point also highlights one of the dangerous implications of the lower court's decision. Under the court's opinion, the state could prosecute only Asian people or Muslim people for particular crimes as long as it didn't prosecute all members of those groups. Considering a characteristic in addition to race or sex would entirely insulate the prosecutorial decision from equal-protection scrutiny. But no sensible view of the equal-protection clause would suggest that the choice to prosecute only healthy Asian people or Muslim adults lacked a discriminatory purpose—but that is now the law in Texas.

The state suggests that perhaps it didn't target men per se and that men were the only ones arrested because they made up most of the individuals trespassing. (BIO 15). This isn't a case, however, in which a defendant contends that a court can infer that the state consciously considered sex based on a statistical pattern, like in *Armstrong*. The testimony from Captain Betancourt, the arresting officer, and other Texas state troopers establishes that the state *intentionally and consciously*

considered sex in both Petitioner's specific case and thousands of others. (Pet. App. 25a–27a). It wasn't happenstance that just men were arrested and prosecuted. It was a choice.

The state also suggests that it didn't discriminate against men like Petitioner because it released the women trespassers to federal immigration authorities and those authorities might have prosected the women. (BIO 16). There is no evidence, however, that the federal government charged the released women with anything. In any event, nothing federal authorities could have done to the women would somehow alter that *the State of Texas* decided to intentionally treat men and women differently.

This again highlights a troubling consequence of the lower court's view about the meaning of the equal-protection clause in Texas. Under the lower court's decision, a Texas county could, for example, consciously refuse to hire Hispanic firefighters without triggering constitutional scrutiny at all as long as it recommended that another county hire those same individuals. Or the state could refuse to prosecute men for a particular drug offense as long as it recommended them for prosecution to the federal government. But no citation is needed to confirm that this is not how the equal-protection clause works. Absent this Court's intervention, however, this is how it now works in Texas.

C. The question presented raises an important federal issue.

The state suggests that this Court should deny review because this petition reflects no more than a request for "error correction." (BIO 12). According to the state, this case "meets none of this Court's traditional certiorari criteria." (BIO 12). The state is wrong. As explained, this petition involves a decision from "a state court" that "has decided an important federal question in a way that conflicts with relevant decisions of this Court," a basis to grant review. Sup. Ct. R. 10(c).

The state is right that there is no entrenched, deep split of authority on the question presented. (*See* BIO 12). That the lower court's decision is an outlier on the

question presented shouldn't be surprising. This Court's precedent is clear, and thus other courts have had no problem following it. For example, the Tenth Circuit (relying on this Court's precedent) has affirmed that "[t]he 'intent to discriminate' forbidden under the Equal Protection Clause is merely the intent to treat differently," not the intent to act based on "animus, hatred, or bigotry." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (citing *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007)). Likewise, courts regularly adjudicate selective-prosecution claims without inquiring into whether the decision to discriminate stemmed from prejudice. *See*, *e.g.*, *State v. Kramer*, 637 N.W.2d 35, 42 (Wis. 2001); *Commonwealth v. Lafaso*, 727 N.E.2d 850, 853–55 (Mass. App. Ct. 2000); *United States v. Dumas*, 64 F.3d 1427, 1431 (9th Cir. 1995); *United States v. Brown*, 9 F.3d 1374, 1376 (8th Cir. 1993).

Still, this Court should not wait to see if the split becomes deeper or to give more time for the question presented to percolate. This Court's decisions have already resolved the issue, and it therefore seems doubtful that any other court will agree with the lower court's opinion.

The lack of a deeper split of authority also doesn't mean that this petition is asking for error correction. The issue raised doesn't just have salience for Petitioner. Instead, as the petition explained, the lower court's holding affects *thousands* of cases that raise the same issue as Petitioner's, including *hundreds* of pending cases. (Cert. Pet. 21–22). Moreover, the lower court's broad ruling will affect all manner of equal-protection claims in Texas, including the adjudication of *Batson* claims—something that the state noticeably doesn't dispute. (Cert. Pet. 22; *see also* Amicus Curiae Brief of the Texas Criminal Defense Lawyers Association 7–8 (discussing implications of lower court's decision to the administration of criminal justice in Texas). Thus, the question presented resonates well beyond this case, underscoring that the petition raises an important issue worthy of this Court's time.

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

The state contends that this Court shouldn't grant review or summarily reverse because this petition is not a good vehicle to resolve the question presented. According to the state, Petitioner might lose his claim on remand anyway. The state doesn't suggest that it can meet its burden to justify its decision to discriminate, a point the petition made. (*See* Cert. Pet. 23–24). Instead, the state suggests that the lower court might hold that Petitioner cannot meet the discriminatory-effect prong of the equal-protection analysis. (BIO 18–20). But settled precedent establishes that Petitioner can easily meet his burden on that prong too, and this Court shouldn't deny review because the lower court might misapply settled precedent on remand.

To prove "discriminatory effect," a defendant must show that similarly situated individuals of a different [sex] were not prosecuted." *Armstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. at 608). This required him to prove that a "comparator committed the same basic crime in substantially the same manner as" him. *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000). Petitioner met that burden. The state found women trespassing with him who were *identically* situated to him, and the state did not arrest or prosecute them. (Pet. App. 24a, 27a). Indeed, the state has found many women trespassing as part of the operation, and the state has not arrested or prosecuted any of them for trespassing. (Pet. App. 24a, 26a–27a). Again, it is hard to imagine a better factual record than the one presented here.

The state's suggestion that Petitioner can't establish the discriminatory-effect prong flows from its misunderstanding of the law. For example, the state claims that Petitioner can't prove a discriminatory effect because he failed to prove whether the state's trespass policy took place in the "thirty-eight other counties participating" in Operation Lone Star. (BIO 19). It is hard to see why this matters. Regardless of whether some other county discriminated, the state discriminated against Petitioner

(and many others). As this Court has put it, "to prevail under the Equal Protection Clause," the defendant "must prove that the decisionmakers in *his* case acted with discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (emphasis in original). It doesn't matter, then, whether the state discriminated against someone else; the record already establishes the state discriminated against Petitioner.

Another misguided state argument is its claim that some other state law enforcement agency might have charged the women found with him with trespassing. (BIO 19). But the record contains no evidence to support that speculation. And a different state law enforcement agency deciding to press charges is especially implausible because the state didn't get the women's name or contact information before turning them over to federal authorities. (Pet. App. 27a). The state, then, has no way of knowing who these women are or where they are. Moreover, regardless of whether some other agency later *arrested* the women, the data introduced in the trial court establishes that no women were ever *prosecuted* for criminal trespassing in the county. (Pet. App. 24a).

Finally, regardless of whether Petitioner succeeds on his claim on remand, this Court should grant review to overturn the lower court's distortion of equal-protection principles. Though the issue has importance to Petitioner and the hundreds of others with pending equal-protection claims arising from Operation Lone Star, the lower court's decision reverberates well beyond this litigation, for the reasons discussed. This Court should not permit one of the largest criminal-justice systems in this country to use its own novel view of what it means to treat people equally.

* * *

In short, this Court should grant review or summarily reverse.

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

Finally, the state disagrees that this Court should at least hold this case until it resolves *United States v. Skrmetti* (No. 23-477), a case from the Sixth Circuit that also involved the scope of the equal-protection clause. (BIO 18). The petition pointed out that this Court's resolution in *Skrmetti* will likely have relevance to Petitioner's claim and the lower court's reasoning. (Cert. Pet. 25). According to the state, however, *Skrmetti* necessarily lacks relevance to this case because, while it involves an equal-protection claim, it "does not involve a selective-prosecution claim." (BIO 18).

The state's argument merely reflects its mistaken view that selective-prosecution claims do not require application of "ordinary equal protection standards." *Amstrong*, 517 U.S. at 465 (quoting *Wayte*, 470 U.S. 608)). Accordingly, if this Court does not grant plenary review or summarily reverse, it should hold this petition until it resolves *Skrmetti*. At that point, this Court should grant this petition, vacate the decision below, and remand for the lower court to reconsider its decision.

CONCLUSION

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

April 3, 2025

Respectfully submitted,

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