**No. 23-70007**

# In the United States Court of Appeals for the Fifth Circuit

DAVID SANTIAGO RENTERIA,
*Petitioner-Appellant*,

v.

BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION; STATE OF TEXAS,
*Respondents-Appellees.*

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Appeal from the United States District Court
for the Western District of Texas,
No. 3:23-cr-2080-1

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## BRIEF FOR APPELLANT

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**CAPITAL CASE**
****EXECUTION SCHEDULED FOR NOV. 16, 2023****

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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*/s/ Tivon Schardl*
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## STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant David Renteria respectfully submits that this case presents issues of law that have not been addressed by this Court and that would therefore benefit from oral argument.

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## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1447(d) which states that "an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal ...."

Defendant filed for removal under § 1443(1) of Title 28. ROA.4-19.

The district court remanded on October 20, 2023. ROA.273-274. Renteria timely filed his notice of appeal on November 3, 2023.

## INTRODUCTION

On October 18, 2023, David Renteria, a prisoner on Texas's death row, filed a notice to remove the state-court proceedings against him to this Court pursuant to 28 U.S.C. § 1443(1) and § 1455. Mr. Renteria asserted that a new basis for removal had accrued from the Texas Court of Criminal Appeals' (TCCA's) recent ruling that Mr. Renteria's trial court had "'no freewheeling jurisdiction to seek to safeguard Renteria's Fourteenth Amendment Rights.'" ROA.17 (quoting *In re State of Texas ex rel. Hicks*, No. WR-95,092-01 (Tex. Crim. App. Sep. 18, 2023) ("*In re Hicks*")). The TCCA invalidated the decision of the 327th District Court of El Paso County that no execution date should have been ordered because the "State's disparate treatment of Defendant … prejudiced his ability to investigate potential grounds for relief from the courts and clemency authorities." ROA.32. The trial court was reconsidering its second of two execution orders, both of which were entered in response to the State's motions brought in the same cause of action as the indictment and judgment.

After initially finding Mr. Renteria's removal petition facially sufficient and ordering a hearing, ROA.245, the district court abruptly reversed itself and held that Mr. Renteria cannot remove his case because "post-judgment removal … is not permitted." ROA.274. The district court relied exclusively upon the following sentence from *State of Ga. v. Rachel*, 384 U.S. 780, 785 (1966): "Congress eliminated post-judgment removal when it enacted … the Revised Statutes in 1874." ROA.273-274. The court was apparently unaware that the statute referenced in *Rachel* was superseded by a law Congress enacted eleven years later.

Mr. Renteria attempted to correct the error by seeking reconsideration. But that resulted in the district court compounding the previous error by interpreting the new law on the basis of excerpts from congressional hearings on the bill.

Under the plain terms of the law, however, post-judgment removal is permitted at any time when the criminal proceedings are ongoing.

On reconsideration, the district also added rationales for remand that erroneously conflate distinct terms in the removal act and misconstrue Supreme Court cases authoritatively construing it.

## ISSUES PRESENTED

1. Did the district court err by ascribing meaning to the statutory term "at a later time," 28 U.S.C. § 1455(b)(1), based on a statement from a witness that is part of the act's legislative history instead of giving the terms their original public meaning?

2. Did the district court wrongly conflate the right a defendant seeks to enforce through removal with the "law providing for the equal civil rights of citizens of the United States"?

3. Did the district court err in holding the Fourteenth Amendment's Equal Protection Clause is not a law providing for equal civil rights?

4. Did the district court err in holding that a decision of Texas's highest criminal court interpreting the Texas Code of Criminal Procedure is not "a formal expression of state law"?

## STATEMENT OF THE CASE

David Renteria was convicted of capital murder for his confessed role in the kidnapping of Alexandra Flores on or about November 18, 2001. Mr. Renteria has steadfastly maintained that other men, members of the Barrio Azteca cross-border drug gang, ordered him to lure Ms. Flores from a Walmart in El Paso or face violent reprisals against his own family.

In 2002, Texas commenced in its courts a criminal prosecution of Mr. Renteria for the capital murder of Alexandra Flores.[1] ROA.29. He

[1] Mr. Renteria has admitted to his role in the abduction of Alejandra Flores, and the placement of her body after she was murdered by mem-

was convicted in 2003 and sentenced to death, *State v. Renteria*, No. 20020D00230, 2003 WL 25704119 (Tex. 41st Dist. Ct. Oct. 28, 2003), but that sentence was vacated on appeal because the trial court wrongly excluded evidence of Mr. Renteria's remorse. *State v. Renteria*, 206 S.W.3d 689 (Tex. Crim. App. 2006).

Texas again sought the death penalty for Mr. Renteria and secured a second death sentence in 2008, which was upheld on appeal. *See State v. Renteria*, No. AP-74,829, 2011 WL 1744067 (Tex. Crim. App. May 4, 2011).

Because Mr. Renteria was sentenced to death the judgment against him has not been executed.

Texas law gives convicting courts the exclusive authority to set execution dates in cases where the death penalty has been imposed. Tex. Code Crim. P. arts. 43.141 & 43.15. State law limits the trial court's discretion in choosing a date in only two ways: (1) the execution date cannot be set before the conclusion of appellate review and review of a timely

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bers of the Barrio Azteca drug gang. Mr. Renteria was coerced into participating in the abduction and had no reason to believe it would result in her murder. Accordingly, he is not eligible for the death penalty. *See Tison v. Arizona*, 481 U.S. 137 (1987).

application for collateral review, *id.*, art. 43.141(a)-(b); and (2) the "execution date may not be earlier than the 91st day after the date the convicting court enters the order setting the execution date," *id.*, art. 43.141(c).

In May 2023, the State contacted counsel for two men who had been sentenced to death in El Paso: Tony Ford, who was sentenced to death in 1993,[2] and whose second round of post-conviction review concluded in 2019,[3] and David Renteria, who was sentenced to death in 2008, and whose only post-conviction review proceedings concluded in 2021.[4] ROA.96; ROA.99-100 at ¶¶ 3-4; ROA.101-102 at ¶¶ 17-18. Both Mr. Ford and Mr. Renteria maintain they are innocent of the death penalty under *Tison v. Arizona*, 481 U.S. 137 (1987), because they did not kill the victims in their respective cases and acted without reason to suspect that the actual killers would use deadly force. *See Ford v. Cockrell*, 315 F. Supp. 2d 831, 835 (W.D. Tex. 2004).

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[2] *See Ford v. State*, 919 S.W.2d 107 (Tex. Crim. App. 1996).

[3] *See Ex parte Ford*, No. 49,011-03 (Tex. Crim. App. Sep. 11, 2019).

[4] *See Renteria v. Davis*, 814 Fed. App'x. 827 (5th Cir. May 21, 2020), *cert. denied*, 141 S. Ct. 1412 (2021).

The attorneys for both Mr. Ford and Mr. Renteria requested an opportunity to meet with counsel for the State before the State sought an execution date. The EPDCA agreed to meet with Mr. Ford's attorney and refused to meet with Mr. Renteria's attorney. ROA.101 at ¶ 17. As a result of the meeting in Mr. Ford's case, the State did not seek an execution date for him, and the State gave Mr. Ford's counsel the opportunity to inspect his prosecution file. ROA.101-102 at ¶ 18.

On May 15, 2023, the State filed a motion requesting that the trial court set November 16, 2023, as the date for the TDCJ to execute Mr. Renteria. ROA.89-93. The State maintained that the trial court had a "ministerial duty" to sign the State's proposed order, *i.e.*, the state court had no discretion to refuse to do the State's bidding. ROA.89-93; ROA.109 ("it is this Court's ministerial duty to sign the order setting [Mr. Renteria's] execution date" as presented by the State); *id.* at 6 ("entering the order" presented by the State is the "fulfillment of [the court's] ministerial duty").

Mr. Renteria opposed the motion and requested a hearing – a request for which there was recent precedent. In 2020, the same court that convicted Mr. Renteria, the 41st District Court for El Paso County, held

a hearing on the State's motion to set an execution date for Mr. Ford. Based on the evidence and argument presented in that hearing, the trial court denied the State's motion. ROA.113-114. The State petitioned the TCCA for a writ of mandamus that would require the trial court to sign and enter the State's proposed execution order. ROA.116-133. The TCCA conducted a preliminary review of the petition, *see* Tex. R. App. P. 72.2, and denied the State leave to file. ROA.135.

Before the trial court acted on the State's motion in this case, Mr. Renteria's counsel requested the same opportunity to inspect the files in the State's possession that Mr. Ford's counsel, and other similarly situated defendants in El Paso, received. ROA.137. The State first ignored Mr. Renteria's requests, then tersely rejected them, ROA.141, then contrived a post-hoc rationalization for that denial, then modified its explanation several times. ROA.143-144; ROA.66 (trial court's findings).

On June 9, 2023, the trial court rubberstamped the State's proposed execution order, and the clerk of that court issued a warrant for Mr. Renteria's execution.[5] ROA.146-148.

[5] In May 2023, responsibility for Mr. Renteria's case was transferred from the 41st District Court in El Paso to the 327th District Court, the Honorable Monique Velarde Reyes, presiding.

On June 27, 2023, Texas filed a motion to vacate the execution date. ROA.150-153. The State relied upon the trial court's inherent powers under the Texas Constitution to control its own judgments. ROA.161-162. The State asserted that there was no defect in the execution order or warrant and no basis in law to question the validity of either document. ROA.159-162. Rather, the State wanted the date-setting process repeated for its own convenience: to avoid anticipated litigation by Mr. Renteria.[6] ROA.161.

On July 5, 2023, without hearing from Mr. Renteria, the trial court granted the State's motion to vacate the execution order and withdraw the death warrant. ROA.172-173. The following day, the State filed another motion to set the same execution date, ROA.175-179, which the trial court rubberstamped a few hours later, again without hearing from Mr. Renteria. ROA.182-184.

On July 12, 2023, Mr. Renteria filed a motion asking the trial court to reconsider the second execution order. ROA.186-196. He argued and presented evidence showing that he had been denied "fair and equal

[6] The State had no evidence that Mr. Renteria was considering such litigation, and no Texas court so much as suggested he was.

treatment before the law." ROA.188; *see generally* ROA.189-192. Specifically, he demonstrated that the State had subjected him "to disparate and arbitrary deprivation of a custom and practice it has afforded other capital litigants—namely access to that Office's case file." ROA.193. The State's actions violated Mr. Renteria's rights under the Equal Protection Clause of the Fourteenth Amendment by making him "a 'class of one,' … [who] has been intentionally treated differently from others similarly situated [with] no rational basis for the difference in treatment." ROA.195 (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

After receiving a response from the State and additional evidence, on August 28, 2023, the trial court held a hearing on Mr. Renteria's motions. Judge Velarde Reyes explained that the execution order had been entered under the belief that the "defense still had access to the file" because that would happen in "any other case." ROA.65. Judge Velarde Reyes looked for the State's reasoning, and found only the State's "email, short and succinct, 'We … decline your request.'" ROA.66 (corrected). Later, the State claimed its reason was a refusal to recognize Mr. Renteria's counsel. But, the court found, "the actions in other cases differ from that," *ibid.*, because counsel identically situated to Mr. Renteria's

counsel were given access to the file. ROA.101-102. The evidence of arbitrariness "scare[d the court] because that's going down of slippery slope of being able to pick and choose which attorneys are going to be able to look at discovery." ROA.66-67.

Judge Velarde Reyes also found grounds for concern in the State's delay tactics; the State allowed six months of the warrant period to lapse while it arbitrarily denied Mr. Renteria the same process afforded similarly situated defendants. ROA.68; ROA.33. The State's delay prejudiced Mr. Renteria because Texas law requires that a clemency application be filed twenty-one days before an execution date[7] and that a subsequent writ application must be filed eight days before an execution date. Tex. Ct. Crim. App. Misc. R. 11-003. *See* ROA.33.

For those reasons, Judge Velarde Reyes ruled from the bench that she was reconsidering and withdrawing the execution order. ROA.67; ROA.32-33.

No sooner did the trial court articulate its order than the State announced it was going to seek reconsideration. ROA.70. On August 31,

[7] 37 Tex. Admin. Code § 143.57(b) (2023) (Tex. Board Pardons & Paroles, Commutation of Death Sentence to Lesser Penalty).

2023, the State filed a motion asking the trial court to reconsider its order.

The trial court never had the opportunity to rule on that motion because, on September 6, 2023, the State filed in the TCCA an emergency motion to stay the trial court proceedings.[8] After Mr. Renteria's counsel filed a preliminary response to the stay motion, the TCCA stayed the trial court's discovery order. ROA.199.

Texas law expressly prohibits the TCCA from granting mandamus relief before the respondent or real-party-in-interest has filed a response. Tex. R. App. P. 72.2 (any case that "should be filed and set for submission … will then be handled and disposed of in accordance with Rule 52.8"); Tex. R. App. P. 52.8(b)(1) (if court tentatively finds petition meritorious, "court must request a response if one has not been filed"). The rules re-

[8] The State only sought to stay the trial court's discovery order. Neither the trial court nor the TCCA was asked to stay the withdrawal of the execution order, and neither court did so. Consequently, Mr. Renteria was without an execution date, the TDCJ had no warrant to carry out his execution and therefore no legal authority to treat him as though he did, *see* Tex. Code Crim. P. art. 43.15, and he was moved from the restrictive "death watch" cells back to the housing of death-sentenced men who have no execution dates. *See* ROA.205-207.

quire a two-stage process: (1) review of the petition and a vote to determine whether "five judges tentatively believe that the case should be filed and set for submission," Tex. R. App. P. 72.2; and (2) an order granting leave to file the petition, and the process dictated Rule 52.8(b)(1), *i.e.*, a request for a response if one has not been filed. The TCCA failed to afford Mr. Renteria his rights under either rule. It granted the petition on September 18, 2023, without calling for a response to the merits of the mandamus action. ROA.76-83.

In granting the petition for mandamus, the TCCA held that the trial court in this case has "no freewheeling jurisdiction to seek to safeguard Renteria's Fourteenth Amendment Rights" including his rights under the Equal Protection Clause. ROA.82.

The TCCA is the highest state court in Texas with jurisdiction over Mr. Renteria's case. The Texas Constitution provides that the TCCA's "determinations shall be final, in all criminal cases of whatever grade." Tex. Const. art. V, § 5(a). The Texas Constitution gives the TCCA exclusive appellate jurisdiction over "all cases in which the death penalty has been assessed," *id.*, § 5(b). The TCCA has interpreted that provision to give it exclusive jurisdiction over original writs (*e.g.*, writs of prohibition

and mandamus) concerning such cases. *See State ex rel. Honorable Court of Appeals for Third Dist.*, 885 S.W.2d 389, 392-96 (Tex. Crim. App. 1994) (en banc). Consequently, the TCCA's holding in this case that the state district court has no "freewheeling jurisdiction to seek to safeguard Renteria's Fourteenth Amendment Rights" constitutes a final and "formal expression of state law," *Williams*, 608 F.2d at 1022, barring Mr. Renteria from enforcing "a right under any law providing for equal civil rights of citizens of the United States." 28 U.S.C. § 1443(1).

The TCCA's denigration of Mr. Renteria's right to equal protection of the laws as a "freewheeling" pursuit, coupled with the court's refusal to let him enforce his rights in the TCCA, means he has no state forum to go to. In other words, the process the TCCA relied on to conclude that the trial court lacked jurisdiction to enforce Mr. Renteria's rights under the Equal Protection Clause denied him the equal protection of the Texas Rules of Appellate Procedure. Although Rules 72.2 and 52.8(b)(1) expressly required notice that the court deemed the case worthy of submission and an opportunity for either Mr. Renteria or the trial court to respond, the TCCA ignored both rules.

The TCCA's substantive holding on the trial court's lack of jurisdiction, coupled with the TCCA's decision to preclude Mr. Renteria from arguing for his equal civil rights in the TCCA itself, conclusively establish that prerequisites for removal under § 1443(1) exist.

## STANDARD OF REVIEW

This Court reviews a "district court's remand order de novo, without a thumb on the remand side of the scale." *Latiolas v. Huntington Ingalls, Incorporated*, 951 F.3d 286, 290 (5th Cir. 2020) (internal quotation marks and citations omitted); *Admiral Ins. v. Abshire*, 574 F.3d 267, 272 (5th Cir. 2009).

## SUMMARY OF THE ARGUMENT

The district court's decision violated this Court's and the Supreme Court's rules of statutory construction to reach conclusions at odds with both the text of the law and the Supreme Court applications of it.

## ARGUMENT

### I. The District Court Wrongly Relied upon Legislative History to Devine what Congress Intended by the Phrase "At a Later Time."

The district court's initial order remanding Mr. Renteria's case was based on a simple syllogism: "'Congress eliminated post-judgment removal when it enacted [section] 641 of the Revised Statutes of 1874.'

*State of Ga. v. Rachel*, 384 U.S. 780, 795 (1966)," ROA.273; "Renteria now seeks post-judgment removal of his criminal case, which is not permitted. *Rachel*, 384 U.S. at 795." ROA.274. Simple, but fallacious for several reasons. First, the statement from *Rachel* was dicta.[9] Second, it is at best uncertain that the statutory compilation *Rachel* commented on was an act of Congress. Third, and most importantly, that statute was superseded by a law enacted eleven years after *Rachel* was decided,[10] and Mr. Renteria had relied specifically upon the new law permitting removal "at a later time" than the pre-trial periods at issue in *Rachel*. ROA.6; *id.* at 17-19.

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[9] The *Rachel* defendants sought to remove "criminal trespass prosecutions pending against them" in the criminal court of Fulton County, Georgia. 384 U.S. at 782. In the Supreme Court, the *Rachel* defendants *prevailed* in establishing their right to a hearing in federal court because, if the allegations in their removal petition proved true, their "right to removal under [the federal removal statute] will be clear." *Id.* at 805. Because the underlying state-court action had not proceeded to judgment, and the defendants prevailed in the Supreme Court, the Supreme Court's comment on post-judgment removals was simply that – "a mere 'judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.'" *In re Hearn*, 376 F.3d 447, 453 (5th Cir. 2004), decision clarified on denial of reh'g, 389 F.3d 122 (5th Cir. 2004) (quoting Black's Law Dictionary 1100 (7th ed. 1999) (defining "obiter dictum")).

[10] Pub. L. 95-78, § 3, July 30, 1977, 91 Stat. 321.

In 1977, Congress amended the removal act by adding the provision now codified in 28 U.S.C. § 1455(b)(1). Pub. L. 95-78, § 3, July 30, 1977, 91 Stat. 321. That law added to § 1446(c)(1) of the Judicial Code the language Mr. Renteria relied upon below: a notice of removal must be filed within thirty days of arraignment in state court or at any time before trial, whichever is earlier – "*except* that *for good cause* shown the United States district court may enter an order granting the defendant or defendants leave to file the notice *at a later time*."[11] 28 U.S.C. § 1455(b)(1) (emphasis added).

Scholars and commentators recognized that the new provision appeared to "breathe new life into § 1433 by allowing for post-judgment removal in criminal cases when the results of the state judicial proceedings have established that the claimed right was in fact denied or could not be enforced." Richard H. Fallon *et al.*, *Hart and Wechsler's The Federal Courts and the Federal System* 961 (4th ed. 1996). This Court also took note of the change. *See Butler v. King*, 781 F.2d 486, 487 (5th Cir. 1986)

[11] In 2011, Congress moved that language to its current home. Pub. L. 112-63, Title I, § 103(c), Dec. 7, 2011, 125 Stat. 761.

(noting district court's reliance on the "1977 amendment to § 1446" that added § 1446(c)(1)). But the district court did not.

Instead of determining whether post-judgment removal is permitted by the phrase "at a later time," the district court construed the issue as whether "Section 1455's legislative history … suggest[s] Congress intended to either overrule the alleged dicta in *Rachel* or permit post-judgment removal." ROA.330. That was an error of law.

"[U]nder our circuit's caselaw, considering legislative history is permissible only if there is ambiguity." *Matter of Glenn*, 900 F.3d 187, 192 n.3 (5th Cir. 2018) (citing *Goswami v. Am. Collections Enter., Inc.*, 377 F.3d 488, 492–93 (5th Cir. 2004)). Under this Court's cases, and, indeed, under the Constitution itself,[12] the "always primary … interpretive tool is the text itself." *Latiolais*, *supra*, 951 F.3d at 292. That is because "legislative history is not the law." *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). While the district court might have turned to "clear

[12] *See Glenn*, 900 F.3d at 192 n.3 (citing *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 783–84 (2018) (Thomas, J., concurring in part and concurring in the judgment) ("[W]e are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.") (quoting *Lawson v. FMR LLC*, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring in part and concurring in the judgment))).

legislative history [that] can 'illuminate ambiguous text,'" the law "won't allow 'ambiguous legislative history to muddy clear statutory language.'" *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019) (quoting *Milner v. Department of Navy*, 562 U.S. 562, 572 (2011)). But that is precisely what happened in the district court.

Rather than "begin where all such inquiries must begin: with the language of the statute itself," *Republic of Sudan v. Harrison*, 587 U.S. ___, 139 S. Ct. 1048, 1056 (2019) (internal quotation marks and citations omitted), the district court quoted the statute but immediately made the analysis into "the task of looking over a crowd and picking out your friends." *Ali v. Barr*, 951 F.3d 275, 282 (5th Cir. 2020) (internal quotation marks and citations omitted). The district court's view took in the friendly presence of Professor Wayne LaFave. ROA.330-31.

If the district court had not lost focus on the text the removal act, its application to Mr. Renteria would have been clear. The district court correctly emphasized that the statute permits removal "of a *criminal prosecution*." ROA.330 (quoting with emphasis 28 U.S.C. § 1455(b)(1)). To the extent there is ambiguity in the phrase "at a later time," the phrase "criminal prosecution" resolves it in Mr. Renteria's favor. That

phrase appears first in § 1443(1), the provision that establishes the district court's removal jurisdiction, *see City of Greenwood v. Peacock*, 384 U.S. 808, 833-34 (1966), so it is essential. *See also* 28 U.S.C. § 1455(b)(3) ("The notice of removal of a criminal prosecution shall not prevent the State court in which such prosecution is pending from proceeding further, except that a judgment of conviction shall not be entered unless the prosecution is first remanded.") Thus, the "later time" in § 1455(b)(1) cannot be after the "criminal prosecution" that is the basis of the district court's jurisdiction "is pending." *Cf. Oviedo v. Hallbauer*, 655 F.3d 419, 424 (5th Cir. 2011) ("[e]mphasizing the total finality of the state case" when holding that a *different* statute precluded removal "after a final judgment *and the time for direct appellate review* has run") (emphasis added).

The record of the post-judgment proceedings in the state court in this case shows the criminal prosecution was pending and far from "total finality" when Mr. Renteria sought to enforce his rights under the Equal Protection Clause of the Fourteenth Amendment. A death judgment in Texas requires additional judicial proceedings. Tex. Code Crim. P. art. 43.141. In the overwhelming majority of cases, the prosecution initiates that proceeding by filing a motion requesting that the convicting court

set an execution date, as occurred in this case. As the record in this case illustrates, sometimes those motions lead to adversarial hearings after which the motion may be granted or denied. *See* ROA.10-13 (discussing evidence at ROA.116-135).

Even the entry of an execution order does not mean the criminal prosecution is no longer pending, as this case also illustrates. The district attorney in this case moved the trial court to vacate the execution date and reset it solely for the purpose of avoiding litigation the district attorney (and the defense) knew would be futile. *See* ROA.12-13 (discussing evidence at ROA.145-184).

Indeed, it was the arbitrary and disparate treatment Mr. Renteria received in those proceedings that prompted him to seek reconsideration from the trial court, and that compelled the trial court to grant him relief. ROA.186-195; ROA.32; ROA.67-69.

That capital cases are not final after judgment should come as no surprise. There are few empirical assertions more often stated in the Supreme Court's death-penalty cases than the observation that post-conviction review frustrates a State's interest in finality. *E.g. Calderon v.*

*Thompson*, 523 U.S. 538, 552-53 (1998); *id.* at 555-557 (quoting many examples); *Shoop v. Twyford*, 596 U.S. 811, 821 (2022). Those cases and the very title of the Anti-terrorism and Effective Death Penalty Act emphasize that in a capital case finality does not truly obtain until the sentence is actually carried out. *See*, *e.g.*, *Rhines v. Weber*, 544 U.S. 269, 277-78 (2005). None of the cases the district court relied upon were capital cases. ROA.331-33. In fact, none of the circuit cases the district court relied upon even involved the removal of a criminal case. ROA.331-32.

Even if "at a later time" is so ambiguous that legislative history would be a permissible consideration, the district court still erred in conducting what Justice Gorsuch has called a "legislative séance[]" because it predictably produces "only the results intended by those conducting the performance." *United States v. Arthrex, Inc.*, 594 U.S. ___, 141 S. Ct. 1970, 1992 (2021) (Gorsuch, J., concurring in part and dissenting in part). There were more reliable and doctrinally appropriate means at hand.

For example, under a standard canon of statutory interpretation, "Congress is presumed to be aware of a[]…judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). The Act of July

30, 1977, left the substantive removal law for criminal cases, § 1443(1), intact but changed the procedural rules to permit removal later in time than the pretrial-only interpretation in *Rachel*. Looking at both the unchanged substantive basis for removal in § 1433(1)—the defendant "is denied or cannot enforce … a right under any law providing for … equal civil rights"—and the new requirement to show good cause for removal after the earliest pretrial filings, one finds a meaning and purpose clearly applicable to this case. Indeed, *Rachel* likely provided the rationale for Congress to change the law back to something with nearly the same scope as the pre-revision statute.

The Court in *Rachel* noted the difficulty federal courts faced when applying § 1443(1)'s "denied or cannot enforce" clause in a pre-trial context. Then, removal was warranted only when the federal court could "predict[] by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts." *Rachel*, 384 U.S. at 800. The need to make an uncomfortable prediction about the future behavior of state-court judges resulted "a series of cases [in which] … the Court established a relatively narrow, well-de-

fined area in which pre-trial removal could be sustained under the 'denied or cannot enforce' clause." *Id*. at 797. Those cases required a state constitutional provision or statute that expressly denied equal civil rights except in rare cases. *Id*. at 799-801.

All those difficulties could be resolved with a legislative change because "[t]here can be no doubt that post-judgment removal was a practical remedy for civil rights defendants invoking … the 'denied or cannot enforce' clause … in order to vindicate rights that had actually been denied at the trial." *Id*. at 794. Voila! the 1977 amendment allowed time for the state courts to decide for themselves whether to deny or enforce federal equality laws, as the Texas court did in this case. That restored the original scope of the substantive basis for removal through a procedural change that—with the advent of the good-cause requirement—still prevented unfair gamesmanship by defendants.

The district court's clear errors of law denied Mr. Renteria the hearing he should have received, just like the *Rachel* defendants. Therefore, this Court should reverse with instructions to hold the hearing required by § 1455(b)(5).

## II. The District Court Wrongly Conflated the Right a Defendant seeks to Enforce through Removal with the "Law Providing for the Equal Civil Rights of Citizens of the United States."

The district court's initial remand decision rested entirely on the court's erroneous supposition that *Rachel* accurately described the law as it is today. On reconsideration, the district court held that Mr. Renteria could not satisfy the "two-part test for § 1443(1) removal petitions in *Johnson v. Mississippi*, 421 U.S. 213 (1975)." ROA.334-336. The court applied quoted this Court's formulation of that test in *Texas v. Gulf Water Benefaction Co*, 679 F.2d 85, 86 (5th Cir. 1982):

> To gain removal … the defendant must show both that (1) the right allegedly denied it arises under a federal law providing for specific rights stated in terms of racial equality; and (2) the removal petitioner is denied or cannot enforce the specified federal rights in the state courts due to some formal expression of state law.

*See* ROA.334.

That formulation appears to have contributed to the district court erroneously conflating two phrases in § 1443(1) that the Supreme Court has distinguished: the need to have "a right" and the need for that right to arise "under any law providing for the equal civil rights of citizens." Ironically, *Rachel* went into great detail explaining the origins of the awkward phrasing. 384 U.S. at 788-789 (explaining that before the

phrase "under any law" was added, the act simply referred to rights listed in another section of the Civil Rights Act of 1966). Instead of asking whether it "appears that the right allegedly denied the removal petitioner *arises under a federal law 'providing for specific civil rights stated in terms of racial equality*,'" *Johnson*, 421 U.S. at 219 (quoting *Rachel*, 384 U.S. at 792) (emphasis added), the district court held Mr. Renteria "fails the first prong of the *Johnson* test" because, in part, he does "not allege a deprivation of racial equality." ROA.335.

The *Rachel* defendants also were not asserting a denial of racial equality in their removal petition. Rather, the Supreme Court held their allegations were sufficient to warrant a hearing because they alleged their trial violated the Civil Rights Act of 1964 because it prosecuted them for protesting. 384 U.S. at 805 ("The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964.").

## III. The District Court Erred in Holding the Fourteenth Amendment's Equal Protection Clause is not a Law Protecting Equal Civil Rights.

The district court also erred in holding that Mr. Renteria's allegations failed under *Johnson* because they did "not implicate the denial or

enforcement of his civil rights under a *statute* protecting racial equality." ROA.335 (emphasis added). Again, the district court amended the removal act, which does not require an equal rights "statute."

Mr. Renteria asserted that a new basis for removal had accrued from the Texas Court of Criminal Appeals' (TCCA's) ruling that Mr. Renteria's trial court had "'no freewheeling jurisdiction to seek to safeguard Renteria's Fourteenth Amendment Rights.'" ROA.5 (quoting *In re State of Texas ex rel. Hicks*, No. WR-95,092-01 (Tex. Crim. App. Sep. 18, 2023) ("*In re Hicks*")). The TCCA invalidated the decision of the 327th District Court of El Paso County that no execution date should have been ordered because the "State's disparate treatment of Defendant … prejudiced his ability to investigate potential grounds for relief from the courts and clemency authorities." ROA.32.

The Equal Protection Clause of the Fourteenth Amendment is "a federal law providing for specific civil rights stated in terms of racial equality." *Williams*, *supra*, 608 F.2d at 1022; *see Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 202 (2023). Indeed, "[t]he Fourteenth Amendment was in part designed to provide a firm constitutional basis for the Civil Rights Act of 1866, 14

Stat. 27, and to place that legislation beyond the power of congressional repeal." *Bell v. State of Md.*, 378 U.S. 226, 292 (1964).

## IV. The District Court Erred in Holding that a Decision of Texas's Highest Criminal Court Interpreting the Texas Code of Criminal Procedure is not "a Formal Expression of State Law."

Finally, the district court held that Mr. Renteria "fails the second prong of the *Johnson* test" because the decision of the TCCA was not "a formal expression of state law which will cause the state court to deprive him of the protection of his federal constitutional or statutory rights." ROA.335-336. This statement is accompanied by no analysis or even a citation to law. It is clearly wrong.

The TCCA is the highest state court in Texas with jurisdiction over Mr. Renteria's case. The Texas Constitution provides that the TCCA's "determinations shall be final, in all criminal cases of whatever grade." Tex. Const. art. V, § 5(a). The Texas Constitution gives the TCCA exclusive appellate jurisdiction over "all cases in which the death penalty has been assessed," *id.*, § 5(b). The TCCA has interpreted that provision to give it exclusive jurisdiction over original writs (*e.g.*, writs of prohibition and mandamus) concerning such cases. *See State ex rel. Honorable Court of Appeals for Third Dist.*, 885 S.W.2d 389, 392-96 (Tex. Crim. App. 1994)

(en banc). Consequently, the TCCA's holding in this case that the state district court has no "freewheeling jurisdiction to seek to safeguard Renteria's Fourteenth Amendment Rights" constitutes a final and "formal expression of state law," *Williams*, 608 F.2d at 1022, barring Mr. Renteria from enforcing "a right under any law providing for equal civil rights of citizens of the United States." 28 U.S.C. § 1443(1).

## CONCLUSION

For the foregoing reasons, this Court should set aside the district court's remand order and direct the court to hold a hearing on Mr. Renteria's petition.

Respectfully submitted,

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DATED: November 9, 2023

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I do hereby certify that on November 9, 2023, the foregoing document was served, via the Court's CM/ECF Document Filing System, upon all registered users and counsel of record for Appellee.

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/s/ *Tivon Schardl*
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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,842 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/ *Tivon Schardl*
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DATED: November 9, 2023

# *United States Court of Appeals*

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No. 23-70007 Renteria v. Lumpkin
USDC No. 3:23-CR-2080-1

Dear Mr. Schardl,

We received your Duplicate Proposed Sufficient Brief. We are taking no action because the document appears to be a duplicate. The appellant's brief is sufficient.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
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cc: Mr. Jefferson David Clendenin