No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

DAVID S. RENTERIA

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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EMERGENCY APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

****Execution scheduled for Thursday, November 16, 2023, at 6 p.m.****

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APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Samuel Alito, Associate Justice, and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

INTRODUCTION

David Renteria is due to be executed by Texas in about 24 hours—despite the fact that no court has reviewed his meritorious claim that his federal right to equal protection of the law was violated when the prosecution refused to allow him to review its trial file, although it had allowed similarly situated capital prisoners facing execution to do so.

Texas law gives convicting courts discretion in deciding when to order execution of a capital judgment. In May 2023, Texas prosecutors chose to seek an execution date for Mr. Renteria and not to seek one for a similarly situated defendant who had been on death row longer, had more post-conviction review, and sought to litigate the same claim as Mr. Renteria.

Mr. Renteria asked the trial court to give him a hearing on the State's motion—the same type of hearing another trial court in El Paso County held for the other defendant when the State sought an execution

date for him in 2020. The trial court denied Mr. Renteria a hearing and rubber-stamped the State's proposed execution order.

Then the State moved to vacate the order. Twenty-four hours after the court granted that request, the State moved to reset the execution. Again, the court rubber-stamped the State's proposed order.

Mr. Renteria moved for reconsideration. He argued the State's disparate treatment of him, including its refusal to let him inspect the prosecution's files after it gave the same opportunity to the other defendant. The convicting court agree that he had been denied equal protection of the laws, and that the prosecution's delays prejudiced him. The court therefore vacated the execution order and withdrew the warrant.

The Texas Court of Criminal Appeals (TCCA) granted the State's mandamus petition from this ruling, reversing the vacation of the execution date and the discovery order. In doing so, the TCCA essentially declared that for prisoners in Mr. Renteria's shoes, the convicting court is a constitution-free zone. In the Court's words, there is "no freewheeling jurisdiction to seek to safeguard Renteria's Fourteenth Amendment rights," including his rights under the Equal Protection Clause. Adding

insult to injury, the Court failed to abide its own rules and granted mandamus without calling for a responsive pleading from Mr. Renteria.

Faced with the deprivation of his constitutional right to equal protection of the law and the inability to vindicate this right in state court, Mr. Renteria filed a notice of removal in the appropriate federal district court. That court granted a hearing on removal petition, but then reversed itself and remanded the matter to state court. Mr. Renteria unsuccessfully appealed this decision to the Court of Appeals for the Fifth Circuit. He is preparing to file with this Court a Petition for Certiorari.

Mr. Renteria respectfully requests a stay of his execution, currently scheduled for tomorrow, November 16, 2023, at 6.p.m. Central Standard Time, pending its disposition of his petition for writ of certiorari. As set out below, this case satisfies each consideration relevant to that determination.

MR. RENTERIA IS ENTITLED TO A STAY

The standard for granting a stay of execution is well-established. This Court will consider the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). There must be "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and "a significant possibility of reversal of the lower court's decision," in addition to irreparable harm. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (citation omitted). These factors weigh in favor of staying Mr. Renteria's execution pending this Court's review of the issues raised in his petition for certiorari.

I. A reasonable probability exists that the Court will grant certiorari because Mr. Renteria has presented significant issues on which he is likely to prevail in this Court.

There is a reasonable probability that this Court will grant certiorari in this case because the Fifth Circuit's decision turned on this Court's construction of an important federal law that was based on legislative history, not the text of the law or its original public meaning. The Fifth

Circuit also decided an important question of federal law that has not been, but should be, settled by this Court. Supreme Court Rule 10(c).

The court of appeals made two significant errors in interpreting the removal statute, 28 U.S.C. §§ 1443(1) and 1455(b)(1). First, the court categorically ruled that removal is purely a pretrial right and therefore cannot apply to a post-conviction case. It mustered only non-precedential circuit decisions in cases that involved post-conviction review proceedings in state court, or that were completely closed and the judgment executed, to support this novel reading of § 1455. That it could identify no controlling precedent is not surprising, as the wording of the statute places no such limits on the timing of removal. Indeed, it provides that removal notices may, for good cause, be filed after "at any time before trial," without limitation. 28 U.S.C. § 1455(b)(1).

Second, the court of appeals held that, under 28 U.S.C. § 1433(1), removal is available only when the deprivation of civil rights is motivated by racial animus. Again, the text of the statute contains no such limits. However, this Court in *State of Georgia v Rachel*, 384 U.S. 780 (1966), relied upon the legislative history of the model for the current law—not even the legislative history of the current law—to conclude "that the

phrase 'any law providing for … equal civil rights' must be construed to mean any law providing for specific civil rights stated in terms of racial equality." *Id*. at 792. The Fifth Circuit reasoned that because the Equal Protection of the Laws Clause of the Fourteenth Amendment includes no formal "terms of racial equality" it is not such a law.

This Court in *Rachel* did not consider at all the original *public* meaning of the removal law. Or any public meaning of that law. The Court's exclusive focus on Congress's intent based on legislative history cannot be reconciled with Article III and this Court's recent cases circumscribing the role of federal courts when interpreting federal laws. *E.g.*, *Bostock v. Clayton County, Georgia*, 590 U.S. ___, 140 S. Ct. 1731, 1738 (2020). *Rachel* is a particularly egregious example of how the courts can radically change the public meaning of a law enacted so that it is narrowed to the point where it no longer provides the public the protection they needed.

As Justice Thomas recently recounted, this Court has consistently held since *The Slaughter-House Cases*, 83 U.S. 36 (1873), that although the "'prevailing purpose'" of Equal Protection Clause was "'the freedom of the slave race, the security and firm establishment of that freedom, and

the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him,'" "the Fourteenth Amendment's equality guarantee applied to members of all races." *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 244-245 (2023) (quoting *Slaughter-House* at 67-72). As Justice Thomas said there, under the

> most commonly held view today … the [Fourteenth] Amendment was designed to remove any doubts regarding Congress' authority to enact the Civil Rights Act of 1866 and to establish a nondiscrimination rule that could not be repealed by future Congresses.

Id. at 241. It is entirely inconsistent with that understanding to deem the Equal Protection Clause anything other than a "law providing for the equal civil rights of citizens." 28 U.S.C. § 1443(1).

Mr. Renteria has a strong likelihood of relief on these issues. A "reasonable probability" of prevailing is usually understood as describing a likelihood lower than "more likely than not[.]" *Smith v. Cain*, 565 U.S. 73, 75 (2012) (discussing "reasonable probability" of a different outcome in the context of *Brady* materiality). Thus, to be entitled to a stay of execution until the Court can review his petition in due course, Mr. Renteria need not demonstrate a high likelihood that the Court will decide to hear his case, but only a reasonably good chance of that outcome. Mr. Renteria

satisfies that standard, because the court of appeals' decision is contrary to the plain language of §§ 1443(1) and 1455.

As for the timing of the notice, that provision plainly provides that removal is available, on a showing of good cause, after trial has commenced or ended. In Mr. Renteria's case, his right to removal was triggered by the September 18, 2023, announcement by the TCCA that it could not vindicate his federal constitutional rights. Nothing in § 1455 prevented him from then removing his claim to federal court.

As for the basis of Mr. Renteria's meritorious equal-protection claim, the plain language of §1433(1) does not support the court of appeals' holding that the statute provides for removal of claims under "any law providing for the equal rights of citizens of the United States" only when the claims involve racial discrimination. The statute does not say so; nor does any precedent from this Court.

Because the court of appeals' ruling is contrary to the plain language of the statutes it interprets, this Court is likely to grant certiorari and hold that Mr. Renteria is entitled to relief.

II. Mr. Renteria will suffer irreparable harm absent a stay.

Irreparable harm is indisputably present when a stay of execution is sought. As this Court has explained, "death is different"—"execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases.").

In this capital case, Mr. Renteria's irreparable injury would be a by-product of the State's unconstitutional behavior. Without interference from this Court, "prosecutors can run out the clock and escape any responsibility for all but the most extreme violations." *Bernard v. United States*, 141 S. Ct. 504, 507 (2020) (Sotomayor, J., dissenting from denial of certiorari). That is the danger Mr. Renteria faces here. This Court should not allow him to be executed without affording him the opportunity to have his removal claim meaningfully heard.

In weighing the equities, the State's undoubted interest in carrying out the sentence must yield to the public interest in seeing that a condemned man is not put to death as a result of proceedings tainted by a

constitutional violation. There is an "overwhelming public interest" in "preventing unconstitutional executions." *Bronshtein v. Horn*, 404 F.3d 700, 708 (3d Cir. 2005) (citation omitted). A stay of execution, in fact, will serve the strong public interest—an interest the State of Texas shares—in administering capital punishment in a manner consistent with the Constitution.

III. Mr. Renteria has not delayed in seeking a stay.

Mr. Renteria's petition is not a "last-minute attempt[ ] to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quotation marks and citation omitted). As shown in the Petition for Certiorari, he has moved with dispatch and has certainly not engaged in any delay.

His claim for removal did not come into being until September 18, 2023, when the TCCA declared that Mr. Renteria could not vindicate his rights to equal protection. Mr. Renteria sought reconsideration of that decision, and, 22 days after being denied reconsideration, on October 18, 2023, he filed his Notice of Removal. After that was denied on October 23, 2023, he promptly sought reconsideration. The district court did not deny reconsideration until October 31, 2023, at which point Mr. Renteria

began to expeditiously prepare his opening brief for the Fifth Circuit Court of Appeals, which he filed the following week. The Fifth Circuit denied relief only yesterday, on November 14, 2023. Mr. Renteria has not delayed in seeking redress for the violation of his right to equal protection.

CONCLUSION

For these reasons, this Court should enter an order staying Mr. Renteria's execution pending resolution of the issues raised in his petition for writ of certiorari.

Respectfully submitted,

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