No. 19-_____

In the
Supreme Court of the United States

_____

Thomas Michael Riley,

Petitioner,

v.

State of Arizona,

Respondent

_____

On Petition for a Writ of Certiorari to the
Supreme Court of Arizona

_____

Petition for a Writ of Certiorari

_____

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CAPITAL CASE

QUESTION PRESENTED

"To pass constitutional muster, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (cleaned up). When the legislature elects to use a broad definition of murder combined with aggravating factors, this narrowing requirement has long been understood to require the aggravating factors to collectively narrow the persons eligible for death.

Arizona has split from this rule. The Arizona Supreme Court concluded that only individual aggravators need narrow; the collective scheme need not. This is the sole basis for the court's conclusion that Arizona's scheme constitutionally narrows, even though nearly 99% of first-degree murder defendants qualify for one or more aggravating factors.

Arizona's decision requires this Court to clarify a limited issue:

To pass constitutional muster, must a death eligibility scheme collectively narrow the class of defendants eligible for the death penalty?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Thomas Riley, petitions this Court for a writ of certiorari to review the judgment of the Arizona Supreme Court affirming the death sentence in his case.

DECISION BELOW

The Arizona Supreme Court's opinion is reported at *State v. Riley*, 248 Ariz. 154, 459 P.3d 66 (2020) (attached at Appendix A).

JURISDICTION

The Arizona Supreme Court issued its decision on March 10, 2020. Appendix A. Riley timely filed a Motion for Reconsideration on March 25, 2020, which the Arizona Supreme Court denied on April 6, 2020. The Arizona Supreme Court subsequently amended its opinion on April 13, 2020. Riley is timely filing this Petition for Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section One of the Fourteenth Amendment provides, in pertinent part: "… nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

Lowenfield v. Phelps, 484 U.S. 231, 244 (1988):

> To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."

State v. Riley, 459 P.3d 66, ¶ 176 (Ariz. 2020):

> Riley appears to be urging us to examine the aggravating factors in their entirety—as opposed to individually—when considering whether the legislature has sufficiently narrowed the class of persons eligible for the death penalty. If that is the case, we rejected a similar argument in *Hidalgo*, noting that Supreme Court precedents undermine such a position.

Arizona's death penalty scheme fails to legislatively delineate between those who deserve and do not deserve death. Rather, Arizona's scheme has so many aggravating factors that nearly every conceivable murder is death-eligible. Such a scheme leads to the infrequency problem this Court observed in *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality).

Despite this Court's statement in several cases that the legislative scheme or system must narrow, the Arizona Supreme Court concluded that the only narrowing necessary was at the individual aggravator level. Thus, as long as any single aggravator applies to only a limited number of murder defendants, it does not matter if the system collectively fails to narrow in any meaningful manner.

Relying on this premise, the Arizona Supreme Court upheld Arizona's death-penalty scheme, under which nearly 99 percent of all first-degree murder defendants qualify for one or more aggravating factors and therefore could be eligible for the death penalty.

But this Court's precedent and application has been clear: it is not enough for individual aggravators to narrow; the aggravators, considered collectively, must meaningfully narrow eligibility for the death penalty. And there is a consensus among other jurisdictions and capital jurisprudence scholars: the collective-narrowing function of a scheme is essential.

STATEMENT

Background of the Narrowing requirement.

In 1972, capital punishment, as it was then administered, was deemed unconstitutional. *Furman v. Georgia*, 408 U.S. 238 (1972) (plurality). There were two key problems.

The first problem was infrequency—the plurality was bothered by the wide discrepancy between death eligibility and imposition. *See id.* at 276-77 (Brennan, J., concurring), 309 (Stewart, J., concurring), 311-12 (White, J., concurring), 340 (Marshall, J., concurring). In his dissent, Chief Justice Burger noted, "[a]lthough accurate figures are difficult to obtain, it is thought that from 15% to 20% of those convicted of murder are sentenced to death in States where it is authorized." *Id.* at 386 n.11 (Burger, C.J., dissenting). This created a wide discrepancy between eligibility and imposition. *Id.* at 276-77 (Brennan, J., concurring), 309 (Stewart, J., concurring), 311 (White, J., concurring). The plurality was of the opinion that this wide discrepancy between eligibility and imposition illustrated that capital punishment, as it was then imposed, was unconstitutional. *Id.* at 276-77, 293-94 (Brennan, J., concurring), 309 (Stewart, J., concurring), 311 (White, J., concurring).

Second, the plurality was troubled by the fact that decisions to impose death were largely unguided. *Id.* at 293-94 (Brennan, J., concurring), 309-10 (Stewart, J., concurring), 313 (White, J., concurring).

In the four years after *Furman*, approximately two-thirds of the state legislatures, as well as Congress, modified their capital punishment schemes. *Gregg v. Georgia*, 428 U.S. 153, 179-80 (1976). The goal was to narrow the divide between eligibility and imposition while providing guidance. *Id.* at 180.

There were two primary approaches. States like North Carolina made the death penalty mandatory for all persons convicted of capital offenses, including murder. *Woodson v. North Carolina*, 428 U.S. 280, 285-87 (1976) (plurality). Other states, like Georgia and Florida, established a limited number of aggravating factors the prosecution was required to prove before a defendant became death-eligible. *Gregg*, 428 U.S. at 162-68; *Proffitt v. Florida*, 428 U.S. 242, 247-53 (1976). In a slight variation, Texas established a separate offense that incorporated the aggravating factors into the guilt phase. *Jurek v. Texas*, 428 U.S. 262, 267-75 (1976). Louisiana took a hybrid approach, establishing a narrowed definition of murder but making imposition mandatory. *Roberts v. Louisiana*, 428 U.S. 325, 328-31 (1976).

Facially, each approach addressed the problems identified in *Furman*. A mandatory death scheme obviated the need for guidance and reduced the variance between eligibility and imposition by increasing imposition. The aggravators approach, on the other hand, decreased eligibility, driving it closer to expected imposition. The aggravators, combined with consideration of mitigation, also guided the jury decision.

On July 2, 1976, decisions in five cases established a new constitutional framework for capital cases: *Gregg v. Georgia*, 428 U.S. 153 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Proffitt v. Florida*, 428 U.S. 242 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Jurek v. Texas*, 428 U.S. 262 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality); and *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality). Taken together, these cases established five fundamental principles that must be met for a capital scheme to be constitutional:

> 1. The capital sentencing scheme, established by the legislature, must narrow those eligible for the death penalty through either eligibility factors or a circumscribed definition of capital murder that incorporates eligibility factors. *Gregg*, 428 U.S. at 196-97; *Proffitt*, 428 U.S. at 248-51; *Jurek*, 428 U.S. at 270-71.

2. The defendant must have the ability to present mitigating circumstances to the sentencer. *Jurek*, 428 U.S. at 271; *Woodson*, 428 U.S. at 303-04; *Roberts*, 428 U.S. at 333-34.

3. The sentencer's discretion must be guided by the aggravating factors (or narrowed homicide definition) and consideration of the mitigation. *Jurek*, 428 U.S. at 271-72; *Gregg*, 428 U.S. at 197-98; *Proffitt*, 428 U.S. at 250-51.

4. The sentencer must have the discretion to impose a sentence other than death if persuaded. *Jurek*, 428 U.S. at 271-72; *Woodson*, 428 U.S. at 303-04; *Roberts*, 428 U.S. at 333-34.

5. The defendant must have an opportunity for meaningful appellate review. *Gregg*, 428 U.S. at 198; *Proffitt*, 428 U.S. at 250-51; *Jurek*, 428 U.S. at 269.

These guiding principles still animate our capital punishment jurisprudence.

The argument below focused on the first issue: legislative narrowing. "To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)). This narrowing can be done in one of two ways: "[t]he legislature may itself narrow the definition of capital offense … so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Id.* at 246.

Arizona's capital eligibility scheme does not satisfy this narrowing requirement. When all the aggravating factors are considered, 98.8 percent of murder defendants qualify for at least one of the aggravating factors. Thus, the Arizona legislature has only narrowed 1.2 percent of murder defendants. Arizona's eligibility scheme is so broad the trial judge reviewing it observed "it is hard to fathom a factual situation in which a first degree murder does not have an aggravating

circumstance, and that's troubling from the Court's perspective." App. 219a-220a. And the disparity between eligibility and even notice is vast. Despite near-universal eligibility, "prosecutors sought the death penalty in Maricopa County in about ten percent of first degree murder cases" during a two-year period studied. *State v. Hidalgo*, 390 P.3d 783, ¶ 25 (Ariz. 2017).

Factual and Procedural Background.

1. Arizona's death penalty scheme.

In Arizona, every first-degree murder is punishable by death. Ariz. Rev. Stat. § 13-1105(D). First-degree murder includes any intentional, premeditated murder, and intentional murder of a law enforcement officer in the line of duty. Ariz. Rev. Stat. § 13-1105(A)(1) & (3). It also includes an expansive felony-murder provision—any death occurring during the commission, attempted commission, or immediate flight from one of more than 15 felony offenses is first-degree murder. Former Arizona Court of Appeals Judge Rudolph J. Gerber characterized Arizona's felony murder rule as "extreme by any standard, modern or medieval …." Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle,* 31 Ariz. St. L.J. 763, 767 (1999). He observed that Arizona's felony murder rule appeared "to be the broadest in this country" and "exemplifies the inevitable and illogical results from any version of the rule." *Id.*

In light of how expansive Arizona's first-degree murder statute is, Arizona has also set forth a number of aggravating factors. Ariz. Rev. Stat. § 13-751(F). Any one aggravating factor makes a defendant eligible for the death penalty. Ariz. Rev. Stat. § 13-751(E). When Riley was

charged and tried, Arizona had 14 aggravating factors. *See* Ariz. Rev. Stat. § 13-751(F) (2011 & 2013).

The evidence in this case indicates that, over a decade-long period reviewed, one or more aggravating factors could apply to 98.8 percent of first-degree murder cases in Arizona. App. 154a.

2. The trial court denies Riley's two motions to dismiss the death penalty.

Before trial, Riley joined a Motion to Dismiss the Death Penalty filed by another defendant. The defense argued that Arizona's aggravating factors did not perform the legislative narrowing function required by *Furman* and its progeny because every first-degree murder was death-eligible. App. 96a-98a.

The state argued that no legislative narrowing need occur: "Judge, the bottom line is that every first degree murder defendant should be eligible for the death penalty." App. 117a.

The court denied the request for an evidentiary hearing and findings of fact and assumed Riley's factual claims were true. App. 82a-83a, 88a-90a. After holding oral argument, the trial court denied the motion, largely relying on Arizona precedent that had concluded Arizona's capital punishment scheme was constitutional. App. 125a-132a.

A year-and-a-half later, Riley joined a second round of litigation challenging Arizona's death penalty on the grounds that it did not comply with *Furman* and its progeny.

The evidence the defense wished to present had expanded. Riley had an expert ready to testify. *See* App. 154a. That expert would have testified that at least 856 of 866 murders that could be analyzed over a ten-year period—98.8 percent—would have been death-eligible under the legislative scheme. App. 154a.

The trial court denied Riley's request for an evidentiary hearing and assumed the expert's conclusions were correct. App. 156a-158a, 167a-168a.

At oral argument, the trial court was concerned by Arizona's scheme. The court agreed a death-penalty scheme had to narrow at the legislative stage and noted it was "not seeing meaningful narrowing when we're applying aggravating circumstances …." App. 200a. And the court expressed it was "troubled by what I believe to be a lack of narrowing in the statute, and when I say statute, I mean scheme." App. 219a. Arizona's aggravating factors are so expansive that the court found "it is hard to fathom a factual situation in which a first degree murder does not have an aggravating circumstance …." App. 219a-220a.

The trial court also outright rejected the state's argument that only individual aggravators need narrow: "Respectfully, I think the state's argument that as long as individual aggravators themselves narrow the class of persons eligible for the death penalty, then the statute is constitutional is just wrong." App. 220a; *accord* App. 197a-198a.

Nonetheless, the trial court denied Riley's motion. App. 219a. Relying upon Arizona cases upholding the death penalty scheme—even though those cases were not supported by data—the court saw its decision as a straightforward application of stare decisis: "However, my job is to do what the [Arizona] Supreme Court tells me to do and to follow what they say the law is and, to me, that's straightforward and that's what I need to do." App. 219a-220a.

3. This Court denies certiorari in *Hidalgo v. Arizona*; Justice Breyer issues a statement respecting the denial of certiorari.

Before Riley filed his appeal, another defendant involved in the first round of the litigation appealed the issue in *State v. Hidalgo,* 390 P.3d 783 (Ariz. 2017). The Arizona Supreme Court concluded Arizona's death penalty scheme adequately narrowed. *Id.* at ¶¶ 14-29.

The court's conclusion was premised upon its rejection of the appellant's argument that aggravating factors had to collectively narrow death-eligibility. *See id.* at ¶¶ 18-28. The court relegated support for collective narrowing to "isolated quotes" and "[a]cademic commentators." *Id.* at ¶ 18. And the court opined that this Court's jurisprudence undermined the claim that collective narrowing was required. *Id.* at ¶ 19. They held that this "Court has not looked beyond the particular case to consider whether, in aggregate, the statutory scheme limits death-sentence eligibility to a small percentage of first degree murders." *Id.* at ¶ 26.

The court also relied upon three other factors to support Arizona's scheme: 1) death eligibility is limited to first-degree murder, 2) the state had to prove at least one aggravator beyond a reasonable doubt to the jury, and 3) the jury is allowed to consider mitigation. *Id.* at ¶ 28.

The appellant filed a petition for writ of certiorari, which this Court denied. *See Hidalgo v. Arizona*, 138 S.Ct. 1054 (2018) (Breyer, J., statement respecting denial of certiorari). Justice Breyer—joined by Justices Ginsburg, Sotomayor, and Kagan—wrote a statement respecting the denial of certiorari. *Id.* In it, Justice Breyer expressed concerns about the constitutionality of Arizona's death-penalty scheme and the Arizona Supreme Court's justifications of the scheme. *Id.* at 1054-57. Justice Breyer specifically found each of the justifications wanting.

Justice Breyer started by explaining that narrowing must occur at the legislative stage. *Id.* at 1054. This can be done through either a narrowed definition of capital murder (so that narrowing occurs at the guilt phase) or a broad definition of murder and the use of aggravating factors (so that narrowing occurs at an aggravation phase). *Id.* at 1055.

Addressing the claim that Arizona limits imposition to first-degree murder, Justice Breyer observed that Arizona has not narrowed through a definition of capital murder. *Id.* at 1055.

Unlike Texas or Louisiana, Arizona's first-degree murder statute is defined broadly "to include all premeditated homicides along with felony murder based on 22 possible predicate felony offenses." *Id.*

Justice Breyer also found the Arizona Supreme Court's reliance upon the aggravating factors for narrowing problematic because the court had presumed that nearly 99 percent of first-degree murder defendants would qualify for at least one aggravator. *Id.* at 1056.

Regarding the claims that the jury had to find an aggravator and was allowed to consider mitigation, Justice Breyer explained the methods were "basically beside the point—they do not show the necessary *legislative* narrowing that our precedents require." *Id.* (emphasis original).

4. The Arizona Supreme Court denies Riley's appeal, and hinges the entire ruling on how narrowing is understood.

Riley argued the Arizona Supreme Court should revisit its decision in light of Justice Breyer's statement. *See State v. Riley*, 459 P.3d 66, ¶ 174 (Ariz. 2020).

Foremost, Riley asked the court to consider the aggravating factors collectively. *See id.* at ¶ 176. The court relied upon its prior decision in *Hidalgo* to reject the argument. *Id.* (citing *Hidalgo*, 390 P.3d 783, ¶¶ 19-20, 26).

The entire issue turned upon the question of whether the narrowing effect of aggravating factors should be considered individually or collectively. *See id.* at ¶ 178. The court quoted its conclusion from *Hidalgo* wherein it decided to consider only whether an aggravating factor individually narrowed. *Id.* (quoting *Hidalgo*, 390 P.3d 783, ¶ 26).

The court conceded Justice Breyer's analysis "suggests that our rejection of the 'holistic view' of aggravating circumstances in favor of the narrowing nature of individual aggravating

circumstances is contrary to at least four of the Justices' interpretation of Supreme Court precedent." *Id.* But the court refused to reconsider its decision. *Id.*

The court backed away from the other justifications, however.

The court concluded "Riley is likely correct" that "Arizona's broad definition of first degree murder does not satisfy the legislative duty to narrow the class of persons eligible for the death penalty." *Id.* at ¶ 177.[1] And the court agreed this Court's precedents "require the legislature to provide the narrowing function within the statutory definitions of the capital offenses or the aggravating circumstances." *Id.* at ¶ 179. Unlike *Hidalgo*, the *Riley* court therefore did not attempt to justify Arizona's scheme by relying upon the definition of first-degree murder; jury function at the guilt, aggravation, or sentencing stage; prosecutorial discretion; or the need to consider mitigation. *Id.*

The Arizona Supreme Court's decision therefore hinged upon one premise: its "rejection of the 'holistic view' of aggravating circumstances in favor of the narrowing nature of individual aggravating circumstances …." *Id.* at ¶ 178.

Arizona alone has ignored the collective-narrowing requirement. Accordingly, this petition for writ of certiorari follows.

[1] Notably, the Arizona Supreme Court only referenced intentional, premeditated murders when reaching this conclusion. *Riley*, 459 P.3d 66, ¶ 177. The court did not address the extensive range of felony murders. *See* Ariz. Rev. Stat. § 13-1105(A)(2); Gerber, *The Felony Murder Rule*, 31 Ariz. St. L.J. at 767.

REASONS FOR GRANTING THE PETITION

The Arizona Supreme Court has defied precedent and departed from the method of review accepted by courts and commentators alike—collective review of death-eligibility factors. This Court has repeatedly considered death-eligibility factors as a whole—not individually—when deciding whether schemes properly narrowed eligibility.

Because the Arizona Supreme Court erred, this Court should clarify that the Eighth and Fourteenth Amendments require aggravating factors to collectively narrow death-eligibility, and remand this case back to the Arizona Supreme Court for further proceedings.

1. This Court has both required and engaged in the collective review of aggravating factors to ensure death penalty sentencing schemes accomplish the narrowing requirement of *Furman* and *Gregg*.

The core of the Arizona Supreme Court's ruling was its conclusion that the narrowing requirement established by *Furman* and *Gregg* need only be accomplished at the individual-aggravator level. Under this approach, every murder defendant could be eligible for the death penalty. And in Arizona, nearly every defendant is.

This approach defies precedent. Support for collective narrowing is not relegated to "isolated quotes" as the Arizona Supreme Court suggests; this Court's demand for collective narrowing is established by this Court's consideration and review in several cases. Other courts and scholars agree.

Review of individual aggravating circumstances does not render the need for a scheme to collectively narrow eligibility obsolete. Rather, both levels of review are crucial to ensure that a particular scheme is constitutional. To abandon the requirement that a scheme collectively

narrow would require the abandonment of the core principles of the modern post-*Furman* era of capital punishment.

And collective narrowing makes the most sense in light of the goals established by *Furman* and *Gregg*.

A. Precedent requires that a collective review of aggravators establish that death schemes narrow eligibility.

The Arizona Supreme Court wrongly concluded that its statutory aggravator scheme need not collectively narrow the class of murders that render a defendant eligible for the death penalty.

Perhaps the clearest example of this Court's assessment of whether a death-eligibility scheme collectively narrows comes from the Court's consideration of Louisiana's scheme in *Lowenfield v. Phelps*, 484 U.S. 231 (1988). There, the defendant argued it was improper for the sole aggravating factor to mirror an element of the crime of conviction. *Id.* at 241.

Chief Justice Rehnquist looked at the overarching homicide scheme, and specifically evaluated the definitions of second- and first-degree murder. *Id.* at 241-42. On top of this narrowed definition, Louisiana had also established 10 statutory aggravating factors, one of which was required for death-eligibility. *Id.* at 242-43. Other protections included a requirement that the jury consider mitigation and appellate review for excessiveness. *Id.*

Chief Justice Rehnquist observed that "to pass constitutional muster, a capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Id.* at 244 (cleaned up). While most states accomplished this narrowing by using aggravating circumstances, it could be accomplished by a limited definition of murder.

Id. at 244-26. This was permissible because the purpose was to "genuinely [narrow] the class of death-eligible persons and thereby [channel] the jury's discretion." *Id.* at 244.

The true narrowing of the Louisiana scheme was due to its limited definition of murder. *Id.* at 246. Thus, it did not matter that an aggravating factor mirrored the elements of murder; the definition of murder was sufficiently circumscribed so as to narrow the class of death-eligible defendants. *Id.*

But *Lowenfield* is not an aberration. *Furman* also reviewed the entire scheme. *See Furman*, 408 U.S. at 276-77, 294-95 (Brennan, J., concurring) (discussing arbitrary infliction); *Gregg*, 428 U.S. at 877 (noting Court addressed system as a whole in *Furman*). Certainly, less of a scheme existed in *Furman*, but that was precisely the problem—the scheme in *Furman* did not narrow or guide discretion. *See Furman*, 408 U.S. at 276-77, 293-94 (Brennan, J., concurring), 309-10 (Stewart, J., concurring), 311, 313 (White, J., concurring). The result was unreasoned imposition of the death penalty.

The cases decided July 2, 1976, in response to *Furman*, also analyzed the entire scheme. The *Gregg* plurality expressly noted it looked at the entire scheme: "the petitioner looks to the sentencing system as a whole (as the Court did in *Furman* and we do today) …." *Gregg*, 428 U.S. at 200.

Proffitt also considered the entire scheme. *Proffitt*, 428 U.S. at 247-59. Like *Gregg*, the petitioner in *Proffitt* argued several of the aggravators were "so vague and so broad that virtually 'any capital defendant becomes a candidate for the death penalty'"—a narrowing argument. *Id.* at 255. The petitioner pointed to two aggravators: 1) the murder was "especially heinous, atrocious, or cruel"; and 2) the "defendant knowingly created a great risk of death to many

persons." *Id.* However, because the Florida Supreme Court had interpreted these aggravators in such a manner that they were not vague, there was no constitutional problem. *Id.* at 255-56.

Similarly, the Court looked at the entire scheme in *Jurek*. *Jurek,* 428 U.S. at 268-75. Texas had redefined capital homicide to apply to just five types of murder: "murder of a peace officer or fireman; murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee." *Id.* at 268. The scheme also required jurors to answer three questions: whether the conduct was deliberate and death foreseeable; whether the defendant posed an ongoing threat; and whether the defendant's conduct was an unreasonable response to provocation (if raised). *Id.* at 269. The state had to prove the answer to each was yes. *Id.*

Thus, Texas's "action in narrowing the categories of murder for which a death sentence may ever be imposed serve[d] much the same purpose" as aggravating circumstances did in Georgia and Florida. *Id.* at 270.

Eight years later, Justice Stevens observed that the statutes in these three cases "were designed to eliminate" the defects observed in *Furman*. *Pulley v. Harris*, 465 U.S. 37, 55 (1984) (Stevens, J., concurring). "Each scheme provided an effective mechanism for categorically narrowing the class of offenses for which the death penalty could be imposed and provided special procedures" to protect the integrity of the death decision. *Id.*

The majority in *Pulley* also engaged in this collective review. The defendant had argued the California capital sentencing scheme was constitutionally inadequate because it did not provide for a proportionality review. *Id.* at 38-40. After considering its history, and the fact that the Texas scheme at issue in *Jurek* did not guarantee proportionality review, Justice White

considered the broader scope of California's scheme. *Id.* at 42-54. California restricted death to cases where one or more "special circumstances" were present. *Id.* at 51. The "special circumstance" requirement "limit[ed] the death sentence to a small sub-class of capital eligible cases" and guided the jury. *Id.* at 53. The special circumstances—considered collectively—narrowed the class of defendants eligible for death.

And this Court again considered a scheme collectively in *Kansas v. Marsh*, 548 U.S. 163 (2006). There, the defendant argued the scheme was unconstitutional because it required a death sentence when the jury concluded aggravation and mitigation was in equipoise. *Id.* at 165-66. This Court found the issue had been squarely addressed by *Walton v. Arizona*, 497 U.S. 639 (1990), and that the statute's alleged presumption of death was not unconstitutional. *Marsh*, 548 U.S. at 169-73.

This Court proceeded further and analyzed the claim under *Furman* and *Gregg*. *Id.* at 173. Justice Thomas, writing for the majority, held that *Furman* and *Gregg* "establish that a state capital sentencing system must: (1) rationally narrow the class of death eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Id.* at 173-74.

Considering the entirety of the Kansas scheme, Justice Thomas concluded the statute "narrows the universe of death-eligible defendants consistent with Eighth Amendment requirements." *Id.* at 175. The statute initially narrowed the class of persons eligible for death through its definition of capital murder, which required the presence of "one or more specific elements beyond intentional premeditated murder …." *Id.* The statute further narrowed through a requirement that the state prove an aggravating circumstance. *Id.* at 176. The scheme also met

further requirements for consideration of mitigation and individualized sentencing. *See id.* at 176-80.

The precedent is clear: the collective impact of a death-eligibility scheme must narrow the class of defendants eligible for a death sentence. The requirement for a collective analysis is not just based upon "isolated quotes"; it is grounded in the process that has served as the modern foundation for capital jurisprudence since *Furman*. Arizona has strayed from this precedent and departed from the norm established by other jurisdictions that have faithfully applied the collective-narrowing requirement.

B. Other courts have understood this Court's jurisprudence to require a collective review.

The Arizona Supreme Court's decision to consider the narrowing effect of only individual aggravators also departs from how other jurisdictions have understood and applied this Court's jurisprudence. State and federal courts have repeatedly interpreted this Court's holdings as requiring aggravating factors, or their functional equivalent, to collectively narrow the class of persons eligible for the death penalty.

For example, the Tenth Circuit considered the collective effect of Utah's scheme in *Andrews v. Shulsen*, 802 F.2d 1256, 1261 (10th Cir. 1986)). The court found Utah's scheme constitutional because Utah had "restricted capital homicides to intentional or knowing murders committed under eight aggravating circumstances." *Id.* The Tenth Circuit therefore believed the eight aggravating circumstances collectively accomplished the narrowing required by the Eighth Amendment. *See* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. Rev. 1283, 1300 fn.103 (1997) (discussing *Andrews*). The

Tenth Circuit again considered the cumulative effect of aggravators ten years later in *U.S. v. McCullah*, 76 F.3d 1087, 1108-10 (10th Cir. 1996).

Similarly, in *McKenzie v. Risely*, the defendant argued Montana's scheme contained no aggravating factors to narrow eligibility. *McKenzie v. Risely*, 842 F.2d 1525, 1539 (9th Cir.). The Ninth Circuit rejected this argument, concluding that additional elements must be proven to render a murder conviction eligible for a death sentence. *Id.* Accordingly, while conviction alone may have been enough for imprisonment, the additional elements ensured "only a much narrower class [was] punishable by death." *Id.*; *see also* Shatz & Rivkin, 72 N.Y.U. L. Rev. at 1300 fn.103 (discussing *McKenzie*).

The Eleventh Circuit also considered whether a scheme—as a whole—narrowed eligibility in *U.S. v. Chandler*, 996 F.2d 1073 (11th Cir. 1993). *Chandler* relied upon *Lowenfield* to conclude the schemes before them narrowed at the guilt stage, rendering further narrowing unnecessary. *Chandler*, 996 F.2d at 1092-93; *see also* Shatz & Rivkind, 72 N.Y.U. L. Rev. at 1302.

And the Fifth Circuit considered whether the Texas scheme narrowed in *Sonnier v. Quarterman*, 476 F.3d 349 (5th Cir. 2007). There, the defendant argued an amendment to the scheme removed a vital narrowing protection and rendered the scheme unconstitutional. *Id.* at 364.

The Fifth Circuit rejected this claim. *Id.* at 365-67. Drawing a comparison to *Marsh*, The Fifth Circuit observed that the "initial narrowing of the class of persons who may potentially face the death penalty" occurred at the definition stage because Texas had provided a limited definition of capital murder. *Id.* at 366. Additionally, the scheme required a further finding analogous to an aggravating factor. *Id.* From this, the Fifth Circuit concluded that the scheme—

considered as a whole—"rationally narrows the classes of defendants determined to be eligible and selected for the death penalty." *Id.*

Several states have also considered the collective effect of their schemes to determine if the necessary narrowing had occurred.

The Oregon Supreme Court confronted the issue in *State v. Wagner*, 752 P.2d 1136 (Or. 1988), *vacated and remanded on other grounds*, 492 U.S. 914 (1989). There, the defendant argued the "ten categories of aggravated murder actually made 26 types of murderers death-eligible, and that this pool of death-eligible offenders was not sufficiently narrowed." Shatz & Rivkind, 72 N.Y.U. L. Rev. at 1304; *accord Wagner*, 752 P.2d at 1157-58. The Oregon Supreme Court rejected this as overcounting. *Wagner*, 752 P.2d at 1158. The Court then relied on the number to find narrowing: "Oregon's ten kinds of aggravated murder narrow the pool in the manner approved in *Jurek* … and compares favorably in number with the 10 sentencing aggravating factors of the Georgia statute approved in *Gregg* … and with the eight sentencing aggravating factors of the Florida statute approved in *Proffitt* …." *Id.*

The Utah Supreme Court considered the collective narrowing of their capital scheme in *State v. Young*, 853 P.2d 327 (Utah 1993). There, the Utah Supreme Court found Utah's scheme was "similar to that upheld in *Lowenfield*," and concluded "it narrows the class of offenders subject to the death penalty during the guilt phase of the trial." *Id.* at 352. Notably, this was over a dissent. Justice Durham believed Utah had adopted so many aggravating factors that the scheme failed to narrow. *Id.* at 399 (Durham, J., concurring in part and dissenting in part); *see also See* Shatz & Rivkind, 72 N.Y.U. L. Rev. at 1305. The Utah Supreme Court subsequently concluded the scheme narrowed at the guilt phase in *State v. Honie*, 57 P.3d 977, ¶ 27 (Utah 2002). And the court affirmed *Young* and *Honie* in *State v. Maestas*, 299 P.3d 892, ¶¶ 348-351.

South Dakota confronted the issue in *State v. Rhines*, where the defendant argued "the pool of death eligible offenses [in South Dakota] is too broad." *State v. Rhines*, 548 N.W.2d 415, ¶ 75 (S.D. 1996). The South Dakota Supreme Court rejected this argument because the list of ten aggravating factors was "nearly identical" to the scheme this Court approved in *Gregg*. *Id.*; *see also State v. Page*, 709 N.W.2d 739, ¶ 22 (S.D. 2006).

The Indiana Supreme Court has also twice concluded the aggravating factors set forth in statute served to narrow eligibility. *Wrinkles v. State*, 690 N.E.2d 1156, 1165 (Ind. 1997); *Corcoran v. State*, 739 N.E.2d 649, 653 (Ind. 2000).

And the Mississippi Supreme Court looked at the entire list of aggravating factors when it concluded, "Our capital-murder statute narrows the class of murders to those with additional egregious characteristics." *Batiste v. State*, 121 So.3d 808, ¶ 50 (Miss. 2013).

The analysis in many of these decisions has been criticized as perfunctory. *See* Shatz & Rivkin, 72 N.Y.U. L. Rev. at 1299-1307. But each improves on the Arizona Supreme Court's analysis by understanding that the eligibility scheme must be considered as a whole. It is not enough that individual aggravators narrow. Eligibility factors must collectively narrow death-eligibility to a subclass of murder defendants.

C. Academics have long understood this Court's jurisprudence to require aggravating factors to collectively narrow death eligibility.

Commentators have also recognized that this Court's jurisprudence requires aggravating factors to collectively narrow death-eligibility:

- "If a capital sentencing statute is written or applied too broadly, either in any of the particular statutory circumstances that make a defendant death eligible, or in the aggregate effect of all the statutory circumstances taken as a whole, it fails to meet the Eighth Amendment requirement of narrowing." Randall K. Packer, *Struck by*

Lightning: The Elevation of Procedural Form over Substantive Rationality in Capital Sentencing Proceedings, 20 N.Y.U. Rev. L. & Soc. Change 641, 642 (1994).

- "It is generally agreed that this narrowing must be both quantitative and qualitative. That is, a capital statute both must reduce the number of killers who are eligible for death and must do so in ways that identify the worst offenders." Justin Marceau et. al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. Colo. L. Rev. 1069, 1083 (2013).

- "[T]he Court's own decisions explicitly state that the capital sentencing scheme as a whole, not merely any particular individual aggravating circumstance, must serve a narrowing function." Tyler Ash, *Can All Murders Be "Aggravated?" A Look at Aggravating Factor Capital-Eligibility Schemes*, 63 St. Louis U. L.J. 641, 655 (2019).

Even commentators who were critical of the petition for writ of certiorari filed in *Hidalgo* agreed that aggravators should be considered collectively. Professor Chad Flanders noted that when a small number of aggravators that, "when taken together, covered conceptually all possible murders, then the whole scheme would certainly have a problem under *Gregg* and related cases." Chad Flanders, *Is Having Too Many Aggravating Factors the Same As Having None at All?: A Comment on the Hidalgo Cert. Petition*, 51 U.C. Davis L. Rev. Online 49, 59-60 (2017).

Indeed, this underlying interpretation is what led Shatz and Rivkind to criticize the failure of courts to do more than count aggravating factors or logically infer a narrowing effect. Shatz & Rivkind, 72 N.Y.U. L. Rev. at 1296-1306.

Scholars have reached the same conclusion as courts on the issue: this Court's precedent requires schemes to collectively narrow death-eligibility. When the eligibility scheme is one that relies upon aggravating factors, it is not enough for individual aggravators to narrow; the aggravating factors must collectively narrow. Arizona departed from this Court, the other jurisdictions that have correctly construed this Court's cases, and the academic consensus regarding this Court's Eighth Amendment jurisprudence.

2. While this Court has often addressed claims regarding the vagueness or overbreadth of individual aggravators, this does not alter the underlying requirement for collective narrowing.

Although this Court, other courts, and academics have repeatedly emphasized that aggravation or death-eligibility schemes must collectively narrow the class of defendants eligible for death, the Arizona Supreme Court stood alone. The court premised its decision upon the fact that this Court has previously reviewed the scope of individual aggravators in a number of cases. They did so without understanding the nature of this Court's review of individual aggravators, and what it means for the constitutional analysis.

While this Court has reviewed overbreadth and vagueness claims regarding individual aggravators, this Court has never concluded that narrowing is accomplished at just the individual aggravator level. *See* Argument 1(A), *supra*. Vagueness and overbreadth claims are distinct; such claims address the guidance component of *Furman*, not the narrowing component.

The Arizona Supreme Court's primary authority for its assertion that this Court assesses narrowing on an individual-aggravator level was *Tuilaepa v. California*, 512 U.S. 967 (1994). *Hidalgo*, 241 Ariz. 543, ¶¶ 21-23.

But *Tuilaepa* did not consider eligibility factors. As this Court explained in *Tuilaepa*, California defendants become death eligible when convicted and the jury finds a special circumstance under Cal. Penal Code § 190.2. *Tuilaepa*, 512 U.S. at 975. The next statutory subsection, § 190.3, allows the jury to consider a number of other factors during the penalty phase. *Id.* The defendants in *Tuilaepa* challenged some of the § 190.3 factors—not the eligibility factors—for vagueness. *Id.* at 969, 975. This Court found the challenged factors were not vague. *Id.* at 976-77.

The petitioners further argued that the selection-phase factors set forth in § 190.3 had to "meet the requirements for eligibility factors … and therefore must require an answer to a factual question, as eligibility factors do." *Id.* at 977-78. There was, however, no constitutional problem with providing the jury with further factors to consider at the selection phase. *Id.* at 978.

Justice Stevens, joined by Justice Ginsburg, got to the nub of the issue in a concurring opinion: "Petitioners have not challenged the constitutionality of [the eligibility] procedure or its application in these cases." *Id.* at 981 (Stevens, J., concurring). He thus concluded, "given the assumption (unchallenged by these petitioners) that California has a statutory 'scheme' that complies with the narrowing requirement defined in *Lowenfield*[,] I conclude that the sentencing factors at issue in these cases are consistent with the defendant's constitutional entitlement to an individualized" sentencing. *Id.* at 984.

Justice Scalia was of a similar opinion: "It is my view that once a State has adopted a methodology to narrow the eligibility for the death penalty, thereby ensuring that its imposition is not 'freakish,' the distinctive procedural requirements of the Eighth Amendment have been exhausted." *Id.* at 980 (Scalia, J., concurring) (citations omitted).

The majority opinion, Justice Stevens's concurrence, and Justice Scalia's concurrence made clear that *Tuilaepa* was not about narrowing. The Arizona Supreme Court's reliance upon *Tuilaepa* was therefore misplaced.

Setting *Tuilaepa* aside, it is fair to say this Court has considered whether individual aggravators were vague or overbroad. *E.g. Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988); *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002); *Arave v. Creech*, 507 U.S. 463 (1993). Like with *Tuilaepa*, that is because the attorneys in those cases challenged individual aggravators as

vague and overbroad. *See Godfrey*, 446 U.S. at 428-29; *Maynard*, 486 U.S. at 359; *Walton*, 497 U.S. at 652; *Arave*, 507 U.S. at 468.

But challenges to individual aggravators are of a different species. The core inquiry when an individual aggravator is challenged as vague or overbroad is whether the factor "adequately channels sentencing discretion as required by the Eighth and Fourteenth Amendments." *Arave*, 507 U.S. at 465; *accord Godfrey*, 446 U.S. at 428 ("[The state] must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"); *Maynard*, 486 U.S. at 362; *Walton*, 497 U.S. at 652; *Arave*, 507 U.S. at 471.

Challenges to the specificity or breadth of a single eligibility factor therefore focus on a different issue. Such a challenge is not related to the narrowing component of *Furman* and *Gregg*; the challenge is related to the guidance component.

This illustrates why the Arizona Supreme Court's reliance upon *Tuilaepa*, and cases analyzing individual aggravators more broadly, is misplaced. When this Court evaluates individual aggravators, it does so to determine whether the individual aggravators adequately channel sentencer discretion. It does not evaluate individual aggravators to decide whether the scheme sufficiently narrows eligibility for the death penalty.

The issue here, on the other hand, is whether Arizona's eligibility scheme fails to narrow the class of murderers eligible for death. As explained above, when this Court has considered whether a scheme narrows, it has consistently considered whether the scheme, as a whole, reduces death-eligibility to a subclass of otherwise eligible defendants. *E.g. Gregg*, 428 U.S. at 200; *Jurek*, 428 U.S. at 268-70; *Lowenfield*, 484 U.S. at 246.

3. Collective review of aggravators best accomplishes the constitutional goals set out in *Furman* and *Gregg*.

Finally, collective review of aggravators is necessary to ensure the principles of *Furman* and *Gregg* are upheld. As explained above, in *Furman* and *Gregg*, this Court set out to ensure the death penalty was not applied in an arbitrary or capricious manner. The vast disparity between eligibility and imposition indicated the penalty was not imposed in a reliable manner. *See Furman*, 408 U.S. at 276-77 (Brennan, J., concurring), 309 (Stewart, J., concurring), 311-12 (White, J., concurring), 340 (Marshall, J., concurring), 386 n.11 (Burger, C.J., dissenting).

The narrowing requirement sought to correct this disparity in the proper direction. Other jurisdictions had tried to increase imposition by making death mandatory. This Court rejected that approach. *See Woodson*, 428 U.S. at 303-04; *Roberts*, 428 U.S. at 333-34.

This Court accepted schemes that sought to drive eligibility down, closer to the rates of imposition. *See Gregg*, 428 U.S. at 196-97; *Proffitt*, 428 U.S. at 248-51; *Jurek*, 428 U.S. at 270-71.

In the wake of *Furman*, Arizona redrafted its capital punishment scheme in 1973. *See* John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to A Jury Trial: A Preliminary Inquiry*, 44 U. Miami L. Rev. 643, 723 (1990). The new scheme, based on the Model Penal Code, set forth six aggravating circumstances. *Id.* at 723-24.

Over time, however, the Arizona state legislature added more and more aggravating factors. The total number of aggravators eventually climbed to 14. *See Hidalgo*, 390 P.3d 783, ¶ 15 (citing Ariz. Rev. Stat. § 13-751(F) (2016)); *Hidalgo*, 138 S.Ct. at 1058 (Appendix reciting Ariz. Rev. Stat. § 13-751(F) (2017). And the factors were so broad that at least one aggravating factor—one death eligibility factor—applied to 98.8 percent of first-degree murders. This growth undermined the narrowing requirement.

As Professor Mona Lynch recently explained, "If [a legislature] provides for broad eligibility on the books, it has the potential to produce arbitrariness at two critical decision-points in regard to the eligibility assessment: The prosecutor's decision to seek death, and the capital jury's fact-finding decision about the presence of any statutory aggravators." Mona Lynch, *Double Duty: The Amplified Role of Special Circumstances in California's Capital Punishment System*, 51 Columbia Human Rights L. Rev. 1010, 1016 (2020).

And Professors Carol and Jordan Steiker observed aggravator creep can actually undermine *Furman*'s guidance goal and improperly increase the likelihood a death sentence is selected. Carol Steiker & Jordan Steiker, *Courting Death: The Supreme Court and Capital Punishment*, 160-62 (2016). "Before *Furman*, jurors could impose the death penalty against essentially any offender who committed murder. After *Furman*, [Arizona's] enumeration of numerous and broad aggravating factors, combined with the Court's minimalist policing, leaves jurors in virtually the same place—except now they are more likely to *believe* that the offense before them is especially deserving of death." *Id.* at 162 (emphasis original). This is because the numerous and broad factors transform "every killing during a convenience store or a liquor store robbery into a 'worst of the worst' offense." *Id.* They "convert an otherwise ordinary murder into a death-eligibile offense." *Id.*

Collective consideration of eligibility factors is the only way to guard against returning to the broad-eligibility, infrequent-imposition setting that this Court found arbitrary in *Furman* and *Gregg*.

4. This Court should grant certiorari, reiterate that capital-eligibility schemes must collectively narrow, and remand for further proceedings.

The issue presented in this case is a limited one. Beginning with *Gregg*, this Court has repeatedly emphasized that a death-eligibility scheme must collectively narrow the class of defendants eligible for a death sentence.

Arizona's scheme does not do that. Data presented below indicated 98.8 percent of first-degree murder cases would qualify for at least one of Arizona's aggravating circumstances. The data itself, however, is not pertinent to this petition.

As Justice Breyer—joined by Justices Ginsburg, Sotomayor, and Kagan—explained in *Hidalgo*, "[e]vidence of this kind warrants careful attention and evaluation." *Hidalgo*, 138 S.Ct. at 1057 (Breyer, J., statement respecting denial of certiorari).

But the evidence has not yet received that careful consideration. *See id.*

This is because the Arizona Supreme Court abandoned the requirement that a scheme narrow eligibility when considered as a whole. *Riley*, 459 P.3d 66, ¶¶ 176, 178. Relying on this premise, the Arizona Supreme Court avoided meaningful review of Arizona's eligibility scheme, ignored the data, and denied Riley's request for an evidentiary hearing.

Unlike *Hidalgo*, this petition does not ask this Court to determine whether Arizona's scheme is constitutional when the Arizona Supreme Court has not properly considered the question in the first instance. This petition merely asks this Court to clarify that the narrowing requirement established by *Gregg*, and extended in cases like *Lowenfield* and *Marsh*, requires courts to consider an eligibility scheme as a whole. It is not enough for individual aggravators to narrow; the scheme must collectively narrow eligibility.

With this clarification made, this Court should remand for further proceedings consistent with the opinion. At that point, the Arizona Supreme Court will be able to give the evidence and

argument the careful attention it deserves, apply the correct legal analysis, and accurately assess the constitutionality of Arizona's capital-eligibility scheme in the first instance.

CONCLUSION

Arizona's death penalty scheme, when considered as a whole, does not narrow the class of murders that render a defendant eligible for the death penalty.

The Arizona Supreme Court upheld this scheme based upon a misunderstanding of a bedrock principle of post-*Furman* capital jurisprudence. Rather than consider the collective impact of the aggravating factors, the Arizona Supreme Court concluded that the post-*Furman* narrowing requirement is satisfied so long as each individual aggravator narrows, regardless of overall eligibility.

This was wrong. This Court has repeatedly looked at the eligibility schemes to ensure the laws—as a whole—narrow eligibility for the death penalty. The issue is not just a matter of "four of the Justices' interpretation of Supreme Court precedent," as the Arizona Supreme Court asserts. *Riley*, 459 P.3d 66, ¶ 178. Collective narrowing has been broadly accepted by this Court over the years. The case law has been sufficiently clear that several other jurisdictions and commentators have rightly concluded that aggravation schemes—not individual aggravators—must meaningfully reduce eligibility.

Accordingly, this Court should grant this Petition for Writ of Certiorari, and clarify that the Eighth and Fourteenth Amendments require the collective consideration of eligibility factors. This Court should then remand the case for further proceedings.

Respectfully submitted,

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