

No. 21-6008

**In the
Supreme Court of the United States**

Keyaira Porter,

Petitioner,

v.

State of Arizona,

Respondent.

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

**REPLY IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

For over a decade now, Courts have found themselves intractably divided on two important issues regarding the enforcement of *Batson v. Kentucky*, 476 U.S. 79 (1986), both squarely presented in this Petition:

1. Whether a trial court must make express rulings at *Batson*'s third step.
2. Whether an appellate court should consider a comparative juror analysis presented for the first time on appeal.

TABLE OF CONTENTS

QUESTIONS PRESENTED	ii
1. Whether a trial court must make express rulings at <i>Batson</i> ’s third step.	
2. Whether an appellate court should consider a comparative juror analysis presented for the first time on appeal.	
REPLY	1
1. This Court should grant certiorari to resolve the split regarding whether trial courts must make express findings at <i>Batson</i> ’s third step.	1
a. Respondent Arizona concedes there is a well-established split regarding whether trial courts must make express findings.	2
b. Arizona’s reliance on habeas cases proves this case is an ideal vehicle to resolve the split because it is on direct appeal.	5
2. This Court should grant certiorari to resolve the split regarding whether side-by-side jury comparisons are waived on appeal unless expressly argued by trial counsel.	7
a. Courts are split on whether waiver—the “independent state ground” identified by Arizona—can be constitutionally applied to juror comparisons.	7
b. Arizona’s arguments demonstrate the pervasiveness of the split.	9
3. The significant role this case played in leading to the Arizona Supreme Court’s decision to abolish peremptory strikes proves that this case is an ideal vehicle to resolve both issues.	11
CONCLUSION	14

TABLE OF CITATIONS

Cases	Page
<i>Addison v. State</i> , 962 N.E.2d 1202 (Ind. 2012)	7, 8, 10
<i>American Legion v. American Humanist Association</i> , 588 U.S. ___, 139 S.Ct. 2067 (2019)	9
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986).....	Passim
<i>Boyd v. Newland</i> , 467 F.3d 1139 (9th Cir. 2006)	11
<i>Clay v. Com.</i> , 291 S.W.3d 210 (Ky. 2008)	7, 8, 10
<i>Com. v. Maldonado</i> , 788 N.E.2d 968 (Mass. 2003).....	4
<i>Coombs v. Diguglielmo</i> , 616 F.3d 255 (3d Cir. 2010)	3, 4
<i>Davis v. Ayala</i> , 576 U.S. 257 (2015)	5, 6
<i>Flowers v. Mississippi</i> , 588 U.S. ___, 139 S.Ct. 2228 (2019).....	6, 10, 11, 13
<i>Green v. LaMarque</i> , 532 F.3d 1028 (9th Cir. 2008)	3, 4
<i>Jones v. State</i> , 938 A.2d 626 (Del. 2007)	4
<i>Marshall v. Com.</i> , 977 N.E.2d 40 (Mass. 2012)	4
<i>Michigan v. Long</i> , 463 U.S. 1032 (1983)	8
<i>Miller-El v. Cockrell</i> , 537 U.S. 322 (2003)	6
<i>Miller-El v. Dretke (Miller-El II)</i> , 545 U.S. 231 (2005)	9
<i>Morgan v. City of Chicago</i> , 822 F.3d 317 (7th Cir. 2016)	3, 6
<i>People v. Beauvais</i> , 393 P.3d 509 (Colo. 2017)	7, 8, 10
<i>People v. Lenix</i> , 187 P.3d 946 (Cal. 2008)	7, 8, 10
<i>People v. Tennille</i> , 888 N.W.2d 278 (Mich. App. 2016)	3, 6
<i>People v. Woodruff</i> , 421 P.3d 588 (Cal. 2018)	8, 10
<i>Purkett v. Elem</i> , 514 U.S. 765 (1995).....	6
<i>Snyder v. Louisiana</i> , 552 U.S. 472 (2008).....	6, 8, 10, 11
<i>State v. Alexander</i> , 851 S.E.2d 411 (N.C. App. 2020)	3, 6
<i>State v. Butler</i> , 286 P.3d 1074 (Ariz. App. 2012)	6
<i>State v. Canez</i> , 42 P.3d 564 (Ariz. 2002).....	6
<i>State v. Hobbs</i> , 841 S.E.2d 492 (N.C. 2020)	6
<i>State v. Lucas</i> , 18 P.3d 160 (Ariz. App. 2001)	6
<i>State v. Lynch</i> , 357 P.3d 119 (Ariz. 2015).....	6
<i>State v. Medina</i> , 306 P.3d 48 (Ariz. 2013)	6
<i>State v. Pona</i> , 926 A.2d 592 (R.I. 2007).....	3
<i>State v. Porter</i> , 460 P.3d 1276 (Ariz. App. 2020).....	12
<i>State v. Porter</i> , 491 P.3d 1100 (Ariz. 2021)	2, 4, 6, 8
<i>State v. Prasertphong</i> , 75 P.3d 675 (Ariz. 2003)	6
<i>State v. Smith</i> , 475 P.3d 558 (Ariz. 2020)	6

Cases	Page
<i>Thaler v. Haynes</i> , 559 U.S. 43 (2010)	5, 6
<i>United States v. McAllister</i> , 693 F.3d 572 (6th Cir. 2012)	3, 4
<i>United States v. McMath</i> , 559 F.3d 657 (7th Cir. 2009)	2
<i>United States v. Moore</i> , 651 F.3d 30 (D.C. Cir. 2011)	2
<i>United States v. Rutledge</i> , 648 F.3d 555 (7th Cir. 2011)	2
<i>United States v. Thompson</i> , 735 F.3d 291 (5th Cir. 2013)	2
<i>Williams v. State</i> , 429 P.3d 301 (Nev. 2018)	3, 6
 Statutes	
28 U.S.C. § 2254.....	5

REPLY

Courts are divided on two issues regarding *Batson v. Kentucky*, 476 U.S. 79 (1986): 1) Whether trial courts must make express findings at *Batson*'s third step, and 2) Whether juror comparisons should be conducted for the first time on appeal.

In its Brief in Opposition, Respondent Arizona demonstrates why this case is the ideal vehicle to resolve both splits. Regarding express findings, Arizona concedes a split exists and its reliance upon habeas cases proves why this Court needs to address the issue in a direct appeal case. Regarding side-by-side comparisons, Arizona's "independent state grounds" argument again proves the split. The lower court's application of waiver departs from several jurisdictions and violates this Court's demand that all circumstances be considered. Finally, Arizona's brief discussion of our state's decision to abolish peremptory strikes reinforces why this case is an ideal vehicle—this case spurred the abolition of peremptory strikes.

1. This Court should grant certiorari to resolve the split regarding whether trial courts must make express findings at *Batson*'s third step.

Respondent Arizona concedes courts are split regarding whether trial courts must make express findings at *Batson*'s third step. Br. Opp. 15-16. Moreover, Arizona's briefing proves this case is an ideal vehicle to resolve the split because this case is on direct appeal.

a. Respondent Arizona concedes there is a well-established split regarding whether trial courts must make express findings.

The Arizona Supreme Court considered whether trial courts must make express findings at *Batson*'s third step through the lens of a demeanor-based strike. *State v. Porter*, 491 P.3d 1100, ¶ 7 (Ariz. 2021).

Respondent Arizona attempts to convert this lens into a limit. Br. Opp. 14-16. Arizona claims the question should only be viewed in the context of demeanor-based strikes.

While Arizona seeks to reduce the scope of the split, it concedes a split exists. Arizona agrees the Seventh Circuit reached “a contrary conclusion to the one reached by the Arizona Supreme Court on this issue.” Br. Opp. 15-16.

The Seventh Circuit alone establishes a long-standing split:

- In *United States v. McMath*, the Seventh Circuit required express determinations. *United States v. McMath*, 559 F.3d 657, 665-66 (7th Cir. 2009).
- Two years later, in 2011, the D.C. Circuit held express findings were not required. *United States v. Moore*, 651 F.3d 30, 42 (D.C. Cir. 2011).
- That same year, the Seventh Circuit again required express determinations. *United States v. Rutledge*, 648 F.3d 555, 560 (7th Cir. 2011).
- In 2013, the Fifth Circuit recognized the split and refused to require express findings. *United States v. Thompson*, 735 F.3d 291, 300 (5th Cir. 2013).

- Three years after that, the Seventh Circuit identified the split and retained its requirement for express findings. *Morgan v. City of Chicago*, 822 F.3d 317, 329-30 & 330 fn.30 (7th Cir. 2016).

Because this divide is entrenched, review would be appropriate even if the Seventh Circuit was the only appellate court requiring express findings at *Batson*'s third step.

But the Seventh Circuit is not alone. Courts in Nevada, Rhode Island, Michigan, and North Carolina have all addressed demeanor-based strikes and required factual findings at *Batson*'s third step. *Williams v. State*, 429 P.3d 301, 310 (Nev. 2018); *State v. Pona*, 926 A.2d 592, 608 (R.I. 2007); *People v. Tennille*, 888 N.W.2d 278, 282 (Mich. App. 2016); *State v. Alexander*, 851 S.E.2d 411, 419 (N.C. App. 2020).¹ The split has persisted for more than a decade and needs a resolution.

Moreover, Arizona concedes several more jurisdictions have established a “general need for explicit findings when addressing a *Batson* claim.” Br. Opp. 17-18; see *Coombs v. Diguglielmo*, 616 F.3d 255, 263 (3d Cir. 2010); *United States v. McAllister*, 693 F.3d 572, 580 (6th Cir. 2012); *Green v. LaMarque*, 532 F.3d 1028,

¹ Respondent Arizona incorrectly argues *Pona*, *Tennille*, and *Alexander* only addressed a “general need for explicit findings” in a *Batson* inquiry Br. Opp. 18-19. But each case addressed a demeanor-based justification. See *Pona*, 926 A.2d at 600 (noting prosecutor relied upon “the juror’s inattentiveness, lack of eye contact, and body language”); *Tennille*, 888 N.W.2d at 282 (noting “prosecutor asserted that he exercised the strikes based solely on the jurors’ demeanors”); *Alexander*, 851 S.E.2d at 414 (noting prosecutor relied upon the juror’s “tone of voice”).

1031 (9th Cir. 2008); *Jones v. State*, 938 A.2d 626, 635-36 (Del. 2007); *Com. v. Maldonado*, 788 N.E.2d 968, 973 (Mass. 2003), *abrogated on different grounds by* *Marshall v. Com.*, 977 N.E.2d 40 (Mass. 2012).

This proves the depth of the split: courts that always require findings at *Batson*'s third step will necessarily require findings at *Batson*'s third step when the striking party offers a demeanor-based justification. Thus, the Third, Sixth, and Ninth Circuits' general requirement for express findings would also require findings regarding demeanor-based justifications. *See Coombs*, 616 F.3d at 263; *McAllister*, 693 F.3d at 580; *Green*, 532 F.3d at 1031. The same would be true in states like Delaware and Massachusetts. *See Jones*, 938 A.2d at 635-36; *Maldonado*, 788 N.E.2d at 973.

Further attempting to convert a lens into a limit, Arizona claims that the Arizona Supreme Court did not address the general need for express findings. Br. Opp. 22.

The Arizona Supreme Court's opinion dispels this claim. *See e.g. State v. Porter*, 491 P.3d 1100, ¶ 17 (Ariz. 2021) (declining "Porter's request ... to implement a rule in which trial courts must make explicit determinations at each step of *Batson*"); *see also id.* at ¶ 18 (finding deference proper "even when the trial court did not expressly rule on the third *Batson* factor"). While demeanor was the

lens it used, the Arizona Supreme Court addressed the general need for express findings.

b. Arizona’s reliance on habeas cases proves this case is an ideal vehicle to resolve the split because it is on direct appeal.

Respondent Arizona’s reliance upon two habeas cases—*Thaler v. Haynes*, 559 U.S. 43 (2010), and *Davis v. Ayala*, 576 U.S. 257 (2015)—illustrates why this is an ideal vehicle to resolve the split: this case is on direct appeal.

Based on *Thaler* and *Davis*, Arizona argues this Court has already decided that *Batson* does not require express findings. Br. Opp. 21.

To the contrary, this proves why the split must be resolved using a case on direct appeal. *Thaler* and *Davis* were habeas cases and were reviewed under the Antiterrorism and Effective Death Penalty Act. *Thaler*, 559 U.S. at 46; *Davis*, 576 U.S. at 265. Under AEDPA, relief is only appropriate when a decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by” this Court. 28 U.S.C. § 2254(d); *see also Davis*, 576 U.S. at 268-69. *Davis* and *Thaler* necessarily involved a different inquiry.

In *Thaler* and *Davis*, this Court considered whether state court rulings violated “clearly established” federal law. To address what is required by *Batson*—not just what is “clearly established” federal law—this Court must review a case on direct appeal.

Additionally, the split has deepened in the wake of *Thaler* and *Davis*. One year after *Davis*, the Seventh Circuit decided *Morgan* and the Michigan Court of Appeals decided *Tennille*. *Morgan*, 822 F.3d at 329-30; *Tennille*, 888 N.W.2d at 282. The Nevada Supreme Court decided *Williams* three years after *Davis*. *Williams*, 429 P.3d at 310. And the North Carolina Court of Appeals decided *Alexander* five years after *Davis*. *Alexander*, 851 S.E.2d at 419 (relying upon *State v. Hobbs*, 841 S.E.2d 492 (N.C. 2020)).

Arizona also claims the Arizona Supreme Court “found that Arizona law does not generally require express findings, not that the federal constitution has no such requirement.” Br. Opp. 22.

Again, *Porter* dispels this argument. In *Porter*, the Arizona Supreme Court focused upon the federal question. *Porter*, 491 P.3d at 1104-06, ¶¶ 8-14.² To the extent that *Porter* addressed state law, each state case applied *Batson*. *Id.* at ¶¶ 16, 18.³ The court even linked its state analysis to federal law, opining that state and federal jurisprudence aligned. *Id.* at ¶ 19.

² *Porter* discussed the Equal Protection Clause; *Batson*, 476 U.S. 79; *Purkett v. Elem*, 514 U.S. 765 (1995); *Miller-El v. Cockrell*, 537 U.S. 322 (2003); *Snyder v. Louisiana*, 552 U.S. 472 (2008); *Thaler*, 559 U.S. 43; *Davis*, 576 U.S. 257; and *Flowers v. Mississippi*, 588 U.S. ___, 139 S.Ct. 2228 (2019).

³ The court discussed *State v. Canez*, 42 P.3d 564, ¶ 28 (Ariz. 2002); *State v. Prasertphong*, 75 P.3d 675, ¶¶ 63-64 (Ariz. 2003); *State v. Medina*, 306 P.3d 48, ¶ 45 (Ariz. 2013); *State v. Lynch*, 357 P.3d 119, ¶ 70 (Ariz. 2015); *State v. Smith*, 475 P.3d 558, ¶¶ 72-73 (Ariz. 2020); *State v. Lucas*, 18 P.3d 160, ¶¶ 11-13 (Ariz. App. 2001); and *State v. Butler*, 286 P.3d 1074, ¶ 43 (Ariz. App. 2012).

This case is an ideal vehicle to decide whether trial courts must make express factual findings at *Batson*'s third step because this case is on direct appeal and the lower court squarely addressed the issue.

2. This Court should grant certiorari to resolve the split regarding whether side-by-side juror comparisons are waived on appeal unless expressly argued by trial counsel.

Respondent Arizona's briefing again supports granting certiorari. First, Arizona's "independent state grounds" claim proves the split. Second, Arizona's remaining arguments demonstrate the split is pervasive.

a. Courts are split on whether waiver—the "independent state ground" identified by Arizona—can be constitutionally applied to juror comparisons.

Arizona asserts the lower court's application of waiver is an "independent state ground" that justifies the decision. Br. Opp. 24.

First, this argument proves courts are split. Whereas Arizona applied a waiver doctrine, states like California, Colorado, Indiana, and Kentucky have refused to do so. *See People v. Lenix*, 187 P.3d 946, 961 (Cal. 2008); *People v. Beauvais*, 393 P.3d 509, ¶ 52 (Colo. 2017); *Addison v. State*, 962 N.E.2d 1202, 1213 (Ind. 2012); *Clay v. Com.*, 291 S.W.3d 210, 215 (Ky. 2008).

This Court has explained that reviewing courts must consider “all of the circumstances that bear upon the issue of racial animosity” *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). Thus, as the California Supreme Court noted, “evidence of comparative juror analysis must be considered ... even for the first time on appeal if relied upon by defendant and the record is adequate to permit the urged comparisons.” *Lenix*, 187 P.3d at 961, *affirmed in People v. Woodruff*, 421 P.3d 588, 631-32 (Cal. 2018); *see also Beauvais*, 393 P.3d 509, ¶ 52; *Addison*, 962 N.E.2d at 1213; *Clay*, 291 S.W.3d at 215.

If appellate courts are permitted to deem juror comparisons waived, those courts are permitted to circumvent the totality-of-circumstances review this Court demands.

Second, Respondent’s argument misconstrues “independent state grounds.”

When a state decision rests primarily on federal law, or is interwoven with federal law, this Court “will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.” *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

Because the Arizona Supreme Court believed waiver was authorized by the United States Constitution and this Court’s *Batson* jurisprudence, the court’s decision rested primarily upon federal law. *See Porter*, 491 P.3d at 1107-08, ¶¶ 21-22.

But a state cannot use “independent state grounds” to provide less protection than the United States Constitution requires. *See American Legion v. American Humanist Association*, 588 U.S. ___, 139 S.Ct. 2067, 2094 (2019) (Kavanaugh, J., concurring) (“The constitutional floor is sturdy and often high, but it is a floor.”).

While independent state grounds could support broader *Batson* protections, independent state grounds cannot support reduced protections.

b. Arizona’s arguments demonstrate the pervasiveness of the split.

Respondent Arizona points out that three circuits discussed in the Petition—the Fifth, Seventh, and Ninth Circuits—have reached inconsistent decisions regarding whether side-by-side comparisons should be considered for the first time on appeal. Br. Opp. 32-35.

This bolsters the need for review. Not only have different circuits reached different decisions, circuits are internally inconsistent. This Court’s guidance is needed to resolve the divide.

Arizona’s arguments also prove the importance of the question.

Arizona first distinguishes *Miller-El II*, *Snyder*, and *Flowers*—cases in which this Court compared jurors—on the grounds that they were death penalty cases. Br. Opp. 27-32; *Miller-El v. Dretke (Miller-El II)*, 545 U.S. 231, 235 (2005);

Snyder, 552 U.S. at 474; *Flowers v. Mississippi*, 588 U.S. ___, 139 S.Ct. 2228, 2237 (2019).

This is a meaningless distinction. Nothing in *Miller-El II*, *Snyder*, or *Flowers* was premised upon a heightened protection for capital defendants. Rather, each was premised upon *Batson*, which applies equally to Ms. Porter. This Court did not limit *Miller-El II*, *Snyder*, or *Flowers* to capital contexts. And California, Colorado, Indiana, and Kentucky have all applied *Miller-El II* and *Snyder* in non-capital cases. *E.g. Lenix*, 187 P.3d at 950, 960-61; *Beauvais*, 393 P.3d 509, ¶¶ 50-52; *Addison*, 962 N.E.2d at 1209-11, 1213; *Clay*, 291 S.W.3d at 213.

In its second argument, Respondent Arizona recognizes several cases have conducted juror comparisons for the first time on appeal. Br. Opp. 35. But Arizona argues, “none of these cases stand for the proposition that the analysis is constitutionally required in all cases.” *Id.*

As noted above, several jurisdictions have concluded that appellate courts cannot use waiver to uniformly evade juror comparisons presented for the first time on appeal. *See Lenix*, 187 P.3d at 961; *Woodruff*, 421 P.3d at 631-32; *Beauvais*, 393 P.3d 509, ¶ 52; *Addison*, 962 N.E.2d at 1213; *Clay*, 291 S.W.3d at 215. Courts might view the claim with more skepticism or apply a stricter review standard, but courts cannot refuse to consider side-by-side comparisons on appeal.

This Court vigorously enforces *Batson*. *Flowers*, 139 S.Ct. at 2243. This Court has thus clarified that reviewing courts must consider “all of the circumstances that bear upon the issue of racial animosity” *Snyder*, 552 U.S. at 478. Side-by-side comparisons are crucial when assessing whether a striking party was discriminating. “Without engaging in comparative juror analysis,” the Ninth Circuit found it was “unable to review meaningfully whether the trial court’s ruling at ... step three of *Batson* was unreasonable” *Boyd v. Newland*, 467 F.3d 1139, 1149 (9th Cir. 2006).

This Court has diligently enforced *Batson*’s totality-of-the-circumstances standard. Courts cannot create a procedural mechanism designed to evade the review this Court demands.

3. The significant role this case played in leading to the Arizona Supreme Court’s decision to abolish peremptory strikes proves that this case is an ideal vehicle to resolve both issues.

Respondent Arizona advances a one-paragraph argument that our state’s abolition of peremptory strikes renders this case a poor vehicle. Br. Opp. 38.

To the contrary, this is the ideal vehicle to address *Batson*’s protections because the injustices that occurred here played a significant role in the abolition decision.

When the Arizona Court of Appeals decided this case, a rule petition had already been submitted to reform the *Batson* process. *See State v. Porter*, 460 P.3d 1276, ¶ 47 (Ariz. App. 2020) (McMurdie, J., dissenting).⁴ In his dissent, Judge McMurdie stated that reform was needed. *Id.*

The petition drew attention, and the proposing organization withdrew the petition so that an Arizona State Bar working group could study the issue and submit a revised petition.⁵

The next year, the Arizona State Bar submitted its revised Petition.⁶ Judge Peter Swann—the author of the Arizona Court of Appeals majority opinion in this case—was a member of the working group.⁷

But Judges Swann and McMurdie were not satisfied with the reform proposal. Judges Swann and McMurdie—who had been on opposite sides in this case—joined and proposed the abolition of peremptory challenges.⁸

Three days after Judges Swann and McMurdie submitted their proposal, the Arizona Supreme Court heard argument in this case.⁹ The Arizona Supreme Court

⁴ The Petition and Comments for R-20-0009 can be viewed at <https://www.azcourts.gov/Rules-Forum/aft/1081>.

⁵ The Motion to Withdraw Petition R-20-0009 is also available at <https://www.azcourts.gov/Rules-Forum/aft/1081>.

⁶ The Petition and Comments for R-21-0008 can be viewed at <https://www.azcourts.gov/Rules-Forum/aft/1196>.

⁷ *See* Petition R-21-0008, Appx. B pg. 2 (identifying Judge Swann as a member), available at <https://www.azcourts.gov/Rules-Forum/aft/1196>.

⁸ The Petition and Comments for R-21-0020 can be viewed at <https://www.azcourts.gov/Rules-Forum/aft/1208>.

deliberated for more than seven months as comments came in on both petitions. The court decided this case on July 22, 2021. On August 30, 2021—40 days later—the Arizona Supreme Court abolished peremptory strikes. Br. Opp. Appx. 2a.

While this Court has “vigorously enforced and reinforced” *Batson* and “guarded against any backsliding,” *Flowers*, 139 S.Ct. at 2243, Ms. Porter’s case proved *Batson*’s inadequacies.

Rather than try to fix *Batson*, two judges on opposite sides of this case proposed eliminating peremptories. And an Arizona Supreme Court that refused to require factual findings at *Batson*’s third step agreed that abolition was the best course.

Peremptory strikes are used in 49 states and all federal district courts, including in Arizona. And this Court still views *Batson* as integral to the proper function of peremptory strikes and worthy of vigilant protection. Even though Arizona has abolished peremptory strikes, the injustices in this case—injustices that motivated abolition—make this case an ideal vehicle to safeguard *Batson*.

⁹ Oral argument was held on January 14, 2021. *See* <https://www.azcourts.gov/AZSupremeCourt/LiveArchivedVideo.aspx>.

CONCLUSION

This case presents two issues where inconsistent enforcement of *Batson* has reduced protections. First, courts are divided about whether *Batson*'s third step requires express findings. Second, jurisdictions disagree whether juror comparisons should be considered for the first time on appeal.

Because this case is an ideal vehicle to resolve both splits, Ms. Porter asks this Court to grant her Petition and reverse the Arizona Supreme Court.

Respectfully submitted this 10th day of December, 2021.

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