No. 21-846

IN THE

Supreme Court of the United States

JOHN MONTENEGRO CRUZ,

Petitioner,

v.

ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF OF *AMICUS CURIAE* LATINOJUSTICE PRLDEF IN SUPPORT OF PETITIONER

LOURDES ROSADO
President and General Counsel
ANDREW CASE
Senior Counsel
LATINOJUSTICE PRLDEF
475 Riverside Drive, Suite 1901
New York, NY 10115

BRUCE H. SCHNEIDER
Counsel of Record
CHRISTINE E. ELLICE
EMILY L. KUZNICK
JOHN F. IAFFALDANO
PAUL Y. LISBON
STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, NY 10038
(212) 806-5800
bschneider@stroock.com

Counsel for Amicus Curiae

309734

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTEREST OF AMICUS CURIAE[1]

LatinoJustice PRLDEF, founded in 1972 as the Puerto Rican Legal Defense and Education Fund, is a national not-for-profit civil rights organization that advocates for and defends the constitutional rights of Latinos under the law. LatinoJustice has challenged discriminatory practices in the areas of criminal justice by suing police departments and correctional institutions. During its nearly fifty-year history, LatinoJustice has brought impact litigation to address discrimination against Latinos in education, employment, fair housing, immigrants' rights, language rights, redistricting, and voting rights.

SUMMARY OF ARGUMENT

Because of the importance that capital jurors attach to the defendant's "future dangerousness," it is constitutionally mandated that they must be given clear instructions about alternatives to the death sentence. More specifically, when a state has an alternative sentence of "life imprisonment without parole," the trial court must inform the jury that the defendant would be ineligible for parole and would spend the rest of his or her life in prison. By this charge, trial courts can cure an underestimation that the jurors might otherwise make about the time the defendant would serve and, therefore, the danger the defendant may pose in the future.

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1. *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and no party other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of the filing of this brief. Petitioner and Respondent both consented to the filing of this brief.

But preconceived notions about the nature of a life sentence are not the only misconceptions that are brought to the jury room. Decades of studies have shown that juries—even mock juries in controlled experiments—perceive Black defendants as more dangerous than white ones, and that harsher sentences are the result. More recent research has demonstrated widespread belief that Latinos, too, are more prone to crime and violence than whites. When a jury may perceive a defendant as more dangerous based on his race, a *Simmons* charge is still more crucial. A jury already making a subjective decision about future dangerousness—one that has enormous potential to be influenced by racial bias—is all the more disadvantaged when it does not have accurate information about alternatives to a death sentence. Thus, the bare constitutional minimum of a *Simmons* charge carries even greater importance with a Latino defendant. The Arizona courts denied Mr. Cruz his due process right to have the jury properly informed that he was ineligible for parole.

ARGUMENT

I. Perceived Future Dangerousness, an Important Factor in Capital Case Jurors' Consideration of a Death Sentence, Is a Subjective Inquiry Necessarily Informed by Jurors' Implicit Biases.

Determining a defendant's future dangerousness is inherently subjective—a juror must guess at both a defendant's propensity towards future criminal conduct and a likelihood that he or she will commit dangerous acts in the future. Yet, as this Court has recognized, "a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system."

Simmons v. South Carolina, 512 U.S. 154, 162 (1994) (*citing Jurek v. Texas*, 428 U.S. 262, 275 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Jurors necessarily bring to this guesswork a host of personal opinions and preconceived notions, including racial biases. And as the Court has noted, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986).

Because no one is immune to harboring implicit biases, when a defendant is a member of a racial or ethnic group that is consistently portrayed as dangerous in news, entertainment, and political campaigns, jurors are even more likely to perceive that person as more "dangerous" even without consciously expressing racial animus. The Court also has recognized that jurors may bring preconceived notions about the parole process premised on inaccurate or outdated information. Recognizing the potential injustice that could result, this Court, in *Simmons*, explained that "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole." 512 U.S. at 163–64. The Court recognized that jurors holding subjective impressions of the defendant's "future dangerousness" might be more likely to impose a death sentence when a sentence of life imprisonment without

parole would equally address a juror's desire to eliminate the possibility of a repeated criminal harm to society, and, therefore, found that, when a prosecutor has placed "future dangerousness" at issue, a failure to inform a sentencing jury of a capital defendant's parole ineligibility was sufficiently grave that it amounted to a denial of due process of law. *Id.* at 156. This due process right is an even more precious safeguard to a defendant against whom jurors may already hold some biased prediction of violence or criminality.

Indeed, as numerous research studies and articles have established, the race of a capital defendant bears directly on the severity of the punishment chosen, suggesting that, at a minimum, implicit biases about dangerousness based on race play a factor in sentencing. *See, e.g.,* David C. Baldus & George Woodworth, Race Discrimination and the Death Penalty: An Empirical and Legal Overview, (James R. Acker et al. 2d rev. ed. 2003). And because "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence," any error that increases this risk is particularly troubling. *Turner*, 476 U.S. at 35.

Thus, this case presents a "perfect storm" of elements that may lead a jury to misjudge future dangerousness: the lack of a *Simmons* instruction, preconceived notions that parole is always available, and a Latino defendant tried during a time and place where messages about Latino dangerousness were rampant. The Court recently described race-based allegations of a propensity towards violence as "a particularly noxious strain of racial prejudice," that was especially problematic when it "coincided precisely with the central question at sentencing." *Buck v. Davis*, 137 S. Ct. 759, 776 (2017).

A. Future Dangerousness Is One of the Most Important Factors Juries Consider in Imposing a Death Sentence.

Often, a capital defendant's best opportunity to avoid a death sentence is convincing a jury at the penalty phase to accept an alternative penalty of life imprisonment. Studies of capital jurors have found that, in considering whether to impose the death penalty, "[o]ther than facts about the crime, questions related to the defendant's dangerousness if ever back in society are the issues that jurors discuss most" and that "dangerousness exceeds discussion of the defendant's criminal past, the defendant's background or upbringing, the defendant's IQ or intelligence, and the defendant's remorse or lack of it." Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instruction in Capital Cases*, 79 Cornell L. Rev. 1, 6 (1993). Their research confirmed that "the more jurors agree [that the defendant poses a future danger,] the more likely they are to impose a death sentence." *Id.* at 7. *See also* William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999) (using nationwide Capital Juror Project data to examine Stephen P. Garvey & Paul Marcus, *Virginia's Capital Jurors*, 44 Wm. & Mary L. Rev. 2063, 2089–93 (2003) (using Virginia data)); Wanda D. Foglia, *They know not what they do: Unguided and misguided discretion in Pennsylvania capital cases,* 20 Just. Q. 187, 197 (2003) (Pennsylvania); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Jurors Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109, 1166 (1997) (California). Even where jurors reported that the prosecutor had not explicitly argued that the defendant would pose a danger

to the public, the topic of future dangerousness remained a centerpiece of the jury's deliberations. John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 Cornell L. Rev. 397, 406–07 (2001) (noting that seven out of every 10 jurors in such cases reported that concerns over future dangerousness was either a "very" (43%) or "fairly" (26%) important consideration in their penalty decision).

Jurors who inaccurately believe that a life sentence will allow parole are therefore more likely to impose a death sentence when they operate under the mistaken assumption that no other option will sufficiently prevent recurrence of criminal behavior by the defendant. Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277, 300–01 tbl.6 (2001) (Interviews with South Carolina jurors found that the less time a juror believed the defendant would remain in prison unless sentenced to death, the more likely the juror was to cast his or her first vote for death); Garvey & Marcus, *supra* at 2089–93 (using Virginia data).

The impulse to impose the death penalty purportedly to prevent a defendant from committing another crime is reinforced by popular culture and the media portrayals of the criminal justice system as a "revolving door." Take, for example, the notorious "Willie Horton" commercials that seared into the minds of American voters the image of a Black prisoner getting released early from prison and then committing a heinous, second crime. *See* Blanche Bong Cook, *Death-Dealing Imaginations: Racial Profiling, Criminality, and Black Innocence,* 63 Wayne L. Rev. 9 (2017). A fear that sparing someone the death penalty may

leave that person free to commit another violent crime can drive jurors to vote for death. *See* Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 117 (2010). When jurors are misinformed about the availability of parole, they may rely on this fear, along with other subjective biases, when making their decision.

B. Jurors' Misunderstanding of the Availability of Parole Has a Major Impact on Jurors' Concerns about the Defendant's Future Dangerousness.

"A crucial assumption underlying [the] system [of trial by jury] is that juries will follow the instructions given them by the trial judge." *Parker v. Randolph,* 442 U.S. 62, 73, (1979). Writing for the plurality of the Court in *Simmons*, Justice Blackmun observed that "[i]t can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment'…." *Simmons*, 512 U.S. at 169. In a concurring opinion, Justice O'Connor, writing for Chief Justice Rehnquist and Justice Kennedy, similarly observed that "common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole." *Id.* at 177–78.

Confusion as to the meaning of "life imprisonment" is common among capital jurors. Many jurors' knowledge of parole practices derives from information presented by the media which is often distorted by politics or sensationalism. William W. Hood III, *The Meaning of "Life" for Virginia Jurors and its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV. 1605, 1621 (1989). Stories such as that of a Georgia defendant who was sentenced to 12 life terms plus 115 years in prison but

was released less than 25 years later take on mythic status in the public imagination. Andrew Davis, *Georgia man who received 12 life sentences released on parole,* WRIC (Dec. 18, 2019) (Richmond, VA), https://www.wric.com/news/georgia-man-who-received-12-life-sentences-released-on-parole/.

Such sensationalism may cause some portion of the public to believe that parole is available for a sentence of life imprisonment. In fact, in a study of juries that were informed that "the judge would sentence the defendant to life in prison without the possibility of parole," half of the jurors surveyed stated that the defendant would be released. Shari Seidman Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 Am. Psychologist 423, 429 (1993). The same study also found that "[j]urors who believed that the defendant eventually would be released were twice as likely to sentence him to death as those who believed he would die in prison." *Id.* Thus, the mistaken belief that capital defendants will be released to return to the community can drive jurors toward a sentence of death, rather than life imprisonment.

Juror studies since *Simmons* continue to show that many jurors continue to believe that life imprisonment does not eliminate the possibility of parole and significantly underestimate how long the defendant will actually spend in prison. In 2006-07, the American Bar Association undertook an assessment of the death penalty in eight states. One finding of these studies confirmed that large numbers of capital jurors vastly underestimated the time the defendants would actually serve and continued to believe that defendants who were sentenced to life imprisonment eventually would be paroled. *See, e.g.,*

ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report*, p. 216 (Oct. 2007), https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/pennsylvania-finalreport.pdf, (82.8% of Pennsylvania capital jurors did not believe "that a life sentence really meant life in prison," and 21.6% believed that if a defendant was not sentenced to death, s/he would be released from prison in nine years or less); ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report*, pp. 257–58 (Jan. 2006), https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/georgia_report.pdf, (49.3% of interviewed capital jurors believed that capital murderers who were not sentenced to death would be paroled in seven years).

These misperceptions about life imprisonment do not take place in a vacuum. Rather, they operate in tandem with associations of certain racial groups—including Blacks and Latinos in particular—with dangerousness. A juror who (mistakenly) believes a disfavored defendant will be paroled if sentenced to life in prison, and who has been taught to think of that defendant as more dangerous based on his race, will be more likely to sentence that defendant to death over a (mistaken) belief that he poses a future danger to society.

The ABA assessment of Arizona's death penalty practices found them deficient with respect to jury instructions because, even after this Court's decision in *Simmons*, Arizona failed to explain the various life imprisonment sentences offered as alternatives under Arizona law:

> Under section 13-703(A) of the A.R.S., a defendant convicted of a capital offense may be sentenced to death, imprisonment for life, or imprisonment for natural life. Arizona law does not require a court to instruct the jury on the definitions of "imprisonment for life" or "imprisonment for natural life"…
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> **********
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> In order to enable capital jurors to make informed sentencing decisions, the State of Arizona should ensure that the pattern jury instructions include and define "imprisonment for life" as well as "imprisonment for natural life," and permit parole testimony when necessary to clarify a jury's understanding of these alternative sentences.

ABA, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Arizona Death Penalty Assessment Report*, pp. 249–50 (July 2006), www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/arizona_report.pdf. Cruz's trial suffered from this very deficiency.

II. Popular Culture and Media Contribute to Jurors' Heightened Fears of the Dangerousness of Black and Latino Defendants, Making Those Defendants More Vulnerable to a Death Sentence without a *Simmons* Instruction.

A. Jurors Possess an Implicit Bias that Latino Males Are More Dangerous and Pose a Greater Threat of Future Criminality.

Like Black men, Latino men in particular are perceived as more prone to violence and criminality and more of a danger to society. In 2012, a survey conducted by the Associated Press in conjunction with Stanford University, the University of Michigan, and NORC (National Opinion Research) at the University of Chicago found that 58% of respondents answered that the word "violent" described Hispanic[2] people slightly or moderately well, closely comparable to the 62% of respondents who said the word "violent" described Black people slightly or moderately well. Radical Attitudes Survey, The Associated Press, Conducted by GfK (Oct. 29, 2012), http://surveys.associatedpress.com/data/GfK/AP_Racial_Attitudes_Topline_09182012.pdf; *see also AP Poll: US majority have prejudice against blacks*, USA Today (Oct. 27, 2012), https://www.usatoday.com/story/news/politics/2012/10/27/poll-black-prejudice-america/1662067/.

Similarly, studies have shown that whites report higher perceptions of criminal threat when Latinos live

2. Citations to social science research will use terminology (for example "Hispanic" or "Latino") that the authors of the cited study use.

nearby in greater numbers. Ted Chiricos et al., *Perceived Racial and Ethnic Composition of Neighborhood and Perceived Risk of Crime*, 48 Soc. Problems, 322, 335 (2001). Researchers have found that jury-eligible participants strongly associated Latino men with "Danger" and white men with "Safety," and that they held similar dangerousness stereotypes for Latino men as they do for Black men. Justin D. Levinson et al., *Deadly "Toxins": A National Empirical Study of Racial Bias and Future Dangerousness Determinations*, 56 Ga. L. Rev. 1, 37 (Forthcoming 2021).

These attitudes may have been shaped by the negative portrayals of Latinos as prone to violence in news coverage, in the entertainment media, and in political and legislative campaigns. In the late 1990s and early 2000s (when Mr. Cruz was sentenced to death) local news disproportionately portrayed Latinos as criminals, Hollywood films trafficked in anti-Latino stereotypes, and anti-Latino imagery and rhetoric were prevalent in legislative initiatives in Arizona and California.

B. The Media Disproportionately Portrays Latinos as Violent Criminals in the Media.

Anti-Latino attitudes, particularly in the American Southwest, are nothing new; research on "the social evolution of stereotypes of Mexican criminality" dates the development of these stereotypes to the early nineteenth century. Malcolm D. Holmes et al., *Minority Threat, Crime Control, and Police Resource Allocation in the Southwestern United States*, 54 Crime & Delinquency 128, 137 (2008). Indeed, American popular culture has long relied on negative stereotypes of Latinos, including

those portraying them as prone towards violence and crime. Historically, Latino men in popular culture have been portrayed through stereotypes such as the "Bandido" and the "tough hombre," and as part of a hyper-masculine "macho" culture. *See generally* Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 Denv. U. L. Rev. 1081, 1096 (2001).

Researchers have established that Latinos in America have been associated with "innate criminality." Malcolm D. Holmes & Brad W. Smith, Race and Police Brutality: Roots of an Urban Dilemma, 68 (2008). Others have noted that Latinos are and typified as "dangerous" and still more have emphasized that Latinos are portrayed as "violence-prone." Katherine Beckett & Theodore Sasson, The Politics of Injustice: Crime and Punishment in America (2d ed. 2003). *See also* Coramae Richey Mann et al., Images of Color, Images of Crime: Readings, (Oxford U. Press 3d ed. 2006).

In the entertainment industry, Latinos have long been underrepresented and subject to erasure. When they are depicted, "Latinos have historically been confined to a narrow set of stereotypic, often-times negative, characterizations" including the criminal, the Latin lover, and the comic buffoon. Dana E. Mastro & Elizabeth Behm-Morawitz, *Latino Representation on Primetime Television*, 82 J&MC Q. 110, 111 (2005). In studying a composite of prime-time programming across five broadcast networks over a six-week period in October and November 2002, Mastro found that Latino men were over-represented as less intelligent, least articulate, and most hot tempered. *Id.* at 126. In 2010,

another study found that Latinos were nine times more likely to be portrayed as immoral as white characters in prime-time television shows. Elizabeth Monk-Turner et al., *The Portrayal of Racial Minorities on Prime Time Television: A Replication of the Mastro and Greenberg Study a Decade Later*, 32 Studies in Popular Culture 101, 108 (2010).

A 2018 study by the Opportunity Agenda found 50% of the Latino immigrant characters in a sample of 2014–16 programming were depicted as committing a crime. (The Opportunity Agenda, Executive Summary, https://www.opportunityagenda.org/explore/resources-publications/power-pop/executive-summary). And an even more comprehensive review of 1,200 films by USC Annenberg found that Latinos are underrepresented on the whole and overrepresented as criminals, noting that one quarter of Latinos in film were portrayed as criminal, and that more than half of those were associated with organized crime. Dr. Stacy L. Smith et al., *Latinos in Film: Erasure on Screen & Behind the Camera Across 1,200 Popular Movies*, Aug. 2019 (https://assets.uscannenberg.org/docs/aii-study-latinos-in-film-2019.pdf).

News coverage likewise overrepresents Latino men as criminal, which has been shown to drive support for punitive criminal measures. A 2002 study of local crime coverage in Orlando found that "Hispanics were the most overrepresented as violent crime suspects in relation to their proportion in the Orlando population," and expressed concern that "the frequency with which the news shows Hispanic crime suspects in threatening contexts could well reinforce, if not amplify, whatever social threat comes to be associated with that group." Ted Chiricos & Sarah

Eschholz, *The Racial and Ethnic Typification of Crime and the Criminal Typification of Race and Ethnicity in Local Television News*, 39 J. OF RESEARCH IN CRIME & DELINQUENCY 400, 410, 417 (2002).

In a 2002 study of local news broadcasts in Los Angeles, researchers found that crime stories featuring Latino defendants were twice as likely to contain prejudicial information about the defendant, and that "Latinos who victimized Whites were almost three times as likely as Whites to be associated with prejudicial information." Travis L. Dixon & Daniel Linz, *Television News, Prejudicial Pretrial Publicity, and the Depiction of Race*, 46 J. OF BROADCASTING & ELECTRONIC MEDIA 112, 129 (2002). Repeatedly suggesting, through news and media, that Latinos are prone to crime and violence has policy consequences. For example, a study of the relationship between viewing television programming related to crime (local news and television crime dramas) and support for the death penalty found that "the more often people watched crime dramas, the more likely they were to support the death penalty." Lisa A. Kort-Butler & Kelley J. Sittner Hartshorn, *Watching the Detectives: Crime Programming, Fear of Crime, and Attitudes About the Criminal Justice System*, 52 THE SOCIOLOGICAL Q. 36, 48 (2011). Moreover, as discussed below, attitudes about race and crime reinforced, if not developed, by the cultural climate can drive a jury to vote for harsher punishment.

C. Latinos Were Maligned in Public Affairs in Arizona and California in the Period Around Cruz's Trial and Death Sentence.

In the years leading up to Petitioner's trial, the police, public officials, and others in Arizona and California

portrayed Latino men as criminal. Tellingly, in 1987 the Phoenix Police Department manufactured a Chicano gang problem by using the media to attribute random criminal acts to alleged "gang members" in order to acquire additional federal funds. Marjorie S. Zatz, *Chicano youth gangs and crime: the creation of a moral panic*, 11 CONTEMP. CRISES 129, 129–30 (1987). A study of the ruse concluded that despite higher arrest and charging rates for Chicano gang members, Chicano gang members were no more threatening to the outside world than non-gang Chicano youth. *Id.* at 143. By constructing an image of dangerous Chicano gang members, the police fueled fear and created the impression of a gang problem when none was justified, and relying specifically on describing the gang as Chicano to drive public fear and attention: "[T]he images produced by the police and media brought about an intense urgency for increased social control over the youth gang problem, and thus the threat was legitimized." Jenna L. St. Cyr, *The Folk Devil Reacts: Gangs and Moral Panic*, 28 CRIM. JUST. REV. 26, 32 (2003); *see also* Zatz, *supra*, at 130–33.

Similarly, in 1994, California voters promoted a ballot initiative, Proposition 187 (also known as the "Save Our State (SOS)" initiative). Among other things, that initiative would have required local police departments to notify the Immigration and Naturalization Service of anyone who is arrested and whom they "suspect" is in the United States in violation of federal immigration laws. *See* Voter Information Guide for 1994, General Election, U.C. Hastings Scholarship Repository (1994), https://repository.uchastings.edu/ca_ballot_props/1091. It also would have established a state-run citizenship screening system and prohibited undocumented immigrants from

using non-emergency health care, public education, and other services in California.

In 1997, 16-year old Julian Valerio was shot 25 times by Phoenix police officers, killing him. The department's response to this and other fatal shootings was not to implement any reforms, but to create a marketing team to defend the pro-police position, so that, according to the department's spokesperson, "people will no longer have to rely on the media to pose questions for them—or on community activists who are just loud." Louis Sahagun, *Phoenix spreading new type of police line,* L.A. Times (June 12, 1997), https://www.latimes.com/archives/la-xpm-1997-06-12-mn-2739-story.html. A spokesman for the Arizona Branch of the NAACP cautioned that this strategy could backfire and "will only continue to build their myth of it being an 'us vs. them' world." *Id.*

In 2004, Russell Pearce, former deputy to Sheriff Joe Arpaio and a state senator at the time, championed Proposition 200, the first in a series of state initiatives and laws that were hostile to Latinos. Terry Greene Sterling & Jude Joffe-Block, Driving While Brown: Sheriff Joe Arpaio versus The Latino Resistance, 45 (2021). This initiative was approved by 56% of Arizona voters and enacted into law. Ariz. Rev. Stat. Ann. § 46-140.01. That law required individuals to provide proof of citizenship when registering to vote or to receive public benefits. The proposition also made it a misdemeanor for public officials to fail to report violations of U.S. immigration law by applicants for those public benefits and permitted private lawsuits by any resident to enforce its provisions related to public benefits. The campaign over Proposition 200 reached a fever pitch and featured anti-Latino

rhetoric. Reporters noted that during the campaign, businesses put up "[h]omemade street signs tell[ing] day laborers to keep moving," eerily reminiscent of Jim Crow vagrancy laws. *See* Mark K. Matthews, *Arizona Lashes Out at Illegal Immigration*, STATELINE (Aug. 31, 2005), https://www.pewtrusts.org/en/researchandanalysis/blogs/stateline/2005/08/31/arizona-lashes-out-at-illegal-immigration.

D. Without a *Simmons* Charge, Jurors' Misperceptions of Dangerousness and Mistaken Views on the Availability of Parole Combine to Heighten the Risk of a Death Sentence for Latinos and Other Minority Defendants.

Racial disparities between Black and white defendants in capital sentencing are well established, and there is a strong scholarly consensus that racial bias against Black defendants is one cause. *See generally* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990). These disparities have been replicated under control conditions using mock juries; a meta-analysis of mock jury studies found that "research on this issue indicates a small, but significant, effect for racial bias in both verdict and sentencing." Tara L. Mitchell et al., *Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment*, 29 L. & HUMAN BEHAV. 621, 625 (2005).

More recent scholarship has demonstrated the likelihood of a less drastic but still notable bias against Latino defendants[3] as well. *See* Sheri Lynn Johnson, *The*

3. Any criminal justice research regarding the Latino population is hampered by the fact that data on Latinos in the

Influence of Latino Ethnicity on the Imposition of the Death Penalty, 16 Ann. Rev. L. and Soc. Sci. 421 (2020). These biases may help explain the racial disparities in sentencing of Latinos generally and in capital cases in particular.[4] For example, one of the first studies on racial disparities in death sentencing in which "Hispanics and African-Americans, were analyzed separately" looked at Arizona, and found that the well-established racial disparities regarding Black defendants and white victims was replicated with Latinos. Ernie Thomson, *Research Note: Discrimination and the Death Penalty in Arizona,* 22 Crim. Just. Rev. 65, 74 (1997).

A 2010 study explored the link between "ethnic threat linked to Hispanics" and "harsher crime control" and found that perceptions of Hispanics as criminals results in an increase in support for punitive crime control measures. *See* Kelly Welch et al., *The Typification of Hispanics as criminals and Support for Punitive Crime Control Policies,* 40 Soc. Sci. Rsch. 822 (2011). The Welch study extended to Hispanics the then-existing research that explored whether measures of social control intensify in proportion to an increase in minority, and specifically Black, populations. *Id.* at 823. As the Hispanic population grows in the United States, this hypothesis becomes all

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criminal justice system is underreported and often mis-reported, resulting in what is commonly referred to as the "Latino data gap." *See* Urban Institute: The Alarming Lack of Data on Latinos in the Criminal Justice System (2016), *https://apps.urban.org/features/latino-criminal-justice-data/*.

4. Sentencing disparities of Latinos is not limited to capital cases. As of 2018, the incarceration rate for Latinos was 3.1 times higher than the incarceration rate for whites.

the more relevant. Indeed, the Welch study noted that the substantial growth of the Hispanic population in the United States coincided with a "proliferation of threat related stereotypes linking Hispanics with crime in new and compelling ways. . . . hav[ing] clear parallels with long established stereotypes frequently applied to African American males." *Id.* The Welch study concluded that individuals who typify Latinos as violent criminals are more supportive of punitive crime control policies. *Id.* at 832. These crime control policies include executing more murderers. *Id.* at 826, Table 1.

Of the 538 federal death penalty cases authorized by the U.S. Attorney General, 28% of the defendants were white, 49% Black, 18% Latino, and 5% other minorities. Levinson, *supra* at 18. In these cases, future dangerousness has been alleged against Latino defendants at a disproportionate rate in federal capital charges—higher than against Black, white, or other minority defendants. *Id.* Specifically, there has been an allegation of future dangerousness against 80 of the 99 (81%) Latino defendants authorized for the federal death penalty. *Id.* These statistics are borne out by an empirical study in which the researchers developed an Implicit Association Test, a recognized test used to examine implicit bias. *Id.* at 23–27. In this test, mock jurors were presented with crime vignettes: a control group was not provided racially identifying information, while the experimental group was provided names that suggested a race of white, Black, or Latino. *Id.* The results indicated that jury-eligible citizens hold similar dangerousness stereotypes for Latino men as they do for Black men. *Id.* Therefore, as with Black capital defendants, Latino capital defendants also are disproportionately vulnerable to a jury finding of future dangerousness and a greater risk of the jurors rejecting an alternative to a death sentence. *See* Johnson, *supra*.

Therefore, a Latino defendant such as Mr. Cruz bears a much higher risk than a non-Black or non-Latino defendant of being perceived by a jury as inherently dangerous or criminal. This heightened perception correlates to more severe punishment. Failure to give a *Simmons* charge against this backdrop allows jurors to act upon their uncorrected belief that imposition of the death penalty is the only way to protect their community from the danger of a repeated crime (where such fear of a repeated crime may be disproportionately heightened due to the typification of Latino men as criminal). This pernicious combination deprives a Latino defendant of due process of law.

CONCLUSION

Amicus LatinoJustice respectfully submits that the petition for a writ of *certiorari* should be granted.

Dated: January 6, 2022

Respectfully submitted,

Lourdes Rosado
President and General Counsel
Andrew Case
Senior Counsel
LatinoJustice PRLDEF
475 Riverside Drive, Suite 1901
New York, NY 10115

Bruce H. Schneider
Counsel of Record
Christine E. Ellice
Emily L. Kuznick
John F. Iaffaldano
Paul Y. Lisbon
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038
(212) 806-5800
bschneider@stroock.com

Counsel for Amicus Curiae