No. 21-846

IN THE
Supreme Court of the United States

JOHN MONTENEGRO CRUZ,
Petitioner,
v.
STATE OF ARIZONA,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JON M. SANDS
Federal Public Defender
CARY SANDMAN
CORY GORDON
Assistant Federal Public Defenders
407 West Congress Street
Suite 501
Tucson, Arizona 85701

NEAL KUMAR KATYAL
Counsel of Record
WILLIAM E. HAVEMANN*
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

** Admitted only in Virginia. Supervised by principals of the firm admitted in D.C.*

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 21-846

JOHN MONTENEGRO CRUZ,
Petitioner,
v.
STATE OF ARIZONA,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

In this capital case, the State does not even try to dispute Cruz's entitlement to relief under federal law. It does not dispute that this Court's decision in *Lynch* v. *Arizona*, 578 U.S. 613 (2016) (per curiam), applied the "settled" rule of *Simmons* v. *South Carolina*, 512 U.S. 154 (1994). It does not dispute that, under federal law, decisions like *Lynch* applying settled rules must be given effect on collateral review. And it does not dispute that state courts "must meet" federal standards in applying federal rights retroactively. *Danforth* v. *Minnesota*, 552 U.S. 264, 288 (2008). These concessions should be the end of the case.

The State nonetheless defends the decision below on the theory that it rested on an adequate and

independent question of Arizona law. The State's argument—that it may adopt a procedural rule that *directly conflicts with federal law*, then apply that rule to insulate a clear constitutional violation from this Court's review—is both remarkable and wrong.

State procedural rules are not adequate if they "discriminate against claims of federal rights." *Walker* v. *Martin*, 562 U.S. 307, 321 (2011). And it is difficult to imagine a rule that more clearly discriminates against federal rights than the one adopted below. While this Court's retroactivity precedent *requires* states on collateral review to give effect to decisions applying settled rules, the decision below interprets Arizona law to *prohibit* courts from giving effect to those same decisions. Indeed, Cruz's Petition argued that the decision below impermissibly discriminates against federal claims, and the State does not bother to offer a response.

Apart from discrimination, state procedural rules are not a bar to review if they are "not strictly or regularly followed." *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964). But the decision below imposes an entirely novel bar to relief. It contorts a state procedural rule in a manner that conflicts with decades of Arizona precedent, and it seizes on a new distinction—between a "significant change in the law" and a "significant change in the *application* of the law," Pet. App. 9a—so hollow that the State does not try to defend it.

Bereft of a strong merits argument, the State asserts that Cruz waived his *Simmons* claim. That is wrong. Cruz preserved his *Simmons* claim at every opportunity—at trial and through his appeal to the Arizona Supreme Court. The State maintains that

Cruz did not seek a parole-ineligibility *instruction*, but never disputes that Cruz repeatedly attempted to introduce parole-ineligibility *evidence*. Nor does the State dispute that *Simmons* itself recognized that defendants have a due-process right to present "evidence" of parole-ineligibility. *Simmons*, 512 U.S. at 164 (plurality opinion); *id.* at 176 (O'Connor, J., concurring in judgment).

This case is a clean vehicle for review; it implicates a split among state high courts; and it presents a life-or-death question for Cruz and numerous other Arizona defendants. As the *amicus* brief filed by many of the Nation's preeminent habeas scholars underscores, this case also presents an exceptionally important question concerning federal retroactivity in state courts. To restore the supremacy of federal law in Arizona, this Court should grant the Petition and reverse.

ARGUMENT

I. THE DECISION BELOW FLOUTS FEDERAL LAW.

1. The State does not dispute that, at the time of Cruz's trial, the Due Process Clause, as interpreted by this Court in *Simmons*, entitled capital defendants to inform the jury that they would be parole-ineligible if not sentenced to death. The State does not dispute that this Court's decision in *Lynch*, which summarily reversed the Arizona Supreme Court's refusal to follow *Simmons*, applied a "settled" rule. The State does not dispute that decisions like *Lynch* involving settled rules apply retroactively on collateral review as a matter of federal law. And the State does not dispute that state courts, no less than federal courts, "must meet" federal standards for applying federal rights retroactively. *Danforth*, 552 U.S. at 288.

These principles resolve this case. Because *Lynch* must apply to cases on collateral review as a matter of federal law, the Arizona Supreme Court was required to give effect to *Lynch* below. Doing so would not have given Cruz the benefit of new law adopted after his conviction became final. It would have simply honored Cruz's right to the application of federal law that should have been applied to begin with.

2. The State hinges its argument on the theory (Opp. 13) that the Arizona Supreme Court did not reach "the question whether *Lynch* applies retroactively." Instead, the State maintains (Opp. 16) that the court refused to apply *Lynch* under Arizona Rule of Criminal Procedure 32.1(g), which requires defendants to seek the benefit of "a significant change in the law."

The State is wrong. State courts "cannot ignore valid and controlling federal substantive law by resort to principles, supposedly of procedure, that would replace federal law with state law." 16B Wright & Miller, Federal Practice & Procedure § 4023 (3d ed. Apr. 2021 Update). It is hard to imagine a clearer example of an effort to evade a disfavored federal right than the decision below. Rule 32.1(g) is not an adequate and independent state-law ground for two reasons.

First, this Court has "repeated[ly]" explained that state procedural rules are not adequate if they "discriminate against claims of federal rights." *Walker*, 562 U.S. at 321; *cf. Testa* v. *Katt*, 330 U.S. 386, 394 (1947). But, as interpreted below, Rule 32.1(g) plainly discriminates against federal rights. Federal law *requires* courts to give effect to decisions applying settled rules on collateral review, but the decision below interprets Arizona law to *prohibit* courts from giving

effect to those same decisions. The State does not dispute that the Arizona Supreme Court trapped Cruz in a Catch-22—seizing on his argument under federal law as proof that he should lose under state law. Indeed, the State does not even attempt to respond to the Petition's argument that the decision below impermissibly "discriminates against federal claims." Pet. 20.

The decision below thus contravenes *Yates* v. *Aiken*, which unanimously held that state postconviction courts must give effect to decisions applying settled federal rules. 484 U.S. 211, 217-218 (1988). Arizona permits defendants to challenge their sentences on constitutional grounds in postconviction proceedings. It follows that Arizona must properly apply constitutional law in those proceedings—regardless of whether (Opp. 13-14) the proceedings are initial or successive. *Yates* makes clear that "when state courts provide a forum for postconviction relief, they need to play by the 'old rules' announced *before* the date on which" the conviction became final. *Montgomery* v. *Louisiana*, 577 U.S. 190, 219 (2016) (Scalia, J., dissenting).

The decision below also contravenes *Montgomery*, which held that "state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution." 577 U.S. at 204. And it contravenes *Danforth*, which held that "[s]tates are independent sovereigns with plenary authority to make and enforce their own laws *as long as they do not infringe on federal constitutional guarantees*." 552 U.S. at 280 (emphasis added). Every Justice in *Danforth* recognized that federal law requires states *at least* to

satisfy federal retroactivity guarantees. It is unclear what the State understands *Danforth* to mean if states may simply interpret their postconviction rules to circumvent it.

Second, state procedural rules are not adequate unless they are "strictly or regularly followed." *Barr*, 378 U.S. at 149. But, before its decision below, the Arizona Supreme Court had *never* construed Rule 32.1(g) to apply in remotely comparable circumstances.

In fact, the Arizona Supreme Court had held the opposite. In *State* v. *Slemmer*, it held that decisions applying settled rules "should generally be applied retroactively, even to cases that * * * are before the court on collateral proceedings." 823 P.2d 41, 46 (Ariz. 1991). The State insists (Opp. 16) that *Slemmer* addressed retroactivity only after concluding that the decision at issue satisfied Rule 32.1(g) "because it was a significant change in the law." That is wrong; *Slemmer* never addressed whether the decision at issue was "a significant change in the law." Instead, it stated that "we determine preclusion under Rule 32 on the basis of our retroactivity analysis," and concluded that decisions applying settled rules must be accorded "complete retroactivity." *Id.* at 46-49. It then held that the decision at issue was "not automatically fully retroactive" because (unlike *Lynch*) it "d[id] *more than merely apply settled principles to new facts*." *Id.* at 49 (emphasis added). There is no way to reconcile that reasoning with the decision below.

That is enough to require reversal, but it is not all. In *State* v. *Shrum*, the Arizona Supreme Court held that the "archetype" of a significant change in the law "occurs when an appellate court overrules previously binding case law." 203 P.3d 1175, 1178 (Ariz. 2009).

Lynch plainly meets this definition; it overruled Arizona's binding case law deeming *Simmons* inapplicable. While the State attempts to distinguish *Shrum* (Opp. 15-16) on the ground that *Lynch* was not a "clear break from the past," this argument simply ignores *Shrum*'s definition.

The Arizona Supreme Court, for its part, defended its departure from *Shrum* by attempting to distinguish decisions of this Court that concededly *were* significant changes, Pet. App. 7a-8a—which makes its decision "influenced by a question of federal law" and therefore not "independent." *Foster* v. *Chatman*, 578 U.S. 488, 499 n.4 (2016). The court then opined that *Lynch* was not "a significant change in the law," but rather was "a significant change in the *application* of the law," Pet. App. 9a—a distinction so devoid of content that the State does not defend it. Nor does the State defend the perverse logic embraced below, which barred Cruz's claim because the law entitling him to relief "was clearly established at the time of Cruz's trial * * * *despite the misapplication of that law by Arizona courts*." *Id.* (emphasis added). Unless corrected, this novel rule would excuse Arizona courts from providing relief on collateral review precisely where their decision on direct review most obviously violated this Court's precedent.

II. STATE HIGH COURTS ARE DIVIDED ON THE QUESTION.

The State's effort to dispute the split (Opp. 16-17) turns on its premise that the court below was not required to address federal retroactivity. Because the State is wrong about the premise, it is equally wrong about the split.

During the *Teague* era, the high courts in Texas, Mississippi, California, and Florida have confronted materially identical circumstances—where this Court has applied a settled federal rule to correct the state high court's misapplication of that rule. After each decision, all four courts allowed defendants to rely on this Court's corrective decision retroactively. Those decisions cannot be reconciled with the Arizona Supreme Court's conclusion that it was free to disregard federal retroactivity in favor of a rights-restrictive state-law approach.

Consider the decision in *Ex parte Hood*, 304 S.W.3d 397 (Tex. Crim. App. 2010), which the State never addresses although it was discussed in the Petition. Pet. 22-23. In Texas, much like in Arizona, a postconviction statute barred habeas relief unless the defendant relied on "new law." *Ex parte Hood*, 304 S.W.3d at 405. Thus, a defendant could not obtain relief by invoking new decisions that were "mere applications of previously available law." *Id.* at 406. But *Hood* recognized that defendants in federal court could *only* obtain the benefit of new decisions applying "clearly established federal law." *Id.* Thus, the court noted, "a death-row inmate must argue in [state court] that" the cases at issue "announced new law, but, once he arrives in federal court, he must argue that those same cases simply reiterated clearly established law." *Id.* The court concluded that federal law must govern, and granted relief. *Id.* That is exactly the approach the court should have followed below.

III. THIS CASE IS AN EXCELLENT VEHICLE.

The State devotes the bulk of its brief to supposed vehicle problems that would complicate the Court's review. All are meritless.

1. The State claims (Opp. 9) that Cruz at trial "waived the argument he now makes." That is emphatically wrong. Cruz repeatedly urged his judge to allow him to inform the jury of his parole-ineligibility, and the judge repeatedly refused. The judge rejected Cruz's pretrial request for relief on the (erroneous) ground that "*Simmons* is distinguishable" because "nothing has been presented to suggest that" Cruz could not be released. Order at 1-2, *Arizona* v. *Cruz*, No. CR20031740 (Ariz. Super. Ct. Mar. 8, 2004). Then, when Cruz sought to call a witness who would testify regarding Cruz's parole-ineligibility, the judge again refused, accepting the State's (erroneous) argument that "the prospects of parole for an inmate sentenced to life imprisonment are irrelevant." Pet. 9. Finally, after the jury returned a death sentence after being misinformed that Cruz *could* be eligible for parole, Cruz moved for a new trial on the ground that he should have been allowed to present evidence of parole-ineligibility. The judge again denied relief, holding (erroneously) that the "jury was correctly instructed on the law" and that parole-ineligibility evidence was not "even relevant." Ruling, *Arizona* v. *Cruz*, No. CR-2003-1740 (Ariz. Super. Ct. May 20, 2005).

Notwithstanding all of this, the State maintains (Opp. 9) that Cruz waived his *Simmons* claim because he declined to "request a parole-ineligibility instruction." But *Simmons* entitles a defendant to inform the jury about parole ineligibility either through instruction or "evidence." 512 U.S. at 164 (plurality opinion); *id.* at 175 (O'Connor, J., concurring in judgment) (the defendant must "be afforded an opportunity to introduce evidence on this point") (quotation marks omitted); *State* v. *Rushing*, 404 P.3d 240, 250 (Ariz. 2017)

(reversing a death sentence where the trial court failed to give an instruction of parole-ineligibility "*or permit [a defendant] to introduce evidence to that effect*") (emphasis added). The State's argument turns on a formalistic distinction that *Simmons* itself refutes—much like the argument this Court summarily rejected in *Lynch*.

The State's other waiver arguments are weaker still. Its suggestion (Opp. 4) that the judge invited Cruz to seek a *Simmons* instruction is fanciful. The judge instead repeatedly made clear that he believed the "jury was properly instructed" even though the jury was misinformed that Cruz was parole-eligible. And, contrary to the State's suggestion (Opp. 4), Cruz preserved his *Simmons* argument on appeal. Cruz did not merely object to the judge's pretrial ruling; he also argued that he was denied his right to present evidence of parole-ineligibility, and the Arizona Supreme Court held (erroneously) that "Cruz's case differs from *Simmons*" because "[n]o state law would have prohibited Cruz's release on parole." Pet. App. 31a. Cruz preserved his claim at every opportunity.

2. The State next claims (Opp. 18) that Cruz is not entitled to *Simmons* relief because his future dangerousness was not at issue. The court below did not consider that question, and this Court need not address it either. This Court can instead hold that *Lynch* applies, then remand for consideration of Cruz's *Simmons* claim. *E.g.*, *Shafer* v. *South Carolina*, 532 U.S. 36, 54-55 (2001).

If this Court reaches the question, however, it can easily conclude that Cruz's dangerousness was at issue. As the Petition explained, the prosecution placed Cruz's dangerousness at issue by (among other

things) seeking to impeach a former warden who testified that Cruz was unlikely to pose a danger in prison. *See* Pet. 8. The State challenged the warden's testimony and invited the jury to discredit his opinions, making the question of dangerousness a "logical inference from the evidence." *Kelly* v. *South Carolina*, 534 U.S. 246, 252 (2002) (quotation marks omitted).

This conclusion requires no speculation. The same warden who testified for Cruz testified to the same effect in *Lynch* itself, and the State similarly attempted to impeach his testimony. On the basis of that impeachment, "the Arizona Supreme Court found that the State had put petitioner Shawn Patrick Lynch's future dangerousness at issue." 578 U.S. at 614. The same conclusion necessarily follows here.

3. The State argues (Opp. 20) that any error was harmless beyond a reasonable doubt. Again, that question is best resolved on remand, and again, the State is mistaken. There may be no greater assurance of a defendant's non-dangerousness "than the fact that he never will be released on parole." *Simmons*, 512 U.S. at 163-164 (plurality opinion). But Cruz's jury was never informed of his parole-ineligibility, and instead was *affirmatively and erroneously* instructed that he could be paroled unless sentenced to death. As *amicus* LatinoJustice explains, the error was all the more damaging given the risk that jurors would draw conclusions about Cruz's dangerousness based on invidious racial stereotypes. *Amicus* Brief of LatinoJustice 11-18.

If there were any doubt, the jury foreperson dispelled it in unmistakable words: "We WANTED to find a reason to be lenient," but nonetheless sentenced Cruz to death because "[w]e were not given an option

to vote for life in prison without the possibility of parole." Pet. 10. Contrary to the State's argument (Opp. 18 n.2), nothing prevents this Court from considering that statement, which does not seek "to impeach a jury verdict" but instead is evidence of juror "confusion" that properly bears on whether the error was harmless. *Lawlor* v. *Zook*, 909 F.3d 614, 634-635 (4th Cir. 2018).

4. This case is life-or-death for Cruz and for the six other defendants sentenced to death in Arizona who have sought certiorari on the same issue. *Burns* v. *Arizona*, No. 21-847 (petition for writ of cert. filed Nov. 22, 2021). And this case presents an exceptionally important question of federal law, as reflected by the *amicus* brief submitted by some of the Nation's foremost habeas scholars urging this Court to "stop Arizona's use of collateral procedure to discriminate against established constitutional rights." *Amicus* Brief of Habeas Scholars 1. The State's argument—that a state rule that flatly violates federal law may nonetheless prevent this Court's review of a meritorious federal claim—underscores the urgency of this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JON M. SANDS
Federal Public Defender
CARY SANDMAN
CORY GORDON
Assistant Federal Public Defenders
407 West Congress Street
Suite 501
Tucson, Arizona 85701

NEAL KUMAR KATYAL
Counsel of Record
WILLIAM E. HAVEMANN*
HOGAN LOVELLS US LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com
** Admitted only in Virginia. Supervised by principals of the firm admitted in D.C.*

Counsel for Petitioner

FEBRUARY 2022