No. 21-846

IN THE
Supreme Court of the United States

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

On Writ of Certiorari to the Arizona Supreme Court

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

Whether the Arizona Supreme Court's holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment.

PARTIES TO THE PROCEEDING

John Montenegro Cruz was the defendant/petitioner in the proceedings below.

The State of Arizona was the plaintiff/respondent in the proceedings below.

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INTRODUCTION

Petitioner John Montenegro Cruz was sentenced to death in Arizona even though this Court's binding precedent at the time of his trial made clear that his death sentence violated due process.

In *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), this Court held that where a capital defendant's future dangerousness is at issue, due process entitles the defendant to inform the jury that he will be ineligible for parole if not sentenced to death. The logic of *Simmons* is straightforward: Where a jury is urged to impose the death penalty for fear that the defendant will pose a future danger to society, the defendant has a due-process right to inform the jury that he could never be paroled, even if the jury spared him from the death penalty.

The Arizona Supreme Court responded to *Simmons* by defying it, holding in a series of decisions that *Simmons* does not apply in Arizona even though Arizona abolished parole for capital defendants beginning in 1994. The Arizona Supreme Court's refusal to apply *Simmons* prompted this Court to issue a rare summary reversal in *Lynch* v. *Arizona*, 578 U.S. 613 (2016) (per curiam), which held that *Simmons* applies in Arizona no less than elsewhere.

In the decision below, the Arizona Supreme Court responded by defying *Lynch*. John Montenegro Cruz was sentenced to death after *Simmons* but before *Lynch*. The State placed his future dangerousness at issue, yet the judge repeatedly denied him his right to inform the jury that he was parole-ineligible. The judge then instructed the jurors that if they did not sentence Cruz to death, he could face "[l]ife imprisonment *with a possibility of parole*," JA94 (emphasis added)—an instruction the Arizona Supreme Court approved even though it was flatly wrong at the time. After this Court decided *Lynch*, Cruz sought state postconviction relief under *Simmons*. But the Arizona Supreme Court refused to correct its error, relying on Arizona Rule of Criminal Procedure 32.1(g), which entitles a defendant to postconviction relief where there has been "a significant change in the law." According to the Arizona Supreme Court, *Lynch* was not "a significant change in the law," but rather "a significant change in the *application* of the law." Pet. App. 9a.

If that sounds like hair splitting, it is. A state-law ground for denying a federal right bars this Court's review only if it is adequate to support the judgment and independent of federal law. This is an easy case for rejecting the State's claim to adequacy and

independence. The decision below implicates virtually every reason why this Court refuses to accept state-court decisions as resting on adequate and independent grounds.

First, the decision below flatly violates federal law. Under federal law, a decision like *Lynch* that applies a "settled" rule governs cases on direct and collateral review alike. *See Teague* v. *Lane*, 489 U.S. 288 (1989). And in states like Arizona that provide a postconviction forum for federal claims, the Supremacy Clause requires state courts to apply settled rules on collateral review. *See Yates* v. *Aiken*, 484 U.S. 211, 218 (1988). As this Court has repeatedly made clear, if a state opens its postconviction forum to federal claims, it must "grant the relief that federal law requires." *Id.*

Second, the decision below discriminates against federal rights. It places defendants like Cruz in a Catch-22—they must argue that *Lynch* applied a "settled" rule to prevail under federal law, but that argument dooms their claim under state law. The decision below also discriminates against this Court's decisions—by affording them narrower retroactive effect than identical decisions of the Arizona Supreme Court. And the decision below creates a procedural labyrinth that makes it impossible for defendants like Cruz to obtain review of federal claims preserved at every opportunity.

Third, the decision below adopts an entirely novel interpretation of state law. Until this case, the Arizona Supreme Court had repeatedly and unequivocally held that a defendant may obtain postconviction relief under Rule 32.1(g) where an intervening decision overrules previously binding precedent in Arizona. But the decision below reversed course,

declaring that Rule 32.1(g) does not apply even though *Lynch* overruled a decade of Arizona precedent. The Arizona Supreme Court's distinction between "a significant change in the law" and "a significant change in the *application* of the law," Pet. App. 9a, is both completely new and entirely baseless. The Arizona Supreme Court cannot evade its obligations under federal law by improvising spurious state-law grounds for denying relief.

Finally, the decision below is, at the very least, interwoven with federal questions. The Arizona Supreme Court's conclusion that Cruz failed to satisfy Rule 32.1(g) turned on its analysis of *this Court's* precedent and the degree to which that precedent affected *federal law* in Arizona. The meaning of this Court's precedent, and its effect on federal law, fall well within this Court's jurisdiction.

The question presented is narrow. It does not call on this Court to revisit the holding of *Simmons*; the State forfeited any challenge to *Simmons* by declining to raise the issue in its Brief in Opposition. Nor does it implicate whether states must provide a postconviction forum for federal claims. Instead, this case presents the question whether, if a state provides a postconviction forum, the state must faithfully apply federal law in that forum. This Court should vacate the decision below, reject the Arizona Supreme Court's latest effort to evade federal law, and instruct the Arizona Supreme Court on remand to consider Cruz's claim under *Simmons* and *Lynch*.

OPINIONS BELOW

The Arizona Supreme Court's decision affirming the denial of Cruz's petition for postconviction relief is reported at 487 P.3d 991. Pet. App. 1a-11a. The Arizona

trial court's decision denying Cruz's petition for post-conviction relief is not reported. *Id*. at 12a-18a. The Arizona Supreme Court's decision affirming Cruz's sentence on direct appeal is reported at 181 P.3d 196. *Id*. at 18a-62a.

JURISDICTION

The Arizona Supreme Court entered judgment on June 4, 2021. After the Arizona Supreme Court denied Cruz's timely motion for reconsideration on June 23, 2021, Pet. App. 63a-64a, Cruz filed a timely petition for certiorari on November 22, 2021. The Clerk ordered the petition refiled. The refiled petition was timely under Supreme Court Rule 14.5. On March 28, 2022, this Court granted certiorari. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, provides:

> No state shall * * * deprive any person of life, liberty, or property, without due process of law * * * .

The Supremacy Clause, U.S. Const. art. VI, para. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Arizona Rule of Criminal Procedure 32.1 provides in relevant part:

> **Generally.** A defendant may file a notice requesting post-conviction relief under this rule if the defendant was convicted and sentenced for a criminal offense after a trial * * * or in any case in which the defendant was sentenced to death.
>
> * * *
>
> **Grounds for Relief.** Grounds for relief are:
>
> * * *
>
> (g) there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence * * * .

STATEMENT

A. Legal Background

1. In *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), this Court held that in capital cases where the prosecution puts the defendant's future dangerousness at issue, the defendant has a due-process right to inform the jury that he will be ineligible for parole if spared execution.

As the *Simmons* plurality explained, "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." *Id.* at 163-164 (plurality op.). If a jury mistakenly believes that a capital defendant "could be released on parole if he were not executed," that misperception creates "a false choice between sentencing [the defendant] to death and sentencing him to a limited period of incarceration." *Id.*

at 161. Because the "Due Process Clause does not allow the execution of a person on the basis of information which he had no opportunity to deny or explain," where the jury has been urged to impose the death penalty on the ground that the defendant could pose a future danger, the defendant must be permitted to inform the jury that he is parole-ineligible. *Id.* at 161-162 (quotation marks omitted).

The concurrence in *Simmons* echoed this reasoning. Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, agreed that when the prosecution places a defendant's future dangerousness at issue, the defendant must "be afforded an opportunity to introduce evidence on this point." *Id.* at 175 (O'Connor, J., concurring in the judgment) (quotation marks omitted). The concurrence noted that a defendant's parole-ineligibility "will often be the only way that a violent criminal can successfully rebut the State's case" and concluded that "due process entitles the defendant to inform" the jury that he is parole-ineligible when the prosecution puts his "future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole." *Id.* at 177-178.

In subsequent decisions, this Court repeatedly affirmed *Simmons*. *See Kelly* v. *South Carolina*, 534 U.S. 246, 248, 251-252 (2002); *Shafer* v. *South Carolina*, 532 U.S. 36, 39 (2001); *Ramdass* v. *Angelone*, 530 U.S. 156, 165-167 (2000) (plurality op.); *id.* at 179 (O'Connor, J., concurring in the judgment) ("I have no doubt that *Simmons* was rightly decided.").

2. During the period relevant here, Arizona provided two alternatives to a death sentence for defendants convicted of capital murder—"natural life,"

under which a defendant was categorically ineligible for release "on any basis," and "life," which required a defendant to serve at least 25 years before he could be eligible for release. Ariz. Rev. Stat. Ann. § 13-703(A) (2004) (recodified as Ariz. Rev. Stat. Ann. § 13-751(A)); *see* Pet. App. 4a-5a & n.1. A separate provision of Arizona law, however, abolished parole for felons as of January 1, 1994. *See* Ariz. Rev. Stat. Ann. § 41-1604.09(I)(1). Accordingly, capital defendants in Arizona who committed their crimes after 1993 were (and remain) ineligible for parole.

For many years, however, the Arizona Supreme Court refused to apply *Simmons*. *See* Pet. App. 15a. Although Arizona had abolished parole for capital defendants, the Arizona Supreme Court maintained that *Simmons* did not apply because capital defendants could be released through "executive clemency," *State* v. *Lynch,* 357 P.3d 119, 138-139 (Ariz. 2015), and because the legislature could change the law to render capital defendants "eligible for parole" at some future date, Pet. App. 31a.

3. In *Lynch* v. *Arizona*, 578 U.S. 613 (2016) (per curiam), this Court summarily reversed the Arizona Supreme Court's holding that *Simmons* did not apply in Arizona. This Court easily rejected Arizona's attempts to distinguish *Simmons*, explaining that the State's arguments "conflict[] with this Court's precedents." *Id.* at 615.

As this Court explained, "the only kind of release for which Lynch would have been eligible" under Arizona law was "executive clemency," and "*Simmons* expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility." *Id.* The Court

rejected the State's attempt to distinguish *Simmons* on the theory that "nothing prevents the legislature from creating a parole system in the future," noting that *Simmons* itself "said that the potential for future 'legislative reform' could not justify refusing a parole-ineligibility instruction"—otherwise "a State could always argue that its legislature might pass a law rendering the defendant parole eligible." *Id.* at 616 (quoting *Simmons*, 512 U.S. at 166 (plurality op.)). The Court thus found that "*Simmons* and its progeny establish Lynch's right to inform his jury" of his parole-ineligibility. *Id.*

The Arizona Supreme Court has since recognized that *Lynch* "reversed" its "originally narrow reading of *Simmons*." *State* v. *Robinson*, — P.3d —, 2022 WL 1634771, at *14 (Ariz. May 24, 2022); *accord State* v. *Escalante-Orozco*, 386 P.3d 798, 828-829 (Ariz. 2017).

B. Factual Background

1. Petitioner John Montenegro Cruz was convicted of capital murder and sentenced to death in 2005. His conviction became final in 2009—after *Simmons* but before *Lynch*. At trial, Cruz repeatedly sought to inform the jury that he would be parole-ineligible if spared execution. The judge denied every request.

As relevant here, Cruz informed the judge that he would seek to call as a witness the chairman of the Arizona Board of Clemency, Duane Belcher, who would testify that Cruz would be parole-ineligible under state law. JA43-44. Cruz insisted that Belcher's testimony demonstrated that parole was unavailable in Arizona for "inmates serving 25 years to life sentences after 1994," and that *Simmons* therefore governed. JA62. And Cruz argued that information about his parole-ineligibility was "critical and should

be made available to the jury," *id*., to prevent jurors from drawing an "inference that if you don't give this gentleman the death penalty there is a possibility" he could receive parole. JA260.

The State objected to Belcher's testimony and sought an order stating that "the prospects of parole for an inmate sentenced to life imprisonment are irrelevant." JA45. The State asserted—in direct conflict with *Simmons*—that "[t]his idea that what the current status of the law is in regard to what the Parole Board might do doesn't fit anywhere" in the jury's role. JA251-252, 254. The State further asserted that Belcher's testimony was "irrelevant" because he did not "know what laws may come about next year or [the] year after or five years from now or 10 years from now." JA252, 259-260.

The trial judge agreed with the State and refused to allow Cruz to inform the jury of his parole-ineligibility. JA76-77; *see* JA71. He then denied Cruz's motion for reconsideration. JA87-88.

2. At sentencing, the State put Cruz's dangerousness at issue. JA291-297. As part of Cruz's case for leniency, he called a former prison warden, who testified that Cruz was unlikely to be a danger in prison. JA279-291. In response, the State attacked the witness's credibility, eliciting admissions that the witness had testified in another case that a capital defendant would not be dangerous, and that this defendant later assaulted other prisoners and corrections officials. JA291-292.

With that damaging cross-examination in mind, the jurors received instructions on the "three possible penalties" for which Cruz was eligible: (1) "Death by lethal injection"; (2) "Life imprisonment with no

possibility of parole or release from imprisonment on any basis"; and (3) "Life imprisonment *with a possibility of parole* or release from imprisonment" after 25 years. JA94 (emphasis added). The jurors were told that if they did not sentence Cruz to death, the judge would be "solely * * * responsibl[e]" for "impos[ing] one of the other two possible punishments." JA99. As Justice Gould of the Arizona Supreme Court later observed, this jury instruction was "just wrong" under Arizona law—"an illegal instruction."[1]

After being erroneously instructed that Cruz could be eligible for parole if not executed, the jury sentenced Cruz to death.

3. The trial judge's refusal to permit evidence of parole-ineligibility contributed to the jury's decision to impose a death sentence. In a statement provided to the press (and unsolicited by Cruz) the day after the jury returned its sentence, the jury foreperson and two other jurors stated: "Many of us would rather have voted for life if there was one mitigating circumstance that warranted it. In our minds there wasn't. *We were not given an option to vote for life in prison without the possibility of parole*." JA143-144 (emphasis added); *see also* JA269 (declaration from another juror that, had she known "a life sentence without parole" was the alternative to death, she "would have voted for that option").

Cruz moved for a new trial. He reiterated that the jury was deprived of "critical information" regarding his parole-ineligibility and therefore lacked a

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[1] Oral Argument at 28:10-29:00, *State* v. *Cruz,* No. CR-17-0567 (Ariz. 2021), *available at* https://supremestateaz.granicus.com/player/clip/2882?view_id=11&redirect=true.

"complete understanding of the consequences of a non-death verdict." JA137; *see* JA154. And, citing the jurors' press statement, Cruz noted that jurors themselves acknowledged that his parole-ineligibility "would have been a factor for them to weigh in determining whether life or death was the appropriate sentence." JA137.

The trial judge nevertheless denied Cruz's motion for a new trial, concluding that "[t]he jury was correctly instructed on the law." JA169-170. Belcher's testimony was not "proper or even relevant," the court asserted, because whether Cruz would be ineligible for parole after 25 years "is entirely speculative." *Id*.

4. Cruz raised his *Simmons* claim on direct appeal before the Arizona Supreme Court, arguing that he should have been able to inform the jury that he was parole-ineligible. JA337-340. The court disagreed, concluding that *Simmons* did not apply in Arizona. The court declared—incorrectly—that "Cruz's case differs from *Simmons*" because "[n]o state law would have prohibited Cruz's release on parole after serving twenty-five years." Pet. App. 31a. The court also concluded—incorrectly—that the trial judge was right to exclude Belcher's testimony because "[t]he witness would have been asked to speculate about what the [Clemency] Board might do in twenty-five years, when Cruz might have been eligible for parole." *Id*.

This Court denied Cruz's certiorari petition in 2009. *See Cruz* v. *Arizona*, 55 U.S. 1104 (2009).

5. After this Court decided *Lynch*, Cruz filed a successive motion for postconviction relief in state court.[2] The trial court denied relief, and the Arizona Supreme Court granted Cruz's petition for review.

In the Arizona Supreme Court, Cruz maintained that he was entitled to relief under "the Supremacy Clause of the United States Constitution." JA386. He cited the rule of federal retroactivity articulated in *Teague* that a judicial "decision is retroactive if the decision was dictated by precedent existing at the time the defendant's conviction became final." JA352 (quoting *Teague*, 489 U.S. at 301 (plurality op.)). And he explained that because *Lynch* applied the settled rule of *Simmons*, *Lynch* "must be applied retroactively." JA353-354, 373.

Cruz separately maintained that he was entitled to relief under Arizona Rule of Criminal Procedure 32.1(g), which permits a defendant to bring a successive petition for postconviction relief if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." Ariz. R. Crim. P. 32.1(g). Cruz argued that *Lynch* constituted a significant change in the law because it "had transformative effects on previously binding Arizona law." JA387.

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[2] Cruz previously filed an initial postconviction petition in Arizona state court, which was denied. Because he had raised a *Simmons* claim on direct review, Cruz was precluded from raising a *Simmons* claim in this initial petition. *See* Ariz. R. Crim. P. 32.2(a)(2). After the initial petition was denied, Cruz filed a federal habeas petition, which is stayed in the Ninth Circuit pending disposition of this case. *See Cruz* v. *Credio*, No. 21-99005 (9th Cir.).

The Arizona Supreme Court denied relief. Pet. App. 11a. Despite Cruz's insistence that he was entitled to relief under both federal and state law, the court never addressed Cruz's argument under federal law. Instead, the court concluded that Cruz failed to show "a significant change in the law" under Rule 32.1(g). *Id*. at 9a. Although the Arizona Supreme Court had long recognized that a significant change in the law occurs where, as in *Lynch*, a court overturns binding precedent in Arizona, the Arizona Supreme Court abruptly changed course, declaring that *Lynch* represented "a significant change in the *application* of the law," but did not change the law itself. *Id*. Thus, according to the Arizona Supreme Court, Cruz could not obtain the benefit of *Simmons* on collateral review because it had been clearly established when he was sentenced to death, even though Cruz had been denied the benefit of *Simmons* on direct review because the state courts had refused to apply it.

6. This Court granted certiorari, limited to the question whether "the Arizona Supreme Court's holding that Arizona Rule of Criminal Procedure 32.1(g) precluded post-conviction relief is an adequate and independent state-law ground for the judgment."[3]

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[3] Since denying Cruz relief, the Arizona Supreme Court has repeatedly denied the claims of other defendants seeking similar relief under *Lynch*. *See, e.g.*, *State* v. *Burns*, No. CR-19-0261-PC (Ariz. June 30, 2021); *State* v. *Boggs*, No. CR-18-0580-PC (Ariz. June 30, 2021); *State* v. *Reeves*, No. CR-19-0182-PC (Ariz. June 30, 2021); *State* v. *Garza*, No. CR-18-0207-PC (Ariz. July 30, 2021); *State* v. *Gomez*, No. CR-20-0354-PC (Ariz. July 30, 2021); *State* v. *Newell*, No. CR-18-0428-PC (Ariz. Aug. 30, 2021). These defendants have jointly petitioned for certiorari, and the Court is holding their petition pending its disposition of this case. *Burns* v. *Arizona*, No. 21-847.

SUMMARY OF ARGUMENT

For a host of reasons, the Arizona Supreme Court's effort to evade *Simmons* and *Lynch* does not rest on an adequate and independent state-law ground.

I. The decision below interprets Rule 32.1(g) to violate federal law. Federal law undisputedly requires courts to give effect on collateral review to decisions like *Lynch* that apply settled rules. Giving effect to such decisions does not give defendants the benefit of new law announced after their convictions became final, but merely gives defendants the benefit of the law as it should have applied to begin with. By contrast, refusing to give effect to such decisions results in starkly different treatment for identically situated defendants pressing identical federal claims. It also raises serious due-process concerns by denying defendants the opportunity to obtain relief under the law in effect when their case was on direct review.

The Arizona Supreme Court's refusal to give effect to *Lynch* violates the law governing the retroactivity of this Court's decisions, which, like all federal law, is binding on state courts. Because the decision below violates federal law, it contravenes the Supremacy Clause and does not rest on an adequate and independent state-law ground. This Court has repeatedly held that state courts may not supplant federal retroactivity in favor of a more restrictive state-law approach. *See Yates* v. *Aiken*, 484 U.S. 211 (1988); *Danforth* v. *Minnesota*, 552 U.S. 264 (2008); *Montgomery* v. *Louisiana*, 577 U.S. 190 (2016).

II. The State appears to concede that federal law would require the Arizona Supreme Court to give effect to *Lynch* if it adjudicated the merits of Cruz's claim. The State instead argues that it can achieve

precisely the same result through Arizona Rule of Criminal Procedure 32.1(g).

A state procedural rule supplies an adequate and independent state-law ground only if it does not discriminate against federal rights. But, as interpreted below, Rule 32.1(g) discriminates against federal rights in numerous respects. It places defendants in an intractable Catch-22 where their entitlement to relief under federal law prevents them from obtaining relief under state law. It discriminates against decisions of this Court by giving them narrower retroactive effect than functionally identical decisions of the Arizona Supreme Court. It creates a labyrinth of procedures denying defendants any opportunity to obtain state-court review of meritorious federal claims. And it does all this to avoid giving effect to a federal right that Arizona has sought to defy for decades.

Nor can Rule 32.1(g) be defended on the ground that it is a valid jurisdictional rule. For one thing, the Arizona Supreme Court below acknowledged that it had "jurisdiction" over Cruz's petition. Pet. App. 3a. For another, jurisdictional rules, like procedural rules, cannot discriminate against federal law, and Rule 32.1(g) would be discriminatory even if it could be characterized as jurisdictional.

III. The decision below adopts an entirely novel interpretation of Rule 32.1(g), which entitles defendants to postconviction relief where there has been a "significant change in the law." For three decades, the Arizona Supreme Court recognized that a significant change in the law occurs when a court overrules binding precedent—including when this Court overrules Arizona state-court precedent on a federal-law question. For that reason, the State below initially did not

even dispute that *Lynch* amounted to a significant change in the law. But the Arizona Supreme Court changed course, ruling that *Lynch* was not a significant change in the law—but was instead "a significant change in the *application* of the law"—even though *Lynch* overruled binding Arizona precedent. Pet. App. 9a.

That spurious distinction had never even been suggested in any prior case, let alone served as a basis for denying relief. A state cannot improvise new interpretations of its own rules to deny the relief that federal law requires. While the State argued in its Brief in Opposition that the interpretation adopted below is technically reconcilable with prior Arizona precedent, that is wrong, and even if it were right, it would not deprive this Court of jurisdiction. To qualify as adequate, a state court's interpretation must be both "firmly established and regularly followed." *Beard* v. *Kindler*, 558 U.S. 53, 60 (2009) (quotation marks omitted). The interpretation adopted below is neither.

IV. At the very least, the interpretation of Rule 32.1(g) adopted below is interwoven with federal questions. To determine whether *Lynch* represented a significant change in the law under Rule 32.1(g), the Arizona Supreme Court evaluated the degree to which *Lynch* departed from prior decisions of *this Court*, and the effect of *Lynch* on *federal law* in Arizona. Because those questions are intertwined with federal questions, the Arizona Supreme Court cannot evade this Court's review by purporting to rest its decision on state law. This Court has jurisdiction to conclude that *Lynch* was a significant change in the law in Arizona.

ARGUMENT

To preclude this Court's review, a state-law ground of decision must be both "adequate" to support the judgment and "independent" of federal law. *See Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). The question whether a state-court decision is supported by an adequate and independent state-law ground is itself "a matter of federal law." *Johnson* v. *Lee*, 578 U.S. 605, 608 (2016) (per curiam).

The decision below does not rest on an adequate or independent state-law ground. It violates federal law; discriminates against federal rights; adopts an entirely novel interpretation of state law; and is intertwined with federal questions. Indeed, it implicates virtually all of the reasons this Court exercises jurisdiction over decisions that purport to rest on state law.

I. AS INTERPRETED BELOW, RULE 32.1(g) IS NOT ADEQUATE OR INDEPENDENT BECAUSE IT CONFLICTS WITH FEDERAL LAW.

The Supremacy Clause "'creates a rule of decision' directing state courts that they 'must not give effect to state laws that conflict with federal law[].'" *Espinoza* v. *Montana Dep't of Revenue*, 140 S. Ct. 2246, 2262 (2020) (citation omitted). The Arizona Supreme Court's interpretation of Rule 32.1(g) conflicts with federal law governing the retroactivity of this Court's decisions—which, like all federal law, binds federal and state courts alike. That interpretation accordingly cannot be given effect under the Supremacy Clause.

A. Federal Law Requires The Application Of Settled Rules On Collateral Review.

It is a bedrock principle of federal law that postconviction courts should at least "apply the law prevailing at the time a conviction became final." *Teague*, 489 U.S. at 306 (plurality op.) (quotation marks omitted). Under *Teague*, if an intervening decision applies a new rule, "a person whose conviction is already final may not benefit from the decision" on collateral review unless an exception applies. *Chaidez* v. *United States*, 568 U.S. 342, 347 (2013); *see Edwards* v. *Vannoy*, 141 S. Ct. 1547, 1554 (2021). By contrast, if an intervening decision applies an "old" or "settled" rule, the decision "applies both on direct and collateral review." *Whorton* v. *Bockting*, 549 U.S. 406, 416 (2007); *see Chaidez*, 568 U.S. at 347.

The term "retroactivity" is therefore a misnomer in the context of decisions that apply settled rules. When an intervening decision of this Court merely applies "settled precedents" in a new factual context, "no real question" arises "as to whether the later decision should apply retrospectively." *Yates*, 484 U.S. at 216 n.3 (quoting *United States* v. *Johnson*, 457 U.S. 537, 549 (1982)). Instead, it is "a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way." *Id.* (quoting *Johnson*, 457 U.S. at 549).

The obligation to apply the law as it existed when a case was on direct review is compelled by what Justice Harlan referred to as "the basics of the judicial tradition." *Desist* v. *United States*, 394 U.S. 244, 268-269 (1969) (Harlan, J., dissenting). Giving effect to a decision applying settled rules does not give a defendant

the benefit of new law announced after his conviction became final. It simply gives the defendant the benefit of the law that should have governed to begin with.

In contrast, refusing to adjudicate a defendant's claim for postconviction relief under the law in effect when the case was on direct review would "treat similarly situated litigants differently" and impose "selective temporal barriers to the application of federal law." *Harper* v. *Virginia Dep't of Tax'n*, 509 U.S. 86, 97 (1993) (quotation marks omitted). It would allow two defendants who pressed identical federal claims and whose convictions became final on the same date to be held to different rules of federal law depending on where their case was adjudicated—a result that would "permit the substantive law to shift and spring" from jurisdiction to jurisdiction and violate "basic norms of constitutional adjudication." *Id.* (quotation marks and alterations omitted). And it would raise serious questions under the Due Process Clause, which requires "governmental proceedings according to the 'law of the land' *as it existed at the time of those proceedings*." *Montgomery*, 577 U.S. at 230 (Thomas, J., dissenting) (quotation marks omitted).

For this reason, courts have long recognized that one "justifiable area for collateral attack * * * is where the state has failed to provide proper procedure for making a defense at trial and on appeal." Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 152 (1970)). As Judge Friendly explained, "one can hardly quarrel with the proposition that if a state does not afford a proper way of raising a constitutional defense at trial, it must afford one thereafter." *Id.* at 153.

A state's obligation to give effect to decisions applying settled rules also provides the foundation for *Teague*. When this Court declines to give retroactive effect to a new rule, it does so on the premise that the "defendant has had a full trial and one round of appeals *in which the State faithfully applied the Constitution as we understood it at the time*." *Schriro* v. *Summerlin*, 542 U.S. 348, 358 (2004) (emphasis added). As the Court recently reaffirmed, *Teague* protects courts from "applying constitutional rules *not in existence at the time a conviction became final*." *Vannoy*, 141 S. Ct. at 1554 (emphasis added and quotation marks omitted). *Teague*'s reluctance to require post-conviction courts to apply new rules is justified only because those courts are obligated to correctly apply the law as it stood when the case was on direct review.

B. Arizona's Refusal To Follow Federal Law Cannot Be Defended As An Adequate And Independent State-Law Ground.

There is no dispute that *Lynch* applied a "settled" rule. *Lynch* was a summary reversal reaffirming the rule of *Simmons* and admonishing that it applies in Arizona just as in every other state. *See Lynch*, 578 U.S. at 615-616. Generally, this Court "will reverse summarily when a lower court decision is 'not just wrong' but reflects 'fundamental errors that this Court has repeatedly admonished courts to avoid.'" Stephen M. Shapiro et al., *Supreme Court Practice* § 5.12(C) (11th ed. 2019) (quotation marks omitted). *Lynch* did not extend *Simmons* in any respect, but instead concluded that "*Simmons* and its progeny establish Lynch's right to inform his jury" of his parole-ineligibility. *Lynch*, 578 U.S. at 616. As the State acknowledged below, *Lynch* "simply applied

Simmons[]." JA364. The Arizona Supreme Court agreed that *Lynch* "was dictated by" *Simmons*. Pet. App. 8a (quotation marks omitted).

Because *Lynch* applied a settled rule that long predated Cruz's conviction, federal law requires that *Lynch* be given effect "both on direct and collateral review." *Whorton*, 549 U.S. at 416. The Arizona Supreme Court's refusal to apply *Lynch* contravenes federal law governing the retroactivity of this Court's decisions. In these circumstances, "state law is not independent to ignore supreme federal law." 16B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4024 (3d ed. Apr. 2022 update) [hereinafter "Wright & Miller"].

This Court recently confirmed that a state-court decision that fails "to follow the dictates of federal law" cannot be defended "as resting on adequate and independent state law grounds." *Espinoza*, 140 S. Ct. at 2262. In *Espinoza*, this Court rejected the proposition that a decision of the Montana Supreme Court relying on an unconstitutional state-law provision could be adequate or independent. As the Court explained, given "the conflict between the Free Exercise Clause" and state law, "the Montana Supreme Court should have disregarded" the unconstitutional state law "and decided this case conformably to the Constitution of the United States." *Id.* (quotation marks and alterations omitted). The same conclusion follows here. *See also Nitro-Lift Techs., L.L.C.* v. *Howard*, 568 U.S. 17, 20 (2012) (per curiam) (state court conclusion that it could reach a result under state law that conflicted with federal law was "all the more reason for this Court to assert jurisdiction").

It makes no difference that the Arizona Supreme Court opted to ignore federal retroactivity altogether. Where a federal question is properly presented—as it undisputedly was below—a state court cannot evade this Court's review by refusing to address the question. It is "well settled that the failure of the state court to pass on the Federal right" renders its decision reviewable where "the necessary effect of the judgment is to deny a Federal right." *Chi., B. & Q. Ry. Co.* v. *Illinois*, 200 U.S. 561, 580 (1906) (Harlan, J.); *see Chapman* v. *Crane*, 123 U.S. 540, 548 (1887) (recognizing that a right "claimed under the constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action").

C. This Court Has Rejected The Theory That State Court Decisions Refusing To Adhere To Federal Retroactivity Are Adequate And Independent.

This Court has repeatedly held that state courts may not invoke state law as a basis for refusing to give effect to decisions applying settled rules. The Arizona Supreme Court's refusal to apply *Lynch* cannot be reconciled with those precedents.

In *Yates*, 484 U.S. at 216, South Carolina pressed an argument materially identical to Arizona's position here, and this Court unanimously rejected it. *Yates* involved a South Carolina defendant who sought the benefit of a due-process rule that this Court had announced in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979)—a decision issued before Yates's conviction became final—and then reaffirmed in *Francis* v. *Franklin*, 471 U.S. 307 (1985)—a decision issued after Yates's conviction became final. In postconviction

proceedings, the South Carolina Supreme Court refused to apply *Francis*, holding under state law that the defendant could not pursue a "[c]ollateral attack of a criminal conviction on the basis of legal precedent that developed after the conviction became final." *Yates* v. *Aiken*, 349 S.E.2d 84, 86 (S.C. 1986).

This Court reversed. As the Court explained, it was not necessary to address the question of "the retroactivity of cases announcing new constitutional rules to cases pending on collateral review" because "*Francis* was merely an application of the principle that governed our decision in *Sandstrom* v. *Montana*, which had been decided before petitioner's trial took place." *Yates*, 484 U.S. at 215-217. The Court rejected South Carolina's argument that it had "the authority to establish the scope of its own habeas corpus proceedings and to refuse to apply a new rule of federal constitutional law retroactively in such a proceeding." *Id.* at 217. The Court emphasized that "*Francis* did not announce a new rule," but instead involved the application of a settled rule. *Id.* at 217-218. And the Court found that because South Carolina allowed prisoners to raise federal claims in postconviction proceedings, it "has a duty to grant the relief that federal law requires." *Id.* at 218.

For the same reason that South Carolina in *Yates* lacked authority to establish the scope of its habeas proceedings by refusing to give effect to a settled federal rule, Arizona here lacked authority to refuse to give effect to the settled federal rule applied in *Lynch*. The decision below cannot be reconciled with the unanimous decision in *Yates*.

This Court's decision in *Danforth* v. *Minnesota*, 552 U.S. 264 (2008), confirms that Arizona may not adopt

a narrower approach to retroactivity than permitted by federal law. *Danforth* held that while state courts may not be *less* generous than federal courts in applying federal rights retroactively, they may be *more* generous. As the Court explained, "States are independent sovereigns with plenary authority to make and enforce their own laws *as long as they do not infringe on federal constitutional guarantees*." *Id.* at 280 (emphasis added); *see also Vannoy*, 141 S. Ct. at 1559 n.6. Federal retroactivity, *Danforth* held, "sets certain minimum requirements that States *must meet* but may exceed in providing appropriate relief." 552 U.S. at 288 (emphasis added and quotation marks omitted); *see also id.* at 307 (Roberts, C.J., dissenting) (agreeing that state courts at least must meet the requirements of federal retroactivity and that it was "uncontroversial" that a defendant who sought the benefit of both a new and a settled rule in a state post-conviction proceeding must at least "get the benefit of the 'old' rule" (citing *Yates*, 484 U.S. at 218)).

Danforth's conclusion that federal retroactivity "sets certain minimum requirements that States *must meet* but may exceed," *id.* at 288 (emphasis added and quotation marks omitted), forecloses the State's argument that it may adopt a more restrictive approach to retroactivity than permitted by federal law. *See also Harper*, 509 U.S. at 100 ("The Supremacy Clause does not allow federal retroactivity doctrine to be supplanted by" a more restrictive approach to retroactivity "under state law." (citation omitted)). Indeed, *Danforth*'s admonition that states *must meet* the requirements of federal retroactivity would be meaningless if state courts could merely interpret their own law to avoid these requirements.

Finally, *Montgomery* underscores that the Arizona Supreme Court cannot rely on state law to refuse to give effect to *Lynch*. *Montgomery* held that where "state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to" new substantive constitutional rules announced after the defendant's conviction became final. 577 U.S. at 205. The Court therefore exercised jurisdiction and rejected the argument that Louisiana's contrary approach to retroactivity could be justified as adequate and independent of federal law. *Id.*

Justice Scalia—joined by Justices Thomas and Alito—dissented and would not have required state postconviction courts to apply new substantive rules. Justice Scalia's dissent, however, accepted the Court's decision in *Yates* because the claim in *Yates* "depended upon an *old rule*, settled at the time of his trial." *Id.* at 219 (Scalia, J., dissenting). Justice Scalia—who joined the unanimous *Yates* opinion—did not question *Yates*'s holding that "when state courts provide a forum for postconviction relief, they need to play by the 'old rules' announced *before* the date on which a defendant's conviction and sentence became final." *Id.* His dissent rested instead on the premise that "the Constitution does not require States to revise punishments *that were lawful when they were imposed*." *Id.* at 222 (emphasis added).

The question in *Montgomery*—whether the Constitution requires state postconviction courts to give effect to *new* substantive rules announced after the defendant's conviction became final—was a difficult one that divided this Court. The question in this case—whether the Constitution requires state

postconviction courts to correctly apply the law in effect when the defendant's case was on direct review—is straightforward. Unlike in *Montgomery*, Cruz's punishment was unlawful from the outset.

Like the States in *Yates*, *Danforth*, and *Montgomery*, Arizona has created a postconviction forum and opened that forum to federal constitutional claims. Ariz. R. Crim. P. 32.1(a) (defendant may seek postconviction relief on ground that sentence was imposed "in violation of the United States * * * constitution[]"). This case accordingly does not present the question whether states have an obligation to provide a postconviction forum for federal claims. *See Case* v. *Nebraska*, 381 U.S. 336, 337 (1965) (per curiam) (reserving the question); *see also Johnson* v. *Alabama*, 137 S. Ct. 2292, 2293 (2017) (Roberts, C.J., dissenting). Nor does it present the question whether states may limit their forums to particular substantive federal claims. Instead, this Court may resolve this case on grounds already dictated by this Court's precedent: If a state creates a postconviction forum and opens that forum to federal claims, the state cannot refuse to apply the law as it stood when the case was on direct review.

II. AS INTERPRETED BELOW, RULE 32.1(g) IS NOT A PERMISSIBLE PROCEDURAL OR JURISDICTIONAL RULE BECAUSE IT DISCRIMINATES AGAINST FEDERAL LAW.

Cruz maintained below that he was entitled to the benefit of *Lynch* under "the Supremacy Clause of the United States Constitution." JA386. But the Arizona Supreme Court made no attempt to address federal retroactivity or the Supremacy Clause. Instead, the court denied relief under Arizona Rule of Criminal Procedure 32.1(g), which entitles a defendant to

postconviction relief if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." Ariz. R. Crim. P. 32.1(g). Although *Lynch* overruled binding Arizona precedent, the Arizona Supreme Court declared that *Lynch* was not "a significant change in the law" but "a significant change in the *application* of the law." Pet. App. 9a.

The State now asserts that Rule 32.1(g) supplies an adequate and independent state-law ground that deprives this Court of jurisdiction. Some portions of the State's Brief in Opposition suggest that Rule 32.1(g) is a permissible "procedural rule." Br. in Opp. 11. Other portions suggest that Rule 32.1(g) operates as a jurisdictional bar. *Id.* at 13-14. Either way, Rule 32.1(g) does not supply an adequate and independent state-law ground. States have broad authority to adopt "neutral" procedural or jurisdictional rules that bar review of federal claims. *Haywood* v. *Drown*, 556 U.S. 729, 736 (2009). But, as interpreted below, Rule 32.1(g) patently discriminates against federal law.

A. Rule 32.1(g) Is Not A Neutral Procedural Rule.

This Court has "repeated[ly]" recognized that state procedural rules are not adequate if they "operate to discriminate against claims of federal rights." *Walker* v. *Martin*, 562 U.S. 307, 321 (2011); *see Lee* v. *Kemna*, 534 U.S. 362, 388 (2002) (Kennedy, J., dissenting) (a "state procedural ground" is adequate to bar federal review only if the procedure "do[es] not discriminate against federal rights"). This principle ensures that states cannot adopt procedural rules to "produce a result which the State could not command directly." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958).

This Court has encountered numerous state procedural rules that are neutral to federal law and therefore permissible, even though they preclude federal claims in certain applications. *See Walker*, 562 U.S. at 310 (state time limitation); *Johnson*, 578 U.S. at 606, 609 (state procedural default rule); *Parker* v. *Illinois*, 333 U.S. 571, 574-576 (1948) (state waiver rule). But, as interpreted below, Rule 32.1(g) discriminates against federal claims in a host of respects.

First, as interpreted below, Rule 32.1(g) has the effect of "defeat[ing]" federal retroactivity. *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). The Arizona Supreme Court held that Rule 32.1(g) prevents defendants like Cruz from obtaining postconviction relief when an intervening decision reaffirms a rule that Arizona courts refused to apply. But federal law compels the opposite result, requiring postconviction courts to apply settled law in those circumstances. *See Yates*, 484 U.S. at 216-218. Given that Arizona could not adopt a substantive retroactivity rule refusing to give effect to decisions applying settled rules, it cannot employ a putative procedural rule to accomplish this exact same result. The adequate-and-independent-state-law-ground doctrine applies with equal force "whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729. States accordingly "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 § 4023.

Arizona's contrary approach places defendants like Cruz in a Catch-22. To prevail on their state-law claim, they must argue that there has been a significant change in the law. But to prevail on their

federal-law claim, they must argue that they are entitled to relief under settled law. Rather than reconcile these state and federal-law standards by holding that *Lynch* was a significant change in the law in Arizona, the Arizona Supreme Court interpreted Rule 32.1(g) to *prohibit* the result that federal law *requires*. Indeed, the Arizona Supreme Court quoted Cruz's argument that *Lynch* "was dictated by" *Simmons* under federal law as grounds for ruling against him under state law. Pet. App. 8a-9a. It is hard to imagine a clearer case of discrimination against federal law than that.

Under the interpretation adopted below, moreover, even if an intervening decision qualifies as a "significant change in the law," it must then *also* satisfy *Teague*. *See State* v. *Slemmer*, 823 P.2d 41, 46-49 (Ariz. 1991) ("adopt[ing]" the "federal retroactivity analysis" of *Teague*). The result is a whipsaw: First, Rule 32.1(g) bars review of intervening decisions applying settled rules. Then, if a defendant overcomes that hurdle, Arizona courts apply *Teague* to bar review of almost all *new* rules. Arizona has thus appended to *Teague* a state-law rule with the effect of avoiding retroactivity in virtually all cases.

Second, the interpretation of Rule 32.1(g) adopted below "discriminates against federal interests," 16B Wright & Miller § 4028, because it subjects decisions of this Court to less favorable treatment than functionally identical decisions of the Arizona Supreme Court.

Under the decision below, an intervening decision qualifies as a significant change in the law when the Arizona Supreme Court overrules Arizona precedent that misapplied federal law—but not when *this Court*

overrules Arizona precedent that misapplied federal law. *See* Pet. App. 8a-9a. Take this Court's decision in *Lynch*: The Arizona Supreme Court ruled that *Lynch* was not a significant change in the law because it merely overruled Arizona precedent misapplying federal law. But if the Arizona Supreme Court had overruled Arizona precedent to hold that *Simmons* applies in Arizona, that decision would plainly qualify as a significant change in the law. *See Slemmer*, 823 P.2d at 49. The disparity could not be more stark: Where the Arizona Supreme Court overrules Arizona precedent, its decision satisfies Rule 32.1(g), but where this Court overrules Arizona precedent, its decision does not.

This discriminatory treatment advances no conceivable state interest. The purpose of Rule 32.1(g) is to give Arizona defendants the benefit of intervening decisions permitting relief that was previously unavailable in Arizona. *See State* v. *Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009). It also discourages defendants from raising "a litany of claims clearly foreclosed" by Arizona precedent by "provid[ing] a potential avenue for relief" when the law changes. *Id.* Those purposes are satisfied regardless of whether the source of the intervening decision is the Arizona Supreme Court or this Court. The State has identified no basis for giving retroactive effect to an intervening decision of the Arizona Supreme Court, but refusing to give retroactive effect to an intervening decision of this Court reaching the exact same result on the exact same question.

Third, the interpretation of Rule 32.1(g) adopted below deprives defendants of "a reasonable opportunity" to assert federal rights. *Parker*, 333 U.S. at 574 (quotation marks omitted).

Defendants are "constitutionally entitled" to at least "one full and fair opportunity" to raise constitutional claims. Friendly, *supra*, at 160, 162. But Arizona has provided no opportunity for Cruz and other similarly situated inmates to obtain relief under *Simmons*. Cruz was denied the benefit of *Simmons* on direct review because the Arizona Supreme Court refused to apply it. He was then prohibited from raising a *Simmons* claim in his initial petition for postconviction relief because Arizona bars review of claims that were "finally adjudicated on the merits in an appeal." Ariz. R. Crim. P. 32.2(a)(2). Then, after this Court in *Lynch* overruled Arizona's refusal to apply *Simmons*, the Arizona Supreme Court refused to allow Cruz to invoke *Lynch* in a successive petition—asserting that Cruz had no recourse because the rule applied in *Lynch* "was clearly established at the time of Cruz's trial, sentencing, and direct appeal, *despite the misapplication of that law by Arizona courts*." Pet. App. 9a (emphasis added). Thus, Cruz's claim was rejected when he first sought relief on the ground that *Simmons* did not apply in Arizona, and it was rejected when he later sought relief on the ground that *Simmons* had applied in Arizona all along.

This tortured logic accomplishes nothing short of the nullification of a federal right in the State of Arizona—even for petitioners like Cruz who preserved their claim at every opportunity. This Court has rejected an adequate-and-independent-state-law-ground argument in similar circumstances. In the 1940s, Illinois maintained a system of postconviction review that amounted to a "procedural labyrinth" and "offer[ed] no adequate remedy to prisoners." *Marino* v. *Ragen*, 332 U.S. 561, 565 (1947) (Rutledge, J., concurring). In reviewing a state-court decision denying

relief under that system, this Court acknowledged that it does "not review decisions which rest upon adequate non-federal grounds," but that "it is not simply a question of state procedure when a state court of last resort closes the door to any consideration of a claim of denial of a federal right." *Young* v. *Ragen*, 337 U.S. 235, 238 (1949). The same conclusion follows here.

Fourth, this Court reviews state-court decisions for evidence of a "purpose or pattern to evade constitutional guarantees." *Walker*, 562 U.S. at 321 (quoting *Beard*, 558 U.S. at 65 (Kennedy, J., concurring)); *see Rogers* v. *Alabama*, 192 U.S. 226, 231 (1904). Here, the evidence of Arizona's hostility to *Simmons* could hardly be clearer.

Although Arizona abolished parole for capital defendants as of 1994, Arizona courts refused to follow *Simmons* in case after case, using reasoning that bordered on outright insubordination. In Cruz's case, the Arizona Supreme Court held that *Simmons* did not apply because "[n]o state law would have prohibited" the defendant's "release on parole," Pet. App. 31a—even though this was flatly incorrect under state law. *See* Ariz. Rev. Stat. Ann. § 41-1604.09(I)(1). In other cases, the Arizona Supreme Court maintained that *Simmons* did not apply because capital defendants could be released through "executive clemency," *Lynch*, 357 P.3d at 138-139—even though *Simmons* itself "expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility." *Lynch*, 578 U.S. at 615. In still other cases, the Arizona Supreme Court maintained that a *Simmons* instruction would rest on "speculation" given that the Legislature could change the law to provide for parole.

State v. *Dann*, 207 P.3d 604, 626 (Ariz. 2009); *see Lynch*, 357 P.3d at 138 (refusing to apply *Simmons* even though "[a]n instruction that parole is not currently available would be correct"). That theory, too, was rejected in *Simmons*, and would make *Simmons* inapplicable in every case. *See Lynch*, 578 U.S. at 616.

Then, after this Court in *Lynch* rebuked Arizona for refusing to follow *Simmons*, the Arizona Supreme Court contorted Rule 32.1(g) to decline to give *Lynch* effect on collateral review. Federal law does not countenance such gamesmanship.

B. Rule 32.1(g) Is Not A Neutral Jurisdictional Rule.

In its Brief in Opposition, the State all but conceded that the Arizona Supreme Court would be required to apply *Lynch* on collateral review if it considered the "merits" of Cruz's claim. Br. in Opp. 13. But the State maintained that the Arizona Supreme Court could avoid its obligation to apply *Lynch* by adopting a threshold rule closing Arizona courts to Cruz's claim. *See id.* To the extent the State is contending that Rule 32.1(g) is adequate and independent because it withdraws jurisdiction over Cruz's *Lynch* claim, the State is wrong.

1. This Court need not address whether Arizona may remove jurisdiction over *Lynch* claims on state postconviction review, because Rule 32.1(g) is not a jurisdictional rule. *See Haywood*, 556 U.S. at 755-756 (Thomas, J., dissenting) (in determining whether a state court's refusal to hear a federal claim is permissible, "the line between subject-matter jurisdiction over a claim and the merits" "is crucial").

With exceptions not relevant here, the Arizona Constitution grants the Arizona Supreme Court

"[a]ppellate jurisdiction in *all* actions and proceedings." Ariz. Const. art. 6, § 5, cl. 3 (emphasis added). An Arizona statute confirms the Arizona Supreme Court's jurisdiction to review petitions for postconviction relief and "grant such relief as it deems necessary and proper." Ariz. Rev. Stat. Ann. § 13-4239(G). In the proceedings below, the Arizona Supreme Court recognized that it had "jurisdiction" under "the Arizona Constitution and A.R.S. § 13-4239." Pet. App. 3a.

Rule 32.1(g) did not divest the Arizona Supreme Court of jurisdiction. Rule 32.1 governs when defendants can obtain *a remedy* for particular claims, but it does not limit Arizona courts' *jurisdiction*. It is titled "Scope of *Remedy*," and sets forth eight "[g]rounds for *relief*" on which a defendant can seek postconviction relief. Ariz. R. Crim. P. 32.1 (emphases added). And Rule 32.1 operates in tandem with Rule 32.2—titled "Preclusion of *Remedy*"—which dictates when a remedy for particular claims will be precluded. Ariz. R. Crim. P. 32.2 (emphasis added). Neither provision implicates jurisdiction. *See Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (rules regulating remedies are "procedural only" and do not implicate "jurisdiction" (quotation marks omitted)). For that reason, the State's Brief in Opposition acknowledged that Rule 32.1(g) was "procedural." Br. in Opp. 12.

2. Even if this Court determines that Rule 32.1(g) is a jurisdictional rule, it is not adequate or independent because it discriminates against federal claims. States possess "substantial leeway to establish the contours of their judicial systems." *Haywood*, 556 U.S. at 736; *see also Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 372 (1990). But states may only close

their courthouse doors to federal claims through "*neutral* rule[s] of judicial administration." *Haywood*, 556 U.S. at 736, 738 (emphasis added). States cannot treat federal claims less favorably than comparable state claims, and cannot refuse to hear federal claims because of "a policy disagreement" with federal law. *Id.* at 737; *see also Testa* v. *Katt*, 330 U.S. 386, 393 (1947) ("a state court cannot refuse to enforce the right arising from the law of the United States" based on a policy disagreement (quotation marks omitted)).

This Court has accordingly rejected the theory that a state may use threshold jurisdictional rules to discriminate against federal law. In *Haywood*, the Court rejected the argument that "a State could express its disagreement with (and even open hostility to) a federal" claim and refuse to apply federal law "by removing the disfavored category of claims from its courts' jurisdiction." 556 U.S. at 741 n.8. That result, the Court explained, would create "a blind spot in the Supremacy Clause" allowing states to discriminate against federal law if they "cloaked" local rules in "jurisdictional garb." *Id.* at 741 n.8, 742. Indeed, eight Justices in *Haywood* agreed that states cannot adopt threshold rules that treat federal claims less favorably than state claims, with three Justices dissenting only on the ground that the New York rule at issue was in fact neutral to federal law. *Haywood*, 556 U.S. at 768 (Thomas, J., dissenting).

The Supremacy Clause's neutrality requirement forecloses any contention that Rule 32.1(g) is a permissible jurisdictional rule. Although Arizona retains broad leeway to establish the contours of its postconviction forum and adopt neutral rules refusing to hear particular claims, it may not do so in a manner that

discriminates against federal rights. For reasons already explained, the interpretation of Rule 32.1(g) adopted below discriminates against federal rights in numerous respects—by treating a winning argument under federal law as a ground for denying relief under state law; by giving second-class treatment to this Court's decisions; by denying certain state defendants any opportunity for review of meritorious federal claims; and by doing all of this based on its hostility to the underlying federal right. Just as Arizona cannot discriminate against federal law through procedural rules, it cannot discriminate against federal law through jurisdictional rules.

3. In its Brief in Opposition, the State defended the Arizona Supreme Court's discriminatory application of Rule 32.1(g) as consistent with this Court's decision in *Yates*. Br. in Opp. 13. The State cited *Yates*'s statement that a state court must give effect to decisions applying settled rules where the court has not "placed any limit on the issues it will entertain in collateral proceedings." *Id.* (quoting *Yates*, 484 U.S. at 218). This statement, however, simply acknowledges that states have authority to establish the contours of their postconviction forums through neutral rules. *Accord Montgomery*, 577 U.S. at 204-205 (state courts must honor federal retroactivity if the "state collateral proceeding is open to a claim controlled by federal law"). Nothing about *Yates* suggests that states may limit postconviction review in a manner that discriminates against federal rights.

The State's theory of *Yates* is plainly incorrect. Under the State's view, a state could avoid *Yates* simply by adopting a rule refusing to hear claims arising from intervening decisions involving settled rules—

precisely the result that *Yates* rejected in denying the state's "authority to establish the scope of its own habeas corpus proceedings and to refuse to apply" decisions involving settled rules. 484 U.S. at 217. The State's theory would likewise permit a state to circumvent *Montgomery* by adopting a rule declining to hear claims based on new substantive rules of constitutional law. This interpretation of *Montgomery*—a decision grounded in "the Supremacy Clause" and the fact that states lack power "to mandate that a prisoner continue to suffer punishment barred by the Constitution," 577 U.S. at 204—is entirely implausible.

The State's theory, if accepted, would allow states to declare open season on other rights and create perverse incentives for states to misapply settled federal law. For example, a state hostile to this Court's return to "the original meaning of the Confrontation Clause" in *Crawford* v. *Washington*, 541 U.S. 36, 60 (2004), could refuse to apply the core holding of *Crawford*, and then, even if this Court ultimately corrected the error, invoke state law as a basis for refusing to apply this Court's corrective decision to cases decided in the interim—even if the state otherwise opened its post-conviction forum to federal claims.

The same goes for this Court's recent decision in *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1402 (2020), which held that the Sixth and Fourteenth Amendments protect "the right to a unanimous jury verdict" in state-court trials. In *Vannoy*, this Court held that *Ramos* announced a new rule that did not apply retroactively to cases that were final *before* the Court decided *Ramos*. *See Vannoy*, 141 S. Ct. at 1562. But if Arizona is correct here, then Oregon (the only other state to permit non-unanimous criminal verdicts) could

simply ignore *Ramos*, await a decision correcting the error, then rely on state law to refuse to apply the corrective decision even in cases that became final *after* the decision in *Ramos*—even if the state otherwise made a postconviction forum available. The Supremacy Clause does not permit states to discriminate against federal rights in this manner.

III. THE ARIZONA SUPREME COURT'S NOVEL INTERPRETATION OF RULE 32.1(g) IS NOT FIRMLY ESTABLISHED OR REGULARLY FOLLOWED.

This Court should vacate the decision below for the independent reason that the Arizona Supreme Court's interpretation of Rule 32.1(g) is not "firmly established and regularly followed." *Beard*, 558 U.S. at 60 (quotation marks omitted); *see Johnson* v. *Mississippi*, 486 U.S. 578, 587 (1988).

This Court's refusal to treat novel interpretations of state rules as adequate prevents state courts from using "novel state procedural requirements" to "evad[e] compliance with a federal standard." *Beard*, 558 U.S. at 64 (Kennedy, J., concurring); *see also* 16B Wright & Miller § 4026 (state courts "should not be allowed to avoid federal claims by deliberately fabricating spurious state grounds for decision"). As Justice Holmes wrote, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Wechsler*, 263 U.S. at 24.

The decision below adopted an entirely novel interpretation of Rule 32.1(g) to defeat the federal

Simmons right. This novel interpretation "cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958) (Harlan, J.).

A. Under Three Decades Of Arizona Law, Rule 32.1(g) Permits Review Where An Appellate Court Overrules Prior Precedent.

"A defendant is entitled to post-conviction relief" in Arizona "when '[t]here has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence[.]'" *State* v. *Valencia*, 386 P.3d 392, 394 (Ariz. 2016) (quoting Ariz. R. Crim. P. 32.1(g)). Arizona courts have described "a significant change" under Rule 32.1(g) as requiring "some transformative event, a clear break from the past." *Shrum*, 203 P.3d at 1178 (quotation marks omitted).

For more than 30 years, the Arizona Supreme Court has held that "a significant change" occurs when an appellate court overrules binding precedent. In 1989, the Arizona Supreme Court ruled that Rule 32.1(g) permitted review where an intervening decision overruled state-court precedent. *State* v. *Rendon*, 776 P.2d 353, 354-355 (Ariz. 1989). In 2009, the Arizona Supreme Court confirmed that the "archetype" of a significant change in the law "occurs when an appellate court overrules previously binding case law." *Shrum*, 203 P.3d at 1178. And just last year, the Arizona Supreme Court yet again noted that the "archetype of such a change occurs when an appellate court overrules previously binding case law." *State* v. *Bigger*,

492 P.3d 1020, 1029 (Ariz. 2021) (quotation marks omitted).

Arizona courts have found "a significant change in the law" under Rule 32.1(g) regardless of whether the intervening decision overruled precedent of the same or a subordinate court. In *Shrum*, the Arizona Supreme Court found "a significant change in the law" where this Court in *Ring* v. *Arizona*, 536 U.S. 584 (2002), "expressly overruled" its own prior decision. *Shrum*, 203 P.3d at 1178-79 (citing *State* v. *Towery*, 64 P.3d 828 (Ariz. 2003)). By the same token, the Arizona Supreme Court in *Slemmer* found a significant change in the law where the state high court overturned a practice that "a near-unanimous body of lower court authority had expressly approved." 823 P.2d at 49 (alteration and quotation marks omitted). And in *Rendon*, the Arizona Supreme Court likewise found a significant change in the law where it had overruled the holding of an earlier court of appeals case. 776 P.2d at 354-355.

As particularly relevant here, an Arizona appellate court previously found a significant change in the law where this Court overruled Arizona state-court precedent on a federal-law question. In *State* v. *Poblete*, 260 P.3d 1102, 1105 (Ariz. Ct. App. 2011), the court held that *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), constituted a significant change in the law because it overruled "the law in Arizona" on a federal question. The court thus found a significant change in the law even though *Padilla* overruled an Arizona state-court decision rather than a decision of this Court. *Poblete*, 260 P.3d at 1105.

B. The Arizona Supreme Court's Novel Interpretation Of Rule 32.1(g) Is Not A Barrier To This Court's Review.

Under Arizona precedent that preceded this case, *Lynch* plainly qualifies as a significant change in the law. There is no dispute that *Lynch* overruled Arizona Supreme Court precedent on a federal-law question. *See Lynch*, 578 U.S. at 614-615. The Arizona Supreme Court held as much, stating that *Lynch* "reversed our decision * * * that the possibility of executive clemency did not justify refusing the parole-ineligible instruction." *State* v. *Johnson*, 447 P.3d 783, 801 (Ariz. 2019). The State below similarly conceded that "*Lynch* overruled a well-established line of Arizona Supreme Court opinions holding that *Simmons* did not" apply in Arizona. JA307.

Nor is there any doubt that the precedent *Lynch* overruled was binding in Arizona. *See Sell* v. *Gama*, 295 P.3d 421, 428 (Ariz. 2013) ("[t]he lower courts are bound by [the Arizona Supreme Court's] decisions"). In fact, the State below initially did not even dispute that *Lynch* was a significant change in the law, because, as the State noted, *Lynch* overturned "the unambiguous rule" in Arizona "that defendants were not entitled to *Simmons* instructions." JA311. Under settled precedent, the Arizona Supreme Court should have acknowledged *Lynch* as a significant change in the law.

But the Arizona Supreme Court refused to do so. Instead, it departed from precedent to hold that Rule 32.1(g) does not permit review where this Court overrules decisions of the Arizona Supreme Court that misapply federal law. *See* Pet. App. 9a. According to the Arizona Supreme Court, in this circumstance,

there is no "significant change in the law," but instead "a significant change in the *application* of the law." *Id.*

This interpretation slices the bologna far too thin. Never before had the Arizona Supreme Court drawn a distinction between "a significant change in the law" and "a significant change in the *application* of the law." Never before had the Arizona Supreme Court suggested that decisions of this Court overruling Arizona precedent on federal questions are exempted from the rule that decisions overruling precedent are significant changes in the law. And never before had an Arizona court applied Rule 32.1(g) in remotely comparable circumstances. To the contrary, in the closest analogue, an Arizona court concluded that this Court's decision in *Padilla*—which overruled an Arizona state-court interpretation of federal law—"constitutes a significant change in the law." *Poblete*, 260 P.3d at 1105.

While Rule 32.1(g) itself is not novel, its "application to the facts here was." *Lee*, 534 U.S. at 382 (quotation marks omitted). It therefore cannot qualify as an adequate and independent state-law ground. The decision below is not a logical outgrowth of prior Arizona precedent; it is a transparent attempt to prevent Cruz from obtaining review under *Lynch*. And it interprets Rule 32.1(g) to preclude relief on collateral review precisely where the Arizona Supreme Court's error on direct review most obviously violated this Court's precedent.

The State's Brief in Opposition argued that the interpretation of Rule 32.1(g) adopted below can technically be reconciled with Arizona Supreme Court precedent. *See* Br. in Opp. 15-16. That is wrong, but even

if it were right, it would not help the State. Even where a decision may "appear in retrospect" to be reconcilable with precedent, it is not adequate where the defendant cannot "fairly be deemed to have been apprised" that it would apply in his case. *NAACP*, 357 U.S. at 457; *see Lee*, 534 U.S. at 382 (application of state rule to situation the state's "courts had not confronted before" could not bar federal review). Here, Cruz cannot possibly be deemed to have been apprised that the Arizona Supreme Court would interpret Rule 32.1(g) to bar relief. The Arizona Supreme Court's novel interpretation cannot bar review of Cruz's federal claim.

IV. THE ARIZONA SUPREME COURT'S INTERPRETATION OF RULE 32.1(g) IS INTERWOVEN WITH FEDERAL LAW.

At a minimum, the decision below is interwoven with federal law, permitting this Court's review. The Arizona Supreme Court's conclusion that no "significant change in the law" occurred—and that the requirements of Rule 32.1(g) were not met—depended on its analysis of *this Court's precedent* and that precedent's effect on *federal law* in Arizona. *See* Pet. App. 4a-11a. The meaning of this Court's precedent, and its effect on federal law, are federal questions for this Court to resolve.

A. This Court May Review State-Court Decisions That Are Interwoven With Federal Law.

Where a state-law ground of decision "is so interwoven with" a federal-law ground of decision "as not to be an independent matter," this Court's "jurisdiction is plain." *Enter. Irrigation Dist.* v. *Farmers Mut.*

Canal Co., 243 U.S. 157, 164 (1917). In that situation, this Court has "jurisdiction and should decide the federal issue," because "if the state court erred in its understanding of [this Court's] cases," then the Court "should so declare." *Zacchini* v. *Scripps-Howard Broad. Co.*, 433 U.S. 562, 568 (1977); *see Michigan* v. *Long*, 463 U.S. 1032, 1040-41 (1983). This approach allows state courts to develop state-law precedent, while preserving "the integrity of federal law." *Arizona* v. *Evans*, 514 U.S. 1, 7 (1995) (quotation marks omitted).

To determine whether a state-court decision is interwoven with federal law, this Court examines the authorities the state court relied upon. Where the state court cites federal law in the "crucial" sections of its opinion—and there is no "plain statement" that the court is relying solely on state rather than federal law—this Court has jurisdiction. *New York* v. *P.J. Video, Inc.*, 475 U.S. 868, 872 n.4 (1986) (quotation marks omitted); *see Delaware* v. *Van Arsdall*, 475 U.S. 673, 678 n.3 (1986) (reviewing state-court decision that "makes use of both federal and state cases in its analysis"). This remains true where a state court analyzes federal law when interpreting a state statute. *See Ohio* v. *Reiner*, 532 U.S. 17, 20 (2001) (per curiam).

B. The Arizona Supreme Court's Interpretation of Rule 32.1(g) Is Interwoven With Federal Law.

The decision below is interwoven with federal law. To determine whether a significant change occurred, the Arizona Supreme Court examined "the law that existed at the time" Cruz was sentenced. Pet. App. 7a

(quotation marks omitted). The law that the Arizona Supreme Court examined was *federal law*.

This is clear from the face of the decision below. The Arizona Supreme Court held that no significant change in the law occurred because this Court's decision in *Lynch* "was dictated by its earlier decision in *Simmons*." *Id.* at 8a (quotation marks omitted). According to the Arizona Supreme Court, because *Simmons* "was clearly established at the time of Cruz's trial, sentencing, and direct appeal," *Lynch* "does not represent a significant change in the law." *Id.* at 9a. This analysis depends on the Arizona Supreme Court's view of how *Lynch* affected federal law. But this Court—not the Arizona Supreme Court—is the final arbiter of that question. "[T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes of Fort Berthold Rsrv.* v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984). In that situation, "this Court has reviewed the federal question on which the state-law determination appears to have been premised." *Id.*

This Court thus can—and should—review the Arizona Supreme Court's conclusion that *Lynch* did not represent a significant change in the law in Arizona. And it should hold that a significant change occurred here, where this Court *overruled longstanding Arizona Supreme Court precedent* on a federal question. *Lynch* significantly changed the law in Arizona by overruling Arizona Supreme Court precedent holding that due process did not entitle capital defendants to introduce evidence at a capital sentencing that they are ineligible for parole. *See* Pet. App. 4a-5a, 31a.

Where a state court errs in its interpretation of this Court's precedent, the Court "should so declare." *Zacchini*, 433 U.S. at 568. Because the question whether *Lynch* represented a significant change in the law is interwoven with federal questions, this Court should hold that *Lynch* was a significant change in the law in Arizona, and remand for the Arizona Supreme Court to address whether Cruz is entitled to relief under *Simmons* and *Lynch*.

V. FEDERAL HABEAS CANNOT SUBSTITUTE FOR STATE POSTCONVICTION REVIEW IN THE CIRCUMSTANCES HERE.

Arizona cannot avoid its obligation to apply *Lynch* by citing the possibility that Cruz could obtain relief in federal habeas proceedings.

A. Cruz Did Not Default His Federal Claim For Purposes Of Federal Habeas Review.

In the proceedings below, counsel for Arizona argued that, even in federal habeas proceedings, Rule 32.1(g) could result in Cruz's *Lynch* claim being "validly precluded under our state's procedural rules."[4] The State's position appears to be that Rule 32.1(g) can be deployed to nullify this Court's precedent not only in the State's own courts, but in federal court too.

The State is mistaken. Rule 32.1(g) cannot be deployed to prevent Cruz from invoking *Lynch* in federal habeas proceedings. The federal habeas statute provides that federal courts may grant relief to state defendants if "the applicant has exhausted the remedies available in the courts of the State" or "there is an absence of available State corrective process." 28 U.S.C.

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[4] Oral Argument, *supra*, at 29:11-30:28.

§ 2254(b)(1). Here, Cruz exhausted the remedies available in Arizona courts by pressing his claim at every opportunity. He certainly did not default his claim; he did not "fail[] to abide by a state procedural rule." *Martinez* v. *Ryan*, 566 U.S. 1, 9 (2012). His claim was denied not because he failed to exhaust the available remedy or otherwise preserve his claim, but because Arizona refused to make a remedy available.

Even if Cruz could be said to have defaulted, a "prisoner may obtain federal review of a defaulted claim by showing cause for the default and prejudice from a violation of federal law." *Id.* at 10. Here, Cruz could show cause for any default because Arizona courts simply refused to hear his claim under *Simmons* and *Lynch*. And he could also show "that the constitutional violation worked to his *actual* and substantial disadvantage." *Shinn* v. *Ramirez*, 142 S. Ct. 1718 (2022) (quotation marks omitted). After the trial judge misinformed the jury that Cruz would have "a possibility of parole" unless sentenced to death, JA94, multiple jurors made clear that they voted for death only because they erroneously believed they had no "*option to vote for life in prison without the possibility of parole*." JA143-144; *see* JA269. The State has argued that this juror evidence cannot be considered, *see* Br. in Opp. 17-18 n.2, but this Court recently made clear that nothing forbids courts "from considering post-trial testimony about how" a constitutional violation "*actually* affected juror deliberations" in evaluating prejudice. *Brown* v. *Davenport*, 142 S. Ct. 1510, 1530 (2022).

B. Federal Habeas Is Not An Appropriate Substitute For A State Corrective Process.

Although federal habeas is available to correct the State's error, it is not a substitute for a state corrective process. Requiring Cruz to resort to federal habeas without first giving him an opportunity to seek correction of the *Simmons* error in state court would undermine comity interests and upend the balance struck by *Teague*.

Federal habeas law is predicated on the recognition that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). A defendant's obligation to exhaust state-court remedies promotes "federal-state comity" by ensuring that states have "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Shinn*, 142 S. Ct. 1718 (quoting *Duckworth* v. *Serrano*, 454 U.S. 1, 3 (1981) (per curiam)). But the exhaustion requirement "presupposes that some adequate state remedy exists." *Young*, 337 U.S. at 238-239. If Arizona affords no remedy for Cruz, federal courts would be called on to correct an error that Arizona courts did not attempt to correct first—a result that would be "unseemly in our dual system of government." *Shinn*, 142 S. Ct. 1718 (quoting *Darr* v. *Burford*, 339 U.S. 200, 204 (1950)).

By contrast, requiring Arizona to correct its misapplication of *Simmons* in state postconviction proceedings would not unduly burden Arizona. In federal habeas proceedings, AEDPA would require a court to give effect to *Lynch*, which merely applied the "clearly established Federal law" in effect when Cruz's case

was on direct review. 28 U.S.C. § 2254(d)(1). Arizona would therefore face correction of its error in federal habeas proceedings even if it refused to correct the error itself. "If a State may not constitutionally insist that a prisoner remain in jail on federal habeas review, it may not constitutionally insist on the same result in its own postconviction proceedings." *Montgomery*, 577 U.S. at 204.

Requiring Arizona to correct its own error would comport with *Teague*'s "balance" between "the need for finality in criminal cases" and "the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law." *Welch* v. *United States*, 578 U.S. 120, 131 (2016). Arizona's interest in finality is at its nadir here given that Cruz's sentence was unconstitutional from the outset. *See Buck* v. *Davis*, 137 S. Ct. 759, 779 (2017) ("the State's interest in finality deserves little weight" where the state seeks to "enforc[e] a capital sentence obtained on so flawed a basis"). And the countervailing imperative to impose criminal punishment only where authorized by law is at its peak given that Cruz seeks application of the law that governed from the start. Requiring the Arizona Supreme Court to address its *Simmons* error will not require Arizona to "continually" marshal resources "to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Montgomery*, 577 U.S. at 223 (Scalia, J., dissenting) (quoting *Teague*, 489 U.S. at 310 (plurality op.)). It will require Arizona to apply law that was settled at the time of conviction.

The State's interests are particularly minimal in Cruz's case. The State presented no evidence and called no witnesses during Cruz's penalty-phase

proceedings, and the State would therefore suffer no prejudice if it sought to initiate new penalty-phase proceedings now. *Cf. Vannoy*, 141 S. Ct. at 1554-55 (noting harm to public interest where "evidence needed to conduct a retrial has become stale or is no longer available" or victims must "testify again"). And, of course, even if the jury declined to resentence Cruz to death, that verdict would not entitle Cruz to release from prison. Instead, it would simply reflect the jurors' judgment that a death sentence is not warranted given that Cruz would never be paroled if they granted him mercy.

CONCLUSION

For these reasons, the judgment of the Arizona Supreme Court should be vacated and the case remanded for consideration of Cruz's claim under *Simmons* and *Lynch*.

Respectfully submitted,

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JUNE 2022