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 AMICI CURIAE OHIO JUSTICE & POLICY CENTER AND RODERICK & SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The **Ohio Justice & Policy Center** (OJPC) is a nonprofit organization with offices in Cincinnati and Columbus, Ohio. Founded in 1997 as the Prison Reform Advocacy Center, OJPC currently provides free legal services and resources to currently and formerly incarcerated people, including in state postconviction proceedings.

The **Roderick & Solange MacArthur Justice Center** (MJC) is a nonprofit organization founded by the family of J. Roderick MacArthur to advocate for civil rights and a fair and humane criminal justice system. MJC has represented clients facing myriad civil rights injustices, and has an interest in the sound and fair administration of the criminal justice system.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about the obligations that states incur when they create postconviction forums that are open to federal constitutional claims. Under a long line of cases, this Court has made clear that such state courts must give defendants equal benefit of the law that was clearly established at the time their convictions became final. While that obligation may stem from several constitutional sources, *amici* contend it is best understood as deriving from the Due Process Clause. And the decision below, which

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[1] The parties have consented to the filing of this *amici* brief. No counsel for any party authored this brief in whole or in part; no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

reinterpreted state procedural law to avoid applying established federal law, is wholly irreconcilable with basic principles of due process.

In 1994, this Court in *Simmons v. South Carolina* clearly established that, when a capital defendant's future dangerousness is at issue, the defendant is constitutionally entitled to inform the sentencing jury that he will be ineligible for parole if he is not sentenced to death. 512 U.S. 154, 168–69 (1994). Petitioner John Montenegro Cruz was tried in Arizona state court after *Simmons* was firmly established but was denied its benefit despite the prosecution having put Cruz's future dangerousness at issue. *See* Pet'r Br. 10–11. On direct appeal, the Arizona Supreme Court ruled that Cruz was not entitled to the benefit of *Simmons*. *Id.* at 12; Pet. App. 31a. Arizona continued defying *Simmons* until this Court intervened in *Lynch v. Arizona*, 578 U.S. 613 (2016), summarily reversing the Arizona Supreme Court. *See* Pet. App. 15a. After *Lynch*, Cruz once again sought relief in the Arizona courts. Pet'r Br. 13. But once again, Arizona refused to enforce the *Simmons* rule.

Undeterred by *Lynch*, the Arizona Supreme Court reinterpreted its postconviction procedural law to *continue* denying capital defendants the constitutional rule established in *Simmons*. Without addressing Cruz's arguments under federal law, the Arizona Supreme Court denied Cruz's claim under Arizona Rule of Criminal Procedure 32.1(g). That Rule enables petitioners like Cruz to seek relief when "there has been a significant change in the law." Ariz. R. Crim. P. 32.1(g). For decades, the Arizona Supreme Court had treated an appellate court overruling a prior binding decision as "a significant

change in the law." *See, e.g.*, *State v. Shrum*, 203 P.3d 1175, 1178–79 (Ariz. 2009); *State v. Rendon*, 776 P.2d 353, 354 (Ariz. 1989). Yet in Cruz's case, the Arizona Supreme Court again denied him the benefit of *Simmons* because, even though *Lynch had* overruled binding Arizona precedent, the court deemed *Lynch* to be merely a "significant change in the *application* of the law." Pet. App. 9a; *see id.* at 2a. Accordingly, Arizona courts have repeatedly denied Cruz the benefit of the *Simmons* rule, despite the rule having been firmly established well before his conviction became final. That result cannot be squared with this Court's due-process precedents.

Part I explains that due process imposes baseline requirements of fundamental fairness on state courts. *See Danforth v. Minnesota*, 552 U.S. 264, 269–70 (2008). One such baseline requirement is that states provide each litigant with a fair "opportunity to be heard" and vindicate their federal rights. *Brinkerhoff-Faris Tr. & Sav. Co. v. Hill*, 281 U.S. 673, 678, 681–82 (1930). Another baseline requirement that sounds in due process is that states must provide each criminal defendant with an equal opportunity to benefit from settled law at the time the defendant's conviction becomes final. *See, e.g.*, *Yates v. Aiken*, 484 U.S. 211, 216–18 (1988); *Griffith v. Kentucky*, 479 U.S. 314, 322–23 (1987). In the decision below, the Arizona Supreme Court flouted both of those basic principles of fundamental fairness.

Part II addresses this Court's jurisdiction to enforce those due-process principles in this case—specifically, why the Arizona Supreme Court's interpretation of Rule 32.1(g) is *not* an adequate and independent state-law ground that deprives this Court of jurisdiction. For one, treating Rule 32.1(g)

as such would violate due process by denying Cruz an opportunity to be heard and effectively nullifying a federal right. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 736 (2009); *Davis v. Wechsler*, 263 U.S. 22, 23–24 (1923). In addition, by abruptly reinventing its rules to avoid enforcing *Simmons*, the Arizona Supreme Court's interpretation of Rule 32.1(g) discriminates against federal claims in violation of due process—a grounding that can never be adequate or independent. *See, e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); *Ward v. Bd. of Cnty. Comm'rs of Love Cnty.*, 253 U.S. 17, 22–24 (1920).

For all of these reasons, this Court should reject Arizona's contrived jurisdictional arguments, vacate the decision below, and remand for consideration of Cruz's claim under *Simmons* and *Lynch*.

ARGUMENT

I. DUE PROCESS REQUIRES STATE POSTCONVICTION COURTS TO APPLY THE SETTLED CONSTITUTIONAL RULES IN EFFECT AT THE TIME A CONVICTION BECAME FINAL.

In *Montgomery v. Louisiana*, this Court explained that states are constitutionally required to give retroactive effect to new substantive rules of constitutional law. 577 U.S. 190, 200 (2016). The Court grounded that obligation in the federal Supremacy Clause. *Id.* at 204. Justice Scalia's dissent argued that this framing "only elicits another question: What federal law is supreme? Old or new?" *Id.* at 217 (Scalia, J., dissenting). Justice Thomas raised a similar concern, stating that the Supremacy Clause "merely supplies a rule of decision: *If* a federal constitutional right exists, that right supersedes any

contrary provisions of state law." *Id.* at 228 (Thomas, J., dissenting).

This case concerns a more modest question. While *Montgomery* addressed a "new" rule that was established after the defendant's conviction became final, this case involves "old" law—the *Simmons* rule—that predated Cruz's conviction. This case thus boils down to the question whether states that create a forum for federal postconviction claims must give defendants who have preserved their claims the benefit of the law that was already settled at the time their convictions became final. *Amici* contend that states *do* have such an obligation, and regardless of any constitutional basis in the Supremacy Clause, that obligation is independently imposed by the Due Process Clause.

Due process requires basic fairness, and applying no less than the law as it stood at the time a defendant's conviction became final comports with time-honored notions of fair play. Indeed, the precursors of the retroactivity analysis in *Teague v. Lane*, 489 U.S. 288 (1989)—especially *Griffith v. Kentucky*, 479 U.S. 314 (1987)—demonstrate that the obligation to apply settled law is grounded in the Fourteenth Amendment's command to ensure that no defendant is deprived of liberty "without due process of law." U.S. Const. amend. XIV, § 1.

A. Due process requires an irreducible core of fair treatment, which includes the right to be heard on—and thus receive the equal benefit of—settled law.

"The ratification of the Fourteenth Amendment radically changed the federal courts' relationship with state courts." *Danforth v. Minnesota*, 552 U.S.

264, 269 (2008). Among those changes was new authority for federal courts to ensure that state-court defendants received "due process of law." *Id.* (quoting U.S. Const. amend. XIV, § 1). This Court has made clear that the Fourteenth Amendment's Due Process Clause "imposes minimum standards of fairness on the States, and requires state criminal trials to provide defendants with protections 'implicit in the concept of ordered liberty.'" *Id.* at 269–70 (quoting *Palko v. Connecticut,* 302 U.S. 319, 325 (1937)); *see also, e.g.*, *Medina v. California*, 505 U.S. 437, 448 (1992) (discussing the due-process requirement of "fundamental fairness"). This requirement extends to state postconviction courts. *See Dist. Att'y's Off. for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

Among those minimum standards is the requirement that states "do not infringe on federal constitutional guarantees." *Danforth*, 552 U.S. at 280; *see also Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 102 (1993) ("State law may provide relief beyond the demands of federal due process, but under no circumstances may it confine petitioners to a lesser remedy." (citations omitted)). In this case, the constitutional right Cruz is claiming under *Simmons* was already well-established at the time of his trial, though the Arizona courts long misapplied it. *See Lynch*, 578 U.S. at 615–16; *accord* BIO 6 (acknowledging that *Lynch* "held that the Arizona Supreme Court had misinterpreted *Simmons*"). The question is whether Cruz can now vindicate that right in Arizona's postconviction courts. To answer that question, two due-process principles are critical.

First, this Court has long recognized that due process itself can protect the right to be heard on a

federal claim. For example, in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, a bank sued the county to enjoin tax assessments that allegedly violated the Equal Protection Clause. 281 U.S. 673, 674 (1930). The Missouri Supreme Court denied relief, stating that the bank should have applied to the state tax commission instead of bringing suit. *Id.* at 675. But the rub with that ruling, this Court explained, was that up until then the Missouri Supreme Court had definitively stated that such relief was *unavailable* in the state tax commission. *Id.* at 676–77. In other words, the "possibility of relief before the tax commission was not suggested by anyone in the entire litigation until the [Missouri] Supreme Court filed its opinion," and by then "it was too late for the plaintiff to avail itself of the newly found remedy." *Id.* at 677. This Court thus held that Missouri's procedural gamesmanship violated "due process" by impermissibly denying the bank "an opportunity to present its case and be heard in its support." *Id.* at 681. "Whether acting through its judiciary or through its Legislature," the Court continued, "a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Id.* at 682.

Second, due process also requires "equal treatment" in adjudication. *See Lyng v. Castillo*, 477 U.S. 635, 636 & n.2 (1986). Though the term "equal treatment" itself connotes equal-protection principles, due process imposes the same requirement of impartiality on the states (as well as the federal government). *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). "The concept of equal justice under law is served by the Fifth Amendment's guarantee of

due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Id.* And there is, of course, no opportunity to receive equal treatment under settled law if a party is deprived of *any* meaningful opportunity to assert its claim under that settled law. *See Brinkerhoff-Faris Tr. & Sav. Co.*, 281 U.S. at 681–82.

In sum, the Fourteenth Amendment imposes certain critical due-process obligations on state postconviciton courts, and those obligations include the right to be heard and to receive equal treatment under settled law.

B. The *Teague* line, especially *Griffith v. Kentucky*, grounds this Court's retroactivity rulings in due process.

1. Those core due-process principles—the right to be heard and to equal treatment—undergird this Court's modern retroactivity jurisprudence. By the middle of the twentieth century, the Court's prior retroactivity regime—epitomized by *Linkletter v. Walker*, 381 U.S. 618 (1965)—had come under fire. *See Montgomery*, 577 U.S. at 215–16 (Scalia, J., dissenting) (discussing *Linkletter*'s "unworkable" approach). *Linkletter*'s case-by-case balancing approach to retroactivity led to intolerably unequal results for similarly situated defendants. As Justice Harlan memorably put it:

> We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason

> for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.

Desist v. United States, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting).

Several years later, in his separate opinion in *Mackey v. United States*, 401 U.S. 667 (1971), Justice Harlan reiterated his concerns about fairness, equality, and the judicial role. If courts can pick and choose which defendants will get the benefit of rights recognized while those defendants' cases are still pending, Justice Harlan reasoned, then courts are not really acting like courts at all, but rather like legislatures or "council[s] of revision." *Id.* at 679 (Harlan, J., concurring in judgments in part and dissenting in part); *see also United States v. Johnson*, 457 U.S. 537, 555 n.16 (1982) ("*[A]ctual inequity* . . . results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a retroactively applied rule.").

Justice Harlan's concerns ultimately persuaded this Court to reevaluate its retroactivity jurisprudence and adopt the framework articulated in Justice O'Connor's plurality opinion in *Teague v. Lane*, 489 U.S. 288 (1989). "[O]nce a new rule is applied to the defendant in the case announcing the rule," the justices explained, "evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Id.* at 300.

2. The clearest explication of these due-process principles came in *Griffith v. Kentucky*, 479 U.S. 314, (1987). *Griffith* concerned whether defendants whose

cases were still pending on direct review when this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), could claim the benefit of that decision. This Court said yes. 479 U.S. at 316.

Notably, this Court reached that conclusion based on the same concerns about fair and equal treatment that Justice Harlan had raised in his separate writings. As *Griffith* explained, "In Justice Harlan's view, and now in ours, failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322. Once the Court had decided a new rule, the decision continued, "the integrity of judicial review" required affording similar defendants with "cases pending on direct review" an opportunity to seek the benefit of the rule. *Id.* at 323. What's more, "selective application of new rules" would "violate[] the principle of treating similarly situated defendants the same." *Id.*

The *Griffith* Court cited with approval its previous decision in *Johnson*, which had already acknowledged [that] defendants with nonfinal convictions should at least get the benefit of any "decision of this Court that did not nothing more than apply settled precedent to different factual situations." *Id.* at 324; *see also Johnson*, 457 U.S. at 549 ("[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been 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."). *Griffith*, in other words, linked defendants seeking the benefit of deeply rooted rules (such as the rule at issue in

Johnson) with those seeking the benefit of newly recognized rights (such as the right identified in *Batson*). They all had a common right to any developments in the law that preceded their convictions becoming final.

Griffith situated this right in the "basic norms of constitutional adjudication," "the integrity of judicial review," and "the principle of treating similarly situated defendants the same"—the right protected by the Due Process Clause. 479 U.S. at 322–23; *see also, e.g.*, *Danforth*, 552 U.S. at 269–70; *Castillo*, 477 U.S. at 636.

3. In *Yates v. Aiken*, this Court crystallized these due-process concepts in the context of state postconviction review. 484 U.S. 211 (1988). There, Yates was seeking the benefit of a later case, *Francis v. Franklin*, 471 U.S. 307 (1985), which itself "was merely an application of" an earlier case, *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Yates*, 484 U.S. at 216–17; *see also id.* at 215–16. Adopting Justice Harlan's reasoning, *see id.* at 216 (quoting *Desist*, 394 U.S. at 264 (Harlan, J., dissenting)), and quoting with approval *Johnson*'s prior statement that "it has been a foregone conclusion that the rule of the later case applies in earlier cases" in such situations, *id.* at 216 n.3 (quoting *Johnson*, 457 U.S. at 549), the Court in *Yates* agreed that the petitioner was entitled to the benefit of *Francis*. *Id.* at 216–17.

In doing so, the Court rejected South Carolina's argument that it could deny relief simply by restricting "the scope of its own habeas corpus proceedings." *Id.* at 217. Because the State had not "placed any limit on the issues that it [would] entertain in collateral proceedings," it "ha[d] a duty to grant the relief that federal law requires." *Id.* at 218.

In other words, by opening up its forum, South Carolina had an obligation to provide Yates with the benefit of the law at the time his conviction became final—as well as any decisions that merely flowed from it. *See id.*

Yates was entitled to the benefit of *Francis* for essentially the same reason that Griffith was entitled to the benefit of *Batson*. *See id.* at 216–18; *Griffith*, 479 U.S. at 322–24; *see also Montgomery*, 577 U.S. at 219 (Scalia, J., dissenting) ("*Yates* merely reinforces the line drawn by *Griffith*: 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."). And South Carolina was foreclosed from denying Yates an opportunity to obtain the benefit of *Francis* in its postconviction forum for the same reason that Missouri could not deprive Brinkerhoff-Faris Trust & Savings of such an opportunity in its state courts. *See Yates*, 484 U.S. at 217–18; *Brinkerhoff-Faris Tr. & Sav. Co.*, 281 U.S. at 677–82. To use *Griffith*'s language, "basic norms of constitutional adjudication," 479 U.S. at 322, required the available state forum to provide Yates the benefit of the law as understood when his conviction became final.

Yates controls this case. Here, as in *Yates*, the state has established a postconviction forum that is open to federal constitutional claims. *See* Ariz. R. Crim. P. 32.1(a) (permitting defendants to raise claims that their conviction was in "violation of the United States . . . [C]onstitution[]"). But establishing such a forum comes with the obligation to conduct proceedings that comport with the "basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. And those basic norms include the right to be

heard and to receive equal treatment under settled law. *See supra* at 5-8. Arizona's blatant refusal to follow those basic norms—even after this Court's express repudiation in *Lynch*—amounts to a defiant violation of the Due Process Clause. The decision below cannot stand.

II. THE ARIZONA SUPREME COURT'S INTERPRETATION OF RULE 32.1(G) IS NOT AN ADEQUATE AND INDEPENDENT STATE-LAW GROUND AND DOES NOT COMPORT WITH THE DUE PROCESS CLAUSE.

The same basic logic explains why Arizona's interpretation of its procedural rule, Arizona Rule of Criminal Procedure 32.1(g), is *not* an adequate and independent state-law ground that deprives this Court of jurisdiction. This Court and lower federal courts sitting in habeas are generally not empowered to review state-court decisions "that rest on adequate and independent state grounds." *Michigan v. Long*, 463 U.S. 1032, 1041–42 (1983); *see Johnson v. Lee*, 578 U.S. 605, 606 (2016). And because of that, not every criminal defendant convicted on the same day will necessarily receive the benefit of the same federal law. States can and do impose procedural rules that foreclose relief for some. But not all asserted state-law justifications are in fact adequate and independent. Arizona's procedural rule at issue here fails this test for multiple reasons. *See* Pet'r Br. 18–45. *Amici* here focus on two reasons that intersect with due process: Arizona's interpretation of its procedural rule violates due process (1) by arbitrarily shifting the goalposts to deny defendants like Cruz any opportunity to vindicate their federal rights; and (2) by discriminating against federal rights, which

results in the unequal application of settled federal law. Such a procedural rule is neither an adequate nor an independent state-law ground.

A. As interpreted by the Arizona Supreme Court, Rule 32.1(g) denies due process by arbitrarily removing a forum for the vindication of federal rights.

State procedural rules may fail the adequacy-and-independence test for numerous reasons unrelated to due process, but a procedural rule that in fact *violates* due process plainly cannot satisfy the test. "States have no independent right to fashion procedures that deny due process." *See generally* 16B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4025 (3d ed. 2022, Westlaw). When states engage in gamesmanship or plainly unfair procedural devices that deny the right to be heard that was recognized in *Brinkerhoff-Faris Trust & Savings Co.*, 281 U.S. 673 (1930), this Court has not hesitated to reject independence-and-adequacy arguments and enforce its constitutional rulings. The cases below provide just a sampling.

1. In *Saunders v. Shaw*, in an opinion by Justice Holmes, this Court rejected the procedural machinations of a state court that denied the right to be heard. 244 U.S. 317, 318–19 (1917). There, the Louisiana Supreme Court had reversed the petitioner's trial-court victory based on a disputed factual premise, but it had not allowed the petitioner to enter any evidence into the record. *Id.* This Court took a practical view, noting that the petitioner's due-process claim was itself based on "the act of the [Louisiana] supreme court, done unexpectedly at the end of the proceeding, when the [petitioner] no longer

had any right to add to the record." *Id.* at 320. Under such circumstances, Justice Holmes explained, "it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here." *Id.*

The Court extended this logic to a different context in the canonical case, *Ward v. Board of County Commissioners of Love County*, 253 U.S. 17 (1920). There, members of the Choctaw tribe sued over an Oklahoma tax. *Id.* at 19. Oklahoma threatened to seize and sell the lands if the tribal members did not pay the tax, so the plaintiffs paid—under protest—to keep their lands and then sought repayment. *See id.* at 20. The Oklahoma Supreme Court ruled against them, opining that the taxes were voluntarily paid and that there was no state law either providing for repayment or making the county officials liable for any funds since passed on to other government bodies, which presumably had occurred. *Id.* at 21.

When the Choctaw members sought relief from this Court, the county officials protested that the Oklahoma high court's ruling was based "entirely on independent nonfederal grounds which were broad enough to sustain the judgment." *Id.* Again, however, this Court's approach was cleareyed. While acknowledging that it lacked power to review state-court judgments that rested on truly "independent nonfederal grounds," the Court emphasized that it needed to examine whether "the right was denied . . . in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support." *Id.* at 22–23. "[I]f nonfederal grounds, plainly untenable, may thus be put forward successfully," the Court noted, "our power to review easily may be avoided." *Id.* at 22.

Because the payments were plainly not voluntary, meanwhile, the Court reasoned that the lack of a state-law mechanism for a refund was irrelevant. *Id.* at 24. "To say that the county could collect these unlawful taxes by coercive means" and then, pursuant to state law, avoid "any obligation to pay them back" would be "nothing short of saying that it could take" Choctaw property "without due process of law." *Id.* In other words, allowing the county to hide behind state law to thwart federal-court review would itself work a denial of at least the underlying due-process right. *See id.*

Arizona's approach in this case is similar. For years, the Arizona Supreme Court insisted that defendants such as Cruz were not entitled to the benefit of *Simmons*. *See supra* at 2. And for years, the same court insisted that Rule 32.1(g) required merely the overruling of binding precedent by an appellate court. *See supra* at 2–3. Then, this Court summarily reversed in *Lynch*, this litigation followed, and the meaning of Rule 32.1(g) abruptly changed. Given that *Lynch* merely applied *Simmons*, the constitutional reality is that Arizona defendants like Cruz have been deprived of their due-process rights under *Simmons* this whole time. *Cf. Danforth*, 552 U.S. at 271 n.5; *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment) ("Since the Constitution does not change from year to year . . . the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense."). To say that Arizona can misapply federal due-process law for years and then thwart review on state-law grounds because of the agedness of its own error is "nothing short of saying that it" can deprive

those defendants of liberty "without due process of law." *See Ward*, 253 U.S. at 24.

2. Though *Saunders* and *Ward* were tax disputes, these principles extend into the criminal-law sphere as well. In *Reece v. Georgia*, 350 U.S. 85 (1955), this Court saw through Georgia's argument that Mr. Reece's failure to challenge the racial composition of his grand jury before the indictment was handed down constituted an adequate and independent state-law ground when Reece was not appointed counsel until the day after the indictment. *See id.* at 86, 88–90. "[T]he right to object to a grand jury presupposes an opportunity to exercise that right," this Court reasoned, and it was "utterly unrealistic to say that [Reece] had such an opportunity." *Id.* at 89–90.

A few years later, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court similarly rejected procedural gamesmanship when the Alabama Supreme Court claimed that it could not consider the NAACP's constitutional challenges to the contempt order imposed against it because the organization had failed to seek a writ of mandamus. *See id.* at 454–58. Though the case is better known for its First Amendment holding (the contempt order was for the organization's refusal to turn over its full membership lists, *id.* at 451), this Court would have never been able to reach that issue had it not examined Alabama's "past unambiguous holdings as to the scope of review available," *id.* at 456, which had never before suggested that mandamus was "the exclusive remedy" in such situations, *id.* at 457. "Novelty in procedural requirements," Justice Harlan wrote for the unanimous Court, "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." *Id.* at 457–58.

The same approach held in *Wright v. Georgia*, 373 U.S. 284 (1963), a case involving sit-in arrests. There, this Court rejected the Georgia Supreme Court's holding that the defendants had forfeited their vagueness challenge, not because they had failed to press it substantively, but because (it appeared) they had failed to include a sentence or clause expressly connecting that argument to the motion for new trial whose denial they were appealing. *Id.* at 290-91. And in another sit-in case a year later, *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Court connected the vagueness problem with South Carolina's application of its trespass statute in that case to the procedural goalpost-shifting involved in cases like *Wright*, *NAACP*, and *Brinkerhoff-Faris Trust & Savings Co.* "The basic due process concept involved," the Court wrote, "is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." *Id.* at 354; *see also Barr v. City of Columbia*, 378 U.S. 146, 149–50 (1964).

Young v. Ragen, 337 U.S. 235 (1949), which Cruz cites, *see* Pet'r Br. 33, fits squarely within this line of cases. *Young* was the latest in an apparently exhausting morass of Illinois postconviction cases, prompting Chief Justice Vinson to begin his opinion by noting: "We are once again faced with the recurring problem of determining what, if any, is the appropriate post-trial procedure in Illinois by which claims of infringement of federal rights may be raised." 337 U.S. at 236. Though even the Illinois

Attorney General conceded that Mr. Young had a colorable claim, Young's habeas petition had been denied without a hearing because, the Attorney General asserted, habeas was not the proper remedy under Illinois procedure at the time. *Id.* at 237. Nevertheless, the Attorney General maintained, the state's law had since changed, such that habeas had become the proper remedy, *id.*, even though, this Court observed, Illinois courts were still denying state habeas petitions, *id.* at 238. All of these denials, according to the Attorney General, were unreviewable by this Court because they were "decisions solely upon a question of Illinois procedural law." *Id.*

This Court did not buy it. "Of course we do not review decisions which rest upon adequate non-federal grounds," Chief Justice Vinson wrote, "and of course Illinois may choose the procedure it deems appropriate for the vindication of federal rights." *Id.* But, he continued, "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." *Id.* That was "the effect of the denials of habeas corpus in a number of cases now before this Court," as the Attorney General did not agree that "either of the other two Illinois post-trial remedies, writ of error and coram nobis," was applicable. *Id.* At least so long as Illinois was going to be treated as if it had a system of state remedies that state defendants had to exhaust, it had to ensure that the forum was open to the vindication of federal rights not only in form but also in function. *See id.* at 238–39.

The same rule should obtain here. After misapplying *Simmons* for years, the Arizona Supreme Court has since shifted the goalposts of state procedural law. In doing so, it has made it so that

defendants like Cruz have never had a fair opportunity to vindicate their federal due-process rights under *Simmons* in the state's postconviction forum. These "novel[] . . . procedural requirements 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." *See NAACP*, 357 U.S. at 457–58. This "basic due process concept" reveals why the Arizona Supreme Court's "unforeseeable" and unreasonable interpretation of state procedure—an interpretation that serves to deprive defendants of a fair chance to vindicate their constitutional right under *Simmons*—"does not constitute an adequate ground to preclude this Court's review of a federal question." *See Bouie*, 378 U.S. at 354.

B. As interpreted by the Arizona Supreme Court, Rule 32.1(g) is not adequate and independent because it discriminates against federal rights.

State courts that discriminate against federal rights violate the fundamental due-process principle of equal treatment. This Court has thus long recognized that "federal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Walker v. Martin*, 562 U.S. 307, 321 (2011). State procedural rules that do so cannot constitute adequate and independent state-law grounds. *See id.* State courts, for example, may not change "the contours of their judicial systems" so as "to nullify a federal right of cause of action they believe is inconsistent with their local policies."

Haywood v. Drown, 556 U.S. 729, 736 (2009); *see also Testa v. Katt*, 330 U.S. 386, 392–93 (1947). Even if state procedures are facially "evenhanded," they still "cannot be used as a device to undermine federal law." *Haywood*, 556 U.S. at 739.

Mere formalism—for instance, calling a rule "jurisdictional"—thus provides no safe harbor from federal-law obligations. *Howlett v. Rose*, 496 U.S. 356, 381–83 (1990). Nor does leaving a forum ostensibly open to federal claims but imposing heightened procedural requirements that functionally burden those rights. *Felder v. Casey*, 487 U.S. 131, 141–42 (1988).

By the same token, state courts may not thwart federal review by declaring an issue moot, *Liner v. Jafco, Inc.*, 375 U.S. 301, 304–06 (1964), or an error harmless, *Chapman v. California*, 386 U.S. 18, 21 (1967), or by imposing their own pleading rules, *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949). And, of course, they cannot enforce retroactivity doctrines that fall below the federal floor. *Danforth*, 552 U.S. at 288–89.

These principles demonstrate a practical focus on the effects that state procedures have on claimants seeking to vindicate federal rights. This practical focus is hardly new: For over a century this Court has been keenly attuned to the problem of state procedural entanglements that operate to thwart federal rights and deny due process.

Consider for instance two opinions written by Justice Holmes and handed down on the same day. In the first case, a contract dispute, the Court reversed a Louisiana state court judgment that had, pursuant to a local rule, lowered the burden of proof for the

plaintiff and thus kept the defendant from enjoying the full benefit of federal law. *Am. Ry. Express Co. v. Levee*, 263 U.S. 19, 20–21 (1923). Justice Holmes put it bluntly for the Court: "The law of the United States cannot be evaded by the forms of local practice." *Id.* at 21.

The same day, the Court resolved a case involving a personal-injury suit against a railroad. There, the Missouri courts had relied on local civil procedure to treat the railroad's jurisdictional defense as waived. *Davis v. Wechsler*, 263 U.S. 22, 23–24 (1923). Citing *Levee*, Justice Holmes elaborated on the importance of not allowing state procedure to operate in a way that thwarts federal rights:

> Whatever spring[s] 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. . . . The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of Federal right. The principle is general and necessary. If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall not be allowed to put unreasonable obstacles in the way.

Id. at 24–25 (citations omitted).

Here, Arizona has repeatedly imposed state-law obstacles to block defendants from claiming the benefit of the federal *Simmons* rule. As Cruz demonstrates, the Arizona Supreme Court has abruptly changed its own longstanding interpretation of Rule 32.1(g), redrawing the boundaries to keep claims like Cruz's from receiving a hearing on the merits in the wake of *Lynch*. *See* Pet'r Br. 39–43. That blatant discrimination against a federal claim violates due process under this Court's precedents and cannot constitute an adequate and independent state-law ground.

CONCLUSION

For the foregoing reasons, the decision below should be vacated and remanded with instructions to consider Cruz's claim under *Simmons* and *Lynch*.

Respectfully submitted,

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