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 SUPREME COURT OF ARIZONA

BRIEF OF *AMICI CURIAE* LATINOJUSTICE PRLDEF AND THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

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

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans, and to break down barriers that prevent African Americans from realizing their basic civil and human rights. LDF has long been concerned about the persistent and pernicious influence of race in the administration of the criminal legal system, including the death penalty. LDF was lead counsel in *Buck v. Davis*, 137 S. Ct. 759, 777 (2017), in which this Court invalidated Duane Buck's death sentence because racially discriminatory testimony at Mr. Buck's capital sentencing proceeding about his alleged "future dangerousness"

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

meant Mr. Buck "may have been sentenced to death in part because of his race."

SUMMARY OF ARGUMENT

Capital jurors attach enormous importance to their perceptions of a defendant's "future dangerousness," the question of whether that defendant is likely to pose a danger to others. Despite its crucial role in death penalty determinations, this issue is necessarily subjective, causing jurors to make future predictions about behavior. And when questions involve a great deal of subjectivity, the risk that racial bias or prejudice may play a role in some jurors' decisions increases.

This is especially so when the subjectivity involves predictions of future dangerousness. Decades of studies have shown that Black men are perceived as more dangerous than their white counterparts, even when other factors are controlled for. Indeed, this Court has recognized the existence of a "powerful racial stereotype—that black men [are] 'violence prone.'" *Buck*, 137 S. Ct. at 776 (2017) (citation omitted). And described it as a "particularly noxious strain of racial prejudice." *Id.* Latinos and Afro-Latinos, too, are portrayed by politicians and the popular culture as more prone to crime and violence than whites, and social science has begun to note the same sort of preconceptions towards dangerousness seen with Black defendants.

Informing jurors that if convicted a defendant would not be eligible parole, consistent with *Simmons v. South Carolina*, 512 U.S. 154 (1994), can play a crucial role in minimizing the risk of such racial bias infecting

the capital sentencing process. *Simmons* ensures that individuals are not executed based on misinformation and incorrect speculation that a defendant has no opportunity to rebut or explain. This is especially true when that misinformation—which impacts the weight of perceived future dangerousness—is subject to proven racial bias. Such compounded harm combines the dual threats of being sentenced to death as a result of misinformation and of racial bias.

Specifically, under *Simmons*, when a capital defendant's future dangerousness is at issue, and the only alternative sentence to death is life imprisonment without parole, the defendant has a constitutional right to inform jurors of his parole ineligibility. If racial bias by some members of a jury leads them to believe that a defendant poses a future danger if released, a *Simmons* instruction can prevent that bias from leading to a vote for the death penalty. In that way, a *Simmons* instruction plays not merely a procedural role in the administration of the death penalty, but serves as an important check on the widespread racial disparities in death sentences that this Court has repeatedly reaffirmed its commitment to eradicating.

This safeguard is particularly important in the case of Mr. Cruz, who was tried and sentenced during a period where anti-Latino policies and politicians were ascendant in Arizona, and when Latino men were particularly demonized in the public eye.

ARGUMENT

I. Perceived Future Dangerousness, an Important Factor in Capital Case Jurors' Consideration of a Death Sentence, is Particularly Subject to being Influenced by Racial Prejudice

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

Studies of capital jurors have found that, in considering whether to impose the death penalty, "[o]ther than facts about the crime, questions related to the defendant's dangerousness if ever back in society are the issues that jurors discuss most," and that "dangerousness exceeds discussion of the defendant's criminal past, the defendant's background or upbringing, the defendant's IQ or intelligence, and the defendant's remorse or lack of it." Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instruction in Capital Cases*, 79 CORNELL L. REV. 1, 6 (1993). Research also confirms that across states, "the more the jurors agree [that the defendant poses a future danger,] the more likely they are to impose a death sentence." *Id.* at 7; *see also* Stephen P. Garvey & Paul Marcus, *Virginia's Capital Jurors*, 44 WM. & MARY L. REV. 2063, 2089–93 (2003) (discussing this finding in Virginia jurors); Wanda D. Foglia, *They Know Not What They do: Unguided and Misguided Discretion in Pennsylvania Capital Cases*, 20 JUST. Q. 187, 197 (2003) (discussing same in study of Pennsylvania jurors); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Jurors Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1166 (1997) (discussing same in study of California

jurors). Even where jurors reported that the prosecutor had not explicitly argued that the defendant would pose a danger to the public, the topic of future dangerousness remained a centerpiece of the jury's deliberations. *See* John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 406–07 (2001) (noting that seven out of every 10 jurors in such cases reported that concerns over future dangerousness were either a "very" (43%) or "fairly" (26%) important consideration in their penalty decision).

Beliefs about whether or not a person poses a future danger can often have life-or-death consequences. Justice O'Connor, concurring in the *Simmons* judgment along with Justices Rehnquist and Kennedy, explained that "the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut" a suspicion of his dangerousness. *Simmons,* 512 U.S. at 177 (1994). Jurors who inaccurately believe that a life sentence will allow for the possibility of parole are more likely to impose a death sentence because they believe that no other option will sufficiently prevent the possibility of recidivism. *See* Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 300–01 Table 6 (2001) (discussing finding among South Carolina jurors that the less time a juror believed the defendant would remain in prison, the more likely the juror was to cast his or her first vote for death); Garvey & Marcus, *supra* at 2089–93 (discussing same finding among Virginia jurors).

This fundamental concern on the part of jurors is so prevalent in the Project's data that one researcher has

called it "the capital juror's Hippocratic Oath." Having convicted the defendant of capital murder, many jurors want to ensure that the defendant will never kill again. Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 117 (2010). Given the pivotal role that concerns about future dangerousness plays in the jurors' decision, addressing those concerns is a critical prerequisite for defense counsel to present a persuasive case for life. Without assurances that the defendant will not be released jurors are far less likely to be receptive to mitigating evidence no matter how compelling. *Id.*; *see also* John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1047–49 (2007).

B. Future Dangerousness Is an Inherently Subjective Determination

Assessing a defendant's future dangerousness is necessarily subjective: jurors must predict the likelihood that a defendant will commit dangerous acts in the future. This issue is presented to the jurors at a highly sensitive moment in the case: they have already found that the defendant is guilty of a crime which, the prosecutor believes, merits the ultimate punishment, death.

Jurors necessarily bring to this speculation a host of personal opinions and preconceived notions when considering future dangerousness. Additionally, Arizona jurors are instructed to use their "common sense" when deliberating. *See, e.g.*, REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL), PRELIMINARY CRIMINAL 10 – CREDIBILITY OF WITNESSES 5, (5th ed. 2019), https://www.azbar.org/media/

jl5lzdpl/2019-raji-criminal-5th-ed.pdf; MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT, RULE 3.5 REASONABLE DOUBT—DEFINED 46 (2010 ed., updated 6/2021), https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_6_2021.pdf.

> Common sense can mean a variety of things: beliefs inherent in people's minds or nature; if not specific inborn beliefs, a common pattern of thinking; or socially transmitted and widely shared beliefs. . . .
>
> Common sense is dependent on cultural fabric, on social, ethnic, and geographic variations, and on historical traditions. . . . Indeed, the unquestioning acceptance of certain "common sense" beliefs is necessary to their perpetuation.

Nancy Levit, *Practically Unreasonable*: *A Critique of Practical Reason: A Review of the Problems of Jurisprudence by Richard A. Posner*, 85 N.W. L. REV. 494, 501–02 (1991). Unfortunately, those "socially transmitted and widely shared beliefs" may include racial biases. John D. Brewer, *Competing understandings of common sense understanding: a brief comment on 'common sense racism*,' 35 BRIT. J. SOCIO. 66, 70 (1984) ("Common sense knowledge . . . is a personal construction . . . It is constructed on the basis of each member's personal biography of past experiences and socially transmitted 'recipes' and categories.").

C. Perceptions of Who Is Dangerous Can be Influenced by Prejudice

Misperceptions about life imprisonment do not take place in a vacuum. Rather, they operate in tandem with associations of certain racial groups—including Black and Latino, and Afro-Latino people in particular—with increased dangerousness. A juror who (mistakenly) believes a disfavored defendant will be paroled if sentenced to life in prison, and who has been taught to think of that defendant as more dangerous based on his race, will be more likely to sentence that defendant to death due to a (mistaken) belief that he poses a future danger to society. And substantial research supports the finding that jurors do, in fact, falsely perceive Black and Latino men as more dangerous than their white counterparts.

In the United States, Black individuals, and specifically Black men, are perceived both implicitly and explicitly as being more dangerous than their white counterparts. *See, e.g.*, John Paul Wilson et al., *Racial bias in judgments of physical size and formidability: From size to threat,* 113(1) J. OF PERSONALITY AND SOC. PSYCH., 59, 62, 64 (2017). (When shown photographs of people of the same size and weight, participants "judged the black men to be larger, stronger and more muscular than white men" and "believed that black men are more capable of causing harm in a hypothetical altercation."). This false perception is reinforced in media coverage of crime, which regularly over-represents Black people as the alleged perpetrators of violence. *See* Travis L. Dixon & Daniel Linz, *Race and the Misrepresentation of Victimization on Local Television News*, 27 COMM'N RSCH. 547, 561 (2000) (finding that Blacks were overrepresented as crime perpetrators

and whites were overrepresented as crime victims compared to arrest and crime reports). Scholars have noted that associations of Blackness with dangerousness are so strong that residents will report crime rates as increasing when neighborhoods integrate, even when the crime rates have not actually risen. *See* Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 Am. J. Socio. 717, 722 (2001) (attributing perceptions of higher crime in neighborhoods with a higher proportion of Black residents to presumptions of criminality of Blacks that is "deeply embedded in the collective consciousness of Americans.").

Researchers also found that coverage of capital cases likewise conflates Blackness with violence. In a study of news coverage of capital cases in the Philadelphia region, for example, researchers found that articles used animal references more often for Black defendants (approximately 8.5 mentions per article) than for white defendants (approximately 2.2 mentions per article). Further, they found that those Black defendants who were more frequently referred to in coverage using animal terms (such as "ape," "brute," "barbaric," or "claw") were more likely to receive death sentences than those who were less frequently described in such terms. *See* Justin D. Levinson et. al., *Deadly Toxins: A National Empirical Study of Racial Bias and Future Dangerousness Determinations*, 56 Ga. L. Rev. 225, 267 (2021).

The "particularly noxious strain of racial prejudice," that Black men are "violence prone," *Buck*, 137 S. Ct. at 776 can also drive juror decision-making. Indeed, even outside the capital context, criminal defendants with

more Afrocentric facial features receive longer sentences. Irene V. Blair et al., *The Influence of Afrocentric Facial Features in Criminal Sentencing*, 15 Psych. Sci. 674, 678 (2004) (finding that within each group, those with high Afrocentric facial features received longer sentences than those with less Afrocentric facial features).

And as this Court has emphasized, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Turner v. Murray*, 476 U.S. 28, 35 (1986). Indeed, as numerous studies have established, the race of a capital defendant bears directly on the severity of the punishment chosen, suggesting that, at a minimum, racial bias may play a role in evaluating dangerousness. *See, e.g.*, David C. Baldus & George Woodworth, Race Discrimination and the Death Penalty: An Empirical and Legal Overview, (James R. Acker et al. 2d rev. ed. 2003). Reviews of recent scholarly literature show that studies continue to find "robust and consistent evidence of disparate racial treatment of black or Latinx defendants or victims." Catherine M. Grosso et al., *Death by Stereotype: Race, Ethnicity, and California's Failure to Implement Furman's Narrowing Requirement*, 66 U.C.L.A. L. Rev. 1394, 1412 (2019) (collecting research).

Latinos likewise are subject to some of the same prejudices—including a perception of being prone to violence—that are directed at Black people. In 2012, a survey conducted by the Associated Press in conjunction with Stanford University, the University of Michigan, and NORC (National Opinion Research) at the University of Chicago found that 58% of respondents answered that

the word "violent" described Hispanic[2] people slightly or moderately well. This was closely comparable to the 62% of respondents who said the word "violent" described Black people slightly or moderately well. Racial Attitudes Survey, The Associated Press, Oct. 29, 2012, http://surveys.associatedpress.com/data/GfK/AP_Racial_Attitudes_Topline_09182012.pdf; *see also* Dennis Junius, *AP Poll: U.S. Majority Have Prejudice Against Blacks*, USA Today (Oct. 27, 2012), https://www.usatoday.com/story/news/politics/2012/10/27/poll-black-prejudice-america/1662067/.

Another study exploring the link between "ethnic threat linked to Hispanics" and "harsher crime control" found that perceptions of Hispanics as criminals resulted in an increase in support for punitive crime control measures. *See* Kelly Welch et al., *The Typification of Hispanics as criminals and support for punitive crime control policies*, 40 Soc. Sci. Res. 822, 822–23 (2011). As the Welch study further noted, the substantial growth of the Hispanic population in the United States has coincided with a "proliferation of threat related stereotypes linking Hispanics with crime in new and compelling ways . . . hav[ing] clear parallels with long established stereotypes frequently applied to African American males." *Id.* The study further noted that individuals who typify Latinos as violent criminals are more supportive of punitive crime control policies, including the death penalty. *Id.* at 832, 836.

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

Similarly, studies have shown that whites report higher perceptions of criminal threat when Latinos live nearby in greater numbers. *See* Ted Chiricos et al., *Perceived Racial and Ethnic Composition of Neighborhood and Perceived Risk of Crime*, 48 Soc. Problems, 322, 335 (2001). Researchers have found that jury-eligible participants strongly associate Latino men with "danger" and white men with "safety," and that they hold similar beliefs about dangerousness for Latino men as they do for Black men. For example, when presented with an otherwise-identical example of a crime, "[j]ury eligible citizens were more likely to rate a defendant as posing a future danger if they read about a Latino-sounding named defendant or a Black-sounding named defendant, compared to if the jury-eligible citizens read about a defendant with a White-sounding name." Levinson, *supra* at 284.

Research on "the social evolution of stereotypes of Mexican criminality" dates the development of these stereotypes to the early nineteenth century. Malcolm D. Holmes et al., *Minority Threat, Crime Control, and Police Resource Allocation in the Southwestern United States*, 54 Crime & Delinquency 128, 137 (2008). Scholars have established that Latinos in America have been associated with "innate criminality." Malcolm D. Holmes & Brad W. Smith, Race and Police Brutality: Roots of an Urban Dilemma 68 (2008). Others have noted that Latinos are typified as "dangerous" and still more have emphasized that Latinos are portrayed as "prone to violence." Katherine Beckett & Theodore Sasson, The Politics of Injustice: Crime and Punishment in America 97 (2d ed. 2003); *see also* Coramae Richey Mann et al., Images of Color, Images of Crime: Readings 218 (Oxford U. Press 3d ed. 2006).

These beliefs and prejudices may be fueled by an environment in which Latinos are routinely portrayed as dangerous. News coverage of Latinos charged with crimes was more likely to include prejudicial information than coverage of white people charged with crimes. Travis L. Dixon & Daniel Linz, *Television News, Prejudicial Pretrial Publicity, and the Depiction of Race*, 46 J. OF BROADCASTING & ELECTRONIC MEDIA 112, 129 (2002). And in the early 2000s, when the defendant in this case was sentenced, public hostilities towards Latinos in Arizona were growing, fueled by rhetoric that associated Latino ethnicity with immigration status. *See* Point III(C), *infra*; *see generally* TERRY GREENE STERLING & JUDE JOFFE-BLOCK, DRIVING WHILE BROWN: SHERIFF JOE ARPAIO VERSUS THE LATINO RESISTANCE (2021).

II. A *SIMMONS* INSTRUCTION CAN MITIGATE ONE SOURCE OF RACIAL BIAS AT CAPITAL SENTENCING

Writing for the plurality of the Court in *Simmons*, Justice Blackmun observed that "[i]t can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' . . . " 512 U.S. at 169. In a separate opinion concurring in the judgment, Justice O'Connor similarly observed that "[w]hile it may come to pass that the 'plain and ordinary meaning' of a life sentence is life without parole," that is still not the case. *Id.* at 178. "[C]ommon sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole." *Id.* at 177–78.

Real-world studies confirm these observations. A study of nationwide data from the Capital Jury Project

demonstrated that "[j]urors grossly underestimate how long capital murderers not sentenced to death usually stay in prison." William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605, 648 (1999). Many jurors base their "knowledge" on outdated parole practices before the enactment of "life means life" statutes in many states.

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

Juror studies since *Simmons* continue to find significant misunderstandings regarding parole and sentence length among jurors. In 2006, twelve years after the Court's *Simmons* ruling, the American Bar Association undertook an assessment of the death penalty in eight states. These studies confirmed that large numbers of capital jurors vastly underestimated the time defendants would actually serve and continued to believe that defendants who were sentenced to life imprisonment would eventually be paroled. In one study, 82.8% of Pennsylvania capital jurors reported that they

did not believe "that a life sentence really meant life in prison," and 21.6% believed that if a defendant was not sentenced to death, they would be released from prison in nine years or less. American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Pennsylvania Death Penalty Assessment Report*, 216 (Oct. 2007), https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/pennsylvania-finalreport.pdf. In another study, nearly half of capital jurors interviewed stated that they believed those convicted of capital murder and not sentenced to death would be paroled within seven years. *See* American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Georgia Death Penalty Assessment Report*, pp. 257–58 (Jan. 2006), https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/georgia_report.pdf.

Against this background, the constitutional rule established in *Simmons* plays a crucial role in decreasing the risk of unreliable death sentences that result from jurors' misunderstandings about parole eligibility. The *Simmons* plurality and all of the concurring Justices recognized that, where "dangerousness" is at issue, "due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible." 512 U.S. at 178 (O'Connor, J., concurring); *see also Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam) (confirming that neither executive clemency nor the possibility of a change in the parole law renders a *Simmons* instruction unnecessary).

When properly followed, the *Simmons* rule may also minimize one source of racial bias in capital sentencing.

As the plurality explained in *Turner*, a juror who believes that Black people are "violence prone . . . might well be influenced by that belief" in deciding whether or not to sentence a Black defendant to death. 476 U.S. at 35. The same is true for jurors who harbor such discriminatory views toward Latino defendants. And, as the foregoing discussion makes clear, the risk of such bias affecting a juror's sentencing decision is particularly pronounced if the juror incorrectly believes that the defendant is likely to be released if sentenced to life imprisonment. By requiring jurors to be informed that the alternative is in fact life without parole, *Simmons* reduces the risk that this source of racial bias will affect a capital sentencing determination.

A court cannot, of course, cure jurors of individual prejudice or bias, and a *Simmons* instruction will not eliminate the risk of bias affecting capital sentencing determinations. Still, jury instructions may mitigate such biases. After all, "[a] crucial assumption underlying [the] system [of trial by jury] is that juries will follow the instructions given them by the trial judge." *Parker v. Randolph*, 442 U.S. 62, 73 (1979). The due process protection that a *Simmons* instruction provides is designed to correct juror confusion about a defendant's release notwithstanding a life sentence and is, therefore, one important safeguard against racial biases concerning future dangerousness influencing jurors' death penalty sentencing decisions.

This Court has consistently and repeatedly confirmed its commitment to eliminating racial bias and arbitrariness in the capital sentencing system. *See Gregg v. Georgia*, 428 U.S. 153, 167 (1976) (approving of procedural safeguards

including a judicial questionnaire on "whether race played a role in the trial"), *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) ("Relying on race to impose a criminal sanction 'poisons public confidence' in the judicial process") (citation omitted), *Tharpe v. Sellers*, 138 S. Ct. 545, 546 (2018) (noting the "strong factual basis for the argument that Tharpe's race affected Gattie's vote for a death verdict), and *Flowers v. Mississippi*, 139 S. Ct. 2228, 2242 (2019) ("Equal justice under law requires a criminal trial free of racial discrimination in the jury selection process"). And of course, in *Furman* itself, Justice Douglas wrote, "It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Furman v. Georgia*, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

III. FAILURE TO ISSUE A *SIMMONS* INSTRUCTION WHEN REQUIRED IS LIKELY TO REINFORCE RACIAL DISPARITIES IN SENTENCING

A. Arizona Is an Outlier in Applying *Simmons* and Has a Racially Disparate Death Row

The American Bar Association's ("ABA") assessment of Arizona's death penalty practices found them deficient with respect to jury instructions because, even after this Court's decision in *Simmons*, Arizona jurors were not informed about the various life imprisonment sentences offered as alternatives under Arizona law. The ABA concluded that "[i]n order to enable capital jurors to make informed sentencing decisions, the State of Arizona should ensure that the pattern jury instructions include and

define 'imprisonment for life' as well as 'imprisonment for natural life,' and permit parole testimony when necessary to clarify a jury's understanding of these alternative sentences." American Bar Association, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Arizona Death Penalty Assessment Report*, 249–50 (July 2006), https://www.americanbar.org/content/dam/aba/administrative/crsj/deathpenalty/arizona_report.pdf.

Arizona's failure to enforce *Simmons* may well contribute to racial disparities in capital sentencing: the Black population of Arizona's death row is three times higher than the Black population statewide. *See* United States Census Bureau, *Arizona: 2020 Census*, https://www.census.gov/library/stories/state-by-state/arizona-population-change-between-census-decade.html; Death Penalty Information Center, *State-by-State Death Row Populations by Race*, https://deathpenaltyinfo.org/death-row/overview/demographics. As discussed above, jurors are more likely to perceive Black and Latino men as dangerous than similarly situated white people. And this "particularly noxious strain of racial prejudice" creates a risk of jurors making capital sentencing decisions that "depart[] from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are." *Buck*, 137 S. Ct. at 776, 778; *see also* Sheri Lynn Johnson, *The Influence of Latino Ethnicity on the Imposition of the Death Penalty*, 16 Ann. Rev. L. and Soc. Sci. 421, 426 (2020).[3]

3. Any criminal justice research regarding the Latino population is hampered by the fact that data on Latinos in the criminal justice system is underreported and often mis-reported, resulting in what is commonly referred to as the "Latino data gap." *See* Urban Institute, *The Alarming Lack of Data on Latinos in the*

B. These Forces Were at Play in Arizona at the Time of Cruz's Sentencing, Unmitigated by a *Simmons* Instruction

In the years leading up to Petitioner's trial, Arizona police, public officials, and others portrayed Latino men as criminal. In 1987, the Phoenix Police Department attributed random criminal acts to alleged "gang members" who were specifically identified as Latino in order to acquire additional federal funds. Marjorie S. Zatz, *Chicano Youth Gangs and Crime: The Creation of a Moral Panic*, 11 CONTEMP. CRISES 129, 129–30 (1987). By constructing an image of dangerous Latino gang members, the police fueled fear and created the impression of a gang problem when none existed, and relied specifically on racial stereotypes to drive fear and attention: "[T]he images produced by the police and media brought about an intense urgency for increased social control over the youth gang problem, and thus the threat was legitimized." Jenna L. St. Cyr, *The Folk Devil Reacts: Gangs and Moral Panic*, 28 CRIM. JUST. REV. 26, 32 (2003); *see also* Zatz, *supra*, at 130–33.

In 2004, Russell Pearce, former deputy to Sheriff Joe Arpaio and then a member of the state senate, championed Proposition 200, the first in a series of state initiatives and laws that were hostile to Latinos. *See* Sterling & Joffe-Block, *supra*, at 45. Pearce, who later authored the statute that was at issue in *Arizona v. United States*, 567 U.S. 387 (2012), overtly invokes rhetoric of dangerousness and fear when discussing Latino immigration. For

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Criminal Justice System (2016), https://apps.urban.org/features/latino-criminal-justice-data/.

example, he has claimed (falsely) that immigrants in Arizona are disproportionately responsible for crime "because the culture is different. The gangs are bigger. There's more violence, kidnappings are way up." Ted Robbins, *The Man Behind Arizona's Toughest Immigrant Laws*, NAT. PUB. RADIO, Mar. 12, 2008, https://www.npr.org/templates/story/story.php?storyId=88125098. The campaign over Proposition 200 reached a fever pitch and featured anti-Latino rhetoric. Reporters noted that during the campaign, businesses put up "[h]omemade street signs tell[ing] day laborers to keep moving," eerily reminiscent of Jim Crow vagrancy laws. Mark K. Matthews, *Arizona Lashes Out at Illegal Immigration*, STATELINE, Aug. 31, 2005, https://www.pewtrusts.org/en/researchandanalysis/blogs/stateline/2005/08/31/arizona-lashes-out-at-illegal-immigration.

In this atmosphere of manufactured perceptions of dangerousness, jurors knowing that Mr. Cruz was ineligible for parole and would not be a looming danger was a much needed protection. Had he been tried in a jurisdiction other than Arizona, jurors may not have been exposed to this same level of racial bias and fear-mongering, and Mr. Cruz would have received the protections from the misinformation that *Simmons* was intended to correct.

CONCLUSION

Amici LatinoJustice and LDF respectfully submit that 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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