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 RESPONDENT

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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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITY

INTRODUCTION

This case implicates the states' ability to place limits on the types of claims reviewable in collateral proceedings in criminal cases. Petitioner John Montenegro Cruz was convicted and sentenced to death for the 2003 murder of a Tucson police officer. After exhausting his appeal and state post-conviction rights, and filing a petition for writ of habeas corpus in federal court, Cruz filed a successive state petition for post-conviction relief asserting that the trial court should have given a parole-unavailability instruction under *Simmons v. South Carolina*, 512 U.S. 154 (1994). But although *Simmons* had been settled law at the time of his sentencing, Cruz did not ask the trial court to give such an instruction.

Because Arizona limits the types of claims that may be brought in a successive petition for post-conviction relief, Cruz argued that his new claim was justified by a significant change in the law that, if applied to his case, would probably have changed the outcome—one of the avenues around a timeliness bar. *See* Ariz. R. Crim. P. 32.1(g). However, *Simmons* was established law at the time of Cruz's trial and therefore could not be a significant change in the law under Arizona's rule. So Cruz asserted that *Lynch v. Arizona*, 578 U.S. 613 (2016), constituted a "significant change in the law" because this Court held in that case that capital defendants in Arizona were entitled to the benefit of *Simmons*' rule due to the state's lack of a mechanism for implementing parole, even though the sentencing statutes included it.

The state courts denied relief. Relying entirely on its interpretation of the state procedural rule, the Arizona Supreme Court held that Cruz's claim failed Rule 32.1(g)'s standard because *Lynch* was not a "significant change in the law"—it merely applied *Simmons* and broke no new ground. Pet. App. 4a–11a. Cruz petitioned for certiorari, asking whether *Lynch* "applied a settled rule of federal law that must be applied to cases pending on collateral review in Arizona." Cert. Pet. at (i).

This Court granted certiorari, but on a different 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." That question must be answered in the affirmative. The state court's application of Rule 32.1(g) was independent of federal law because it did not involve any determination on the merits of Cruz's federal claim. And the court's application of Rule 32.1(g) was adequate because the Arizona courts routinely and consistently preclude relief on similarly-situated claims.

Cruz largely ignores the question presented, instead litigating the question on which this Court declined to grant review. Simply put, his arguments regarding *Lynch*'s retroactivity are irrelevant. The state court never reached that issue because his claim failed to meet a threshold state law procedural requirement. This Court should hold that the Arizona Supreme Court's decision applying Rule 32.1(g) is an independent and adequate state-law ground for the judgment and affirm the states' ability

to place procedural limits on the claims they will entertain in collateral proceedings.

STATEMENT OF THE CASE

A. Murder of Officer Hardesty and Cruz's trial.

On May 26, 2003, Tucson Police Officers Patrick Hardesty and Benjamin Waters were investigating a hit-and-run accident. Pet. App. 19a. This led them to an apartment occupied by John Montenegro Cruz, who fit the description of the hit-and-run driver. *Id.* When Cruz identified himself as "Frank White," Officer Hardesty contacted dispatch and learned that there was no licensed driver in Arizona named Frank White with the birthdate Cruz provided. *Id.* Hardesty then asked Cruz for identification, and Cruz said he left it in his car. *Id.*

Hardesty and Cruz walked toward Cruz's car. *Id.* Cruz leaned in as if to retrieve something, but instead "took off running." *Id.* Officer Hardesty chased Cruz on foot while Officer Waters drove around the block to cut Cruz off. *Id.* When Officer Waters turned the corner, he saw Cruz throwing a gun to the ground but did not see Officer Hardesty. *Id.* Waters drew his weapon on Cruz, who stated, "Just do it.… Just go ahead and kill me now. Kill me now. Just get it over with." *Id.* Officer Waters arrested Cruz. *Id.* at 19a–20a.

Cruz had shot Officer Hardesty five times, emptying the five-shot revolver he was carrying. Two shots struck Hardesty's protective vest, two others struck him in the abdomen below the vest, and one entered his left eye, killing him almost instantly.

Id. at 20a. Four of the shots were fired from no more than a foot away. *Id.* The five bullets recovered from Hardesty's body were determined to have been fired from the revolver Cruz threw to the ground, and Cruz had five additional unfired cartridges in his pocket. *Id.*

Cruz was indicted on one count of first-degree murder, and the State alleged a capital aggravating factor that "[t]he murdered person was an on-duty peace officer who was killed in the course of performing the officer's official duties and the defendant knew, or should have known, that the murdered person was a peace officer." *Id.* (quoting A.R.S. § 13–703(F)(10) (2003)). The jury convicted Cruz of first-degree murder and found the capital aggravator proven. The jury also found Cruz's mitigation insufficiently substantial to call for leniency and sentenced Cruz to death. *Id.*

B. Cruz's failure to squarely raise a *Simmons* claim at trial or on appeal.

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), this Court held that, in a capital case "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* at 156; *see also Shafer v. South Carolina*, 532 U.S. 36 (2001). Under those narrow circumstances, the defendant is entitled to inform the jury of parole ineligibility "by way of argument by defense counsel or an instruction from the court." *Simmons*, 512 U.S. at 169. *Simmons* places no affirmative duty on the

court to instruct the jury absent a request from the defendant.

Cruz's trial took place over ten years after *Simmons* was decided. It also took place *before* the Arizona Supreme Court held that *Simmons* was inapplicable to Arizona's capital sentencing scheme. Thus, nothing prevented Cruz from asserting that the State had placed his future dangerousness at issue and asking for a *Simmons* instruction. At his trial, however, Cruz did not assert that the State had put his future dangerousness at issue. He also did not request that counsel be permitted to argue to the jury that a life sentence would mean life without parole. And he did not request that the judge instruct the jury that a life sentence would mean life without parole.

Instead, citing *Simmons*, Cruz requested relief that *Simmons* does not afford. First, Cruz asked the judge to decide—before trial—whether he would sentence Cruz to a natural life sentence or a life sentence with the possibility of release after 25 years *if* the jury did not return a death sentence. *See* J.A. 22–31. Cruz argued that if the court denied this request, he would be deprived of a fair trial and "the opportunity to present the mitigating factor that he will not be released from prison," and the jury would "speculate about what the possibilities for parole would be for [him] in the event a life sentence is imposed." J.A. 23, 24. Second, Cruz sought to present mitigation testimony from the Chairman of the Arizona Board of Executive Clemency that the Board could only recommend release after 25 years,

but could not order Cruz's release on parole. J.A. 60–63.

The trial court denied both requests. It declined to sentence Cruz before trial and it precluded the Chairman's testimony as speculative. J.A. 76–77. The court offered, however, to "give an instruction of the consequences of a life or natural life sentence … if the defendant so requests." J.A. 77. Cruz did not ask the trial court to instruct the jury about the unavailability of a mechanism for parole. *See, e.g.*, J.A. 78–84. Without objection from Cruz, the trial judge instructed the jury on the three possible penalties for first degree murder under Arizona's applicable sentencing statute:

> 1. Death by lethal injection.
>
> 2. Life imprisonment with no possibility of parole or release from imprisonment on any basis.
>
> 3. Life imprisonment with a possibility of parole or release from imprisonment but only after twenty-five calendar years of incarceration have been served.

J.A. 94; *see also* Ariz. Rev. Stat. § 13–703(A) (2000).

Cruz likewise did not argue on direct appeal that *Simmons* required the trial court to instruct the jury on the unavailability of parole. Instead, he contended that "the trial court erred by refusing to make a pretrial ruling on whether, if the jury decided against the death penalty, the court would sentence him to life or natural life in prison." J.A. 337–40. The Arizona Supreme Court rejected this argument.

It found that Cruz's case differed from *Simmons* because "[n]o state law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence" and that the "jury was properly informed of the three possible sentences Cruz faced if convicted: death, natural life, and life with the possibility of parole after twenty-five years." Pet. App. 31a. The court also noted that Cruz "failed to explain how the trial court could opine on a defendant's sentence before any evidence is offered or a verdict is rendered." *Id.*

Cruz also argued on appeal that the trial court abused its discretion by precluding the Chairman's testimony about parole. *Id.* The Arizona Supreme Court concluded that the trial court did not err because "[t]he witness would have been asked to speculate about what the Board might do in twenty-five years, when Cruz might have been eligible for parole had he been sentenced to life." *Id.* Thus, the trial court "could reasonably have concluded that testimony on what the Board might do in a hypothetical future case would have been too speculative to assist the jury." *Id.*

The Arizona Supreme Court rejected Cruz's remaining claims and affirmed his conviction and death sentence. *Id.* at 57a. Cruz filed a petition for writ of certiorari, but did not raise a *Simmons* issue. Cert. Pet., No. 08–6803 (filed Aug. 29, 2008). Cruz filed his first petition for post-conviction relief in 2012; the post-conviction court denied relief and the Arizona Supreme Court denied discretionary review. J.A. 171. In 2014, Cruz initiated federal habeas corpus proceedings. The district court denied habeas

relief on March 31, 2021. *Cruz v. Shinn*, 2021 WL 1222168 (D. Ariz. March 31, 2021). His appeal to the Ninth Circuit is stayed pending these certiorari proceedings. *Cruz v. Credio et al.*, No. 21–99005, Dkt. # 17 (9th Cir. Nov. 9, 2021).

C. This Court's decision in *Lynch v. Arizona* and Cruz's successive post-conviction proceeding.

After its decision in Cruz's direct appeal, the Arizona Supreme Court held in multiple cases that *Simmons* did not apply to Arizona's sentencing scheme. *See, e.g., State v. Hardy*, 283 P.3d 12, 24, ¶ 58 (Ariz. 2012); *State v. Garcia*, 226 P.3d 370, 391, ¶ 111 (Ariz. 2010). It reached that conclusion in part because, until 2012, Arizona sentencing law permitted the imposition of a parole-eligible life sentence for defendants convicted of first-degree murder. *See* A.R.S. § 13–703(A) (2000), *renumbered as* A.R.S. § 13–751(A). But in 1994, the Arizona Legislature amended its parole statutes to effectively abolish parole for all inmates convicted of felony offenses. *See* A.R.S. § 41–1604.09(I). "Accordingly, at the time of [Cruz's] sentencing, defendants facing death sentences were statutorily eligible to receive life-with-parole sentences but, as a practical matter, could not be paroled." *Andriano v. Shinn*, 2021 WL 184546, *46 (D. Ariz. Jan. 19, 2021). In other words, when Cruz was sentenced, the applicable *sentencing* statute (A.R.S. § 13–703(A) (2000)) allowed for a parole-eligible sentence, but Arizona's *parole* statute (A.R.S. § 41–1604.09(I)) did not provide a mechanism for parole for defendants, like Cruz, who committed crimes after 1993.

This Court held in *Lynch*, however, that the Arizona Supreme Court had misapplied *Simmons* when it concluded that Arizona's sentencing laws did not entitle capital defendants to a parole ineligibility instruction when the State placed the defendant's future dangerousness at issue. *Lynch v. Arizona*, 578 U.S. 613 (2016). *Lynch* held that, because A.R.S. § 41–1604.09(I) prohibited parole for felonies committed after 1993, Arizona capital defendants are ineligible for parole within *Simmons*' meaning. 578 U.S. at 613–16. Thus, when the State places future dangerousness at issue, Arizona courts must allow a capital defendant the narrow due process right of rebuttal to inform the jury that state law does not allow his release on parole. *Id*. at 615–16.

Nearly one year later, in 2017, Cruz filed a successive petition for post-conviction relief in Pima County Superior Court, claiming that *Lynch* entitled him to a new sentencing proceeding under Arizona Rule of Criminal Procedure 32.1(g). J.A. 219. Under Rule 32.1(g), a defendant may obtain relief if "[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."

The post-conviction court denied relief, finding that *Lynch* was not a significant change in the law under the rule, was not retroactively applicable, and even if it applied to Cruz's case would not have "probably overturned" the sentence. Record, CR20031740, Aug. 24, 2017, at 2–4. On the latter point, the court noted that Cruz never asked the trial court for the relief *Simmons* and *Lynch* afford—the

ability, if the State puts future dangerousness at issue, to inform the jury of the unavailability of parole through jury instructions or argument by counsel. *Id.* at 3. The court also found that, in light of the weak mitigation Cruz presented and his murder of a police officer in the line of duty, "[n]othing in the record nor the exhibits suggest that had Mr. Cruz'[s] jury been informed of his parole ineligibility, his sentence would have 'probably' been overturned." *Id.* at 3–4.

Cruz filed a petition for review in the Arizona Supreme Court. J.A. 341. The Arizona Supreme Court granted review, holding that the trial court correctly denied relief because *Lynch* did not constitute a significant change in the law under Rule 32.1(g). Pet. App. 4a–11a.

The court noted that, under state law, a Rule 32.1(g) "significant change in the law" "requires some transformative event, a clear break from the past." Pet. App. 6a (quoting *State v. Shrum*, 203 P.3d 1175, 1178 (2009)). *Lynch*, however, "did not declare any change in the law representing a clear break from the past." *Id.* at 8a. The law *Lynch* relied on—*Simmons*—"was clearly established at the time of Cruz's trial, sentencing, and direct appeal, despite the misapplication of that law by Arizona courts." *Id.* at 9a. Thus, *Lynch* "did not change any interpretation of federal constitutional law, the holding of *Simmons* did not change between Cruz's crime and his first PCR petition, and no Supreme Court precedent was overruled or modified." *Id.* at 11a. As a result, under Arizona law, *Lynch* "does not represent a significant change in the law for purposes

of Rule 32.1(g)" and Cruz was not entitled to collateral relief. *Id.* at 9a, 11a.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to review the judgment below because the Arizona Supreme Court's holding that *Lynch* is not a significant change in the law under Arizona Rule of Criminal Procedure 32.1(g) is an adequate and independent state-law ground. First, the holding is independent because it is not "interwoven" with federal law—it does not depend on any antecedent ruling on the merits of Cruz's federal claim. In *Ake v. Oklahoma*, 470 U.S. 68 (1985), this Court held that a state procedural rule was *not* independent where its application first required the state court to rule, either explicitly or implicitly, on the merits of the federal question. In *Stewart v. Smith*, 536 U.S. 856 (2002), in contrast, a state procedural rule *was* independent where its application did not require the state court to evaluate the merits of the federal claim, but instead only to categorize the claim.

In finding Cruz's claim precluded, the Arizona Supreme Court did not address the merits of Cruz's federal claim, either explicitly or implicitly. Instead, it was required only to determine whether *Lynch* was a significant change in the law under its own procedural rule, akin to the state court categorizing the federal claim in *Stewart*. Because that conclusion did not require any explicit or implicit ruling on the merits of Cruz's *Lynch*/*Simmons* claim, the holding is independent of federal law under this Court's case law.

Second, the holding is an adequate state-law ground for the judgment. Arizona courts routinely and consistently require defendants asserting claims under Rule 32.1(g) to establish a significant change in the law as a precondition to obtaining untimely collateral relief. Furthermore, the Arizona Supreme Court's interpretation of that requirement is consistent with other Arizona cases addressing that question. Unlike here, where *Lynch* simply applied *Simmons*' existing rule, prior Arizona decisions finding a significant change in the law involved decisions that imposed a new or changed interpretation of state or federal law, such as *Ring* or *Padilla*. Cruz fails to identify any Arizona cases holding that a decision applying a previously existing, well-settled rule, as occurred here, constituted a significant change in the law. The fact that *Lynch* overruled Arizona case law finding *Simmons* inapplicable to Arizona sentencing law does not render *Lynch* a significant change in the law as defined or interpreted in prior applications of Rule 32.1(g) by Arizona courts.

Despite this independent and adequate state law ground for the judgment, Cruz incorrectly asserts that the Arizona Supreme Court was nonetheless required to apply *Lynch* to his case because this Court's precedent requires state courts to "give effect" to decisions applying well-settled rules on collateral review. However, this is true *only* if the state opens its collateral proceeding to merits consideration of such a claim in the first place, else there is no limiting principle to the concept of "collateral review" at all.

Here, Arizona's post-conviction relief rules allowed consideration of Cruz's untimely claim *only* if (as relevant here) it was based on a significant change in the law. Under Arizona's procedural rules, a claim based on a well-settled rule of law that existed *before* a defendant's case became final—such as Cruz's claim—must be presented on direct appeal or, in certain circumstances, in an initial timely-filed collateral proceeding. Cruz did not assert at trial or on appeal that he was entitled to a *Simmons* instruction. Because Cruz first presented this claim in a successive collateral proceeding, he was entitled to merits consideration of his claim only if it was based on an intervening significant change in the law under Rule 32.1(g). Because his claim failed this requirement, the state courts properly denied relief.

ARGUMENT

I. The Arizona Supreme Court's holding that *Lynch* is not a significant change in the law under Arizona's post-conviction procedural rules is an independent and adequate state-law ground to support the judgment.

"This Court lacks jurisdiction to entertain a federal claim on review of a state court judgment 'if that judgment rests on a state law ground that is both independent of the merits of the federal claim and an adequate basis for the court's decision.'" *Foster v. Chatman*, 578 U.S. 488, 497 (2016) (quoting *Harris v. Reed*, 489 U.S. 255, 260 (1989)). In cases like this one, involving direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional because "this Court has no power to review a state law determination

that is sufficient to support the judgment," and "resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (citing *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945)). A state court judgment rests on an independent and adequate state procedural ground when the "state court decline[s] to address a prisoner's federal claims because the prisoner … failed to meet a state procedural requirement." *Id.* at 730.

The Arizona Supreme Court's decision that Cruz was not entitled to untimely collateral relief because *Lynch* did not represent a significant change in the law rests on an independent and adequate state law ground—Rule 32.1(g). The decision is independent of federal law because the state court's application of Rule 32.1(g) did not include any ruling on the merits of Cruz's federal claim. It is also adequate because Arizona courts routinely and consistently apply Rule 32.1(g)'s significant change in the law requirement, and the decision below is in harmony with existing state court precedent. Cruz's largely irrelevant arguments fail to establish otherwise. This Court is thus without jurisdiction to review the judgment below.

A. The Arizona Supreme Court's conclusion that *Lynch* was not a "significant change in the law" under Rule 32.1(g) is independent of federal law.

1. State procedural rules that do not depend on resolving the merits of a federal claim are independent of federal law.

For a state procedural rule to be "independent," the basis of the state law decision must not be "interwoven with federal law." *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983). Resolution of the state procedural law question must not "depend[] on a federal constitutional ruling." *Stewart*, 536 U.S. at 860. A state law ground is interwoven with federal law if "the state has made application of the procedural bar depend on an antecedent ruling on federal law [such as] the determination of whether federal constitutional error has been committed." *Ake*, 470 U.S. at 75.

Under the state procedural rule at issue in *Ake*, waiver did not apply to "fundamental trial error," and under state law, federal constitutional errors were "fundamental." 470 U.S. at 74–75. As a result, before applying the state waiver principle to a federal constitutional question, the state court was required to first rule, "either explicitly or implicitly, on the merits of the constitutional question." *Id.* at 75. Under those circumstances, this Court held that the Oklahoma court's decision was not independent of federal law because application of the state law waiver rule hinged on whether a federal constitutional error had occurred. *Id.* at 75; *see also Foster*, 578 U.S. at 498 (state court's application of

res judicata to *Batson* claim was not independent of merits of federal constitutional challenge where state court's analysis included determination that the *Batson* claim was "without merit").

In *Stewart*, in contrast, this Court held that application of an Arizona procedural rule was independent of federal law where it did "not require [the state] courts to *evaluate the merits* of a particular claim, but only to *categorize* the claim." 536 U.S. at 859 (emphasis added). In determining whether to invoke the procedural rule at issue, state law required a court to "evaluate whether 'at its core, [a] claim implicates a significant right that requires a knowing, voluntary, and intelligent waiver.'" *Id.* at 859–60 (quoting *Stewart v. Smith*, 46 P.3d 1067, 1071 (Ariz. 2002)). But that inquiry did not require state courts to decide the merits of the claim, that is, whether a federal law violation had occurred. *Id.* at 860. A state court applying the state rule "need only identify what type of claim it is, and there is no indication that this identification is based on an interpretation of what federal law requires." *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 652–53 (1979)). *Stewart* thus demonstrates that when a state court ruling merely "categorizes" a federal claim without addressing its merits—as does Rule 32.1(g)—that decision is independent of federal law and federal review is unavailable.

2. The decision below did not depend on any antecedent ruling on Cruz's federal claim and is therefore independent of federal law.

Here, the first step in assessing whether untimely collateral relief is warranted under Rule 32.1(g) is

categorical—whether there has been a "significant change in the law." Because the state court answered that question in the affirmative, it was the sole ground for the decision below. It is, therefore, an Arizona procedural question wholly independent of federal law.

The Arizona Supreme Court began its analysis by looking to past Arizona decisions construing the definition of a significant change in the law under 32.1(g):

> A significant change in the law pursuant to Rule 32.1(g) "requires some transformative event, a clear break from the past." *State v. Shrum*, 220 Ariz. 115, 118 ¶ 15, 203 P.3d 1175, 1178 (2009) (quotation marks omitted) (quoting *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991)). To determine when a "clear break from the past" has occurred, "we must consider both that decision and the law that existed" at the time a criminal defendant was sentenced. *State v. Valencia*, 241 Ariz. 206, 208 ¶ 9, 386 P.3d 392, 394 (2016).

Pet. App. 6a–7a. The court then applied those state-law principles, to conclude that that "*Lynch* [] did not declare any change in the law representing a clear break from the past" because *Lynch* relies on *Simmons*, which Cruz cited in his direct appeal. *Id.* at 8a–9a. In other words, *Lynch* did not announce a new constitutional rule, it merely applied an old one articulated in *Simmons* based on this Court's reading of Arizona's sentencing and prison statutes, which differed from the Arizona Supreme Court's previous interpretation of those statutes. Therefore, *Lynch*

was not a significant change in the law within the meaning of Rule 32.1(g), and Cruz was not entitled to untimely collateral relief under that provision. *Id*. at 11a.

The Arizona Supreme Court's decision did not turn on any determination of the merits of Cruz's untimely federal claim for the narrow due process right-of-rebuttal articulated in *Simmons*. The state court did not analyze *Simmons* or *Lynch* for applicability to Cruz's case or otherwise consider the merits of Cruz's long-waived federal claim. The Arizona Supreme Court's application of Rule 32.1(g)'s significant-change-in-the-law requirement thus did not depend on "an antecedent ruling on federal law [such as] the determination of whether a federal constitutional error has been committed." *Ake*, 470 U.S. at 75.

When the Arizona Supreme Court discussed *Simmons*' rule, it did so only to determine whether, under the applicable state-law rule, *Lynch* constituted a "significant change in the law." This analysis is wholly independent of federal law. The court did not explore whether an error occurred under *Lynch* or *Simmons* because it was not required to. It also did not address *Lynch*'s potential for retroactive application or resolve the merits of Cruz's untimely federal *Simmons* claim. Cruz conceded as much in his Petition for Writ of Certiorari when he complained that the Arizona Supreme Court failed to address his arguments under federal law. *See* Cert. Pet. at 19 ("But when the Arizona Supreme Court issued its decision, its response to the extensive argument over federal law was: Nothing."). This is

because the question on review before the Arizona Supreme Court was not whether Cruz waived a meritorious *Simmons* claim, but whether his untimely request for collateral relief was justified under Arizona post-conviction rules because *Lynch* significantly changed *Simmons's* existing federal law. And the answer to that question is no.

Consequently, the state court's discussion of *Simmons* and *Lynch* was akin to *Stewart*, where application of a state procedural rule required considering a federal claim and "categoriz[ing]" it—but not considering its merits—to determine whether it "implicate[d] a right that requires a knowing, voluntary, and intelligent waiver." 536 U.S. at 859. Similarly, here, the state court was required to consider *Lynch* to determine whether it constituted a significant change in the law, but not to "decide the merits of the claim, i.e., whether the right was actually violated." *Id.* at 859–60. The Rule 32.1(g) analysis below was based solely in state procedural law and thus was independent of the substantive federal law articulated in *Simmons*.

B. The Arizona Supreme Court's holding that *Lynch* is not a significant change in the law also is adequate under this Court's jurisprudence.

1. Rule 32.1(g) is firmly established and regularly followed by the Arizona courts.

"To qualify as an 'adequate' procedural ground, a state rule must be 'firmly established and regularly followed.'" *Walker v. Martin*, 562 U.S. 307, 316 (2011) (quoting *Beard v. Kindler,* 558 U.S. 53, at 60–

61 (2009)); *see also Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (state procedural bar is "adequate" that has been "consistently or regularly applied") (quoting *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988)). Rule 32.1(g), and specifically its requirement that a claim is based on a significant change in the law, has been consistently and regularly applied by the Arizona courts.

The Arizona courts consistently require defendants asserting claims under Rule 32.1(g) to establish a significant change in the law as a precondition to obtaining collateral relief. *See, e.g., State v. Bigger*, 492 P.3d 1020, 1028–30, ¶¶ 23–30 (Ariz. 2021) (denying relief because *Perry v. New Hampshire*, 565 U.S. 228 (2012), was not a significant change in the law); *State v. Evans*, 506 P.3d 819, 826–27, ¶¶ 18–26 (Ariz. App. 2022); *Shrum*, 203 P.3d at 1180, ¶ 23; *State v. Davi*s, 2022 WL 2065942, *2, ¶ 7 (Ariz. App. June 8, 2022); *State v. Werderman*, 350 P.3d 846, 847, ¶ 6 (Ariz. App. 2015); *State v. Escareno-Meraz*, 307 P.3d 1013, 1014, ¶ 6 (Ariz. App. 2013); *State v. White*, 2013 WL 6243310, *1, ¶¶ 4–5 (Ariz. App. Dec. 3, 2013) (mem.). Rule 32.1(g) is thus firmly established and regularly followed, and it is consequently adequate to support the judgment below.

Cruz asserts, however, that the Arizona Supreme Court's application of Rule 32.1(g) in this case is not firmly established or regularly followed because it is inconsistent with other Arizona decisions holding that a significant change in the law occurs when an appellate court overrules binding precedent. *See* Pet. Br. at 39–44. But not every change in precedent

amounts to a "significant change in the law" permitting relief on collateral review. To meet Rule 32.1(g)'s requirement, there must *still* be a significant change in the law, not a mere change in precedent. Those are two separate concepts. Arizona courts have found a "significant change in the law" under Rule 32.1(g) only when a new appellate decision involves a *changed interpretation* of either state or federal law. *See Shrum*, 203 P.3d at 1178–79 (noting that *Ring* constituted significant change in the law because it changed the rule of *Walton*); *Slemmer*, 823 P.2d at 41, 49 (appellate decision holding that standard jury instruction on self-defense was error was significant change in the law); *State v. Rendon*, 776 P.2d 353, 354–55 (1989) (decision changing interpretation of state burglary statute constituted significant change in the law).

Cruz takes the wrong lesson from *State v. Poblete*, 260 P.3d 1102 (Ariz. App. 2011), when he suggests that case establishes that there is a significant change in the law any time a decision of this Court overrules an Arizona decision. Pet. Br. at 41, 43. In *Poblete*, the Arizona court considered whether *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that failure to advise a client of the immigration consequences of a guilty plea constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668 (1984), constituted a significant change in the law. Before *Padilla*, "the law in Arizona provided that an attorney's failure to advise a defendant of the immigration consequences of his or her plea was not ineffective assistance of counsel." *Poblete*, 260 P.3d at 1105, ¶ 10. Additionally, "the majority of other states and every federal circuit that had considered

the issue pre-*Padilla* followed a similar rule." *Id.* Because this Court rejected that approach in *Padilla*, the state court of appeals concluded that *Padilla* was a significant change in the law under 32.1(g). *Id.*

By arguing that the decision below is inconsistent with *Poblete*, Cruz blurs the distinction between the law—i.e., the legal rule applicable to a case—and outcomes in particular cases. Unlike *Padilla*, the rule here was the same before and after *Lynch*: when the state puts a capital defendant's future dangerousness at issue, and the defendant cannot receive a parole-eligible sentence, then due process requires that the defendant be allowed to bring the jury's attention to his parole ineligibility "by way of argument by defense counsel or an instruction from the court." *Simmons*, 512 U.S. at 168–69.

As the court below explained, "the law relied upon by the Supreme Court in *Lynch* []—*Simmons*—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. In other words, the law did not change, even if, between *Simmons* and *Lynch*, Arizona courts reached the wrong outcome in some cases (though because the State did not place Cruz's future dangerousness at issue and he did not ask for the appropriate relief, Cruz's was not one of them). *Padilla* is distinguishable because the law was markedly different after that case was decided.

Cruz does not point to any Arizona decision (nor is the State aware of any) holding that a situation like the one presented below constitutes a "significant change in the law" under Rule 32.1(g). In fact, the

Arizona Supreme Court noted that its interpretation of 32.1(g) was consistent with *Shrum*, where the court found no significant change in the law because the new decision the petitioner relied on "did not change any interpretation of Arizona constitutional law, the statute at issue did not change between the petitioner's crime and petition for relief, and no precedent was overruled, all of which meant 'the law remained precisely the same.'" Pet. App. 11a (quoting *Shrum*, 203 P.3d at 1179, ¶ 19). Likewise, here, this "Court's decision in *Lynch* [] did not change any interpretation of federal constitutional law, the holding of *Simmons* did not change between Cruz's crime and his first PCR petition, and no Supreme Court precedent was overruled or modified." *Id.* What changed was this Court's interpretation of Arizona sentencing and prison statutes in *Lynch*. Cruz is therefore incorrect that the Arizona Supreme Court's interpretation of Rule 32.1(g) in his case is inconsistent with prior decisions interpreting the rule, and thus not regularly enforced and consistently followed.

Cruz similarly contends that the decision below is novel, and thus cannot bar review of his federal claim, because "[t]here is no dispute that *Lynch* overruled Arizona Supreme Court precedent on a federal-law question." Brief at 42. Again, while *Lynch* may have overruled Arizona decisions applying *Simmons* based on this Court's different interpretation of Arizona statues, it did *not* change this Court's interpretation of federal law (the identified narrow due process right of rebuttal) and did not modify or change the holding of *Simmons*. In other words, the law at issue—*Simmons*—did not

change. Thus, the Arizona Supreme Court's decision here was fully consistent with prior Arizona decisions applying Rule 32.1(g).

Cruz's arguments otherwise boil down to his dissatisfaction with the court's decision, but they fail to establish that the rule is not regularly applied. "[M]ere errors of state law are not the concern of this Court unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution." *Dugger*, 489 U.S. at 410. Thus, even if Cruz were correct that the state court wrongly applied state law, that determination would not be reviewable by this Court. At bottom, Rule 32.1(g) is adequate because it is consistently applied by the Arizona courts.

2. Rule 32.1(g) does not treat state court decisions more favorably than decisions of this Court.

Cruz argues that, under the interpretation below, a state court decision overruling state precedent that misapplied federal law would qualify as a significant change in the law under Rule 32.1(g), but a decision of this Court overruling state precedent that misapplied federal law would not. Pet. Br. at 30–31. That misses the point of Rule 32.1(g). It also ignores what actually happened in *Lynch*—this Court interpreting Arizona's statutes differently than had the Arizona Supreme Court.

Rule 32.1(g)'s "significant change in the law" requirement looks to whether there has been a "clear break from the past,"—i.e., a new rule of law. *Shrum*, 203 P.3d at 1178, ¶ 15. But if, like here, a

new decision simply applied an existing rule, even if that rule had been misapplied in the interim, then the new decision does not constitute a significant change and is not eligible for untimely collateral relief. That is true whether the new decision is issued by this Court or an Arizona court. Thus, the state court's interpretation of Rule 32.1(g) does not "discriminate" against federal law. Instead, it functions as designed to provide a potential avenue for relief "[i]n those rare cases when a 'new rule' of law is announced." *Id.* at 1178, ¶ 14. And, in fact, the Arizona courts have several times held that a decision of this Court constituted a significant change in the law. *See Valencia*, 386 P.3d at 395, ¶ 15 (*Miller v. Alabama* as modified by *Montgomery v. Louisiana*); *State v. Towery*. 64 P.3d 828, 831, ¶ 5 (Ariz. 2003) (*Ring v. Arizona*); *Poblete*, 260 P.3d at 1105, ¶ 10 (*Padilla v. Kentucky*).

3. Rule 32.1(g) does not deprive defendants of the ability to vindicate federal constitutional rights.

Nor is Cruz correct that the Arizona Supreme Court's interpretation of Rule 32.1(g) deprives defendants of "a reasonable opportunity" to assert federal rights. Pet. Br., at 31 (quoting *Parker v. People of State of Ill.,* 333 U.S. 571, 574 (1948)). Cruz *had* the opportunity to raise a *Simmons* claim at trial and on direct appeal, but failed to do so. And when he did invoke *Simmons*, Cruz did not seek the remedies it provides—instead, he asked the trial court to "presentence" him and sought to present witness testimony regarding parole procedures, neither of which *Simmons* permits. Cruz thus

repeatedly failed to timely avail himself of the federal right this Court articulated in *Simmons* and now seeks to upend finality on state collateral review in his quest for a re-do. This is not permitted under Arizona's procedural rules.

And even if Cruz were correct that the Arizona Supreme Court "refused to apply" *Simmons* in his direct appeal, this does not require the State to permit him to raise the claim in an untimely successive Rule 32 proceeding. Cruz's remedy would have been to file a certiorari petition to this Court directly challenging the state court's *Simmons* ruling—which he did not do—or to argue in a petition for writ of habeas corpus under 28 U.S.C. § 2254(d) that the Arizona Supreme Court unreasonably applied *Simmons*—which he likewise did not do.

Cruz is equally wrong in asserting that Rule 32.1(g) "closes the door to any consideration of a claim of denial of a federal right." Pet. Br. at 33 (quoting *Young v. Ragen*, 337 U.S. 235, 238 (1949)). Rule 32.1(g) relief is reserved for *extraordinary* situations where the rule a defendant seeks to apply to his case did not previously exist. As noted above, Cruz had opportunities to present a claim based on *Simmons*' existing rule at trial and on direct appeal, but he inexplicably failed to avail himself of them. Cruz's failure does not render Arizona's procedures flawed.

Finally, Cruz's assertion that Arizona is "hostile" to *Simmons* is simply incorrect (and irrelevant to the question presented here). *See* Pet. Br. at 33. The baselessness of Cruz's charge is evidenced by the multiple cases following *Lynch* in which the Arizona

Supreme Court has remanded for a new capital sentencing proceeding based on the lack of a parole unavailability instruction. *See State v. Hulsey*, 408 P.3d 408, 439, ¶ 144 (Ariz. 2018); *State v. Rushing*, 404 P.3d 240, 251, ¶ 44 (Ariz. 2017); *State v. Escalante-Orozco*, 386 P.3d 798, 830, ¶ 127 (Ariz. 2017). Further, Arizona's standard jury instructions now instruct that a sentence of life with the possibility of release does not include parole:

> If the defendant is sentenced to "life with the possibility of release," parole is not currently available. The defendant's only option is to petition the Board of Executive Clemency for release. If that Board recommends to the Governor that the defendant should be released, then the Governor would make the final decision regarding whether the defendant would be released.

Revised Arizona Jury Instructions, Capital Case Instruction 1.1.

Nevertheless, Cruz contends that after *Lynch* "rebuked Arizona for refusing to follow *Simmons*,"[1]

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[1] The State maintains that *Lynch* was wrongly decided. As Justice Thomas, joined by Justice Alito, pointed out in his dissent, the jury in *Lynch* was accurately instructed on the applicable sentencing statute. 578 U.S. at 619 (Thomas, J., dissenting). Yet *Lynch* "perpetuate[d]" the Court's error in *Simmons* by assuming a jury would be influenced to impose the death penalty based on fear for the future rather than the depravity of the defendant's crimes and it imposed a "magic-words requirement" that the court tell the jury "that if a defendant sentenced to life with the possibility of early release *in 25 years* were to seek early release *today*, he would be

the Arizona Supreme Court "contorted" Rule 32.1(g) to avoid giving relief. *Id.* at 34. Once again, the decision below "contorted" nothing. In a straightforward application of the rules governing post-conviction proceedings the Arizona Supreme Court found that *Lynch* did not satisfy Rule 32.1(g)'s significant change in the law requirement because it did not change the law and created no new rule—it simply applied *Simmons*' existing rule. In fact, Cruz concedes this very point. Pet. Br. at 21 ("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 state."). The only "contortion" of Arizona's procedural rules arises from Cruz's assertion that Arizona must provide an avenue for untimely collateral relief when none exists.

4. Rule 32.1(g) is a neutral procedural rule.

Cruz asserts that Rule 32.1(g) is not a neutral rule because it "discriminates" against federal law. Pet. Br. at 34–37. Not so. In conjunction, Arizona Rule of Criminal Procedure 32.2(a) "precludes collateral relief on a ground that either was or could have been raised on direct appeal or in a previous

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ineligible for parole under Arizona law." *Id.* at 618–19 (emphasis in original). Moreover, the Arizona Supreme Court has clarified that a defendant sentenced to "life without possibility of parole after 25 years" is still entitled to be considered for parole, despite A.R.S. § 41–1604.09(I)'s prohibition of parole for persons convicted of offenses occurring on or after January 1, 1994. *See Chaparro v. Shinn*, 459 P.3d 50, 51, ¶ 2 (Ariz. 2020) (state waived ability to correct illegally lenient sentences allowing for parole by failing to timely appeal).

[post-conviction] proceeding," *Shrum*, 203 P.3d at 1178, ¶ 12, while Rule 32.1(g) provides an exception to Rule 32.2(a) preclusion where a claim was not previously available because the law has changed, *id.* at 1178, ¶ 14. Rule 32.1(g)'s exception to preclusion exists because "[a] defendant is not expected to anticipate significant future changes of the law." *Shrum*, 203 P.3d at 1178, ¶ 12. Nothing about this procedural system, or the Arizona Supreme Court's interpretation of it in this case, "discriminates" against federal law or otherwise deprives Arizona defendants of the ability to vindicate federal rights.

The litany of nonsensical hypotheticals Cruz posits likewise does not support his case. For example, he suggests that, under the State's theory, a state could "circumvent" *Montgomery*'s holding that *Miller v. Alabama*'s prohibition on mandatory life-without-parole sentences for juveniles applies retroactively "by adopting a rule declining to hear claims based on new substantive rules of constitutional law." Pet. Br. at 38. But such a rule would not survive scrutiny because, as this Court has stated, "[i]f … the Constitution establishes a rule and requires that the rule have retroactive application, then a state court's refusal to give the rule retroactive effect is reviewable by this Court." *Montgomery v. Louisiana*, 577 U.S. 190, 197 (2016). In any case, that scenario is not implicated here, where Rule 32.1(g) specifically allows for review of claims based on new substantive rules of constitutional law. *See, e.g., Valencia*, 386 P.3d at 395, ¶ 15 (concluding that "*Miller*, as clarified by *Montgomery*, represents a 'clear break from the past' for purposes of Rule 32.1(g)").

Ultimately, if Cruz believed the Arizona Supreme Court misapplied *Simmons* in his direct appeal, he could have filed a petition for writ of certiorari presenting that argument. He failed to do so. The defendant in *Lynch* did, and obtained relief. Cruz also could have argued in his habeas corpus petition that the Arizona Supreme Court unreasonably applied *Simmons* under 28 U.S.C. § 2254(d)(1). He did not pursue that remedy either.

Cruz's failure to seek review of a perceived error in his case under the procedures established by the Arizona courts does not require the Arizona courts to allow him to bring a collateral claim invoking *Lynch* despite the claim's ineligibility for review under Arizona's procedural rules. In fact, states "have no obligation to provide" an avenue for collateral proceedings after direct review at all. *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Arizona thus could constitutionally do away with its Rule 32 proceedings altogether.[2] Nor does *Lynch*'s holding that Arizona "misapplied *Simmons*", Pet. App. 2a, require the Arizona courts to provide a procedural avenue for post-conviction relief based on that decision. And Arizona's proper refusal to do so under Rule 32.1(g) does not "discriminate" against federal law.

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[2] Doing so, however, would likely waive the exhaustion requirement for federal habeas corpus, at least for claims that could not be exhausted on direct appeal. *See* 28 U.S.C. § 2254(b)(1)(B)(i).

II. Cruz's reliance on federal retroactivity principles is misplaced because the state court did not reach—and was not required to reach—that issue.

A. Rule 32.1(g) requires a retroactivity analysis only if a claim is first determined to be based on a significant change in the law.

As explained above, under Arizona's procedural rules for collateral post-conviction proceedings, a claim under Rule 32.1(g) is not eligible for merits review unless it meets the threshold requirement of being based on a significant change in the law. *See Shrum*, 203 P.3d at 1180, ¶ 23 (relief sought in successive post-conviction relief proceeding "precluded under Rule 32.2(a)" where decision that was basis of claim was not a significant change in the law). Only *if* an Arizona court determines that a claim under Rule 32.1(g) is based on a significant change in the law does the court then go the next step—assessing whether a new decision that forms the basis for the claim is retroactively applicable. *See Valencia*, 386 P.3d at 394–96, ¶¶ 9–15 (assessing whether the significant change in the law created by *Miller v. Alabama*, 567 U.S. 460 (2012), applied retroactively); *Towery*, 64 P.3d at 832–35, ¶¶ 10–25 (assessing whether the significant change in the law created by *Ring*, 536 U.S. 584 (2002), applied retroactively); *Werderman*, 350 P.3d at 847, ¶ 6 (no need to address retroactivity where claim failed because it was not based on significant change in law); *Poblete*, 260 P.3d at 1105, ¶ 11 (addressing whether significant change in the law was retroactively applicable).

The threshold question below—whether Cruz's claim was based on a "significant change in the law"—is a matter of state procedural law governing whether Cruz's claim was reviewable in the first place. Because Cruz's claim failed that requirement, it was not reviewable in a successive collateral post-conviction proceeding as a matter of Arizona procedural law. *See Werderman*, 350 P.3d at 847, ¶ 6 ("[I]f *Harris* is not a significant change in the law, Werderman is not entitled to relief and it is not necessary to evaluate, pursuant to *Teague* or *Allen*, whether *Harris* should apply retroactively.").

B. Arizona is not required to permit Cruz to present his claim of a *Simmons* violation in a successive collateral proceeding.

Cruz nevertheless asserts the right to merits review, in an untimely successive collateral post-conviction proceeding initiated more than 8 years after his case became final, of his claim that is based on a "settled federal rule" that existed at the time of his trial. Pet. Br. at 24. If Cruz is correct, then there are effectively *no* limits on a criminal defendant's ability to continue to bring claims to state courts, and finality of state judgments would cease to exist. But as this Court has acknowledged, a state may place "limit[s] on the issues that it will entertain in collateral proceedings." *Yates v. Aiken*, 484 U.S. 211, 218 (1988). While Arizona certainly must (and does) give effect to this Court's decisions applying settled rules of federal law when a defendant raises such a claim in a procedurally appropriate manner, the state is also entitled to funnel such claims to direct appeal and initial timely-filed post-conviction

proceedings, and to consider such claims waived if not presented at the appropriate time.

Cruz also reveals his fundamental misunderstanding of Rule 32's operation (and of his own claim in this case) when he asserts that, because Rule 32.1(a) opens Arizona's post-conviction proceedings "to federal constitutional claims," this case does not present the question whether states have an obligation to provide a post-conviction forum for federal claims. Pet. Br. at 27. Cruz fails to acknowledge that Arizona places strict procedural limits on the circumstances under which its courts may entertain claims of constitutional violations under Rule 32.1(a). First, Arizona courts will only entertain constitutional claims under Rule 32.1(a) in a timely *initial* post-conviction relief proceeding. Ariz. R. Crim. P. 32.4(a) ("Any notice not timely filed may only raise claims pursuant to Rule 32.1(d), (e), (f), (g) or (h).") (2017). The proceeding below was not Cruz's initial, timely post-conviction proceeding, but a successive, untimely one. Moreover, a constitutional claim under Rule 32.1(a) is procedurally precluded by operation of Rule 32.2(a) if it either "was or could have been raised on direct appeal or in a previous PCR proceeding." *Shrum*, 203 P.3d at 1178, ¶ 12. In sum, Arizona opens collateral proceedings to claims asserting a constitutional violation only *if* a petitioner presents it in an initial, timely post-conviction proceeding and *if* it could not have been presented on direct appeal or

in a previous collateral proceeding. Cruz fails both conditions here.[3]

The rule Cruz advances would defeat the states' ability to impose any limits on the timing or types of claims defendants can bring and that state courts must entertain on collateral review. If Cruz's failure to seek appropriate review of his claim now entitles him to bring it in a manner not authorized by Arizona's rules, then a state could never require defendants to comply with its procedural rules for orderly presentation of claims.

Cruz's reliance on *Yates*, *Danforth v. Minnesota*, 552 U.S. 264 (2008), and *Montgomery* ignores the critical distinction between the issue decided below—whether Cruz's claim was reviewable on its merits in an untimely state collateral proceeding—and what law a state court must apply when adjudicating a claim on its merits. The principle Cruz employs—that state courts must apply settled rules of law on collateral review—holds true only "*[i]f* a state collateral proceeding is open to a claim controlled by

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[3] Though Cruz ignores these important state law procedural limitations, he is surely aware of them, given that he brought the claim below under Rule 32.1(g) rather than (a). Had he proceeded under Rule 32.1(a), his claim would have been precluded because: 1) he presented the claim in a successive, rather than initial, post-conviction proceeding, Ariz. R. Crim. P. 32.4(a); and 2) he could have presented the claim that *Simmons* entitled him to a jury instruction on parole unavailability in his direct appeal, Ariz. R. Crim. P. 32.2(a)(3). But because the proceeding was not open to such a claim, Cruz was required to meet Rule 32.1(g)'s requirements for relief. He could not do so, and the decision below rests on independent and adequate state law grounds.

federal law" in the first place. *See Montgomery v. Louisiana*, 577 U.S. 190, 204–05 (2016).

Unlike Arizona's Rule 32, the state court in *Yates* did not "place[] any limit on the issues that it [would] entertain in collateral proceedings." 484 U.S. at 218. Given the lack of any such limit, and the fact that the state court "considered the merits of the federal claim," this Court held that the state court erred by failing to grant relief based on a new decision that applied a prior case decided before the petitioner's trial. *Id.* at 217–18.

As outlined above, however, Arizona *has* placed limits on the issues that it will entertain in collateral proceedings and, because Cruz's claim fell outside those limits, the state court did not consider the merits of the federal claim. *Yates* does not require state courts to provide a post-conviction forum for a federal claim to be heard. *See also Young*, 337 U.S. at 238 (State "may choose the procedure it deems appropriate for the vindication of federal rights," and this Court does "not review decisions which rest upon adequate non-federal grounds"). Arizona has chosen direct appeal as "the procedure it deems appropriate" to allow defendants to vindicate claims that the trial court improperly denied a *Simmons* instruction. And in the untimely successive collateral proceeding below, the court could entertain Cruz's claim only if it was based on a "significant change in the law." Since it was not, the Arizona Supreme Court did not consider the merits of Cruz's *Lynch*/*Simmons* claim, and federal retroactivity principles were not applicable. Cruz is therefore incorrect that Rule 32.1(g) "defeat[s]" federal retroactivity by failing to

provide for relief when a claim is based on a settled rule of law.

The decision below is likewise in harmony with *Danforth* and *Montgomery*. In *Danforth*, the state court applied federal principles to assess whether *Crawford v. Washington*, 541 U.S. 36 (2004), was retroactively applicable to the petitioner's case. *Danforth*, 552 U.S. at 268. In concluding that states are free to allow more *lenient* retroactive application than mandated by *Teague*, this Court stated that "Federal law simply 'sets certain minimum requirements that States must meet but may exceed in providing appropriate relief.'" *Id.* at 288 (quoting *American Trucking Assn. v. Smith*, 496 U.S. 167, 178–79 (1990)). But that acknowledgment of one state's largesse does not impede another state's ability to limit post-conviction collateral review, much less implicate retroactive application of existing federal law. And here, there is no retroactivity analysis for this Court to review.

Cruz similarly seeks refuge in this Court's statement in *Montgomery*, 577 U.S. at 205, that "[w]here state collateral review proceedings permit prisoners to challenge the lawfulness of their confinement, States cannot refuse to give retroactive effect to a substantive constitutional right that determines the outcome of that challenge." Pet. Br. at 26. Setting aside the fact that neither *Simmons* nor *Lynch* created a substantive constitutional right, Cruz ignores this Court's important qualification that "[i]n adjudicating claims under its collateral review procedures a State may not deny a controlling right asserted under the Constitution, *assuming the claim*

is properly presented in the case." *Montgomery*, 577 U.S. at 205 (emphasis added). Cruz's claim was not "properly presented" in his untimely successive post-conviction proceeding because it did not rely on a significant change in the law. Notably, when Arizona prisoners brought Rule 32.1(g) claims under *Miller* and *Montgomery*, the Arizona Supreme Court held that they were entitled to merits review since *Miller* constituted a significant change in the law that was retroactively applicable. *Valencia*, 386 P.3d at 396, ¶ 18.

Arizona provides a forum for defendants to present claims based on settled rules—direct appeal or an initial post-conviction proceeding. If a defendant fails to present such a claim in that setting, it is precluded in a subsequent collateral proceeding. Claims that are retroactively applicable as new rules of substantive criminal law (and potentially other state law claims, such as a claim based on a significant statutory change that is retroactively applicable)[4] are eligible for relief under Rule 32.1(g).

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[4] *See State v. Jensen*, 970 P.2d 937, 939 (Ariz. App. 1989) (finding that claim based on statutory change constituted significant change in the law under Rule 32.1(g), but denying relief after concluding legislature did not intend amendment to apply retroactively).

CONCLUSION

For the reasons above, this Court should affirm the decision of the Arizona Supreme Court.

Respectfully submitted,

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