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 JONATHAN F. MITCHELL AND ADAM K. MORTARA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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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.

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INTEREST OF AMICUS CURIAE[1]

Amici curiae between them have over forty years of experience with this Court's habeas corpus jurisprudence. Jonathan F. Mitchell has taught federal habeas corpus as a professor and visiting professor at several law schools and is the former Solicitor General of the State of Texas. Mr. Mitchell recently served as a court-appointed *amicus curiae* in the Fifth Circuit. *In re Hall*, 979 F.3d 339 (5th Cir. 2020).

1. All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

Adam K. Mortara is a Lecturer in Law at the University of Chicago Law School, where he has taught federal courts, federal habeas corpus, and criminal procedure since 2007. Mr. Mortara has also served as a court-appointed *amicus curiae* in federal criminal law and habeas cases, including before this Court in *Terry* v. *United States*, 141 S. Ct. 1858 (2021), and *Beckles* v. *United States*, 137 S. Ct. 886 (2017), and before the Eleventh Circuit in *Wilson* v. *Warden*, 834 F.3d 1227 (11th Cir. 2016) (en banc), and *Bryant* v. *Warden, FCC Coleman-Medium*, 738 F.3d 1253 (11th Cir. 2013).

INTRODUCTION AND SUMMARY OF ARGUMENT

John Cruz shot and murdered a police officer at close range. *See State* v. *Cruz*, 181 P.3d 196, 203 (Ariz. 2008). The murder victim, Patrick Hardesty, had been investigating Cruz as a suspect in a hit-and-run accident. When Hardesty and a fellow officer asked Cruz for identification, Cruz fled on foot. *Id.* Hardesty pursued, and Cruz shot him five times—twice into his abdomen below his protective vest, twice into the protective vest, and once into his left eye, killing him almost instantly. *Id.* Cruz was convicted of first-degree murder and the jury found him worthy of society's ultimate penalty. The Supreme Court of Arizona affirmed his conviction and death sentence, and the judgment became final when this Court denied his petition for certiorari. *See Cruz*, 181 P.3d 196, *cert. denied*, 555 U.S. 1104 (2009).

On direct appeal Cruz argued (unsuccessfully) that his sentence violated *Simmons* v. *South Carolina*, 512 U.S.

154 (1994),[2] which requires courts to inform sentencing juries of a defendant's parole ineligibility when "the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future." *Id.* at 177 (O'Connor, J., concurring in judgment). *Simmons* announced a new procedural due-process rule,[3] and the Court has since applied that rule in *Ramdass* v. *Angelone*, 530 U.S. 156 (2000), again in *Shafer* v. *South Carolina*, 532 U.S. 36 (2001), again in *Kelly* v. *South Carolina*, 534 U.S. 246 (2002), and most recently in *Lynch* v. *Arizona*, 578 U.S. 613 (2016) (per curiam). *Lynch* summarily reversed a death sentence after observing that Arizona law prohibits parole for felonies committed on or after January 1, 1994, which triggers the need for a *Simmons* instruction when the prosecution puts a capital defendant's future dangerousness at issue. *See id.* at 615. As

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2. Arizona denies that Cruz ever presented a "*Simmons* claim" at trial or on direct appeal because Cruz sought to trigger the need for a *Simmons* instruction by asking the trial court to declare him ineligible for parole or release before the trial began. *See* Resp. Br. 4–7. This is a cramped and erroneous understanding of what a "claim" is. *Cf. United States* v. *Brannigan*, 249 F.3d 584, 589 (7th Cir. 2001) (Easterbrook, J.) (discussing relitigation bar of § 2244(b)(1) and holding "[i]t is better to conclude that all variations of *Apprendi*-based challenges to a single sentence are a single 'claim.'"). Cruz presented a *Simmons* "claim" when he demanded a pre-trial declaration regarding his eligibility for parole or release, and this claim was adjudicated on the merits and rejected by the trial court and the state supreme court on direct review. Maybe Cruz presented it in a clumsy or unconventional fashion. But that does not mean he never presented a "*Simmons* claim" at trial or on direct appeal.

3. *See O'Dell* v. *Netherland*, 521 U.S. 151, 156–68 (1997).

Cruz concedes, each of these post-*Simmons* cases involved applications of the old rule that this Court had previously announced in *Simmons*. *See* Pet. 2.

Cruz's sentence has been final for more than 13 years. And he cannot possibly obtain federal habeas relief under 28 U.S.C. § 2254(d), as his *Simmons* claim was previously adjudicated on the merits in state court. *See Harrington* v. *Richter*, 562 U.S. 86, 103 (2011) (prohibiting federal habeas relief on previously adjudicated claims unless there is no "possibility for fairminded disagreement" over a petitioner's eligibility for relief). So Cruz has come to this Court on certiorari from a state post-conviction proceeding, in the hopes of evading the strictures of AEDPA and obtaining a finality-busting do-over.

Even if this Court concludes that it has jurisdiction under 28 U.S.C. § 1257, it should decline to consider Cruz's request for collateral review—and it should announce that the Court will no longer consider or grant certiorari to review claims arising from state post-conviction proceedings (subject to a narrow exception discussed below). The Court's indulgence of these claims is allowing state prisoners to escape the limits that Congress has imposed on the federal courts' authority to entertain collateral attacks on state convictions and sentences. And state prisoners have been exploiting this loophole with increasing frequency, as they seek and obtain review directly from this Court at the conclusion of their state postconviction proceedings, while bypassing the lower federal courts whose authority is constrained by AEDPA. This Court has decided more than 15 cases in that posture since the 2015 Term, a notable shift from its ordinary practice of

deciding one (or none) each term since AEDPA's passage. *See* Z. Payvand Ahdout, *Direct Collateral Review*, 121 Colum. L. Rev. 159, 164, 179 (2021) (discussing uptick); *see also Kyles* v. *Witley*, 498 U.S. 931, 932 (1990) (Stevens, J., concurring in denial of stay) ("[T]he Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims."); *Lawrence* v. *Florida*, 549 U.S. 327, 335 (2007) (describing the likelihood of certiorari review from state postconviction review as "quite small").

When a prisoner seeks collateral review under 28 U.S.C. § 1257 of a claim previously adjudicated on direct appeal, this Court should deny certiorari unless the petitioner's claim could overcome the barriers to federal habeas relief imposed by 28 U.S.C. § 2254(d). This Court has used AEDPA to cabin its own discretion with respect to post-conviction review before, even in situations where the terms of AEDPA do not apply. In *Felker* v. *Turpin*, 518 U.S. 651 (1996), for example, the Court held that the strictures imposed by AEDPA should inform the Court's willingness to issue so-called "original"[4] writs of habeas corpus, even as the Court refused to hold that AEDPA actually governs this Court's consideration of original writs. *See id.* at 663 ("Whether or not we are bound by these restrictions, they certainly inform our consideration of original habeas petitions.")

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4. We describe these as "so-called 'original' writs" because this Court has held (paradoxically) that its "original" writ practice is actually an exercise of Article III *appellate* jurisdiction, a mixed use of terms that both confuses law students and avoids the need for this Court to overrule *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). *See Ex parte Bollman*, 8 U.S. 75 (1807).

The concerns for preserving finality that animate this Court's habeas jurisprudence and AEDPA are no less significant on the days that this Court receives a certiorari petition on state collateral review than they are on the days that a prisoner files a habeas petition in federal district court. Why should the former be allowed to evade these finality-promoting doctrines but not the latter? Certainly not because a murderer and his law-professor *amici* hope to undermine the principle of finality by having this Court review their AEDPA-barred claims on certiorari from state post-conviction proceedings rather than submitting those claims to a federal habeas court.

The Court should resolve this case by explaining that petitions in this posture are disfavored and dismissing the writ as improvidently granted. Cruz pressed his *Simmons* claim on direct appeal and a federal habeas court has already rejected any possible *Simmons* claim.[5] Cruz can file a meritless certiorari petition from the denial of federal habeas and it can in turn get denied in the ordinary course. Section 1257 should not be an HOV lane for Cruz and other murderers to evade finality doctrines. This case is an excellent vehicle to stem the tide of these AEDPA-circumventing section 1257 petitions.

If the Court decides to reach the question presented, it should hold that there is no jurisdiction to order Arizona to reverse course on the state-law question decided below. Any attempt to overcome that procedural ruling and obtain further review on the merits must come as a federal habeas petition.

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5. *See Cruz* v. *Shinn*, 2021 WL 1222168 (D. Ariz. March 31, 2021).

ARGUMENT

I. THIS COURT SHOULD NOT PERMIT 28 U.S.C. § 1257 TO BE USED TO CIRCUMVENT AEDPA

There is a prescribed order for considering federal constitutional claims by convicted state prisoners: they exhaust their claims in state court and then present them in a federal habeas petition. *See* 28 U.S.C. § 2254(b); *Kyles*, 498 U.S. at 932 (Stevens, J., concurring in denial of stay); *Lawrence*, 549 U.S. at 335. We already know how that would have worked out for Cruz. He raised *Simmons* on direct appeal, unsuccessfully. *See Cruz*, 181 P.3d at 207, *cert. denied*, 555 U.S. 1104. And he has already filed a federal habeas petition. *See Cruz* v. *Ryan*, 2018 WL 1524026 (D. Ariz. Mar. 28, 2018). What is his *Simmons* claim even doing here? It is barred by res judicata unless the "exception" to finality created by federal habeas corpus can be met.

Presciently anticipating the weakness of his *Simmons* claim, Cruz does not even present it in his pending federal habeas petition. Worse still, the federal habeas court ruled that it would have rejected Cruz's *Simmons* argument if he had raised it there. *See Cruz*, 2018 WL 1524026, at *49 (citing *Lynch*, 555 U.S. at 615-16) ("Petitioner did not raise this due process argument in his federal habeas petition, but even if he had, this case is distinguishable from *Simmons*; Petitioner's future dangerousness was never put at issue by the State, and Petitioner never requested to inform the jury, through instructions or argument, that, under state law, he was ineligible for parole." (footnote omitted)).

Cruz comes to this Court now in a different posture, one that is disfavored yet increasingly deployed to seek finality-busting error-correction without the deference to state courts that AEDPA demands. All while Cruz's federal habeas appeal is stayed pending this case. *See* Stay Order, *Cruz* v. *Credio*, No. 21-99005 (9th Cir. Nov. 9, 2021). This is all to the good, Cruz says, because "[t]his Court in recent years has not hesitated to review the habeas decisions of state high courts rather than awaiting those cases on federal habeas. The Court has granted certiorari in more than a dozen cases in this posture over the past five Terms. . . ." Pet. 28. That's the sound of a prisoner who knows he cannot satisfy AEDPA. *Compare, e.g.*, *Dunn* v. *Madison*, 138 S. Ct. 9, 12 (2017) (per curiam) (Ginsburg, J., concurring) (noting "restraints imposed by [AEDPA] . . . preclude consideration of the question"), *with Madison* v. *Alabama*, 139 S. Ct. 718 (2019) (considering same Eighth Amendment question *de novo* in appeal in state habeas posture and vacating state-court decision on the merits). Cruz even says that continued federal habeas proceedings are no substitute for the state-court error correction he seeks here. Pet. Br. 47–51. Whither finality and deference?[6]

Cruz is right about one thing. This Court in recent years has reviewed more cases in this unusual posture than it did in the more than two decades after AEDPA's

6. Cruz even wears his earlier pressing of *Simmons* on direct review as a badge of honor. Pet. Br. 12. What says finality more than revisiting decisions that became final in 2009?

passage.[7] But this is a bug not a feature. It represents this Court's doing on review under § 1257 what a federal district court could not under § 2254—and it needs to stop. Now is the time to return to the Court's conventional practice of denying certiorari petitions from state post-conviction review. This Court should hold that § 2254(d) will inform this Court's certiorari jurisdiction under § 1257, just as it informs this Court's "original" writ practice. This means certiorari will be denied from state post-conviction review unless the petitioner can surmount the statutory barriers that would be imposed if he had sought habeas relief from a federal district court.[8] *See, e.g.*,

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7. Z. Payvand Ahdout, *Direct Collateral Review*, 121 Colum. L. Rev. 159, 164 (2021) ("In its 2015 Term, the Supreme Court decided five cases originating on state collateral review—matching the prior five Terms combined—and in its 2016 Term, the Court continued this practice, deciding four cases in this posture. In the 2018 Term, the Court decided three cases in this posture, and its shadow docket reflects this change. In 2019, the Court heard two direct-collateral-review cases on its plenary docket, resolved another in summary fashion, and granted one for its 2020 term.").

8. Most ineffective-assistance claims would be treated differently, as these are often raised for the first time in post-conviction proceedings. For those ineffective-assistance claims, state post-conviction review should be regarded as "direct review" as that term is understood in habeas parlance, because it marks the first time those claims are adjudicated on the merits. At some point this Court should say so, in part because it would explain why it could announce a new rule of criminal procedure on collateral review in *Padilla* v. *Kentucky*, 559 U.S. 356, 374 (2010) (creating new rule that "counsel must inform her client whether his plea carries a risk of deportation."), without any member of the Court—including Justice Scalia in dissent—acknowledging or complaining that this violated *Teague* because the conviction had long become final). *See id.* at 388–92 (Scalia, J., dissenting) (not even citing

Wearry v. *Cain*, 577 U.S. 385, 402–03 (2016) (Alito, J., dissenting) (noting that "we have previously told litigants that petitions like the one here, challenging a state court's denial of postconviction relief, are particularly unlikely to be granted" and concluding that "[b]y intervening now before AEDPA comes into play, the Court avoids the application of that standard and is able to exercise plenary review"); *see also, e.g.*, *Foster* v. *Chatman*, 578 U.S. 488, 518–21 (2016) (Alito, J., concurring in judgment) (cautioning that the Court might not have had jurisdiction over petitioner's state habeas claim).

If anything, the State's interests are all the more heightened in this posture. Plenary review by the Supreme Court of the United States—indeed, plenary review that would first entail discussion of the adequacy of the State's own procedural bar—is comity-frustrating, to say the least.[9] Indeed, Cruz's primary argument is that

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Teague or criticizing the Court for its blatant violation of *Teague*). It would also explain how *Chaidez* v. *United States*, 568 U.S. 342, 358 (2013), could hold that *Padilla* created a "new rule" that was not retroactive—without any member of the Court (including Justice Sotomayor in dissent) observing that *Padilla* could not have announced a new rule because it arose on state post-conviction review. *See id.* at 359–70 (Sotomayor, J., dissenting) (failing to observe that *Padilla* was decided after the conviction had become final on direct review and therefore should not have created a new rule, absent the not-yet-articulated but silently observed exception to *Teague* for "first time review" of ineffective-assistance claims in state post-conviction proceedings).

9. Notably, this Court's decisions about the adequacy of state habeas procedural bars have ordinarily come in cases on federal habeas review, not in the state habeas posture presented here. *See, e.g.*, *Walker* v. *Martin*, 562 U.S. 307, 310-11 (2011); *Beard* v.

the State's procedural bars must yield to federal-court review whenever the state court arguably got a question wrong all the way back on direct review however many years ago. Pet. Br. 18–20.

In sum, there is no good reason to apply different rules to appeals in this § 1257 posture from those this Court would have to apply if Cruz's case came as a federal habeas petition. That federal habeas petition would fail, and in all events Cruz chose to omit his *Simmons* claim from his federal petition. *See State* v. *Cruz*, 487 P.3d 991, 992, 995-96 (Ariz. 2021). Even if Cruz had preserved that claim, the state court's adjudication on the merits during the direct appeal was not contrary to or an unreasonable application of this Court's clearly established precedents. *See Cruz*, 2018 WL 1524026, at *49.

The same result should follow in this state habeas posture. The Court does not have jurisdiction to revisit the State's application of its own procedural bar. But even if it did, the most basic principles of comity, federalism, and finality counsel in favor of denying certiorari review. The writ should be dismissed as improvidently granted.

II. THE ARIZONA SUPREME COURT'S REJECTION OF CRUZ'S SUCCESSIVE STATE HABEAS PETITION ON PROCEDURAL GROUNDS IS AN ADEQUATE AND INDEPENDENT STATE-LAW GROUND PRECLUDING THIS COURT'S REVIEW

Arizona allows convicts to seek post-conviction relief in state court on the ground that their sentence was

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Kindler, 558 U.S. 53, 55 (2009); *Coleman* v. *Thompson*, 501 U.S. 722, 726 (1991).

imposed "in violation of the United States or Arizona constitutions." Ariz. R. Crim. P. 32.1(a). But a defendant is forbidden to raise claims that were already "finally adjudicated on the merits in an appeal or in any previous post-conviction proceeding," or otherwise "waived at trial or on appeal, or in any previous post-conviction proceeding." Ariz. R. Crim. P. 32.2(a). There are a handful of exceptions to this procedural bar,[10] including one at issue here: if the defendant can show that "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence," the defendant can raise anew an already-decided claim. Ariz. R. Crim. P. 32.1(g).

Applied here, this Court announced a new procedural Due Process rule in *Simmons*—long before Cruz's sentence became final. *Simmons* was the law at the time of his sentencing and Cruz raised *Simmons* in his direct appeal. The Arizona Supreme Court rejected the *Simmons* claim, among many others. And then this Court denied certiorari. *See Cruz*, 181 P.3d at 207, *cert. denied*, 555 U.S. 1104 (2009). Under Arizona's rules, Cruz could not reraise his *Simmons* claim again, absent some exception to the procedural bar.

Cruz seemingly understood. After this Court denied certiorari on direct appeal, he petitioned for state post-conviction relief raising unrelated Sixth Amendment claims. *See Arizona* v. *Cruz*, 2012 WL 9187546 (Sup. Ct. Ariz. Oct. 31, 2012). And he also filed a federal habeas petition raising 27 different claims—but not the *Simmons*

10. *See* Ariz. R. Crim. P. 32.2(b).

one, which was unequivocally barred by 28 U.S.C. § 2254(d). *See Cruz*, 2018 WL 1524026, at *49.

While that federal habeas petition was pending, this Court summarily reversed an Arizona death sentence after concluding that the state judiciary had violated *Simmons* by denying a parole-ineligibility instruction. *See Lynch*, 578 U.S. 613. In response to *Lynch*, Cruz tried raising his *Simmons* claim again in state-postconviction court. Indicating his full awareness of the procedural obstacles, he argued that *Lynch* marked a "significant change in the law" within the meaning of Arizona's Rule 32.1(g), in an effort to surmount the bar that prevents him from asserting an already-litigated *Simmons* claim in a successive state habeas petition. *See* Ariz. R. Crim. P. 32.1(g).

The state post-conviction court concluded, as a matter of state law, "that *Lynch II* did not represent a significant change in the law permitting relief" and, even if it did, "it did not apply retroactively nor would it have probably changed Cruz's sentence." *State* v. *Cruz*, 487 P.3d 991, 992 (Ariz. 2021).

The Arizona Supreme Court affirmed. *Id.* at 995–96. The court explained that its earlier rejection of Cruz's *Simmons* claim was final unless there had been some "significant change in law," "requir[ing] some transformative event, a clear break from the past." *Id.* at 994 (quotation marks omitted). The court identified the "archetype of such a change" as "when an appellate court overrules previously binding case law." *Id.* (quotation marks omitted). The court identified both *Ring* v. *Arizona*, 536 U.S. 584 (2002), and *Miller* v. *Alabama*, 567 U.S. 460 (2012), as

clarified by *Montgomery* v. *Louisiana*, 577 U.S. 190 (2016), as examples of such changes. *See id. Ring* announced a new Sixth Amendment procedural rule, requiring juries rather than judges to determine the existence of aggravating factors that render defendants eligible for capital punishment, and overruling an earlier Supreme Court precedent that had allowed judges to make those determinations. *See Ring*, 536 U.S. at 589 (overruling *Walton* v. *Arizona*, 497 U.S. 639 (1990)). *Miller* invented a new substantive Eighth Amendment rule, prohibiting certain mandatory punishments for juvenile murderers. By comparison, *Lynch*'s summary reversal "did not declare any change in the law representing a clear break from the past," as the ground rules were already "dictated by" *Simmons*—it was ordinary error correction. *Cruz*, 487 P.3d at 995. In *Lynch*, "no Supreme Court precedent was overruled or modified"; *Lynch* at most decided that there had been a "misapplication" of existing law (*Simmons*) "by the Arizona courts." *Id.* at 994–95. But under Arizona law, a Supreme Court ruling that corrects a "misapplication" of a clearly established precedent does not qualify as "a significant change in the law." *Id.* at 995. Concluding Cruz had procedurally defaulted, the court declined to reach the merits of his claim.

The question presented here is whether this Court even has jurisdiction to consider Cruz's claim under the adequate-and-independent-state-grounds doctrine.[11] The

11. It is worth asking whether, having limited the question presented to this jurisdictional issue, the Court has inadvertently laid the groundwork for an unconstitutional advisory opinion. If this

answer is no. The state courts rejected Cruz's successive *Simmons* claim on state-law grounds. This Court's jurisdiction over that state-court judgment, 28 U.S.C. § 1257(a), does not reach such questions of state law. "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment," "whether the state law ground is substantive or procedural." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). Applied here, the Arizona Supreme Court has the last word. Its application of the Arizona procedural rule is an "adequate and independent" basis for affirming the judgment below, so opining on the underlying federal constitutional question would be merely advisory. *See id.* at 729.

Cruz and his friends disagree. They insist that the Supremacy Clause requires Arizona postconviction courts to overlook their own procedural bars. Failing that, they assert that the Arizona procedural bar at issue here is pretextual—that is, it is not sufficiently "adequate" or "independent" to foreclose this Court's review on the merits. Neither argument has merit.

Court can do nothing further after determining that it has jurisdiction over Cruz's claim, then how can that possibly alter or rule upon the state-court judgment? And what instructions from this Court would have to be obeyed on remand? A ruling from this Court on the adequacy of Arizona's procedural bar for § 1257 purposes does not and cannot change the state-law ruling below. Perhaps this is why Cruz ignores the limitation of the question presented and recasts all of his merits arguments underneath it.

A. "Toward A More Muscular Version Of The Supremacy Clause"

To overcome his procedural default, Cruz now makes a remarkable argument: that *the Supremacy Clause* requires state habeas courts to ignore their own procedural rules. Pet. Br. 18–21. According to Cruz and his friends, a state post-conviction court is constitutionally compelled to revisit his *Simmons* claim—even when the claim was previously rejected on the merits in his direct appeal. There is no room for finality in Cruz's view. The word appears only at the tail end of his brief on one page. Pet. Br. 50 (and we dare any reader to understand how Cruz's version of "finality" is not just the idea that old errors should always be corrected at any time into the future with unlimited do-overs—the Seventies are back!). As Cruz sees it, "courts are obligated to correctly apply the law as it stood when the case was on direct review." Pet. Br. 21.[12] And he means *all* courts—even state habeas courts that ordinarily would not revisit such claims. Pet. 13 ("The Supremacy Clause requires state courts, no less than federal courts,

12. The certiorari-stage *amicus* brief of the habeas scholars is likewise devoid of reasoning on this point. In the same breath, *amici* acknowledge the existence of a state procedural rule while concluding that the Arizona Supreme Court has violated "the Supremacy Clause" by applying that rule. Federal Habeas Scholars *Amicus* 3. They then assert that "reversal here would restore the appropriate federal-state balance, in accord with this Court's Supremacy Clause precedents." *Id.* Restoration and revolution are not synonyms. The notion that reversal strikes the "appropriate federal-state balance" feigns complete ignorance of state procedural rules, which necessarily abound in state postconviction proceedings.

to apply settled federal rules to cases adjudicating federal claims *on collateral review*." (emphasis added)).

Cruz imagines that *Lynch* restarted the clock on his long-final sentence. If he is right, then there are no more procedural bars because this view of the Supremacy Clause would always require every state habeas court to revisit old claims already decided by state courts to make sure the earlier state courts got it right on the merits. "It's, like, the *Supremacy* Clause, man!" goes the incantation at the drum circle.

1. There is no Supremacy Clause problem here. The Clause does not require state or federal courts to consider constitutional claims *ad infinitum*, irrespective of their own finality-preserving procedural rules. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145 (1970) ("The proverbial man from Mars would surely think we must consider our system of criminal justice terribly bad if we are willing to tolerate such efforts at undoing judgments of conviction."). As even the newest student of habeas would know, Arizona (like every other State) may put in place procedural rules to keep final sentences final. And Arizona (like every other State) has the last word on the application of those state-law rules.

Indeed, what happened in the Arizona courts below is entirely ordinary in state post-conviction courts. The state supreme court rejected Cruz's *Simmons* claim on direct. When he went to raise it again, he faced insuperable state post-conviction procedural rules barring successive claims with limited exceptions found to be inapplicable here. If this sounds familiar, it is because the federal

habeas courts have their own rules to limit second-or-successive federal habeas petitions too. *See* 28 U.S.C. § 2244(b). No one contends that a federal court must overlook a federal habeas petitioner's failure to meet AEDPA's second-or-successive bar and reach the merits of the petitioner's claim because the Constitution trumps a federal statute. Likewise, no one can contend that a state court must overlook its own procedural bars and reach the merits of a petitioner's claim. *See Montgomery* v. *Louisiana*, 136 S. Ct. 718, 741 (2016) (Scalia, J., dissenting) ("The Supremacy Clause does not impose upon state courts a constitutional obligation it fails to impose upon federal courts.").

2. The only time this Court has suggested otherwise was in the unique circumstances of *Montgomery*, 136 S. Ct. 718, which are inapplicable here. *Montgomery* explained that "when a new *substantive* rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule." *Id.* at 729. For reasons that cannot be reticulated any better than in Justice Scalia's dissent, *Montgomery* was wrong on that score. *Id.* at 737–41 (Scalia, J., dissenting).

And in any event, *Montgomery*'s constitutional carveout would be inapplicable here. *Montgomery* limited itself to the rare instance in which this Court announces "a new substantive rule of constitutional law." 136 S. Ct. at 729. But the constitutional claims at issue here are not substantive. *Simmons* is indisputably a procedural Due Process rule that can never apply retroactively under this Court's retroactivity framework. *See Edwards* v. *Vannoy*,

141 S. Ct. 1547, 1560 (2021) ("The watershed exception" for new procedural rules "is moribund."). The time to raise those procedural claims was on direct appeal. Cruz had that chance. And *Lynch* does not prescribe any do-over.

B. Arizona's Adequate and Independent Bar

Cruz argues that that Arizona's procedural rule cannot bar review because it is not "'firmly established and regularly followed.'" Pet. Br. 39. Likewise, some of his friends say that the state court's application of the rule "is the *opposite* of an application of a 'firmly established and regularly followed rule." Federal Habeas Scholars *Amicus* 11. The nub of that argument is that the Arizona courts should have applied the procedural rule differently—and that it's incumbent on this Court to say so. One of us has suggested that this Court should reconsider its adherence to state-court judicial supremacy, as well as its categorical unwillingness to review and reverse a state court's interpretation of its own state's laws. *See* Jonathan F. Mitchell, *Reconsidering* Murdock*: State-Law Reversals As Constitutional Avoidance*, 77 U. Chi. L. Rev. 1335 (2010). But both of us know that the Court has not done it.

As the State has thoroughly and convincingly explained, Resp. Br. 19–28, Arizona's procedural rule is an adequate and independent state-law ground precluding this Court's further review. The procedural bar is independent of the merits of Cruz's *Simmons* claim. *Stewart* v. *Smith*, 536 U.S. 856, 860 (2002). It is "firmly established" by Arizona statute "and regularly followed," and is thus adequate. *Ford* v. *Georgia*, 498 U.S. 411, 424 (1991); *see also Dugger* v. *Adams*, 489 U.S. 401, 410 n.6 (1989)

(failing to apply the procedural rule in a few cases does not undermine the state's consistent application in the vast majority of cases). There is no doubt that Cruz had "adequate notice" of Arizona's procedural rule—indeed, he confronted it head-on in his successive state habeas petition. *See Beard* v. *Kindler*, 558 U.S. 53, 63 (2009) (Kennedy, J., concurring). The procedural rule, moreover, is hardly "novel." *Id.* at 64. It mirrors the same procedural rules that Cruz would face in federal habeas. *See* 28 U.S.C. § 2244(b)(2)(A). Nor can Cruz establish that the procedural rule has been uniquely deployed here for the purpose of hostility toward *Simmons* claims. Arizona courts on direct appeal are giving full effect to *Simmons*, as clarified in *Lynch* for purposes of Arizona's unique sentencing scheme.[13] The rules are different here because Cruz's sentence is final. The procedural rule has been deployed here and everywhere else for finality, not hostility.

At bottom, Cruz's problem is that he doesn't like the way the rule has been applied to him. His remedy it to take it up with the Arizona courts. Otherwise, every procedural bar becomes subject to the "too-rigorous or demanding insistence" by this Court that a State's "procedural requirements be established in all of their detail before they can be given effect," thereby "depriv[ing] the States of the case law decisional dynamic that the Judiciary of the United States finds necessary and appropriate for the elaboration of its own procedural rules." *Beard*,

13. *See, e.g.*, *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).

558 U.S. at 65 (Kennedy, J., concurring) (citing *Smith* v. *United States*, 94 U.S. 97 (1876)).

Is this Court, under the auspices of its § 1257 jurisdiction, to decide whether *Lynch* is a sufficiently "significant" change for purposes of Arizona's own statutory procedural bar, even though it would not be "significant" enough to apply retroactively in federal habeas? *See, e.g.*, *Teague* v. *Lane*, 489 U.S. 288, 301 (1989) (requiring new rules to "break[] new ground or impos[e] a new obligation"); *Edwards*, 141 S. Ct. at 1560 (rejecting that procedural rules can apply retroactively to federal habeas petitions). And even if this Court could do that, is it next supposed to decide whether it "would probably overturn the defendant's judgment or sentence"? Ariz. R. Crim. P. 32.1(g). Of course not. Arizona has the last word.

And ultimately, even Cruz concedes that *Lynch* is not a new rule. *Lynch* "merely applies a 'settled' rule of federal law." Pet. 2; *see also* Pet. Br. 18–20. If *Lynch* is just an application of *Simmons*'s old rule, then the time to raise the *Simmons* issue was on direct appeal, as he did. If—contrary to Cruz's own arguments—*Lynch* is a new procedural rule, then Cruz has no right to have a federal court declare that it applies to him. An Arizona court could decide whether it is "significant" enough and whether it "would probably overturn the defendant's judgment or sentence." Ariz. R. Crim. P. 32.1(g). That again is a question of Arizona law, and a matter of grace under Arizona law. *See, e.g.*, *Walker* v. *Martin*, 562 U.S. 307, 311 (2011) (even discretionary procedural rules are adequate and independent). But in this Court *Teague* would unequivocally

bar the application of any such new rule to Cruz. *See Edwards*, 141 S. Ct. at 1560.

CONCLUSION

The petition should be dismissed as improvidently granted.

Respectfully submitted.

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