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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The decision below manipulated a state procedural rule to avoid giving effect to a federal right—a right that Arizona has tried to evade for decades. It did so even after this Court summarily rejected the same error in *Lynch* v. *Arizona*, 578 U.S. 613 (2016) (per curiam). The State's efforts to defend the decision below flounder.

First, the State claims that Rule 32.1(g) is an adequate-and-independent procedural rule. As interpreted below, however, Rule 32.1(g) plainly discriminates against federal law. Had the Arizona Supreme Court self-corrected its years-long refusal to apply *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), its decision overruling Arizona Supreme Court precedent would easily qualify as a "significant change in the

law." But because this Court overruled Arizona Supreme Court precedent, its decision in *Lynch* does not qualify. That is clear discrimination. Equally troubling, the decision below creates a Catch-22 that makes it impossible to obtain the benefit of the law that should have applied from the outset. Under the perverse logic of the decision below, the very reason why Cruz is entitled to the benefit of *Simmons* under federal law—that the decision was well-established at the time of his sentencing—is the reason he is *not* entitled to the benefit of *Simmons* under state law. The result is the outright nullification of a federal right in Arizona. And the evidence of discrimination here is particularly powerful given Arizona's decades-long hostility to *Simmons*.

Second, the State lacks a coherent response to Cruz's novelty argument. The State does not defend the Arizona Supreme Court's distinction between "a significant change in the law" and a "significant change in the *application* of the law," nor does the State cite any prior Arizona decision drawing that distinction. The State instead offers an altogether new interpretation of Rule 32.1(g) that squarely conflicts with longstanding Arizona precedent. The Court could resolve this case on this ground alone without addressing discrimination.

Third, the State argues that the decision below does not turn on an antecedent question of federal law. But, in interpreting Rule 32.1(g), the Arizona Supreme Court addressed *this Court's* precedent and the extent to which that precedent affected *federal law* in Arizona. The State does not attempt to dispute that the decision below was influenced by federal law.

Fourth, because the State cannot win on the merits, it argues that Cruz forfeited his *Simmons* claim and invokes policy arguments. But the State's forfeiture argument is so obviously wrong that even the State's sole *amici* reject it. *See* Mitchell & Mortara Amicus Br. 3 n.2. Cruz repeatedly pressed his *Simmons* claim on direct review, and the Arizona Supreme Court rejected it on the merits. The State's policy arguments fare no better. Nothing about ruling in Cruz's favor would prevent states from placing neutral limits on their postconviction forums—it would simply prevent states from limiting those forums in a manner that discriminates against federal law. Likely for that reason, not a single other state supports Arizona's position.

The State's argument boils down to the astonishing assertion that it may reinterpret its procedural rules to nullify a federal right in Arizona. This Court should vacate the decision below and remand to require the Arizona Supreme Court to apply federal law.

ARGUMENT

I. AS INTERPRETED BELOW, RULE 32.1(g) VIOLATES AND DISCRIMINATES AGAINST FEDERAL LAW.

The State does not dispute that *Lynch* applied the "settled" rule of *Simmons*. Nor does the State dispute that, under federal law, such settled rules apply "both on direct and collateral review." *Whorton* v. *Bockting*, 549 U.S. 406, 416 (2007). The State thus appears to concede (at 34) that, had the Arizona Supreme Court reached the merits of Cruz's claim, the Supremacy Clause would require the application of *Lynch*. This Court's precedent makes that conclusion

indisputable. *See Yates* v. *Aiken*, 484 U.S. 211, 216 n.3 (1988) (state courts on collateral review cannot invoke state law to refuse to give effect to intervening decisions applying "settled precedents" in a new factual context (quotation marks omitted)); *Montgomery* v. *Louisiana*, 577 U.S. 190, 204-205 (2016); *Danforth* v. *Minnesota*, 552 U.S. 264, 288 (2008).

The State's argument instead rests on the theory (at 2) that federal law is "irrelevant" because Rule 32.1(g) supplied a "threshold" ground for denying relief. But this Court has "repeated[ly]" recognized that state procedural rules are not adequate if they "operate to discriminate against claims of federal rights." *Walker* v. *Martin*, 562 U.S. 307, 321 (2011). The interpretation of Rule 32.1(g) adopted below discriminates against federal rights in numerous respects—several of which the State hardly attempts to dispute.

A. The Decision Below Discriminates Against This Court's Decisions.

The interpretation of Rule 32.1(g) adopted below discriminates against the decisions of this Court by giving them narrower effect than identical decisions of the Arizona Supreme Court.

The Arizona Supreme Court held that *Lynch* does not qualify as a significant change in the law because this Court overruled Arizona precedent that failed to apply *Simmons*. To see the discrimination, imagine that the Arizona Supreme Court had reached the same conclusion this Court reached in *Lynch*. If so, that decision *would* qualify as a significant change in the law. *E.g.*, *State* v. *Bonnell*, 831 P.2d 434, 437-438 (Ariz. Ct. App. 1992). The discrimination is obvious and indisputable: Where the Arizona Supreme Court overrules Arizona precedent on a federal question, its

decision satisfies Rule 32.1(g), but where this Court overrules Arizona precedent on the same question, its decision does not.

The State's only response is to suggest (at 24-25) that, if the Arizona Supreme Court had reached the same conclusion this Court reached in *Lynch*, the Arizona Supreme Court's decision might not qualify as a significant change in the law. That suggestion is untenable. The "archetype" of a significant change in the law "occurs when an appellate court overrules previously binding case law." *State* v. *Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009). The State does not cite *a single case* holding otherwise. For good reason: If Cruz loses under the old interpretation and wins under the new one, that is an obvious, significant change in the law. The decision below privileges the Arizona Supreme Court's decisions overturning state precedent while denying the same treatment when this Court does the exact same thing. That is clear discrimination.

B. The Decision Below Discriminates Against Federal Law By Creating A Catch-22.

The interpretation of Rule 32.1(g) adopted below also discriminates against federal law by placing defendants in a Catch-22 that subordinates federal law to state law.

According to the decision below, because *Lynch* applied the settled rule of *Simmons*, *Lynch* cannot be given effect on collateral review under Rule 32.1(g). But federal law provides the reverse: Decisions like *Lynch* that apply settled rules *must* be given effect on collateral review. Thus, as interpreted below, the fact that a defendant would prevail as a matter of federal law is the reason he must lose as a matter of state law.

The decision below did not attempt to hide the trap: The court quoted Cruz's argument that *Lynch* "was dictated by" *Simmons*—as necessary to prevail under federal law—as grounds for ruling against Cruz under state law. Pet. App. 8a-9a.

The State argues (at 2, 28) that this Catch-22 is permissible because it was accomplished pursuant to a "state procedural rule." But the adequate-and-independent-state-law-ground doctrine applies with equal force "whether the state law ground is substantive or procedural." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991); *Lee* v. *Kemna*, 534 U.S. 362, 375 (2002) (same). This ensures that states cannot adopt procedures to "produce a result which the State could not command directly." *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *see* 16B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4023 (3d ed. Apr. 2022 update) ("states cannot ignore valid and controlling federal substantive law by resort to principles, supposedly of procedure, that would replace federal law with state law"). Arizona could not refuse to apply *Simmons* and *Lynch* as a matter of substance, and it cannot achieve the same result by recasting its decision as a matter of procedure. Indeed, the State acknowledges that if "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 not an adequate state-law ground, regardless of the substantive or procedural label. Resp. Br. 29 (quoting *Montgomery*, 577 U.S. at 197). That acknowledgment should resolve this case.

The State maintains (at 2, 31-32) that Rule 32.1(g) imposes a "threshold" requirement, such that the

decision below never addressed whether *Simmons* and *Lynch* apply on collateral review. But the Arizona Supreme Court interprets Rule 32.1(g) to permit post-conviction relief only where an intervening decision *both* qualifies as a significant change in the law *and* is retroactively applicable under *Teague*. *See State* v. *Towery*, 64 P.3d 828, 831 (Ariz. 2003). Arizona has thus adopted the *Teague* framework, but with a state law appendage that—as interpreted below—bars state courts from giving effect to an entire category of decisions that under *Teague* must be applied retroactively. In effect, Arizona has replaced federal retroactivity with a narrower state-law standard—exactly what this Court has held States may not do. *See Danforth*, 552 U.S. at 288.

C. The Decision Below Nullifies A Federal Right.

The Arizona Supreme Court's interpretation of Rule 32.1(g) deprives Cruz and other similarly situated defendants of "a reasonable opportunity" to assert their federal *Simmons* claim. *Parker* v. *Illinois*, 333 U.S. 571, 574 (1948) (quotation marks omitted). Although Cruz pressed *Simmons* at every opportunity, Arizona has never afforded Cruz the relief that *Simmons* requires—first because the Arizona Supreme Court said *Simmons* did not apply, and now because it says *Simmons* always applied.

This Court has not hesitated to reject this kind of gamesmanship that denies litigants the right to be heard. *See* Ohio Just. & Pol'y Inst. et al. Amicus Br. 14-20. When "a state court of last resort closes the door to any consideration of a claim of denial of a federal right," its decision cannot be defended as resting on "state procedure." *Young* v. *Ragen*, 337 U.S. 235,

238 (1949). Instead, defendants are "constitutionally entitled" to at least one "full and fair opportunity" to raise their constitutional claims. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 149-153 (1970). Arizona's nullification of *Simmons*—first on direct review, and now on collateral review—means Cruz has never had that opportunity.

The Arizona Supreme Court's decision offers state courts a blueprint for outright evasion of this Court's precedents. Whenever this Court announces a constitutional rule, states could refuse to apply the rule, fend off review by this Court for as long as possible, and—even after this Court issues a corrective decision—refuse on collateral review to apply federal law *as it existed at the time of a defendant's trial*. This would entirely deprive defendants of the proper application of settled federal law that should have governed from the outset.

D. The Decision Below Perpetuates Arizona's Hostility To *Simmons* And *Lynch*.

Hostility to this Court's precedents does not get much more evident than Arizona's longstanding efforts to evade *Simmons*. Ever since this Court decided *Ring* v. *Arizona*, 536 U.S. 584 (2002), Arizona has gone to great lengths to prevent capital defendants from informing jurors of their parole-ineligibility. *See* Arizona Cap. Representation Project et al. Amicus Br. 5-12.

Although Arizona abolished parole for capital defendants as of 1994, Arizona courts refused to follow *Simmons* on grounds bordering on insubordination. In Cruz's direct appeal, the Arizona Supreme Court held that *Simmons* did not apply because, even

though no state law *permitted* parole, "[n]o state law would have prohibited Cruz's release on parole." Pet. App. 31a. The Arizona Supreme Court also speculated that the law could change and render Cruz eligible for parole, *see id.*—even though that is *always* true and would, as this Court in *Lynch* recognized, mean that *Simmons* never applies. 578 U.S. at 616.

Now, even after this Court rebuked the Arizona Supreme Court for defying *Simmons*, the Arizona Supreme Court has doubled down by refusing to give *Lynch* effect on collateral review, reinterpreting a state procedural rule in the process. The State declares (at 26) that this hostility to *Simmons* is "irrelevant." But this Court will not uphold a state-court decision if it reflects a "purpose or pattern to evade constitutional guarantees." *Walker*, 562 U.S. at 321 (quoting *Beard* v. *Kindler*, 558 U.S. 53, 65 (2009) (Kennedy, J., concurring)). That is why this Court evaluates "whether [a state] ground of decision was the real one, or whether it was set up as an evasion, and merely to give color to a refusal" to apply federal law. *Rogers* v. *Alabama*, 192 U.S. 226, 230-231 (1904) (Holmes, J.).

The State insists (at 26-27) that there is no hostility to *Simmons* in Arizona because the Arizona Supreme Court has applied *Lynch* on direct review. But the fact that Arizona has no choice but to grudgingly apply *Lynch* on direct review does not excuse its refusal to apply *Lynch* here.

The State's assurance that there is no hostility to *Simmons* and *Lynch* in Arizona is particularly difficult to credit given the State's assertion (at 27 n.1) that *Simmons* was an "error" that *Lynch* "perpetuate[d]." In fact, the State continues to cling to the very

arguments this Court rejected in *Lynch*. The State suggests (at 1) that parole is available in Arizona because "the sentencing statutes" refer to parole—even though the state lacks "a mechanism for implementing parole." But the Arizona Supreme Court has repeatedly held that "parole was unavailable" in Arizona. *Lynch*, 578 U.S. at 615-616; *see Chaparro* v. *Shinn*, 459 P.3d 50, 51-52 (Ariz. 2020). The State also defends itself on grounds even more plainly erroneous than those rejected in *Lynch*—arguing (at 27-28 n.1) that parole is available in Arizona because a defendant may mistakenly be given an "illegally lenient" parole-eligible sentence and the State may fail to object. *See id.* (citing *Chaparro*, 459 P.3d at 51-52). Needless to say, the fact that a state might accidentally acquiesce to a parole-eligible sentence that is *prohibited by state law* hardly means that parole is available. The State's continued hostility to *Simmons* and *Lynch* is yet another reason this Court has jurisdiction.

II. THE ARIZONA SUPREME COURT'S NOVEL INTERPRETATION OF RULE 32.1(g) IS NEITHER FIRMLY ESTABLISHED NOR REGULARLY FOLLOWED.

The State's argument (at 19) that the interpretation of Rule 32.1(g) adopted below is "firmly established and regularly followed" is difficult to comprehend. This Court could rule for Cruz on this ground alone.

In holding that Cruz did not satisfy Rule 32.1(g), the decision below distinguished between "a significant change in the law" and "a significant change in the *application* of the law." Pet. App. 9a. The State offers no defense of that distinction as a longstanding

interpretation of Rule 32.1(g).[1] That should be the end of the matter. *See NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (holding that new interpretation of procedural bar applied with "pointless severity" was inadequate to preclude federal review).

The State maintains (at 20) that "Arizona courts consistently require defendants" "to establish a significant change in the law as a precondition" to relief. But this just shows that the Arizona Supreme Court has applied Rule 32.1(g) in prior cases; it does not demonstrate a consistent interpretation of Rule 32.1(g). The State does not attempt to explain how Cruz could "fairly be deemed to have been apprised," *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-458 (1958), that the Arizona Supreme Court would deny review on the basis of a distinction that has never been articulated before. *See* Nat'l Ass'n of Crim. Def. Lawyers et al. Amicus Br. 10-13.

Rather than defend the Arizona Supreme Court's interpretation of Rule 32.1(g), the State offers an altogether new interpretation. The State posits (at 21) that Rule 32.1(g) distinguishes between a "change in the law" and a "change in precedent." But the State cites no case to support this rationalization—and for good reason. The Arizona Supreme Court has held that the "archetype" of a "significant change in the law" is "when an appellate court overrules" binding

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[1] The distinction cannot be defended. "[T]he Constitution does not change from year to year"; only its interpretation changes. *Am. Trucking Ass'ns., Inc.* v. *Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment). Accordingly, *every* decision purporting to change constitutional law is merely a change in the application of the law.

precedent. *Shrum*, 203 P.3d at 1178. A change in precedent is *the prime example* that the Arizona Supreme Court describes as a significant change in the law.

The State's distinction between changes in law and changes in precedent is especially untenable in light of *State* v. *Poblete*, 260 P.3d 1102 (Ariz. Ct. App. 2011), which found a significant change in the law in materially identical circumstances. Before *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), Arizona courts held that an attorney's failure to advise a client on the immigration consequences of a guilty plea was *not* deficient performance under the Sixth Amendment. *See Poblete*, 260 P.3d at 1105. *Padilla* corrected that misinterpretation of federal law, holding that the failure to provide such advice *is* deficient performance. *See id.* *Poblete* then concluded that *Padilla*'s rejection of the Arizona courts' interpretation of federal law was a significant change in the law. *Id.*

The same is true here: Before *Lynch*, Arizona courts held that due process did *not* entitle capital defendants to inform the jury that they were parole-ineligible. *See State* v. *Benson*, 307 P.3d 19, 32 (Ariz. 2013). *Lynch* corrected the Arizona courts' misinterpretation of federal law, holding that due process *does* entitle capital defendants in Arizona to inform the jury that they are parole-ineligible. *State* v. *Johnson*, 447 P.3d 783, 801 (Ariz. 2019). Just as in *Padilla*, *Lynch* rejected the Arizona courts' interpretation of federal law. Because *Padilla* constituted a significant change in the law, the same is necessarily true of *Lynch*.

The State's response borders on incomprehensible. The State claims (at 21-22) that Cruz's argument "blurs the distinction between the law—i.e., the legal

rule applicable to a case—and the outcomes in particular cases." But that makes no sense. *Lynch* changed "the legal rule applicable" to *Simmons* claims in Arizona just as *Padilla* changed "the legal rule applicable" to ineffective-assistance-of-counsel claims in Arizona. To the extent the State claims (at 22) that *Padilla* constituted a significant change in the law because it "rejected" the Arizona courts' resolution of a question of federal law, the same was true of *Lynch*. And to the extent the State claims that *Lynch* merely clarified federal law in Arizona, the same was true of *Padilla*.

The State's insistence that "no precedent was overruled" as a result of *Lynch* and that the rule in Arizona "was the same before and after *Lynch*" defies reality. Resp. Br. 22-23 (quotation marks omitted). As the Arizona Supreme Court itself has recognized, *Lynch* "reversed" the Arizona Supreme Court's "originally narrow reading of *Simmons*." *State* v. *Robinson*, 509 P.3d 1023, 1043 (Ariz. 2022). Indeed, the State *agreed* in the proceedings below that *Lynch* "overruled" and "invalidated" the Arizona Supreme Court's "well-established" precedent. JA307, 400. And the State's assertion (at 23) that *Lynch* did not overrule the Arizona Supreme Court on a federal-law question but instead adopted a "different interpretation of Arizona statu[t]es" is meritless: As this Court recognized, the Arizona Supreme Court in *Lynch* "*confirmed* that parole was unavailable * * * under its law." 578 U.S. at 616 (emphasis added). This Court "of course" was "bound" by that interpretation of the State's "own statute" in *Lynch*. *Garner* v. *Louisiana*, 368 U.S. 157, 166 (1961).

Lynch plainly qualifies as a significant change in the law under the longstanding interpretation of Rule 32.1(g) that applied without exception before this case. *See, e.g.*, *State* v. *Valencia*, 386 P.3d 392, 394-395 (Ariz. 2016) (finding a "significant change in the law" where this Court overruled Arizona precedent); *State* v. *Slemmer*, 823 P.2d 41, 51 (Ariz. 1991). Although Cruz would have been entitled to relief under that interpretation, the Arizona Supreme Court adopted a new interpretation that appears tailor-made to deny Cruz relief. What Arizona is attempting here—improvising changes to procedural rules to avoid giving effect to a disfavored federal right—is *precisely* why this Court holds that "an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question." *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964); *accord Patterson*, 357 U.S. at 457-458.

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

The State claims (at 15-19) that the decision below is independent of federal law because it did not reach the merits of Cruz's *Simmons* claim or turn on an "antecedent" federal question. But the Arizona Supreme Court *did* analyze federal law in determining whether to address Cruz's *Simmons* claim. The Arizona Supreme Court's conclusion that Rule 32.1(g) prevented it from reaching the merits of Cruz's claim turned on its evaluation of *this Court's precedent* and the effect of that precedent *on federal law* in Arizona. *See* Cruz Br. 44-47. Because it was at least "influenced by" an interpretation of federal law, the decision below was

"not independent of federal law." *Foster* v. *Chatman*, 578 U.S. 488, 499 n.4 (2016) (quotation marks omitted).

Cruz's certiorari petition did not, as the State claims (at 18), "concede[]" independence. It argued that "federal law is dispositive." Cruz Pet. 20-21. And Cruz's opening brief explained at length why the decision below was influenced by federal law. Cruz Br. 44-47. The State's failure even to address those arguments demonstrates that the State has no response.

IV. THE STATE'S FORFEITURE AND POLICY ARGUMENTS ARE MERITLESS.

First, because the State cannot defend the decision below as resting on an adequate-and-independent-state-law ground, the State hangs its hat on forfeiture, repeatedly claiming (at 25, 26) that "Cruz had the opportunity to raise a *Simmons* claim at trial and on direct appeal, but failed to do so." This argument is groundless many times over.

For one thing, the State did not raise forfeiture on direct appeal, and thus forfeited forfeiture. *See State* v. *Gissendaner*, 865 P.2d 125, 127-128 (Ariz. Ct. App. 1993) (State forfeits an argument that it fails to press on appeal).

For another, the State raised forfeiture in opposing certiorari, *see* Br. in Opp. 9-11, but this Court granted certiorari anyway, reframing the question presented in a way that excludes forfeiture. The State's forfeiture argument is not fairly encompassed by the reframed question presented, and this Court should not pass on it. *See* Stephen M. Shapiro et al., Supreme Court Practice § 6.26(a) (11th ed. 2019).

In any event, the State's forfeiture argument is meritless. Even the State's sole *amici* describe the State's position as "cramped and erroneous." Mitchell & Mortara Amicus Br. 3 n.2. Cruz repeatedly raised his *Simmons* claim in the trial court. Citing *Simmons*, he argued that he risked being "deprived of the opportunity to present the mitigating factor that he will not be released from prison." JA28-29. He then sought to submit evidence that the Arizona Board of Executive Clemency "does not have the authority" to order that Cruz "be paroled." JA62; *see* JA43-44, 252, 260. The State responded by seeking an order "to preclude the defense from offering" evidence of "the prospects of parole for an inmate sentenced to life imprisonment." JA45. Citing "*SIMMONS*," Cruz objected, JA54-55, but the judge granted the motion over Cruz's objection. JA77. The State in *Lynch* sought and received an almost identical order, *see* Pet. App. K, *Lynch*, 578 U.S. 613 (No. 15-8366), and this Court identified that order as the root of the *Simmons* violation. *Lynch*, 578 U.S. at 614. The same logic follows here.

After the jury returned a death verdict, Cruz moved for a new trial, arguing that the judge was wrong to conclude that "*SIMMONS* is distinguishable" and maintaining that precluding testimony about parole denied the jury "an accurate and complete understanding of the consequences of a nondeath verdict." JA135-137, 154. The judge denied the motion, holding (erroneously) that whether Cruz would be given a "parole eligible sentence" was "entirely speculative" and that the "jury was correctly instructed," JA170—even though the jury was *affirmatively misinformed* that Cruz could be paroled unless executed. JA94.

The State is also wrong (at 6-7) that Cruz failed to preserve his *Simmons* claim on direct appeal. Cruz invoked *Simmons* and argued that the sentencing court's refusal to permit parole-ineligibility evidence "denied the jury of information to which it could have used to impose a sentence of less than death." JA337, 340. The Arizona Supreme Court then squarely addressed *Simmons*, holding (erroneously) that "Cruz's case differs from *Simmons*" because nothing "prohibited Cruz's release on parole." Pet. App. 31a.

The State is wrong again (at 25) that Cruz sought relief that *Simmons* does not "permit[]" because he tried to inform the jury of his parole-ineligibility through evidence rather than an instruction. *Simmons* entitles a defendant to inform the jury about parole-ineligibility either through instruction or "evidence." 512 U.S. at 163-164, 168-169 (plurality op.); *id*. at 175, 177-178 (O'Connor, J., concurring in judgment) (the defendant must "be afforded an opportunity to introduce evidence on this point" (cleaned up)). The Arizona Supreme Court has recognized that *Simmons* requires the trial court "to either instruct that [the defendant] would not be eligible for parole or permit [him] *to introduce evidence to that effect*." *State* v. *Rushing*, 404 P.3d 240, 250 (Ariz. 2017) (emphasis added); *accord State* v. *Hulsey*, 408 P.3d 408, 436 (Ariz. 2018).

As for the State's suggestion (at 5) that Cruz forfeited his *Simmons* claim because he did not explicitly argue that the State had placed future dangerousness at issue, the State omits the inconvenient fact that the Arizona Supreme Court has rejected that exact theory of forfeiture. A defendant need not "explicitly contend that his future dangerousness was at issue for the

judge to comprehend the nature of the objection and fashion a remedy." *State* v. *Escalante-Orozco*, 386 P.3d 798, 829 (Ariz. 2017), *abrogated on other grounds by State* v. *Escalante*, 425 P.3d 1078 (Ariz. 2018).[2]

The State's repeated insistence (at 12-14, 16, 18-19, 25-28, 32-35, 37) that Cruz's claim is "untimely" is mystifying. Cruz raised *Simmons* at trial and on direct appeal. State law then precluded Cruz from raising a *Simmons* claim in his initial postconviction petition because he had pressed it on direct appeal. *See* Ariz. R. Crim. P. 32.2(a)(2). And Cruz's second postconviction petition, filed "within a reasonable time" after this Court's decision in *Lynch*, provided "the basis" for his significant-change-in-the-law claim, Ariz. R. Crim. P. 32.4(b)(3)(B), which the State has never contested.

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[2] Cruz's future dangerousness was at issue. *See* JA233-237, 291-297, 348-349. At trial, the State attacked the credibility of a former warden, James Aiken, who testified that Cruz was unlikely to be a danger in prison, eliciting admissions that Aiken had previously testified that a capital defendant would not be dangerous even though this defendant later assaulted other prisoners and corrections officials. JA291-292. The Arizona Supreme Court has twice concluded that the State placed future dangerousness at issue by cross-examining that *very same witness* on the *very same topic*. *See State* v. *Lynch*, 357 P.3d 119, 130-131 (Ariz. 2015) (future dangerousness at issue when State cross-examined "Aiken testimony that Lynch could be safely housed in prison"); *Rushing*, 404 P.3d at 250 (similar). Future dangerousness was even more plainly at issue here given that the trial court affirmatively misinformed the jury that Cruz would have "a possibility of parole" unless sentenced to death. JA94. That erroneous reference to parole "inject[ed] into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness." *California* v. *Ramos*, 463 U.S. 992, 1008 (1983).

Second, the State attacks a straw-man version of Cruz's argument, warning (at 34) that ruling for Cruz "would defeat the states' ability to impose any limits on the timing or types of claims defendants can bring" on collateral review.

Not at all. Nothing about this case will prevent states from placing neutral limits on their postconviction forums. States may impose reasonable time limits, *see Walker*, 562 U.S. at 310-311; preclude postconviction review of defaulted claims, *see Johnson* v. *Lee*, 578 U.S. 605, 606 (2016) (per curiam); and bar review where the defendant failed to comply with state procedural practice, so long as "that practice gives litigants a reasonable opportunity to have the issue as to the claimed right heard and determined." *Parker*, 333 U.S. at 574 (quotation marks omitted). Indeed, the Constitution may well permit states to decline to provide any postconviction forum at all. *See Case* v. *Nebraska*, 381 U.S. 336, 337 (1965) (per curiam) (reserving question); *Johnson* v. *Alabama*, 137 S. Ct. 2292, 2293 (2017) (Roberts, C.J., dissenting).

What states cannot do is limit their postconviction forums in a manner that discriminates against federal law. This constraint on states' broad discretion to establish the contours of their postconviction forums ensures that they cannot refuse to apply federal law based on "disagreement with (and even open hostility to) a federal" claim. *Haywood* v. *Drown*, 556 U.S. 729, 741 n.8 (2009).

The same reasoning refutes the State's breathless assertion (at 32) that "[i]f 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." Cruz

does not claim that states must provide defendants with "unlimited" access to a postconviction forum. Mitchell & Mortara Amicus Br. 16. Instead, Arizona simply cannot discriminate against federal law in its existing postconviction forum.

The situation here arises in exceptionally narrow circumstances—where a state court refuses to apply federal law on direct review, this Court issues a subsequent decision correcting the error, and a forum for federal claims is otherwise available. In this narrow context, the State cannot credibly claim that giving Cruz the benefit of the federal law he was erroneously denied on direct review would undermine finality interests. Indeed, in the other rare cases where a state court has failed on direct review to apply federal law that governed at the time, and this Court later issued a corrective decision, the state court then applied that law on collateral review. *See Mosley* v. *State*, 209 So. 3d 1248, 1279-81 (Fla. 2016) (per curiam); *Ex parte Hood*, 304 S.W.3d 397, 406-409 (Tex. Crim. App. 2010); *In re Gomez*, 199 P.3d 574, 575, 578-580 (Cal. 2009); *Irving* v. *State*, 618 So. 2d 58, 61 (Miss. 1992). Arizona is alone in refusing to follow federal law in this context, which likely explains why no other state supports Arizona's position. *See* Fed. Courts Scholars Amicus Br. 14.

Third, the State attempts (at 30) to shunt responsibility for its error to the federal-court system. But "state courts are the principal forum for asserting constitutional challenges to state convictions." *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011). Arizona cannot refuse to apply federal law on the premise that federal courts are available to correct the error.

The State's argument (at 30) that Cruz was required to file a certiorari petition on direct review to preserve his *Simmons* claim is untenable. Defendants need not seek this Court's review from state-court judgments to preserve their federal claims. *See Lawrence* v. *Florida*, 549 U.S. 327, 333 (2007) ("state prisoners need not petition for certiorari to exhaust state remedies"). A contrary rule would flood this Court with petitions that do not satisfy this Court's criteria for certiorari. *See* Sup. Ct. R. 10.

The State's contention (at 30) that federal habeas review should be Cruz's only avenue for relief is equally meritless. The State argued below that federal habeas relief under *Lynch* was unavailable. *See* Oral Arg. 30:12-30:28. The State cannot claim that federal habeas review provides a remedy while insisting that federal habeas review is unavailable. In any event, opening Arizona state courts to Cruz's claim would be less intrusive than federal habeas review. If the State affords no remedy for Cruz, federal courts would be called on to correct an error that Arizona courts did not attempt to correct first—a result "unseemly in our dual system of government." *Coleman*, 501 U.S. at 729 (quotation marks omitted).

Fourth, sensing the weakness of the State's merits arguments, its *amici* ask this Court to dismiss the petition on the theory that this Court should refuse to review decisions of state high courts denying postconviction relief.

This Court was well aware of the case's posture when it granted review, *see* Pet. 28-29 (discussing the posture), and the State's *amici* point to nothing that has changed. While the State's *amici* may believe it would be good policy for this Court to decline review

in this posture, this Court disagrees; its numerous cases granting review in this posture include *Jones* v. *Mississippi*, 141 S. Ct. 1307, 1313 (2021); *McGirt* v. *Oklahoma*, 140 S. Ct. 2452, 2459 (2020); *Foster*, 578 U.S. at 491; and *Montgomery*, 577 U.S. at 196-197, 205.

Even the State's *amici* recognize an exception to their proposed rule where "the petitioner can surmount the statutory barriers" that would apply under AEDPA. Mitchell & Mortara Amicus Br. 9. This would effectively rewrite AEDPA to exend its limits where Congress specifically declined to apply them. And Cruz would fall within that exception even if the Court adopted it. The Arizona Supreme Court's adjudication of Cruz's *Simmons* claim on direct review "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), for the same reason the identical error in *Lynch* involved such an obvious violation of federal law that this Court summarily reversed it.[3]

Finally, the State does not assert any meaningful burden from resentencing Cruz. The State introduced

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[3] The State (at 26) and its *amici* (at 4) are mistaken in contending that Cruz failed to preserve his *Simmons* claim in his federal habeas petition. While the federal district court ruled that Cruz did not present a *Simmons* claim, that conclusion was incorrect. Cruz's federal petition argued that the refusal to allow him to present evidence of parole-ineligibility "deprived Mr. Cruz of a fair sentencing proceeding" because parole-ineligibility "was a factor that could have led the jury to impose a sentence less than death." Petition for Writ of Habeas Corpus at 223-224, *Cruz* v. *Shinn*, No. 4:13-cv-00389-JGZ (D. Ariz. May 1, 2014), ECF No. 28. Cruz will seek to correct the district court's error on appeal in the Ninth Circuit.

no evidence or witnesses during Cruz's sentencing proceedings, so there is no risk of spoliation or lapsed memories. And, of course, there is no risk that resentencing Cruz would require his release from prison. Resentencing would simply allow Cruz to inform the jury that he would be ineligible for parole if not sentenced to death—a critical fact in jurors' decision whether to impose a death sentence. *See* LatinoJustice PRLDEF et al. Amicus Br. 4-13.

Parole-ineligibility was indisputably critical in this case. Cruz's judge misinformed the jury that Cruz had "a possibility of parole" unless executed. JA94. A day later, Cruz's jury foreperson explained: "Many of us would rather have voted for life if there was one mitigating circumstance that warranted it," but imposed a death sentence because "[*w*]*e were not given an option to vote for life in prison without the possibility of parole*." JA143-144 (emphasis added). Due process does not permit the State to procure a death sentence by prohibiting Cruz from informing jurors of a fact that the jurors themselves stated would have made the difference between life and death.

CONCLUSION

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

Respectfully submitted,

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