No. 24-391

IN THE

Supreme Court of the United States

FELIPE PETRONE-CABANAS, et al.,

Petitioners,

vs.

STATE OF ARIZONA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE, ARIZONA CAPITAL REPRESENTATION PROJECT, ARIZONA JUSTICE PROJECT, AND THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT OF ARIZONA IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici are[1] the National Association of Criminal Defense Lawyers, Arizona Attorneys for Criminal Justice, the Arizona Capital Representation Project, the Arizona Justice Project, and the Federal Public Defender for the District of Arizona. *Amici* have a strong interest in the consistent and reliable application of the Eighth Amendment's prohibition on disproportionate punishment, as interpreted in *Miller v. Alabama*, 567 U.S. 460 (2012), *Montgomery v. Louisiana*, 577 U.S. 190 (2016), and *Jones v. Mississippi*, 593 U.S. 98 (2021), and in ensuring that a juvenile life-without-parole sentence is imposed only in the rare case where that harsh sentence is constitutional.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, with up to 40,000 more in its affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of

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[1] Pursuant to Rule 37.2, *amici* have informed counsel of record for all parties of their intention to file this brief more than 10 days before its due date. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

justice. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of NACDL, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide non-profit membership organization of criminal defense lawyers, law students, and associated professionals, who are dedicated to protecting the rights of the accused in the courts and in the legislature, to promoting excellence in the practice of criminal law through education, training, and mutual assistance, and to fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

The Arizona Capital Representation Project (ACRP) is a statewide non-profit legal services organization that assists indigent persons facing the death penalty in Arizona through direct representation, pro bono training and consulting services, and education. ACRP tracks and monitors all capital prosecutions in Arizona. ACRP also represents several individuals sentenced to life without parole for offenses committed when juveniles.

The Arizona Justice Project (AJP) is a non-profit organization dedicated to preventing and overturning wrongful convictions and other manifest injustices, such as excessive or unconstitutional sentences. Since its founding in 1998, AJP has received several thousands of requests for assistance from individuals incarcerated in Arizona prisons and has represented numerous individuals before courts of law and the Arizona Board of

Executive Clemency, including many juvenile offenders who have been successfully rehabilitated. AJP has a compelling interest in ensuring affected juvenile defendants receive sentences that comply with the Eighth Amendment's prohibition on cruel and unusual punishment.

The Federal Public Defender for the District of Arizona (FPD) is the organization established under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(g), to provide representation of indigent criminal defendants before the federal trial and appellate courts covering Arizona. Under 18 U.S.C. §§ 3006A(a)(2)(B) and 3599(a)(2), the FPD also represents Arizona state prisoners seeking relief in federal court under 28 U.S.C. § 2254 from their unconstitutional sentences of either incarceration or death. The FPD has represented numerous individuals in federal habeas proceedings challenging the constitutionality of their life-without-parole sentences following this Court's decisions in *Miller* and *Montgomery*.

Amici have a particular and informed perspective on the operation of Arizona's first-degree murder sentencing scheme and Arizona's response to this Court's decision in *Miller* declaring mandatory life-without-parole sentences for juvenile offenders unconstitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

Dozens of juvenile offenders in Arizona—like the petitioners in this case—were sentenced to life imprisonment without the opportunity for any type of release for crimes they committed as children. Because the Arizona Legislature eliminated parole for all felonies committed after 1993, juvenile offenders sentenced between 1994 and 2014 in Arizona were sentenced under

a scheme in which judges had no discretion to grant a parole-eligible sentence.

Despite this Court's clear directive in *Miller v. Alabama*, 567 U.S. 460 (2012), reaffirmed and made retroactive in *Montgomery v. Louisiana*, 577 U.S. 190 (2016), that a sentencing scheme that requires a sentence of life without the possibility of parole for a juvenile offender constitutes cruel and unusual punishment in violation of the Eighth Amendment, the State of Arizona has repeatedly refused to allow individuals who received these unconstitutional sentences to be resentenced. While this Court recently reaffirmed in *Jones v. Mississippi* that "an individual who commits a homicide when he or she is under 18 may be sentenced to life without parole, but only if the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment," 593 U.S. 98, 100 (2021), the State of Arizona interpreted that decision to foreclose any relief to Arizona juvenile offenders unconstitutionally sentenced to mandatory life without parole.

In the wake of *Montgomery*, the Arizona Supreme Court held that individuals like the petitioners were entitled to postconviction evidentiary hearings at which they could prove that their sentences did not reflect "irreparable corruption" so as to warrant a life-without-parole sentence. *State v. Valencia*, 386 P.3d 392, 395–96 (Ariz. 2016) (quoting *Miller*, 567 U.S. at 479–80). But in *State ex rel. Mitchell v. Cooper* ("*Bassett*"), 535 P.3d 3 (2023), *cert. denied sub nom. Bassett v. Arizona*, 144 S. Ct. 2494 (2024), the Arizona Supreme Court reversed course, holding that juvenile offenders in Arizona are not eligible for such hearings even though their life-without-parole sentences were mandatory at the time they were

imposed.[2] In these cases, the courts below followed *Bassett*, even though they are factually distinct. Without this Court's intervention, dozens of juvenile offenders who were unconstitutionally sentenced to mandatory life-without-parole sentences will lose their chance to ever have a *Miller*-compliant re-sentencing hearing.

ARGUMENT

1. At the time of petitioners' trials and sentencing hearings, Arizona had a mandatory life-without-parole sentencing scheme, which is unconstitutional as applied to juveniles under *Miller*.

A. At the time petitioners were sentenced, Arizona law did not allow a sentence less severe than life without the possibility of parole.

Miller, this Court properly identified Arizona as a jurisdiction with a mandatory life-without-parole sentencing scheme. *See* 567 U.S. at 482, 486–487 & nn.9, 13, 15. Effective January 1, 1994, the Arizona legislature prospectively eliminated the state's parole scheme. Ariz. Rev. Stat. § 41-1604.09; *see also State v. Vera*, 334 P.3d 754, 758 (Ariz. App. 2014) ("Because the Arizona legislature had eliminated parole for all offenders who

[2] The *Valencia* court resisted characterizing the sentences as mandatory, even as it acknowledged a sentencing judge's lack of discretion to impose a parole-eligible sentence. Against the backdrop of the aggravating and mitigating factors for first-degree murder, *see* Ariz. Rev. Stat. § 13-752(F), (G), the court said that the "natural life sentences at issue… were not mandatory but did amount to sentences of life without parole" because the "system of 'earned release credits,'" which replaced the parole scheme, "did not by its terms apply to natural life sentences." 386 P.3d at 394 (citing *State v. Vera*, 334 P.3d 754, 758–59 (Ariz. Ct. App. 2014)).

committed offenses after January 1, 1994…, [a defendant's] only possibilities for release would be through a pardon or commutation by the governor.") (cleaned up). Accordingly, when petitioners were sentenced, no sentence the judge could have legally imposed would have allowed for the possibility of parole. *See Lynch v. Arizona*, 578 U.S. 613, 615 (2016) (per curiam) ("But under state law, the only kind of release for which Lynch would have been eligible—as the State does not contest—is executive clemency.").

In *Bassett*, the state argued that some Arizona courts' mistaken belief that parole was still available after 1994 somehow converts Arizona's sentencing scheme into one that did not mandatorily impose life without parole for first-degree murder. But the Arizona Supreme Court itself has explained that a parole-eligible sentence was not legally available when petitioners were sentenced. *See Chaparro v. Shinn*, 459 P.3d 50, 52, 54 (Ariz. 2020) (characterizing a sentence that "include[s] parole eligibility after he has served 25 years," as "illegally lenient"). In fact, the state has previously argued and acknowledged in other cases before this Court that Arizona did have mandatory life-without-parole sentencing before *Miller*. (Pet. 11.) And the state has continued to argue in other cases, as recently as 2022, that Arizona's sentencing scheme unambiguously barred parole eligibility and that judges understood that parole was not available. *See* Defendant's Motion for Certification or Dismissal at 2, 12–13, *Chaparro v. Ryan*, No. 2:19-cv-650-DWL (D. Ariz. Mar. 27, 2019); Supplemental Merits Brief of Plaintiff-Appellant at 5, *Shinn v. Board of Executive Clemency*, No. CV-21-0275-PR (Ariz. May 24, 2022) ("[I]n 1994, first-degree murderers… were not statutorily eligible for parole; they were eligible only for 'release,' i.e. commutation or pardon.").

B. The availability of clemency—the only type of "release" that was legally available at the time petitioners were sentenced—is not constitutionally equivalent to the possibility of parole.

If an Arizona defendant convicted of first-degree murder after 1993 received a sentence carrying the possibility of "release after 25 years," the "only kind of release" for which that defendant was statutorily eligible was executive clemency. *Lynch*, 578 U.S. at 615. Yet in the decisions below, the Arizona Supreme Court ignored this Court's directive in *Lynch*: executive clemency is not constitutionally equivalent to parole. 578 U.S. at 615–16; *see also Solem v. Helm*, 463 U.S. 277, 303 (1983) ("Recognition of such a bare possibility [of executive clemency] would make judicial review under the Eighth Amendment meaningless.").

In *Graham v. Florida*, this Court explicitly held that "the remote possibility" of executive clemency is not a constitutionally adequate substitute for parole. 560 U.S. 48, 70 (2010). *Graham* considered a scheme analogous to Arizona's: Florida had abolished its parole system, leaving executive clemency as the only available form of release. *Id.* at 57 ("Because Florida has abolished its parole system… a life sentence gives a defendant no possibility of release unless he is granted executive clemency."). This Court concluded that, in the case of juveniles, Florida's sentencing scheme providing for executive clemency was not constitutionally interchangeable with one providing for parole. *Id.* at 70.

The Eighth Amendment distinguishes parole, which represents a meaningful opportunity for release, from executive clemency, which—in Arizona especially—amounts to a de facto natural life sentence. *See Viramontes v. Att'y Gen. of Arizona*, No. 4:16-cv-151-

TUC-RM, 2021 WL 977170, at *2 (D. Ariz. March 16, 2021) ("Unlike parole, the chances of obtaining release through executive clemency are slim."); *id.* at *2 n.2 (citing statistics from 2013 in which parole was granted in approximately 24% of cases, while commutation was granted in only 0.005% of cases); *see also State v. Dansdill*, 443 P.3d 990, 1000 n.10 (Ariz. Ct. App. 2019) ("[I]n Arizona, the possibility that a life sentence may allow for release after twenty-five years is more theoretical than practical. Parole was eliminated for all offenses committed after January 1, 1994, leaving commutation or pardon as the only possibilities for release…. The likelihood of either is so remote that the mandatory noncapital life sentence for felony murder is constitutionally indistinct from the mandatory noncapital natural life sentence for premeditated murder.") (cleaned up). The possibility of clemency is particularly illusory in Arizona: *amici* who track clemency proceedings in Arizona are not aware of a single instance in which an individual convicted of first-degree murder since Arizona eliminated parole in 1994 has received a grant of executive clemency (i.e., commutation of sentence or pardon), which requires a recommendation from the Board of Executive Clemency and approval by the Governor.

As in *Lynch*, the Arizona courts in *Bassett* and the cases below continue to fail to recognize the constitutionally significant difference between the only type of release petitioners' sentencing judges could lawfully permit—executive clemency—and the type of release *Miller* requires a judge to have discretion to impose—parole.

2. Petitioners and other similarly situated juvenile offenders in Arizona have never received a *Miller*-compliant sentencing hearing; unless this Court grants review, Arizona law will ensure that no court and no parole board will review their capacity for rehabilitation.

A. Because Arizona's sentencing scheme did not allow for a parole-eligible sentence, juvenile offenders in Arizona, including petitioners, did not have *Miller*-compliant sentencing hearings.

This Court has repeatedly held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller*, 567 U.S. at 479; *see also Jones*, 593 U.S. at 118 ("Today's decision does not disturb [the] holding" of *Miller* "that a State may not impose a mandatory life-without-parole sentence on a murderer under 18."). Despite these clear precedents, the Arizona Supreme Court in *Bassett* held that "*Miller* and its progeny do not specifically require the availability of parole when sentencing a juvenile offender." *Bassett*, 535 P.3d at 11. That is the opposite of what this Court has said is required in *Miller*, *Montgomery*, and, most recently, *Jones*: "[A]n individual who commits a homicide when he or she is under 18 may be sentenced to life without parole, *but only if* the sentence is not mandatory and *the sentencer* therefore *has discretion to impose a lesser punishment*." *Jones*, 593 U.S. at 100 (emphasis added). The Arizona Supreme Court's blatant disregard of this Court's precedent echoes similar rulings in capital cases, which this Court recently rejected. *See Cruz v.* Arizona, 598 U.S. 17, 28 (2023).

As explained above, Arizona courts sentencing offenders like petitioners between 1994 and 2014 did not

have discretion to impose a life sentence that carried the possibility of parole. Sentences that are *more* severe were available, including natural life with no eligibility for any kind of executive clemency, and death. But *Miller*'s prohibition on mandatory sentencing requires a sentencer to have discretion to impose a sentence of life with the possibility of parole or a *less* severe sentence than those two. *See* 567 U.S. at 474–76.

Indeed, many of the individuals—including four of the petitioners in this case— now sentenced to natural life for crimes committed as juveniles were sentenced at a time when death was an available sentence. It was not until 2005 that this Court held in *Roper v. Simmons* that executing a person for a crime committed during childhood violates the Eighth Amendment. 543 U.S. 551 (2005). Prior to *Simmons*, Arizona law allowed certain offenders younger than 18 to be sentenced to death. Of the 29 individuals throughout Arizona currently serving natural life for crimes committed when they were children, 19 were sentenced before *Simmons* was decided. This timing matters for two reasons. First, *Simmons* marked the beginning of a paradigm shift—continued in this Court's later jurisprudence through *Miller* and its progeny—in how juvenile crime and punishment are understood under the Eighth Amendment. While judges may have considered youth as a chronological fact in pre-*Simmons* cases, they could not have appreciated the constitutional significance of "youth and its attendant characteristics" that this Court has since held must factor into sentencing. *Jones*, 593 U.S. at 111 (quoting *Montgomery*, 577 U.S. at 210). Second, because death was an alternative available punishment, the fact that these individuals received a less severe sentence—natural life—indicates that they are not among the "rarest of children, those whose crimes reflect 'irreparable

corruption.'" *Montgomery*, 577 U.S. at 195 (quoting *Miller*, 567 U.S. at 479–80).

Under Arizona's pre-*Simmons* scheme, a natural-life sentence does not reliably indicate that an individual falls within the class of juveniles for whom a life-without-parole sentence is constitutionally permissible. To the contrary, in these cases, a natural life sentence reflects either a prosecutorial or judicial determination that an individual is not one of the "worst of the worst" for whom the harshest possible penalty—life without the possibility of parole—is appropriate.

B. Arizona's sentencing procedures did not sufficiently narrow the class of juvenile offenders for whom natural life is an appropriate sentence.

Simmons marked the beginning of a dramatic shift in how juvenile offenders are treated under the Eighth Amendment—a shift that this Court has continued to bear out and expand in the two decades since. *Simmons* described the meaningful differences between child and adult offenders and acknowledged that these differences are of constitutional import. 543 U.S. at 569–71. In *Simmons*, the Court concluded that, given juveniles' "diminished culpability," the "penological justifications" for the most severe penalty "apply to them with lesser force than to adults." *Id.* at 571. Accordingly, in *Miller*, this Court stated that "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty [*i.e.*, life without the possibility of parole] will be uncommon." 567 U.S. at 479. While the Court stopped short of outlawing life-without-parole sentences for juveniles, it mandated that sentencers "take

into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 480.

A few years later in *Montgomery*, this Court explained that under *Miller*, "a lifetime in prison is a disproportionate sentence for all but the rarest of children, those whose crimes reflect irreparable corruption." 577 U.S. at 195 (cleaned up). This Court then affirmed in *Jones* the outcome-driven policy behind *Montgomery* and *Miller* that a discretionary sentencing scheme in which youth and its attendant characteristics must be considered will "help[] ensure that life-without-parole sentences are imposed only in cases where that sentence is appropriate in light of the defendant's age," 593 U.S. at 111–12, and that these procedures themselves "would make life-without-parole sentences 'relatively rare' for juvenile offenders." *Id.* at 112–13. In *Jones*, this Court assumed that *Miller*'s promise had come true, and that "when given the choice, sentencers impose life without parole on children relatively rarely." *Id.* (quoting *Miller*, 567 U.S. at 483 n.10).

Unfortunately, in Arizona, *Miller*'s promise has not proven true. Even assuming there was a meaningful difference between life with the possibility of release and natural life sentences, Arizona sentencing courts impose natural life on juvenile offenders at an alarmingly high rate. *See* Brief of Amicus Curiae Arizona Attorneys for Criminal Justice at 11 and Appx. A, *State v. Valencia*, No. CR-16-0156-PR (Ariz. July 15, 2016) (collecting data demonstrating that more than 30% of juvenile offenders convicted of first-degree murder in Arizona are sentenced to natural life). And, in most cases, a child will spend more of their life in prison than an adult who receives the same sentence. This is hardly reconcilable with *Jones*'s assumption that "when given the choice, sentencers

impose life without parole on children relatively rarely," 593 U.S. at 112, and thus is more evidence that Arizona's scheme at the time petitioners were sentenced did not comply with *Miller*'s directives.

C. The vast majority of juveniles in Arizona who were unconstitutionally sentenced to life without parole have not received any type of relief since *Miller*.

In *Jones*, this Court assumed that "[b]y now, most offenders who could seek collateral review as a result of *Montgomery* have done so and, if eligible, have received new discretionary sentences under *Miller*." *Jones*, 593 U.S. at 110 n.4. But this assumption also has not proven true in Arizona. The State of Arizona has successfully fought to prevent re-sentencing hearings from occurring in almost all cases. Immediately after *Miller*, the state argued that *Miller* was not retroactive and did not provide a basis for postconviction relief under Arizona law—a position this Court rejected in *Montgomery*. Following *Montgomery*, this Court vacated and remanded several Arizona cases, finding that the Arizona courts had not properly "take[n] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Tatum v. Arizona*, 580 U.S. 952, 952 (2016) (Sotomayor, J., concurring) (quoting *Miller*, 567 U.S. at 480). While a handful of defendants were resentenced following *Montgomery* and *Tatum*, most were not. In Maricopa County—Arizona's most populous county, where the vast majority of natural life sentences in Arizona were imposed—not a single one of the 25 juvenile offenders who received natural life sentences has been resentenced since *Miller*. This is not consistent with the Court's assumption when it decided *Jones*. Yet the State of Arizona has continued to argue juveniles are not entitled to any

hearings on the constitutionality of their life-without-parole sentences, most recently relying on this Court's decision in *Jones* to argue to Arizona courts that *Miller* is meaningless in Arizona and to convince them to vacate pending re-sentencing and postconviction proceedings.

Unlike the defendant in *Jones*, whose life-without-parole sentence was upheld following a post-*Miller* re-sentencing hearing, petitioners and similarly situated juveniles sentenced to mandatory life without parole in Arizona have never received a re-sentencing hearing. These individuals have never had the discretionary sentencing at which a judge would consider a child's "'diminished culpability and heightened capacity for change' before condemning him or her to die in prison." *Montgomery*, 577 U.S. at 195 (quoting *Miller*, 567 U.S at 479). As a result, Arizona's procedures have failed to distinguish between the "rarest" children whose crimes reflect permanent incorrigibility—for whom life without parole may be a permissible sentence—and the majority of children whose crimes reflect transient immaturity—for whom such a sentence is disproportionate under the Eighth Amendment. *Jones*, 593 U.S. at 106 n.2 (quoting *Montgomery*, 577 U.S. at 211).

D. The State's arguments for denying review in *Bassett* do not apply here.

In *Bassett*, the state encouraged this Court to deny review because Mr. Bassett's sentencing judge "expressly considered whether parole-eligible sentences were appropriate" for each of his first-degree convictions and "imposed a sentence of 'life with the possibility of parole after 25 years'" on one count and natural life for the other. Brief in Opposition at i, *Bassett v. Arizona*, No. 23-830 (May 7, 2024) ("*Bassett* BIO"). While acknowledging that "[t]o be sure, Arizona law did not provide a parole-eligible

option at the time of Bassett's sentencing," the state nevertheless defended the imposition of a natural life sentence on one count because "[t]he record [in Mr. Bassett's case] makes clear that Bassett received a natural life sentence only after his sentencer considered his age and attendant characteristics and found that a parole-eligible sentence was inappropriate for *this* murder." *Id.* at 1–2 (emphasis in original). The state did not argue that a choice between two sentences, neither of which provide eligibility for parole, would withstand *Miller*; rather, the state argued that the facts of Mr. Bassett's case made that inquiry irrelevant. *Id.* at 16–18.

These arguments do not hold water here. First, there is nothing in the record in petitioners' cases to suggest that the sentencing judges in these cases—or in the many others in which relief or review has been denied since *Bassett*—had a mistaken belief (like Mr. Bassett's judge) that they could legally sentence the defendants to a parole-eligible sentence and considered imposing such a sentence. (*See* Pet. at 24–25.) Unlike Mr. Bassett, none of the petitioners received one natural life sentence and one sentence of life with the possibility of parole. As explained above, four of the petitioners—and many other similarly situated defendants—were sentenced prior to this Court's decision in *Simmons*, making the death penalty an available legal sentence. (*See* Pet. at 22–24.) In these cases, the records show that the sentencing judges[3] were really concerned with the choice between a *death* sentence and a life sentence, with the natural life sentence being chosen as a mitigated sentence as compared to death. The possibility of imposing death in these cases was not theoretical; in 1996 alone, the Arizona Supreme Court

[3] Because many of these cases were also prior to this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), the capital sentencing proceedings were handled by judges, not juries.

affirmed three death sentences imposed on juvenile offenders. *See State v. Jackson*, 918 P.2d 1038 (Ariz. 1996); *State v. Laird*, 920 P.2d 769 (Ariz. 1996); *State v. Soto-Fong*, 928 P.2d 610 (Ariz. 1996). In cases where death was on the table, the sentencing judges were not thinking about whether parole was available or if the individual maybe one day would be released; they were considering whether the individual was one of the worst of the worst offenders for whom death at the hands of the state was appropriate. In imposing the less severe sentence of natural life, the sentencer necessarily concluded that they were not.

Just months ago, the state in *Bassett* attested to this Court that "Arizona is not arguing that the mere existence of its two [life-without-parole] sentencing options saves it from a *Miller* violation" and acknowledged that "[n]either [sentencing] option allowed for parole-eligibility and clemency-eligibility alone would have been insufficient." *Bassett* BIO at 22–23 (emphasis in original). The State conceded that "[b]ut for the sentencer's actual consideration of parole-eligibility and the subsequent statute effectuating this sentence, there would be a *Miller* violation." Id. at 23 (emphasis added). Based on these concessions, the state should support review being granted in this case. Unfortunately, the state's arguments in other cases suggest that it may try to change its position on this issue once again. *See* State of Arizona's Response to Petition for Review at 14, *State of Arizona v. DeShaw et al.*, No. CR-24-0175-PR (Ariz. Sept. 24, 2024) (arguing that the "discretionary process" that allowed for a choice between two life sentences that did not legally allow for the possibility of parole is sufficient to comply with *Miller*); *id.* at 14–15 ("Because Bassett's sentencer was not required to sentence him to natural life… his natural life sentence was not mandatory under *Miller*) (internal citation omitted); *id.* at 17 ("While choosing

between natural life and life with the possibility of release, Petitioners' sentencers rejected the release-eligible option based on the specific facts of each case after considering Petitioners' youth and attendant characteristics. That type of inquiry is what *Miller* requires."). It is alarming that in the span of four months, the Attorney General's office has changed its position and is now arguing that actual consideration of parole eligibility is not required. *Compare Bassett* BIO at 23. ("But for the sentencer's actual consideration of parole-eligibility and the subsequent statute effectuating this sentence, there would be a *Miller* violation. It is the combination of all three factors… that renders Bassett's natural life sentence *Miller*-compliant."). This Court should reject any such arguments in this case. The state should not now be allowed to renege on the avowal it made to this Court mere months ago about what it thought Arizona law meant.

E. While *Bassett* is factually distinguishable from petitioners' cases, the lower Arizona courts have relied on *Bassett* to foreclose any possibility of resentencing or release on parole to them and other similarly situated defendants.

Despite the faulty logic of the Arizona Supreme Court's decision in *Bassett*, lower courts have found their hands tied by the decision. As in petitioners' cases, lower courts in Arizona have denied relief and the Arizona Supreme Court has denied review to all other juvenile offenders in Arizona whose cases have been decided since *Bassett* was issued.[4] *See, e.g.*, *State v. Pierce*, No. 2 CA-

[4] Notably, these cases raised claims under Arizona Rule of Criminal Procedure 32.1(g), the same state rule at issue in *Cruz v. Arizona*, 598 U.S. 17 (2023).

CR 22-0160 PR (Ariz. Ct. App. Nov. 16, 2023) (denying relief); *State v. Aston*, No. 1 CA-SA 22-0068 (Ariz. Ct. App. Jan. 3, 2024) (granting special action relief and vacating prior decision granting relief); *State v. Aston*, No. 1 CA-CR 22-0125 (Ariz. Ct. App. Oct. 1, 2024) (granting State's motion to dismiss appeal); *State v. Conley*, No. 1 CA-CR 22-0266 PRPC (Ariz. Ct. App. Feb. 6, 2024) (denying relief); *State v. Bosquez*, No. 1 CA-CR 22-0360 PRPC (Ariz. Ct. App. Feb. 6, 2024) (denying relief); *State v. Maciel*, No. 1 CA-CR 23-0442 PRPC (Ariz. Ct. App. Mar. 21, 2024) (denying relief); *State v. Cruz*, No. 2 CA-CR 2023-0199-PR (Ariz. Ct. App. May 14, 2024) (denying relief); *State v. Rutledge*, No. 1 CA-CR 22-0169 PRPC (Ariz. Ct. App. May 16, 2024) (denying relief); *State v. Bustos*, No. 1 CA-CR 23-0530 PRPC (Ariz. Ct. App. May 16, 2024) (denying relief); *State v. Bustos*, No. CR-24-0138-PR (Ariz. Oct. 15, 2024) (denying review); *State v. DeShaw*, No. 1 CA-CR 21-0512 (Ariz. Ct. App. June 25, 2024) (affirming superior court order vacating resentencing hearing and reinstating natural life sentence); *State v. Purcell*, No. CA-CR 21-0541 (Ariz. Ct. App. June 25, 2024) (same); *State v. Tatum*, No. CA-CR 22-0061 (Ariz. Ct. App. June 25, 2024) (same); *State v. Najar*, No. CA-CR 22-0071 (Ariz. Ct. App. June 25, 2024) (same).

While a handful of cases remain pending in the Arizona courts, these results furnish no reason to believe that they will depart from prior holdings. Thus, the decisions below demonstrate that *Bassett* represents a bar to all Arizona juveniles challenging their mandatory life-without-parole sentences as unconstitutional under *Miller*—a perverse result given this Court's rulings in *Montgomery*, *Tatum*, *Jones*, and *Cruz*.

This Court should grant review to correct the Arizona Supreme Court's error and allow these cases to proceed

to litigation on the merits of the individuals' constitutional claims challenging their sentences in the Arizona state courts. The Arizona Attorney General's Office has previously asked this Court to deny review in similar cases seeking certiorari review from the Ninth Circuit, requesting this Court to delay review while Mr. Bassett's case was pending in state court because it was possible that there would be a state remedy that would moot any federal claims. *See, e.g.*, Brief in Opposition at 27–28, *Rue v. Thornell*, No. 22-6027 (Mar. 7, 2023). The state further argued that instead of using a habeas case subject to the limitation on relief in 28 U.S.C. § 2254(d), "the better vehicle [for this Court] to address the constitutionality of Arizona [sentencing] statutes would be a decision from the Arizona Supreme Court interpreting and analyzing those statutes." *Id.* at 28. The opportunity the State of Arizona asked this Court to wait for in *Rue* is now here. The Court should not allow the State of Arizona to continue to ignore this Court's precedents, to disavow its own previous arguments, and to deny individuals with potentially meritorious constitutional claims their day in court.

Finally, this Court in *Jones* concluded its analysis by stating that the Court's decision was "far from the last word on whether Jones will receive relief from his sentence" because the Court's decision allowed him to present his "moral and policy arguments for why he should not be forced to spend the rest of his life in prison" to "the state officials authorized to act on them." *Jones*, 593 U.S. at 121. Unfortunately, no such opportunity exists for juveniles like petitioners sentenced to natural life in Arizona. Under Arizona law, a natural life sentence prevents an individual from ever seeking review of his sentence through any form of executive clemency and denies him any opportunity to present evidence of his rehabilitation. *See* Ariz. Rev. Stat. § 13-751(A)(1) ("A defendant who is sentenced to natural life is not eligible

for commutation, parole, work furlough, work release or release from confinement on any basis."). As explained above, the natural life sentence imposed on petitioners and other juvenile offenders in Arizona is even harsher than the life-without-parole sentences this Court considered in *Miller* and *Jones*. If the Court allows the decision of the Arizona Supreme Court below to stand, it will truly shut the prison gates forever for impacted juvenile offenders in Arizona.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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