No. 24-391

IN THE

# Supreme Court of the United States

FELIPE PETRONE-CABANAS; CHARLES VINCENT WAGNER; JONATHAN ANDREW ARIAS; THOMAS JAMES ODOM; AND CHRISTOPHER LEE MCLEOD,

*Petitioners*,

v.

STATE OF ARIZONA,

*Respondent*.

**On Petition for a Writ of Certiorari to the Arizona Court of Appeals**

## REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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## INTRODUCTION

The Eighth Amendment's prohibition on mandatory life without parole for juveniles requires that a State's "sentencing system" include an option less than life without parole. *Jones* v. *Mississippi*, 593 U.S. 98, 105 (2021). There is no dispute that from 1994 to 2014, Arizona's sentencing options—death, natural life, or life with the possibility of executive clemency after 25 years—did not include parole, and "parole-eligibility is constitutionally required." *Bassett* v. *Arizona*, 144 S. Ct. 2494, 2496 (2024) (Sotomayor, J., dissenting from denial of certiorari) (quoting *Bassett* BIO 24); *see* BIO 11. The State does

not—and cannot—defend the Arizona Supreme Court's contrary conclusion that this Court's precedents "*do not specifically require* the availability of parole when sentencing a juvenile." *State ex rel. Mitchell* v. *Cooper*, 535 P.3d 3, 11 (Ariz. 2023) ("*Bassett*") (emphasis added). Nor does the State ask this Court to overrule *Miller* v. *Alabama*, 567 U.S. 460 (2012).

This Court should grant certiorari and reverse Arizona's consequential error of law. The State urged this Court to deny certiorari in *Bassett* for fact-bound reasons, but those reasons do not apply here. The Arizona Court of Appeals initially granted relief below because Petitioners were sentenced under a "scheme that did not allow for the possibility of parole." Pet. App. 71a. But after *Bassett*, the Court of Appeals concluded it was compelled to deny relief because Arizona law included multiple sentencing options, even though none included parole. *Id.* at 77a, 107a. Whatever this Court's reasons for denying certiorari in *Bassett*, they do not apply to Petitioners.

The State claims this Court should nevertheless deny review. But behind its rhetoric, the State has no response to two critical points distinguishing this Petition from *Bassett*: First, in four Petitioners' cases, *death was the harshest option available*, yet those Petitioners did not receive a death sentence. This means the prosecutor or the sentencer exercised leniency. The State is thus not entitled to speculate here—as it did in *Bassett*—that the sentencer would still have picked the harshest sentence available, even if parole were an option. Second, Petitioners' sentencers did not "affirmatively say" parole was available, BIO 30, so the State cannot rely on its

argument in *Bassett* that Petitioners' sentencers mistakenly believed parole was available.

The State speculates that every single judge in Arizona somehow mistakenly believed parole was available, even though Arizona "abolish[ed] parole." *Cruz* v. *Arizona*, 598 U.S. 17, 21 (2023). That assertion is staggering and unfounded. The only court below that said anything about a mistake flatly *rejected* the State's argument, concluding that the "record negates" the State's speculation that the sentencer "believed it could sentence [the defendant] to a parole-eligible term." Pet. App. 73a.

The question presented is critically important. Of the 28 States with unconstitutional sentencing schemes cited in *Miller*, Arizona is the only one that continues to deny relief. Scholars Br. 4, 22-25. *Every other State* has remedied its unconstitutional sentencing regime. The Arizona Supreme Court's rubber-stamp denial of relief in every case post-*Bassett* demonstrates that it is not conducting any individual consideration of any case, and instead persists in its deeply erroneous view that this Court's precedents do not require "the availability of parole when sentencing a juvenile." *Bassett*, 535 P.3d at 11.

This is not a one-off event. Arizona has a history of defying this Court's precedents with respect to this same sentencing scheme. *See Cruz*, 598 U.S. at 21-22; *Lynch* v. *Arizona*, 578 U.S. 613, 614-615 (2016) (per curiam). That Arizona continues to "conspicuously disregard[] governing Supreme Court precedent" is all the more reason to grant review. *Taylor* v. *Riojas*, 592 U.S. 7, 11 (2020) (Alito, J. concurring in the judgment). This Court should step in and ensure its precedents apply uniformly across every jurisdiction.

## ARGUMENT

### I. THE STATE'S REASONS FOR DENYING REVIEW IN *BASSETT* DO NOT APPLY HERE.

The State attempts to portray Petitioners' cases as identical to *Bassett*—while ignoring *Bassett*'s key features upon which the State relied in urging this Court to deny review. The State's own arguments in *Bassett* confirm this Petition is worthy of certiorari.

#### A. The Death Penalty Distorted Any Consideration Of Youth.

The State urged this Court to deny review in *Bassett* because the law at the time Bassett was sentenced made natural life the "harshest option." *Bassett* BIO 20. According to the State, because the sentencer in *Bassett* gave the harshest sentence possible, it would not have exercised any leniency even if it had been able to impose a parole-eligible sentence. *See id.* at 24.

This Court has already rejected that kind of after-the-fact speculation about what individual sentencers might have done, *see Jones*, 593 U.S. at 115-118, which the lower courts did not analyze in Petitioners' cases. And four Petitioners (Petrone-Cabanas, Wagner, Arias, and McLeod) were sentenced when natural life was *not* the harshest sentence under Arizona law—before *Roper* v. *Simmons*, 543 U.S. 551 (2005), held the death penalty unconstitutional for juveniles. Petitioners' natural life sentences thus reflected a "determination that an individual is not one of the 'worst of the worst' for whom the harshest possible penalty" was appropriate. NACDL Br. 10. There is every reason to think that, absent the death penalty, a judge presented with the option of

exercising leniency and imposing a parole-eligible sentence would have done so—and certainly no reason to assume the opposite.

The State ignores this argument. Instead, it dismisses the availability of the death penalty as "immaterial." BIO 18. But the fact that Bassett received the "harshest option" was a key reason the State asked this Court to deny certiorari in *Bassett*—and it is simply not true here.

The State does not dispute that Petrone-Cabanas's sentencer, after concluding that youth overcame the presumption of the death penalty, imposed natural life *without addressing any distinction between life sentences*. Pet. 14, 21-22. That is unsurprising: There was no functional difference between natural life and life with the possibility of executive clemency after 25 years; neither permitted any hope of release, where executive clemency has never been granted for someone convicted of first-degree murder in the 30 years since Arizona abolished parole. NACDL Br. 8.

The State likewise cannot dispute that Wagner's sentencing judge, after rejecting the death penalty as inappropriate on account of youth, did not mention youth when imposing natural life. Pet. 23; Pet. App. 58a. And the State does not contest that it urged Arias's and McLeod's sentencing judges to disregard youth because the State's decision not to pursue the death penalty *already credited their youth*. Pet. 23.

Where youth was the reason not to impose death, there is no basis to speculate that the sentencing judge deemed the defendant to be among the "relatively rare" children for whom a life-without-parole sentence was appropriate. *Jones*, 593 U.S. at 111-112.

The State nevertheless invites that speculation, citing statements by Petrone-Cabanas's sentencer *in a different case*. BIO 19. But the State never raised this argument below, nor produced this transcript in the twelve years since Petrone-Cabanas sought postconviction relief. Nor does a transcript in a different sentencing proceeding count as an on-the-record explanation of why the judge acted *at the time* he imposed Petrone-Cabanas's sentence. All that transcript shows is that the same reasoning that led the court to believe a death sentence would not have been upheld would make a life-without-parole sentence improper. In any event, the record refutes the State's position that the judge mistakenly thought a parole-eligible sentence was available. Petrone-Cabanas's sentencer confirmed there were just "*two* possible penalties" for first-degree murder: "a sentence of death by lethal injection *or* a sentence of life," to which the possibility of release "does not apply." 7/19/2001 Plea Hr'g 7, 12, *State* v. *Petrone-Cabanas*, No. CR-1999-4790 (Ariz. Super. Ct.) (emphases added). The State's argument only underscores the kind of speculation it is asking this Court to conduct—speculation that the Court's precedents reject, *see Jones*, 593 U.S. at 105, 114-118, and that the lower courts did not engage in.

The State has no response to the sentencer's extensive findings that Petrone-Cabanas is "amenable to rehabilitation," that "juvenile impulsivity played an important part" in the crime, and that such a "lack of substantial judgment" is "one of the often-present vagaries of youth." Pet. App. 24a, 29a, 31a; *see generally id.* at 21a-31a. Those findings are incompatible with life without parole, which

"forswears altogether the rehabilitative ideal." *Miller*, 567 U.S. at 473 (citation omitted).

### B. There Was No "Actual Consideration Of Parole-Eligibility" In Petitioners' Cases.

The State *agrees* that "the unavailability of a parole-eligible option would typically lead to a violation of *Miller*." BIO 11. The State nevertheless urged this Court to deny review in *Bassett* on the ground that "Bassett's sentencer actually considered whether he should be parole-eligible," citing portions of the sentencing transcript expressly referencing parole. *Bassett* BIO 22. According to the State, this meant the sentencer "fortuitously complied with *Miller*." *Id.* at 27. The State expressly acknowledged, however, that *"[b]ut for the sentencer's actual consideration of parole-eligibility* * * *, there would be a *Miller* violation." *Id.* at 23 (emphasis added).

The problem for the State is that there is no evidence of actual consideration of parole eligibility for Petitioners. *See* BIO 15, 30 (acknowledging that the State's claimed "misunderstanding is perhaps less plain" with respect to Petitioners, whose sentencers did not "affirmatively say" parole was available). The State cannot cite any sentencing transcript demonstrating the sentencer considered a parole-eligible sentence on the basis of the Petitioner's youth and rejected it. Instead, the State provides, with no context, a grab bag of other references to "parole"—including in entirely different cases and newspaper clippings—nearly all of which the State did not offer below. *Id*. at 31-34. Those belated arguments cannot establish that Petitioners received the "discretionary sentencing procedure" *Miller* requires. *Jones*, 593 U.S. at 110.

This Court should not deny certiorari based on evidence the State did not marshal below. Instead, it should grant certiorari and address the actual basis for the decisions below—that this Court's precedents "do not specifically require the availability of parole when sentencing a juvenile," and "a choice between" parole-ineligible sentences sufficed. *Bassett*, 535 P.3d at 11-13. That conclusion plainly violates this Court's precedents and should not be left standing.

## II. THE STATE'S "UNIVERSAL MISTAKE" ARGUMENT IS WRONG—AND WAS NOT ACCEPTED BY THE COURTS BELOW.

Because the State cannot show a mistake as to any individual Petitioner, the State asks this Court to presume there was a "universal" mistake by all Arizona judges that parole was available despite an explicit statute to the contrary. BIO 3, 33. That argument is as absurd as it sounds. No court below relied upon it—indeed, one expressly rejected it—so it cannot possibly serve as a basis for denying certiorari.

**1.** The trial courts below denied relief not because of some universal mistake about the availability of parole, but because they believed Arizona's sentencing option of "life with the possibility of release after 25 years" meant a "natural life sentence was not mandatory." Pet. App. 36a, 81a, 95a. The Arizona Court of Appeals correctly reversed because Petitioners were "sentenced to life terms under a scheme that did not allow for the possibility of parole," directly contrary to this Court's precedents. *Id.* at 71a; *see id.* at 41a, 86a.

The Arizona Supreme Court then reversed with *Bassett*, concluding that Bassett's sentencing

complied with this Court's precedents and that the availability of parole was irrelevant. 535 P.3d at 11. Following *Bassett*, the State argued below that "*Bassett* confirmed" that a "natural life sentence was not mandatory as prohibited by *Miller*," because the sentencer could have imposed a clemency-eligible sentence. 10/31/2023 State Br. 5-10, *State* v. *Petrone-Cabanas*, No. 1-CA-CR-21-0534-PRPC (Ariz. Ct. App.). Notably, the State did *not* argue there was some kind of universal mistake regarding parole availability. *See id.*

Following *Bassett*, the Arizona Court of Appeals concluded it was compelled to deny relief to all juvenile life-without-parole defendants because a "natural life sentence was not mandatory" in Arizona—without mentioning any supposed universal mistaken belief about parole. Pet. App. 107a, 77a. The Arizona Supreme Court summarily denied review.

Across the decisions below, the sole reference to any mistake by any sentencing judge was in Wagner's case, where the Arizona Court of Appeals *rejected* the State's argument that the judge "believed it could sentence Wagner to a parole-eligible term." *Id.* at 73a. This negates the State's argument that there was a universal mistake; the court found no such mistake in *Wagner*. *See Foster* v. *Chatman*, 578 U.S. 488, 500 (2016) (deference to state-court factual findings absent clear error).

To the extent this Court gives any credence to the State's universal mistake argument—and it should not—the Court should grant the Petition, hold that Arizona's sentencing scheme is unconstitutional, vacate the decisions below, and remand for the

Arizona courts to evaluate that question in the first instance.

**2.** The State's universal mistake argument is demonstrably false.

Our system of "cooperative judicial federalism presumes federal and state courts alike are competent." *McKesson* v. *Doe*, 592 U.S. 1, 5 (2020) (per curiam) (quotation marks omitted); *see Woodford* v. *Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (rejecting the "readiness to attribute error [a]s inconsistent with the presumption that state courts know and follow the law"). A presumption that every state jurist was hoodwinked by the "interplay" between two titles of the state code and pervasively misinterpreted their own law *for decades*, BIO 5, subverts the "respect for state courts" enshrined in this Court's precedents, *Michigan* v. *Long*, 463 U.S. 1032, 1040 (1983).

There is no basis for a presumption of error here. Arizona courts consistently "recognized that state law 'eliminated the possibility of parole for crimes committed after 1993.'" *Bassett*, 144 S. Ct. at 2496-97 (Sotomayor, J., dissenting from denial of certiorari) (quoting *State* v. *Rosario*, 987 P.2d 226, 230 (Ariz. Ct. App. 1999)) (brackets omitted); *accord Bassett* Reply 5 (collecting cases). The mine-run of Arizona courts addressing *Miller* claims similarly accepted that "parole had been eliminated," without any mention of a misunderstanding. *E.g.*, *State* v. *Cox*, No. 2-CA-CR-2014-0035-PR, 2014 WL 4816081, at *1 (Ariz. Ct. App. Sept. 29, 2014). It beggars belief to claim that every Arizona judge was nonetheless ignorant of state law.

The breadth of the State's claim is striking given its lack of evidence. The best the State can muster (at

4-5, 15) is *State* v. *Anderson*, which referenced "confusion * * * about parole availability." 547 P.3d 345, 348 (Ariz. 2024). But *Anderson*—which did not involve a *Miller* claim—offers no evidence of "universal" confusion, BIO 3, and says nothing about whether sentencers really thought parole was available. The State places great weight on the fact that *some* Arizona cases mention the "possibility of parole." *Id*. at 4 (citations omitted). But Petitioners' sentencers did not. *Id.* at 30.

The references to parole in Arizona caselaw, moreover, do not prove a universal misunderstanding. As the State previously explained, Arizona courts used "parole" "as shorthand for when all forms of applicable executive clemency * * * became available." *Chaparro* v. *Ryan*, State MTD 12-13, No. 2:19-cv-00650 (D. Ariz. Mar. 27, 2019). That does not mean courts actually thought parole was available. Indeed, the State agreed that Arizona law "*at all relevant times unambiguously forbade parole*." *Id*. at 3 (emphasis added). The State should not be permitted to switch sides when it suits them. And as counsel for Petitioner Odom explained at sentencing in 2011, "there has *never* been someone released on parole since the statute was put in place." 8/19/2011 Sentencing Tr. 4, *State* v. *Odom*, No. CR-2010-121445-001 (Ariz. Super Ct.) (emphasis added). The Court should reject the State's baseless universal mistake argument and grant certiorari.

## III. THIS PETITION IS AN IDEAL VEHICLE TO ADDRESS THIS IMPORTANT QUESTION.

This joint petition asks the Court to address an important and recurring question about whether the Court's precedents apply in Arizona. This question is

of immense importance to the 29 defendants sentenced as juveniles under Arizona's unconstitutional scheme, 19 of whom were sentenced while Arizona law still permitted juveniles to be sentenced to death. NACDL Br. 10. It is also of immense importance to our federal system, where state courts must abide by this Court's precedents. *See Lynch*, 578 U.S. at 615.

The State says this Court should deny certiorari because, although Petitioners each raised *Miller* claims, Petitioners other than Petrone-Cabanas did not make "the specific argument that there was no actual consideration of parole-eligibility." BIO 15-16. But a party does not forfeit an argument by failing to anticipate a counterargument. The State acknowledges that Petrone-Cabanas made and preserved this argument, and the State does not dispute that the other Petitioners squarely challenged the unconstitutionality of Arizona's sentencing scheme under *Miller*. *See id.* Moreover, the decisions below were not based on findings that Petitioners' sentencing judges mistakenly believed parole was available, much less that there was a universal mistake. The fact that Arizona resorts to new evidence on certiorari in a last-ditch attempt to save Arizona's unconstitutional sentencing system is a reason to grant certiorari, not deny it.

The State complains (at 10-11) that *Bassett* was a better vehicle, but the State urged this Court to deny certiorari in *Bassett* on the unique facts of that case. The State cannot make the same arguments here, where the courts below did not find a mistake and Petitioners' sentencers did not "affirmatively say" parole was available. *Id.* at 30. The courts below

denied relief based on *Bassett*'s holding that Arizona law did not violate *Miller*—reinforcing the need for this Court's review.

Ruling for Petitioners would not entitle them to parole. It would entitle Petitioners to their day in court, where a judge could consider whether they should be eligible for parole before commanding that they die in prison. In every State except Arizona, defendants sentenced as juveniles to mandatory life without parole have been afforded that opportunity. This Court should grant certiorari to uphold its precedents and ensure the uniformity of federal law.

## CONCLUSION

The Petition should be granted.

Respectfully submitted,

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