No. 24-6939

IN THE

Supreme Court of the United States

SCOTT DESHAW, BOBBY PURCELL, BOBBY TATUM, WILLIAM NAJAR, RALPH CRUZ, JOSEPH CONLEY, JOSE BOSQUEZ & JERMAINE RUTLEDGE,
Petitioners,
v.

STATE OF ARIZONA,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

David J. Euchner
PIMA COUNTY PUBLIC DEFENDER'S OFFICE
33 N. Stone Ave., 21st Floor
Tucson, Arizona 85701

Kerrie D. Zhivago
1934 E. Camelback, Ste. 120-482
Phoenix, Arizona 85016

Natalee Segal
1641 E. Osborn Rd., Ste. 8
Phoenix, Arizona 85016

Kaitlin DiMaggio
10611 N. Hayden Rd., Ste. D106
Scottsdale, Arizona 85260

Stephen Duncan
4295 N. 75th St.
Scottsdale, Arizona 85251

Mikel Steinfeld
Counsel of Record
MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE
620 West Jackson, Suite 4015
Phoenix, Arizona 85003
(602) 506-7711
Mikel.steinfeld@maricopa.gov

E. Joshua Rosenkranz
Katherine E. Munyan
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Nicole Ries Fox
ORRICK, HERRINGTON & SUTCLIFFE LLP
2050 Main Suite, Suite 1100
Irvine, CA 92614

Kamilyn Y. Choi
ORRICK, HERRINGTON & SUTCLIFFE LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Jermaine Rutledge was 15 years old when he committed his crime. An Arizona court acknowledged that Jermaine's 25-year-old brother was the "prime" instigator but sentenced Jermaine to life without parole, explaining that its "job is not to do what is best for the defendant." App. 192a, 194a. Bobby Purcell was 16. The sentencing court found that Bobby "possesse[d] the capacity to be meaningfully rehabilitated." App. 25a. Yet that court too sentenced Purcell to life without parole. App. 27a-28a. These courts had no choice: Arizona law at the time mandated life without parole for Petitioners' crimes.

Remarkably, the State nonetheless contends that Jermaine and Bobby and the other six Petitioners sentenced to life without parole as juveniles "received all that *Miller* requires." BIO 23. But *Miller* held "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller v. Alabama*, 567 U.S. 460, 479 (2012). That is exactly what Arizona's sentencing scheme did.

The courts below denied Petitioners relief based on the Arizona Supreme Court's holding that *Miller*—despite its language—does not require the availability of parole. *See State ex rel. Mitchell v. Cooper (Bassett)*, 535 P.3d 3, 11-14 (Ariz. 2023). The State, however, acknowledges that *Miller* does in fact require parole availability. That fact makes the Arizona Supreme Court decision—which the State otherwise attempts to defend—senseless. A choice between two parole-ineligible sentences is not a choice that satisfies *Miller*. Indeed, *Miller* specifically forecloses the State's argument that consideration of youth is sufficient absent authority to

impose a parole-eligible sentence based on that youth. And the State's 2014 legislative "fix" making some sentences parole eligible does not make Petitioners' sentences retroactively constitutional.

The State resorts to a remarkable contention: that there was a "mistake that was shared by Arizona's *entire* judiciary" between 1994 and 2014 as to the availability of parole. BIO 16 (emphasis added). This extraordinary argument is contrary to the presumption that judges know and apply the law. As the State itself must acknowledge, it has no evidence that all the sentencing courts below did not know they could not impose a parole-eligible sentence at Petitioners' sentencings. And ample Arizona caselaw belies the State's claims of any "'universal'" judicial misunderstanding, BIO 4, instead demonstrating that Arizona's sentencing judges did in fact know Arizona sentencing law—something the State itself has acknowledged in the past.

On thin grounds on the merits, the State prefers to speculate about this Court's grounds for denying certiorari in prior petitions. Once again, the State contradicts bedrock law: A denial of certiorari is not a statement on the merits, nor the certworthiness of a future petition. The only two prior petitions to raise this issue outside of a habeas proceeding suffered from vehicle problems not at issue here. While the State now argues that both were "ideal" vehicles for review, BIO 1, its briefs in opposition to certiorari in those cases rested on unique features of those cases. The State is left to argue that these cases—and these Petitioners' lives, now consigned

to be spent entirely in prison without the constitutional protections mandated by this Court—do not matter.

They do.

This Court should grant certiorari and reverse Arizona's error of law.

ARGUMENT

I. Petitioners Sentenced As Juveniles To Mandatory Life Without Parole Did Not Receive What *Miller* Requires.

The State fails to defend the core reasoning of the Arizona Supreme Court decision at issue: that "*Miller* and its progeny do not specifically require the availability of parole when sentencing a juvenile." *Bassett*, 535 P.3d at 11. To the contrary, the State acknowledges that *Miller* requires the availability of parole in sentencing juveniles. *See* BIO 12 (admitting "the unavailability of a parole-eligible option would typically lead to a violation of *Miller*"), 34 (similar). And the State admits that parole was not available when Petitioners were sentenced. BIO 4. Yet the State nonetheless argues that "Petitioners received all that *Miller* requires" because they "received individualized sentencing hearings at which their youth and attendant characteristics were considered." BIO 23.

This argument misunderstands *Miller*. *Miller* requires that sentencing courts have not only discretion to consider youth as a mitigating factor but authority to implement that discretion by "impos[ing] a lesser sentence than life without parole," *Jones v. Mississippi*, 593 U.S. 98, 112 (2021). As *Miller* explained, the Constitution requires sentencers not just to "take into account how children are different" but to assess how those differences "counsel against irrevocably sentencing them to a life-

time in prison." 567 U.S. at 480. Where a State offers no possible penalty other than life without parole, as Arizona did, any consideration of age is irrelevant under *Miller* because consideration of age "could not change the sentence; whatever [is] said in mitigation, the mandatory life-without-parole prison term would kick in." *Id.* at 488.

While the State (at 26-32) touts a few courts' mention of youth, Petitioners' cases illustrate the emptiness of that consideration absent authority to impose anything less than the "harshest prison sentence." *Miller*, 567 U.S. at 479. Scott DeShaw, 17 years old at the time of his crimes, was found to have "emotional and moral immaturity"—yet was sentenced to life without parole. App. 5a. Bobby Purcell, 16 years old at the time of his crimes, was found to "possess[] the capacity to be meaningfully rehabilitated"—yet was sentenced to life without parole. App. 25a. As to Jermaine Rutledge, 15 years old at the time of his crimes, the sentencing court considered his age the "first and foremost" mitigating factor—yet sentenced him to life without parole. App. 194a.

While admitting that no sentencing option available permitted parole, the State repeatedly suggests that courts that imposed "natural life" necessarily would have rejected parole eligibility because they rejected "life" as too lenient. *See, e.g.*, BIO 38-39. This argument misrepresents Arizona law. "Life" provided no prospect of relief except for executive clemency. *See Cruz v. Arizona*, 598 U.S. 17, 23 (2023). The "likelihood of [clemency] is so remote" that "life" was considered "indistinct" from "natural life" under Arizona law, not a more lenient option. *State v. Dansdill*, 443

P.3d 990, 1000 n.10 (Ariz. Ct. App. 2019). Arizona law did not classify "natural life" as a more severe or aggravated sentence and had no presumption in favor of "life." *State v. Fell*, 115 P.3d 594, 598 ¶ 15 & n.5 (Ariz. 2005). When each Petitioner was sentenced, Arizona provided no guidance on choosing between a "life" or "natural life" sentence. *State v. Wagner*, 982 P.2d 270, 273 ¶ 16 (Ariz. 1999). In choosing between life with no release whatsoever and life with wholly "theoretical" release, *Dansdill*, 443 P.3d at 1000 n.10, a judge had no reason to make the assessment of a defendant's possibility of maturation relevant to determining whether to impose a parole-eligible sentence.

The sentencing records in these cases before *Roper v. Simmons*, 543 U.S. 551 (2005), further disprove the State's argument. In Scott DeShaw, Bobby Purcell, and Bobby Tatum's cases, the sentencing judge cited the defendant's youth as a reason not to impose death, the harshest sentence available at that time. *See* Pet. 27. The availability of death is relevant not because, as the State casts the argument, consideration of death itself creates a *Miller* violation. BIO 20. Rather, it is relevant because a court's rejection of death evidences that it wanted to impose *less* than the harshest sentence on the defendants based on their youth. In these circumstances, there is no basis whatsoever to speculate that the court would have deemed the defendant to be among the "relatively rare" children for whom life without parole, now the harshest available sentence, was appropriate if parole had been available. *Jones*, 593 U.S. at 111-112.

The State also errs in suggesting that the 2014 reinstatement of parole somehow retroactively rehabilitated sentences that were otherwise unconstitutional. BIO 32, 34. What matters is the constitutionality of the sentencing scheme at the time of sentencing. Courts generally have "no authority to leave in place a conviction or sentence that violates a substantive rule." *Montgomery v. Louisiana*, 577 U.S. 190, 203-04 (2016). And the "potential for future 'legislative reform'" cannot rescue an unconstitutional scheme. *Lynch v. Arizona*, 578 U.S. 613, 616 (2016). Moreover, the "reform" Arizona imposed was only a partial one. The 2014 reinstatement of parole applies only to juveniles serving "life" sentences, not those serving "natural life" sentences. As explained above, *contra* BIO 34, it cannot be assumed that a judge that imposed "natural life" would not have imposed a parole-eligible sentence given the option.

II. The State's "Universal Mistake" Argument Is Wrong.

Unable to mount a reasoned defense of *Bassett*, the State turns to a more radical position. It argues that Petitioners' sentencing courts *did* determine whether to impose a parole-eligible sentence, despite having no authority to do so, because they were ignorant of Arizona law. According to the State, "*everyone* was mistaken about the actual availability of parole at the time of sentencing." BIO 23 (emphasis added). Sentencing courts therefore unnecessarily considered parole-eligible sentences, complying with *Miller*, despite having no legal authority to impose anything other than life without parole.

This argument is not just "unusual." BIO 12. It is a stunning claim for a State to make about its own judiciary. It is also wholly unsupported.

A. As a threshold matter, the State provides no support for the notion that widespread judicial mistake could right an unconstitutional state sentencing system. BIO 12. As this Court in *Jones* emphasized, *Miller* and *Montgomery* require examination of the "State's discretionary sentencing system" as a whole, not individual judges' statements in isolation, to determine whether the *system* is "both constitutionally necessary and constitutionally sufficient." 593 U.S. at 105. Arizona's is not.

Even if such a misunderstanding could cure a constitutional defect, the State still gets the legal inquiry backwards. Rather than present evidence that Petitioners' sentencing courts misunderstood Arizona law, the State seeks to put the burden on Petitioners to present evidence that the courts did *not* violate Arizona law. *See* BIO 16.

That turns the fundamental principles of judicial review—and federalism—on their head. 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). The State's argument is flatly "inconsistent with the presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam).

The problem for the State is that there is no evidence that all *eight* sentencing courts were ignorant of basic Arizona sentencing law. As the State puts it, "[t]he misunderstanding is perhaps less plain in some cases." BIO 16. Indeed, far from plain, evidence of misunderstanding is nonexistent as to some cases. The State has

cited no evidence whatsoever to suggest the sentencing courts for DeShaw, Purcell, or Tatum mistakenly believed that parole was available. *See* Pet. 2, 30. In other cases, the State relies merely on the use of the word "parole" at sentencing. *See* BIO 36-37. But using the word "parole" does not evidence a belief that parole is available. After Arizona abolished parole, the first-degree murder statute continued to define "natural life" as barring release including "parole," and "life" as including the possibility of "release." Ariz. Rev. Stat. § 13-703(A) (2003). As the State has previously explained, Arizona courts unsurprisingly continued to use "parole" "as shorthand for when all forms of applicable executive clemency … became available." State MTD at 12-13, *Chaparro v. Ryan*, No. 2:19-cv-00650 (D. Ariz. Mar. 27, 2019). By the State's own past admission, that does not mean courts thought parole was available.

B. Absent record evidence of any "mistaken belief," the State claims that the mistake can be assumed on a silent record because it was "'universal.'" BIO 4. This is a recent position even on the State's part. *Compare id. with* State MTD at 3, *Chaparro v. Ryan,* No. 2:19-cv-00650 (D. Ariz. Mar. 27, 2019) ("Arizona statutory law … *unambiguously forbade parole*" (emphasis added)). And it is wrong.

Unsurprisingly, both before and after Petitioners' sentencings, caselaw demonstrates that Arizona judges understood that Arizona had "eliminat[ed] the possibility of parole." *State v. Rosario*, 987 P.2d 226, 230 (Ariz. Ct. App. 1999); *see State v. Lynch*, 357 P.3d 119, 138 (Ariz. 2015) ("parole is available only to individuals who committed a felony before January 1, 1994, and juveniles [after 2014]"), *rev'd*, 578

U.S. 613 (2016); *State v. Vera*, 334 P.3d 754, 758-759 (Ariz. Ct. App. 2014) (similar); *State v. Hargrave*, 234 P.3d 569, 582-83 (Ariz. 2010) (similar), *abrogation recognized*, *Cruz*, 598 U.S. at 22 n.1; *see Bassett v. Arizona*, 144 S. Ct. 2494, 2496-97 (2024) (Sotomayor, J., dissenting from denial of certiorari). The best support the State can find outside of its own briefing is the Arizona Supreme Court's statement that there had been "pervasive confusion" about parole. *State v. Anderson*, 547 P.3d 345, 348 ¶ 2 (Ariz. 2024). The case makes no claim that confusion was universal; indeed, it makes clear that Arizona law was "unquestionabl[e]" in eliminating parole. *Id.* at 353 ¶ 32 n.1. Similarly, the State places great weight on a few Arizona cases mentioning "parole." BIO 5. But, as explained above, the State itself has acknowledged that Arizona courts often used "parole" as a shorthand for "release" more generally, and, even if these individual courts were confused, it would not establish universal confusion. Tellingly, the one law review the State cites in its own support takes the position that Arizona's sentencing scheme was unconstitutional. *See* Katherine Puzauskas & Kevin Morrow, *No Indeterminate Sentencing Without Parole*, 44 Ohio N.U. L. Rev. 263, 299 (2019).

III. This Case Is An Ideal Vehicle To Review A Critically Important Issue.

There is no better proof that the question presented is important than that Petitioners represent a diverse set of *eight* defendants all sentenced under an unconstitutional sentencing scheme, and that this issue has yet again come before this Court. Nonetheless, the State claims this case presents a "significantly *worse* vehicle than *Bassett* … and *Petrone-Cabanas*." BIO 12. It does little to explain why that is so.

Instead, the State's primary vehicle arguments rely on the denials of certiorari in *Bassett* and *Petrone-Cabanas* as justifying denial of certiorari here. [1] But it is well settled that the Court's "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *United States v. Carver*, 260 U.S. 482, 490 (1923). And, as the petition explained, "[i]f the sentencer's mistaken belief that parole was available was reason to deny certiorari in *Bassett*, this case is the ideal vehicle to grant review." Pet. 30. At least two of the Petitioners—DeShaw and Tatum—have a record showing the judge did not mistakenly believe parole was available. *Id.* And now, in addition to the sole petitioner in *Bassett*, and the five petitioners in *Petrone-Cabanas*, this petition presents eight more petitioners all suffering from the very same constitutional violation. The State does not and indeed cannot argue that all eight cases present some vehicle problem foreclosing review.

Next, the State contends that "Petitioners are not similarly situated." BIO 18. But the State itself acknowledges that the cases present the same "core legal dispute": the constitutionality of Arizona's sentencing scheme under *Miller*. BIO 12. And it admits that Petitioners all raised and preserved that core legal issue. *See* BIO 10 ("All petitioners raised *Miller* claims in post-conviction proceedings and argued that Arizona's sentencing scheme violated *Miller*."). The State offers no explanation as to why the limited differences in posture in Petitioners' cases would

[1] The State also cites the denial of certiorari as to several habeas petitions to raise the issue. BIO 16. But those petitions are not comparable, as they carried the added layer of applying AEDPA's deferential standard.

impede this Court's review. Were Petitioners to prevail, all would be entitled to postconviction review and potential resentencing.

While irrelevant to reviewability of the legal question presented, the variations in Petitioners' cases do underscore that Arizona has continued to flout this Court's precedents in *Miller*, *Montgomery*, and *Jones*. This Court remanded the cases of four of the Petitioners here—DeShaw, Purcell, Tatum, and Najar—in light of its decision in *Montgomery*. Pet. 13-14. The State initially stipulated to resentencing, only to withdraw that stipulation before any resentencing occurred. *Id.* Without the State's stipulation, the State's courts denied postconviction relief. They also denied relief for Rutledge, Conley, and Bosquez, reasoning that *Miller* and *Montgomery* were not a "significant change in the law" after all. App. 201a, 209a-210a, 253a-255a. While one Petitioner, Cruz, made it to the evidentiary-hearing stage, the Court of Appeals still denied relief, in a decision assuming that Cruz's original sentence of life without parole was discretionary, the same legal mistake underlying *Bassett*. App. 284a.

Finally, the State claims that the "issues raised involve only eight Arizona defendants and are unlikely to recur." BIO 19. True, there are "only" eight Petitioners here. But dozens of individuals were sentenced under Arizona's unconstitutional sentencing scheme and are "currently serving natural life for crimes committed when they were children." Brief of *Amici Curiae* Nat'l Ass'n of Crim. Def. Lawyers et al. Supporting Petitioners at 10, *Petrone-Cabanas v. Arizona*, No. 24-391 (U.S. Nov. 7, 2024). And this Court has never imposed some minimum number of crimi-

nal defendants affected to enforce constitutional protections. *See, e.g.*, *Cruz*, 598 U.S. at 21-22 (reviewing issue affecting only Arizona's death row).

Further, while the State contends there is "no conflict among the states" on the question presented, BIO 19, that is because Arizona is in conflict with every other state that once had unconstitutional juvenile sentencing schemes. Every one of those states has brought its sentencing scheme into compliance with *Miller*. *See* Brief of *Amici Curiae* 15 Constitutional and Criminal Law Professors in Support of Petitioners at 23-24, *Petrone-Cabanas v. Arizona*, No. 24-391 (U.S. Nov. 7, 2024). This Court should require Arizona to do the same.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

David J. Euchner
PIMA COUNTY PUBLIC DEFENDER'S OFFICE
33 N. Stone Ave., 21st Floor
Tucson, Arizona 85701

Kerrie D. Zhivago
1934 E. Camelback, Ste. 120-482
Phoenix, Arizona 85016

Natalee Segal
1641 E. Osborn Rd., Ste. 8
Phoenix, Arizona 85016

Kaitlin DiMaggio
10611 N. Hayden Rd., Ste. D106
Scottsdale, Arizona 85260

Stephen Duncan
4295 N. 75th St.
Scottsdale, Arizona 85251

Mikel Steinfeld
Counsel of Record
MARICOPA COUNTY PUBLIC DEFENDER'S OFFICE
620 West Jackson, Suite 4015
Phoenix, Arizona 85003
(602) 506-7711
Mikel.steinfeld@maricopa.gov

E. Joshua Rosenkranz
Katherine E. Munyan
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Nicole Ries Fox
ORRICK, HERRINGTON & SUTCLIFFE LLP
2050 Main Suite, Suite 1100
Irvine, CA 92614

Kamilyn Y. Choi
ORRICK, HERRINGTON & SUTCLIFFE LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037

July 29, 2025