No. 21-846

IN THE

Supreme Court of the United States

JOHN MONTENEGRO CRUZ,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

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

BRIEF OF AMICI CURIAE HABEAS SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are law professors who have extensive academic and practical habeas corpus expertise, especially in the capital context. A list of amici is attached as Appendix A. Amici sign this brief in their individual capacities and not on behalf of their institutions; institutional affiliations are provided solely for identification purposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici urge this Court to grant certiorari—or summarily reverse—to stop Arizona's use of collateral procedure to discriminate against established constitutional rights. "[S]tate courts have the solemn responsibility, equally with the federal courts 'to guard, enforce, and protect every right granted or secured by the constitution of the United States....'" *Steffel v. Thompson*, 415 U.S. 452, 460-61 (1974) (quoting *Robb v. Connolly*, 111 U.S. 624, 637 (1884)). They cannot selectively disregard particular constitutional rights.

With respect to a claim under *Simmons v. South Carolina*, 512 U.S. 154 (1994), that is exactly what the Arizona Supreme Court has done here. Petitioner Cruz was denied his trial rights because, for years, Arizona courts insisted on a narrow misreading of *Simmons*. After this Court held in *Lynch v. Arizona*,

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

578 U.S. 613, 616 (2016) (per curiam), that the Arizona courts had wrongly treated the requested application of *Simmons* as *too novel*, the same courts now refuse to entertain those claims on the ground that the requested application of *Simmons* is *not novel enough*. This refusal violates federal law.

By refusing to consider an application of *Simmons* on the grounds that it is not new enough, the state court impermissibly restricts remedies for prisoners who diligently identify established constitutional errors. In *Lynch*, this Court corrected the Arizona courts' cramped reading of *Simmons*. Instead of providing a remedy for its own errors, however, the Arizona Supreme Court has punished *Simmons* claimants for the Arizona courts' own mistakes. Now, Arizona courts may not entertain *Simmons* claims because, the state Supreme Court says, *Lynch* was not a "significant change in the law." Of course, *Lynch* did not announce a new rule of *federal* law, but it effected a sweeping change in Arizona's *application* of federal law, by holding that the Arizona Supreme Court's precedents in this area had to be reversed and overruled wholesale.

Although *Lynch* effectuated a substantial change in the way *Arizona courts* apply *Simmons*, it clearly did so because the Arizona courts had gotten the federal law wrong—not because Lynch (or Cruz here) had pressed a new *Simmons* frontier. *Lynch* thus makes clear that under *Teague v. Lane*, 489 U.S. 288 (1989), and *Yates v. Aiken*, 484 U.S. 211 (1988), the claimants' preferred application was retroactive because it was "old law." Unbowed, the Arizona Supreme Court then seized on the "old" nature of

Simmons for federal retroactivity purposes to bar claimants under Arizona Rule of Criminal Procedure 32.1(g). The 32.1(g) bar was the final step in a shell game by which Arizona courts have simply refused to apply the established law of *Simmons*. This attempt to sidestep *Simmons* and *Lynch* is not only contrary to federal law, but also marks an unpredictable departure from the state's own precedents.

This remedial catch-22 flies in the face of this Court's precedents, the Supremacy Clause, and the modern division of post-conviction labor between state and federal courts. In state cases, state courts are the primary sites for enforcing constitutional rights of criminal procedure. If a state provides a collateral forum, its courts may not improvisationally change the definition of new law to thwart the collateral remedy.

This Court's intervention is both necessary and appropriate. The Arizona decision results in the clear violation of a federal right, and the Arizona Supreme Court's violation of the Supremacy Clause itself merits this Court's intervention. Moreover, there is jurisdiction to review the judgment because the state ground is neither adequate to bar review nor independent of federal law. And because Arizona appears to be a singular outlier in its treatment on collateral review of the federal rights at issue here, correction of this error would not affect the practices of other states. Instead of being disruptive, reversal here would restore the appropriate federal-state balance, in accord with this Court's Supremacy Clause precedents.

ARGUMENT

I. Arizona's Refusal To Apply *Simmons* Violates The Supremacy Clause

When states provide a collateral forum, they must not improvise rules of retroactivity to disfavor particular rights. The Supremacy Clause requires that state courts provide defendants with at *least* the federal constitutional safeguards in place at the time their conviction became final. *Montgomery v. Louisiana*, 577 U.S. 190, 204-05 (2016); *accord id.* at 219 (Scalia, J., dissenting). This is a modest but critical restriction on the otherwise wide latitude states are afforded in adjudicating constitutional rights. And it extends to *all* "settled" or "old" rules regardless of whether those rules were applied correctly by the state court at the time an individual's conviction became final—in other words, on collateral review, state courts must apply the federal law they ought to have applied in the first place. *See, e.g.*, *Teague*, 489 U.S. at 307.

A. Federal law dictates which decisions apply retroactively in state collateral proceedings.

The Arizona Supreme Court held that petitioners' claims were barred under Arizona Rule of Criminal Procedure 32.1(g), which provides that a defendant may seek post-conviction relief that would otherwise be precluded if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." In doing so, the state court ignored its

obligation to not discriminate against constitutional rights, and its obligation to follow federal retroactivity doctrine.

1. State courts are the primary avenue for adjudicating constitutional challenges to state convictions.

State courts are the "principal forum" for collateral review of federal constitutional rights. *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Just as state courts are the "'main event,' so to speak," at the criminal trial stage, *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977), they also play the leading role in adjudicating constitutional rights after conviction.

Indeed, much of modern habeas law has been configured to reflect the principle that state courts are the primary sites of remediation. Federal courts have taken special pains to avoid "the unjustified intrusion on state sovereignty that results" from "circumvention of the state courts" and their role in adjudicating constitutional challenges to state convictions. *Trevino v. Thaler*, 569 U.S. 413, 430 (2013) (Roberts, C.J., dissenting). But states' primacy cannot be at the expense of federal rights. Indeed, the limitations on federal habeas corpus review are premised on the assumption that state courts will faithfully apply federal law. *See Burt v. Titlow*, 571 U.S. 12, 19 (2013) ("AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights.… '[whose] sovereignty [is] … subject only to limitations imposed by the Supremacy Clause.'" (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990))); *see also Martinez v. Ryan*, 566 U.S. 1, 17

(2012) (excusing procedural default of ineffective assistance of counsel claims where state failed to provide competent counsel in initial-review collateral proceedings).

2. States that provide collateral review must enforce new decisions that qualify as "old law" under *Teague*.

When states provide a process for collateral review, they must enforce all settled federal constitutional rules as of the date a conviction became final. "States are independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008). When state courts fail to faithfully apply rules established by this Court on direct review, the federal retroactivity doctrine cures that error. For there is "no real question" "as to whether the later decision should apply retrospectively" when a decision applies "settled precedents to new and different factual situations." *Yates*, 484 U.S. at 216 n.3 (quoting *United States v. Johnson*, 457 U.S. 537, 549 (1982)).[2]

The Supremacy Clause also dictates the framework for determining whether something is "old law"—and thus whether a person should receive the

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[2] Because *Teague*'s old-law plank does not require that any new law be given retroactive effect, using the term "retroactivity" to refer to this category of Supreme Court decision is somewhat of a misnomer. We use it nevertheless for the sake of continuity with case law.

benefit of a later Supreme Court decision in post-conviction proceedings. *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 100 (1993) ("The Supremacy Clause … does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law."). To the extent the Arizona Supreme Court's interpretation of Rule 32.1(g) thwarts the retroactive effect required by *Teague* and *Yates*, the Supremacy Clause demands that the *Simmons* claim receive merits consideration.

That is for good reason. Allowing states unlimited discretion to define the boundaries of "old law" would result in geographically inconsistent constitutional rights. It would also provide a perverse incentive for states to indefinitely delay faithful implementation of this Court's decisions, effectively denying federal constitutional protections to all defendants whose convictions become final before the Court is forced to reiterate those rights ever more forcefully in subsequent decisions directed at individual states.

If any doubt existed, *Yates* and *Montgomery* confirmed that the *Teague* framework applies to state collateral proceedings. In *Yates*, like here, the petitioner sought the benefit of a ruling by this Court that was first announced before his conviction became final, and later dictated the outcome in another decision by this Court. 484 U.S. at 212-13. Also like here, the state supreme court in *Yates* denied relief in an opinion that "did not consider whether the decision in [the later decision by this Court] might apply retroactively and also did not discuss [the earlier case] on which petitioner had relied." *Id.* at 213. This Court held that the Supremacy Clause required the state to apply

Francis v. Franklin, 471 U.S. 307 (1985)—the *Yates* analog to *Lynch*—in post-conviction proceedings because "*Francis* did not announce a new rule." *Yates*, 484 U.S. at 218. Having opened its courts to federal claims in collateral review, "it has a duty to grant the relief that federal law requires." *Id*. Three decades later this Court reiterated this principle: "Under the Supremacy Clause of the Constitution, state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution." *Montgomery*, 577 U.S. at 204-05 (citing *Yates*, 484 U.S. at 218).

B. *Simmons* is "old law" that Arizona courts must apply.

Here, as Cruz's petition for certiorari demonstrates, *Teague* and *Yates* require that Arizona apply *Lynch*'s interpretation of *Simmons*. *Simmons* was "precedent existing" at the time petitioner's conviction became final, and it "dictated" the outcome in *Lynch*. *Teague*, 489 U.S. at 301. The Arizona Supreme Court recognized that linkage between *Simmons* and *Lynch*, mirroring this Court's language from *Edwards v. Vannoy*: "the Supreme Court's *Lynch* decision was dictated by its earlier decision in *Simmons*." Pet. App. 8a (alteration omitted); *see also Edwards v. Vannoy,* 141 S. Ct. 1547, 1555 (2021) (a rule is settled if it was "*dictated* by precedent"). The State, too, acknowledges as much. *See* Resp. to Pet. for Review at 5-6, *Cruz. v. Arizona*, CR-17-0567-PC (Ariz. Sup. Ct. Jan. 8, 2018) (*Lynch* "simply applied *Simmons*"); Oral Arg. at 22:17-22:22, *Cruz. v. Arizona*, CR-17-0567-PC (Ariz. Sup. Ct. June 4, 2021) ("*Lynch* … is doing nothing

more than restating [the U.S. Supreme Court's] holding in *Simmons*.").

Lynch was not "new" for federal retroactivity purposes because it did not alter *Simmons*, let alone in a material way. *See Yates*, 484 U.S. at 216 n.3 (it is "a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way" (quoting *Johnson*, 457 U.S. at 549)). *Lynch* imposed no "new obligation"—it simply dictated that the obligation announced by *Simmons* be followed throughout the country, as it should have been all along. *Teague*, 489 U.S. at 301. Nor did *Lynch* "break[] new ground." *Id*. It couldn't have; it was a summary reversal. *Lynch* simply declared that the Court meant what it said when it decided *Simmons* decades earlier.

This Court must sometimes grapple with close cases in determining whether a rule is "old" or "new." Not here. *Lynch* did not even extend *Simmons*; it simply repeated it. This Court highlighted that *Simmons* had already rejected all the arguments raised by the state in *Lynch*, and chided the Arizona Supreme Court for failing to adhere to "*Simmons* and its progeny." 578 U.S. at 616. As the Court further noted, those "progeny"—*Ramdass*, *Shafer*, and *Kelly*—simply "reiterated" *Simmons*'s holding. *Id.* at 613, 615. Recognizing, as the *Ramdass* court had before it, that "the dispositive fact in *Simmons* was that the defendant conclusively established his parole ineligibility under state law at the time of his trial," *Lynch*, 578 U.S. at 616 (quoting *Ramdass v. Angelone*, 530 U.S. 156, 171 (2000)), this Court held that its precedents foreclosed the state's recycled argument, *id.*

Rules have been deemed not "novel" for *Teague* purposes when they expanded a principle to apply in a different factual context. *See, e.g.*, *Stringer v. Black*, 503 U.S. 222, 229 (1992) (rule was not new even when later applied to a substantially different capital sentencing scheme); *Penry v. Lynaugh*, 492 U.S. 302, 317-19 (1989) (rule was not new even though result was reached by reading two cases together, neither of which addressed jury instructions or Texas procedure). *Lynch* involved no such extension, and is an easy case under *Teague* and *Yates*.

Just as in *Yates*, an "old rule" is at issue here—and "when state courts provide a forum for postconviction relief, they need to play by the 'old rules' announced before the date on which a defendant's conviction and sentence became final." *Montgomery*, 577 U.S. at 219 (Scalia, J., dissenting).

II. This Court Has Jurisdiction Because The Potential State Ground Is Not Adequate Or Independent

A state ground bars certiorari jurisdiction in this Court only if the ground is both "adequate and independent." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Here, the asserted ground—Arizona Rule 32.1(g)—is neither. Instead, the Arizona Supreme Court has interpreted Rule 32.1(g) unpredictably and inconsistently, in order to avoid consideration of the *Simmons* claim.

Moreover, this Court has jurisdiction to review the decision below in order to ensure that a state procedural ground is not used to discriminate against the

federal right at issue here. "[F]ederal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights." *Walker v. Martin*, 562 U.S. 307, 321 (2011).

A. The Arizona Supreme Court's unpredictable interpretation of Rule 32.1(g) is not an adequate state ground.

First, the state ground is inadequate because it is not firmly established and regularly followed. "The question whether a state procedural ruling is adequate is itself a question of federal law." *Beard v. Kindler*, 558 U.S. 53, 60 (2009) (citing *Lee v. Kemna*, 534 U.S. 362, 375 (2002)). "We have framed the adequacy inquiry by asking whether the state rule in question was 'firmly established and regularly followed.'" *Id.* (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). *See also Lee*, 534 U.S. at 376 ("Ordinarily, violation of 'firmly established and regularly followed' state rules … will be adequate to foreclose review of a federal claim."); *James*, 466 U.S. at 348-49 ("Kentucky's distinction between admonitions and instructions is not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights.").

Here, though, the Arizona Supreme Court's decision marked a sea change in Arizona law, adopting a reinterpretation of Arizona Rule of Criminal Procedure 32.1(g) that is wholly inconsistent with its long-established practice. The decision below is the *opposite* of an application of a "firmly established and regularly followed" rule. Specifically, before *Cruz*, the

"newness" of a Supreme Court decision under Rule 32.1(g) was determined by reference to prior *state* practice. Therefore, if a Supreme Court decision corrected a pervasive state refusal to apply old law, there was still a 32.1(g) remedy because the Supreme Court decision was still "new" as a matter of state practice. *Cruz* changed the referent to something other than state practice, allowing Arizona courts to refuse the 32.1(g) gateway for the tranche of *Simmons* claims at issue in these cases.

Pre-*Lynch *Framework

As noted above, Arizona Rule of Criminal Procedure 32.1(g) provides that a defendant may seek post-conviction relief that would otherwise be precluded if "there has been a significant change in the law that, if applicable to the defendant's case, would probably overturn the defendant's judgment or sentence." Consistent with that procedural text, the Arizona Supreme Court previously interpreted Rule 32.1(g) to hold that the "archetype of such a change occurs when an *appellate court overrules previously binding case law*." *State v. Shrum*, 203 P.3d 1175, 1178 (Ariz. 2009) (emphasis added).

Similarly, the Arizona Supreme Court previously held—even in the context of Rule 32.1(g)—that "new decisions applying" old rules of constitutional law "should generally be applied" on state collateral review. *State v. Slemmer*, 823 P.2d 41, 46 (Ariz. 1991) (citing *Yates*, 484 U.S. at 216).

Post*-Lynch *Framework

But as has consistently been the case for the Arizona Supreme Court, *Simmons* is different. When faced with a *Simmons* claim post-*Lynch*, the court changed the rules. Under the text of Rule 32.1(g), as fairly interpreted in *Shrum*, Mr. Cruz should have been permitted to seek post-conviction relief after this Court "overrule[d] previously binding case law" of the Arizona Supreme Court. *Shrum*, 203 P.3d at 1178. As the Arizona Supreme Court noted in *Shrum*, "[t]he rationale for the Rule 32.1(g) exception is apparent: A defendant is not expected to anticipate significant future changes of the law in his of-right PCR proceeding or direct appeal." *Id.* Of course, petitioner did anticipate the change *Lynch* wrought. But in 1997, he raised his *Simmons* claim too soon. Now, having raised it after *Lynch*, the Arizona Supreme Court has concluded he also raised it too late.

In this case, the Arizona Supreme Court did not dispute that Cruz's *Simmons* claim *was* "clearly foreclosed" by existing Arizona Supreme Court precedent at the time of his direct appeal and first PCR petition, and that the United States Supreme Court—concededly an "appellate court"—had "overrule[d] previously binding case law," *Shrum*, 203 P.3d at 1178. But without explanation, the Arizona Supreme Court changed the rules in the case below, overruling *Shrum sub silentio* to hold for the first time that something entirely different is required.

Mr. Cruz argued before the Arizona Supreme Court that he qualified for relief because *Lynch* "engendered a significant change in [the Arizona

Supreme] Court's application of federal constitutional law" by overruling that court's "misapplication of *Simmons* in prior Arizona capital cases." Pet. for Review at 2, *Cruz v. Arizona*, (Ariz. Sup. Ct. Dec. 4, 2017). But, consistent with its decades-long refusal to fairly apply *Simmons*, the court moved the goalposts yet again. The court declared that *Lynch* "does not represent a significant change in the law for purposes of Rule 32.1(g)" because *Lynch* merely "relied upon" *Simmons*, which "was clearly established at the time of Cruz's trial, sentencing, and direct appeal, despite the misapplication of that law by Arizona courts." Pet. App. 9a. The court further maintained that *Lynch* was not a significant change in the law, but instead was "a significant change in the *application* of the law." *Id.* That formalism is wholly inconsistent—and irreconcilable with *Shrum*.

In *Shrum*, the Arizona Supreme Court provided, as an *example* of a "significant change in law," this Court's decision in *Ring v. Arizona,* 536 U.S. 584 (2002)—a United States Supreme Court decision that overruled a previous Unites States Supreme Court decision. Relying on that example, in *this* case the Arizona Supreme Court in effect held that Mr. Cruz would only be permitted to rely on Rule 32.1(g) if *Lynch* had *overruled Simmons*, rather than merely applying it. But *Shrum* itself was clear that for purposes of Rule 32.1(g), "a significant change in law" "occurs when an *appellate court* overrules *previously binding* case law." *Shrum*, 203 P.3d at 1178-79 (emphasis added). *Ring* provided an example, not the rule. Here, the United States Supreme Court in *Lynch* overruled previously binding case law of the Arizona Supreme Court. Mr. Cruz's case thus fits into the

heartland of Rule 32.1(g)—at least, as the Arizona Supreme Court interpreted that Rule until Mr. Cruz attempted to assert his rights here. *Simmons*, once again, was different. That change in law singled out *Simmons*, even after summary correction by this Court in *Lynch*.

The Arizona Supreme Court is entitled to change its mind and overrule its own prior precedents. But when it changes the rules just to avoid applying a disfavored federal right, this Court has jurisdiction to review that decision. *See infra* II.B.

The analysis above focuses on the State's expected arguments that *Cruz*'s application of Rule 32.1(g) constitutes an adequate state ground for the decision below. But for the reasons discussed above, the Arizona Supreme Court's novel interpretation of state law makes the purported independent state ground for denying relief here wholly inadequate. If, however, the State were to try to dodge the adequacy problem by expressly or implicitly characterizing the decision as an interwoven question of state and federal law, then *Cruz* would be subject to review as resting on a non-independent ground. *See Michigan,* 463 U.S. at 1040-41 ("[W]hen … a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."). That is, whether *Lynch* "overruled" prior precedent—the determinative question under Rule

32.1(g)—is itself a federal question, albeit a separate one from the question whether *Lynch* supplied a new rule. In *Lynch*, this Court exercised its Supremacy Clause power to overrule a long line of Arizona precedents, as dictated by *Simmons* and its progeny. The contrary holding below is itself a federal question. Under either theory, adequacy or independence, the decision below is subject to this Court's review.[3]

B. The broader principles of the adequate and independent state grounds doctrine make clear that this Court has jurisdiction to review the decision in *Cruz*.

This Court has repeatedly made clear that state courts cannot create novel rules or erect unpredictable procedural requirements to evade the federal constitution and frustrate litigants' settled expectations based on precedent. *See Walker*, 562 U.S. at 321.

Here, the Arizona Supreme Court refused for years to apply *Simmons*, on the basis of a distinction that *Simmons* itself expressly rejected. As this Court noted in *Lynch*, "[t]he Arizona Supreme Court thought Arizona's sentencing law sufficiently different from the others this Court had considered that *Simmons* did not apply," "rel[ying] on the fact that, under state law, Lynch could have received a life sentence that would have made him eligible for 'release' after 25 years." 578 U.S. at 615. But as this Court explained, "under state law, the only kind of release for

[3] Of course, the decision is also subject to this Court's review because it violates the Supremacy Clause. *See supra* § I.

which Lynch would have been eligible—as the State does not contest—is executive clemency." *Id.* And as this Court reaffirmed in *Lynch*, "*Simmons* expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility." *Id.*

The novel construction of Rule 32.1(g) continues the Arizona Supreme Court's discrimination against this Court's *Simmons* jurisprudence. In the words of Justice Holmes, "[w]hatever spring[]s the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (quoted in *Lee*, 534 U.S. at 376). *See also Johnson v. Lee*, 578 U.S. 605, 609 (2016) (holding that California's *Dixon* bar was "adequate to bar federal habeas review" where "[n]othing suggests … that California courts apply the … bar in a way that disfavors federal claims"); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) ("The basic due process concept involved is the same as that which the Court has often applied in holding 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."); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 457-58 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."). The Arizona Supreme Court here applied a novel rule, changing the standard for applying 32.1(g) for this case, which

should not be permitted to block enforcement of an established constitutional right.

III. Other States Overwhelmingly Provide A Forum For Non-New Rules Of Constitutional Law

In determining the adequacy of a state procedural bar, this Court also looks to the practice of other states and of federal courts. *See, e.g.*, *Johnson*, 578 U.S. at 609 (concluding that California's rule was adequate where it was not at all "unique" and where "[f]ederal and state habeas courts across the country follow the same rule"). In *Johnson*, for example, this Court noted that "[i]t appears that every State shares this procedural bar in some form." *Id.* Here, almost the opposite is true.

First, as discussed above, the Arizona Supreme Court's rule is inconsistent with *Teague*'s retroactivity rules and thus bears no resemblance to the practice of federal habeas courts.

Second, and even more tellingly, Arizona's decision in *Cruz* makes it an extreme outlier in providing a post-conviction forum that denies relief for old rules of federal law, where this Court issues a decision reiterating the old federal rule but effecting a change in state decisional law. That new decisions breaking no new legal ground are old law and apply on collateral review is so axiomatic that not all states have even wrestled with the question. But of those that have, Arizona stands alone. Alaska, California, Delaware, Florida, Hawaii, Massachusetts, Mississippi, New York, South Carolina, Tennessee, Texas, and

Vermont all permit non-new claims to be brought on post-conviction review as a general matter (or appear willing to do so). *See* Appendix B. Only Arizona has announced, for the tranche of *Simmons* claims at issue here, that it will not do so under Rule 32.1(g). *Id.* And while some other states have provisions analogous to Rule 32.1(g), none appear to have interpreted those rules in the way that the Arizona Supreme Court did here. For example, when faced with an analogous question, the Texas Court of Criminal Appeals found that its state analog permitted review because this Court's decision "constitute[d] a legal basis … that was not available" previously in light of existing state court precedent. *Ex parte Bridgers*, No. WR-45,179-05, 2021 WL 2346539 (Tex. Crim. App. June 9, 2021) (unpublished). Arizona's outlier status provides yet more indication that the Arizona Supreme Court's novel application of Rule 32.1(g) fails the adequacy test. *See Johnson*, 578 U.S. at 609.

But beyond the doctrinal adequacy question, Arizona's outlier status also means in practical terms that a reversal here would not change the status quo in any other states.

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Cruz's petition for certiorari.

Respectfully submitted,

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APPENDIX A

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APPENDIX B

A "‡" indicates state decisional law that is highly probative of the state's willingness to provide a post-conviction forum for non-new rules as a general matter.

A "*" indicates that the state provides a post-conviction forum that denies relief for old rules of federal law, where this Court issues a decision reiterating the old federal rule but effecting a change in state decisional law.

The absence of any symbol indicates that as a general matter, a non-new rule receives a post-conviction forum.

Whether a non-new rule receives a post-conviction forum	
State	**Relevant Law**
‡Alaska	*State v. Smart*, 202 P.3d 1130, 1138-39 (Alaska 2009) (applying federal retroactivity standard to ensure that state retroactivity standard was "no less protective").
*Arizona	*State v. Cruz*, 487 P.3d 991, 992 (Ariz. 2021) (refusing to apply *Simmons v. South Carolina*, 512 U.S. 154 (1994)).
California	*In re Gomez*, 45 Cal. 4th 650, 660 (2009) (holding *Cunningham v. California*, 549 U.S. 270 (2007) was dictated by *Blakely v. Washington*, 542 U.S. 296 (2004) and,

Whether a non-new rule receives a post-conviction forum	
State	**Relevant Law**
	therefore, applies retroactively on collateral review).
‡Delaware	*Powell v. State*, 153 A.3d 69 (Del. 2016) (applying federal retroactivity standard to state supreme court decision).
Florida	*Mosley v. State*, 209 So. 3d 1248, 1281 (Fla. 2016) (giving retroactive effect to *Hurst v. Florida*, 577 U.S. 92 (2016), where that case's reasoning makes clear "that Florida's capital sentencing statute was unconstitutional from the time that the United States Supreme Court decided *Ring* [*v. Arizona*, 536 U.S. 584 (2002)]").
‡Hawaii	*Schwartz v. State*, 361 P.3d 1161 (Haw. 2015) (noting that *Yates v. Aiken*, 484 U.S. 211 (1988) explained that *Francis v. Franklin*, 471 U.S. 307 (1985) "merely applied" *Sandstrom v. Montana*, 442 U.S. 510 (1979) and thus did not create a new rule).
Massachusetts	*Commonwealth v. Nieves*, 476 N.E.2d 179 (Mass. 1985) (giving retroactive effect to *Sandstrom v. Montana*, 442 U.S. 510 (1979)'s application of earlier precedent).

Whether a non-new rule receives a post-conviction forum	
State	**Relevant Law**
Mississippi	*Woodward v. State*, 635 So. 2d 805, 811-12 (Miss. 1993) (adjudicating in post-conviction proceedings a claim based on *Stringer v. Black*, 503 U.S. 222 (1992), which held that *Clemons v. Mississippi*, 494 U.S. 738 (1990) was dictated by *Godfrey v. Georgia*, 446 U.S. 420 (1980)).
New York	*People v. Smith*, 66 N.E.3d 641, 651-52 (N.Y. 2016) (recognizing application of "old" rules in post-conviction review).
South Carolina	*Arnold v. State*, 420 S.E.2d 834 (S.C. 1992) (adjudicating in post-conviction proceedings a claim based on *Yates v. Aiken*, 484 U.S. 211 (1988) which had held that *Francis v. Franklin*, 471 U.S. 307 (1985) was a non-new rule).
Tennessee	*Swanson v. State*, 749 S.W.2d 731, 732-33 (Tenn. 1988) (adjudicating in post-conviction proceedings a claim based on *Yates v. Aiken*, 484 U.S. 211 (1988) which had held that *Francis v. Franklin*, 471 U.S. 307 (1985) was a non-new rule).
Texas	*Ex parte Goodman*, 816 S.W.2d 383, 384 (Tex. Crim. App. 1991) (adjudicating in post-conviction proceedings a claim based on

Whether a non-new rule receives a post-conviction forum	
State	**Relevant Law**
	Penry v. Lynaugh, 492 U.S. 302 (1989) "although [the defendant's] trial, direct appeal, and filing of this writ application all preceded the Supreme Court's decision in *Penry*.")
‡Vermont	*State v. White*, 944 A.2d 203, 208 n.2 (Vt. 2007) (explaining that its approach to retroactivity, which is rooted in the same basis as *Teague*, "is in harmony with the federal test and does not dictate a different result.")