No. 21-846

IN THE

# Supreme Court of the United States

JOHN MONTENEGRO CRUZ,

*Petitioner*,

*v.*

STATE OF ARIZONA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

## BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN CIVIL LIBERTIES UNION, AND AMERICAN CIVIL LIBERTIES UNION OF ARIZONA AS AMICI CURIAE IN SUPPORT OF PETITIONER


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## INTEREST OF AMICI CURIAE

Amici are nonprofit organizations with a keen interest in this Court's application of the adequate and independent state ground doctrine in cases where state procedural rules prevent criminal defendants from asserting constitutional claims.[1] Amici believe this doctrine, as described by this Court's precedents, does not insulate a state court decision from review when the state court applies a novel interpretation of state law to deprive a defendant of any opportunity, at any time, to successfully vindicate a constitutional right.

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, and up to 40,000 with 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 justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6. Letters from the parties extending blanket consent to the filing of amicus briefs are on file with the Clerk. *Id.* 37.3(a).

provide amicus assistance in cases that present issues of broad importance to criminal defendants.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters, dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the U.S. Constitution and our nation's laws. The ACLU of Arizona is a statewide affiliate of the national ACLU.

## SUMMARY OF THE ARGUMENT

This case presents a rare circumstance in which a state court has refused, at every stage of petitioner's case, to apply a constitutional decision of this Court. For more than a decade and a half, the Arizona courts have steadfastly refused to apply to petitioner's case this Court's Due Process ruling in *Simmons* v. *South Carolina*, 512 U.S. 154 (1994). Despite acknowledging that this refusal constituted a misapplication of constitutional law, the Arizona Supreme Court has yet again refused to apply *Simmons* to petitioner's case, this time based on an entirely novel application of the state's procedural rules. The result of the decision, as Arizona would have it, is to preserve petitioner's unconstitutionally imposed death sentence and refuse him rights that all now agree are guaranteed to him by the Constitution and this Court's precedent.

Amici submit this brief in support of petitioner's argument that Arizona's refusal to apply federal law—not merely in a single postconviction proceeding, but at every point throughout a criminal defendant's case—is not immune from this Court's review. Here, the Arizona courts have denied petitioner's Due Process claim under *Simmons* for more than a decade and a half, first

on the grounds that *Simmons* did not apply to Arizona's sentencing scheme, and then, after this Court made clear that it does apply, on the ground that he should have raised it previously because *Simmons* applied all along. The only thing consistent about the Arizona Supreme Court's treatment of petitioner's *Simmons* claim is that petitioner loses either way. Under these circumstances, the Arizona Supreme Court's invocation of a procedural rule to bar petitioner's *Simmons* claim is not "independent and adequate," and does not bar this Court's review.

Moreover, for more than a century, this Court's precedents have established that novel applications of state procedural rules, especially those demonstrating a state court's resistance to applying federal constitutional law, do not deprive this Court of jurisdiction to review the federal constitutional issues in a case on direct review from a state high court. This Court has not often confronted state courts that have invoked newfound interpretations of their own procedural rules in order to frustrate vindication of a federal constitutional right. But whenever it has, the Court has insisted on the propriety of federal court review. The same holds true here.

## I. APPLICATION OF A STATE COURT RULE THAT EFFECTIVELY BARS A PETITIONER FROM ALL FORMS OF RELIEF, AT ANY TIME, FOR AN OTHERWISE AVAILABLE FEDERAL CONSTITUTIONAL CLAIM, CANNOT SHIELD THAT CLAIM FROM THIS COURT'S REVIEW

One important reason why this Court has jurisdiction to consider the merits of petitioner's federal Due Process Clause claim is because the Arizona Supreme Court decision, in seeking once again to evade

*Simmons* and *Lynch* v. *Arizona*, 578 U.S. 613 (2016), violates federal law. The violation is apparent, for reasons explained well by petitioner, based on the refusal of the Arizona Supreme Court to apply settled constitutional rules on collateral review, as required by federal law. *See* Pet. Br. 15, 18-27. The violation is also apparent from the broader, repeated refusal of the Arizona courts to abide by *Simmons* throughout the history of petitioner's time in the State's courts. Amici submit this brief to further explain this second point, and to show why the Arizona Supreme Court's action conflicts with both *Simmons* and *Lynch* themselves, requiring this Court's review.

Beginning in petitioner's trial and extending through two trips to the Arizona Supreme Court—on direct appeal and in the post-conviction review case here—the Arizona courts have consistently rejected the application of this Court's *Simmons* decision to petitioner's case. This began more than a decade and a half ago when, in 2005, the Arizona trial court refused to permit petitioner to inform the jury of his parole ineligibility as a response to the State's contention that his future dangerousness supported the death penalty. Pet. Br. 9-10. It continued in 2008 when the Arizona Supreme Court, in petitioner's direct appeal, affirmed the trial court's ruling based on the erroneous holding that petitioner's "case differs from *Simmons*" because "[n]o state law would have prohibited Cruz's release on parole after serving twenty-five years, had he been given a life sentence." Pet App. 31a.[2] Following that decision, the Arizona Supreme Court continued to rule—in at least eight more decisions spanning 2010 to

[2] This Court rejected that distinction in *Lynch*. *See* 578 U.S. at 615-617.

2015—that *Simmons* did not apply to Arizona's capital sentencing scheme. *See* Pet. App. 5a-6a, 15a (citing cases).

Now, after this Court's *per curiam* decision in *Lynch* roundly rejecting the Arizona Supreme Court's position and holding that *Simmons* plainly does apply to the State's capital sentencing scheme, the Arizona Supreme Court has acknowledged that *Simmons* "was clearly established at the time of Cruz's trial, sentencing, and direct appeal." Pet. App. 9a. The Arizona Supreme Court has likewise recognized that Arizona courts "misappli[ed] … that law" in petitioner's case. *Id.* Nevertheless, advancing an entirely novel interpretation of Arizona Rule of Criminal Procedure 32.1(g), the Arizona Supreme Court has relied on that very reasoning—that *Simmons* necessarily applied to petitioner's trial, sentence, and direct appeal—to refuse, yet again, to apply *Simmons* to petitioner's case. Pet. App. 9a, 11a. In the state court's view, even though it had steadfastly rejected the application of *Simmons* to Arizona death sentences for more than half a decade, *Lynch* was "not a significant change in the law" and therefore, once again, the Court would not abide by the ruling in petitioner's case. Pet. App. 11a.[3]

In short, before *Lynch*, the Arizona Supreme Court refused to abide by *Simmons* in petitioner's case (and other cases)—on the ground that *Simmons* did not apply to Arizona's capital sentencing scheme. And now,

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[3] As petitioner points out, Arizona's procedural rules also provided a third obstacle to vindication of his constitutional rights under *Simmons*; Arizona Rule Criminal Procedure 32.2(a)(2) prevented him from raising his *Simmons* claim in his initial postconviction petition because he had raised it on direct review. Pet. Br. 13 n.2.

after this Court made clear in *Lynch* that *Simmons* does apply, the Arizona Supreme Court again refuses to abide by *Simmons* in petitioner's case—based on the diametrically opposite proposition that *Simmons* necessarily always applied to Arizona's capital sentencing scheme. With the lens pulled back to view petitioner's full, sixteen-year journey through the Arizona state courts, there is one clear result, handed down time and time again without deviation: the Arizona courts will not apply *Simmons* to petitioner's case. The decision on review here is merely the last brick in a larger wall erected by the Arizona Supreme Court, insulating petitioner's flatly unconstitutional death sentence from any challenge or invalidation.

Under these circumstances, this Court can and must reach the federal Due Process Clause question in petitioner's case. The Supremacy Clause makes federal law supreme over conflicting state law. *See, e.g.*, *Testa* v. *Katt*, 330 U.S. 386, 391 (1947) ("[T]he Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'any-thing in the Constitution or Laws of any State to the contrary notwithstanding.'"). It should not matter whether a state court's refusal to abide by federal law can be traced to one particular decision or instead results from a series of decisions over a decade and a half in a single person's case. To hold otherwise would elevate form over substance. The result is the same from the perspective of both the defendant and this Court—a state court refusing to follow federal law. "States may not disregard a controlling, constitutional command in their own courts." *Montgomery* v. *Louisiana*, 577 U.S. 190, 198 (2016). Arizona's refusal accordingly requires this Court's review.

Put another way, "[w]hether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Tr. & Sav. Co.* v. *Hill*, 281 U.S. 673, 682 (1930). Yet that is precisely what Arizona has attempted here. Though its courts are open to federal constitutional claims on both direct and collateral review, Arizona has, over the course of petitioner's proceedings, repeatedly precluded him from vindicating his federal constitutional rights under *Simmons*. Arizona's refusal to apply Simmons to petitioner's case accordingly demands this Court's review. *See, e.g.*, *Yates* v. *Aiken*, 484 U.S. 211, 218 (1988).

## II. THIS COURT'S LONGSTANDING PRECEDENT HOLDS THAT NOVEL INTERPRETATIONS OF STATE COURT RULES CANNOT SHIELD FEDERAL CONSTITUTIONAL CLAIMS FROM THIS COURT'S REVIEW

This Court also has jurisdiction to consider the merits of petitioner's federal Due Process Clause claim because the Arizona Supreme Court's interpretation of Rule 32.1(g) was entirely novel, sharply departing from past Arizona precedent, in order to preclude application of federal law. Petitioner amply demonstrates why, under Arizona law, the Arizona Supreme Court's interpretation was novel. *See* Pet. Br. 39-44. Amici supplement that showing by demonstrating that the principle that novel applications of state procedural rules are inadequate to bar this Court's review of a state court decision is rooted in more than a century of this Court's precedents. This Court has long viewed novel applications of state procedural rules with skepticism when invoked by a state court to avoid vindicating a federal right.

As early as 1904, this Court rejected an argument that an inconsistently applied state pleading standard could bar federal review of an action challenging the exclusion of African Americans from the jury that had convicted the petitioner of murder. *Rogers* v. *Alabama*, 192 U.S. 226, 230-231 (1904). In that case, the Alabama Supreme Court had rejected the substantive constitutional claim by interpreting its statute prohibiting "unnecessarily prolix, irrelevant, or frivolous pleadings" to bar the defendant's two-page motion. *Id.* at 230. In refusing to allow this contorted application of state procedural rules to bar this Court's review, Justice Holmes cited favorably to early precedents of this Court, which had focused on "whether [a state] ground of decision was the real one, or whether it was set up as an evasion, and merely to give color to a refusal" to apply the relevant substantive federal law. *Id.* at 231.

Indeed, for nearly as long as this Court has considered state procedural grounds adequate to prevent the exercise of its jurisdiction, it has provided an exception for state procedural rules applied arbitrarily, or as "a mere device to prevent a review of the decision upon the Federal question." *Enterprise Irrigation Dist.* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917); *see also McCoy* v. *Shaw*, 277 U.S. 302, 303 (1928) (acknowledging lack of federal-review authority "unless the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question"); *Chapman* v. *Crane*, 123 U.S. 540, 548 (1887) ("[A] judgment which rejects the [federal] claim, but avoids all reference to it, is as much against the right … as if it had been specifically referred to and the right directly refused."). As famously captured by Justice Holmes, this Court in its early precedent adhered to

the principle that "[w]hatever springes 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). The rule that novel applications of state law cannot preclude federal court review of a federal claim is a specific application of this more general principle.

This Court's refusal to allow inconsistently applied state procedural rules to prevent its review continued in the twentieth century. In *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), for example, the Court considered a contempt order issued against the NAACP for failure to disclose its membership lists. *Id.* at 451-452. On direct appeal in state courts, the NAACP's writ of certiorari was denied by the Alabama Supreme Court, which held that the NAACP was required to file a writ of mandamus, rather than certiorari, to obtain relief from contempt under state law. *Id.* at 454-455. Alabama then argued to this Court that its highest court's procedural ruling on the purported procedural defects in the NAACP's writ constituted an independent and adequate state ground barring this Court's jurisdiction to review. *Id.*

Justice Harlan, writing for the Court, rejected this argument. He explained that it was not possible to "reconcile the procedural holding of the Alabama Supreme Court in [that] case with its past unambiguous holdings as to the scope of review available upon a writ of certiorari addressed to a contempt judgment." *Patterson*, 357 U.S. at 456. Indeed, the state court's precedent had consistently allowed litigants to advance the same sort of challenges to contempt orders pressed by the NAACP in that case. *Id.* at 456-457. A novel

procedural rule, the Court held, is inadequate "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." *Id.* at 457-458.

Similarly, in *Williams* v. *Georgia*, 349 U.S. 375 (1955), this Court held that it had jurisdiction to review a state postconviction challenge despite the state court's discretionary procedural decision not to grant a motion for a new trial after a verdict. *Id.* at 383-384. The Court reached this decision because the Georgia courts had frequently granted such motions in similar cases, and "[a] state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner." *Id.* at 383. Importantly—and similar to petitioner's case here—this holding was motivated in part by "the acknowledgement by the State … that, as a matter of substantive law, [petitioner] ha[d] been deprived of his constitutional rights." *Id.* at 390. That additional "important factor … impel[led this Court] to remand." *Id.*

The principle that state procedural rules that depart from the state's own precedent are inadequate to bar this Court's review of federal law claims has been reaffirmed frequently. In 1963, this Court held that the inadequacy of a Georgia rule concerning the form of a brief, strictly enforced to bar review in the court below, was "especially apparent" because that application was unsupported by any prior Georgia case. *Wright* v. *Georgia*, 373 U.S. 284, 291 (1963). The next year, in a case filed by individuals involved in sit-ins at racially segregated lunch counters, this Court held the state court's procedural rule inadequate to bar review where the application of that rule conflicted with state

precedent decided both before and after the demonstrators' case. *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964). The Court once again reaffirmed that "state procedural requirements which are not strictly or regularly followed cannot deprive [this Court] of the right to review." *Id.* Similarly, in *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964), this Court found that the state court's rigidly formalist application of procedural requirements for the NAACP's brief did not bar its review of the plaintiff's constitutional challenges because "the Alabama courts ha[d] not heretofore applied their rules respecting the preparation of briefs with the pointless severity shown" in that case. *Id.* at 297, 301.[4]

This Court continued, after the era of the civil rights movement, to reject inconsistently applied state procedural rules as a bar to federal review. In 1982, the Court found inadequate the Mississippi Supreme Court's procedural ruling that a plaintiff's constitutional argument was barred because it was raised for

[4] *Flowers* was the fourth iteration of the NAACP's challenge to Alabama's attempts to oust it from the state and frustrate its efforts to promote civil rights. 377 U.S. at 289-290. *Patterson*, described *supra* (at pp. 9-10) was the first. *Id.* at 290. Over the course of those four cases, the Alabama Supreme Court demonstrated palpable hostility to this Court's precedents and repeatedly defied this Court's orders on remand. *See id.* at 290-293. In the face of this refusal to uphold constitutional commands, when the state court insisted that, if its procedural ruling were held to be inadequate to bar federal review, the case be yet again remanded, Justice Harlan wrote simply, "in view of what has gone before, we reject that contention and proceed to the merits." *Id.* at 302. In that case—the culmination of six years of state court hostility to federal law and refusal to vindicate federal rights—this Court refused to allow the state to yet again attempt to shield itself from its obligation to apply constitutional commands.

the first time in a petition for rehearing. *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-263 (1982). The Court concluded that Mississippi's rehearing rule was not "strictly or regularly followed," and indeed applied "only in exceptional cases." *Id.* Thus, Mississippi courts could "not avoid deciding federal issues by invoking procedural rules that they did not apply evenhandedly to all similar claims." *Id.* at 263; *see also id.* at 264-265 (finding no independent and adequate state ground because state court decision "rested either upon a substantive rejection of petitioners' federal claim or upon a procedural rule that the state court applies only irregularly").

So too in *James* v. *Kentucky*, 466 U.S. 341 (1984), in which this Court conducted its review notwithstanding a purported state procedural basis for the decision. The Court held that the state court's precedent revealed that the state procedural rule "was not always clear or closely hewn to" and was "not the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights." *Id.* at 346, 348-349. And, in *Johnson* v. *Mississippi*, 486 U.S. 578 (1988), eight Justices joined an opinion holding that a state procedural bar that had not been "consistently or regularly applied" was "[c]onsequently, under federal law … not an adequate and independent state ground for affirming petitioner's conviction." *Id.* at 588-589.

As this Court recently summed up its precedent, only those state procedural rules "'firmly established and regularly followed' … will be adequate to foreclose review of a federal claim." *Lee* v. *Kemna*, 534 U.S. 362, 376 (2002). An "exorbitant application of a generally sound rule," however, "renders the state ground inadequate to stop consideration of a federal question." *Id.*

In other words, for nearly as long as it has understood adequate and independent state grounds to bar its review of certain federal claims, this Court has remained "mindful of the danger that novel state procedural requirements will be imposed for the purpose of evading compliance with a federal standard." *Beard* v. *Kindler*, 558 U.S. 53, 64 (2009) (Kennedy, J., concurring). As demonstrated above, this Court has been especially reluctant to find itself barred from reviewing state court decisions based on procedural rules that conflict with the state court's own precedents, where the rules operate to deny litigants the opportunity to assert a constitutional claim, and where the State admits that the rule functions to deprive a petitioner of a constitutional right to which he is entitled.

As petitioner ably demonstrates, Arizona's application of Rule 32.1(g) checks each of these boxes, any one of which is sufficient to conclude that the state rule is not "independent and adequate." The Arizona Supreme Court's ruling conflicts with Arizona's own precedent, *see* Pet. Br. 40-44, operates to deny petitioner any opportunity to assert the constitutional rights to which all now agree he is entitled under this Court's precedents in *Simmons* and *Lynch*, *supra* Part I, and the Arizona Supreme Court has acknowledged that it misapplied constitutional law in its prior considerations of petitioner's claims, Pet. App. 9a. This case thus falls squarely into this Court's longstanding, oft-reaffirmed precedent that novel procedural rules—especially those perfectly tailored to deny a litigant any opportunity to raise a constitutional claim—do not preclude this Court's review of a federal constitutional issue in a case on direct review from a state court.

## CONCLUSION

For the foregoing reasons, this Court has jurisdiction to review the federal constitutional issues in petitioner's case.

Respectfully submitted.

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