No. 17-

IN THE
Supreme Court of the United States

ABEL DANIEL HIDALGO,
Petitioner,
v.

STATE OF ARIZONA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

SUSAN L. COREY
CONSUELO OHANESIAN
OFFICE OF THE LEGAL ADVOCATE
222 N. Central Avenue
Suite 154
Phoenix, AZ 85004
(602) 506-4111

GARRETT W. SIMPSON
GARRETT SIMPSON PLLC
Box 6481
Glendale, AZ 85312
(623) 910-7216

NEAL KUMAR KATYAL
Counsel of Record
COLLEEN ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-5547

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

I. Whether Arizona's capital sentencing scheme, which includes so many aggravating circumstances that virtually every defendant convicted of first-degree murder is eligible for death, violates the Eighth Amendment.

II. Whether the death penalty in and of itself violates the Eighth Amendment, in light of contemporary standards of decency.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 17-

ABEL DANIEL HIDALGO,
Petitioner,
v.

STATE OF ARIZONA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arizona

PETITION FOR A WRIT OF CERTIORARI

Petitioner Abel Daniel Hidalgo respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Arizona.

OPINIONS BELOW

The Supreme Court of Arizona's opinion is reported at 390 P.3d 783. Pet. App. 1a-31a. The trial court's order is unreported but is reproduced in the appendix. *Id*. at 32a-40a.

JURISDICTION

The Supreme Court of Arizona entered judgment on March 15, 2017. On June 6, 2017, Justice Kennedy granted petitioner's application to extend the time for filing a petition for a writ of certiorari to and including July 14, 2017. On June 29, 2017, Justice Kennedy granted petitioner's application to further

extend the time to and including August 12, 2017. Because August 12, 2017 is a Saturday, the petition is due on August 14, 2017. S. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTE INVOLVED

The relevant provisions of the Arizona Revised Statutes are reproduced in an appendix to this petition. Pet. App. 41a-55a.

INTRODUCTION

Forty-five years ago, in *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), this Court held that the death penalty, as then administered, was unconstitutional. Because the death penalty was only imposed on a "capriciously selected random handful," it was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id*. at 309-310 (Stewart, J., concurring). And the Eighth Amendment does not "permit this unique penalty to be so wantonly and so freakishly imposed." *Id*. at 310; *see id*. at 313 (White, J., concurring).

In response to that decision, a number of States reinstated the death penalty, but this time seeking by statute to confine the application of the death penalty to the "worst of crimes." *Kennedy* v. *Louisiana*, 554 U.S. 407, 447 (2008). In *Gregg* v. *Georgia*, 428 U.S. 153 (1976) (plurality opinion), this Court—while affirming the central teaching of *Furman* that the death penalty cannot be "inflicted in an arbitrary and capricious manner," *id*. at 188—upheld many of those new capital sentencing schemes. The Court concluded that that the "aggravating circumstances" and other limitations in the statutes before it would "suitably direct[] and limit[]" the sentencer's discretion "so as to minimize the risk of wholly arbitrary

and capricious action." *Id*. at 189. But the Court acknowledged that it might someday revisit the constitutionality of the death penalty in light of "more convincing evidence." *Id*. at 187.

The evidence is in. The long experiment launched by *Gregg*—in whether the death penalty can be administered within constitutional bounds—has failed. It has failed both in Arizona in particular and in the Nation more broadly.

Taking Arizona first: The animating principle of *Gregg* and *Furman* is that a State's "capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" *Lowenfield* v. *Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983)). Arizona's scheme utterly fails to do that. The number of statutory aggravators has proliferated such that "virtually every" person—around 99%—convicted of first-degree murder is eligible for the death penalty. Pet. App. 8a, 11a. The Arizona Supreme Court held that state of affairs acceptable because (1) prosecutors and juries can perform the needed narrowing, and (2) each *individual* aggravator does some narrowing work, even if in the *aggregate* they sweep in almost everyone. That holding both conflicts with decisions of other state supreme courts and contravenes the precedent of this Court: The "*legislature*" must provide a means of "*narrow*[*ing*] the class of death-eligible murderers," and the Arizona legislature certainly has not. *Lowenfield*, 484 U.S. at 246 (emphasis added).

Turning to the Nation as a whole: The Court did not resolve the constitutionality of the death penalty for all time in *Gregg*. Nor could it, given that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Gregg*, 428 U.S. at 173 (quoting *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). In the last twenty years, the number of death sentences imposed and carried out has plummeted. A national consensus has emerged that the death penalty is an unacceptable punishment in any circumstance. And this Court's opinions, supported by reams of evidence, are trending unmistakably toward that consensus. As the Court has increasingly recognized, States simply cannot provide the guidance necessary to ensure that the penalty is imposed only on the worst offenders. Nor can States administer the penalty without ensnaring and putting to death the innocent. And the present reality of capital punishment—that those sentenced to death must spend decades languishing on death row with the remote but very real possibility of execution hovering like a sword of Damocles—is "a punishment infinitely more ghastly" than a swift death. Alexander M. Bickel, *The Least Dangerous Branch* 243 (1962).

Two Justices of this Court, documenting these flaws, have called for the Court to reexamine the constitutionality of the death penalty. *See Glossip* v. *Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., joined by Ginsburg, J., dissenting). With each passing month, the Court receives more last-minute pleas for relief from individuals sentenced to die by a punishment whose constitutionality is in grave doubt.

There is no point in waiting any longer for "more * * * evidence." *Gregg*, 428 U.S. at 187.

Caprice and mistake have proven ineradicable in the administration of death. The Eighth Amendment tolerates neither. This Court should grant certiorari, at a minimum to declare Arizona's death penalty scheme unconstitutional.

STATEMENT

1. In Arizona, first-degree murder includes any premeditated homicide and felony murder.[1] Ariz. Rev. Stat. § 13-1105. Any defendant found guilty of first-degree murder is eligible for the death penalty as long as the "trier of fact finds that one or more * * * aggravating circumstances have been proven." *Id*. § 13-752(D). There are fourteen aggravating circumstances under Arizona law—twice the number in the original post-*Furman* regime. *See id*. § 13-751(F).

2. Abel Daniel Hidalgo killed someone in exchange for $1,000 from a gang member. Pet. App. 2a. In the course of that crime, he also killed a bystander. *Id*. Arizona charged him with two counts of first-degree murder and one count of first-degree burglary. Before his trial, Hidalgo filed a motion arguing that Arizona's statutes governing the imposition of the death penalty are unconstitutional under the Eighth and Fourteenth Amendments. He argued that the list of aggravating factors does not adequately narrow the class of defendants eligible for death, and

[1] Felony murder under Arizona law includes permutations of 22 different felonies, including transporting marijuana for sale and felony flight. Ariz. Rev. Stat. § 13-1105(A)(2).

that the large county-by-county disparities show that the imposition of the death penalty bears no rational relationship to the characteristics of the specific offenses. In support of his motion, Hidalgo submitted evidence demonstrating that virtually every first-degree murder committed in 2010 or 2011 in Maricopa County—where he was tried—had at least one aggravating factor present. *Id*. at 35a. His motion was consolidated with similar motions filed by other capital defendants. *Id*. at 33a.

The trial court denied the motion. It declined to hold a hearing, and therefore "accepted the facts as alleged by Defendants," namely "that every first degree murder case filed in Maricopa County in 2010 and 2011 had at least one aggravating factor under A.R.S. §13-751(F)." *Id*. at 35a-36a. But it held that it was "bound by the Arizona Supreme Court's holdings" that had previously upheld the State's death penalty scheme. *Id*. at 39a. The court also rejected Hidalgo's equal protection argument.

Hidalgo pleaded guilty, but the question whether to sentence him to the death penalty was tried before a jury. The jury found four aggravating circumstances: Hidalgo committed another offense eligible for a sentence of life imprisonment or death under Arizona law; he committed prior serious offenses (this finding was overturned on appeal, *id*. at 29a); he committed multiple homicides; and he murdered for pecuniary gain (only with respect to one of the two murder victims). *Id*. at 2a-3a. The jury sentenced Hidalgo to death. *Id*. at 3a.

3. Hidalgo appealed the death sentence to the Arizona Supreme Court. As relevant here, he once again argued that Arizona's death penalty scheme is

unconstitutional because it fails to narrow adequately the class of offenders eligible for the death penalty, and because it denies equal protection. The supreme court affirmed.

a. The court first found that Arizona's death penalty scheme comports with the Eighth Amendment. Hidalgo had "supplemented the record on appeal with an expanded study of first degree murder cases in several counties over an eleven-year period, which concludes that one or more aggravating circumstances were present in 856 of 866 murders." *Id*. at 8a. In other words, 99% of first-degree murders were eligible for the death penalty. The court accepted that expanded study into the record, and did not question that figure. But it held that the lack of narrowing was constitutionally acceptable for two reasons.

First, the court pointed to the fact that "death sentences are in fact not sought in most first degree murder cases." *Id*. at 12a. The court thus believed the requisite narrowing could be achieved through the "unbridled * * * discretion" of prosecutors. *Id*. at 14a. Second, the court asserted that each *individual* factor did some narrowing work, even though taken together the factors swept in virtually every first-degree murder. In its view, "[t]he [U.S. Supreme] Court has not looked beyond the particular case to consider whether, in aggregate, the statutory scheme limits death-sentence eligibility to a small percentage of first degree murders." *Id*. at 12a. The court also noted that the death penalty is limited to first-degree murders, and that the trier of fact must take mitigating circumstances into account. *Id*. at 13a-14a.

b. Next, the court rejected Hidalgo's argument that intercounty disparities in the imposition of the death penalty violate the "equal protection component implicit in the Eighth Amendment." *Id*. at 14a-16a. Like the trial court, it held the argument foreclosed by *McCleskey* v. *Kemp*, 481 U.S. 279 (1987), quoting the Fifth Circuit's assertion that "[n]o Supreme Court case has held that the Constitution prohibits geographically disparate application of the death penalty due to varying resources across jurisdictions." Pet. App. 15a-16a (quoting *Allen* v. *Stephens*, 805 F.3d 617, 629-630 (5th Cir. 2015)).

c. Finally, the court rejected a number of other arguments Hidalgo had made—that the trial court erred in not holding evidentiary hearings on two issues; that the trial court erred when it revoked its permission to let Hidalgo represent himself; and that the prosecutor had violated *Caldwell* v. *Mississippi*, 472 U.S. 320 (1985), when she told the jury that, if it found there was "no mitigation," it had no "option" but to return a verdict of death. The Court then independently reviewed and affirmed Hidalgo's death sentence.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. Arizona's capital sentencing scheme does not "genuinely narrow the class of persons eligible for the death penalty." *Lowenfield*, 484 U.S. at 244 (quoting *Zant*, 462 U.S. at 877). It therefore violates the Eighth Amendment. And the Arizona Supreme Court's decision upholding that scheme conflicts with decisions from other state high courts. This Court should grant certiorari to resolve the resulting conflict and to vindicate the bar on the "arbitrary"

and "irrational" infliction of death. *Parker* v. *Dugger*, 498 U.S. 308, 321 (1991).

II. Even if Arizona provided some meaningful limit on the persons eligible for death, however, its death penalty would remain unconstitutional. A national consensus has emerged that the punishment of death should never be imposed. That wide-ranging consensus—reflected in the laws or practices of nearly every State—accords with the judgments of this Court and copious evidence. It has become clear that no death penalty scheme, no matter how designed, is capable of preventing the arbitrary and capricious imposition of death. Nor have States proven capable of administering the sentence of death in a manner that does not regularly entrap the innocent. The delays and conditions inherent in the imposition of capital punishment are themselves an affront to human dignity. In *Gregg*, this Court deferred judgment on the death penalty's constitutionality pending "more * * * evidence." 428 U.S. at 187. The evidence is now unequivocal that the death penalty cannot be administered in accordance with contemporary standards of decency. This Court should answer the question whether the death penalty, in and of itself, comports with the Eighth Amendment.

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE SCOPE OF THE EIGHTH AMENDMENT'S NARROWING REQUIREMENT.

A. The Arizona Supreme Court's Decision Breaks With The Clear Precedent Of This Court And Endorses A System In Which The Death Penalty May Be "Wantonly" And "Freakishly" Imposed.

1. The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." This Court has long read that prohibition to bar "the arbitrary or irrational imposition of the death penalty." *Parker* v. *Dugger*, 498 U.S. 308, 321 (1991). "If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." *Spaziano* v. *Florida*, 468 U.S. 447, 460 (1984), *overruled on other grounds*, *Hurst* v. *Florida*, 136 S. Ct. 616 (2016). If a State's scheme offers "no principled way" of making that distinction, *Godfrey* v. *Georgia*, 446 U.S. 420, 433 (1980) (plurality opinion), the death penalty is "cruel and unusual in the same way that being struck by lightning is cruel and unusual," *Furman* v. *Georgia*, 408 U.S. 238, 309 (1972) (per curiam) (Stewart, J., concurring).

To "protect[] against arbitrary and capricious impositions of the death sentence," *Sawyer* v. *Whitley*, 505 U.S. 333, 341 (1992), a State's "capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe

sentence on the defendant compared to others found guilty of murder.'" *Lowenfield* v. *Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983)). The legislature may accomplish the "narrowing function * * * in either of * * * two ways." *Lowenfield*, 484 U.S. at 246. "The legislature may itself narrow the definition of capital offenses" at the *guilt* phase, by—for example—narrowly defining the offense of first-degree murder and then making every defendant convicted of that offense eligible for the death penalty. *Id.* at 245-246. Alternately, "the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Id.* at 246.

A state is free to choose either of these options, but the Constitution forbids a legislature from dispensing with statutory narrowing altogether. Indeed, the narrowing principle is so fundamental to the constitutional administration of the death penalty that even Justice Scalia—otherwise a vocal critic of the Court's Eighth Amendment jurisprudence—"adhere[d] to the precedent establish[ing] * * * that when a State adopts capital punishment for a given crime but does not make it mandatory," the State must "establish in advance, and convey to the sentencer, a governing standard." *Walton* v. *Arizona*, 497 U.S. 639, 671 (1990) (Scalia, J., concurring in part and concurring in the judgment). In other words, the legislature *must* offer "clear and objective" standards, *Godfrey* v. *Georgia*, 446 U.S. at 428, that provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J., concurring).

2. The Arizona Supreme Court has disregarded that bedrock requirement of the Eighth Amendment, upholding the constitutionality of a capital punishment scheme that renders "virtually every" defendant convicted of first-degree murder eligible for the death penalty. Pet. App. 11a.

Because Arizona's legislature has adopted and retained a broad definition of first-degree murder, Ariz. Rev. Stat. § 13-1105, it has attempted "to comply with the Eighth Amendment's mandate to impose statutory limitations on capital sentencing discretion" through the use of aggravating circumstances set out in § 13-751. Brief of Respondent State of Arizona at 21-26, *Ring* v. *Arizona*, 536 U.S. 584 (2002) (No. 01-488) (explaining that compliance with the Eighth Amendment was the State's "undisputed motivation" in establishing its aggravating circumstances). Thus, Arizona's system is compatible with the Eighth Amendment only if the aggravating circumstances "genuinely narrow the class of persons eligible for the death penalty." *Lowenfield*, 484 U.S. at 244 (internal quotation marks omitted).

They do not. Petitioner in this case set out evidence demonstrating that the aggravating circumstances serve no narrowing function at all because "virtually every first degree murder case [in Arizona] presents facts that could support at least one [of the legislature's] aggravating circumstance[s]." Pet. App. 11a. The Arizona Supreme Court did not dispute the accuracy of this claim; it approved of the trial court's decision to "deny[] an evidentiary hearing and instead [to] assume[] the truth of Hidalgo's factual assertions." *Id*. at 4a-7a. But it held that Arizona's capital sentencing scheme is nonetheless consistent with the Eighth Amendment. That hold-

ing is plainly incompatible with this Court's insistence that a statutory scheme must *limit* the class of death-eligible defendants. *See, e.g.*, *Zant*, 462 U.S. at 878.

3. The Arizona Supreme Court offered no coherent reason for its departure from this Court's precedent. In attempting to justify its holding, the state high court pointed first to the fact that even if the death penalty is available in almost every case, "death sentences are in fact not sought in most first degree murder cases." Pet. App. 12a; *see also id*. at 11a (observing that, according to Petitioner's evidence "prosecutors sought the death penalty * * * in about ten percent of first degree murder cases" during the relevant period). The state supreme court opined that there is nothing wrong with a scheme that gives prosecutors "unbridled * * * discretion" to define the class of death-eligible defendants. *Id*. at 14a (quoting *State* v. *Ovante*, 231 Ariz. 180, 185-186 (2013) (en banc)).

This Court has held otherwise. In *Zant*, the Court held that narrowing is a "constitutionally necessary function at the stage of *legislative* definition." 462 U.S. at 878 (emphasis added); *see also Gregg*, 428 U.S. at 174 n.19 ("[The Eighth] Amendment was intended to safeguard individuals from the abuse of *legislative* power." (emphasis added)). And *Lowenfield* made very clear that it is "the *legislature*" that must provide a means of "narrow[ing] the class of death-eligible murderers." 484 U.S. at 246 (emphasis added).

That makes sense. A legislature is able to establish "clear and objective" systemwide standards that will lead to uniform distinctions between those who

are death-eligible and those who are not. *Godfrey*, 446 U.S. at 428. By contrast, if the question is left to the prosecutors' "standardless sentencing discretion," the class of death-eligible defendants will shift depending on which prosecutor is making the charging decision. *Id*. (internal quotation marks and alterations omitted). In that sort of scheme, those not sentenced to death are often "just as reprehensible" as those who are, a form of arbitrariness that the *Furman* Court firmly rejected. 408 U.S. at 309 (Stewart, J., concurring).

The Arizona Supreme Court purported to draw support for its contrary holding from this Court's statements explaining that prosecutors (like judges and juries) must enjoy broad discretion in deciding whether to "*remove* a defendant from consideration as a candidate for the death penalty." *Gregg*, 428 U.S. at 199 (emphasis added). But the fact that a prosecutor may "remove" a particular defendant from the class of death-eligible individuals does not obviate the need for the State legislature to establish a narrow class in the first place. As this Court has explained, the Eighth Amendment requires *both* that a State limit the class of death-eligible defendants to avoid arbitrariness, and that it allow individualized discretion in selecting which members of this narrow class will actually be sentenced to death. *See, e.g.*, *Tuilaepa* v. *California*, 512 U.S. 967, 972 (1994).

4. The Arizona Supreme Court also seems to have believed that a State's aggravating circumstances are constitutional so long as each individual aggravator "applies to fewer than all murders." Pet. App. 10a-11a. But under that logic, a State would be free to adopt two aggravators: one that covers all murders with a particular feature, and the other that

covers all murders that *lack* the particular feature. Or—as Arizona has done here—it could adopt a long list of aggravators such that every convicted murderer is somehow made eligible for death. Either system utterly fails to offer a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." *Gregg*, 428 U.S. at 188 (internal quotation marks omitted). That is why this Court has regularly taken a holistic approach in analyzing whether a State's scheme fulfills the constitutionally mandated narrowing requirement. In *Jurek* v. *Texas*, 428 U.S. 262 (1976) (plurality opinion), and *Lowenfield*, for example, the Court examined the Texas and Louisiana statutes to determine whether each State's scheme, as a whole, "narrow[ed] the class of death-eligible murderers," 484 U.S. at 245-246.

5. Finally, the Arizona Supreme Court suggested that the State's scheme *does* somehow fulfill the narrowing function because "Arizona statutorily limits the death penalty to a subclass of defendants convicted of first degree murder" and because the "statutes further limit death eligibility to the identified aggravating circumstances." Pet. App. 13a. But Arizona itself has previously disclaimed any reliance on the narrowing function performed by its very broad statutory definition of first-degree murder. In *Ring* v. *Arizona*, the State told this Court that—after *Furman*—the legislature decided to introduce aggravating circumstances "to comply with the Eighth Amendment's mandate to impose statutory limitations on capital sentencing discretion," opting *against* narrowing the definition of first-degree murder, "which remains today substantially identical to its nineteenth century territorial counterpart."

Respondent's Brief at 22-25, *Ring*, 536 U.S. 584 (No. 01-488); *see* Ariz. Rev. Stat. § 13-1105.

Thus, by the State's own lights, the constitutionality of Arizona's sentencing scheme turns on whether the aggravating circumstances "impose statutory limits on capital sentencing discretion." Petitioner has demonstrated that they do not. Instead, they render "virtually every" defendant death eligible, returning Arizona to the pre-*Furman* days in which the "unique penalty" of death is "so wantonly and so freakishly imposed" that there is no meaningful difference between those who receive this most severe of all possible penalties and those that do not. This Court's intervention is necessary to prevent this blatantly unconstitutional scheme from going forward.

B. The Arizona Supreme Court's Decision Splits From The Decisions Of Other State Supreme Courts.

1. Unsurprisingly, the Arizona Supreme Court's decision is inconsistent with the holdings of other state supreme courts, which have properly recognized the need to narrow the class of death-eligible defendants. The Nevada Supreme Court's decision in *McConnell* v. *State* is representative. 102 P.3d 606, 622 (Nev. 2004) (en banc) (per curiam). In that case, a defendant brought a narrowing challenge to the Nevada sentencing scheme for those convicted of capital felony murder. The Nevada Supreme Court held that "[b]ecause Nevada defines capital felony murder broadly, its capital sentencing scheme must narrow death eligibility in the penalty phase by the jury's finding of aggravating circumstances." *Id*. The Nevada court explained that "[a]t a bare mini-

mum, then, a narrowing device must identify a more restrictive and more culpable class of first degree murder defendants than the pre-*Furman* capital homicide class." *Id.* (internal quotation marks omitted).

That is exactly the opposite of what the Arizona Supreme Court decided. The Arizona Supreme Court assumed that the State's aggravating circumstances made "virtually every" first-degree murderer death eligible. Pet. App. 11a. Yet it held that these aggravating circumstances, in connection with the State's pre-*Furman* definition of the class of first-degree murderers, were enough to satisfy the constitutional narrowing requirement.

2. Multiple other state high courts have also recognized that it would pose a serious constitutional problem if a State's scheme made "virtually every" murder defendant death eligible. For example, the Illinois Supreme Court held that "a capital sentencing scheme must genuinely narrow the class of individuals eligible for the death penalty and must reasonably justify imposition of a more severe sentence on the defendant compared to others found guilty of murder." *People* v. *Ballard*, 794 N.E.2d 788, 816 (Ill. 2002). The *Ballard* Court went on to reject a claim that the Illinois scheme's multiple aggravators violated this narrowing requirement, *id.*, but a special concurrence emphasized that the defendant had not supplied the Court with empirical data regarding the extent to which Illinois' aggravating factors "actually narrow[ed] the pool of death-eligible defendants," *id.* at 826 (McMorrow, J., specially concurring). "Accordingly, defendant's contention that the death penalty statute is unconstitutional fails in this case, *not as a matter of law*, but rather,

as the majority notes, because defendant has failed to substantiate his contention in any way." *Id.* (internal quotation marks and alterations omitted). Similarly, the Delaware Supreme Court held that "too many aggravating circumstances may violate the principles enunciated in *Furman* v. *Georgia* and *Zant* v. *Stephens*," but held that the "limit has not yet been reached in Delaware." *Steckel* v. *State*, 711 A.2d 5, 13 n.11 (Del. 1998) (en banc).

In this case, petitioner put forward precisely the concrete empirical evidence that was lacking in *Ballard*. And that evidence demonstrated that in Arizona, unlike in Delaware, the constitutional "limit" on "too many aggravating circumstances" has been reached. The Arizona Supreme Court nevertheless rejected the constitutional challenge to the State's death penalty scheme. The division in authority engendered by that erroneous decision warrants this Court's certiorari review.

C. The Arbitrariness Of The Death Penalty In Arizona Has Real And Troubling Consequences.

The arbitrariness of the death penalty in Arizona is not just an abstract and doctrinal problem. "[T]he death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Furman*, 408 U.S. at 242 (Douglas, J., concurring). The standardless lottery that is the Arizona capital sentencing scheme "gives room for the play" of prejudice and other factors that should have no place in the administration of the death penalty. *Id*.

First, the arbitrariness of Arizona's scheme enables troubling racial disparities. Arizona follows the national trend in that "individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2760 (2015) (Breyer, J., dissenting). One study published in 1997 demonstrated that "white-victim homicides in Arizona are much more likely to result in death sentences than minority-victim homicides." Ernie Thomson, *Discrimination and the Death Penalty in Arizona*, 22 Crim. Just. Rev. 65, 73 (1997). "Minorities accused of killing whites are more than three times as likely to be sentenced to death as minorities accused of killing other minorities (6.7% vs. 2.0%)." *Id*. And a Hispanic man accused of killing a white man is 4.6 times as likely to be sentenced to death as a white man accused of killing a Hispanic victim. *See id*.

These problems have persisted since that study was published. In Maricopa County—where Hidalgo was tried and convicted—18% of the defendants sentenced to death were black, even though black people comprise just 6% of the population. Fair Punishment Project, *Too Broken To Fix: Part I: An In-depth Look at America's Outlier Death Penalty Counties* 12 (2016) (hereinafter "FPP Report").[2] In all, 57% of the defendants sentenced to death between 2010 and 2015 were people of color. *Id*. at 11.[3]

---

[2] *Available at* http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf.

[3] Maricopa County was also the jurisdiction of Sheriff Joe Arpaio, whose office, according to a 2011 Justice Department

In short, the failure of Arizona to narrow the class of offenders eligible for the death penalty has allowed for bias in its imposition.

Second, Arizona's death penalty turns on accidents of geography and county resources, rather than the characteristics of the offense. Hidalgo adduced evidence that, because of financial limitations, several counties were unable to pursue the death penalty even in cases with facts far more heinous than in his own. Pet. App. 14a-15a, 34a. Maricopa County (where Hidalgo was tried) is on the other end of the spectrum; it imposed the death penalty at a rate 2.3 times higher than the rest of Arizona between 2010 and 2015. FPP Report at 8. That was driven in part by a particularly zealous County Attorney, who was disbarred in 2012 because he had "outrageously exploited power, flagrantly fostered fear, and disgracefully misused the law." *In re Thomas*, No. PDJ-2011-9002, at 245 (Ariz. Apr. 10, 2012). Indeed, some form of prosecutorial misconduct has been found in 21% of capital cases in Maricopa County. FPP Report at 8.[4] The happenstance of geography is no way to "rationally distinguish between those individuals for whom death is an

---

Report, had "a pervasive culture of discriminatory bias against Latinos." Marc Lacey, *U.S. Finds Pervasive Bias Against Latinos by Arizona Sheriff*, N.Y. Times (Dec. 15, 2011) (quoting the DOJ Report), *available at* http://www.nytimes.com/2011/12/16/us/arizona-sheriffs-office-unfairly-targeted-latinos-justice-department-says.html.

[4] *See also* Michael Kiefer, *Prosecutorial Misconduct Alleged in Half of Capital Cases*, Ariz. Republic (Oct. 28, 2013), *available at* http://archive.azcentral.com/news/arizona/articles/20131027milke-krone-prosecutors-conduct-day1.html.

appropriate sanction and those for whom it is not." *Spaziano*, 468 U.S. at 460.

The Court should grant certiorari to bring the Arizona Supreme Court in line with its post-*Furman* death penalty jurisprudence, to resolve a split between state high courts, and to end the havoc that arbitrariness is wreaking on the administration of justice in Arizona.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE DEATH PENALTY IS CONSTITUTIONAL.

Invalidating Arizona's death penalty statute under existing doctrine would not, however, cure all of the underlying constitutional maladies. The death penalty is unconstitutional full stop. This Court can and should strike down the punishment in its entirety.

A. The Death Penalty Is "Cruel And Unusual" Punishment.

The Constitution's proscription on "cruel and unusual punishments" protects, at its heart, human dignity. *Kennedy* v. *Louisiana*, 554 U.S. 407, 420 (2008); *Trop* v. *Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion). The content of that proscription is not frozen in time, but grows in light of "the evolving standards of decency that mark the progress of a maturing society." *Kennedy*, 554 U.S. at 419 (quoting *Trop*, 356 U.S. at 101).

In *Gregg*, the Court found that "contemporary standards" of decency did not then render the death penalty in all circumstances unconstitutional. 428 U.S. at 175. It noted that 35 States had enacted

death penalty statutes in the previous four years, and that juries regularly imposed the punishment. *Id.* at 179-182. Moreover, the Court believed that by providing adequate guidance, States could ensure that the penalty was administered rationally, and restricted only to the worst offenders. *Id.* at 195.

The *Gregg* experiment has failed. A decisive majority of this country, acting through its democratic representatives, has turned its face from capital punishment. And *Gregg*'s hope that the punishment of death could be administered rationally and in accord with legitimate penological purposes has proved to be empty, a fatal mistake which this Court must now correct.

1. A National Consensus Rejects The Death Penalty.

This Court examines "objective indicia of society's standards" to determine whether a national consensus has emerged deeming a punishment cruel and unusual. *Roper* v. *Simmons*, 543 U.S. 551, 563 (2005). Every such indication now reveals a widespread consensus against the death penalty.

Thirty-one States have abandoned the death penalty. Nineteen of those States have formally abolished the punishment. Four States—Oregon, Colorado, Washington, and Pennsylvania—have "suspended the death penalty" and ceased to carry out executions.[5] *Hall* v. *Florida*, 134 S. Ct. 1986, 1997 (2014). The remaining eight States have not carried out an

[5] *See* Death Penalty Information Center (DPIC), States With and Without the Death Penalty, https://deathpenaltyinfo.org/states-and-without-death-penalty.

execution "[i]n the past 10 years," *Roper*, 543 U.S. at 565—and four of them (Kansas, Nebraska, New Hampshire, and Wyoming) have not executed a prisoner in twenty years or longer.[6]

Furthermore, in those jurisdictions that continue to carry out death sentences, the practice is "most infrequent." *Graham* v. *Florida*, 560 U.S. 48, 62 (2010). Last year, 31 death sentences were imposed and 20 executions were carried out across the nation. Eight States with the death penalty on the books have administered fewer than five executions in the last decade; in most cases, just one or two.[7] And a "significant majority," *id.* at 64, of those executions that do occur—more than 85% over the last five years—are concentrated in just five States: Texas, Oklahoma, Florida, Missouri, and Georgia.[8] Within those States, an overwhelming majority of death sentences are issued by a handful of counties. *See Glossip*, 135 S. Ct. at 2779-780 (Breyer, J., dissenting).

Even more striking than the magnitude of the consensus is "the consistency of the direction of change." *Roper*, 543 U.S. at 566 (quoting *Atkins* v. *Virginia*, 536 U.S. 304, 315 (2002)). In the past fifteen years,

---

[6] *See* DPIC, Number of Executions by State and Region Since 1976, https://deathpenaltyinfo.org/number-executions-state-and-region-1976.

[7] *Id.* The States are Arkansas (4), Idaho (2), Indiana (1), Kentucky (1), Louisiana (1), South Dakota (3), Tennessee (4), and Utah (1).

[8] *Id.*

seven States have abolished the death penalty,[9] four have formally suspended it, and four have ceased to conduct executions.[10] No State has reinstated the punishment in that time.

Meanwhile, the numbers of death sentences and executions throughout the country have plummeted. *See Graham*, 560 U.S. at 62 ("Actual sentencing practices are an important part of the Court's inquiry into consensus."). In 1996, 315 people were sentenced to death; by 2016, that number had fallen by 90%.[11] Likewise, the number of executions has fallen by nearly 80%, from 1999, when 98 persons were executed.[12] In just the last five years, the numbers of death sentences and executions have dropped by more than half.[13]

In short, the death penalty has become a rare and "freakish" punishment. *Gregg*, 428 U.S. at 206. The frequency of its use "in proportion to the opportunities for its imposition" is infinitesimal. *Graham*, 560 U.S. at 66. Out of over 10,000 individuals arrested

---

[9] *See* DPIC, States With and Without the Death Penalty, *supra* note 5. The States are New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Delaware (2016).

[10] *See* DPIC, Number of Executions by State and Region Since 1976, *supra* note 6. The States are California (2006), Montana (2006), Nevada (2006), and North Carolina (2006).

[11] DPIC, Death Sentences in the United States From 1977 By State and By Year, https://deathpenaltyinfo.org/death-sentences-united-states-1977-present.

[12] *See* DPIC, Number of Executions by State and Region Since 1976, *supra* note 6.

[13] *Id.*

for homicide offenses each year, fewer than two-tenths of one percent ultimately receive the punishment of death.

2. The Death Penalty Cannot Be Administered In A Manner That Comports With The Eighth Amendment.

"[T]he Constitution contemplates that in the end [the Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Roper*, 543 U.S. at 590 (internal quotation marks omitted). And precedent, logic, and bitter experience all confirm what the people themselves have now concluded: The death penalty simply cannot be imposed in accord with minimum standards of proportionality, reliability, and decency.

a. This Court has long made clear that the Constitution can tolerate the death penalty if, and only if, States are capable of "ensur[ing] against its arbitrary and capricious application" by confining the punishment to "the worst of crimes." *Kennedy*, 554 U.S. at 447; *see Gregg*, 428 U.S. at 188. This requirement follows from the Eighth Amendment's demand for proportionality and humanity. As the Court explained in *Kennedy*, "[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." 554 U.S. at 420. In order to serve legitimate penological aims, the "punishment must 'be limited to those offenders'" whose "extreme culpability makes them 'the most deserving of execution.'" *Id*. (quoting *Roper*, 543 U.S. at 568).

After 45 years, the evidence is overwhelming that States cannot satisfy this requirement. Numerous

independent studies—some commissioned by States themselves—have demonstrated that the death penalty is routinely and pervasively imposed based on considerations irrelevant to a person's culpability. *See* Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics:* Furman*,* McCleskey*, and a Single County Case Study*, 34 Cardozo L. Rev. 1227, 1244-256 (2013); *Glossip*, 135 S. Ct. at 2760-63 (Breyer, J., dissenting). The principal determinant of whether a defendant will be sentenced to death is typically not his blameworthiness, but the county in which he commits his crime. Shatz & Dalton, *supra*, at 1253-56; *see, e.g.*, John J. Donohue III, *An Empirical Evaluation of the Connecticut Death Penalty System Since 1973: Are There Unlawful Racial, Gender, and Geographic Disparities?*, 11 J. Empirical Legal Stud. 637, 673 (2014). Researchers have been unable to find any meaningful correlation between the heinousness of a person's offense and the likelihood he will receive a capital sentence. *See, e.g.*, *id*. at 678-679.

Meanwhile, for decades studies have consistently found—as in Arizona—that the race of the victim is a critical factor in predicting whether the perpetrator will be sentenced to death. Shatz & Dalton, *supra*, at 1246-51; *see, e.g.*, Raymond Paternoster et al., *Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999*, 4 Md. J. on Race, Religion, Gender, and Class 1, 35 (2004) (study commissioned by Maryland governor). Numerous other factors that should be irrelevant to the question of who lives and who dies—gender, resources, politics—have likewise been found meaningfully determinative. Shatz & Dalton, *supra*, at 1251-

53; *Glossip*, 135 S. Ct. at 2761-62 (Breyer, J., dissenting).

These problems are ineradicable. They flow from at least two features intrinsic to the death penalty under our Constitution, features that the Court itself has increasingly recognized are both problematic and incapable of repair.

The first difficulty is that the Constitution imposes two irreconcilable demands on sentencers. On one hand, it requires States to provide guidance to juries so that they impose the death penalty in a consistent and rational manner. *Gregg*, 428 U.S. at 195 n.47 ("[W]here the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments."). On the other hand, "the fundamental respect for humanity underlying the Eighth Amendment" requires that States leave juries complete discretion to decline to impose death based on a defendant's individual characteristics. *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). As Justice Scalia succinctly explained, "[t]he latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve." *Walton*, 497 U.S. at 664-665 (Scalia, J., concurring in part and concurring in the judgment); *see Callins* v. *Collins*, 510 U.S. 1141, 1151 (1994) (Blackmun, J., dissenting) (similar). By granting juries untrammeled discretion to grant mercy to whomever they wish, the law reintroduces into the death penalty system the very sort of arbitrariness that the first "narrowing" requirement is intended to remove.

The Court has acknowledged that after four decades, this problem has defied solution short of banning the death penalty's application to whole classes of persons and offenses. In *Kennedy*, it explained that the "[t]he tension between general rules and case-specific circumstances has produced results not altogether satisfactory." 554 U.S. at 436; *see Tuilaepa*, 512 U.S. at 973 (explaining that "[t]he objectives of these two inquiries can be in some tension"). The Court proceeded to state that its "response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed" to increasingly narrow sets of crimes and individuals. *Kennedy*, 554 U.S. at 437. Narrowing the death penalty, however, can only mitigate but not cure this fundamental defect. So long as juries retain open-ended discretion—as the Constitution says they must—the punishment will continue to be subject to an intolerable degree of arbitrariness.

That difficulty is compounded by a second, equally severe problem. As Arizona's scheme illustrates, the first step of the sentencing process—the narrowing of death-eligible offenders—is also infected with an insoluble degree of caprice. One year before *Furman*, this Court recognized the core difficulty: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." *McGautha* v. *California*, 402 U.S. 183, 204 (1971); *see Godfrey*, 446 U.S. at 442 (Marshall, J., concurring in the judgment).

Again, the Court has increasingly recognized this problem. And again it has identified only one solution: banning the penalty's application to classes of offenses and persons altogether. In *Kennedy*, the Court explained that while some persons who commit non-homicide offenses may rank among the most culpable offenders, States lack the capacity to "identify standards that would guide the decisionmaker so the penalty is reserved for the most severe cases." 554 U.S. at 439. The Court had "no confidence," it explained, that the characteristics of individual cases would not "overwhelm a decent person's judgment," and render "the imposition of the death penalty * * * so arbitrary as to be 'freakis[h].'" *Id.*; *see also Roper*, 543 U.S. at 572 (rejecting the contention that juries can reliably select those juvenile offenders who have "sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death"). That same problem holds *a fortiori* for homicide crimes—offenses whose human cost is all the more likely to "overwhelm a decent person's judgment," and for which distinguishing the most severe and blameworthy crimes is all the more difficult.

b. A further constitutional problem has emerged since *Gregg*. In the past 45 years, the advent of more reliable forensic techniques—particularly DNA evidence—has revealed that innocent people are sentenced to death with startling frequency. And it is equally clear that States have actually carried out executions of the innocent.

The evidence on this point is unequivocal. Since 1989, 117 individuals who were sentenced to death

have been formally exonerated of their crimes of conviction.[14] Since 1973, approximately 4% of death-row inmates have been determined to be actually innocent. *See* Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to death*, 111 Proc. Nat'l Acad. Sci. 7230 (2014). The numbers continue to increase each year; two more death-row inmates have been exonerated in 2017 alone.

There is also little doubt that States have put some such individuals to death. Multiple, painstaking studies have found "overwhelming" evidence that a number of executed prisoners were actually innocent. *See Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting) (internal quotation marks omitted). And too many close calls have occurred—including last-minute stays by this Court, eleventh-hour reprieves by a governor, or exoneration after decades on death row—to believe that more individuals were not executed before evidence of their innocence came to light. *Id.* at 2757, 2766 (giving examples).

Executing innocents is intolerable. Because of the "finality" of death, the Constitution insists upon "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305. Thus, in *Atkins*, the Court found that the "risk of wrongful executions" provided an important reason why the intellectually disabled could not constitutionally be executed. 536 U.S. at 320-321; *see Hall*, 134 S. Ct. at 1993 (same). At a time when the number of exonerations was approxi-

---

[14] National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx.

mately half what it is now, *see Glossip*, 135 S. Ct. at 2757 (Breyer, J., dissenting), the Court explained that it "cannot ignore the fact that in recent years a disturbing number of inmates on death row have been exonerated." *Atkins*, 536 U.S. at 320 n.25. The risk that intellectually disabled defendants would give "false confessions" and be executed because of them, the Court concluded, was too great for the Constitution to bear. *Id.* at 320.

The Court "cannot ignore" that the same risk pertains to all offenders. As the evidence makes clear, every type of defendant—mentally competent or not—faces a substantial risk of receiving an improper sentence of death. The problems that cause such errors are regrettably common: defendants may be induced to give false confessions, receive poor quality defense counsel, face prosecutorial misconduct, or suffer from myriad other errors. *See Glossip*, 135 S. Ct. at 2757-58 (Breyer, J., dissenting). The unique dynamics of capital trials—where the pressure to obtain a conviction is enormous—make such problems all the more likely to lead to an erroneous conviction.[15] Perhaps the Constitution can tolerate a risk of wrongful conviction outside the capital context, where the penalty is not irreversible and justice

---

[15] John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 Cornell L. Rev. 157, 170 (2014) ("The possibility of being sentenced to death, even if it is remote, can lead defendants, even innocent ones, to plead guilty to get the death penalty 'off the table.'"); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 63 & n.197 (1987) (noting five cases in which innocent defendants pled guilty in order avoid the risk of a death sentence).

without error may be unattainable. But "death is different": States must ensure the penalty is reliably imposed, and decades of evidence reveal that they cannot. *Gregg*, 438 U.S. at 188.[16]

c. Finally, the decades since *Gregg* have made clear that, in order to carry out capital punishment in a remotely rational manner, States must not subject the convicted to inordinate delay—a form of punishment that is itself profoundly cruel, and which saps the punishment of any legitimate penological purpose.

Fifty years ago, the average delay between a death sentence and an execution was approximately 2 years. Today that delay has grown to more than 17 years. The reason is straightforward: As the rationality and reliability of death sentences has grown more questionable, States have been required to implement more and more procedural protections to ensure the penalty is not wrongly carried out. *See Glossip*, 135 S. Ct. at 2764-65, 2770-72 (Breyer, J., dissenting).

These protections are necessary and proper. Indeed, this Court has concluded that the Constitution mandates them. But the result is that the death penalty itself has become even more discordant with the Eighth Amendment.

---

[16] *See, e.g.*, Robert J. Smith et al., *The Failure of Mitigation*, 65 Hastings L. J. 1221, 1228-229 (2014) (finding 87% of the last 100 executed offenders had characteristics akin to juveniles or the intellectually disabled); John H. Blume et al., *An Empirical Look at* Atkins *v.* Virginia *and Its Application in Capital Cases*, 76 Tenn. L. Rev. 625, 628-629 (2009) (discussing success rates of *Atkins* claims).

One problem is that the delay itself is a cruel form of punishment. The agony of waiting for a death sentence for weeks on end—let alone decades—has long been recognized as a barbaric form of punishment. *See, e.g.*, *In Re Medley*, 134 U.S. 160, 172 (1890). And death-row inmates typically must bear this delay while housed in solitary confinement that frequently drives prisoners to "madness." *Davis* v. *Ayala*, 135 S. Ct. 2187, 2209 (2015). Many individuals have given up their lives voluntarily rather than endure this condition. *Glossip*, 135 S. Ct. at 2766 (Breyer, J., dissenting).

When a death sentence is administered after decades of delay, moreover, it ceases to serve any legitimate penological purpose. *Id*. at 2767-69 (Breyer, J., dissenting). Individuals are not rationally deterred by the prospect that they have a slim chance of being sentenced to death decades in the future. And society's interest in retribution is not meaningfully served by a punishment carried out after memories have faded and the perpetrator himself has undergone profound changes. "In most cases justice is not better served by terminating the life of the perpetrator rather than confining him and preserving the possibility that he and the system will find ways to allow him to understand the enormity of his offense." *Kennedy*, 554 U.S. at 447.

d. Finally, it is "instructive," *Roper*, 543 U.S. at 575, that nearly every other developed Nation, after considering these and other problems, has abandoned capital punishment. One hundred and four countries have formally abolished the death penalty,

and more than 30 have ceased to impose it.[17] Only 23 countries imposed the death penalty last year, and more than 85% of those executions (excluding those performed by China) were carried out by four countries: Iran, Saudi Arabia, Iraq, and Pakistan.[18] The "overwhelming weight of international opinion" against the death penalty is not controlling on this Court. *Roper*, 543 U.S. at 578. But it reinforces the judgment—amply evidenced in the democratic decisions of the people, the precedents of this Court, and decades of experience—that the death penalty no longer accords with fundamental precepts of decency and the "dignity of man." *Trop*, 356 U.S. at 100.

B. This Is A Suitable Vehicle To Decide The Constitutionality Of The Death Penalty, And The Court Should Decide The Question Now.

It is time for the Court to revisit the death penalty's constitutionality. In *Gregg*, this Court issued a provisional judgment upholding capital punishment, based on "contemporary standards" and the "evidence" available to it at the time. 428 U.S. at 175, 185. In the four decades since, the Court has never reexamined the question. It has noted only that the question was "settled" under existing precedent. *Baze* v. *Rees*, 553 U.S. 35, 47 (2008) (plurality opinion); *see id.* at 63 (Alito, J., concurring) ("[T]he consti-

---

[17] DPIC, Abolitionist and Retentionist Countries, https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140.

[18] DPIC, The Death Penalty: An International Perspective, https://deathpenaltyinfo.org/death-penalty-international-perspective.

tutionality of capital punishment is not before us in this case, and therefore we proceed on the assumption that the death penalty is constitutional.").

The nature of the rights protected by the Eighth Amendment makes clear that *Gregg*'s judgment is not static. The "standard of extreme cruelty * * * necessarily embodies a moral judgment" whose application "must change as the basic mores of society change." *Graham*, 560 U.S. at 58 (internal quotation marks omitted). As a result, this Court has often revisited prior decisions upholding the constitutionality of the death penalty as new consensus and new insights emerge. In *Atkins*, the Court overturned the judgment in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), that States may execute the intellectually disabled, finding that "standards * * * ha[d] evolved" in the intervening 13 years and reinforced its judgment that the penalty was impermissible. *Roper*, 543 U.S. at 563. Three years later, in *Roper*, the Court overturned its judgment in *Stanford* v. *Kentucky*, 492 U.S. 361 (1989), allowing the execution of juveniles, finding that "indicia [of societal consensus] ha[d] changed" and that in the Court's own "independent judgment" the penalty was unacceptably cruel. *Roper*, 543 U.S. at 574.

The changes wrought since *Gregg* are far more substantial. *Gregg* relied on the fact that 35 States "ha[d] enacted new statutes that provide for the death penalty," and that juries regularly sentenced individuals to death, including 254 persons in the two years after *Furman* alone. 428 U.S. at 179-182. Since then, a majority of States have abandoned capital punishment, and the penalty has withered in every State. *See supra* Part II.A.1. Equally significant, this Court has repeatedly rendered its inde-

pendent judgment that the pillars on which *Gregg*'s judgment rested—that the death penalty is capable of being imposed non-arbitrarily, reliably, and in a humane manner—were severely flawed. 428 U.S. at 206. As the Court made clear in *Kennedy*, "[d]ifficulties in administering the penalty to ensure against its arbitrary and capricious application require adherence to a rule reserving its use" to a dwindling class of persons and offenses. 554 U.S. at 447. Moreover, definitive evidence—which this Court expressly noted it lacked at the time it issued *Gregg*—now confirms that these problems are endemic to the death penalty wherever it is administered.

Two justices of this Court, documenting these problems, recently called upon the Court to examine whether the punishment accords with the Eighth Amendment. *See Glossip*, 135 S. Ct. at 2755 (Breyer, J., joined by Ginsburg J., dissenting). This case presents an ideal vehicle for this Court to at last do so. The case comes to the Court on direct review, and the constitutional issues are well-preserved. As a result, the vehicle problems that often afflict criminal cases coming from state court are absent here: The AEDPA standard of review is inapplicable, so the Court can get straight to the merits without deference; there is no independent and adequate state ground; and the constitutional question was pressed and passed on below.

Furthermore, Arizona is a microcosm of the problems with the death penalty catalogued by Justice Breyer in his *Glossip* dissent, and so this case comes with a suitable record and context to consider the

constitutional issues. Nine people on death row have been exonerated in Arizona, including one in 2015.[19] The number and breadth of the statutory aggravators make it an exemplar of the arbitrariness in the imposition of the death penalty in the United States. And, while 125 people currently sit on death row in Arizona, the State has not carried out a single execution since 2014 (when Joseph Wood had to be injected 15 times in a two-hour ordeal).

The Court therefore has the opportunity to do more than remedy the severe infirmity in Arizona's death penalty scheme. It may wish to go further and answer the question whether the penalty that the State seeks to administer—one shot through with arbitrariness, unreliability, and cruelty—can any more be inflicted in accordance with the Eighth Amendment.

---

[19] *See* DPIC, Innocence Cases, https://deathpenaltyinfo.org/node/4900.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SUSAN L. COREY
CONSUELO OHANESIAN
OFFICE OF THE LEGAL ADVOCATE
222 N. Central Avenue
Suite 154
Phoenix, AZ 85004
(602) 506-4111

GARRETT W. SIMPSON
GARRETT SIMPSON PLLC
Box 6481
Glendale, AZ 85312
(623) 910-7216

NEAL KUMAR KATYAL
Counsel of Record
COLLEEN ROH SINZDAK
MITCHELL P. REICH
HOGAN LOVELLS US LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

THOMAS P. SCHMIDT
HOGAN LOVELLS US LLP
875 Third Avenue
New York, NY 10022
(212) 918-5547

Counsel for Petitioner

AUGUST 2017