No. 17-251

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

BRIEF OF *AMICI* FORMER AND CURRENT ARIZONA JUDGES, PROSECUTORS, DEFENDERS, LEGISLATORS, AND OTHERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

BRIEF OF *AMICI CURIAE*[1]

INTEREST OF THE *AMICI*

Amici curiae—former and current Arizona state-court judges, prosecutors, capital-defense counsel, public defenders, legislators, Arizona Attorneys for Criminal Justice, and other stakeholders—have extensive familiarity and experience with the administration of justice in Arizona and the evolution of the death-penalty regime in the State since *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam).[2] Although they represent a spectrum of views on the death penalty, *Amici* all share a strong commitment to maintaining the Arizona justice system's fairness and public legitimacy, particularly in capital cases. And *Amici* believe, based on their collective experience, that Arizona's scheme for capital sentencing falls below the minimum standard set by the Constitution.

[1] *Amici* certify that no party or party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. All counsel of record received timely notice of *Amici*'s intent to file this brief more than 10 days prior to its due date and all parties consented to the filing of this brief.

[2] A complete list of *Amici* appears as an addendum to this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For decades, this Court's precedents have instructed that, "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty.'" *Lowenfield* v. *Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983)). To satisfy this constitutional prerequisite, a State must either (1) "narrow the definition of capital offenses" at the guilt phase, or (2) "more broadly define capital offenses [but] provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Lowenfield*, 484 U.S. at 246.

In defiance of this Court's clear instructions, Arizona's legislature has done neither. At the guilt phase, the State's criminal code continues to define first-degree murder using the broadest of strokes. And, over time, Arizona's death-penalty statute has come to include an irredeemably sweeping set of aggravating circumstances. Arizona's original capital-sentencing statute—enacted in response to this Court's decision in *Furman*—aimed to reserve the death penalty for only the worst offenders, but today's statute makes "virtually every" defendant convicted of first-degree murder eligible for the penalty of death. *State* v. *Hidalgo*, 390 P.3d 783, 789 (Ariz. 2017). By abdicating its constitutional responsibility of providing meaningful guidance to narrow death eligibility, Arizona's legislature has left prosecutors and juries with far more discretion than the Constitution permits.

Consequently, and as *Amici* can attest based on their experience, the administration of the capital regime in Arizona unfortunately reflects "a pattern of arbitrary and capricious sentencing." *Zant*, 462 U.S.

at 877 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 195 n.46 (1976) (plurality opinion)). For one thing, the rate at which Arizona seeks death has surged: In 2007, "Maricopa County alone had 65 percent more [death penalty] cases pending than the next three highest death penalty-charging jurisdictions combined." Christopher Dupont & Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, 95 Judicature 216, 216 (2012). And the results of these capital cases reflect troubling racial disparities: A Hispanic man accused of killing a white victim is 4.6 times as likely to be sentenced to death as a white man accused of killing a Hispanic victim. *See* Ernie Thomson, *Discrimination and the Death Penalty in Arizona*, 22 Crim. Just. Rev. 65, 73 (1997).

In upholding the State's capital-sentencing regime despite the legislature's failure to narrow death eligibility, the Arizona Supreme Court did not faithfully apply either the letter or the spirit of this Court's precedents. Instead, the state court sustained Arizona's statutory scheme by means of an empty, hypertechnical distinction. This Court's intervention is needed to restore the fair administration of justice in Arizona.

ARGUMENT

I. ARIZONA'S DEATH-PENALTY STATUTE, ONCE NARROWLY DRAWN, NOW PROVIDES PROSECUTORS AND JURIES WITH UNFETTERED DISCRETION.

A. Arizona Responded To *Furman* With A Statute Intended To Be Narrow.

1. In 1972, this Court struck down every capital sentencing statute then in effect in the United States. *Furman*, 408 U.S. at 239. Because these statutes were

drawn broadly, and because they imposed the sentence of death upon a "capriciously selected random handful" of criminal defendants, they resulted in cruel and unusual punishment in violation of the Eighth Amendment. *Id*. at 309-10 (Stewart, J., concurring).

2. Like nearly every other State, Arizona went back to the drawing board. The day after *Furman* was decided, then-Arizona State Senator Sandra Day O'Connor met with *Amicus* Rudolph J. Gerber, then the Associate Director of the Arizona Criminal Code Commission.[3] Then-Senator O'Connor asked Gerber, in her words, to draft a death-penalty statute "we can live with"—one that excluded "ordinary" murders and gave uniformity to capital sentencing consistent with this Court's instructions.

Gerber, in turn, "looked for guidance to the Model Penal Code," much like his colleagues in "most [other] states." Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355, 374 (1995). The following year, in 1973, Arizona's legislature passed a sentencing statute based on the Model Penal Code.

In the new legislative scheme, Arizona left intact the broad definition of first-degree murder then in effect. *See* Brief of Respondent State of Arizona at 21-22, *Ring* v. *Arizona*, 536 U.S. 584 (2002) (No. 01-488), 2002 WL 481144 ("The 1973 legislation did not amend

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[3] The Honorable Rudolph J. Gerber is now retired, after a distinguished career as an Arizona trial and appellate judge, as well as a prosecutor. He is also the author of Criminal Law of Arizona (1978), a resource relied on by Arizona state courts. *See, e.g.*, *State* v. *Garza Rodriguez*, 791 P.2d 633, 636 (Ariz. 1990) (quoting Judge Gerber's book).

Arizona's substantive first-degree murder statute, which remains today substantially identical to its nineteenth century territorial counterpart.").

Instead, in order to comply with *Furman*, the State enacted a new provision requiring prosecutors to prove, following the guilt phase, that at least one of six aggravating circumstances was present before the death penalty could be imposed: (1) prior conviction for an offense for which life imprisonment was a possible sentence; (2) prior conviction for a felony involving "the use or threat of violence"; (3) creating a "grave risk of death to another person or persons in addition to the victim of the offense"; (4) procuring the offense by payment or promise of payment; (5) committing the offense in exchange for payment or promise of payment; and (6) committing the offense "in an especially heinous, cruel, or depraved manner." Ariz. Rev. Stat. Ann. § 13-454(E) (1973) (current version at Ariz. Rev. Stat. Ann. § 13-751(F)).

3. Arizona's death-penalty statute, as enacted in 1973, thus reflected an effort to comply with *Furman*'s mandate. *See* Brief of Respondent State of Arizona, *supra*, at 25 (the "undisputed motivation" for adoption of Arizona's aggravating circumstances was compliance with *Furman*); *Ring* v. *Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring) ("What compelled Arizona (and many other States) to specify particular 'aggravating factors' that must be found before the death penalty can be imposed was the line of this Court's cases beginning with *Furman*.") (citations omitted). And, in that effort, Arizona's legislature adopted the Model Penal Code's approach for seeking to "shrink the pool of death-eligible defendants" from those convicted of first-degree murder "and [to] produce a more meaningful correspondence between the class of

death-eligible defendants and those actually sentenced to death." Carol S. Steiker & Jordan M. Steiker, Courting Death: The Supreme Court and Capital Punishment 159 (2016) ("Courting Death").[4]

B. Over Time, Arizona Has Vastly Expanded Its Death-Penalty Statute

1. Since 1973, Arizona's legislature has repeatedly expanded its statute's scope to such a degree that, assuming the statute once accomplished the legislative intent of complying with the Constitution, it no longer does. Arizona's actions in this regard reflect what may best be described as "aggravator creep"—the tendency of legislatures to make aggravating-factor lists "longer and longer" over time, so that death-penalty statutes, "which might [have] be[en] narrowly tailored at the outset, begin[] to get away from us" in the course of time. Edwin Colfax, *Fairness in the Application of the Death Penalty*, 80 Ind. L.J. 35, 35 (2005). Indeed, "the pressure to expand the ambit of the death penalty over time has proven politically irresistible," for it is easy enough to expand and enlarge aggravating-factor lists in response to political forces. Courting Death 161.

Arizona has more than doubled the list of aggravating factors—from the original six in 1973 to 14 today—and over that same period it has substantially broadened many of these factors. The legislature

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[4] The authors of the Model Penal Code's death-penalty statute eventually withdrew their support for it, concluding that the model statute failed in practice to identify with enough precision the worst of the worst offenders. Am. Law Institute, Report of the Council to the Membership of The American Law Institute on the Matter of the Death Penalty 5 (Apr. 15, 2009).

made its first addition to the original list in 1978, extending death eligibility to offenses committed while incarcerated. Ariz. Rev. Stat. Ann. § 13-703(F)(7) (current version at Ariz. Rev. Stat. Ann. § 13-751(F)(7)). Arizona added an eighth aggravating circumstance in 1984, making it an aggravating factor to commit more than one homicide. § 13-703(F)(8). The ninth aggravating circumstance, where the defendant was at least 18 at the time of the offense and the victim was under 15, was added to the list in 1985. § 13-703(F)(9). In 1988, the legislature added as a tenth aggravating factor the victim's status as a law enforcement officer. § 13-703(F)(10).

In 1993, the legislature broadened three then-existing aggravating circumstances. First, it expanded the second aggravating factor from a prior "felony" conviction to a prior "serious" conviction. § 13-703(F)(2). Second, it expanded the seventh aggravating factor to include being on "authorized or unauthorized release" from custody at the time of the offense. § 13-703(F)(7). And third, it expanded the age-of-victim aggravating circumstance (the ninth) to include victims "seventy years of age or older." § 13-703(F)(9).

In subsequent years, the legislature continued to broaden existing factors and to add new ones; the statute now has 14 aggravators. These efforts included expanding the age-of-victim aggravating circumstance to include "an unborn child in the womb at any stage of its development," § 13-703(F)(9), and adding four additional aggravating circumstances: where the offense was gang-related; where the victim was targeted for prevention of or retaliation for cooperation with law enforcement; where the offense was "committed in a cold, calculated manner without pretense of moral

or legal justification"; and where the offense involved a stun gun, § 13-703(F)(11)-(14).

Each of these changes to Arizona's aggravating circumstances expanded the reach of its death-penalty statute. Arizona has never narrowed the scope of death eligibility by restricting aggravators.

2. In addition to permitting "aggravator creep," Arizona has simultaneously continued to define first-degree murder expansively, just as it did at the time of *Furman*. First-degree murder in Arizona today includes (as it did in 1972) premeditated murder as well as felony murder. Ariz. Rev. Stat. Ann. § 13-1105(A)(1)-(2). Premeditated murder extends to any intentional homicide involving a mental state more considered than "a snap decision made in the heat of passion." *State* v. *Kiles*, 213 P.3d 174, 180 (Ariz. 2009) (quoting *State* v. *Thompson*, 65 P.3d 420, 427 (Ariz. 2003)). Felony murder, for its part, currently extends to 22 different felonies, including felony flight and transporting marijuana for sale, reflecting its own kind of legislative creep. § 13-1105(A)(2). Indeed, as *Amicus* Gerber has explained, "[d]espite contrary recommendations from many sources, the Arizona Legislature has fashioned a felony murder rule that seems to be the broadest and most unprincipled in the United States." Rudolph J. Gerber, *On Dispensing Injustice*, 43 Ariz. L. Rev. 135, 147 (2001). Finally, intentionally or knowingly killing a law enforcement officer in the line of duty also counts as first-degree murder. § 13-1105(A)(3).

Despite the breadth of the first-degree murder statute, it remains the case today that any defendant found guilty of first-degree murder is eligible for the death penalty if the prosecutor proves any aggravating circumstance. §§ 13-1105(D), 13-752(D).

C. Contravening This Court's Decisions, Arizona Has Made "Virtually Every" First-Degree Murderer Death-Eligible.

1. Taken together, Arizona's broad definition of first-degree murder and its expansive list of aggravating circumstances fail to narrow the class of death-eligible offenders in a manner consistent with the Constitution.

A capital sentencing scheme, this Court has long held and the Arizona Supreme Court recognized in principle, "must genuinely narrow the class of persons 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." *State* v. *Hidalgo*, 390 P.3d 783, 789 (Ariz. 2017) (quoting *Lowenfield*, 484 U.S. at 244). The legislature may accomplish the requisite "narrowing function" in two ways: by prescribing a cabined definition of "capital offenses" or by "provid[ing] for narrowing by jury findings of aggravated circumstances at the penalty phase." *Lowenfield*, 484 U.S. at 246.

Because Arizona expansively defines first-degree murder, it has chosen not to adopt the first means of narrowing. But its expansive list of aggravating factors also fails to "genuinely narrow the class of persons eligible for the death penalty." *Lowenfield*, 484 U.S. at 244 (quoting *Zant*, 462 U.S. at 877). In this case, petitioner Hidalgo offered the report of an expert who concluded that, over a period of 11 years in several Arizona counties, at least one aggravating circumstance was present in "856 of 866 murders," or 99%. *Hidalgo*, 390 P.3d at 789. And the Arizona Supreme Court accepted as fact, for purposes of its decision, that "virtually every" first-degree murder in Arizona is death-eligible. *Id*. at 551.

Hidalgo's unrebutted evidence that 99% of first-degree murder cases are death-eligible is hardly surprising when one compares Arizona's list of aggravating factors to its definition of first-degree murder. As earlier recounted, Arizona's first-degree murder statute punishes (1) premeditated murders, (2) felony murders, and (3) murders of law enforcement officers. It is difficult to conceive of a premeditated homicide, one involving more than "'a snap decision made in the heat of passion,'" *Kiles*, 213 P.3d at 180 (quoting *Thompson*, 65 P.3d at 427), that is not covered by, at a minimum, the thirteenth aggravating circumstance (for "offense[s] . . . committed in a cold, calculated manner without pretense of moral or legal justification"), if not the sixth (for offenses committed "in an especially heinous, cruel or depraved manner"). Similarly, it is difficult to conceive of a felony murder not captured, at a minimum, by the second aggravating circumstance, which embraces "[c]onvictions for serious offenses committed on the same occasion as the homicide." Finally, the tenth aggravating factor ("[t]he murdered person was an on duty peace officer") obviously spans the third species of first-degree murders (for intentionally or knowingly "caus[ing] the death of a law enforcement officer who is in the line of duty").

Arizona's list of aggravating circumstances thus offers prosecutors and juries no legislative guidance, either in fact or in principle, to narrow first-degree murderers into a confined class of death-eligible defendants. It therefore cannot survive constitutional scrutiny.

2. The Arizona Supreme Court nevertheless upheld the statute. "Observing that at least one of several aggravating circumstances could apply to nearly

every murder," the court reasoned, "is not the same as saying that a particular aggravating circumstance is present in every murder." *Hidalgo*, 390 P.3d at 791. In other words, the court determined that, "so long as" *any one* aggravating circumstance "applies only to a subclass of murders," the constitutional requirement of genuine narrowing is met. *Id.* Neither law nor logic justifies the Arizona Supreme Court's hypertechnical bypass of this Court's clear instructions.

a. To satisfy the Eighth Amendment, this Court has explained, a State's capital sentencing "scheme" as a whole must "narrow[] the class of persons eligible for the death penalty according to an objective legislative definition." *Lowenfield*, 484 U.S. at 244. That is why this Court has squarely held that an aggravating circumstance that applies to all categories of murder is unconstitutional. *See Tuilaepa* v. *California*, 512 U.S. 967, 972 (1994) ("[T]he aggravating circumstance . . . may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder."). The same logic requires that the aggravating circumstances, *taken collectively*, must reduce the number of persons eligible for the death penalty, for otherwise the requisite "narrowing function" is missing. *Lowenfield*, 484 U.S. at 246.

In ruling otherwise, the Arizona Supreme Court chose to elevate form over substance, in disregard of this Court's long-standing instruction that, "in passing upon constitutional questions the court has regard to substance and not to mere matters of form, and . . . the [statute] must be tested by its operation and effect." *Near* v. *State of Minnesota ex rel. Olson*, 283 U.S. 697, 708 (1931). In *Jurek* v. *Texas*, for example, the Court upheld a narrowly drawn guilt-phase statute because it "serve[d] much the same purpose"—

legislative narrowing—as "a list of statutory aggravating circumstances." 428 U.S. 262, 270-71 (1976) (plurality opinion). Similarly, in *Ring*, this Court explained that the constitutional requirements of sentencing do not turn on technical "characterization," but rather the "functional" effect of a statute in operation. 536 U.S. at 605.[5] Arizona's statutory scheme simply fails to perform the necessary "function" that the Eighth Amendment demands. *Lowenfield*, 484 U.S. at 245-46. It cannot survive the scrutiny this Court's precedents require.

b. The Arizona Supreme Court's hypertechnical approach also defies common sense. Consider the following hypothetical aggravating-circumstances statute:

> (1) The trier of fact shall consider the following aggravating circumstance in determining whether to impose a sentence of death:
>
> i. Circumstance A.

Assume, for purposes of a first hypothetical, that Circumstance A covers all first-degree murders. Such a statute is unconstitutional. *See Tuilaepa*, 512 U.S. at 972.

Now consider a second hypothetical statute:

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[5] *See also Ring*, 536 U.S. at 610 (Scalia, J., concurring) ("[A]ll facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt."); *Trop* v. *Dulles*, 356 U.S. 86, 95 (1958) (plurality opinion) (whether statute was "penal" for Eighth Amendment purposes turned on "substance," not "form").

(1) The trier of fact shall consider the following aggravating circumstances in determining whether to impose a sentence of death:

i. Circumstance A_1,

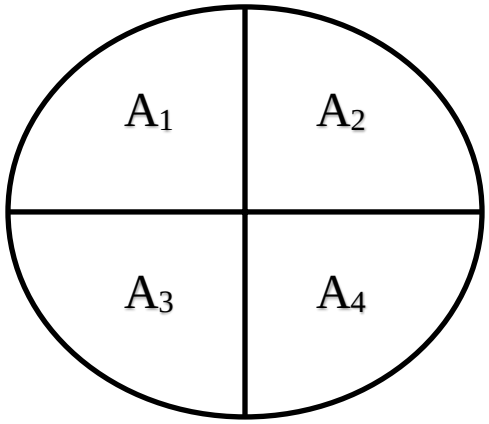
ii. Circumstance A_2,

iii. Circumstance A_3, or

iv. Circumstance A_4.

Assume, for purposes of the second hypothetical, that Circumstances A_1 through A_4 are completely co-extensive with Circumstance A:

Aggravating Circumstance A



Because Statute 1 and Statute 2 both render all murder cases death-eligible, it would make no sense to sustain the second statute but strike the first, as they are functionally equivalent. Yet the reasoning of the Arizona Supreme Court sanctions precisely that result, making dispositive the empty label change from A to A_1 through A_4.

* * *

The use of aggravating circumstances serves a substantive constitutional purpose. It is not "an end

in itself," this Court has instructed, but rather a practical "*means*" of channeling the jury's discretion and "genuinely narrowing the class of death-eligible persons." *Lowenfield*, 484 U.S. at 244 (emphasis added). The Arizona Supreme Court's decision—by turning on what is essentially a word game—undermines this critical, constitutionally required goal.

II. ARIZONA'S UNCONSTITUTIONAL SCHEME HAS LED TO TRAGICALLY PREDICTABLE RESULTS.

"[U]nfettered discretion . . . to impose the death sentence," this Court has observed, results in the "inevitable" influence of arbitrary factors in violation of the Eighth Amendment. *Pulley* v. *Harris*, 465 U.S. 37, 55 (1984). So it has been in Arizona. The State's failure to seek to conform its death-penalty regime to the Constitution's requirements has predictably led to high rates at which the death penalty is sought and severe race-based disparities in its imposition.

A. Unbridled Prosecutorial Discretion Has Caused A Capital-Case Crisis In Arizona.

Maricopa County, the most populous county in Arizona and home to the city of Phoenix, has established itself as a national outlier in seeking and imposing death sentences. "On a per capita basis Maricopa County had four times as many [death penalty] cases pending as Los Angeles, California and Harris County (Houston), Texas, [counties] both known for their high use of capital punishment." Death Penalty Info. Ctr., The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Cost to All 21

(2013).[6] Maricopa County is also an outlier within Arizona itself; "Maricopa's rate of death sentencing per 100 homicides is approximately 2.3 times higher than the rate for the rest of Arizona." Fair Punishment Project, Too Broken to Fix Part I: An In-Depth Look at America's Outlier Death Penalty Counties 8 (2016), https://goo.gl/qTCzYk. This outlier status is largely the product of unbridled discretion in the hands of the prosecutor's office.

From 2004 to 2010, the Maricopa County Attorney's Office dramatically increased the number of capital prosecutions. Dupont & Hammond, *supra*, at 216 ("Maricopa County alone had 65 percent more [death penalty] cases pending than the next three highest death penalty-charging jurisdictions combined."). The office's extreme charging practices continued throughout the County Attorney's tenure, which was brought to an abrupt end when he faced disbarment because he "outrageously exploited power, flagrantly fostered fear, and disgracefully misused the law," including by bringing baseless charges against political adversaries and directing the sheriff's office to lead investigations into judges. Opinion and Order Imposing Sanctions at 245, *In re Thomas*, No. PDJ-2011-9002, at 245 (Ariz. Apr. 10, 2012).

The surge in death-penalty cases brought about by the county prosecutor's practices quickly consumed defense counsel's limited resources and resulted in a "capital case crisis." Dupont & Hammond, *supra*, at 217-19. At that time, capital cases—"1/4 of 1% of all criminal cases"—"chew[ed] up 26.8% of the budget" of the Office of Public Defense Services. Order at 4, *State*

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[6] *Available at* https://deathpenaltyinfo.org/documents/TwoPercentReport.pdf.

v. *Martinez*, CR2006-007790-001 (Maricopa Cnty., Ariz. Aug. 3, 2009). Qualified defense counsel became overwhelmed and unavailable to take on additional cases. *See* Order at 4, *State* v. *Martinez*, CR2006-007790-001 (Maricopa Cnty., Ariz. Aug. 3, 2009) (finding the County Attorney's "filing practices in capital litigation . . . played a direct role" in the lack of available qualified counsel). Capital defendants were appointed investigators and attorneys who had never conducted a death-penalty trial and consequently had to obtain waivers from Arizona's rules, which were designed to protect capital defendants by setting minimum qualifications for their counsel. *See, e.g.*, Petition at 48-49, *State* v. *Rose*, CR2007-149013-002 (Maricopa Cnty., Ariz. June 29, 2017); *see also* Ariz. R. Crim. P. 6.8.

Even when capital defendants had experienced counsel, defense counsel were unable to adequately represent their clients' interests under the pressures of increased caseloads. Dupont & Hammond, *supra*, at 218 (noting it was "standard" for a lawyer to have six pending capital trial cases during this period). Counsel resorted to "rote, repetitive and unfocused" tactics, disconnected from the particulars of the case they were trying. *Id.* at 218, 220 ("[V]ery few original motions were submitted in those cases that resulted in a death sentence. The vast majority of pleadings were based entirely on templates readily available to members of the defense community through seminars and internet listserves.").

The results were predictable. The death-penalty conviction rate in "cases in which the prosecution filed a notice of intent to seek the death penalty" more than tripled: from 6.3 percent in 1999 to 20.9 percent in 2009. Dupont & Hammond, *supra*, at 218. Among the

cases that went to trial, the rate at which the death penalty was imposed increased *seven-fold*: While in 1999 only 10.3 percent of these cases resulted in a penalty of death, in 2008 a full 72.7 percent of these cases—nearly *three quarters*—resulted in a penalty of death. *Id.*

By contrast, when Mexican nationals were provided competent representation under a program sponsored by the Mexican government, the death-sentencing rate in Arizona plummeted: "[W]hen [the Mexican Capital Legal Assistance Program] is involved from the outset . . . the death sentencing rate for Mexican nationals accused of capital crimes is three to five times lower than for death-eligible cases in general." Gregory J. Kuykendall et al., *Mitigation Abroad: Preparing a Successful Case for Life for the Foreign National Client*, 36 Hofstra L. Rev. 989, 1000 (2008). In Arizona's capital-case crisis, the oft-noted concern that the quality of criminal defense counsel is the best predictor of capital-case outcomes has had particular resonance. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1836 (1994).[7]

[7] The surge in capital sentencing has not spared the innocent. Maricopa County sent both Ray Krohn and Debra Milke to death row despite powerful evidence that undermined the case against them. Both have since been freed: Mr. Krohn after DNA pointed to the actual perpetrator, and Ms. Milke after the Ninth Circuit vindicated her in a scathing decision authored by then-Chief Judge Kozinski. *See Fair Punishment Project*, *supra*, at 13; *Milke* v. *Ryan*, 711 F.3d 998 (9th Cir. 2013).

Maricopa County's capital-case crisis continues unabated. In March 2017, the county office responsible for assigning competent counsel in capital cases declared that it had run out of attorneys. Michael Kiefer, *Maricopa County Runs Out of Death-Penalty Defense Attorneys*, The Ariz. Republic (Mar. 26, 2017), https://goo.gl/rUfSkh. The Public Defender directly attributes the shortage to the breadth—and constitutional infirmity—of Arizona's capital sentencing statute: "All first-degree murder cases have the potential of being death-penalty cases . . . ." *Id.*

A. Unbridled Discretion Invites Reliance on Race in Capital Sentencing.

1. Where there is broad discretion, the Court has explained, "there is a unique opportunity for racial prejudice to operate." *Turner* v. *Murray*, 476 U.S. 28, 35 (1986). The pernicious influence of race in capital sentencing is by now well known and documented. *See Buck* v. *Davis*, 137 S. Ct. 759, 778 (2017) ("Relying on race to impose a criminal sanction poisons public confidence in the judicial process.") (internal quotation omitted); *Foster* v. *Chatman*, 136 S. Ct. 1737, 1754-55 (2016) (finding black prospective jurors were struck in capital case on basis of race); *see also Glossip* v. *Gross*, 135 S. Ct. 2726, 2760-62 (2015) (Breyer, J., dissenting) (discussing several studies). Arizona, unfortunately, has not escaped this influence.

"Between 2010 and 2015, 57 percent of the defendants sentenced to death in Maricopa County were people of color. . . . 18 percent of the defendants from Maricopa were African-American, even though African-Americans are just six percent of Maricopa's population." *Fair Punishment Project*, *supra*, at 11-12.

More broadly, "[m]inorities [in Arizona] accused of killing whites are more than three times as likely to be sentenced to death as minorities accused of killing other minorities." Thomson, *supra*, at 73. A race-of-victim bias is one of the most commonly found forms of racial bias in the administration of the death penalty in the United States. *See, e.g.*, Sheri Lynn Johnson et al., *The Delaware Death Penalty: An Empirical Study*, 97 Iowa L. Rev. 1925, 1941 (2012) (reporting similar disparities in eight other states). But Arizona's problems are more acute, with race of the defendant playing a role as well: A Hispanic man accused of killing a white victim is 4.6 times as likely to be sentenced to death as a white man accused of killing a Hispanic victim. Thomson, *supra*, at 73. The distorting influence of race would be even more pronounced if the Mexican government were not providing competent counsel in cases involving Mexican nationals. Kuykendall, *supra*, at 1000.

As this Court has long recognized, the race of the defendant or the victim should have no bearing on whether a defendant lives or dies. Any use of race in determining capital sentencing is "patently unconstitutional," *Buck*, 137 S. Ct. at 775, but Arizona's unconstitutionally broad sentencing scheme makes the use of race (and other arbitrary factors) far more likely.

B. Arizona's Capital Regime Is Now In Substance No Different From Those Struck Down By *Furman*.

Instead of reserving capital sentences for the worst of the worst, Arizona's legislature has enacted a sweeping sentencing scheme that embodies all the characteristics held objectionable in *Furman*. Yet the Arizona Supreme Court, in sustaining the legislative

scheme, pointed approvingly to the discretion of prosecutors to seek (or not to seek) the death penalty. *Hidalgo*, 390 P.3d at 791 (observing that, as a result of that discretion, "death sentences are in fact not sought in most first degree murder cases").

The Arizona Supreme Court's rationale thus turns this Court's constitutional mandate on its head. It is precisely because prosecutors are left with unfettered discretion that Arizona's scheme must be set aside. Arizona has given prosecutors and juries no legislative guidance as to how they should determine which subclass of offenders merits the death penalty. As a result, in Arizona, the death penalty is imposed upon a capriciously selected population of defendants. This state of affairs violates this Court's core holding—repeatedly emphasized in many cases since *Furman*—that only objective and narrowing legislative rules, rather than unfettered prosecutorial discretion, can avoid "the wanton and freakish imposition of the death penalty." *Zant*, 462 U.S. at 876.

CONCLUSION

The Court should grant the petition for certiorari and reverse the decision of the Arizona Supreme Court.

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September 15, 2017

APPENDIX

Amici consist of the following individuals and organizations:

1. **Rebecca A. Albrecht**

   Judge, Maricopa County Superior Court (1985-2005; Associate Presiding Judge, 1993-1995).

2. **David Bradley**

   Senator, Arizona Legislature (2013-present); Representative, Arizona House of Representatives, (2003-2011).

3. **Michael A. Breeze**

   Public Defender, Yuma County (2006-present).

4. **Colin F. Campbell**

   Attorney, Osborn Maldeon, P.A.; Judge, Maricopa County Superior Court (1990-2017; Presiding Judge, 2000-2005).

5. **Terri Capozzi**

   President, Arizona Public Defender Association (2017-present).

6. **Bernard J. Dougherty**

   Judge, Maricopa County Superior Court (1983-2001).

7. **Joel Feinman**

   Public Defender, Pima County (2017-present).

8. **Noel Fidel**

   Attorney, Noel Fidel, Attorney at Law; Judge, Maricopa County Superior Court (1982-1986;

Presiding Judge, 1985-1986); Judge, Arizona Court of Appeals, Division One (1987-2002; Vice Chief Judge, 1989-1991; Chief Judge, 1991-1993).

9. **Rudolph J. Gerber**

Judge, Maricopa County Superior Court (1979-1985; Associate Presiding Judge, 1985-1988); Judge, Arizona Court of Appeals, Division One (1988-2001).

10. **Stephen A. Gerst**

Judge, Maricopa County Superior Court (1984-2005).

11. **Robert Gottsfield**

Judge, Maricopa County Superior Court (1980-2015).

12. **Jim Haas**

Public Defender, Maricopa County (2001-present).

13. **Ruth H. Hilliard**

Judge, Maricopa County Superior Court (1985-2011).

14. **Marty Lieberman**

Legal Defender, Maricopa County Office of the Legal Defender (2011-present).

15. **James Mannato**

Public Defender, Pinal County (2014-present); Florence, Arizona Town Attorney (2002-2014).

16. **Cecil B. Patterson, Jr.**

    Judge, Maricopa County Superior Court (1980-1991); Judge, Arizona Court of Appeals, Division One (1995-2003).

17. **Christina Philis**

    Director, Maricopa County Office of Public Defense (2016-present).

18. **Jose de Jesus Rivera**

    U.S. Attorney, District of Arizona (1998-2001).

19. **Barry Schneider**

    Judge, Maricopa County Superior Court (1986-2007).

20. **Gary Stuart**

    Senior Policy Advisor to the Dean, Arizona State Sandra Day O'Connor College of Law (2009-present); President, Arizona Board of Regents (2004-2005).

21. **James P. Walsh**

    Attorney (Retired); Pinal County Attorney (2007-2012); Chief Deputy in the Arizona Attorney General's Office (2004-2006); Arizona State Senator (1975-1976).

22. **Thomas A. Zlaket**

    Shareholder, Law Office of Thomas A. Zlaket; Justice, Arizona Supreme Court (1992-2002; Vice Chief Justice, 1996-1997; Chief Justice, 1997-2002).

23. **Arizona Attorneys for Criminal Justice**

Formed in 1986, AACJ is a statewide non-profit organization whose members include criminal defense lawyers, law students and associated professionals. AACJ's mission is to protect the rights of the accused and promote excellence in the practice of criminal law through education, training, and fostering public awareness of the criminal justice system and the role of the defense lawyer.

24. **Office of the Legal Defender, Maricopa County**

The Office of the Legal Defender is an indigent defense office in Maricopa County established to represent indigent clients in criminal, juvenile dependency and severance, civil mental health, and criminal appeals cases. The office has represented scores of capital clients.

25. **Pima County Public Defender**

Pima County is the second-most populous county in Arizona. The Pima County Public Defender represents indigent defendants in their trials and appeals from criminal convictions originating in Pima County. The office regularly represents persons facing a potential death sentence.

26. **Pinal County Public Defender**

Pinal County is home to Arizona's death row. The Pinal County Public Defender represents indigent clients facing criminal charges and appealing convictions from them, including charges that could result in a death sentence.