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

REPLY BRIEF IN SUPPORT 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

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INTRODUCTION

In the years since *Gregg* v. *Georgia*, 428 U.S. 153 (1976), statutory aggravators have proliferated in Arizona such that its capital sentencing scheme does not "genuinely narrow the class of persons eligible for the death penalty." *Zant* v. *Stephens*, 462 U.S. 862, 877 (1983). Meanwhile, across the Nation, as death sentences and executions have grown more and more unusual, the evidence continues to mount that the penalty is "freakish[ly]" imposed, *id*. at 876, that innocents have been put to death, and that inhumane delays between sentence and execution are both widespread and ineradicable. This case presents an ideal opportunity for the Court to confront at least some, if not all, of these problems.

The State's main strategy is to deflect from rather than engage with these serious issues. First, it claims that this is not a suitable vehicle because petitioner committed his crime when Arizona's capital sentencing scheme had ten factors, whereas today it has fourteen. That argument is a red herring. The ten-factor version of the statute still swept in nearly 98% of first-degree murderers, and so suffers from the same constitutional infirmity as the current one. *See infra* Part I.A. More fundamentally, neither petitioner's argument nor the decision under review turns on the precise number of aggravators. Indeed, in the state courts, Arizona never once raised the issue it now claims blocks review. To the contrary, at the *State's* behest, the courts below assumed that Arizona's death penalty scheme swept in "virtually every" first-degree murder defendant, Pet. App. 11a, and then decided, *as a matter of law*, that that fact did not matter. Petitioner seeks review of that legal ruling, which has ramifications beyond Arizona: States such as California, Colorado, and Missouri have also adopted statutory aggravators that collectively sweep so broadly that they cannot perform any meaningful narrowing. *See* Cal. Penal Code § 190.2; Colo. Rev. Stat. § 18-1.3-1201; Mo. Rev. Stat. § 565.032. And the decision below may embolden more states to follow suit.

As for the broader question of the death penalty's constitutionality, the State has no real answer to the evidence and arguments marshaled by petitioner or by Justice Breyer in his *Glossip* dissent. In the end, the State rests on the assertion that the constitutionality of the death penalty is settled law. But *Gregg* itself recognized that the Court could revisit

the issue in light of "more convincing evidence." 428 U.S. at 187. The time has come.

ARGUMENT

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

A. Unless This Court Grants Review, Arizona Defendants Will Be Unable To Vindicate Their Eighth Amendment Rights.

In order for a capital sentencing scheme to comply with the Eighth Amendment, it "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 [sentenced to death] compared to others found guilty of murder." *Lowenfield* v. *Phelps*, 484 U.S. 231, 244 (1988) (internal quotation marks omitted). Notwithstanding that requirement, the Arizona Supreme Court held here that Arizona may impose a death sentence under a scheme in which the aggravating factors make "virtually every" first-degree murderer eligible for capital punishment. Pet. App. 11a.

1. Despite that stark departure from this Court's precedent, the State urges this Court to eschew review because petitioner's crime was committed at a time when Arizona's capital scheme had ten aggravating factors, rather than the fourteen factors the statute now lists. But petitioner's present challenge is not tied to a particular iteration of the Arizona statute. He challenges the Arizona Supreme Court's *holding* that there is no constitutional defect in a capital sentencing scheme in which "nearly every

charged first degree murder could support at least one aggravating circumstance." *Id*. at 12a. And that sweeping pronouncement is not confined to a specific version of Arizona's sentencing scheme; the Arizona Supreme Court discussed the current fourteen-factor statute, but it also repeatedly relied on *State* v. *Greenway*, 170 Ariz. 155 (1991), a prior Arizona case holding that the ten-factor statute was constitutional. Pet. App. 13a-14a. Thus, unless and until this Court grants review, *no* Arizona defendant will be able to challenge his sentence under a statute that makes "virtually every" first-degree murderer death-eligible, whether that statute contains ten, fourteen, or forty aggravators.

Moreover, the State's focus on whether petitioner should have been sentenced under the ten-factor or fourteen-factor statute marks a complete departure from its position before the state courts. There, the State repeatedly assumed that the fourteen-factor statute would apply to petitioner, and even disclaimed the relevance of any of the particular facts underlying the challenge. *See, e.g.*, State's Super. Ct. Resp. to Mot. To Dismiss the Death Penalty, at 13-14 (assuming that petitioner "is asserting that because A.R.S. § 13-751(F) has fourteen (14) possible aggravating factors, it is unconstitutional" and responding that "even if [petitioner's factual allegations] w[ere] true" that "does not make A.R.S. § 13-751(F) unconstitutional"); State's Ariz. Sup. Ct. Br. at 16-23 (offering a detailed defense of the 14-factor statute without once suggesting that the 10-factor statute was relevant).

Indeed, the irrelevance of any disputed facts was the basis of the State's successful opposition to petitioner's request for an evidentiary hearing:

According to the State, "even if the facts alleged [a]re true," petitioner's constitutional claims "fail[] as a matter of law and, as a result, an evidentiary hearing was unnecessary." State's Ariz Sup. Ct. Br. at 8. Having prevailed on that position, the State should not now be permitted to dispute the underlying facts in order to avoid certiorari review of the *legal* holding it so ardently sought.

In any event, the State's account of the underlying facts is wrong. Arizona suggests that prevailing before this Court and obtaining an evidentiary hearing would not help petitioner because the study he seeks to present shows only that the fourteen-factor statute makes "virtually every" first degree murderer death eligible. In fact, the referenced study analyzes ten years of cases, and shows that, for example, in 2002 when there were 10 aggravating factors, 100% of the first-degree murder cases were death eligible. *See* Cassia Spohn, Aggravating Circumstances in First-Degree Murder Cases, Maricopa County, AZ: 2002-2012, at 2 n.1.[1] Further, the author of the study recently reanalyzed the evidence and determined that, even under the ten-factor statute, 97.8% of first-degree murder defendants between 2002 and 2012 would be death eligible. *Id*. at 2. In other words, both the ten-factor and the fourteen-factor statute patently fail to perform the constitutionally required narrowing.

2. On the merits, the State first argues (at 8) that the narrowing requirement is met so long as each individual aggravator is "neither overly broad, nor

[1] *Available at* https://ccj.asu.edu/sites/default/files/death_penalty_report.pdf.

unconstitutionally vague." That misses the point entirely. The State's argument would leave room for a scheme like the one Arizona has long employed, in which a series of aggravators that might be constitutional on their own work *together* to make "virtually every" first-degree murderer death eligible. And it is directly contrary to this Court's approach in *Lowenfield* and *Jurek* v. *Texas*, 428 U.S. 262 (1976) (plurality opinion), in which the Court analyzed a state's scheme as a whole to determine whether it "narrow[ed] the class of death-eligible murderers" as the Eighth Amendment requires. *Lowenfield*, 484 U.S. at 245-246.

Respondent also wrongly asserts (at 10) that petitioner seeks a rule requiring "numerical, or quantitative, narrowing," while the Arizona Supreme Court upheld a system in which narrowing is assessed under a "qualitative measure." Petitioner does not challenge the Arizona Supreme Court's decision because of the *type* of legislative narrowing that it embraced. Petitioner challenges the decision because the holding dispenses with the narrowing requirement *altogether*, explicitly permitting the State to impose the death penalty through a scheme that makes "nearly every charged first degree murder[er]" eligible for death. Pet App. 12a; *see* Br. of *Amici* Former and Current Arizona Judges, et al. 3-13.

In the end, the State's primary defense is to repeat the mantra that the State's system is not "standardless." Opp. 9-12. But petitioner has shown that in one crucial way it is: Arizona's legislature has failed to narrow the class of death eligible defendants, placing the task entirely in the hands of the charging officials and juries. And, rather than rejecting that

scheme as the Eighth Amendment demands, the Arizona Supreme Court has endorsed the legislature's decision to give "unbridled * * * discretion" in meting out life or death. Pet. App. 14a (internal quotation marks omitted).

3. Finally, the State does not dispute that the lack of statutory narrowing has engendered deeply troubling racial, ethnic, and geographic disparities in the imposition of the death penalty. *See* Pet. 18-21. Instead, the State argues that petitioner's claim is foreclosed by *McCleskey* v. *Kemp*, 481 U.S. 279 (1987), because he has not alleged "purposeful discrimination in his case." Opp. 16. That is beside the point. The grave inequalities that result from Arizona's standardless capital sentencing scheme show why this Court's narrowing requirement is so vital. The same goes for arbitrary geographic disparities. *McCleskey* did not overrule *Furman*.

B. There Is A Clear Split In The State Courts.

The Arizona Supreme Court's decision breaks with the dictates of other state high courts. The Nevada Supreme Court has held that where a State broadly defines a capital offense, "its capital sentencing scheme must narrow death eligibility in the penalty phase by the jury's finding of aggravating circumstances." *McConnell* v. *State*, 102 P.3d 606, 622 (Nev. 2004) (en banc) (per curiam). Similarly, the Illinois Supreme Court has held that "a capital sentencing scheme must genuinely narrow the class of individuals eligible for the death penalty." *People* v. *Ballard*, 794 N.E.2d 788, 816 (Ill. 2002). And the Delaware Supreme Court has stated that "too many aggravating circumstances may violate the principles enunciated in" this Court's key Eighth Amendment

precedents. *Steckel* v. *State*, 711 A.2d 5, 13 n.11 (Del. 1998) (en banc).

Respondent tries to sweep all these decisions aside, observing that none of the courts actually invalidated an entire state scheme based on a failure to properly narrow the pool of death eligible defendants. But that is because, in each case, the Court found that the overall scheme *could* perform the requisite narrowing, *McConnell*, 102 P.3d at 624-625; *Steckel*, 711 A.2d at 12-13, or at least that the defendant in question had not supplied the Court with sufficient empirical evidence to support his claim, *Ballard*, 794 N.E.2d at 826 (McMorrow, J., specially concurring). The decisions make clear, however, that if the Nevada, Illinois, or Delaware courts were confronted with a challenge like petitioner's, they would not hold that it fails "as a matter of law." Pet. App. 7a. Rather, they would engage in precisely the analysis that the Arizona Court rejected, evaluating whether the aggravating circumstances "narrow death eligibility" as the Constitution requires. *McConnell*, 102 P.3d at 622. There is thus a square split that provides further reason for this Court's review, and that this Court should resolve to provide guidance to state legislatures.

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

A. This Court Has Not Conclusively Settled The Constitutionality Of The Death Penalty.

The State is equally off the mark in contending (at 20) that the Court has "settled" the constitutionality

of the death penalty for all time. The Eighth Amendment was not fossilized at some point in the past, and *Gregg*'s judgment that capital punishment could be imposed constitutionally was, expressly, a provisional one: The Court made clear that it might one day revisit the question in light of "more convincing evidence." 428 U.S. at 187.

The State portrays the Court's intervening decisions as having somehow turned the Court's tentative judgment into a conclusive one. But the Court has never revisited the issue; rather, it has been careful to state only that it was proceeding on the premise that *Gregg* was correctly decided. In *Baze* v. *Rees*, 553 U.S. 35 (2008), for instance, the plurality simply "beg[a]n with the principle, settled by *Gregg*"—and challenged by no party—"that capital punishment is constitutional." *Id.* at 47 (plurality opinion); *see id.* at 63 (Alito, J., concurring) ("As the plurality opinion notes, the constitutionality of capital punishment *is not before us in this case*, and therefore we proceed *on the assumption* that the death penalty is constitutional." (emphases added)). *Glossip* proceeded on the same unchallenged premise. *See Glossip* v. *Gross*, 135 S. Ct. 2726, 2732-33 (2015). The Court did not—and could not—conclusively settle what the "[e]volving standards of decency" permit. *Kennedy* v. *Louisiana*, 554 U.S. 407, 420 (2008).

B. The Death Penalty Is Unconstitutional In Light Of Contemporary Standards Of Decency.

1. The State offers little to rebut Petitioner's showing that a widespread consensus has emerged that the death penalty is categorically impermissible.

The State does not dispute that 31 States have abandoned capital punishment, that the frequency of death sentences and executions has plummeted, and that the rate of abolition has continued to grow. Pet. 22-24.

The State asserts that "[t]he majority of States" still have capital punishment on the books. Opp. 20. But this Court's "inquiry into consensus" looks to "[a]ctual sentencing practices," not just formal legislation. *Graham* v. *Florida*, 560 U.S. 48, 62 (2010) (citing cases). Not only have a substantial majority of States abandoned capital punishment in practice, but even those States that retain it administer the penalty "most infrequent[ly]." *Id.*; *see* Pet. 23.; Br. of *Amicus Curiae* Fair Punishment Project 8-17.

The State claims (at 20) that this decline is "temporary" and attributable to the difficulty in obtaining lethal-injection drugs from pharmaceutical companies. Neither assertion is accurate. The decline is nearly two decades old, and shows no signs of abating.[2] Furthermore, that decline has continued since *Glossip* permitted States to execute inmates with midazolam, a drug that may be obtained without the cooperation of unwilling pharmaceutical manufacturers. 135 S. Ct. at 2733-35. And it cannot account for the marked decline in death *sentences*, as well as executions. Pet. 23.

None of the recent developments the State points to undermine this trend. *See* Opp. 21. California and

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[2] *See* Death Penalty Information Center (DPIC), Executions by Year, https://deathpenaltyinfo.org/executions-year; DPIC, Death Sentences By Year: 1976-2015, https://deathpenaltyinfo.org/death-sentences-year-1977-present.

Nebraska have not executed a single inmate in 10 and 20 years, respectively.[3] And Oklahoma continues to be one of only five States that carries out the death penalty with any regularity. Pet. 23.

2. The State musters almost no response to petitioner's argument that, after decades of experience, it is clear that capital punishment cannot be administered in accordance with minimum standards of rationality, reliability, and humanity.

a. The State asserts (at 22-23) that *Gregg* resolved forever that the tension at the heart of the administration of the death penalty—between the untrammeled discretion afforded capital juries, on the one hand, and the need to articulate aggravating factors with reasonable determinacy, on the other, Pet. 27-29—presents no constitutional problem. That is incorrect. This Court itself has recognized that these features have "produced results not altogether satisfactory," and has sought to mitigate their obvious defects by "confining the instances in which capital punishment may be imposed." *Kennedy*, 554 U.S. at 436-437; *see id.* at 439.[4]

b. The State also dismisses, with shocking cavalierness, the "overwhelming" evidence that States

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

[4] The State attacks a straw man by claiming (at 22) that petitioner is raising an equal-protection argument foreclosed by *McCleskey*. He is not. His argument is that the well-documented inequalities in the imposition of the death penalty substantiate the claim that the penalty, as administered, is arbitrary, in violation of the Eighth Amendment.

have executed the innocent. *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting). While the State does not dispute the number of death row exonerations, it claims (at 23) that no "particular case" has been identified in which an innocent person was executed—notwithstanding that multiple painstaking studies have done just that. *See id.* at 2757, 2766. And it relies on Justice Scalia's solo concurrence, 11 years ago, dismissing reports of wrongful executions in a case where the parties did not brief the question and when unambiguous DNA evidence of such errors was still new. *See Kansas* v. *Marsh*, 548 U.S. 163, 188 (2006) (Scalia, J., concurring); *see id.* at 207-208 (Souter, J., dissenting). A problem of such moral gravity deserves a full briefing on the merits, not two sentences of casual dismissal.

c. Lastly, the State believes that decades-long delays in imposing capital sentences have no bearing on the cruelty or penological utility of the punishment. Opp. 23. This Court has long suggested otherwise. *See, e.g.*, *In re Medley*, 134 U.S. 160, 172 (1890). The notion that such delays are a luxury afforded to a prisoner who wishes to "avail himself * * * of appellate and collateral procedures," Opp. 23, is belied by the fact that such procedures have prevented the execution of hundreds of wrongfully convicted inmates. Pet. 29-30.

C. This Case Is An Ideal Vehicle To Resolve The Constitutionality Of The Death Penalty.

Once again, the State's half-hearted efforts to gin up a vehicle problem are unavailing. Petitioner has not "waived" his Eighth Amendment argument. Opp. 18. He unquestionably argued in the lower

courts that his sentence, and the Arizona statute pursuant to which he was sentenced, violate the Eighth Amendment. "Having raised a[n] [Eighth Amendment] claim in the state courts," petitioner can "formulate[] any argument [he] like[s] in support of that claim here." *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992). Indeed, he can "frame the question [presented] as broadly or as narrowly as he sees fit." *Id.*; *see also Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

The State's repeated observations about the facts of Hidalgo's crime are also immaterial. The problems that afflict the death penalty—the arbitrariness, the errors, the cruelty—are systemic. And Arizona's death penalty laws and practices exemplify those problems. Pet. 36-37.

CONCLUSION

The petition 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
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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

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