

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 *AMICUS CURIAE*
FAIR PUNISHMENT PROJECT
IN SUPPORT OF PETITIONER**

—◆—
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INTEREST OF AMICUS CURIAE

Fair Punishment Project (“FPP”) is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School. FPP is dedicated to creating a fair and accountable justice system by addressing the ways in which the country’s laws and criminal justice system contribute to excessive punishment for offenders. FPP believes that punishment can be carried out in a way that holds offenders accountable and keeps communities safe, while still affirming the inherent dignity that all people possess. FPP thus has a strong interest in ensuring that the imposition of punishment complies with the mandates of the Constitution.¹



SUMMARY OF ARGUMENT

2016 saw the fewest number of executions performed and the fewest number of death sentences imposed in the last quarter of a century. This was no historical glitch. Rather, over the past 25 years, there has been a consistent decline in the frequency of executions and death sentences imposed. The rarity of the death penalty today demands an examination of whether it comports with “the evolving standards of

¹ Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that no counsel for a party authored this brief in whole or in part and that no counsel or party made a monetary contribution intended to fund this brief’s preparation or submission. Counsel of record for all parties received timely notice of the filing of this brief and consented to its filing.

decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

In evaluating whether a given punishment violates the Constitution, this Court conducts two inquiries. First, the Court assesses whether there exists a national consensus against the punishment. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 417, 421 (2008). Second, the Court exercises its own judgment and independently “ask[s] whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” *Atkins v. Virginia*, 536 U.S. 304, 313 (2002). Today, each of these inquiries compels the conclusion that the death penalty is no longer constitutional. Evidence of a national consensus can be found in the following figures:

- 19 states and the District of Columbia have abolished the death penalty through statute, constitutional guarantee, or court decision;
- Four states have instituted moratoria against the death penalty;
- Ten other jurisdictions, though the death penalty is on the books, have essentially rejected the punishment, performing five or fewer executions over the past fifty years;
- Three additional jurisdictions have had zero executions in the past decade, and two more have had just one;
- In 2016, a total of only 31 death sentences were imposed, all in just 27 counties; and

- In 2016, only 20 executions were performed.

Likewise, years of experience and study demonstrate that the death penalty serves no legitimate end and is a grossly disproportionate form of punishment. There is no objective evidence that the death penalty, as currently administered, has any marginal deterrent effect over the threat of life imprisonment without the possibility of parole. And there is sound reason to doubt that capital punishment capably advances society's interest in retribution: juries consistently fail to identify the most culpable offenders who supposedly merit the death penalty. In addition, use of the death penalty subjects all of those condemned to die to inhumane conditions for two decades before execution and involves an intolerable risk of executing the innocent.



ARGUMENT

I. Objective Indicators Demonstrate a National Consensus Against Capital Punishment.

Analysis of whether a punishment violates the Eighth Amendment begins with an assessment of whether a societal consensus exists against it. *See, e.g., Kennedy*, 554 U.S. at 421. Indicators of consensus include legislation enacted by the country's legislatures as well as “[a]ctual sentencing practices” over time, *Graham v. Florida*, 560 U.S. 48, 62 (2010), and executions performed, *Kennedy*, 554 U.S. at 433. Moreover, this Court has stressed that “the consistency of the

direction of change” in states’ practices is more informative than a simple tally of jurisdictions. *Atkins*, 536 U.S. at 315. At bottom, the search is “for reliable objective evidence of contemporary values.” *Id.* at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

Today, that evidence—which encompasses state legislation, the practices of state governors, actual sentencing and execution figures, as well as opinion polls, proposed legislation, and the conclusions of professional organizations and commissions—reveals a national consensus against the death penalty.

A. 31 States, the District of Columbia, the Federal Government, and the U.S. Military Have Abandoned the Death Penalty.

1. 20 Jurisdictions Have Abolished Capital Punishment.

19 states and the District of Columbia have abolished the death penalty. 16 states and the District of Columbia have prohibited capital punishment through legislation or constitutional guarantee.² The highest courts of three more states have ruled their respective

² These states are Alaska, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. *See States with and without the death penalty*, Death Penalty Information Center (“DPIC”) (Nov. 9, 2016), <https://deathpenaltyinfo.org/states-and-without-death-penalty>.

death penalty statutes unconstitutional,³ and no legislation has since been enacted to reinstate the punishment.

The recent surge of states formally abandoning the death penalty is especially striking. Seven states have abandoned the death penalty in just the last decade: New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Delaware (2016).⁴ This Court has recognized a shift of less magnitude over more time to be “significant” proof of consensus. *See Roper v. Simmons*, 543 U.S. 551, 565 (2005) (discussing abandonment of juvenile death penalty by five states in a 15-year period).

2. A Moratorium on Executions Exists in Four Additional States.

Between 2011 and 2015, governors of Colorado, Oregon, Pennsylvania, and Washington implemented indefinite moratoria on executions in their states.⁵ This Court has already recognized that the combination of Oregon’s moratorium and the state’s infrequent application of the penalty in the years preceding it—just two executions over 40 years—rendered Oregon functionally abolitionist. *See Hall v. Florida*, 134 S. Ct.

³ *See Rauf v. State*, 145 A.3d 430 (Del. 2016); *People v. Taylor*, 878 N.E.2d 969 (N.Y. 2007); *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984).

⁴ *States with and without the death penalty*, *supra* note 2.

⁵ *Id.*

1986, 1997 (2014). Colorado, Pennsylvania, and Washington are no different. Their moratoria followed decades of sparse use of the death penalty: Colorado, Pennsylvania, and Washington have had only two, three, and five executions, respectively, in the last 50 years.⁶

3. 10 Other Jurisdictions Exhibit a Significant Degree of Disuse.

Eight other states, the federal government, and the U.S. military exhibit a degree of long-term disuse that rivals Oregon, Pennsylvania, Colorado, and Washington. New Hampshire, for example, has not performed an execution in 88 years and has only one inmate on death row.⁷ Wyoming has executed one person in fifty years and has no one on death row.⁸ Kansas

⁶ See *Number of Executions by State and Region Since 1976*, DPIC (Sept. 13, 2017), <https://deathpenaltyinfo.org/number-executions-state-and-region-1976> [hereinafter, “*Executions by State and Region*”]; M. Watt Espy & John Ortiz Smykla, *Executions in the U.S. 1608-2002: The ESPY File, Executions by State*, available at <https://deathpenaltyinfo.org/documents/ESPYstate.pdf> [hereinafter, “*ESPY File*”].

⁷ *New Hampshire*, DPIC, <https://deathpenaltyinfo.org/new-hampshire-1> (last accessed Sept. 12, 2017).

⁸ *Executions by State and Region*, *supra* note 6; *ESPY File*, *supra* note 6; Alex Dobuzinskis, *Judge overturns capital sentence of Wyoming’s only death row inmate*, Reuters (Nov. 20, 2014), available at <http://www.reuters.com/article/us-usa-deathsentence-wyoming/judge-overturns-capital-sentence-of-wyomings-only-death-row-inmate-idUSKCN0J501R20141121>.

has not executed anyone since 1965, and the U.S. military has not executed anyone since 1961.⁹ Idaho, Kentucky, Montana, Nebraska, South Dakota, and the federal government have performed only three executions each over the past 50 years.¹⁰

In addition, five states have carried out one or fewer executions “[i]n the past 10 years.” *Roper*, 543 U.S. at 565. California, Nevada, and North Carolina have had no executions in the past decade; Louisiana and Utah have had only one each.¹¹

* * *

In total, these numbers are glaring. 34 jurisdictions have formally abandoned the death penalty or have carried out one or fewer executions per decade over the past half-century. And an additional five have had no more than one execution in the last ten years.

⁹ *Kansas*, DPIC, <https://deathpenaltyinfo.org/kansas-1> (last accessed Sept. 12, 2017); *The U.S. Military Death Penalty*, DPIC, <https://deathpenaltyinfo.org/us-military-death-penalty> (last accessed Sept. 12, 2017).

¹⁰ *Executions by State and Region*, *supra* note 6; *ESPY File*, *supra* note 6; *Federal Executions 1927-Present*, DPIC, <https://deathpenaltyinfo.org/federal-executions-1927-2003> (last accessed Sept. 12, 2017).

¹¹ *See Executions by State and Region*, *supra* note 6.

B. Even in the States That Continue to Employ Capital Punishment, Its Use Is in Sharp Decline.

Among the few states that continue to use some form of capital punishment, there has recently been a substantial decline in the number of death sentences imposed and executions performed. This drop in sentences and executions accords with the long, consistent national march away from capital punishment.

1. New Death Sentences Are at Record Lows.

Current societal consensus may be best reflected in the number of new death sentences imposed by juries. *See Enmund v. Florida*, 458 U.S. 782, 794 (1982).¹² This figure is a particularly telling measure of consensus because it reflects not only the decision of each jury itself, but also the exercise of discretion by locally elected prosecutors and the legal and constitutional

¹² Even jury verdicts in death cases overstate society's acceptance of the death penalty. Because capital juries are entirely composed of death-qualified members, *i.e.*, those who will commit to considering and imposing the death penalty, *see Lockhart v. McCree*, 476 U.S. 165, 165 (1986), verdicts reflect the consensus of only this portion of society. The significant segment of the population that is opposed to capital punishment is entirely excluded from service, and its views are therefore unrepresented in this metric. *See* Brandon Garrett, et al., *Capital Jurors in an Era of Death Penalty Decline*, 126 *Yale L.J. F.* 417, 419-20 (2017) (explaining that the results of a survey of jurors in one county known as a "redoubt of death sentencing" showed that "35% or more of jurors reporting for jury service were . . . excludable as having . . . substantial doubts about the death penalty").

determinations by judges handling death-eligible cases. Each of these actors can, and does, make determinations about whether or not the ultimate sanction of death is an acceptable or appropriate punishment for an aggravated murder. Whether or not a prisoner is sentenced to death is essentially a composite of all of these decisions, each of which is a key factor in the Court's determination of consensus. *See, e.g., id.* at 796.

The drop in death sentences over the past quarter century is thus quite revealing. The number has declined consistently over the past decade, and only 31 death sentences were imposed in 2016.¹³ This is a fraction of the figures for previous decades, signaling a new era of death penalty disuse. In the nineties, there were an average of 286 death sentences imposed per year.¹⁴ The following decade, the number averaged 145 per year.¹⁵

New death sentences, moreover, are localized in only a few geographic areas. Of the 31 new death sentences imposed in 2016, three states—California,

¹³ *Death Sentences By Year: 1976-2015*, DPIC, <https://deathpenaltyinfo.org/death-sentences-year-1977-present> (last accessed Sept. 12, 2017). In 2016, “[f]or the first time in more than 40 years, no state imposed ten or more death sentences.” DPIC, *The Death Penalty in 2016: Year End Report 2* (2016) [hereinafter, “2016 Year End Report”], available at <https://deathpenaltyinfo.org/documents/2016YrEnd.pdf>.

¹⁴ *Death Sentences By Year: 1976-2015*, *supra* note 13.

¹⁵ *Id.* The decline cannot be attributed to a corresponding decrease in crime. *See Murder Rates Nationally and By State*, DPIC, <https://deathpenaltyinfo.org/murder-rates-nationally-and-state> (last accessed Sept. 12, 2017).

Texas, and Ohio—were responsible for 17, or 55 percent.¹⁶

County-level data show an even more striking geographical disparity in death sentencing: nationwide, between 2010 and 2015, “only 15 counties imposed five or more death sentences.” *See Glossip v. Gross*, 135 S. Ct. 2726, 2774 (2015) (Breyer, J., dissenting). And, from 2012 to 2016, the number of counties imposing a death sentence fell from 60 to 27.¹⁷ It is evident that “the number of active death penalty counties is small and getting smaller.” *Id.*

Even the 31 sentences handed down in 2016 inflame society’s acceptance of the death penalty, as many were imposed in states that have abandoned executions. Members of juries in states that never actually perform executions are free to vehemently denounce a defendant’s crime by returning a death verdict, comfortably protected by the certainty that the person whom they have purportedly condemned will never be put to death. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 331 (1985) (explaining that, “[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to ‘send a message’ of extreme disapproval for the defendant’s acts”

¹⁶ *See 2016 Sentencing*, DPIC, <https://deathpenaltyinfo.org/2016-sentencing> (last accessed Sept. 12, 2017).

¹⁷ *2016 Year End Report*, *supra* note 13, at 2. In 2012, a 61st jurisdiction, the federal government, also imposed a death sentence. *Id.*

if it believes the verdict will not necessarily lead to a death sentence or execution).

Thus, the 12 death sentences imposed in California, Pennsylvania, Kansas, and Oregon¹⁸ provide little support for a public embrace of capital punishment. *See Glossip*, 135 S. Ct. at 2780, Appendix E (noting that 5 of the 15 counties imposing 5 or more death sentences since 2010 are in California, a state that has “effectively abandoned executions”). California and Pennsylvania have two of the nation’s largest death row populations, but neither actually executes its inmates. In California, juries sentenced 960 persons to death from 1977 to 2016,¹⁹ but the State has performed only 13 executions in that same time span and none since 2006.²⁰ Pennsylvania juries returned 381 death

¹⁸ *See 2016 Sentencing*, *supra* note 16.

¹⁹ *Death Sentences in the United States From 1977 By State and By Year*, DPIC, <https://deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last accessed Sept. 12, 2017).

²⁰ *Executions by State and Region*, *supra* note 6. Although California voters approved a measure in November 2016 to speed up the death penalty appeals process in the state, there is substantial doubt about whether that law will have any actual effect. *See Briggs v. Brown*, No. S238309, 2017 WL 3624094, at *25 (Cal. Aug. 24, 2017) (holding that new time limits are unenforceable and “directive,” “not mandatory”). In addition, each of the sentences imposed in California during 2016 were returned prior to that referendum’s passage. Regardless of what may happen in the future, it is clear that, when jurors returned these sentences, there was little likelihood the defendants they condemned would be executed.

sentences from 1977 to 2016,²¹ but the State has executed only three inmates in the last 50 years,²² and, as noted, there is currently an official moratorium on executions in place. Kansas has not executed anyone since 1965.²³ Oregon has executed only two people in the last fifty years and has a moratorium in place as well.²⁴

An additional two Florida sentences resulted from non-unanimous verdicts, imposed pursuant to an unconstitutional death penalty scheme.²⁵ These, like the sentences discussed above, are also unlikely to lead to an execution.

In sum, when last year's death sentences are considered alongside states' execution practices and unconstitutional sentencing schemes, only 17 arguably meaningful death sentences were imposed. Considering that there were 13,455 homicides committed in

²¹ See *Death Sentences in the United States From 1977 By State and By Year*, *supra* note 19.

²² See *Executions by State and Region*, *supra* note 6.

²³ See *Kansas*, *supra* note 9.

²⁴ See *Hall*, 134 S. Ct. at 1997.

²⁵ See *Hurst v. State*, 202 So. 3d 40, 44 (Fla. 2016) (holding that juries must return unanimous verdicts); *Florida Judge Sentences Man to Death Under Sentencing Law That Supreme Court Ruled Unconstitutional*, DPIC, <https://deathpenaltyinfo.org/node/6446> (last accessed Sept. 12, 2017) (reporting jury vote of 9-3); *Jury recommends death for Vahtiece Kirkman*, WFTV (Apr. 12, 2016), <http://www.wftv.com/news/local/vahtiece-kirkman-awaits-jurys-recommendation-on-death-penalty/211617091> (reporting jury vote of 10-2).

this nation in 2015,²⁶ these numbers reflect a near-complete repudiation of capital punishment.

2. The Number of Executions Has Substantially Decreased in Recent Years.

Consideration of a national consensus looks not only to sentences imposed, but also to the number of executions carried out. *See Kennedy*, 554 U.S. at 433. Executions, like sentences, are at their lowest ebb in a quarter century. There were only 28 executions in 2015 and 20 in 2016.²⁷ 2017 has seen only 18 executions with three-quarters of the year elapsed.²⁸ These numbers pale in comparison to, for example, the 98 executions performed in 1998.²⁹

These executions, as with more recent sentences, also show marked geographical isolation. Three states—Texas, Missouri, and Georgia—are responsible for 48 of the 65 executions carried out since 2015.³⁰ Since 2012, five states are responsible for more than 75 percent of

²⁶ *Murder Victims by Race, Ethnicity, and Sex, 2015*, FBI: UCR, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_1_murder_victims_by_race_ethnicity_and_sex_2015.xls (last accessed Sept. 12, 2017).

²⁷ *Executions by Year*, DPIC (Sept. 13, 2017), <https://deathpenaltyinfo.org/executions-year>.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Executions by State and Region*, *supra* note 6. These three states carried out 24 of the 28 executions in 2015. *Id.*

executions and only an additional nine states have performed any.³¹

While some of these death sentences have not been carried out because of litigation-related delays or other factors, a lack of “political will” is a substantial contributor to the low execution rate as well. See Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 Tex. L. Rev. 1869, 1923 (2006). It is no coincidence that, year after year, the same handful of states produces the vast majority of executions while others with hundreds of inmates on death row carry out a small fraction.

C. Public Opinion Polls, Proposed Legislation, Nonpartisan Studies, and Professional Associations Support the Conclusion That the Nation No Longer Accepts Capital Punishment.

With each passing year, public opinion polls show a steady decrease in support for the death penalty. In 2016, for the first time in 45 years, a major national poll estimated that less than half of the public favored the death penalty as a punishment for murder.³² When respondents are asked whether a sentence of death or

³¹ Those states are Florida, Georgia, Missouri, Oklahoma, and Texas. *Id.*

³² Baxter Oliphant, *Support for death penalty lowest in more than four decades*, Pew Research Center (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/>.

life without parole is preferable, opposition to capital punishment grows.³³ These polls likely underestimate the numbers opposed to the death penalty—while some express a willingness to impose the penalty in the abstract, juries faced with the actual choice are substantially more reluctant. *See State v. Santiago*, 122 A.3d 1, 54 (Conn. 2015) (finding a statewide consensus against the death penalty even though polls reported 59 percent of voters in Connecticut favored the death penalty because, despite these numbers, the “state has proved increasingly unwilling and unable to impose and carry out the ultimate punishment”); *see also id.* at 157 (Rogers, C.J., dissenting) (citing the polling numbers).

The politics of the death penalty have also shifted dramatically in recent years. While abolition had long been considered exclusively a left-wing cause, growing numbers of conservatives are now voicing opposition to the punishment.³⁴ Republican legislators in an “unprecedented” 12 states have sponsored or co-sponsored

³³ *Quinnipiac Poll Shows Americans Prefer Life Without Parole to Death Penalty*, DPIC, <https://deathpenaltyinfo.org/node/6158> (last accessed Sept. 12, 2017); *AMERICAN VALUES SURVEY: Majority of Americans Prefer Life Without Parole Over Death Penalty*, DPIC, <https://deathpenaltyinfo.org/node/6309> (last accessed Sept. 12, 2017).

³⁴ Amber Phillips, *Could Arkansas’ battle over the death penalty signal the beginning of its end?*, Washington Post (April 18, 2017), available at https://www.washingtonpost.com/news/the-fix/wp/2017/04/18/could-arkansas-battle-over-the-death-penalty-signal-the-beginning-of-its-end/?utm_term=.2564db7d881a.

legislation to repeal the death penalty during the past two legislative sessions.³⁵

Professional legal organizations and several state task forces have also found substantial and intractable fault with the administration of the death penalty. Beginning in 2003, the American Bar Association conducted in-depth studies of twelve different death penalty jurisdictions.³⁶ Each study found serious flaws in the investigation, prosecution, defense services, and procedural protections of death penalty cases, which undermined the fairness and justice of the punishment schemes.³⁷

Task forces formed by state courts, legislatures, executives, and nonpartisan organizations to study the death penalty in recent years have echoed these conclusions. In Ohio, a 2014 Joint Task Force recommended 56 reforms necessary to increase the fairness and accuracy of capital punishment in the state.³⁸ In 2017, a bipartisan commission was so disturbed by “the volume and seriousness of the flaws in Oklahoma’s capital punishment system” discovered during its study

³⁵ *Id.*

³⁶ See *State Death Penalty Assessments*, The American Bar Association, https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/state_death_penalty_assessments.html (last accessed Sept. 12, 2017).

³⁷ *Id.*

³⁸ Joint Task Force to Review the Administration of Ohio’s Death Penalty, *Final Report & Recommendations* (2014), available at <http://www.sc.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf>.

that it recommended 45 reforms and a continued moratorium on the death penalty.³⁹ Committees in Illinois, Maryland, and New Jersey conducted similar statewide reviews in years past, yielding analogous results.⁴⁰ The legislative abolition of the punishment followed those reports.⁴¹

The American Law Institute withdrew the death penalty provision of the Model Penal Code in 2009.⁴² This provision, which set forth aggravating circumstances and mitigating circumstances, was relied upon by this Court in *Gregg v. Georgia* to conclude that juror discretion can be sufficiently guided to avoid arbitrary

³⁹ Oklahoma Death Penalty Review Commission, *The Report of the Oklahoma Death Penalty Review Commission* vii (2017), available at <http://okdeathpenaltyreview.org/the-report/>.

⁴⁰ See Illinois Capital Punishment Reform Study Committee, *Sixth and Final Report* (2010), available at <https://www.chicagobar.org/AM/NavigationMenu/Home/Files/IllinosCapitalPunishmentReformStudyCommitteeSixthAndFinalReport.pdf>; Maryland Commission on Capital Punishment, *Final Report to the General Assembly* (2008), available at <https://deathpenaltyinfo.org/files/pdf/MDCcommissionFinalReport.pdf>; New Jersey Death Penalty Study Commission, *New Jersey Death Penalty Study Commission Report* (2007), available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf.

⁴¹ See *States with and without the death penalty*, *supra* note 2.

⁴² See The American Law Institute, *Report of the Council to the Membership of The American Law Institute On the Matter of the Death Penalty* 1 (2009) [hereinafter, “ALI Report”] (recommending withdrawal), available at https://www.ali.org/media/filer_public/3f/ae/3fae71f1-0b2b-4591-ae5c-5870ce5975c6/capital_punishment_web.pdf; *Model Penal Code*, The American Law Institute, <https://www.ali.org/publications/show/model-penal-code/> (last accessed Sept. 12, 2017) (reporting “overwhelming[]” vote for withdrawal).

or capricious imposition of the death penalty. *See* 428 U.S. 153, 193-95 & n.44 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). When reviewing the provision 40 years later, however, the council decided the ALI “should not play a further role in legitimating capital punishment, no matter how unintentionally, by retaining the section in the Model Penal Code.”⁴³ That determination was influenced, in part, by doubts about “whether the capital-punishment regimes in place” or “in any form likely to be implemented in the near future, meet or are likely ever to meet basic concerns of fairness in process and outcome.”⁴⁴

This additional evidence demonstrates that the judgments of legislatures and sentencing juries “reflect[] a much broader social and professional consensus.” *Atkins*, 536 U.S. at 316 n.21.

II. The Death Penalty Serves No Valid Penological Purpose and There Remains an Unacceptable Risk of Executing the Innocent.

In addition to reviewing evidence of consensus, this Court brings its “own judgment . . . to bear on the question of the acceptability of the death penalty under the Eighth Amendment . . . by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.” *Id.* at 313. There is not. The death penalty advances no valid penological purpose, presents an intolerable risk of executing the

⁴³ ALI Report, *supra* note 42, at 4.

⁴⁴ *Id.* at 5.

innocent, and is administered in a manner that is unjustifiably harsh.

A. Capital Punishment Serves No Legitimate Penological Purpose.

When the infliction of capital punishment no longer serves a penological purpose, its imposition represents “the pointless and needless extinction of life.” *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring). This Court’s precedents instruct that capital punishment violates the Eighth Amendment when “it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.” *Kennedy*, 554 U.S. at 441. Capital punishment, in its current form, serves neither.

1. There Is No Evidence That the Death Penalty Deters Murder More Than the Possibility of Life Without Parole.

When this Court decided *Furman v. Georgia* 45 years ago, it had no objective evidence that capital punishment more effectively deters than the threat of life imprisonment. *See Furman*, 408 U.S. at 301 (Brennan, J., concurring). Notwithstanding the controversial nature of the death penalty and the abundance of literature it has spawned, not much has changed. *See, e.g.*, National Research Council of the National Academies, *Deterrence and the Death Penalty 2* (2012) (reviewing 30 years of studies and concluding that “research to date on the effect of capital punishment on homicide is

not informative about whether capital punishment decreases, increases, or has no effect on homicide rates”).

Those few studies claiming to measure an effect of executions on the number of homicides committed are fatally flawed.⁴⁵ They have entirely failed to answer the only pertinent question: whether capital punishment deters murder *more* than lengthy terms of incarceration. *See id.* at 3; *see also* John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 *Stan. L. Rev.* 791 (2005) (examining flaws in multiple studies that claim a meaningful deterrent effect, including those cited *supra* at note 45).

Without resort to statistical analysis, however, it is obvious that a punishment as infrequently imposed as the death penalty can serve little, if any, deterring purpose. As Justice White articulated in *Furman*, “the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system.” 408 U.S. at 311. While the imposition of a death sentence is remarkably infrequent, an execution is even more so. “[A]n offender who is sentenced

⁴⁵ *See, e.g., Glossip*, 135 S. Ct. at 2748-49 (Scalia, J., concurring) (citing Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 *J. Applied Econ.* 163 (2004); Hashem Dezhbakhsh, et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 *Am. L. & Econ. Rev.* 344 (2003); and Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 *Stan. L. Rev.* 703 (2005)).

to death is two or three times more likely to find his sentence overturned or commuted than to be executed; and he has a good chance of dying from natural causes before any execution (or exoneration) can take place.” *Glossip*, 135 S. Ct. at 2768 (Breyer, J., dissenting). Given the small number of sentences and the infrequency of use, limited to only a few geographic regions, it is difficult to see how the death penalty could serve any meaningful deterrent purpose.

2. The Death Penalty Does Not Contribute Any Significant Retributive Value Beyond That Afforded by a Sentence of Life Without Parole.

Pursuit of retribution through capital punishment must be carefully circumscribed because “[w]hen the law punishes by death, it risks its own sudden descent into brutality, transgressing constitutional commitment to decency and restraint.” *Kennedy*, 554 U.S. at 420. For that reason, the death penalty must be reserved for the most egregious offenses, committed by the most culpable offenders. *Id.* Experience, however, demonstrates that the death penalty is not so limited.

Although the imposition of the ultimate sanction of death is undeniably rare, this infrequency does not reflect the identification and punishment of the most abhorrent crimes and culpable offenders. With respect to offense severity, numerous studies “indicate that the factors that most clearly ought to affect application of

the death penalty—namely, comparative egregiousness of the crime—often do not. Other studies show that circumstances that ought not to affect application of the death penalty, such as race, gender, or geography, often do.” *Glossip*, 135 S. Ct. at 2760 (Breyer, J., dissenting). These realities undermine the retributive value of capital punishment. *See Kennedy*, 554 U.S. at 420.

Juries have also repeatedly failed to limit capital punishment to only the most culpable defendants. While this Court has shielded juveniles and the intellectually disabled from the death penalty because such individuals are, regardless of the severity of their offenses, insufficiently culpable to warrant this most extreme punishment, *see Roper*, 543 U.S. at 570; *Atkins*, 536 U.S. at 318, the concerns about retributive excess extend beyond these two groups. Juries regularly sentence defendants with functional deficits that degrade the quality of deliberations and thought process to death. Surveys of those facing the ultimate punishment show that most of these offenders suffer from limited intellectual functioning or mental illnesses, are so young that their brains are not fully developed, or continue to labor under the permanent psychological effects of nearly unimaginable childhood trauma.⁴⁶

Like juvenile status and intellectual disability, these factors diminish a defendant’s culpability. Those

⁴⁶ *See* Robert J. Smith, et al., *The Failure of Mitigation?*, 65 *Hastings L.J.* 1221, 1228-29 (2014).

suffering from mental illness may “have great difficulty in communicating with and understanding others, engaging in logical cost-benefit analysis, and evaluating the consequences of and controlling their behavior.” See Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. Rev. 293, 304 (2003). Those who are under 21, according to “recent behavioral, psychological, and neurological research,” are not “fully mature adults” and, just as those under 18, are “more likely to engage in reckless behavior” and succumb to peer pressure.⁴⁷ See Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds from the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139, 161-67 (2016). And those who have endured abuse and trauma “may develop primitive defense mechanisms, impaired impulse control, or masochistic and self-destructive behavior.” See Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. Rev. 1143, 1162 (1999) (footnote omitted).

Problematically, defendants who fall into these categories of diminished culpability, but are nonetheless sentenced to death, are the norm, not the exception. A recent FPP review of the histories of the 26 men awaiting execution in Ohio revealed that at least 17

⁴⁷ A Kentucky judge, citing numerous studies concerning the brain development of young adults, recently declared the death penalty unconstitutional as applied to persons who are convicted of crimes committed before they turn 21. See *Commonwealth v. Bredhold*, 14-CR-161 (Fayette Cir. Ct. Aug. 1, 2017), available at <https://deathpenaltyinfo.org/files/pdf/TravisBredholdKentuckyOrderExtendingRopervSimmons.pdf>.

“experienced significant childhood trauma,” 11 evidenced intellectual disability, six suffered from mental illness, and three were condemned for crimes they committed before they turned 21.⁴⁸ A 2014 study of the most recent 100 executions found that 87 executed individuals exhibited “intellectual and psychological deficits that compare to those that intellectually disabled and juvenile offenders possess.” See Smith, *supra* note 46, at 1229; see also, e.g., Lyn Entzeroth, *The Challenge and Dilemma of Charting A Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant from the Death Penalty*, 44 Akron L. Rev. 529, 573 (2011) (canvassing death penalty cases and concluding that “juries frequently impose death sentences on the severely mentally ill”).

This Court has, in effect, acknowledged the shortcomings of the current system. *Roper*’s categorical prohibition on executing juveniles was, in part, a prophylactic response to the reality that an “unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments” related to a particular offender’s youth. 543 U.S. at 573. That same logic applies to most mitigating circumstances, particularly those that juries may also perceive as aggravating and that function as a “two-edged sword.” *Penry*, 492 U.S. at 324.

⁴⁸ *Prisoners on Ohio’s Execution List Defined by Intellectual Impairment, Mental Illness, Trauma, and Young Age*, Fair Punishment Project (Aug. 29, 2017), <http://fairpunishment.org/prisoners-on-ohios-execution-list/>.

B. Lengthy Incarceration in Solitary Confinement on Death Row Raises Independent Constitutional Concerns.

Because there is a “special need for reliability and fairness in death penalty cases,” any death sentence necessarily carries with it a long delay between its initial pronouncement and its eventual execution. *Glossip*, 135 S. Ct. at 2764 (Breyer, J., dissenting). A death row prisoner is typically imprisoned for “20 years or more in a windowless cell no larger than a typical parking spot for 23 hours a day; and in the one hour when he leaves it, he likely is allowed little or no opportunity for conversation or interaction with anyone.” *Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring).

These lengthy terms of solitary confinement cause “numerous deleterious harms” to an inmate’s physical and mental health and raise constitutional concerns of their own. *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting); see also *Ayala*, 135 S. Ct. at 2209 (Kennedy, J., concurring); Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 *Crime & Delinquency* 124, 130 (2003) (solitary confinement can cause prisoners to experience “anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations”).⁴⁹

⁴⁹ Nor can these delays be legitimately eliminated. They are a product of procedures instituted in response to the “special need for reliability and fairness in death penalty cases.” *Glossip*, 135 S. Ct. at 2764 (Breyer, J., dissenting).

C. The Death Penalty Carries an Unacceptable Risk of Executing the Innocent.

It is now incontrovertible that all capital punishment proceedings carry an intolerable risk of sentencing innocent people to death. *See Glossip*, 135 S. Ct. at 2756-57 (Breyer, J., dissenting). Advances in forensic evidence, particularly DNA testing, have produced a startling number of exonerations in capital cases. In 2006, when there had been 121 exonerations of death row inmates,⁵⁰ Justice Souter opined that “we are [] in a period of new empirical argument about how ‘death is different.’” *Kansas v. Marsh*, 548 U.S. 163, 210 (2006) (Souter, J., dissenting) (quoting *Gregg*, 428 U.S. at 188 (opinion of Stewart, Powell, and Stevens, JJ.)). Today, there have been 159 exonerations of death row inmates.⁵¹ Even more troubling, there is growing concern that states have executed actually innocent defendants. *See Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting); Maurice Possley, *Fresh Doubts Over a Texas Execution*, *Washington Post* (Aug. 3, 2014), available at http://www.washingtonpost.com/sf/national/2014/08/03/fresh-doubts-over-a-texas-execution/?utm_term=.9af1a49ce7d9; James Liebman, *The Wrong Carlos: Anatomy of a Wrongful Execution* (2014).

Pending cases illustrate just how imminent the possibility of executing an innocent person is. In one dramatic indication, the Governor of Missouri stayed

⁵⁰ *See List of Those Freed from Death Row*, DPIC, <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last accessed Sept. 12, 2017).

⁵¹ *Id.*

the execution of Marcellus Williams just hours before he was scheduled to die to allow newly discovered DNA evidence to be examined.⁵² And, as Richard Glossip awaits execution in Oklahoma, the sole witness against him has provided new contradictory accounts of the crime; and a new witness has emerged to corroborate Glossip's claim of innocence.⁵³ Williams' and Glossip's cases are stark reminders of capital punishment's fatal uncertainty—and the continued potential for tragic error.

◆

CONCLUSION

Because there is a nationwide societal consensus rejecting capital punishment, its application serves no penological purpose, and there are persistent and irremediable difficulties in its administration, the death penalty violates the Eighth Amendment to the United States Constitution. Its continued application

⁵² Mark Berman & Wesley Lowery, *Missouri governor stays execution of Marcellus Williams, says officials will probe DNA evidence in the case*, Washington Post (Aug. 22, 2017), available at https://www.washingtonpost.com/news/post-nation/wp/2017/08/22/missouri-plans-to-execute-marcellus-williams-as-his-attorneys-say-dna-evidence-exonerates-him/?utm_term=.4eb71732c420.

⁵³ Phil Cross, *Murderer's confession changes again as new witness casts doubt*, Fox25 News (July 14, 2017), <http://okcfox.com/news/fox-25-investigates/murders-confession-changes-again-as-new-witness>.

in circumstances such as Petitioner's thus merits this Court's timely review.

Respectfully submitted,

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