No. 15-650

In The Supreme Court of the United States

SHONDA WALTER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF OF THE BAR OF IRELAND, THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES, THE INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE, THE PARIS BAR ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CAPITAL CASE
QUESTION PRESENTED

Whether, in all cases, the imposition of a sentence of death violates the Eighth Amendment's prohibition against cruel and unusual punishments.

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AMICUS BRIEF ON BEHALF OF PETITIONER WALTER

STATEMENT OF INTEREST[1]

1. The Bar of Ireland

The Bar of Ireland is the representative body for the barristers' profession in Ireland and is governed by a constitution. It is the independent referral bar of Ireland and has a current membership of approximately 2,300 practising barristers. The business of the Council is conducted by committees, one of which is the Human Rights Committee of the Bar of Ireland. The Human Rights Committee seeks to advance and promote the rule of law and access to justice both nationally and internationally in accordance with national and international jurisprudence, conventions and protocols. It aims to do this by identifying instances where human rights are at risk and pro-actively supports interventions seeking to vindicate those rights. This is done with the highest standards of ethical and professional conduct in accordance with the Constitution of the Bar of Ireland.

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[1] This brief is submitted pursuant to Supreme Court Rule 37 with the consent of Petitioner, Shonda Walter, and of Respondent, the Commonwealth of Pennsylvania. The parties were given timely notice. This brief has been written by the signatories hereto. Neither Petitioner nor counsel for Petitioner has contributed any funds for the preparation or production of this brief.

2. The Bar Human Rights Committee of England and Wales

The Bar Human Rights Committee of England and Wales (BHRC) is the international human rights arm of the Bar of England and Wales. It is an independent body of legal practitioners concerned with the protection of rights, defending the rule of law, and ensuring the fair administration of justice. The BHRC regularly appears in cases where there are matters of human rights concern, and has experience in legal systems throughout the world. The BHRC has previously appeared as *amicus curiae* in cases before the United States Supreme Court, including *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Roper v. Simmons*, 543 U.S. 551 (2005); and *Deck v. Missouri*, 544 U.S. 622 (2005).

3. The International Bar Association's Human Rights Institute (IBAHRI)

The International Bar Association's Human Rights Institute (IBAHRI) is the human rights arm of the International Bar Association, the world's largest professional association of lawyers, bar associations and law societies. IBAHRI provides human rights training and technical assistance to legal practitioners and institutions, building their capacity to promote and protect human rights under a just rule of law. It also undertakes human rights fact-finding and trial observations. In addition, it undertakes advocacy on

several thematic issues, including the abolition of the death penalty. It is currently researching the issue of the death penalty under Islamic Law and has run training seminars with Moroccan lawyers on this matter. It has previously appeared as *amicus curiae* before courts in several jurisdictions, including the U.S. Supreme Court in the case concerning Guantanamo Bay.

4. The Paris Bar Association

The Paris Bar comprises 25,000 members. Traditionally, the Paris Bar is often approached when human rights are in danger. In the field of Human Rights Defence, the Paris Bar cooperates and exchanges information with numerous human rights associations. The Paris Bar also cooperates with numerous organizations in France and across Europe on behalf of its members to defend their use of validated scientific and medical methodologies, including in determinations of intellectual disability in appropriate cases. The actions undertaken by the Paris Bar are particularly aimed to support lawyers and the freedom, independence and dignity of our profession.

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STATEMENT OF THE CASE

Amici adopt the Opinions Below, Jurisdiction, Constitutional Provisions Involved, and Statement of Facts in the Petition for Writ of Certiorari filed by Shonda Walter and files this *amicus curiae* brief on behalf of Petitioner.

SUMMARY OF ARGUMENT

Amici urge the Court to consider the evolving standard of decency demonstrated in the recent history of abolition of the death penalty in relevant common law countries when deciding on the Writ of Certiorari submitted by Petitioner. International and foreign authorities are of value in this Court's Constitutional analysis of the death penalty because it allows consideration of how other jurisdictions have dealt with this issue.

Common law jurisdictions such as the United Kingdom, South Africa, Canada, Ireland and Australia have decided that the death penalty is a cruel and unusual punishment that goes against the basic ideals of the Right to Life and human dignity, and is inherently flawed in its application. The same reasoning is applicable to the Eighth Amendment and compels a determination that the prohibition on cruel and unusual punishments bars the use of the death penalty in the American legal systems.

ARGUMENT

I. THE DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. THE LAW AND OPINIONS OF THE UNITED KINGDOM ARE PARTICULARLY RELEVANT TO THIS COURT'S EIGHTH AMENDMENT ANALYSIS

A majority of this Court has noted that the United Kingdom's experience is instructive in interpreting the Eighth Amendment not just because of the "historic ties" between our two countries but because the Eighth Amendment was derived from the English Declaration of Rights of 1689. *See Roper v. Simmons*, 543 U.S. 551, 577 (2005); *Lawrence v. Texas*, 539 U.S. 558, 576 (2003). The close relationship between the United Kingdom and the United States spans over two centuries and recent developments in world affairs have made that relationship even closer. President Obama has noted, "[T]he special relationship between the United States and Great Britain is one that is not just important to me, it's important to the American people. And it is sustained by a common language, a common culture; our legal system is directly inherited from the English system; our system of government reflects many of these same values. . . ." *Remarks by President Obama and Prime Minister Brown After Meeting*, The White House (Mar. 3, 2009), https://www.whitehouse.gov/the-press-office/remarks-president-obama-and-prime-minister-brown-after-meeting.

The shared fundamental values and common law heritage of the United States and the United Kingdom has been consistently recognized by this Court. *See*, *e.g.*, *Roper*, 543 U.S. at 577; *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 273 (1989); *Ferguson v. Georgia*, 365 U.S. 570, 582 (1961); *United States v. Lee*, 106 U.S. 196, 205 (1882) (noting American legal doctrines "derived from the laws and practices of our English ancestors"). Consequently, the experience of the United Kingdom with abolition of the death penalty is instructive and provides guidance for this Court.

Fifty years ago, in November 1965, the United Kingdom Parliament voted to abolish the death penalty in Great Britain, namely England, Scotland and Wales.[2] Abolition followed a lengthy legislative and judicial process that saw the United Kingdom's lower chambers, the House of Commons, vote on several occasions in 1956 and 1957 to abolish the death penalty. In the debate on 16 February 1956, Sidney Silverman MP, the sponsor of the first abolition bill, concluded his speech by saying, "Let us all as free men, free women, free members of Parliament in a free society, go forward and wipe this dark stain from our statute book forever."[3] In the debate on the

[2] At the time Northern Ireland, also part of the United Kingdom, had a form of regional autonomy and was not governed by Westminster. The death penalty in Northern Ireland was not formally abolished until 1973.

[3] 548 Parl Deb HC (5th ser.) (1956) col. 2536 (UK).

third reading of the Homicide Bill on 6 February 1957, Sidney Silverman MP described the death penalty as a punishment that "no longer accords with the needs or the true interests of a civilised society."[4]

Complete abolition was defeated in the House of Lords but the debates led to a compromise in passing the *Homicide Act 1957*, 5 & 6 Eliz. 2 c. 11 (Eng.). The *Homicide Act 1957* abolished the death penalty for most offenses of murder while retaining it as a punishment in a few special circumstances. The Act proved very unsatisfactory in operation. The murder of a child was made a non-capital offense as was murder by stabbing or bludgeoning a person to death, but killing with a firearm was a capital offense. Supporters of capital punishment believed the Act failed to provide adequate protection for the public. Abolitionists thought the Act merely illustrated the increasingly random and arbitrary nature of the death penalty in the United Kingdom. One motion before the House of Commons said the following:

> This House regards with the deepest anxiety and distress the anomalies of the Homicide Act of 1957 which discriminates between capital and non-capital murder by arbitrary categories which bear no relationship to the comparative wickedness of the crime and are

[4] 564 Parl Deb HC (5th ser.) (1957) col. 469 (UK).

> an abiding offence to the sense of justice and good sense of the community.[5]

The increasingly unsatisfactory situation created by the *Homicide Act* only added to the calls for the United Kingdom to finally abolish the death penalty. Lord Parker, the Lord Chief Justice at the time, said that it was the absurdities of the *Homicide Act* that had turned him from a supporter of the death penalty into a supporter of abolition.[6] In these circumstances, the *Murder (Abolition of the Death Penalty) Act 1965*, c. 71 (Eng.) was finally passed by Parliament in November 1965. The reasons cited for abolition were the same commonly heard in the U.S. today, but, in particular, it was the declining use of the death penalty that demonstrated it as an ineffective and unusual punishment. In 1962, 1963 and 1964 there had been only two executions in each year even though there had been 129 murders in 1962, 122 in 1963 and 135 in 1964.[7]

Indicative of an evolving standard of decency in the United Kingdom, debate in the House of Commons demonstrated the view of various Members of Parliament that capital punishment "encourages a spirit of retribution" that was "morally unhealthy for

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[5] *Motion on Capital Punishment*, The Times, May 13, 1959, at 14.

[6] *See* 268 Parl Deb HL (5th ser.) (1965) col. 480 (UK).

[7] Evelyn Gibson & S. Klein, *Murder, 1957 to 1968: A Home Office Statistical Division Report on Murder in England and Wales*, table 1 (1969).

the country and the people in it."[8] The death penalty itself was described as "this degrading penalty"[9] and as a "barbaric method of punishment, which . . . reduces the conceptions of the sanctity of human life and society. . . ."[10] In the House of Lords, the Lord Chancellor stated that it was his view that "the deliberate putting to death of a man or a woman in cold blood as a punishment for crime is no longer consistent with our own self-respect."[11]

Once passed, the effect of the 1965 *Murder (Abolition of the Death Penalty) Act*, *supra* was formally to suspend the death penalty for a period of five years. Shortly after the passage of the Act, three police officers were shot dead in an incident in London and two of Britain's most notorious murderers, Ian Brady and Myra Hindley, were tried for a shocking series of child murders. Despite these notorious murders, there was no sudden increase in the public demand for the death penalty. Accordingly, when, in 1969, the government proposed the immediate final abolition of the death penalty a year ahead of schedule, Parliament agreed. In supporting the proposition, the Home Secretary James Callaghan MP said that "capital punishment lowered the moral standard

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[8] 704 Parl Deb HC (5th ser.) (1964) col. 952 (UK).

[9] 704 Parl Deb HC (5th ser.) (1964) col. 966 (UK).

[10] 704 Parl Deb HC (5th ser.) (1964) col. 976 (UK).

[11] 269 Parl Deb HL (5th ser.) (1965) col. 552 (UK). *See also*: http://www.deathpenaltyproject.org/wp-content/uploads/2015/11/DPP-50-Years-on-pp1-68-1.pdf.

of the whole community. . . . When society exacts this penalty it acts on the same level as the murderer himself."[12]

Today there is, in reality, no prospect of the United Kingdom restoring the death penalty. A series of grave miscarriages of justice in cases of murder where those convicted would have been executed under the old law such as the Birmingham Six and the Guildford Four are widely known in the United Kingdom. Both cases arose out of the struggle for civil rights in Northern Ireland in the 1960s and 1970s. Recently, cases such as that of Sam Hallam[13] have highlighted to the public in the United Kingdom that the risk of convicting an innocent person is very real and that the United Kingdom would have executed innocent persons if the death penalty had still been available. The United Kingdom has also committed itself to never returning to the use of the death penalty by ratifying the Council of Europe's regional document for complete abolition – Protocol No. 13 to the European Convention for the Protection of Human

[12] 793 Parl Deb HC (5th ser.) (1969) col. 1169 (UK).

[13] *R v. Hallam* [2012] EWCA (Crim) 1158 (unreported, 17th May 2012) (Hallam was convicted of murder and his direct appeal refused appeal, but he was subsequently freed after seven years' imprisonment following a further appeal, due to the failure of the police to disclose at trial evidence of a legitimate alibi).

Rights and Fundamental Freedoms, abolishing the death penalty in all circumstances.[14]

There is little doubt that the United Kingdom's abolition of capital punishment gives the United Kingdom greater moral authority when challenging the continuing use of the death penalty in countries such as Iran, Saudi Arabia and China. Given the strong relationship that exists between the United States and the United Kingdom, based in substantial part on a shared legal heritage as well as a common striving to high moral values, it would undoubtedly be seen as an affirmation of the strength of that relationship as well as a commitment to evolving and modern standards of decency for the United States to take this opportunity to join the growing community of nations that have rejected the use of capital punishment.[15]

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[14] *Chart of Signatures and Ratifications of Treaty 187*, Council of Europe, http://www.coe.int/en/web/conventions/search-on-states/-/conventions/treaty/country/UK?p_auth=HcuMgZ7i (showing that England signed on Mar. 5, 2002 and ratified on Oct. 10, 2003, and it entered into force on Jan. 2, 2004).

[15] Of 198 Countries, "there are currently 161 countries and territories that, to different extents, have decided to renounce the death penalty. Of these: 103 are totally abolitionist; 6 are abolitionist for ordinary crimes; 6 have a moratorium on executions in place and 46 are de facto abolitionist (i.e., Countries that have not carried out any executions for at least 10 years or countries which have binding obligations not to use the death penalty). Countries retaining the death penalty worldwide declined to 37 (as of 30 June 2015), compared to 39 in 2013. Retentionist countries have gradually declined over the last few

(Continued on following page)

B. THE LAW AND OPINIONS OF OTHER COMMON LAW COUNTRIES ARE RELEVANT TO THIS COURT'S EIGHTH AMENDMENT ANALYSIS

1. South Africa

In 1995 the Constitutional Court of the Republic of South Africa reviewed the death penalty in South Africa in light of Chapter Three of the South African Constitution which sets out the fundamental rights to which every South African is entitled.[16] The Constitutional Court noted in *State v. Makwanyane and Another*: "In section 11(2), it prohibits 'cruel, inhuman or degrading treatment or punishment.' There is no definition of what is to be regarded as 'cruel, inhuman or degrading' and we therefore have to give meaning to these words ourselves."[17]

Even with our different histories and experiences the common law and rule of law find common ground in the judicial approaches of the U.S. Supreme Court and the South African Constitutional Court. The Justices in *Makwanyane* had to wrestle with many of

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years: there were 40 in 2012, 43 in 2011, 42 in 2010, 45 in 2009, 48 in 2008, 49 in 2007, 51 in 2006 and 54 in 2005." *The Most Important Facts of 2014 (And the First Six Months of 2015): Developments on the Death Penalty Worldwide*, Hands Off Cain (2015), http://www.handsoffcain.info/bancadati/index.php?tipotema=arg&idtema=19305152.

[16] *State v. Makwanyane and Another* 1995 (3) SA 391 (CC) (S. Afr.), http://www.saflii.org/za/cases/ZACC/1995/3.html.

[17] *Id.* at para. 8.

the common issues in death penalty analysis *Amici* are asking this Court to consider. Focusing on Section 11(2) of the South African Constitution, which prohibits "Cruel, Inhuman or Degrading Punishment," the Court noted:

> Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased under Chapter Three of the Constitution. It leaves nothing except the memory in others of what has been and the property that passes to the deceased's heirs. In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment. Once sentenced, the prisoner waits on death row in the company of other prisoners under sentence of death, for the processes of their appeals and the procedures for clemency to be carried out. Throughout this period, those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows. Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it 'involves, by its very nature, a denial of the executed person's humanity,' and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the

> state. The question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of section 11(2) of our Constitution. The accused, who rely on section 11(2) of the Constitution, carry the initial onus of establishing this proposition.[18]

In engaging with this issue, the Constitutional Court President Arthur Chaskalson[19] cited former U.S. Supreme Court Justice Brennan's dicta, in *Furman v. Georgia*, in which he cited that the death penalty treats "members of the human race as nonhumans . . . [It is] thus inconsistent with the fundamental premise of the [Cruel and Unusual Punishments] Clause that even the vilest criminal remains a human being possessed of common human dignity."[20] What is implicit in considering Justice Brennan's Eighth Amendment reasoning in interpreting section 11(2) of the South African Constitution is the inherent respect for human dignity and the inescapable connection to the right to life implied in

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[18] *Id.* at para. 26 (citing *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring)).

[19] Arthur Chaskalson was President of the Constitutional Court of South Africa from 1994 to 2001 and Chief Justice of South Africa from 2001 to 2005.

[20] *State v. Makwanyane and Another* 1995 (3) SA 391 (CC) at paras. 57, 58 (S. Afr.) (quoting Brennan, J., in *Furman*, 408 U.S. at 273).

both clauses. On this legal symbiosis, Chaskalson states:

> [T]he rights to life and dignity are the most important of all human rights . . . [b]y committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.[21]

Chaskalson also stated, "The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention."[22]

> Furthermore, Langa J., affirmed in *Makwanyane*:
>
> A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead. In acting out this role, the State not only preaches respect for the law and that the killing must stop, but it demonstrates in the best way possible, by

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[21] *Id.* at para. 144.

[22] *Id.* at para. 34.

> example, society's own regard for human life and dignity by refusing to destroy that of the criminal.[23]

It is particularly informative that the modern histories of the United Kingdom and South Africa are so vastly different, yet both came to understand that capital punishment lowered the moral standard of each of their communities and saw fit to abolish the death penalty.

2. Canada

Canada abolished the death penalty for civilian offenses in 1976 and for military offenses in 1998. The last execution took place in 1962. The Supreme Court of Canada has never had to rule on the issue of whether the death penalty is in all circumstances a cruel and unusual punishment within the meaning of s.12 of the Canadian Charter of Rights and Freedoms, adopted 17 April 1982.[24]

However, in *United States v. Burns* [2001] 1 S.C.R. 283 (Can.), in a unanimous *per curiam* opinion the Court held that the "responsibility of the state" in a potential execution is properly addressed by debate

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[23] *Id.* at para. 222.

[24] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

under s. 7[25] of the Charter and not s. 12.[26] In the instant case it found extradition involving the risk of execution would breach s. 7 of the Charter in all but exceptional circumstances. Under s. 7 there is a guarantee to a Right to Life and execution is by its very nature a violation of a Right to Life. The rule in Canada is an extradition that violates the principles of fundamental justice (e.g., Right to Life,) will "*always* shock the conscience" and not be allowed. *Id.* at 325 (original emphasis).

The balancing process earlier enunciated in *Kindler v. Canada (Minister of Justice)* [1991] 2 S.C.R. 779 (Can.), was not changed but, rather factual developments in Canada and relevant foreign jurisdictions had to be taken into account. The critical change is that the former balance test in favor of extradition to capital punishment jurisdictions is now a balance test opposed to extradition as against the Right to Life guarantee in the Constitution of Canada. *Burns*, 1 S.C.R. at 361.

Canada's experiences and judicial decisions not only highlight the fundamental nature of respecting

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[25] *See United States v. Burns*, [2001] 1 S.C.R. 283, 317-20 (Can.) (noting that s. 7 of the Charter states, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice").

[26] *See id.* (stating that s. 12 of the Charter says, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment").

the Right to Life but also demonstrate to this Court that anytime the State seeks to take a human life in a deliberate fashion, it axiomatically invokes issues of cruel and unusual punishment. In today's society, with our modern and enlightened understandings of human nature and conduct, the need and reasoning for death as a punishment is no longer understood or accepted in most common law and democratic societies.

3. Ireland

In Ireland the death penalty is prohibited under Article 15.5.2 of the Constitution of Ireland.[27] The clause was inserted into the Constitution of Ireland following a referendum of its citizens on 27 March 2002.[28] The death penalty had, in any event, been abolished by statute under the *Criminal Justice Act 1990* (Act No. 16/1990) (Ir.), but the Constitutional provision now prohibits any further enactment of the penalty by statute as a punishment for any criminal offense.

Like the United Kingdom, Ireland solidified this national position by ratifying Council of Europe's regional document for complete abolition – Protocol

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[27] Constitution of Ireland 1937 art. 15.5.2.

[28] *The Twenty-First Amendment of the Irish Constitutional Act 2001*, Article 15.5.2, provides for the abolition of the death penalty, "The Oireachtas shall not enact any law providing for the imposition of the death penalty."

No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, abolishing the death penalty in all circumstances.[29] Ireland's history in the Twentieth Century saw civil violence, famine and extreme poverty before establishing stability and economic growth. In its legal developments, rooted in the common law, Ireland firmly and fully rejected the old standard capital punishment as an acceptable punishment in its evolving standards of decency.

4. Australia

The death penalty was abolished in Australian federal law by the passage of the *Commonwealth Death Penalty Abolition Act 1973*.[30] Individual states and territories have all passed acts of Parliament prohibiting the use of the death penalty as a criminal sanction beginning in Queensland in 1922, and ending in New South Wales in 1985.[31] Australia was one of the first countries to accede to the 1989 *Second*

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[29] *Chart of Signatures and Ratifications of Treaty 187*, Council of Europe, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/country/IRE?p_auth=Gd6SfYXM (showing that Ireland signed and ratified on Mar. 5, 2002, and it entered into force on Jan. 7, 2003).

[30] *Death Penalty Abolition Act 1973* (Cth) (Austl.).

[31] The Law Council of Australia and the Australian Bar Association, *Submission No. 34 to Hum. Rights Sub-Comm. of the Joint Standing Comm. on Foreign Affairs, Defence and Trade: Australia's Advocacy for the Abolition of the Death Penalty* 4 (2015).

Optional Protocol to the *International Covenant on Civil and Political Rights* (ICCPR), which requires "states parties to take all necessary measures to abolish the death penalty within their jurisdiction."[32] In 2010, the Australian Federal Government, with bipartisan support, legislated this commitment by passing the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill*, which prohibits an individual state in Australia from re-introducing the death penalty.[33]

The Australian Human Rights Commission commended the passage of the 2010 legislation and then Commission President Cathy Branson QC stated that "[t]he death penalty has no place in a humane society. By ensuring that it cannot be reintroduced, the government is ensuring the enduring protection of fundamental human rights."[34] A recent submission by Australia's Department of Foreign Affairs and Trade (DFAT) to an Inquiry into Australia's Advocacy

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[32] Dep't of Foreign Affairs and Trade, *Submission No. 35 to Hum. Rights Sub-Comm. on the Joint Standing Comm. on Foreign Affairs, Defence and Trade: Australia's Advocacy for the Abolition of the Death Penalty* 3 (2015).

[33] Explanatory Memorandum, *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Bill 2009* (Cth) (Austl.).

[34] *2010 Media Release: Commission Welcomes Passage of Law Outlawing Torture and Prohibiting the Death Penalty*, Australian Human Rights Commission (Mar. 11, 2010), https://www.humanrights.gov.au/news/media-releases/2010-media-release-commission-welcomes-passage-law-outlawing-torture-and.

on Abolition of the Death Penalty emphasized the Australian Government's "long-standing, bipartisan policy commitment to the abolition of the death penalty," and Australia's opposition to the use of capital punishment in all circumstances.[35]

CONCLUSION

Amici have focused their argument on key common law jurisdictions whose legal process finds reflection in the U.S. legal process. In each of our sister jurisdictions, even with substantially different cultural, economic and social experiences and challenges, the death penalty has been rejected as having no place in a modern, evolved humane society.

In particular, the United Kingdom has historical and lengthy legal kinship with the United States and a legal history viewed with respect by this Court. "The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins. The Amendment was modelled on a parallel provision in the English Declaration of Rights of 1689, which provided: '[E]xcessive Bail

[35] Dep't of Foreign Affairs and Trade, *supra* note 30.

ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted.' "[36]

The Eighth Amendment's prohibition on "cruel and unusual" punishment must be determined as those words find meaning in the U.S. Constitution and its evolving standards of decency. As Justice Chaskalson wrote for South Africa, so it is true for this Court in analyzing the Eighth Amendment:

> "The question is not, however, whether the death sentence is a cruel, inhuman or degrading punishment in the ordinary meaning of these words but whether it is a cruel, inhuman or degrading punishment within the meaning of section 11(2) of our Constitution."[37]

However, Justice Chaskalson also stated:

> "The international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue. For that reason alone they require our attention."[38]

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[36] *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (citing Bill of Rights 1689, 1 W. & M., c. 2, §10, in 3 Eng. Stat. at Large 441 (1770)).

[37] *Id.* at para. 26 (citing *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring)).

[38] *Id.* at para. 34.

For the reasons expressed by *Amici*, we respectfully ask this Court to grant the Petition for Writ of Certiorari in order to find, in all cases, the imposition of a sentence of death violates the Eighth Amendment's prohibition against cruel and unusual punishments.

Respectfully submitted,

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