No. 19-514

IN THE
Supreme Court of the United States

NIKKO A. JENKINS,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE THE PROMISE OF JUSTICE INITIATIVE, THE CATO INSTITUTE, AND THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER IN SUPPORT OF PETITIONER

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Petitioner in this case was sentenced to death by a trio of magistrates. Nebraska is one of four jurisdictions that authorize a judge rather than a jury to make the findings necessary to the imposition of a sentence of death.

The Promise of Justice Initiative ("PJI") has filed amicus briefs in this Court, and a number of state supreme courts, addressing the emerging national consensus on the excessiveness of capital punishment and the central role of the jury in sentencing. PJI is committed to the promise this Court recently recognized: that "[i]t is the mark of a maturing legal system that it seeks to understand and to implement the lessons of history," and that our "society can and

must move forward by achieving the thoughtful, rational dialogue at the foundation of both the jury system and the free society that sustains our Constitution." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017). This includes the following amicus briefs in cases before this Court: *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955), 2015 WL 1247191; *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) (No. 16-8255) 2017 WL 1353288; *Brumfield v. Cain*, 135 S. Ct. 2269 (2015) (No. 13-1433) 2015 WL 412049 , and in the state courts in Washington and Delaware in *Scherf v. State* (pending) and *Rauf v. State,* 145 A.3d 430, 463 (Del. 2016) ("Rauf is joined by amicus curiae, who echo his arguments, but who also make a more fundamental argument, which is that there is no more fundamentally important role for a jury fairly drawn from the community than determining whether a defendant should live or die.").

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The Roderick & Solange MacArthur Justice Center ("MJC") is a not-for-profit organization founded by the family of J. Roderick MacArthur to advocate for civil rights, and for a fair and humane criminal justice system. MJC has represented clients facing

myriad civil rights injustices, including issues concerning the death penalty, the rights of the indigent in the criminal justice system, and the treatment of incarcerated people.

Counsel timely gave notice of intent to file an amicus brief in this case. Petitioner granted consent. Respondent indicated that it took no position.

Wherefore, for the forgoing reasons, amici respectfully asks the Court grant the motion for leave to file an amicus brief, and then to grant certiorari in this case and consider whether the Sixth Amendment requires a jury rather than a panel of appointed judges make the requisite findings prior to the imposition of a death sentence.

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*[1]

The Promise of Justice Initiative ("PJI") is a non-profit law office dedicated to upholding the promises of our constitutional system to protect liberty and ensure dignity. PJI addresses issues concerning fairness in the administration of capital punishment, and has filed briefs in state and supreme courts and this Court on the original role of juries, in fulfilling the promises of our Constitution.

We have researched and written on the role of an original understanding of the Sixth Amendment in capital sentencing, and its inter-relation with the Eighth Amendment. *See* Janet C. Hoeffel, *Death Beyond A Reasonable Doubt*, 70 ARK. L. REV. 267 (2017); G. Ben Cohen, et al., *A Cold Day in* Apprendi-*Land:* Oregon v. Ice *Brings Unknown Forecast for* Apprendi*'s Continued Vitality in the Capital Sentencing Context*, 3 HARV. L. & POL'Y REV. (Online) (2009); Michael L. Radelet and G. Ben Cohen, *The Decline of the Judicial Override*, 15 ANN. REV. L. SOC. SCI. 539 (2019); G. Ben Cohen and Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV.87 (2008).

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[1] Pursuant to this Court's Rule 37, *Amici* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief. Notice was provided timely. Petitioner granted consent. Respondent did not respond to counsel's request for consent.

tion dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement.

The Roderick & Solange MacArthur Justice Center ("MJC") is a not-for-profit organization founded to advocate for civil rights, and for a fair and humane criminal justice system. MJC represents clients facing myriad injustices, including issues concerning the death penalty, the rights of the indigent in the criminal justice system, and the treatment of incarcerated people.

INTRODUCTION

Petitioner is one of less than one hundred defendants condemned to death by a judge, rather than a jury. *See* Michael L. Radelet and G. Ben Cohen, *The Decline of the Judicial Override*, 15 ANN. REV. L. SOC. SCI. 539 (2019). The vast majority of these individuals were condemned under since-abandoned regimes, with sentences that became final before this Court's opinion in *Ring v. Arizona*, 536 U.S. 584 (2002).

Nebraska is a true outlier. Of the fifty-two jurisdictions in the country (fifty states, the District of Columbia, and the federal government), only four jurisdictions even sometimes permit a judge rather the jury to impose a death sentence: in Indiana and Missouri, a trial court is only permitted to impose a death sentence if the jury is deadlocked on the final sentencing decision; Montana permits a judge to assess mitigating circumstances but has not sentenced anyone to death in more than twenty years. Among states that actively enforce the death penalty, only Nebraska allows for a panel of judges to make the determinations necessary to impose a death sentence.

The Petition outlines the sharp and mature split in the state courts concerning whether a jury must make all findings necessary to the imposition of a death sentence. Only this Court can resolve this split, and it should do so by granting certiorari in this case and ultimately ruling that when a legislative scheme providing for capital punishment requires a finding that aggravating factors outweigh mitigating circumstances prior to the imposition of

the death penalty, the Sixth Amendment requires that finding be made by a jury.

This brief endorses Petitioner's argument that the assessment of mitigating circumstances and the determination concerning the weight of aggravating and mitigating circumstances require Sixth Amendment protections. *Amici* emphasize that Petitioner's argument is buttressed by the original understanding and purpose of the right to trial by jury, under which the jury was understood to be the appropriate decision maker to exercise the "moral judgment component" in sentencing. As this Court held in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), a sentencing jury expresses "the conscience of the community on the ultimate question of life or death." *Id.* at 519. And from the founding of our country, it has been understood as essential that a jury, not a judge, make these determinations— not just for the protection of the defendant, but for the benefit of our democracy.

SUMMARY OF ARGUMENT

> Juries are taken, by lot or by suffrage, from the mass of the people, and no man can be condemned of life, or limb, or property, or reputation, without the concurrence of the voice of the people.

John Adams.[2]

"Because the Constitution's guarantees cannot mean less today than they did the day they were adopted, it remains the case today that a jury must find beyond a reasonable doubt every fact 'which the law makes essential to [a] punishment' that a judge might later seek to impose." *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) (alteration in original).

Nebraska, however, rejects that principle. Instead, a "panel of three judges . . . considers whether the aggravating circumstances as determined to exist justified imposition of a death sentence, whether mitigating circumstances existed which approached or exceeded the weight given to the aggravating circumstances." *State v. Jenkins*, 931 N.W.2d 851, 881 (Neb. 2019). See also Neb. Rev. Stat. § 29-2522 (providing for panel of judges to determine "(1) Whether the aggravating circumstances as determined to exist justify imposition of a sentence of death; (2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or (3)

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[2] 2 THE WORKS OF JOHN ADAMS 253 (Charles Francis Adams ed., 1850).

Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").

Ultimately, the questions assigned to the panel of judges in Nebraska—whether they involve factual findings, moral judgment, or some combination of the two—are exactly the type of questions that our founders reserved to a jury. The Sixth Amendment requires a jury make these findings because no death verdict can be imposed without them. In doing so, the Sixth Amendment does not only protect a defendant; reserving these decisions to the people, the jury is also the conscience of the community.

Last term, in assessing the scope of the Sixth Amendment right to trial by jury, this Court observed:

> The Constitution seeks to safeguard the people's control over the business of judicial punishments by ensuring that any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt. By contrast, the view the government and dissent espouse would demote the jury from its historic role as "circuit breaker in the State's machinery of justice," . . . to "low-level gatekeeping."

Haymond, 139 S. Ct. at 2380 (quoting *Blakely v. Washington*, 542 U.S. 296, 306 (2004), and *United States v. Booker*, 543 U.S. 220, 230 (2005) (additional internal sources quoted omitted)). In contemplating the extent of the infringement of the jury trial right,

the Court noted the hypothetical outlier case that proved too much:

> At oral argument, the government even conceded that, under its theory, a defendant on supervised release would have no Sixth Amendment right to a jury trial when charged with an infraction carrying the death penalty. We continue to doubt whether even *Apprendi*'s fiercest critics "would advocate" such an "absurd result."

Haymond, 139 S. Ct. at 2380 (quoting *Blakely*, 542 U.S. at 306). This case is close to that "absurd result," as the statutory scheme asks the jury to determine the existence of an aggravating circumstance, but then requires the court to convene "a panel of three judges to receive evidence" to "consider[] whether the aggravating circumstances as determined to exist justified imposition of a death sentence," and to determine "whether mitigating circumstances existed which approach or exceeded the weight given to the aggravating circumstances." *Jenkins*, 931 N.W.2d at 880.

Blackstone warned of subtle attacks on the right to a jury trial diminishing its importance. No place is this attack more frontal than in Nebraska, where appointed judges are assigned to decide a defendant's moral culpability. Imposing a death sentence based upon the findings of a judge or panel of judges rather than the jury, violates the core protection of the right to trial by jury. It undermines "veneration for the protection of the jury in a criminal case," *Ring*, 536 U.S. at 612 (Scalia, J., concurring), and

confidence in the administration of justice in the very location that confidence is needed most. And it supplants the people with the power of an appointed panel of magistrates as the source of the community's conscience. Finally, it impedes this Court's effort to measure whether imposition of the death penalty itself is in line with contemporary values.

ARGUMENT

I. FROM THE FOUNDING, TRIAL BY JURY WAS AN ESSENTIAL PROTECTION OF LIFE AND LIBERTY, AND RESERVED TO THE PEOPLE THE RESPONSIBILITY OF JUSTICE.

From the founding, it has been understood that the right to trial by jury includes the right to have a jury make the criminal law's essential moral determination of culpability. Capital punishment was at the forethought of the Founders' concern animating the adoption of the Sixth Amendment's jury trial right. Significantly, the Founders believed that the right to trial by jury played an essential role—not just in protecting a defendant from an overzealous government but in centering liberty and justice in the people. Justice Story, in his commentaries, first located the right to trial by jury as a fundamental right of the individual, that "no man shall be arrested nor imprisoned, nor banished, *nor deprived of life*, etc., but by the judgment of his peers . . . ." Story explained that the jury trial right was the only way to guard against a "spirit of oppression and tyranny." 2 STORY'S CONST. § 1779. Involving the people in the process protected citizens against "a spirit of violence and vindictiveness on part of the people." *Id.* "In such a course, there is a double security against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy." *Id.*

For Justice James Wilson, who helped shape the Constitution and famously lectured on it in the founding era, it would have been anathema for a judge to determine whether the defendant lived or died. It was exactly this circumstance that informed the jury trial right:

> It is, we acknowledge, a most weighty burthen. That man must, indeed, be callous to sensibility, who, without emotion and anxiety, can deliberate on the question—whether, by his voice, his fellow-man and fellow-citizen shall live or die. But while capital punishments continue to be inflicted, the burthen *must be born; and while it must be born, every citizen, who, in the service of his countr*y, may be called to bear it, is bound to qualify himself for bearing it in such a manner, as will ensure peace of mind to himself, justice to him whose fate he may determine, and honour to the judicial administration of his country.

THE WORKS OF THE HONOURABLE JAMES WILSON, LECTURES ON LAW 386 (Bird Wilson ed., 1804) (emphasis added).

William Blackstone similarly extolled the virtues of the jury in protecting against arbitrary deprivations of liberty:

> [T]he trial by jury … is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be

> affected either in his property, his liberty, *or his person*, but by the unanimous consent of twelve of his neighbours and equals.

2 BLACKSTONE, COMMENTARIES *378-–79 (emphasis added).

As this Court has recognized, at the Founding and at common law, the judge's imposition of sentence was not "their determination or sentence" but rather the "determination and sentence of the law" based upon sanction-specific findings made by a jury. *Apprendi v. New Jersey*, 530 U.S. 466, 479-80 (2000) ("The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence . . . . " (quoting John Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution, in The Trial Jury in England, France, Germany 1700-1900*, 36-37 (A. Schioppa ed., 1987))). As the Court noted in *Apprendi*, this was consistent with the writings of "Blackstone, among others" made this very point "clear." 530 U.S. at 479-480.

Last term, the Court echoed Blackstone's concerns that the jury trial right might be undermined, by "subtle 'machinations, which may sap and undermine i[t] by introducing new and arbitrary methods.'" *United States v. Haymond*, 139 S. Ct. 2369, 2384 (2019). In Nebraska, the attack comes in a 3-judge panel making the decisions concerning the existence of mitigating circumstances and the weighing of aggravating and mitigating circumstances.

II. THIS CASE PROCEEDS ON THE LOGICAL COURSE IN THE COURT'S SIXTH AMENDMENT JURISPRUDENCE FROM *APPRENDI* TO *RING* TO *HURST*.

In 2000, in *Apprendi*, the Court reinvigorated the original understanding of the right to a jury trial and re-consecrated a robust Sixth Amendment jurisprudence. In plain terms, the Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The Court eschewed labels that attempted to distinguish between factual findings that were "elements" and those that were "sentencing factors." It pronounced that "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494.

The Court applied this jury trial analysis to the penalty phase of capital cases in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016).

In both cases, the Court held that a jury, and not a judge, must find the aggravating factor or factors, at least one of which is necessary for a death verdict. *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), which had allowed a judge rather than a jury to make findings relevant to the penalty phase.

Ring specifically left open the question presented in this case: whether the Sixth Amendment right to

a jury trial applies to the findings Nebraska has reserved for a judge. As the Court noted, the claim in *Ring* was "tightly delineated"; the defendant "contend[ed] only that the Sixth Amendment required jury findings on the aggravating circumstances against him." 536 U.S. at 597 n.4. The Court emphasized: "He makes no Sixth Amendment claim with respect to the mitigating circumstances. Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty." *Id*. (citation omitted).

In his concurrence in *Ring*, Justice Scalia, endorsed a strict Sixth Amendment analysis: findings "essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." 536 U.S. at 610 (Scalia J., concurring). In strong terms, he explained:

> [O]ur people's traditional belief in the right of trial by jury is in perilous decline. That decline is bound to be confirmed, and indeed accelerated, by the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed. We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.

Id. at 612. The Court was not presented with the question of whether the finding that aggravating

factors outweighed mitigating factors was a finding that increased the maximum punishment that could be imposed and therefore needed to be made by a jury beyond a reasonable doubt.[3]

The Court closed its opinion in *Ring* with the broad statement, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." *Id*. at 609. Nebraska's scheme allows just that.

In *Hurst v. Florida*, the Court clarified that *Ring* requires juries to make findings prerequisite to imposing a death sentence. *Hurst* specifically overruled *Spaziano v. Florida,* 468 U.S. 447 (1984), which had tolerated judge determinations of aggravating circumstances and sentences after a recommendation from the jury. This Court emphasized that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619. This Court did not limit its reasoning to "aggravating circumstances," but instead required the jury to make all the "findings" necessary to imposition of a death sentence. *Id.*

In condemning Florida's scheme, the Court declared, "Florida does not require the jury to make *the*

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[3] On remand to the Arizona Supreme Court, however, that court determined that such findings must be made by the jury. *See State v. Ring*, 65 P.3d 915, 943 (Ariz. 2003) (en banc). *See also State v. Lamar*, 115 P.3d 611, 616 (Ariz. 2005).

critical findings necessary to impose the death penalty." *Id.* at 622 (emphasis added). Indicating that the weighing decision was part of the requisite "findings" by a jury, the Court said:

> It is true that in Florida the jury recommends a sentence, but *it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances* and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a *jury's findings of fact with respect to sentencing issues* than does a trial judge in Arizona.

Id. (emphasis added).

The question presented here is also informed by the Court's analysis in *Blakely v. Washington*, 542 U.S. 296 (2004), an extension of *Apprendi* that invalidated much of Washington's sentencing guidelines. In *Blakely*, this Court underscored the measure of effect over form for determination of the jury trial right. Justice Scalia wrote for the Court, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." 542 U.S. at 303-04.

Nebraska takes from the jury three findings: whether mitigating circumstances exist; whether aggravating circumstances outweigh mitigating circumstances; and whether death is the appropriate punishment. Because these findings are necessary to the imposition of a death sentence, the Sixth Amendment requires that they be decided by a jury.

In Nebraska, the maximum sentence that may be imposed without findings regarding the existence of mitigating circumstances and the finding that mitigating circumstances are not outweighed by the aggravating factors, is life. The statutory scheme explicitly requires three additional determinations before the maximum penalty of death may be imposed: whether mitigating circumstances exist, whether the aggravating factors outweigh the mitigating circumstances, and whether death is the appropriate punishment.

In dissent in *Walton v. Arizona*—a dissent which was essentially vindicated by the Court's subsequent overruling of *Walton* in *Ring*—Justice Stevens observed how the founders would have answered these questions:

> If this question had been posed in 1791, when the Sixth Amendment became law, the answer would have been clear. By that time, "the English jury's role in determining critical facts in homicide cases was entrenched. As fact-finder, the jury had the power to determine not only whether the defendant was guilty of homicide but also the degree of the offense. Moreover, *the jury's role in finding facts that would determine a homicide defendant's eligibility for capital punishment was particularly well established*. Throughout its history, the jury determined which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to

> difficult assessments of the defendant's state of mind. By the time the Bill of Rights was adopted, the jury's right to make these determinations was unquestioned."

497 U.S. at 710-11 (Stevens, J., dissenting) (quoting Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 10-11 (1989)).

Justice Stevens noted that "[s]imilarly, if this question had arisen in 1968, when this Court held the guarantee of trial by jury in criminal prosecutions binding on the States, I do not doubt that petitioner again would have prevailed." *Walton*, 497 U.S. at 711 (Stevens J., dissenting). In *Duncan v. Louisiana*, the Court located the "right to jury trial" as an essential protection "against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority." 391 U.S. 145, 155-56 (1968). "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* at 156. The Court recognized that the right to trial by jury "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers *over the life* and liberty of the citizen to one judge or to a group of judges." *Id.* (emphasis added).

As the Court stated in *Hurst*, Sixth Amendment protections apply to all findings necessary to impose a death sentence. As this Court explained in *Haymond*, this principle is firmly rooted in the founding:

> [A]t that time, generally, "questions of guilt and punishment both were resolved in a single proceeding" subject to the Fifth and Sixth Amendment's demands. . . . Over time, procedures changed as legislatures sometimes bifurcated criminal prosecutions into separate trial and penalty phases. But *none of these developments licensed judges to sentence individuals to punishments beyond the legal limits fixed by the facts found in the jury's verdict.*

139 S. Ct. at 2379 (emphasis added) (quoting John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 2011 (2005)).

Post-*Hurst*, the Delaware Supreme Court found its capital statute unconstitutional in *Rauf v. State,* 145 A. 3d 430 (Del. 2016) (per curiam). The Court read *Hurst* to require that all factual findings be made by a jury. Chief Justice Strine wrote separately, for three of the Justices, highlighting the hundreds of years of history of the role of the jury in capital cases, noting that "[t]he proposition that any defendant should go to his death without a jury of his peers deciding that should happen would have been alien to the Founders." *Id.* at 436 (Strine, C.J., concurring). Chief Justice Strine concluded that when the Court in *Hurst* required "a jury, not a judge, to find each fact necessary to impose a sentence of death," it was aware that, "[i]f those words mean what they say, they extend the role of a death penalty jury beyond the question of eligibility" but to

selectivity. *Id.* at 464. *See also* Janet C. Hoeffel, *Death Beyond A Reasonable Doubt*, 70 ARK. L. REV. 267, 271 (2017) (noting history of the jury trial right "as a collective right of the people to stand in the place of the sovereign to impose punishment.").

Thus, the origins of the right to trial by jury, as well as this Court's decision in *Ring* and *Hurst*, demonstrate the primacy of the role of the jury in capital cases.

III. ASSESSING THE WEIGHT OF MITIGATING AND AGGRAVATING FACTORS INVOLVES A MORAL COMPONENT THAT IS EXACTLY THE TYPE OF FINDINGS OUR FOUNDERS WOULD HAVE WANTED A JURY TO MAKE.

What of the arguments by some state and federal courts on the other side of the divide, that "weighing" is not a finding of fact but a "normative," "moral," or "legal" judgment? It is certainly true that any "weighing" the jury does has a normative as well as factual function. In making its weighing finding, the jury most likely uses its moral sense. However, this does not mean *Apprendi* does not apply to this finding.

Juries make findings on a regular basis that involve moral as well as factual components. Was a killing justified? Did a defendant display reckless indifference? Was the conduct malicious? Imagine our Founders' response to a statutory scheme that required the jury, in the 1770 trial, to assess whether the soldiers accused in the Boston Massacre commit-

ted the shooting—but left to the judge the determination whether the shootings were justified.

Justice Scalia mused in dicta in *Kansas v. Carr* that "we doubt whether it is even possible to apply a standard of proof to the mitigating-factor determination," calling it "largely a judgment call." 136 S. Ct. 633, 642 (2016). He also offered that the weighing determination, while in part is a factual finding, "is mostly a question of mercy," and "[i]t would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt." Importantly, however, Justice Scalia's observations in *Carr* concerned whether the Eighth Amendment required the judge to instruct a jury that mitigating circumstances need not be proven beyond a reasonable doubt. The Court had already upheld Kansas' then existent statutory scheme under Kan. Stat. Ann. § 21-4624(e) (1995), because it "requires the State to bear the burden of *proving to the jury*, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate." *Kansas v. Marsh,* 548 U.S. 163, 173 (2006). In contrast, the Nebraska statute places these findings in the hands of the judges not the jury.

The history of the right to a jury trial and the development of the beyond-a-reasonable-doubt standard show that the jury was meant to make exactly such "judgment calls." The "beyond a reasonable doubt standard" was given to the jury to make the moral judgment inherent in making a life or death decision. Findings "essential to imposition of the level of punishment that the defendant receives—

whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring,* 536 U.S. at 610 (Scalia, J., concurring). The jury's finding that aggravators outweigh mitigating circumstances is a necessary finding before death may be imposed. The finding is "essential to imposition of the level of punishment that the defendant receives."

It is worthy of note here that many of the findings we ask the jury to make are not exclusively "factual." Jurors may find as fact that the defendant killed the victim, but their finding as to the defendant's *mens rea—e.g.*, whether he killed negligently, whether he killed with "malice aforethought"—is in significant part a normative, evaluative one. Jurors apply facts to law and make judgments, evaluations, opinions, and conclusions. Ultimately, to decide "guilt" beyond a reasonable doubt is not only a factual finding, but a judgment. That is what the weighing determination is. To say that weighing is "normative" or is a "judgment" speaks to the very origins of the reasonable doubt standard—created for the benefit of jurors, not judges. As Professor James Whitman unearthed, it emanated from an obsession with "doubt and death." James Q. Whitman, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 157 (2008). It counterbalanced a standard of no doubt, giving the jury breathing room to make difficult, moral decisions in matters of life and death.

In the context of capital sentencing procedures, this Court now finds itself in a similar situation as the Framers considered the crime of libel. The

Crown wanted to take away from the jury the requirement of finding the writing was seditious or defamatory and that the publication was made with malicious intent. The Crown wanted all of that to be decided by the judge. The jury was relegated to deciding the fact of publication.

Professor Welsh S. White engages in a thoughtful discussion of this similarity. Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 11 (1989) ("The seditious libel cases of the eighteenth century are important both because of their impact in defining the jury's fact-finding role and their probable significance to the framers of the Bill of Rights. The cases have a significant bearing on the scope of the jury's role in fact-finding because they involved a situation in which there was a serious and prolonged debate concerning the allocation of fact-finding authority between judge and jury.").

The Framers were particularly cognizant of efforts to undermine the vitality of the jury trial right, in cases like John Peter Zenger's Trial, where the judge had attempted to construct the proceedings so that the jury, in 1736, was to determine the fact of whether Zenger had printed the allegedly libelous material, but the judge alone determined his moral culpability. *See Jones v. United States* 526 U.S. 227, 247 (1999) ("According to one authority, the leading account of Zenger's trial was, with one possible exception 'the most widely known source of libertarian thought in England and America during the eighteenth century.'" (quoting L. Levy, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 133 (1963))). This construct was thoroughly rejected by

the Framers who relied upon the jury to "check" "[t]he potential or inevitable severity of sentences." *Jones,* 526 U.S. at 245.

The Framers were cognizant of—and rejected—such "[c]ountervailing measures to diminish the juries' power." *Id.* These included efforts similar to Nebraska's scheme "to confine jury determinations in libel cases to findings of fact, leaving it to the judges to apply the law and, thus, to limit the opportunities for juror nullification." *Id.* at 246.

At the Founding, the course of our country's history was protected by the rejection of the well-known attempts to replace the jury with a judge:

> Ultimately, of course, the attempt[s] failed, the juries' victory being embodied in Fox's Libel Act in Britain, *see generally* T. Green, VERDICT ACCORDING TO CONSCIENCE (1985), and exemplified in John Peter Zenger's acquittal in the Colonies . . . It is significant here not merely that the denouement of the restrictive efforts left the juries in control, but that the focus of those efforts was principally the juries' control over the ultimate verdict, applying law to fact (or "finding" the law. . .), and not the factfinding role itself. . . . That this history had to be in the minds of the Framers is beyond cavil. . . .

Id. at 245-46; *see also* Welsh, *supra*, at 14 ("The importance of the seditious libel cases in shaping the

jury's fact-finding role can hardly be overestimated.").

As Professor Welsh S. White has explained, the "point of cases like *Zenger's Case* was not that the crime of libel had to include particular elements, but rather that the presence or absence of those elements—whatever they were—had to be determined by a jury." White, *supra*, at 14.

IV. JURIES PLAY AN ESSENTIAL ROLE IN THE ADMINISTRATION OF THE DEATH PENALTY.

Juries play an important role in the death penalty process because they "express the conscience of the community on the ultimate question of life or death." *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968). *See also Woodward v. Alabama*, 134 S. Ct. 405, 407 (2013) (Sotomayor J., dissenting from denial of certiorari).

As this Court has noted, "one of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system." *Witherspoon*, 391 U.S. at 519 n.15. Jurors "possess an important comparative advantage over judges . . . [because] they are more likely to 'express the 'conscience of the community on the ultimate question of life or death.'" *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring in the judgment); *see also Middleton v. Florida*, 138 S. Ct. 829 (2018) (Breyer, J., dissenting from the denial of certiorari) ("In my view, 'the Eighth Amendment

requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.'" (quoting *Ring*, 536 U.S. at 619 (Breyer, J., concurring in the judgment))).

Whether a defendant is a future danger, has the potential for rehabilitation or redemption, and whether the circumstances of their life deserve leniency or mercy, are questions that call upon the full conscience of the community. *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989); *see also Satterwhite v. Texas*, 486 U.S. 249, 261 (1988) (Marshall, J., concurring) ("Unlike the determination of guilt or innocence, which turns largely on an evaluation of objective facts, the question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime.").

Confidence in the administration of capital punishment is a core requirement of the criminal justice system. In *Gregg v. Georgia*, the Court stated that "[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law." 428 U.S. 153, 183 (1976). But in Nebraska, this is not the case. Instead, the statutory scheme allows the jury to make preliminary findings, but provides for an appointed panel of judges to make the findings necessary to impose capital punishment undermining confidence in the administration of justice. In so doing, the statutory scheme invites obsequious subservience to the authority of judges—rather to transcending bulwark of freedom that is a jury. A death penalty system predicated upon the decisions of judges, not juries,

only further undermines confidence in the justice system generally and the administration of capital punishment specifically.

CONCLUSION

For the reasons set forth herein, *Amici* respectfully suggest that the Court grant certiorari to recognize the role of the jury in making the findings necessary to the imposition of a death sentence.

Respectfully submitted,

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