

CAPITAL CASE

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARCO ENRIQUE TORRES,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEBRASKA

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

The Nebraska Legislature passed Legislative Bill 268 (“LB 268”), which reformed Nebraska’s death penalty law by modifying then existing death sentences to life imprisonment. Nebraska’s death row is small and LB268 affected around ten inmates. The governor vetoed the bill. The legislature overrode the veto. The governor and death penalty supporters next initiated a referendum to garner support for rejecting LB 268 by public vote of the citizens. Supporters of the death penalty engaged in a months’ long media campaign attacking each death row inmate, including Marco Torres. The media campaign identified each inmate by name and photo and described the crimes they had been convicted of in emotional, sometimes graphic, detail. The campaign to bring back the death penalty and ensure each inmate faced execution was successful. By public vote, the death penalty was affirmed for each death row inmate. These events are unprecedented in the modern era of the death penalty.

The following questions are presented:

- I. Whether the successful media campaign and referendum culminating in affirmance of Mr. Torres’ death sentences qualify as cruel and unusual punishment under the United States constitution;
- II. Whether Mr. Torres’ execution under the unprecedented circumstances violates the Due Process Clause of the United States Constitution;

- III. Whether the referendum is an unconstitutional bill of attainder, where the referendum proceedings specifically cited named individuals who would not be properly punished if the new law was not repealed; and
- IV. Whether the referendum process which resulted in repeal of LB 268 and re-imposition of the death penalty denies Mr. Torres Due Process and Equal Protection of the Laws.

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OPINIONS BELOW

The Nebraska Supreme Court affirmed the lower court's denial of relief to Mr. Torres on January 3, 2020. 936 N.W.2d 730 (Neb. 2020) (Appendix A, 002A-006A).

The Hall County District Court of Nebraska denied Torres' petition for post-conviction relief on March 4, 2009. Case No. CR-07-202, *Unpublished*, (Appendix B, 007A-011A).

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a). The State of Nebraska's repeal of Torres' death sentence by legislative action followed by the months long media campaign to reinstate the death sentence by popular vote of the citizens is repugnant to the United States Constitution.

The Nebraska Supreme Court affirmed the denial of relief on January 3, 2020. 936 N.W.2d 730 (Neb. 2020). On March 19, 2020, this Court entered an order extending the date for seeking certiorari by 60 days. *Order List*, 589 U.S. ____ (Mar. 19, 2020). This petition for certiorari is due June 1, 2020, and is placed with the United States Postal Service, first-class postage paid in advance, on June 1, 2020.

This Court has jurisdiction to review this petition for certiorari.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides that

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Eighth Amendment to the United States Constitution provides that,

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

The Fourteenth Amendment to the United States Constitution, Section 1, provides that

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 9 of the United States Constitution provides, in part, “No bill of attainder or ex post fact law shall be passed.” (The full text of Article I, Section 9, is attached as Appendix C, 048A).

Nebraska Legislative Bill 268 (2015) provides in part, “in any criminal proceeding in which the death penalty has been imposed but not carried out prior to

the effective date of this act, such penalty shall be changed to life imprisonment.”

(The complete text of the bill is attached as Appendix D, 049A-059A).

STATEMENT OF CASE¹

Marco Torres is a Nebraska death row inmate. His death sentences were affirmed on direct appeal in 2012. *See State v. Torres*, 283 Neb. 142 (Neb. 2012), *cert. denied*, 568 U.S. 871 (2012) (Mem) (affirming convictions and death sentences) (APPENDIX A, 002A-006A).

On May 20, 2015, the Nebraska Legislature passed LB 268, abolishing the death penalty and providing that the sentences of those already on death row would be converted to life terms. Neb. Legis. B. 268, 140th Leg., 1st Sess. (Neb. 2015) (Appendix E, 049A-059A). Although Governor Ricketts vetoed the act on May 26, 2015, the Nebraska Legislature again voted in favor of LB 268 on May 27, 2015, overriding the Governor's veto and enacting LB 268.

In response to the legislative veto override, the Governor and death penalty supporters formed a campaign, Nebraskans for the Death Penalty, to collect signatures for a public referendum, "Referendum 426," to reinstate the death penalty that would put the legislation passed in LB 268 to a state-wide public vote. The referendum campaign focused individually on particular death row inmates, including Mr. Torres. Its advertising and promotional publicity personally identified each death row inmate by name and prison number, listed the date each were sentenced to death, and publically called for the execution of each inmate, including

¹The post-conviction court dismissed Mr. Torres' motion without a hearing. The factual summary contained in his Statement of the Case is based on his allegations in his motion and the state court opinions. The post-conviction motion is attached as Appendix C.

Mr. Torres. The referendum campaign by Nebraskans for the Death Penalty included the broadcasting of inflammatory video advertisements that showed pictures of the men and described their crimes while ominous music played in the background. The advertisement's voiceover then says:

These are the men on Nebraska's death row. Their crimes were heinous. They terrified communities, and devastated families: killing innocent wives, husbands, mothers, fathers, and even children as young as three years old. The death penalty protects the public from the most dangerous people in our society.

Nebraskans for the Death Penalty, "*Repeal*" (*Digital ad*),

<https://www.youtube.com/watch?v=uw9xOjX0u0>.² Comments by the referendum campaign supporters showed that they wanted to reinstate the death penalty in order to ensure that these ten men would be executed. The ten men were each identified by photograph and name.

Don Stenberg, state treasurer and chairman of Nebraskans for the Death penalty, explicitly referred to the ten prisoners on death row and publically rallied for their executions during an October 2016 public debate on the referendum. See Andrea Larson, *Advocates for and against death penalty take part in public discussion* (Oct. 13, 2016), http://norfolkdailynews.com/news/advocates-for-and-against-death-penalty-take-part-in-public/article_245180e8-9152-11e6-aa83-97586eb1abab.html.³

² Site last visited on May 29, 2020.

³ Site last visited on May 29, 2020.

Governor Ricketts and Nebraskans for the Death Penalty were successful in their highly publicized effort to reinstate the death penalty. A referendum repealing LB268 was passed on December 5, 2016 and Mr. Torres was denied the benefit of LB268. *See generally* Motion for Post-Conviction Relief. Appendix C, 012A-048A.

On December 4, 2017, Mr. Torres filed a motion for post-conviction relief raising several constitutional challenges to the referendum process. Appendix C, 012A. The post-conviction court dismissed the motion without a hearing. Appendix B, 007A-011A. It reasoned that the Nebraska legislature did not have the authority to reduce a sentence and that LB268 violated Nebraska's separation of powers doctrine, relying upon Article II, § 1 and Article IV, § 13 of the Nebraska Constitution. Appendix B, 007A-011A.

Mr. Torres timely appealed to the Nebraska Supreme Court. The state court did not agree with the lower court's reasoning that LB268 violated the separation of powers doctrine and thus was an invalid law. Instead, the state high court reviewed each of Torres' constitutional challenges and found them without merit. *State v. Torres*, 936 N.W.2d 730 (Neb. 2020); Appendix A, 002A-006A. The court found that LB 268 was rolled back by Nebraska's referendum process before it went in to effect thus Torres' claims failed. *Id.* at 733, 005A. The court also found the claims were based upon an anticipatory injury and did not merit relief. *Id.* at 733, 005A.

REASONS FOR GRANTING REVIEW

I. Review Is Warranted Because the Successful Media Campaign and Referendum Culminating In Affirmance of Torres' Death Sentences Qualify As Cruel and Unusual Punishment Under the United States Constitution.

The re-imposition of the death penalty by referendum was cruel and unusual punishment under the United States Constitution. The state court found Torres stated a “potential” harm but it did not rise to an “Eighth Amendment violation.” *Torres*, 936 N.W.2d at 733, Appendix A, 005A. The state court’s opinion focused on the technical operation of the referendum process to the exclusion of the condemned inmate’s experience. The state courts failed to acknowledge the nature of Torres’ allegations and failed to acknowledge his experience of enduring an aggressive highly public media campaign over which he had no control. Torres alleged he suffered “added” punishment by undergoing a prolonged period of public degradation during the referendum process. He also alleged he suffered anxiety and uncertainty during this process. The state courts failed to address these allegations and only focused on technical application of the referendum process in Nebraska.

The re-imposition of the death penalty by a referendum process involved significant inflammatory media targeted at Mr. Torres and created significant uncertainty; it subjected Mr. Torres to extreme psychological harm. The Eighth Amendment prohibits circumstances that degrade a person or violate the dignity of man. Eighth Amendment, U.S. Const.. The Eighth Amendment prohibits punishment that is “superadded” to the death sentence. *Weems v. United States*, 217

U.S. 349, 327 (1910). The referendum degraded Mr. Torres and was a superadded punishment. No other state has imposed the death penalty by referendum or had an even remotely similar process to what happened in Nebraska. The singularity of this process demonstrates it is unusual.

The nature of the experience of being under a sentence of death, followed by a reprieve, followed by public outrage and re-imposition of the death penalty is degrading and humiliating. It also subjected Mr. Torres to extreme psychological and emotional harm in violation of the United States Constitution's prohibition against cruel and unusual punishment. *See* U.S. Const. amend. VIII; U.S. Const. amend. XIV. The Constitution does not permit execution of a sentence in a manner creating unnecessary stress or anxiety. The Eighth and Fourteenth Amendments bar states from using punishments that "involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). To establish an Eighth Amendment violation, a petitioner need not show the existence of a specific injury, but rather must only demonstrate that the punishment involves "conditions posing a substantial risk of serious harm." *Taylor v. Crawford*, 487 F.3d 1072, 1079-80 (8th Cir. 2007) (holding that petitioner could bring an Eighth Amendment claim for the *risk* of injury caused by lethal injection protocol, though ultimately finding that the facts of that case did not present a constitutionally significant risk).

The Eighth Amendment not only prohibits cruelty of physical injury, pain, and mutilation, but it also prohibits circumstances that degrade, disgrace, cause terror, or otherwise violate the dignity of man. The Founders adopted the Eighth

Amendment not only to prohibit the government from inflicting physical pain on the people, but also to prevent “exercises of cruelty . . . other than those which inflicted bodily pain or mutilation.” *Weems v. United States*, 217 U.S. 349, 372 (1910). The Eighth Amendment forbids laws and punishment subjecting a person to “circumstance[s] of degradation,” *id.* at 366, or to “circumstances of *terror, pain, or disgrace*” that are “superadded” to a sentence of death. *Id.* at 370 (emphasis added). Furthermore, the Supreme Court has ruled unconstitutional those punishments which do not “accord with ‘the dignity of man,’ which is the ‘basic concept underlying the Eighth Amendment.’” *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

This includes circumstances of a prisoner’s sentence that inhibit the ability to sleep, cause frequent headaches, or create emotional distress. The U.S. Court of the Appeals for the Eighth Circuit and other federal courts have held that Eighth Amendment violations may exist in cases without any physical injuries. *Hobbs v. Lockhart*, 46 F.3d 864, 869 (8th Cir. 1995) (“We cannot conclude that plaintiff’s emotional distress was not an injury serious enough to be constitutionally cognizable.”); *Obama v. Burl*, 477 Fed. App’x. 409, 411 (8th Cir. 2012) (unpublished) (finding a potential Eighth Amendment violation where constant lighting of prisoner’s cell “caused inability to sleep, emotional distress, and constant headaches”); *Beal v. Foster*, 803 F.3d 356, 357–58 (7th Cir. 2015) (“the alleged pain [sufficient to constitute cruel punishment] may be physical or *psychological*.” (quoting *Watson v. Carter*, 668 F.3d 1108, 1112 (9th Cir.2012))).

The State of Nebraska created a substantial risk of serious emotional and psychological harm to Mr. Torres by re-imposing a death sentence through referendum after the Legislature enacted a law reforming his death sentence to life. He suffered alternating periods of relief and terror. The state's inconsistent dictates, on which Mr. Torres' life hinge, and the resulting stress and psychological trauma violate his rights to be free from unnecessary suffering and the deprivation of his basic dignity.

The Supreme Court has previously examined the cruelty of imposing a second death sentence in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). There, the petitioner had suffered through and survived a botched execution in the electric chair and asked for relief "because he once underwent the psychological strain of preparation for electrocution" and to "require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment." *Id.* at 464. Ultimately, the Court ruled against the prisoner because the original failed execution was accidental, *id.*, and because Justice Frankfurter did not believe that the Eighth Amendment had been incorporated through the Fourteenth Amendment. *Id.* at 471 (Frankfurter, J., concurring) (a decision that has subsequently been reversed by the Court in *Robinson v California*, 370 U.S. 660 (1962)). The torturous execution of Mr. Torres after telling him he will serve a life sentence is not an unfortunate accident, but the foreseeable result of the State's decision to place him (and other death-row prisoners) in the middle of its death

penalty debate and to target him for execution after he had been told his life would be spared.

These types of tactics are known methods of psychological torture and are prohibited under the Eighth Amendment's prohibition against punishments that do not comport with "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. Under that analysis, courts look to "objective indicia of society's standards, as expressed in legislative enactments and state practice." *Roper v. Simmons*, 543 U.S. 551, 563 (2005). Typically, this means that courts count how many states still permit a particular type of sentencing practice and how many have abolished or never adopted it. *See, e.g., id.* at 564-66; *Atkins v. Virginia*, 536 U.S. 304, 312-17 (2002); *Kennedy v. Louisiana*, 554 U.S. 407, 422-26 (2008). In this case, the practice in question is so unusual that there is no evidence that any other state has ever imposed a sentence in such a manner. The re-imposition of death by referendum is cruel and unusual.

Nebraska's referendum process is unusual. It is also cruel. The state court erred by failing to consider the substance of Torres' Eighth Amendment claim. This Court should grant certiorari to permit review of this claim.

II. Review Is Warranted Because Mr. Torres' Execution in These Unprecedented Circumstances Violates the Due Process Clauses of the United States Constitution.

Imposition of the death penalty by referendum violates the Due Process Clause of the United States Constitution. The state court denied Torres' due process claim by reasoning he never experienced a "change[]" in sentence. *Id.* at 733, Appendix A, 005A. This reasoning ignores the political nature of the

referendum process and the publicity that surrounded it. The publicity encouraged a citizen response that was highly charged and emotional in violation of due process of law. The death penalty may only be imposed by a judicial process that gives recognition to the individual characteristics of the person. The state may not “deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.” Fourteenth Amendment, U.S. Const.; *see also* Fifth Amendment, U.S. Const.. The referendum process failed to do this.

The Nebraska Legislature enacted a sentencing reform statute which applied retroactively. Due process forbade the State from reinstating the capital sentences *en masse*. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (finding state mandatory sentence violated the prisoner’s right to liberty and due process of law). Rather, both state and federal law guaranteed each individual to a new sentencing procedure. *Id.*; *see also Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (discussing importance of individualized sentencing procedures in capital trials to both the specific prisoner and society as a whole);

The Supreme Court has recognized that “the central aim of our entire judicial system—all people charged with a crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court.’” *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) (quoting *Chambers v. State of Florida*, 309 U.S. 227, 241 (1940)). The goal of equality for all applies no less during sentencing proceedings as during the initial guilt determination. *See Gardner*, 430 U.S. at 358. “[T]he

sentencing is a critical stage of the criminal proceeding . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process.” *Id.* (citations omitted). Because sentencing hearings are a critical stage of trial, sentencing is among the type of proceedings that have been accorded greater protection under substantive due process. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 278 (1998) (in determining that a prisoner is entitled to substantive due process in clemency proceedings the Court noted that the amount of process due to an individual is proportional to the degree to which the particular stage in question was “integral” to the trial process).

Here, Mr. Torres seeks to protect his right to life regarding Nebraska’s sentencing procedure. Because this involves a “critical stage” of trial, his right to due process must be protected with the full force of the law. *See Woodard*, 523 U.S. at 278 (finding process due dependent on the proceeding); *Gardner*, 430 U.S. at 358 (noting the importance of process in capital cases. In this instance, due process requires that the Government provide Mr. Torres with adequate notice and a right to be heard before depriving him of his right to life, liberty, or property. Fifth and Fourteenth Amendments, U.S. Const..

Nebraska’s failure to provide Mr. Torres with an individualized resentencing hearing exposed him to the same defects that caused the U.S. Supreme Court to find capital punishment unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). Every capital case must disclose the rationale for imposing the death

sentence, no matter how many times the death sentence is imposed on an individual; if the death sentence is vacated, the district court must articulate the rationale for reinstating a sentence of death. *Gardener*, 430 U.S. at 361. Anything less violates Due Process. *Id.*

The referendum process was highly politicized and featured emotional ads describing Torres and the crimes. There was not a meaningful way for Torres to respond to this type of media or to address the accuracy of the media accounts of him and the crimes. He was denied the opportunity to be heard, the fundamental precept of Due Process of Law. This Court should grant the writ to permit review of this issue.

III. Review Is Warranted Because the Referendum on LB 268 Is An Unconstitutional Bill of Attainder Where It Cites Named Individuals Who Would Not Be Properly Punished if the New Law Were Not Repealed.

Re-imposition of the death penalty by referendum was an unconstitutional bill of attainder. Again, the state court failed to properly consider this claim because it found the sentence had always been in place. *Torres*, 936 N.W.2d at 733. In fact, the referendum specifically targeted the inmates who had benefited from LB 268. It named the individuals and sought to ensure they faced the death penalty. The referendum specified the people who were its target. *United States v. Brown*, 381 U.S. 437, 448-49 (1965). It inflicted the punishment of death. *Id.* at 448-49. And it did so without judicial process. *Id.* The referendum to re-impose the death penalty is a classic example of the bill of attainder the framers of the constitution sought to prohibit. *Id.* at 441. It should not stand.

The repeal by referendum of LB 268 is an unconstitutional bill of attainder, targeting Mr. Torres, among others, for execution. The referendum targeted those the men who had been under death sentences and sentenced them anew to death through a legislative act rather than through judicial process.

“A bill of attainder is a legislative act which inflicts punishment without a judicial trial.” *Cummings v. Missouri*, 71 U.S. 277, 323 (1866). The United States Constitution forbids the passage of such laws. Article I, § 9, United States Constitution. The constitutional protections against bills of attainder were “intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.” *United States v. Brown*, 381 U.S. 437, 442 (1965). They reflect “the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons.” *Id.* at 445.

In Nebraska, the legislative branch includes the people of the State when they speak through voter initiatives and referenda. The legislative authority of the State is thus constitutionally bifurcated—one half belonging to the legislature, the other to the people, who have reserved the right of initiative and referendum. Neb. Const. art. III, § 1. The “[l]egislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is

effectual.” *State ex rel. Stenberg v. Moore*, 258 Neb. 199, 210-11 (1999) (citing *State ex rel. Brant v. Beermann*, 217 Neb. 632 (1984); *Klosterman v. Marsh*, 180 Neb. 506 (1966)).

As a result, courts have treated Nebraskan referenda passed by the people as legislative acts. In 2006, the Eighth Circuit ruled that an amendment to the Nebraska Constitution passed by referendum was not a bill of attainder because it did not inflict punishment. *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 869 (8th Cir. 2006) (“Bills of attainder are ‘legislative acts, no matter what their form.’” (quoting *United States v. Lovett*, 328 U.S. 303, 315 (1946))). If laws passed by referendum could not be bills of attainder this would have been dispositive, and the court would not have engaged in the more detailed analysis under the three pronged test. *See also State v. Thorne*, 129 Wash. 2d 736, 759-60, 921 P.2d 514, 524-25 (Wash. 1996) (the Supreme Court of Washington treated a referendum passed by voters as a legislative act and ruled it was not a bill of attainder on separate grounds).

To establish a bill of attainder a petitioner must show by the “clearest proof” that a particular legislative act would “(1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial. *Selective Service v. Minn. Public Int. Res. Gp.*, 468 U.S. 841 (1984)). Mr. Torres’ death sentence, handed down by the referendum-repeal of LB 268, satisfies all three of these requirements.

The referendum targeted specific persons. The major question of the referendum was whether Mr. Torres should be sentenced to death once more and

executed. The public campaign in support of the referendum, led by Nebraskan's for the Death Penalty, left no question that the purpose of the referendum was to ensure that Mr. Torres and the other death-row prisoners would be executed. He was mentioned by name on television ads, websites, and in public debates. The campaign's focus on the individuals on death row—and the public's reaction to this campaign—made it clear that a vote for the referendum would impose a death sentence on Mr. Torres.

In repealing LB 268, the voters sought to resentence Mr. Torres and the other nine men to death. Although not mentioned in the ballot title for the referendum, Mr. Torres' life was put to a popular vote: would it be life without parole or execution? Of course, bills of attainders are not required to name the specific people they target and may affect a larger group than just a single person. *Cummings*, 71 U.S. at 323. Courts have repeatedly held that even laws implicating *prospective* groups still target specific individuals when the bill levies a unique punishment to them. *Brown*, 381 U.S. at 461; *Crain v. City of Mountain Home, Arkansas*, 611 F.2d 726, 729 (8th Cir. 1979). In *Crain* and *Brown*, the courts struck as bills of attainder law that significantly lowered the salary of the city attorney and banned members of the Communist party from holding labor union positions, respectively. Even though the law at issue in *Brown* “inflict[ed] its deprivation upon more than three people,” the Court still held it to be a bill of attainder because it specified (without naming) “the people upon whom the sanction it prescribes is to be levied.” *Brown*, 381 U.S. at 461. And even though in *Crain* one of the laws at issue was “facially

constitutional” and would have affected all future city attorneys—a potentially infinite class—the court still held it to be a bill of attainder because its target and impetus was to punish one particular city attorney. *Crain*, 611 F.2d at 729.

The decision *Neelley v. Walker*, 67 F. Supp. 3d 1319 (M.D. Ala. 2014), presents an analogous situation. In *Neelley*, the court found that a prisoner had stated a colorable bill of attainder claim where the Alabama Legislature had retroactively rescinded the right to parole review for former death row prisoners serving life imprisonment. The plaintiff was the *only* prisoner in fifty years who had ever won a rare commutation of her death sentence to life imprisonment, making her parole eligible. The court based its decision on language in floor debates expressing the intent of the Legislature to deny her the opportunity of parole and a suspicious provision making the new law retroactive to four months prior to her commutation. *Id.* at 1329-30. *See also Woldt v. People*, 64 P.3d 256, 271 (Colo. 2003) (en banc) (in context of Ex Post Facto Clause, three capital defendants were “identifiable targets of the legislation” where the section applied only to three persons who had received the death penalty from a three-judge panel).

The referendum inflicts punishment. “The classic example [of attainder] is death.” *ACORN v. United States*, 662 F. Supp. 2d 285, 291 (E.D.N.Y. 2009). The repeal of LB 268 by referendum sentenced Mr. Torres to death. He could not be executed without its passing.

The classic sources for considering whether there was a legislative intent to punish include “legislative history, the context or timing of the legislation, or

specific aspects of the text or structure of the disputed legislation.” *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 478 (1977)). The legislative history of and discussion surrounding the referendum reveals that resentencing the ten men to death was not a mere side effect of the legislation but its intent and the source of much of its support. But for the passing of the referendum Mr. Torres would not face the ultimate punishment the State can inflict.

The punishment was imposed without a trial. In the referendum, Mr. Torres and the men on Nebraska’s death row faced a sentencing trial by the public. The referendum effectively re-litigated the question of whether Mr. Torres should receive the death penalty or life in prison. If the referendum had been rejected, his sentence of life without parole would have been confirmed. If it passed, as it did, he would again be sentenced to death. Whether Mr. Torres could be executed hinged on the results of the referendum vote, not on the verdict of a sentencing panel.

Death, however, is not a slightly harsher degree of punishment placed on one already convicted, but a different punishment in kind. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Imposing a death sentence requires a sentencer to “allow [for] the particularized consideration of relevant aspects of the character and record of each convicted defendant.” *Id.* at 309. In *Brown*, the Supreme Court described the dangers of allowing the legislature to replace juries:

Everyone must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in

which the popular feeling is strongly excited—the very class of cases most likely to be prosecuted by this mode.

Brown, 381 U.S. at 445 (citations omitted).

The referendum placed into the hands of the electorate that which is reserved specifically to a sentencing panel, lacking the constitutional safeguards and “particularized consideration” that accompany the penalty phase of a trial. This is exactly the kind of legislation the framers were protecting against when they instituted bans on bills of attainder, and it cannot stand. This Court should grant review. The prohibition against bills of attainder is intended to prevent exactly this type of scenario, where the Governor’s veto was overridden and he campaigned specifically to do away with the sentencing relief. He actively targeted the death row inmates by name, picture, and alleged conduct. This Court should grant review of this issue.

IV. Review Is Warranted Because the Referendum Process Denies Mr. Torres Due Process and Equal Protection of the Laws.

The re-imposition of the death penalty by referendum denied Mr. Torres due process and equal protection of the laws. The Nebraska Governor exceeded his granted powers in spear-heading the referendum. The State of Nebraska’s failure to honor its own separation of powers doctrine denies Mr. Torres due process and equal protection of the law in a manner that is arbitrary and capricious. The Governor’s use of his office to exercise powers not granted to him is an arbitrary and capricious denial of Mr. Torres’ due process and equal protection rights. *Hicks*, 447 U.S. at 346.

The federal constitution prohibits a state from denying a person life, liberty, or property without due process of law and the equal protection of the laws. U.S. Const. amend. XIV, § 1. Due process forbids a state from reinstating capital sentences *en masse*. See *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). Federal law guarantees each person the right to an individual sentencing procedure. *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). Each person is entitled to the same treatment under the laws of the state. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956). Because a sentencing hearing is a critical stage of trial, it is accorded greater protection under substantive due process. See *Gardner*, 430 U.S. at 358; see also *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 278 (1998) (a prisoner is entitled to substantive due process in clemency proceedings; the amount of process due to an individual is proportional to the degree to which the particular stage in question is “integral” to the trial process.). Due process requires that the state provide Mr. Torres with adequate notice and a right to be heard before depriving him of his right to life, liberty, or property. U.S. Const. amend. XIV, § 1. Due process and the Eighth Amendment require that there be a rational basis for imposing death. *Furman v. Georgia*, 408 U.S. 238 (1972). Where the state affords specific procedural protections, the state may not arbitrarily deprive the accused of those protections. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980).

CONCLUSION

The Nebraska Legislature passed LB 268 modifying death sentences to life sentences. What followed was a prolonged publicity campaign that targeted the

men on Nebraska's death row. The politicization of the death penalty ensured a meaningful discussion about the appropriateness of the death sentence for any of the men could not be had. Eventually, the referendum succeeded. The state court found that because Torres was not technically freed from death row, he suffered no harm. This reasoning is incorrect because Torres, lived through this experience and endured the onslaught of a campaign that targeted them personally. Torres was uniquely vulnerable to this event because there is no way he could defend himself from such a campaign while in custody. For the foregoing reasons, Mr. Torres requests that this Court grant the Petition for Writ of Certiorari.

Dated: May 31, 2020.

Respectfully submitted,



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