

No. 17-7869

IN THE
Supreme Court of the United States

MATTHEW MARSHALL, PETITIONER,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

**MOTION FOR LEAVE TO FILE
BRIEF OF AMICUS CURIAE
THE PROMISE OF JUSTICE INITIATIVE &
AMICUS BRIEF IN SUPPORT OF PETITIONER BY
THE PROMISE OF JUSTICE INITIATIVE**

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Petitioner in this case was sentenced to death by a government magistrate, despite a jury's recommendation of life. Respondent seeks his execution despite the broad trend amongst the states that "require[s] use of the death penalty be restrained ... reserved for the worst crimes and limited in its instances of application" and "require[s] adherence to a rule reserving its use, at this stage of evolving standards" to – at the most – those instances where a jury determined that death was the appropriate punishment.

As such, this case presents an extraordinary circumstance that has broad significance to the constitutional discourse, sitting at the intersection of the Sixth Amendment's right to trial by jury and the Eighth Amendment's requirement that

imposition of punishment be governed by the evolving standards of decency.

The Promise of Justice Initiative (PJI) is a non-profit law office dedicated to upholding constitutional integrity. 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.

This includes amicus briefs in *Glossip v. Gross*, 2015 U.S. S. Ct. Briefs LEXIS 1109, *Brief of Amici, The Promise of Justice et al.*; *McCoy v. Louisiana*, 2017 U.S. S. Ct. Briefs LEXIS 4484, *Brief of Amici, The Promise of Justice et al.*; *Brumfield v. Cain*, 2015 U.S. Ct. Briefs LEXIS 1999, (same), and in the state courts in Washington and Delaware in *Scherf v. State* (pending) and *Rauf v. State*, 145 A. 3d 430 (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.”).

PJI continues to believe that the time is near for this Court to address “whether, given the thousands of homicides committed each year, and the handful of death sentences and executions, the death penalty fails to make a measurable contribution to acceptable goals of punishment and is out of proportion to the offense, see *Glossip v. Gross*, 135 S.Ct. 2726, 2755 (2015) (Breyer, J., Ginsburg, J., dissenting) (“I would ask for full

briefing on a more basic question: whether the death penalty violates the Constitution."). But to the extent this Court pretermits answering that question, it should address and constrain outlier procedures for sentencing that are so out of touch with our evolving standards of decency.

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

Wherefore, for the forgoing reasons, amicus 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 evolution in the standards of decency that mark a civilized society render the execution of a death sentence imposed by an elected judge over the vote of a jury constitutes cruel and unusual punishment.

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE¹

The Promise of Justice Initiative (PJI) is a non-profit law office dedicated to upholding constitutional integrity. PJI addresses issues concerning fairness in the administration of capital punishment.

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, that 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).

¹ Pursuant to this Court’s Rule 37, *Amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Timely notice was provided more than ten days from the due date. Petitioner granted consent. Respondent indicated it had no position.

SUMMARY OF ARGUMENT

This case sits at the intersection of the Sixth Amendment's right to trial by jury and the Eighth Amendment's evolving standards of decency.

Matthew Marshall was sentenced to death in 1992 by an elected government official who overrode the jury that voted to spare his life. The standards of decency have evolved since 1992.

Today, twenty jurisdictions have removed capital punishment as an option; another ten have demonstrated long-term disuse; eighteen have affirmed that death sentences can come only from a jury. The standards of decency have evolved and a new consensus has emerged: no person can be executed by the state unless the person's death sentence was imposed by a jury of his or her peers.

The Eighth Amendment draws its meaning from the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Whatever the standards may have been in the past, Matthew Marshall's execution is cruel and unusual today because prevailing standards of decency would honor the jury's decision to spare his life.

This Court has held that "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst v. Fla.*, 136 S.Ct. 616, 619 (2016). It has now become clear that the Eighth Amendment does so as well.

In the founding conversation about the role of the Constitution, Alexander Hamilton observed, “it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question whether societies [...] are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force.” The Federalist No. 1 at 1 (Alexander Hamilton) (The Avalon Project of Yale Law School, 2008); see also Janet C. Hoeffel, *Death Beyond a Reasonable Doubt*, 70 Ark. L. Rev. 267, (2017) (noting that “the history of the jury trial right illuminates it as a collective right of the people to stand in the place of the sovereign to impose punishment on anyone ... [it] is therefore simultaneously a collective right of the people to judge and the individual right of the defendant to be judged by his peers.”).

Amicus believes that this petition offers an opportunity to answer Hamilton’s essential question of whether we are capable of enlightened self-governance. The American people have reached a consensus—after much reflection and choice—that the Eighth Amendment does not allow elected officials to sentence defendants to death in defiance of the community’s conscience.

If Mr. Marshall is executed in defiance of, or even in indifference to, his jury’s reasoned moral judgment, our capacity for self-governance will prove weaker than had been hoped. The outlier execution—breaking a precious link between the will of the people and the command of the

sovereign—reflects a predilection for raw power in the hands of an executive unchecked by the governed.

Moreover, amicus suggests that unless this Court repairs the schism in this doctrine, the Court will be unable to make an accurate 8th Amendment analysis concerning the constitutionality of capital punishment altogether. See *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (noting that in measuring consensus, in addition to counting states, “[w]e have also looked to data concerning the actions of sentencing juries.”) citing *Enumnd v. Florida*, 458 U.S. 782, 794 (1982); *Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988). See also John Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 Wash. & Lee L. Rev. Online 487, 551 (2016) (“Because the function of juries is “to maintain a link between contemporary community values and the penal system,” and because the U.S. Supreme Court looks to jury verdicts to evaluate the “evolving standards of decency that mark the progress of a maturing society,” juries that do not reflect an entire community cannot possibly reflect the conscience of that community.”). Imposition of a death sentence by an elected judge is not only outside the bounds of the standards of decency, it impedes this Court’s effort to measure whether imposition of the death penalty itself is in line with contemporary values.

ARGUMENT

I. OBJECTIVE INDICATORS REVEAL THE PREVAILING STANDARDS OF DECENCY

As this Court has made clear, “the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Recognizing that the words were not “precise” and the scope was “not static”, this Court has established that the “Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 101, citing *Weems v. United States*, 217 U.S. 349 (1909).

In determining whether a sentence violates the Eighth Amendment the Court considers “objective indicia of national consensus.” *Graham v. Florida*, 560 U.S. 48, 62 (2010). In *Roper v. Simmons*, the Court counted 30 states that rejected the death penalty for juvenile offenders—“12 that ha[d] rejected it altogether and 18 that maintain[ed] it but, by express provision or judicial interpretation, exclude[d] juveniles from its reach.” *Roper v. Simmons*, 543 U.S. 551, 564 (2005). *See also Kennedy v. Louisiana*, 554 U.S. 407, 422 (2008) (noting the consistent approach of measuring the objective indicia of consensus); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (noting 30 states that had formally barred the death penalty at the time of *Atkins*—either generally or specifically for the intellectually disabled—and that additional states “continue[d] to authorize executions,” had not performed an execution in decades, which meant

“there [was] little need to pursue legislation barring the execution of the mentally retarded in those States.”); *Hall v. Florida*, 134 S. Ct. 1986 (2014) (noting long-term disuse coupled with executive action counted against the permissibility of a challenged punishment practice placed states “on the abolitionist side of the ledger”); *Graham v. Florida*, 560 U.S. 48 (2010) (finding consensus where thirteen jurisdictions prohibited life without parole for non-homicide juvenile offenses, and thirty-seven jurisdictions that rarely imposed it).

To the extent that the question presented in this case concerns *a process* rather than a categorical bar, the Court has made clear that the State’s argument “on this score [is] weaker than the one we rejected in *Graham*.” *Miller v. Alabama*, 567 U.S. 460, 482-83 (2012) (noting that the bar is lower where the decision “does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process...before imposing a particular penalty.”).

II. THE VAST MAJORITY OF JURISDICTIONS HAVE EITHER REJECTED CAPITAL PUNISHMENT ENTIRELY OR RESERVED THE DEATH PENALTY FOR THOSE INSTANCES IN WHICH THE PUNISHMENT IS CONFIRMED BY A UNANIMOUS JURY

Review of the “objective indicia of society’s standards, as expressed in legislative enactments and state practice with respect to executions,”

Kennedy, 554 U.S. at 408, reveals a growing consensus against the death penalty.

Of the fifty-two jurisdictions in the United States (fifty states, the District of Columbia, and the Federal government), the death penalty has essentially been abandoned or is in disuse in thirty (30) jurisdictions, and is now restricted to jury-sentencing in an additional eighteen (18).

This process reflects the broad evolution of a civilized society and a transformative movement that brings us closer to our founding ideals.

A. Thirty-Five Jurisdictions Have Either Removed the Death Penalty Entirely Or Exhibit Long Term Disuse.

Thirty-five jurisdictions have either removed the death penalty as a possible punishment or exhibit constitutionally significant long-term disuse. In their dissent in *Glossip v. Gross*, Justices Breyer and Ginsburg noted that there were “30 States have either formally abolished the death penalty or have not conducted an execution in more than eight years.” *Glossip v. Gross*, 135 S. Ct. 2726, 2773 (Breyer, J., Ginsburg, J., dissenting). The numbers are even more significant today, with twenty jurisdictions having abolished the death penalty altogether, and 15 states have no executions since 2010. California (2006); Colorado (1997); **Indiana (2009)**; Kansas (no executions since the death penalty was reinstated in 1976); **Louisiana (2010)**; Montana (2006); **Nebraska (1997)**; Nevada (2006); New Hampshire (no executions since the death penalty was reinstated in 1976); North Carolina

(2006); Oregon (1997); Pennsylvania (1999); **Tennessee (2009); Utah (2010); Washington (2010);** Wyoming (1992).²

1. Twenty jurisdictions do not have the death penalty.

Nineteen states³ plus the District of Columbia do not have the death penalty.⁴ Seven of these states have rejected capital punishment in the past ten years: New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013); Delaware (2016).

² See DPIC, Number of Executions by State and Region Since 1976, online at <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>. States in bold were not listed in the *Glossip* opinion. Arkansas is the only state listed in that opinion that since used the death penalty.

³ The following jurisdictions have no death penalty: Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

⁴ The death penalty is also prohibited under the constitutions of Puerto Rico and the Commonwealth for the Northern Mariana Islands. See P.R. Const. Art. II § 7 (“The death penalty shall not exist.”); C.N.M.I. Const. Art. I § 4(i) (“Capital punishment is prohibited.”). In Guam and the U.S. Virgin Islands, the death penalty is not a possible sentence. See, e.g., 9 G.C.A. § 16.39(b) (punishment for aggravated murder is life); 14 V.I. C. § 923(a) (providing for life in prison as punishment for murder).

2. *Four additional jurisdictions have suspended the death penalty and exhibit long-term disuse.*

As the Court observed in *Hall*, states that have suspended use of the death penalty, coupled with long-term disuse are similar to those that have abolished the punishment. *Id.* at 1997 (placing “on the abolitionist side of the ledger” “Oregon, which has suspended the death penalty and executed only two individuals in the past 40 years”).

Four jurisdictions—Colorado,⁵ Oregon,⁶ Pennsylvania,⁷ and Washington⁸—have moratoria in place, suspending use of the death penalty, and a long history of disuse consistent with the measure the Court used in *Hall*. Colorado has executed one individual since 1967. Oregon has executed two individuals since 1962—both were volunteers. Pennsylvania has executed only three individuals since 1962—each was a volunteer. Washington has executed five individuals since 1963 but none since

⁵ See Governor John W. Hickenlooper, Executive Order D-2013-006, May 22, 2013 *available at* <https://deathpenaltyinfo.org/documents/COexecutiveorder.pdf>.

⁶ See Governor John Kitzhaber, Executive Order, November 22, 2011, *available at* <https://deathpenaltyinfo.org/gov-john-kitzhaber-oregon-declares-moratorium-all-executions>. Governor Kate Brown has continued this moratorium.

⁷ See Governor Tom Wolf, Memorandum of Moratorium, February 13, 2015.

⁸ See Governor Inslee, Statement of February 11, 2014.

2010.⁹ And indeed, repeal legislation supported by the Attorney General and Governor, passed the Senate and the House Judiciary Committee in Washington this year, and missed passing the House when the shortened session ended.¹⁰

3. *Six Additional Jurisdictions Exhibited Have Constitutionally Significant Long-Term Disuse and no Expected Use*

At least six states have exhibited long-term disuse.

i. New Hampshire. Though it retains the death penalty by statute, New Hampshire has not performed an execution in 86 years, and has not sentenced a person to death in ten years.

ii. Wyoming has executed one person in the last 50 years. Wyoming has no person on death row

⁹ All data concerning the date of last execution and the number of executions is drawn from The Espy File, which catalogs all executions in the United States between 1608 and 2002. M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608–2002: The ESPY File*, DEATH PENALTY INFO. CTR., available at <https://www.deathpenaltyinfo.org/documents/ESPYstate.pdf>. Counsel also draws from the searchable database for all executions between 1976 and the current date. *Executions in the U.S. 1608–2002*, DEATH PENALTY INFO. CTR., available at <https://www.deathpenaltyinfo.org/views-executions>.

¹⁰ See Rachel La Corte, *Washington Senate Passes Bill to Abolish Death Penalty*, The Seattle Times, February 14, 2018, available at <https://www.seattletimes.com/seattle-news/politics/washington-senate-passes-bill-to-abolish-death-penalty/>.

has not sentenced a person to death in more than ten years.

iii. Kansas, as the *Hall* Court noted, “has not had an execution in almost five decades.” *Hall*, 134 S. Ct. at 1997, and has only sentenced two people to death in the last five years.

iv. Idaho has executed two offenders in the last fifteen years, and has only sentenced one person to death in the last five years.

v. South Dakota has three people on its row has only sentenced two people to death in the last five years.

vi. Kentucky has executed three individuals since 1968 and has only sentenced one person to death in the last five years.

Each of these states require jury sentencing. See Kan. Stat. Ann. § 21-6617 (Lexis 2018); Ky. Rev. Stat. § 532.025 (Lexis 2018); N.H. Rev. Stat. Ann. §630:5 (Lexis 2017); S.D. Codified Laws § 23A-27A-2 (Lexis 2017); Wyo. Stat. § 6-2-102 (Lexis 2017); Idaho Code Ann. §19-2515 (Lexis 2017).

4. Five Additional Jurisdictions Have Not Used the Death Penalty For Ten Years.

Five additional jurisdictions have not executed anyone for over ten years. California (2006); Montana (2006); Nebraska (1997); Nevada (2006); North Carolina (2006).

B. The Vast Majority Of Jurisdictions Are Part of A Trend That Requires A Jury To Decide Whether A Person Lives Or Dies

1. In Twenty-Four Jurisdictions That Authorize Capital Punishment, A Death Sentence May Now only be imposed by a Jury.

In addition to the six jurisdictions identified above, eighteen (18) additional jurisdictions that authorize the death penalty require a unanimous jury. 1) Alabama, Ala. Stat. Ann. 13A-5-46; 2) Arizona, Ariz. Rev. Stat. Ann. §13-751(F) (Cum. Supp. 2017); 3) Arkansas, Ark. Code Ann. § 5-4-603; 4) California, Cal. Penal Code § 190.3 (Deering); 5) Federal, 18 U.S.C.S. § 3593; 6) Florida, Fla. Stat. Ann. § 921.141; 7) Georgia, Ga. Code Ann. § 17-10-2 (Lexis 2017); 8) Louisiana, La. C. Cr. P. Art. 905.1 et seq.; 9) Mississippi, Miss. Code Ann. § 99-19-101; 10) Nevada, Nev. Rev. Stat. Ann. § 200.030; 11) North Carolina, N.C. Gen. Stat. § 15A-2000 (Lexis 2017); 12) Ohio, Ohio Rev. Code Ann. § 2929.03; 13) Oklahoma, 21 Okl. St. § 701.11; 14) South Carolina, S.C. Code Ann. § 16-3-20; 15) Tennessee, T. C. A. § 39-13-204; 16) Texas, Tex. Crim. Proc. Code Ann. § 37.071; 17) Utah, U.C.A. § 76-3-206; 18) Virginia, Va. Code Ann. § 19.2-264.4.

2. There is a strong trend towards limiting the death determination to a jury.

In this case, evidence of consensus is marked not just by the overwhelming number of states that have either rejected the death penalty outright or required unanimous jury sentencing, but the unidirection of the trend. *See Roper v. Simmons*, 543

U.S. 551 (2005) citing *Atkins v. Virginia*, 536 U.S. 304 (2002) (noting the special relevance of the trend toward abolition). While this Court in 1995, in *Harris v. Alabama*, 513 U.S. 504 (1995) held that the imposition of a death sentence by an elected judge did not violate the Eighth Amendment—as it upheld the execution of intellectually disabled and the execution of juveniles in 1989¹¹—the standards of decency have evolved, and Justice Stevens’ dissent is more apt today than it was then. *Harris v. Alabama*, 513 U.S. at 526 (“To permit the State to execute a woman in spite of the community’s considered judgment that she should not die is to sever the death penalty from its only legitimate mooring.”).

Indeed, for Eighth Amendment purposes—the trend is an important component. Florida, Delaware and Alabama all—in the last three years—rejected judge sentencing in capital cases. The Delaware Supreme Court rejected judge sentencing in 2016. *Rauf v. State*, 145 A. 3d 430 (Del. 2016).

In 2017, Florida passed a new capital sentencing provision that requires a unanimous jury to find beyond a reasonable doubt the existence of an aggravating circumstance, to weigh aggravators and mitigators and to determine whether death is the appropriate punishment. See SB 280 (Fla. 2017) (amending Section 921.141 of the Florida Statutes to

¹¹ See *Penry v. Lynaugh*, 492 U.S. 392 (1989) overturned by *Atkins v. Virginia*, 536 U.S. 304 (2002); *Stanford v. Kentucky*, 492 U.S. 361 (1989), overturned by *Roper v. Simmons*, 543 U.S. 551 (2005).

require a unanimous jury verdict); *Hurst v. State*, 202 So. 3d 40, 53-54 (Fla. 2016) (“We also conclude that, just as elements of a crime must be found unanimously by a Florida jury, all these findings necessary for the jury to essentially convict a defendant of capital murder—thus allowing imposition of the death penalty—are also elements that must be found unanimously by the jury.”).

In 2017, Alabama became the forty-eighth jurisdiction to eliminate judge sentencing. Alabama eliminated judicial override and now requires a jury’s vote of 10-2, prohibiting a judge from imposing a death sentence without a jury sentence. Ala. Stat. Ann. 13A-5-46.

C. Less Than A Handful Of Jurisdictions Permit A Death Sentence To Be Imposed By A Judge, And The Number Of Judge-Death Sentences Is Minimal

1. *Only four jurisdictions nationwide currently permit a death sentence to be imposed where a sentencing jury has not concluded the sentence is warranted*

Currently, only four of fifty-two jurisdictions nationwide permit a death sentence to be imposed where a sentencing jury has not unanimously concluded the sentence is warranted. Those states are Indiana, Nebraska, Missouri and Montana.

One of these states—Montana—is functionally abolitionist because no executions in the last ten years and no death sentences in the last 20. *See Hall*, 134 S.Ct. at 1997 (counting Oregon as abolitionist

because it has suspended the death penalty and executed only two individuals in fifty years). Nebraska's law is an extreme outlier in that it places the death sentence determination exclusively in the hands of a three-judge panel, Neb. Rev. Stat. § 29-2522. It has hardly been used, with only three death sentences and no executions in the last twelve years.

Missouri and Indiana authorize a judge to impose a death sentence but only when a jury has deadlocked during its penalty deliberations. Mo. Rev. Stat. § 565.030 (Lexis 2018); Ind. Code Ann. § 35-50-2-9 (Burns, Lexis Advance 2018). It is significant to note that in terms of jury verdicts, Missouri has not had a single jury death sentence in the last four years, and Indiana has only had one. In Missouri, the last two death sentences were judge imposed, raising additional constitutional concerns. Valerie P. Hans, John Blume, et al., *The Death Penalty: Should the Judge or the Jury Decide Who Dies?* 12 Journal of Empirical Legal Studies, 70-99 (2015) ("Moreover, the disproportionate rate at which judges, compared to juries, impose death sentences raises serious Eighth Amendment objections.").

As in *Hall*, which addressed procedures adopted by three states, the scarcity of state laws permitting capital sentencing without a unanimous jury penalty verdict is "strong evidence of consensus that our society does not regard this [procedure] as proper or humane." 134 S.Ct. at 1998; *see also Coker v. Georgia*, 433 U.S. 584, 596 (1977) (death penalty for rape of an adult woman held unconstitutional, in

part, because the nation’s collective judgment on the penalty “obviously weigh[ed] very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman”).

2. The Number of Individuals Under A Judge-Imposed Death Sentence Is Less Than The Number This Court Found Dispositive in Graham v. Florida

In *Graham v. Florida*, this Court found that a consensus when there were “123 juvenile non-homicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. ... The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia.” *Graham*, 560 U.S. at 64.

The number of individuals under a judge-imposed death sentence is less than the number this Court found dispositive in *Graham*. Here, eight states have a total of 102 individuals under judge-imposed death sentences. Florida, Missouri, and Montana each have two individuals under a judge-imposed death sentence. Idaho and Indiana each have five individuals under a judge imposed sentence. Nebraska has eleven defendants under a three-judge death sentence. Alabama (34) and Arizona (40) both have replaced judge-based sentencing with jury sentencing. Significantly, the vast majority of these judge-sentenced condemned prisoners were sent to death row years if not decades ago, before the practice was abandoned.

Not only is the number of states that permit judge death-sentencing lower than this Court found dispositive in *Graham*, but the number of sentences at issue is considerably lower. And the majority of jurisdictions from which these sentences arise have themselves abandoned the practice. The judge-imposed sentence in this case is an anachronistic vestigial process from a period from which the country has evolved.

III. JUDGE-IMPOSED DEATH SENTENCES FAIL TO REFLECT THE COMMUNITY CONSENSUS AND ARE NOT SUFFICIENTLY RELIABLE TO COMPLY WITH THE EIGHTH AMENDMENT

In addition to evaluating the community consensus, the Court must also exercise its “own judgment ... on the question of the acceptability of the death penalty under the Eighth Amendment.” *Hall v. Florida*, 134 S.Ct. at 2000, quoting *Coker*, 433 U.S. at 597. Judicially-imposed death sentences, in the absence of unanimous jury agreement, raise concerns. *See also Middleton v. Florida*, Nos. 17-6580, 17-6735, 2018 U.S. LEXIS 1511, at *1 (Feb. 26, 2018) (Breyer, J.) (“In my view, “the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.” *Id.*, at 619, 122 S. Ct. 2428, 153 L. Ed. 2d 556.”).

A. Juries Play An Important Role In Death Penalty Process.

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). Whether a defendant is a future danger, her potential for rehabilitation or redemption, whether the circumstances of her life deserve leniency or mercy, depends upon the full conscience of the entire 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.”).

“Capital punishment is an expression of society’s moral outrage at particularly offensive conduct,” *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), and a sentence of death thus “expresses the community’s judgment that no lesser sanction will provide an adequate response to the defendant’s outrageous affront to humanity.” *Harris v. Alabama*, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting and citing *Gregg*, 428 U.S. at 184). 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 v. Arizona*, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring in judgment); see also *Woodward v. Alabama*, 134 S.Ct. 405, 409 (2013) (Sotomayor, J., dissenting from denial of certiorari) (noting that “[b]y permitting a single trial judge’s view to displace that of a jury representing a cross-section of the community, Alabama’s sentencing scheme has led to curious and potentially arbitrary outcomes”).

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 v. Illinois*, 391 U.S. 510, 519 n.15 (1968). This process requires full engagement and thorough deliberation. See Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 205 (1994) (“Abolishing the unanimous verdict would weaken the conversations through which laypersons educate one another about their common sense of justice.”). Accordingly, a judge imposed sentence is less likely to “reflect a community-based judgement that the [death] sentence constitutes proper retribution”—as is required by the Eighth Amendment. *Schriro v. Summerlin*, 542 U.S. 348, 360 (2004) (Breyer, J., dissenting).

B. Juries Protect Against Unreliable Death Sentences

In exercising its independent judgment, this Court, in *Atkins v. Virginia*, noted that the

intellectually disabled were more vulnerable to wrongful execution. 536 U.S. 304, 321 (2002) (“Mentally retarded defendants in the aggregate face a special risk of wrongful execution.”); *see also Hall v. Florida, supra*, (noting procedures increased likelihood of wrongful execution). State death penalty schemes comport with the Eighth Amendment only if they provide sufficient protections against unreliable capital sentences. *Beck v. Alabama*, 447 U.S. 625, 637 (1980); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Gregg v. Georgia*, 428 U.S. 153, 195 (1976).

A jury’s guilty verdict does not necessarily mean each member is *certain* of the defendant’s guilt—some residual doubt might remain. As this Court has explained, “residual doubt . . . refer[s] to doubts that may have lingered in the minds of the jurors who were convinced of [the defendant’s] guilt beyond a reasonable doubt but who were not absolutely certain of his guilt.” *Franklin v. Lynaugh*, 487 U.S. 164, 187 (1988). Residual doubt is the most significant reason jurors vote for life sentences. Mulvaney & Chamblee, *supra*, at 108 (citing Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998) (explaining data showing that residual doubt is the most influential factor in jury votes for life); Susan D. Rozelle, *The Principled Executioner: Capital Juries’ Bias and the Benefits of True Bifurcation*, 38 Ariz. St. L.J. 769, 775 (2006)

(describing residual doubt as “the most potent mitigator in capital case.”).

Given the finality of the death penalty, there is an important interest in giving a jury the power to consider questions of residual doubt. *Heiney v. Florida*, 469 U.S. 920, 921—22 (1984) (Marshall, J., dissenting from denial of certiorari) (“The belief that [the death penalty] is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice.”).

As it turns out, residual doubt is oftentimes well-founded. Research demonstrates that non-unanimous jury and judicial override cases are more likely than unanimous jury sentences to produce death row exonerations. *Mulvaney & Chamblee*, *supra*, at 112. Researchers from the Capital Jury Project compared deliberation process for states that had hybrid sentencing statutes like Alabama, Florida, and Indiana with states that required jury sentencing, and determined that “the punishment decisions of jurors in hybrid states were fraught with less seriousness and conscientiousness owing to jurors recognition that their punishment decision was not final.” William J. Bowers, Wanda D. Foglia et. al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 Wash & Lee L. Rev. 931, 953-954 (2006) (“Where their sentence determination was merely a recommendation, they more often denied responsibility for the defendant's punishment, they more often failed to understand jury instructions,

and they devoted less time and effort to deciding the sentence..”).

Here, in petitioner’s case, the elected judge disregarded the jury’s recommendation altogether. This Court has especial awareness that even Article III judges, immune from the pressures of electoral politics, can make mistakes.

C. Juries Are A Fundamental Protection Against Prejudice

The jury is to be “a criminal defendant’s fundamental ‘protection of life and liberty against race or color prejudice.’” *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 868 (2017). Death penalties imposed in the absence of unanimous jury agreement risk the marginalization of racial minorities serving on the jury. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), this Court defended race-based outcomes by denoting that a “capital sentencing jury representative of a criminal defendant’s community assures a diffused impartiality.” *Id.* at 310. As the Court explained: “[i]ndividual jurors bring to their deliberations ‘qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. ... it is the jury’s function to make the difficult and uniquely human judgments that defy codification and that ‘buil[d] discretion, equity, and flexibility into a legal system.’” *Id.* at 311.

The replacement of diverse juries with judge sentencing not only does harm to the defendant, but it undermines the community’s confidence in the

process. If minority communities believe “their voices are being silenced in the jury room,” this jeopardizes their confidence—and willingness to participate—in the judicial process. James Kachmar, *Comment, Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials*, 28 Pac. L.J. 273, 305 (1996).

D. Juries Enhance Confidence In The Administration Of Capital Punishment

As this Court has made clear, the justice system suffers the consequences of the risks of capital punishment: “When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint.” *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). Indeed, the prohibition against cruel and unusual punishments is borne from, and responsive to an evolving moral compass:

Perhaps the central reason that public standards and opinion should influence Eighth Amendment jurisprudence is that the legal system must maintain public confidence in the rule of law.

Jason A. Cairns and Jonathan J. Koehler, *Cruel And Unusual Punishments: Cruel and Unusual Punishments: A Comparison Of Public And Judicial Opinion*, 54 Jurimetrics J. 109 (Winter 2014) citing David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1552 (1992) (noting that “[m]ore than any

other amendment, perhaps, construction of the Eighth Amendment has depended on modern sensibilities"); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 872 (1997) ("The lack of public confidence in the legal system is creating a number of problems for lawyers, judges, and the legal system. The most direct consequence is difficulty securing the acceptance of legal decisions."); *see also* Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1, 24 (2007) at 31 ("When the law is perceived as 'doing justice,' assigning liability in proportion to the moral blameworthiness of the punished offender, it becomes more effective at controlling crime.").

Confidence in the administration of capital punishment is a core requirement of the criminal justice system. In *Gregg v. Georgia*, the Court found that the death penalty served a purpose of ensuring confidence in the administration of justice: "When 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." *Gregg v. Georgia*, 428 U.S. 153, 225 (1976). But this is no longer clear. Instead, random judge imposed capital punishment undermines confidence in the administration of justice. 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.

IV. EVOLVING STANDARDS OF DECENCY NOW PROHIBIT JUDGE-BASED DEATH SENTENCES

The core values underlying the Sixth and Eighth Amendments, and indeed the Constitution itself, fuse to reject execution based upon the finding of a government magistrate.

The right to trial by jury is at the very heart of our compact for self-governance because of the legitimacy it confers on the state's power to punish. If the friends and the foes of the Constitutional project at Philadelphia agreed upon nothing else, there was no doubt that they "concur at least in the value they set upon the trial by jury; or if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government." The Federalist No. 83, at 521 (Alexander Hamilton).

The interconnection of the right to trial by jury and the right to be free from cruel and unusual punishment are fundamental principles of our constitutional democracy, and their importance extends beyond the protections they afford to criminal defendants. These rights converge to define the outer bounds of government power as the reasoned will of the people.

The Eighth Amendment's prohibition against cruel and unusual punishments is a substantive

protection that applies in full force retroactively because a punishment must comport with standards of decency at the time it is carried out. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), when the Court banned mandatory death sentences, the decision applied both respectively and prospectively. In *Lockett v. Ohio*, 438 U.S. 586 (1978), when the Court held that the sentencer must be permitted to consider mitigating circumstances before imposing the death penalty, the decision applied prospectively and retroactively. Similarly, the protections provided in *Graham v. Florida*, 568 U.S. 48 (2010) (holding life sentences for non-homicide offenses unconstitutional), and *Miller v. Alabama*, 567 U.S. 460 (2012) (holding mandatory life sentences for homicide offenses) have been deemed retroactive.

In *Montgomery*, Louisiana argued that *Miller v. Alabama* had not announced a substantive rule but rather imposed a different procedure for determining whether a sentence must be served without the possibility of parole. The Court rejected the proposition. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734-35 (2016) citing *Mackey v. United States*, 401 U.S. 667, at 692, n. 7 (1971) (opinion of Harlan, J.) (“Some rules may have both procedural and substantive ramifications, as I have used those terms here.”). That the standards of decency have evolved, requiring a full jury not a judge to impose a death sentence is exactly such a rule—that has substantive significance and procedural effect. Regardless of whether the sentence was unconstitutional when it was imposed, the execution of that sentence today violates the evolving standards of decency.

CONCLUSION

For the forgoing reasons, amicus respectfully suggests that the Court grant certiorari in this case and consider whether evolution in the standards of decency that mark a civilized society render the execution of a death sentence imposed by an elected judge over the vote of a jury constitutes cruel and unusual punishment.

Respectfully submitted,

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