No. 16 -7576

In The
Supreme Court of the United States

EDMUND ZAGORSKI,
Petitioner,
v.
STATE OF TENNESSEE,
Respondent.

On Petition For A Writ Of Certiorari To The Tennessee Court of Criminal Appeals, Middle Division

BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The Center for Constitutional Rights (CCR) is a national non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Among other areas, CCR has focused on the human rights implications of the United States' use of the death penalty. It is CCR's position that the death penalty violates the Eighth and Fourteenth Amendments to the United States Constitution and international human rights law.[1]

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[1] The parties have consented to the filing of this brief, and their written consent is being filed with the Clerk of this Court. No counsel for any party to this case authored this brief in whole or in part, and no person or party, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

For well over a century, this Court has recognized the fundamental right to life under the Fourteenth Amendment, *see, e.g.*, *County of Sacramento v. Lewis*, 523 U.S. 833, 856-58 (1998) (Kennedy, J., concurring). But it has never squarely addressed whether the death penalty violates this right. This Court should do so now and hold that the death penalty *per se* deprives the right to life in violation of substantive due process.[2]

In conducting this inquiry, this Court first looks to history and tradition. Although the death penalty once enjoyed widespread acceptance, history and tradition now reveal precisely the opposite, as gauged by the diminishing number of states that retain the death penalty as well as the rarity with which death sentences are imposed and executions are carried out. *See, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2772-76 (2015) (Breyer, J., dissenting). The death penalty has lost the acceptance it once enjoyed.

Second, this Court considers whether the deprivation violates human dignity. As demonstrated by a long line of precedents in the LGBT rights and death penalty contexts, the punishment of death surely deprives dignity: by denying "the right to have rights," it is the ultimate humiliation. *Furman v.*

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[2] *Amicus Curiae* agrees with Petitioner that the death penalty *per se* also violates the Eighth Amendment. This brief does not address this issue.

Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

Lastly, this Court considers whether the death penalty is narrowly tailored to serve a compelling interest. To the extent the death penalty ever served the ends of deterrence or retribution, it no longer does so. Arbitrariness, delay, and unreliability deprive the death penalty of any compelling interest. *See, e.g.*, *Glossip*, 135 S. Ct. at 2756-72 (Breyer, J., dissenting).

Our Nation's growing opposition to the death penalty is bolstered by an overwhelming rejection of the death penalty worldwide. Over two-thirds of the world community has come to understand the death penalty as a violation of the fundamental right to life. This Court should follow the insight of the civilized world and abolish the death penalty.

ARGUMENT

I. THE DEATH PENALTY DEPRIVES THE FUNDAMENTAL RIGHT TO LIFE IN VIOLATION OF SUBSTANTIVE DUE PROCESS.

The fundamental nature of the right to life is not open to serious debate. It is explicit in the Constitution's Due Process Clauses, which reach back to Magna Carta. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015); *id.* at 2632 (Thomas, J., dissenting). The right to life's foundational pedigree derives from the "irreducible perception that life and the organic base on which it subsists are somehow sacred; it is . . . the primordial experience of being alive, of experiencing elemental sensation of vitality

and of fearing its extinction that generates the sense of sanctity that attaches to the living human being." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-12, at 1371 (2d ed. 1988) (citation omitted). As this Court has observed in a range of contexts for well over a century, the right to life is "the right which comprehends all others"; it is, quite literally, "the right to have rights." *Furman*, 408 U.S. at 290 (Brennan, J., concurring); *Screws v. United States*, 325 U.S. 91, 133 (1945) (Rutledge, J., concurring); *see, e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 409 (1986) (acknowledging "fundamental right to life" in Eighth Amendment context); *Tennessee v. Garner*, 471 U.S. 1, 9, 22 (1985) (acknowledging "suspect's fundamental interest in his own life" in Fourth Amendment context); *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (acknowledging right to life as a "fundamental human right[]" in Sixth Amendment context); *United States v. Cruikshank*, 92 U.S. 542, 554 (1875) (acknowledging right to life as a "fundamental right[] which belong[s] to every citizen as a member of society" in Fourteenth Amendment context); *accord. Com. v. O'Neal*, 327 N.E.2d 662, 668 (Mass. 1975), *supplemented*, 339 N.E.2d 676 (Mass. 1975); *see also* Daniel G. Bird, Note, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329, 1351-56 (2003) (citing cases).

Under the Fourteenth Amendments' guarantee of substantive due process, the State cannot deprive the fundamental right to life unless such action is narrowly tailored to achieve a compelling purpose. *See, e.g.*, *Lewis*, 523 U.S. at 856-58 (Kennedy, J., concurring) (concluding that motorcycle passenger

accidentally killed by police had "interest sufficient to invoke [substantive] due process"—i.e., the "interest in life which the State, by the Fourteenth Amendment, is bound to respect"—but that such interest was outweighed by "necessities of law enforcement"). For the reasons that follow, the death penalty deprives criminal defendants of the fundamental right to life in violation of substantive due process.[3]

A. This Court Has Not Addressed Whether the Death Penalty Deprives the Fundamental Right to Life.

This Court has never squarely addressed whether the death penalty deprives criminal defendants of the fundamental right to life in violation of substantive due process. In *Gregg v. Georgia*, this Court considered whether "the punishment of death for the crime of murder is, under all circumstances, 'cruel and unusual'" in violation of the Eighth Amendment as applied to the States by the Fourteenth Amendment.

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[3] Incarceration, by contrast, does not *per se* violate substantive due process. Although incarceration deprives the fundamental right to liberty, it is narrowly tailored to achieve a compelling purpose, namely, deterrence and retribution. *See, e.g.*, *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) ("A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution.").

428 U.S. 153, 168 (1976). Significantly, *Gregg* was not a substantive due process decision; it was an Eighth Amendment decision. Indeed, the only mention of due process in *Gregg* relates to the Fifth and Fourteenth Amendments' guarantee of *procedural* due process and this Court's holding in *McGautha v. California* that standardless jury sentencing procedures do not violate this guarantee. *See Gregg*, 428 U.S. at 177, 195 n.47; *McGautha v. California*, 402 U.S. 183, 185-86 (1971) (rejecting procedural due process challenge based on standardless sentencing procedures); *see also Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 276 (1998) (rejecting procedural due process challenge based on inadequate clemency proceedings); *Herrera v. Collins*, 506 U.S. 390, 393 & 407 n.6 (1993) (rejecting procedural due process challenge based on claim of innocence and declining to consider substantive due process challenge).

Although the concepts of cruel and unusual punishment and substantive due process are substantially similar in cases challenging the constitutionality of the death penalty *per se*, they are not the same. Under the Eighth Amendment, the prisoner bears the "heavy burden" of proving that the death penalty is "without justification and thus is . . . unconstitutionally severe." *Gregg*, 428 U.S. at 175, 187. By contrast, "the substantive due process argument is stated in the following manner: because capital punishment deprives an individual of a fundamental right (i.e., the right to life), the State *needs a compelling interest* to justify it." *Furman*, 408 U.S. at 360 n.141 (Marshall, J., concurring) (emphasis added). Critically, the State bears the burden of proving that the death penalty is narrowly tailored to

serve the interests of retribution or deterrence. *See Roper v. Simmons*, 543 U.S. 551, 571 (2005) (noting two penological justifications for the death penalty: "'retribution and deterrence of capital crimes by prospective offenders'") (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 817 (4th ed. 2011) (discussing government's burden of proof); *see also O'Neal*, 327 N.E.2d at 668 ("[I]in order for the State to allow the taking of life by legislative mandate it must demonstrate that such action is the least restrictive means toward furtherance of a compelling governmental end."); *accord.* N.B. Smith, *The Death Penalty as An Unconstitutional Deprivation of Life and the Right to Privacy*, 25 B.C. L. REV. 743, 752 (1984),http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1771&context=bclr.

In assessing whether the death penalty deprives criminal defendants of the fundamental right to life in violation of substantive due process, "history and tradition guide and discipline the [substantive due process] inquiry but do not set its outer boundaries." *Obergefell*, 135 S. Ct. at 2598; *see also Lawrence v. Texas*, 539 U.S. 558, 572 (2003) ("[H]istory and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry.") (quoting *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring)). As this Court's recent precedents make clear, human dignity is also central to the substantive due process inquiry. This searching inquiry "respects our history and learns from it without allowing the past alone to rule the present," for "the nature of

injustice is that we may not always see it in our own times." *Obergefell*, 135 S. Ct. at 2598.

B. History and Tradition Reveal Growing Opposition to the Death Penalty.

History and tradition offer only tentative support for the death penalty. In 1976, this Court stated in *Gregg* that "the imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England." 428 U.S. at 176. But this old road is rapidly aging. By virtually every measure, the death penalty has lost the acceptance it once enjoyed. *See, e.g.*, *Glossip*, 135 S. Ct. at 2772-76; *State v. Santiago*, 122 A.3d 1, 50-53 (Conn. 2015); *cf. Furman*, 408 U.S. at 299 (Brennan, J., concurring) ("[A]lthough the death penalty has been employed throughout our history, in fact the history of this punishment is one of successive restriction.").

Nineteen states have abolished the death penalty, including seven in the past decade.[4] Assuming, as this Court does, that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change," this evolution away from the death penalty is significant. *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315).

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[4] *See States With and Without the Death Penalty*, DPIC, http://www.deathpenaltyinfo.org/states-and-without-death-penalty.

Thirty-one states retain the death penalty, but few states use it with any frequency. As this Court stated in *Lawrence* in the context of same-sex sodomy laws, such a "pattern" or "history of nonenforcement suggests the moribund character" of laws that no longer enjoy support. *Lawrence*, 539 U.S. at 572-73 (citation omitted); *see also Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014) (counting Oregon, which last executed a person in 1997, on the "[abolitionist] side of the ledger"). Indeed, 31 states and three jurisdictions (Federal Government, Military, and District of Columbia) have not carried out an execution in at least ten years.[5]

Although 19 states with the death penalty have imposed the death penalty in the past decade, the number of executions nationwide has steadily declined. In 2016, there were only 20 executions—a 25-year low.[6] With the exception of two executions in Alabama and one each in Florida and Missouri, all of those executions occurred in just two states: Georgia and Texas.[7] Prior years have followed a similar pattern: in 2015, there were 28 executions, all but 2 of which occurred in Florida, Georgia, Missouri, and

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[5] *Executions by State and Year*, DPIC, http://www.deathpenaltyinfo.org/node/5741; *see also Jurisdictions With No Recent Executions*, DPIC, http://www.deathpenaltyinfo.org/jurisdictions-no-recent-executions.

[6] *Execution List 2016*, DPIC, http://www.deathpenaltyinfo.org/execution-list-2016.

[7] *Id.*

Texas; and in 2014, there were 35 executions, all but five of which occurred in the same four states.[8]

This paltry number, alone, suggests a punishment that has lost acceptance, but there is more. Executions overwhelmingly cluster among those states with a history of slavery, racial segregation, and race-conscious criminal justice systems. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 328-34, 343-44 (Brennan, J., dissenting). As the Connecticut Supreme Court recently stated, "The thirteen states that comprised the Confederacy have carried out more than 75 percent of the nation's executions over the past four decades." *Santiago*, 122 A.3d at 52. The fact that "executions are overwhelmingly confined to the South (and states bordering the South)—the very same jurisdictions that were last to abandon slavery and segregation and that were most resistant to the federal enforcement of civil rights norms"—is quite telling. *Id.* at 53 n.86 (citation omitted). A punishment that retains robust support among only a small number of states with a deeply troubling legacy of racial prejudice is a penalty that has lost the support of the Nation.

Add to this a nationwide drop in new death sentences—from modern era highs of more than 300 annually in the mid–1990s to modern era lows of 85

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[8] *Execution List 2015*, DPIC, http://www.deathpenaltyinfo.org/execution-list-2015; *Execution List 2014*, DPIC, http://www.deathpenaltyinfo.org/execution-list-2014.

or fewer since 2011, culminating in an over 40-year low of just 30 death sentences in 2016—together with polling data confirming that a majority of Americans prefer life without the possibility of parole to the death penalty,[9] and it is plain that the death penalty has lost much of the acceptance that it once enjoyed. The death penalty's symphony of support has been reduced to a lonely quartet.

C. The Death Penalty Violates Human Dignity.

As this Court has reiterated in a series of decisions involving the liberty and equality of gays and lesbians, human dignity is central to the substantive due process inquiry. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2608 (state laws denying same-sex couples the fundamental right to marry deprive same-sex couples of "equal dignity" in violation of due process); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (federal Defense of Marriage Act's non-recognition of state-sanctioned same-sex marriages deprived same-sex couples of "dignity conferred by the States" in violation of due process); *Lawrence*, 539 U.S. at 567 (laws criminalizing same-sex sodomy

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[9] *See Death Penalty in 2016: Year End Report,* DPIC, http://www.deathpenaltyinfo.org/YearEnd2016; Betsy Cooper et al., *Anxiety, Nostalgia, and Mistrust: Findings from the 2015 American Values Survey*, PRRI (Nov. 17, 2015), http://www.prri.org/research/survey-anxiety-nostalgia-and-mistrust-findings-from-the-2015-american-values-survey/.

deprived same-sex couples of their "dignity as free persons" in violation of due process).

Like laws depriving gays and lesbians of their dignity, the death penalty violates the dignity of criminal defendants. Indeed, it deprives men and women of not only their liberty and equality rights, but also "the right of life itself"—one which entitles every human being to "respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution." *Screws*, 325 U.S. at 134-35 (Murphy, J., dissenting). The death penalty is the ultimate humiliation, treating people not as "human being[s] possessed of common human dignity," but rather "as nonhumans, as objects to be toyed with and discarded." *Furman*, 408 U.S. at 273 (Brennan, J., concurring); *see also* Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145, 171 (Michael J. Meyer & William A. Parent eds., 1992) (describing dignity as "the right to one's status as a moral being, a right that is implied in one's being a possessor of any rights at all. . . . The possession of such a right is a consequence of one's status as a person . . . .") (citation omitted).

For over forty years, this Court has made dignity the touchstone for gauging who may receive the death penalty, the procedures under which the death penalty may be imposed, and the means by which the death penalty may be carried out. *Compare, e.g., Hall*, 134 S. Ct. at 2001 (rule narrowing class of people exempted from execution based on "intellectual disability" violates "our Nation's commitment to

dignity and its duty to teach human decency as the mark of a civilized world"), *Kennedy v. Louisiana*, 554 U.S. 407, 420, 446-47 (2008) (execution of people who commit non-homicide crimes violates "respect for the dignity of the person"), *Roper*, 543 U.S. at 560, 578-79 (execution of people who are under 18 years old at the time of offense violates "respect [for] the dignity of all persons"), *Atkins*, 536 U.S. at 311, 321 (execution of people with intellectual disabilities violates the "dignity of man"), *Ford*, 477 U.S. at 406, 409-10 (execution of the insane violates "fundamental human dignity"), *and Gregg*, 428 U.S. at 173 (death penalty "must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment'") (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)), *with Furman*, 408 U.S. at 255, 257 (Douglas, J., concurring) (discretionary death penalty statutes are invalid because they are "pregnant with discrimination"—"feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position"), *and with Baze v. Rees*, 553 U.S. 35, 49 (2008) (prohibiting "inhuman and barbarous" methods of execution).

Several former Justices of this Court and at least twenty-six state high court justices have gone further, concluding that the death penalty *per se* is incompatible with human dignity. *Compare Furman*, 408 U.S. at 273 (Brennan, J., concurring) (stating that death penalty is "inconsistent with the fundamental premise of the [cruel and unusual punishments] Clause that even the vilest criminal remains a human being possessed of common human dignity"), *id.* at

371 (Marshall, J., concurring) (stating that "striking down capital punishment" would "recogniz[e] the humanity of our fellow beings"), *Baze*, 553 U.S. at 86 (Stevens, J., concurring) (concluding that death penalty is "patently excessive and cruel and unusual punishment violative of the Eighth Amendment") (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)), *and Callins v. Collins*, 510 U.S. 1141, 1159 (1994) (Blackmun, J., dissenting) (stating that effort to "provide consistency, fairness, and reliability in a capital sentencing scheme" is "so plainly doomed to failure that it—and the death penalty—must be abandoned altogether") (quoting *Godfrey v. Georgia,* 446 U.S. 420, 442 (1980) (Marshall, J., concurring)), *with Santiago*, 122 A.3d at 32 (stating that death penalty was at odds with "dignity reflect[ing] . . . the [n]ation we aspire to be") (quoting *Hall*, 134 S. Ct. at 1992), *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1282-83 (Mass. 1980) (stating that life is "a fundamental right explicitly or implicitly guaranteed by the Constitution" and "the natural right of every man," and rejecting death penalty as "a denial of the executed person's humanity") (quoting *Furman*, 408 U.S. at 290 (Brennan, J., concurring)), *and People v. Anderson*, 493 P.2d 880, 895 (Cal. 1972) (stating that death penalty demeans "the dignity of man, the individual and the society as a whole"); *accord. State v. Santiago*, 49 A.3d 566, 705 (Conn. 2012) (Harper, J., concurring in part and dissenting in part) (arguing that the death penalty is unconstitutional *per se*); *State v. Webb*, 750 A.2d 448, 458 (Conn. 2000) (Katz, J., dissenting) (same); *State v. Ross*, 646 A.2d 1318, 1388 (Conn. 1994) (Berdon, J., dissenting in part) (same); *State v. Kills on Top*, 787 P.2d 336, 355 (Mont. 1990) (Sheehy, J., dissenting)

(same); *State v. Rupe*, 683 P.2d 571, 599 (Wash. 1984) (Dolliver, J., concurring in result) (same); *Hopkinson v. State*, 632 P.2d 79, 199 (Wyo. 1981) (Rose, C.J., dissenting in part and concurring in part) (same); *State v. Dicks*, 615 S.W.2d 126, 142 (Tenn. 1981) (Brock, C.J., concurring in part and dissenting in part) (same); *State v. Pierre*, 572 P.2d 1338, 1357-59 (Utah 1977) (Maughan, J., concurring in part and dissenting in part) (same); *Adams v. State*, 271 N.E.2d 425, 436-42 (Ind. 1971) (DeBruler, J., concurring in part and dissenting in part) (same); *id.* at 444-45 (Prentice, J., dissenting) (same).[10]

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[10] Although all but one of these opinions (in *State v. Pierre*) addressed the dignity of criminal defendants under the Eighth Amendment or state corollary, their discussion of dignity applies with equal force to the Fourteenth Amendment, which shares a longstanding commitment to dignity. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 791-92 (2011) (discussing connection between dignity in the Fourteenth Amendment LGBT rights context and the Eighth Amendment death penalty context); *accord.* Kevin Barry, *The Death Penalty and the Dignity Clauses*, 102 IOWA L. REV. 383, 387 (2017); Robert Smith & Zoë Robinson, "Constitutional Liberty and the Progression of Punishment," at 146-47 (Oct. 26, 2016) (Cornell Law Review, Vol. 102, forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2859894; *cf. United States v. Quinones*, 205 F. Supp. 2d 256, 257, 268 (S.D.N.Y. 2002), *rev'd*, 313 F.3d 49 (2d Cir. 2002) (federal death penalty deprives innocent people of right to life in violation of substantive due process); *Com. v. O'Neal*, 339 N.E.2d 676, 687-88 (Mass. 1975) (Tauro, C.J., concurring) (mandatory death penalty for rape-murder deprives fundamental right to life in violation of substantive due process).

The death penalty was once widely considered compatible with human dignity. Its practice "was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative." *Furman*, 408 U.S. at 305 (Brennan, J., concurring); *see id.* at 335 (Marshall, J., concurring) (discussing "inadequate and insecure" county jails). But "time works changes, brings into existence new conditions and purposes"—"new insights." *Obergefell*, 135 S. Ct. at 2596; *Furman*, 408 U.S. at 264 (Brennan, J., concurring) (quoting *Weems v. United States*, 217 U.S. 349, 373 (1910)). Over the past two decades, "[s]uccessive restrictions, imposed against the background of a continuing moral controversy, have drastically curtailed the use of [the death penalty]. . . . Rather than kill an arbitrary handful of criminals each year," nearly all States now "confine them in prison." *Furman*, 408 U.S. at 305 (Brennan, J., concurring). This "new insight reveals discord between the Constitution's central protections and a received legal stricture," namely, the right to life and the death penalty exception. *Obergefell*, 135 S. Ct. at 2598. The death penalty, "once thought necessary and proper in fact serve[s] only to oppress," and, as a result, "stands condemned as fatally offensive to human dignity." *Lawrence*, 539 U.S. at 579; *Furman*, 408 U.S. at 305 (Brennan, J., concurring).

D. The Death Penalty is Not Narrowly Tailored to Serve a Compelling State Interest.

To the extent that the death penalty was ever narrowly tailored to serve a compelling state

interest—namely, deterrence and retribution—it serves no such purpose now. Arbitrariness, delay, and unreliability deprive the death penalty of any compelling interest. *See, e.g.*, *Glossip*, 135 S. Ct. at 2756-72 (Breyer, J., dissenting); *Santiago*, 122 A.3d at 57-73. They convincingly demonstrate the death penalty's inherently flawed administration—one that can never be remedied so long as prosecutors and juries retain discretion, procedural due process is required, and human beings remain fallible.

1. Arbitrariness

The death penalty does not serve a compelling interest because the individualized process of selecting people for death is hopelessly arbitrary. Former Supreme Court Justices and state high courts have gone further, suggesting an arbitrariness that is not random: the disproportionate selection of people for death based on race. *See, e.g.*, *Santiago*, 122 A.3d at 66-67 (implicitly rejecting *McCleskey* and holding that death penalty "fails to achieve its retributive goals" because, *inter alia*, "the selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias"); *id.* at 68-69 (citing opinions of former Supreme Court Justices Douglas, Marshall, Brennan, Blackmun, and Stevens and legal scholarship regarding racial discrimination in administration of death penalty); *Watson*, 411 N.E.2d at 1283 ("[E]xperience has shown that the death penalty will fall discriminatorily upon minorities, particularly blacks."); CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT 353–54 n.54 (3d ed. 2012) ("[U]nconscious operation of irrational sympathies and antipathies including racial upon jury

decisions and (hence) prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable . . . .") (quoting memorandum from Justice Scalia to Justice Marshall); Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1794 (1970) ("As long as class and racial prejudice is prevalent, imposition of the death penalty probably will not simply be random but discriminatory.").

A punishment that is inherently arbitrary—or worse, discriminatory—obviously does not deter offenders. *See Santiago*, 122 A.3d at 60 (discussing lack of deterrent value of death penalty, given "the sheer rarity with which death sentences are imposed and carried out"). Retribution is also not served by the death penalty, which gives "just deserts" to only some offenders, provides closure to only some family members, and expresses society's outrage for only some murders. Such results do not restore balance to the moral order; they perpetuate imbalance. *See id.* at 66.

2. Delay

A second reason that the death penalty does not serve a compelling state interest is the prolonged and inevitable delay between sentencing and execution. Such delay deprives the death penalty of any deterrent effect. *See, e.g.*, *Glossip*, 135 S. Ct. at 2767 (Breyer, J., dissenting); *Santiago*, 122 A.3d at 58. Would-be offenders face not a swift and certain execution, but instead what one federal district judge has called "life imprisonment with the remote possibility of death." *Jones v. Chappell*, 31 F. Supp.

3d. 1050, 1062 (C.D. Cal. 2014), *rev'd*, *Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015). This is hardly a deterrent. Retribution is also not served. Decades after the crime, community outrage has subsided as the community has changed. *See Glossip*, 135 S. Ct. at 2769. Family members seeking closure have instead been retraumatized during protracted legal proceedings that force them to relive their loved one's murder. *See Santiago*, 122 A.3d at 64. And the offender who once "deserved" death "may have found [herself] a changed human being"—like Kelly Gissendaner, a once-vengeful spouse who died a woman of faith seeking and preaching forgiveness. *Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting).[11]

Several state high courts and former Supreme Court Justices have gone further, arguing that prolonged death row delay is literally "too much" retribution because of the "brutalizing psychological effects of impending execution," namely, prolonged solitary confinement and the "uncertainty as to whether a death sentence will in fact be carried out." *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting); *Anderson*, 493 P.2d at 895; *accord. Watson*, 411 N.E.2d at 1283.

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[11] *See* Tracy Connor et al., *Georgia Woman Kelly Gissendaner Sings "Amazing Grace" During Execution*, NBC NEWS, Sept. 30, 2015, http://www.nbcnews.com/storyline/lethalinjection/pope-urges-halt-execution-georgia-woman-kelly-gissendaner-n43556.

3. Unreliability

A third reason that the death penalty does not serve a compelling interest is its inherent unreliability. Since 1973, 156 people have been exonerated from death row, including six people in 2015.[12] It does not take a mathematical model (though there are some) to conclude from these astonishingly high numbers that "innocent Americans have been and will continue to be executed in the post-*Furman* era." *Santiago*, 122 A.3d at 65; *accord. Callins*, 510 U.S. at 1159 n.8 (1994) (Blackmun, J., dissenting); *see also Glossip*, 135 S. Ct. at 2757-58 (Breyer, J., dissenting) (citing studies).

Killing an innocent person obviously serves no compelling state interest because it is not punishment at all—it is murder, or something "perilously close" to it. *Santiago*, 122 A.3d at 65 (citation omitted). A majority of this Court has therefore concluded that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring). Some authorities have gone further, holding that the substantial risk of executing a legally and factually innocent person is constitutionally intolerable. Among them are multiple former Supreme Court Justices, the Connecticut Supreme Court, and U.S. District Court Judge Jed S. Rakoff, who equated

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[12] *Innocence: List of Those Freed From Death Row*, DPIC, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row.

execution under the Federal Death Penalty Act to "foreseeable, state-sponsored murder of innocent human beings." *Quinones*, 205 F. Supp. 2d at 268; *see, e.g.*, *Baze*, 553 U.S. at 85–86 (Stevens, J., concurring); *Callins*, 510 U.S. at 1158 (Blackmun, J., dissenting); *Santiago*, 122 A.3d at 65.

II. THE WORLD COMMUNITY RECOGNIZES THE DEATH PENALTY AS A VIOLATION OF THE FUNDAMENTAL RIGHT TO LIFE.

Our Nation's lack of support for the death penalty is bolstered by an overwhelming rejection of the death penalty worldwide. *See Lawrence*, 539 U.S. at 576 ("When our precedent has been thus weakened, criticism from other sources is of greater significance."). As of 2015, 102 countries—over half of the world—have abolished the death penalty for all crimes.[13] Add to this the 6 countries that have abolished the death penalty for all "ordinary crimes" and the 32 countries that have not executed anyone over the past decade, and the total number of abolitionist countries is 140, or well over two-thirds of the world.[14] Just 58 countries retain the death penalty, and only 7 countries other than the U.S. use

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[13] *Abolitionist and Retentionist Countries*, DPIC, http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140#Ordinary20crimes.

[14] *Id.*

it with any frequency—China, Iran, Iraq, Saudi Arabia, Pakistan, Sudan, and Yemen.[15]

Importantly, the world community's opinion of the death penalty has not always trended toward abolition. For centuries, world history and tradition pointed in the opposite direction, with "the threat of punishment by death . . . widely accepted as an effective penal weapon of social control." ROGER HOOD & CAROLYN HOYLE, THE DEATH PENALTY, A WORLDWIDE PERSPECTIVE 10 (5th ed. 2015). In early nineteenth century England, for example, 223 crimes were punishable by death. *Id.*

But time works changes. A crucial step on the path toward worldwide abolition took place nearly seventy years ago with the adoption of the 1948 Universal Declaration of Human Rights, which first recognized "the right to life" under international law and "the dignity and worth of the human person." G.A. Res. 217A (III), U.N. Doc. A/810 (1948). Significantly, the Declaration did not expressly forbid—indeed, it did not even mention—the death penalty. *Id.* At that time, the right to life enshrined in the Declaration was generally understood to *permit* the death penalty, and the vast majority of nations that adopted the Declaration employed the death penalty and continued to do so after adoption. *See* HOOD & HOYLE, *supra*, app. 1 at 504-505 (compiling dates of last executions); *accord.* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL

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[15] *Id.*

PUNISHMENT 31 (2003). Two subsequent international treaties carried this understanding forward, explicitly exempting the death penalty from the protection of the right to life. HOOD & HOYLE, *supra*, at 25 (discussing 1950 European Convention on Human Rights and the 1966 International Covenant on Civil and Political Rights).

Notwithstanding international law's tacit approval of the death penalty for certain crimes at the middle of the twentieth century, every Western European nation with the death penalty either suspended or abolished it over the next thirty years. *See* ZIMRING, *supra*, at 29. Notably, each country did so on its own initiative; there was no "serious effort to confront the death penalty in Western democracies as a human rights issue." *Id.* at 31. This new insight eventually came in 1983, when the Council of Europe formally abolished the death penalty in times of peace through Protocol No. 6 of the European Convention on Human Rights, thus providing the "key transition from a right to life that exempts state death penalties to a right to life that condemns state execution." *Id.* at 29; *see also* HOOD & HOYLE, *supra*, at 16, 22 (discussing "revolution" in discourse on death penalty—from an issue "of national criminal justice policy to the status of a fundamental violation of human rights").

In 2003, the Council of Europe went further, abolishing the death penalty "in all circumstances" on grounds that "the right to life is a basic value in a democratic society and . . . the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all

human beings." HOOD & HOYLE, *supra*, at 28 (quoting Protocol No. 13 of the European Convention on Human Rights); *see also* Chapter I, Article 2 of the Charter of Fundamental Rights of the European Union (2000 OJ C364/9), http://www.europarl.europa.eu/charter/pdf/text_en.pdf (stating that "[e]veryone has the right to life" and "[n]o one shall be condemned to the death penalty, or executed").

As a precondition for joining the Council of Europe and the European Union, abolition is now almost universally accepted in the countries of Western and Eastern Europe and the former Soviet Union, as well as in Australasia and in Central and South America. *See* HOOD & HOYLE, *supra*, at 29-30, 49. In Asia and Africa, the trend toward abolition continues, with a growing number of countries abolishing the death penalty outright and in practice, generally conducting fewer executions, and calling for abolition out of respect for the "right to life" in regional human rights instruments. *See id.* at 28-29, 75 (discussing Asian Human Rights Charter and African Charter on Human and Peoples' Rights).

The world community has come to understand the death penalty as a violation of the fundamental right to life. There is nothing to suggest that, in this country, the governmental interest in depriving life "is somehow more legitimate or urgent." *Lawrence*, 539 U.S. at 577. Given this Nation's "duty to teach human decency as the mark of a civilized world," *Hall*, 134 S. Ct. at 2001, this Court should follow the insight of the wider civilization and abolish the death penalty. *See Roper*, 543 U.S. at 578 ("[T]he express affirmation

of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.").[16]

CONCLUSION

For the foregoing reasons, the Petitioner's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: January 19, 2017

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[16] Significantly, where abolition has come about in other countries, "it has not been as a result of the majority of the general public *demanding* it . . . ." HOOD & HOYLE, *supra*, at 426 (emphasis in original). Rather, it has been the result of "responsible agents manifest[ing] a willingness to act against public opinion." FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 155 (1986); *see id.* at 22 ("There are no examples [in the Western world] of abolition occurring at a time when public opinion supported the measure.").