

No. 15-946

IN THE
Supreme Court of the United States

LAMONDRE TUCKER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

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

**MOTION FOR LEAVE TO FILE AND BRIEF
OF *AMICI CURIAE* LAW AND POLITICAL
SCIENCE SCHOLARS IN SUPPORT
OF PETITIONER**

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**MOTION OF LAW AND POLITICAL SCIENCE
SCHOLARS FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE IN SUPPORT OF PETITIONER**

Amici curiae are 20 scholars of law and political science (the “Scholars”). Among them are academics who have analyzed data indicating the frequency with which death sentences are rendered and carried out, and have written scholarly articles on capital punishment. The Scholars respectfully move for leave to file a brief as *Amici curiae* (“*Amici*”) in support of the Petitioner. Counsel of record for the parties received timely notice of *Amici’s* intent to file this brief as required by this Court’s Rule 37.2(a). Counsel for Petitioner consented in writing to the filing of this brief, and their written consent is submitted to the Clerk’s office herewith. However, counsel for Respondent, the State of Louisiana, declined to consent to the filing of this brief, necessitating the filing of this motion.

This case presents an issue of national and constitutional importance: whether the imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. *Amici* are respected scholars of law and political science and are thus particularly well-suited to provide insight to the Court about the dramatic decline of death sentences and executions in this country over the last 20 years, the limited geographic clustering where capital punishment persists, and the various barometers of public support that reflect the public’s stance against the death penalty. Accordingly, *Amici* respectfully request that the Court grant leave to file the attached brief as *Amici curiae*.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*¹

*Amici*² are scholars of law and political science. Among them are academics who have analyzed data indicating the frequency with which death sentences are rendered and carried out, and have written scholarly articles on capital punishment. *Amici* include:

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- Vanessa Buch, Assistant Clinical Professor of Law, University of Arizona James E. Rogers College of Law;
- Aliza Cover, Associate Professor of Law, University of Idaho College of Law;

1. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief in whole or in part and no person other than *Amici*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters of consent to this filing have been filed with the Clerk of the Court.

2. The views expressed by *Amici* are their own. The list of institutions to which *Amici* belong is provided merely for identification purposes.

- John J. Donahue III, C. Wendell and Edith M. Carlsmith Professor of Law, Stanford Law School;
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SUMMARY OF ARGUMENT

In the 40 years since *Furman v. Georgia*, 408 U.S. 238, 242 (1972), our Nation's standards of decency – the prism through which this Court evaluates the protections of the Eighth Amendment – have evolved. Death sentences and executions have drastically declined over the last 20 years, reflecting the powerful shift in public opinion against capital punishment.

In 2015, only 28 executions were carried out in just six states. Texas, Missouri, and Georgia performed over 85% of these executions (24 out of 28). New death sentences were also at a 40-year low, and were disproportionately imposed in localities that either do not execute the condemned or have constitutionally defective sentencing procedures. In total, juries in states that actively execute inmates and have death penalty schemes that otherwise pass constitutional muster returned only 16 death sentences all year.

These numbers reflect a precipitous decline in the use of capital punishment in the past two decades. Since the late 1990's, executions have declined by over 70% and death sentences by 84%. The number of abolitionist states has more than doubled since *Furman*, from nine in 1972 to 19 plus the District of Columbia today. Furthermore, other barometers of our evolving standards of decency demonstrate that capital punishment is increasingly rejected by our Nation's citizenry. Public opinion polls show a sharp decline in the acceptability of capital punishment, many religious organizations now publically oppose the death penalty, and conservative politicians, who have historically been the death penalty's champions, have notably begun to turn against it, recognizing that capital punishment is an immoral, failed government policy.

As evidenced by so many states having abolished the death penalty, the infrequency of juries sentencing defendants to death, the greater infrequency of those death sentences actually being implemented and then only in a limited number of localities, and the views expressed in public opinion polls, there has been a dramatic shift in the public's attitude towards the punishment. As a

result, it is clear that the death penalty has become a cruel and unusual punishment in violation of the Eighth Amendment.

ARGUMENT

A CONSENSUS HAS DEVELOPED AGAINST THE DEATH PENALTY, RENDERING IT A CRUEL AND UNUSUAL PUNISHMENT VIOLATIVE OF THE EIGHTH AMENDMENT

It has been over 40 years since this Court comprehensively examined the constitutionality of the death penalty. *Furman v. Georgia*, 408 U.S. 238 (1972). Throughout that time, the jurisprudence of this Court has been firmly guided by the understanding that the Eighth Amendment draws its meaning from the evolving standards of decency that mark the progress of a maturing society. *See Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014); *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002); *Furman*, 408 U.S. at 242. In the intervening years since *Furman*, our country has undergone changes in its sense of decency in many different areas, some of which have been extraordinary and certainly not predictable 40 years ago. This Court has extended rights and protections in response to those changes. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015) (“There may be an initial inclination to await further legislation, litigation, and debate, but referenda, legislative debates, and grassroots campaigns; studies and other writings; and extensive litigation in state and federal courts have led to an enhanced understanding of the issue. While the Constitution contemplates that democracy is the appropriate process for change, individuals who are harmed need not await legislative action before asserting a fundamental right.”).

Over the past 20 years, American society's support for the death penalty has withered, the number of death sentences has radically declined, the number of those convicted who are actually executed has shrunken, and death sentences have come to be concentrated in isolated locales around the country, making the death penalty increasingly "unusual" and inequitable. The effort to ensure that the death penalty is reserved for the most culpable offenders responsible for the worst offenses "has produced results not altogether satisfactory." *Kennedy v. Louisiana*, 554 U.S. 407, 436 (2008). The broad emerging consensus – across the political spectrum – reflects the inability of eliminating the risk of wrongful execution. These developments make it timely for this Court to reconsider the death penalty's constitutionality.

The shift in values has been recognized and reflected in the jurisprudence of this Court. Over the past 40 years, as a result of these evolving social and ethical values, this Court has steadily narrowed the types of crimes eligible for the death penalty while expanding the categories of individuals exempt from the punishment altogether. See *Coker v. Georgia*, 433 U.S. 584 (1977) (rejecting the death penalty for the rape of an adult woman); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that the Eighth Amendment prohibits the death penalty for an accomplice who neither killed, attempted to kill, nor intended to kill anyone during the commission of a felony resulting in murder); *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986) ("[T]he Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane."); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the execution of intellectually disabled persons violates the Eighth Amendment); *Roper v. Simmons*, 543

U.S. 551 (2005) (holding that the death penalty cannot be imposed on juvenile offenders); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the death penalty cannot be imposed for the crime of child rape). Over those same years, procedural changes have also resulted in fewer defendants being eligible for the punishment of death. *See, e.g., Ring v. Arizona*, 536 U.S. 584 (2002) (holding Sixth Amendment applicable to jury’s factual findings at sentencing phase of capital trial); *Hurst v. Florida*, 136 S. Ct. 616 (2016) (holding Sixth Amendment applicable to sentencing scheme which allowed judge rather than jury to make necessary determinations).

Repeatedly, this Court has revisited society’s standards of decency regarding the death penalty by looking to “objective indicia” of those standards “as expressed in legislative enactments and state practice with respect to executions.” *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)); *Atkins*, 536 U.S. at 311. As demonstrated below, objective indicia of society’s standards demonstrate that today, there is a national consensus against the death penalty.

A. The Number of States that have Abolished the Death Penalty has more than Doubled since *Furman*.

“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *Atkins*, 536 U.S. 304, 312 (2002); *see Glossip v. Gross*, 135 S. Ct. 2726, 2773 (2015) (Breyer, J., dissenting) (“Often when deciding whether a punishment practice is, constitutionally speaking, ‘unusual,’ this Court

has looked to the number of States engaging in that practice”). By that measure, the number of abolitionist states has more than doubled since the Court last took up the constitutionality of the death penalty in 1972. In that year, only nine states had formally abolished capital punishment. *Furman*, 408 U.S. at 298. By contrast, today, 19 states plus the District of Columbia have abolished the practice.³

Moreover, this Court has stated that it “is not so much the number of these States that is significant, but the consistency of the direction of change.” *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315) (finding significant that five states had abandoned the death penalty for juveniles, four legislatively and one judicially, since the Court’s decision in *Stanford v. Kentucky*, 492 U.S. 361 (1989)). In that regard, the trend towards outright abolition of the death penalty has dramatically accelerated in recent years. Of these 19 abolitionist jurisdictions, seven have eliminated the death penalty within the last decade.⁴ In addition, “[i]n the past two decades, no State without a death penalty has passed legislation to reinstate the penalty.” *Glossip, supra*, at 2775 (Breyer, J., dissenting) (internal citations omitted).

3. The Death Penalty Information Center (“DPIC”) collects and publishes information about states that do and do not authorize capital punishment. <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Feb. 8, 2016).

4. What follows is a list of each of those states with the year they abolished the death penalty in parentheses: New Jersey (2007); New York (2007); New Mexico (2009); Illinois (2011); Connecticut (2012); Maryland (2013); Nebraska (2015). DPIC, *supra* note 3.

In addition, the governors of Oregon⁵, Colorado⁶, Washington⁷, and Pennsylvania⁸ have indefinitely stayed executions in their state, effectively suspending their state laws that permit capital punishment. *See Hall v. Florida*, 134 S. Ct. 1986, 1997 (2014) (“Oregon is on the abolitionist side of the ledger because it has *suspended the death penalty* and *executed only two individuals* in the past 40 years”) (emphasis added).

5. “The hard truth is that in the 27 years since Oregonians reinstated the death penalty, it has only been carried out on two volunteers who waived their rights to appeal.” DPIC, <http://www.deathpenaltyinfo.org/gov-john-kitzhaber-oregon-declares-moratorium-all-executions> (last visited Feb. 8, 2016).

6. “Capital punishment is rarely used in Colorado. There has been only one legal execution in Colorado since 1967. It occurred in 1997, more than 15 years ago.” DPIC, <http://deathpenaltyinfo.org/documents/COexecutiveorder.pdf> (last visited Feb. 8, 2016).

7. “First, the practical reality is that those convicted of capital offenses are, in fact, rarely executed. Since 1981, the year our current capital laws were put in place, 32 defendants have been sentenced to die. Of those, 19, or 60%, had their sentences overturned. One man was set free and 18 had their sentences converted to life in prison.” DPIC, <http://www.deathpenaltyinfo.org/documents/InsleeMoratoriumRemarks.pdf> (last visited Feb. 8 2016).

8. “There are currently 186 individuals on Pennsylvania’s death row. Despite having the fifth largest death row in the nation, the death penalty has rarely been imposed in modern times. In the nearly forty years since the Pennsylvania General Assembly reinstated the death penalty, the Commonwealth has executed three people, all of whom voluntarily abandoned their right to further due process.” Death Penalty Moratorium Declaration (Feb. 13, 2015) Governor Tom Wolf, <http://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration> (last visited Feb. 9, 2016).

In a remarkable exercise of legislative will, in 2015, the state legislature in Nebraska – a state generally thought of as politically conservative – amassed sufficient support for repeal of the death penalty that it overrode the Governor’s veto of its earlier enactment of a bill to end capital punishment in that state.⁹

B. In those States Where the Death Penalty is still Legal, Executions are Rarely Carried Out.

Justice Brennan reminded us that “[t]he acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use.” *Furman*, 408 U.S. at 279 (Brennan, J., concurring). Therefore, while state legislation abolishing the death penalty is one objective indicator of society’s evolving standards of decency, “[t]here are measures of consensus other than legislation.” *Kennedy v. Louisiana*, 554 U.S. at 433. Therefore, the Court also looks to whether or not a jurisdiction actually performs executions. *See Roper*, 543 U.S. at 564-65; *Kennedy*, 554 U.S. at 433. Where the death penalty is rarely, if ever, used, the legislature has no pressing need to abolish the practice, even though it has been rejected by the citizenry of the State. *See Atkins*, 536 U.S. at 316 (“Some States, for example New Hampshire and New Jersey, continue to authorize executions, but none have been carried out in decades. Thus there is little need to pursue legislation barring the execution of the mentally retarded in those States”); *see also Hall v. Florida*, 134 S. Ct. at 1997 (“Kansas has not had an execution in almost five decades, and so its laws and jurisprudence on this issue are unlikely to receive attention on this specific question”).

9. Leg. 268, 2015 Leg., 104th Sess. (Neb. 2015).

Of the 31 states in which the death penalty is still legal, more than one third of those states have not conducted any executions in the last ten years.¹⁰ Another six states have not executed anyone in the last five years.¹¹ Furthermore, the governors of Oregon, Colorado, Washington, and Pennsylvania, who indefinitely stayed executions in their states, did so, in part, because of its rare use.¹²

Thus, 36 states plus the District of Columbia¹³, the Federal Government¹⁴, and the U.S. military¹⁵ have either formally abolished the death penalty or have tacitly

10. DPIC collects and publishes data on executions by year and state. DPIC, <http://www.deathpenaltyinfo.org/views-executions>. 11 states and the U.S. military have not conducted any executions since 2007. The date of the last year each of these jurisdictions executed an individual follows in parentheses: California (2006); Montana (2006); Nevada (2006); North Carolina (2006); Arkansas (2005); Pennsylvania (1999); Colorado (1997); Oregon (1997); Wyoming (1992); Kansas (1965); U.S. Military (1961); New Hampshire (1939).

11. DPIC, *supra* note 10. The following states and the federal government have not conducted any executions since 2010. The date of the last year each of these jurisdictions executed an individual follows in parentheses: Louisiana (2010); Utah (2010); Washington (2010); Indiana (2009); Tennessee (2009); Kentucky (2008); Federal government (2003).

12. *See* notes 5-8, *supra*.

13. The District of Columbia abolished the death penalty in 1981. DPIC, *supra* note 3.

14. The Federal Government last executed someone in 2003. DPIC, *supra* note 11.

15. The U.S. military last executed someone in 1961. DPIC, <http://www.deathpenaltyinfo.org/us-military-death-penalty#facts> (last visited Feb. 9, 2016).

abandoned it by not conducting an execution within the last five years.¹⁶ In terms of percentages, 72% of the states in this country either have no death penalty or have not used it within the last five years.

Even in states that continue to execute people, the numbers of those executions has fallen dramatically. Executions in this country peaked in 1999, a year during which we executed 98 people nationwide.¹⁷ In 2015, 28 individuals were executed, a 71% reduction in executions over a sixteen year timespan. *Id.* Notably, 28 executions is the fewest number of executions that has taken place in any single year since 1991.¹⁸ *See* Appendix A.

Executions in the United States peaked in 1999, when 20 states executed 98 individuals. *DPIC 2015 Report*. By way of contrast, last year, six states executed 28 people, amounting to 350% fewer executions than in 1999, and the smallest number of executions that has taken place in any single year since 1991. *Id.*

Moreover, last year's executions were confined to a small number of geographically isolated states. An overwhelming 93% of last year's executions occurred in just four states: Texas, Georgia, Missouri, and Florida. *Id.* 86% of last year's executions took place in three states: Texas, Georgia, and Missouri. *Id.* And, the State of Texas

16. DPIC, *supra* note 10-11.

17. DPIC, *The Death Penalty in 2015: Year End Report* ("DPIC 2015 Report"), <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf> (last visited on Feb. 9, 2016).

18. *Id.*

alone accounted for nearly half of last year's executions (46%).¹⁹ *Id.*

In 2015, 44 states plus the District of Columbia put no one to death. DPIC, http://www.deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=2015&sex=All&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&=Apply (last visited on Feb. 11, 2016). In short, executions are a rare occurrence in this country. Where they do occur, they take place in a limited number of counties that make up a negligible percentage of our population that do not represent our nation's evolved values.

C. Death Sentence Rates – the Best “on-the-Ground” Indicator²⁰ of Support for the Death Penalty – are at an all Time Low.

Like execution numbers, “[a]ctual sentencing practices are an important part of the Court's inquiry into consensus.” *Graham v. Florida*, 560 U.S. 48, 62 (2010)

19. While California and Alabama rank among the highest three states in terms of death sentences, neither state executed anyone in 2015.

20. “[A]s the U.S. Supreme Court has repeatedly pointed out, the decision of a sentencing jury to return a death sentence (or not) is the best on-the-ground indicator of how citizens feel about the practice of capital punishment at any given time. The citizens that comprise a jury are drawn from the county where the offense occurred. Thus, we can draw conclusions about the appetite for the death penalty in a particular jurisdiction based on juror imposition (or rejection) of death sentences. . . .” Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. Rev. 227, 232 (2012).

(citing *Enmund*, 458 U.S. at 794-96 (1982)); *Thompson v. Oklahoma*, 487 U.S. 815, 831-32 (1988); *Atkins*, 536 U.S. at 316; *Roper*, 543 U.S. at 572; *Kennedy*, 551 U.S. at 433-434; *see also Roper*, 543 U.S. at 616 (2005) Scalia, J., dissenting (“[W]e have, in our determination of society’s moral standards, consulted the practices of sentencing juries: Juries maintain a link between contemporary community values and the penal system that this Court cannot claim for itself”). Indeed, whether our citizens are willing to impose the death penalty reflects the public’s current view about the acceptability of the punishment.

The number of death sentences imposed is also a particularly telling measure of consensus because it reflects not only the decision of the jury itself, but also the exercise of discretion by locally-elected prosecutors and the legal and constitutional determinations by judges handling potential capital cases. Even if one accepts the view that the death penalty is reserved for the most heinous crimes, prosecutorial discretion enters into the decisions whether to even charge a capital crime or to accept some more lenient punishment as part of a plea arrangement. Jurors are empowered to make determinations about whether or not the ultimate sanction of death is an acceptable or appropriate punishment for an aggravated murder. Whether or not a prisoner is charged with a capital crime and ultimately sentenced to death is the product of individual decisions, and susceptible of personal judgments. Notwithstanding this variability, the Court views sentences as an indicator of consensus. In the last 20 years, the number of death sentences imposed has declined dramatically. In 1996 – the year during which death sentences peaked – 315 prisoners were condemned

to death.²¹ Last year, only 49 death sentences were imposed, a stark 84% decline.²² See Appendix B.

1. These few Death Sentences also Show Substantial Geographic Isolation.

In 2015, there were no death sentences imposed in more than half of the states that have the death penalty available as a punishment (17 out of 31).²³ Accordingly, of the 31 states that still permit the imposition of the death penalty, only 14 states plus the Federal Government were responsible for the 49 death sentences imposed last year.

In 2013, DPIC issued a report that found that a mere 2% of counties²⁴ in the United States are responsible for

21. DPIC, *supra* note 17.

22. *Id.* Even these statistics drastically understate the number of jurors who would not impose the death penalty. To serve on a jury in a capital case, jurors have to be “death-qualified” – that is, willing to consider imposing the death penalty. See *Lockhart v. McCree*, 476 U.S. 165 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985). Capital juries therefore exclude the significant and growing number of members of our communities who are morally or are otherwise inalterably opposed to the death penalty. Thus, the current, all-time low death sentence figures dramatically overstate the public’s support for the death penalty.

23. DPIC, <http://www.deathpenaltyinfo.org/2015-sentencing> (last visited on Feb. 10, 2016). No death sentences were imposed in Colorado, Washington, Missouri, Virginia, Georgia, Idaho, Indiana, Kentucky, Montana, New Hampshire, North Carolina, Oregon, South Carolina, South Dakota, Tennessee, Utah, or Wyoming last year.

24. Two percent of counties work out to 62 counties of the 3,143 counties in the United States. DPIC, <http://www>.

56% of the individuals on death row. *Id.* In keeping with that trend, nearly two thirds (63%) of last year's death sentences were imposed in the same 2% of American counties that have disproportionately accounted for more than half of all United States death sentences in the past. *DPIC 2015 Report*, at 2. Caddo Parish, Louisiana is one of those notorious counties²⁵, and also is the very county in which Petitioner Lamondre Tucker was sentenced to death.

A closer examination of the states that imposed the 49 death sentences last year reveals that the vast majority of these sentences were either the product of

deathpenaltyinfo.org/documents/TwoPercentReport.pdf (last visited on Feb. 15, 2016).

25. The acting district attorney at the time Petitioner was sentenced to death in Caddo Parrish, Louisiana was Dale Cox, who, in 2011, told the Shreveport Times newspaper that "We need to kill more people...." Vickie Welborn, *Caddo District Attorney's office speaks out concerning Glenn Ford's innocence, death penalty debate*, The Times (Mar. 27, 2015), <http://www.shreveporttimes.com/story/news/local/2015/03/27/glenn-ford-dale-cox-charles-scott-caddo-parish-death-penalty-execution-marty-stroud/70529188/>; *see also* Campbell Robertson, *The Prosecutor Who Says Louisiana Should 'Kill More People'*, The New York Times (July 7, 2015), http://www.nytimes.com/2015/07/08/us/louisiana-prosecutor-becomes-blunt-spokesman-for-death-penalty.html?_r=0; Mr. Cox ultimately decided not to run for re-election, and resigned noting that the community needed to heal. KTBS 3 abc, <http://www.ktbs.com/story/29545637/acting-caddo-da-dale-cox-will-not-run-in-fall-election> ("I have come to believe that my position on the death penalty is a minority position among the members of this community and would continue to be a source of controversy," Cox said in an e-mail. "Our community needs healing and not more controversy.")

capital sentencing procedures now determined to be unconstitutional or the entirely symbolic imposition of death sentences in states that do not perform executions.

In *Hurst v. Florida*, 136 S. Ct. 616, this Court determined that Florida’s capital sentencing scheme, in which the trial judge rather than the jury made the factual findings necessary to impose a death sentence, violated the Sixth Amendment. Likewise, capital sentencing statutes in Delaware and Alabama, which also permit judges to determine the factual prerequisites for a sentence of death, employed procedures now determined to be unconstitutional. 11 Del.C. § 4209; Ala. Stat. Ann. 13A-5-47; *see also Brooks v. Alabama*, 136 S. Ct. 708 (2016) (Breyer, J. dissenting from denial of certiorari) (“The unfairness inherent in treating this case differently from others which used similarly unconstitutional procedures only underscores the need to reconsider the validity of capital punishment under the Eighth Amendment.”); *Woodward v. Alabama*, 134 S. Ct. 405, 410 (2013) (Sotomayor, J., dissenting from denial of certiorari) (“The very principles that animated our decisions in *Apprendi* and *Ring* call into doubt the validity of Alabama’s capital sentencing scheme.”). These three states, in which the ultimate decision to impose a death sentence did not reflect the considered agreement of the capital jury, accounted for 16 of the death sentences imposed in 2015.²⁶

Seventeen additional sentences were handed down in three states that have abandoned executions: California,

26. Judges in these states imposed the following numbers of death sentences: Florida (9), Alabama (6), Delaware (1). DPIC 2015 Report.

Kansas and Pennsylvania.²⁷ While execution and sentencing numbers, standing alone, shed some light on consensus, the best measure is to consider the two together. To determine their true import, newly-imposed death sentences must be evaluated in light of a jurisdiction’s established execution practice. *See Glossip, supra* at Appendix E (noting that five of the 15 counties imposing five or more death sentences since 2010 are in California, a state that has “effectively abandoned executions”). When juries impose death sentences in jurisdictions that do not perform – and historically have not performed – executions, those verdicts are entirely symbolic. California and Pennsylvania have two of the nation’s largest death row populations, but neither actually executes its inmates. In California, juries have sentenced 937 persons to death since 1976, but the State has performed only 13 executions²⁸ in that time span and none since 2006.²⁹ Similarly, Pennsylvania juries have

27. Juries in these states imposed the following numbers of death sentences: California (14), Pennsylvania (2), Kansas (1). DPIC, *The Death Penalty in 2015: Year End Report*, <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf> (last visited on Feb. 9, 2016).

28. DPIC, http://www.deathpenaltyinfo.org/state_by_state (last visited on Feb. 23, 2016).

29. DPIC, http://www.deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=2007&exec_year%5B%5D=2008&exec_year%5B%5D=2009&exec_year%5B%5D=2010&exec_year%5B%5D=2011&exec_year%5B%5D=2012&exec_year%5B%5D=2013&exec_year%5B%5D=2014&exec_year%5B%5D=2015&exec_year%5B%5D=2016&sex=All&state%5B%5D=CA&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&=Apply (last visited on Feb. 23, 2016).

returned 380 death sentences since 1976, but the State has only executed three inmates in the same time period, each of which “volunteered” by waiving his appellate rights,³⁰ and there is currently an official moratorium on executions in place. Kansas, which reinstated its death penalty over 20 years ago, has imposed 13 death sentences since 1977 but has not performed an execution since 1965. DPIC, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008> (last visited on Feb. 24, 2016). There is not a single inmate on Kansas’ death row that has exhausted his appeals. Members of juries in these states, therefore, are free to vehemently denounce a defendant’s crime by returning a death verdict, comfortably protected by the

30. DPIC, http://www.deathpenaltyinfo.org/views-executions?exec_name_1=&exec_year%5B%5D=1977&exec_year%5B%5D=1979&exec_year%5B%5D=1981&exec_year%5B%5D=1982&exec_year%5B%5D=1983&exec_year%5B%5D=1984&exec_year%5B%5D=1985&exec_year%5B%5D=1986&exec_year%5B%5D=1987&exec_year%5B%5D=1988&exec_year%5B%5D=1989&exec_year%5B%5D=1990&exec_year%5B%5D=1991&exec_year%5B%5D=1992&exec_year%5B%5D=1993&exec_year%5B%5D=1994&exec_year%5B%5D=1995&exec_year%5B%5D=1996&exec_year%5B%5D=1997&exec_year%5B%5D=1998&exec_year%5B%5D=1999&exec_year%5B%5D=2000&exec_year%5B%5D=2001&exec_year%5B%5D=2002&exec_year%5B%5D=2003&exec_year%5B%5D=2004&exec_year%5B%5D=2005&exec_year%5B%5D=2006&exec_year%5B%5D=2007&exec_year%5B%5D=2008&exec_year%5B%5D=2009&exec_year%5B%5D=2010&exec_year%5B%5D=2011&exec_year%5B%5D=2012&exec_year%5B%5D=2013&exec_year%5B%5D=2014&exec_year%5B%5D=2015&exec_year%5B%5D=2016&sex=All&state%5B%5D=PA&sex_1=All&federal=All&foreigner=All&juvenile=All&volunteer=All&=Apply (last visited on Feb. 23, 2016).

certainly that the person they have condemned will not actually be put to death. *See Caldwell v. Mississippi*, 472 U.S. 320, 331 (1985) (“[e]ven when a sentencing jury is unconvinced that death is the appropriate punishment, it might nevertheless wish to ‘send a message’ of extreme disapproval for the defendant’s acts”). These symbolic acts do not in any way reflect the public’s embrace of capital punishment.

When last year’s death sentences are considered in light of unconstitutional sentencing schemes and execution practices, it is apparent that even the 49 new death sentences returned dramatically overstates society’s acceptance of capital punishment. Nationwide in 2015, only 16 juries that utilized constitutional sentencing procedures and had reason to believe the defendant on trial would actually be executed chose to condemn him to death. Moreover, even these sentences – because of the removal of citizens who oppose capital punishment – perhaps overstates support for the death penalty. *See Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring) (“Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a “death qualified jury” is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.”); *Uttecht v. Brown*, 551 U.S. 1, 35 (2007) (Stevens, J., dissenting) (explaining that “[m]illions of Americans oppose the death penalty,” and that “[a] cross section of virtually every community in the country includes citizens who firmly believe the death

penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases”). Considering that there were over 14,000 intentional homicides committed in this Nation in 2014,³¹ those numbers reflect a clear repudiation of capital punishment and clearly indicate how “unusual” it has become to execute a convicted capital defendant.

D. Public Support for the Death Penalty Has Seriously Declined.

1. Public Opinion Polls.

Amicus Professor Baumgartner has analyzed the results of 488 national death penalty opinion surveys from 1976 through 2015, and has found a strong correlation between the public’s view of capital punishment and the number of death sentences and executions over the last 20 years when *Gregg v. Georgia*, 428 U.S. 153 (1976), was decided. *See* Appendix C.³² Professor Baumgartner’s analysis demonstrates that, since the mid-1990s, public support for the death penalty has declined to a value 15 points below its starting point. *Id.* The analysis further demonstrates that as that support has declined, death sentences, executions and the number of states and counties carrying out executions have all similarly declined. *Id.*

31. Federal Bureau of Investigation, *2014: Crime in the United States*, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014> (last visited February 22, 2016).

32. Frank R. Baumgartner, *et al.*, *Americans are turning against the death penalty. Are politicians far behind?*, *The Washington Post* (Dec. 7, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/07/americans-are-turning-against-the-death-penalty-are-politicians-far-behind/> (last visited on Feb. 12, 2016).

In 2015, national polls conducted by Gallup and the Pew Research Center showed that support for the death penalty was close to 40-year lows.³³ Another national poll, the 2015 American Values survey, conducted by the Public Religion Research Institute, found that the majority of poll participants prefer life without parole over the death penalty as a punishment for people convicted of murder. DPIC, <http://www.deathpenaltyinfo.org/node/6309> (last visited on Feb. 12, 2016).

More-targeted polls, conducted in those areas of the country that impose and implement the death penalty at greater rates, also demonstrate increased opposition to the death penalty. For example, “the Kinder Institute for Urban Research at Rice University found that only 28% of respondents in Harris County (Houston) – which has executed more prisoners than any other county in the United States – prefer the death penalty to life without parole as punishment for first-degree murder.” DPIC, <http://www.deathpenaltyinfo.org/node/6136> (last visited on Feb. 12, 2016). And a recent Field Poll conducted in California – the state that imposed the greatest number of death sentences in 2015 – showed that 47% of participants prefer a sentence of life without parole over the death penalty. Howard Mintz, *Poll: California Death Penalty is Toss-up for Voters*, San Jose Mercury News (Jan. 15, 2016), http://www.mercurynews.com/crime-courts/ci_29389450/field-poll-california-death-penalty-is-toss-up.

Even these poll responses, demonstrating dwindling support for the death penalty, likely over-state the public’s actual acceptance of it. If even close to half the population actually supported the death penalty as a punishment for

33. DPIC, <http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>, at pg. 5 (last visited on Feb. 12, 2016).

first-degree murder in practice, it is difficult to imagine how the number of death sentences actually returned by juries would be so incredibly small, particularly since jurors on capital cases are limited to those who are “death-qualified.” Rather, it is more likely that even the vast majority of those purportedly “in favor” of the death penalty would decline to impose it were they on the jury faced with an actual life-or-death decision in a capital case. As a result, the dramatic decrease in these positive poll responses over time are substantially more significant than the simple numbers “for” or “against.”

2. Reflecting the Changing Sense of Decency in the Country, Many Religious Organizations have Now Taken a Public Stance Against the Death Penalty.

Another barometer of the change in the Nation’s evolving sense of decency is the consensus that has emerged from the faith communities of the country. Many religious organizations have denounced the death penalty, and many have encouraged their members to work actively towards the abolition of the death penalty in states that continue to authorize it.³⁴ Pope Francis has expressed strong opposition to the use of the death penalty, recently calling for an end to executions worldwide. He preached,

34. Religious organizations that have publicly denounced the death penalty include: the American Baptist Church, the Episcopal Church, the Evangelical Lutheran Church in America, the Orthodox Church in America, the Presbyterian Church in America, the Rabbinical Assembly, the Unitarian Universalist Association, the United Church of Christ, the United Methodist Church, the Union of Orthodox Jewish Congregations of America, and Reform Judaism. DPIC, <http://www.deathpenaltyinfo.org/article.php%3Fdid%3D2249#state> (last visited on Feb. 23, 2016).

“The commandment ‘You shall not kill’ has absolute value, and covers both the innocent and the guilty,...even the criminal keeps the inviolable right to life, a gift from God.”³⁵

Evangelicals, a group historically strongly in favor of capital punishment, enacted a resolution last year acknowledging, “Because of the fallibility of human systems, documented wrongful convictions, and our desire that God’s grace, Christian hope, and life in Christ be advanced, a growing number of evangelicals now call for government entities to shift their resources away from pursuing the death penalty and to opt for life in prison without parole as the ultimate sanction.”³⁶

3. Professional Organizations Once Committed to the Death Penalty Have Recently Repudiated It.

In 2009, the American Law Institute, the organization that drafted the Model Penal Code that has served as a model law for state enactment since 1962, withdrew the section of the law on capital punishment, recognizing that “the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.” ALI, *Report of the Council to the Membership on the Matter of the Death Penalty* (Apr. 15, 2009).

35. Ines San Martin, *The pope wants a death penalty ban during his year of mercy*, Crux (Feb. 21, 2016), <http://www.cruxnow.com/church/2016/02/21/the-pope-wants-a-death-penalty-ban-during-his-year-of-mercy/>.

36. National Association of Evangelicals, *Resolution: Capital Punishment* (2015), <http://nae.net/capital-punishment-2/>.

CONCLUSION

“Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.” *Furman v. Georgia*, 408 U.S. at 287. The steep decline in the imposition and implementation of the death penalty demonstrates that our societal values, most particularly our respect for human dignity, have evolved in such a way that capital punishment no longer embodies what we are as a Nation. *See Glossip v. Gross*, 135 S. Ct. 2726, 2774 (2015) (Breyer, J., dissenting) (“It seems fair to say that it is now unusual to find capital punishment in the United States, at least when we consider the Nation as a whole”). Efforts to make capital punishment tolerable have not achieved the decency and fairness for which advocates of incremental reform had hoped. After 40 years, it is time for this Court to comprehensively address whether capital punishment continues to reflect our society’s standards of decency. *Amici curiae* respectfully urge the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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February 29, 2016

APPENDIX

1a

**APPENDIX A — GRAPH REPRESENTING
EXECUTIONS BY YEAR FROM 1976-2015**

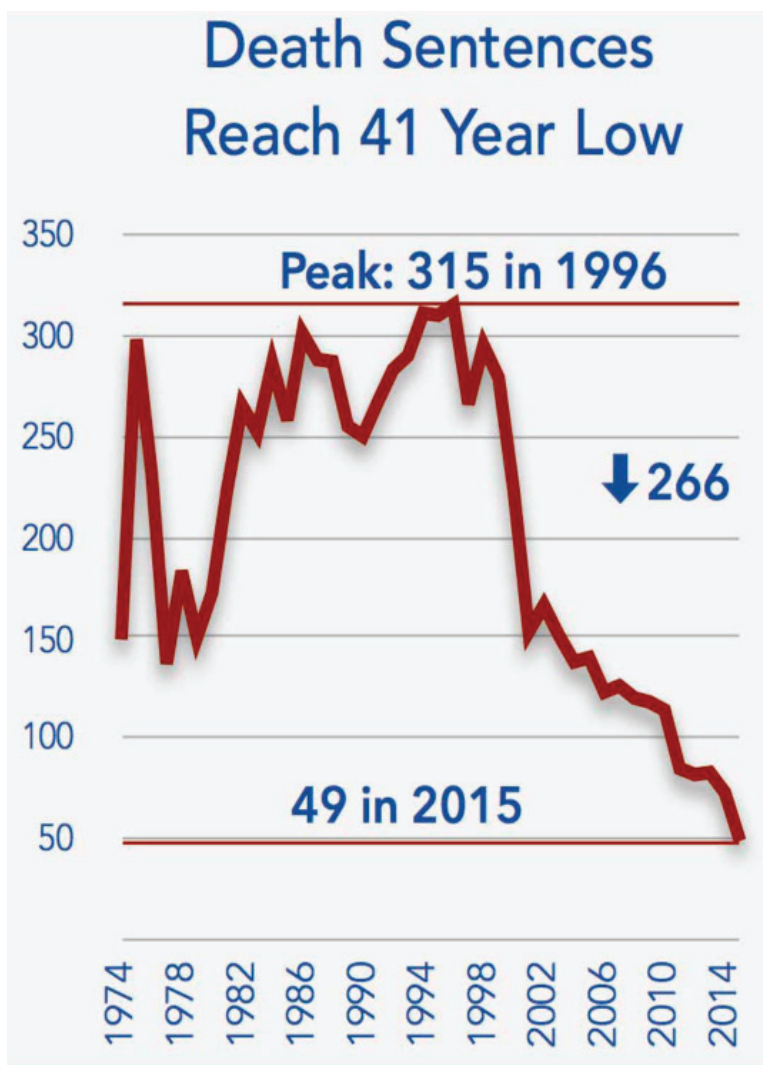


Source

<http://deathpenaltyinfo.org/documents/2015YrEnd.pdf>

2a

**APPENDIX B — GRAPH REPRESENTING
CHANGE IN NUMBER OF DEATH SENTENCES
FROM 1974-2014**

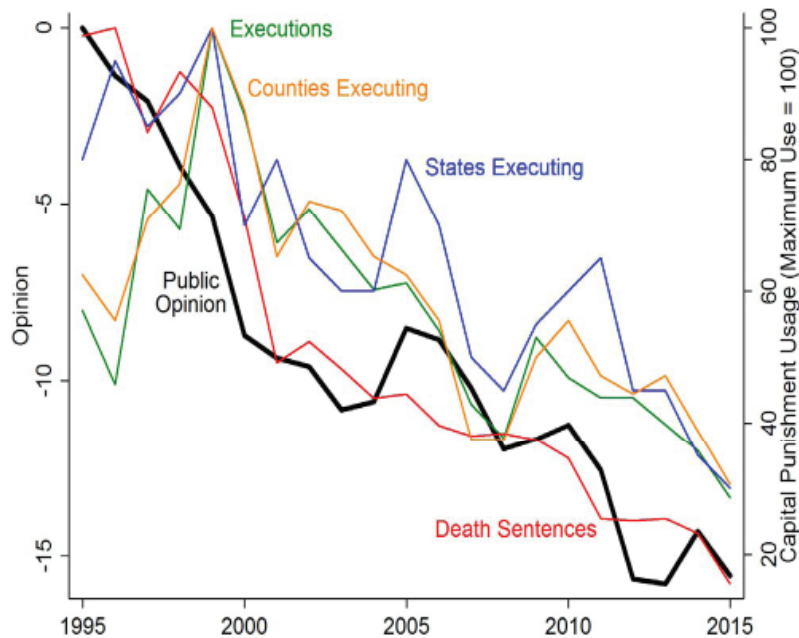


Source

<http://www.deathpenaltyinfo.org/2015-sentencing>

APPENDIX C — CORRELATION OF NATIONAL PUBLIC OPINION POLLS AND SENTENCING AND EXECUTION DATA SINCE 1995

Correlation of National Public Opinion Polls and Sentencing and
Execution Data Since 1995



Note: Death sentencing and executions data from DPIC. Public opinion data is based on an analysis of 488 national surveys combining answers to 66 distinct questions about the death penalty. These represent all questions about the death penalty posed at least twice to a nationally representative sample of US adults from the period of 1976 through May 19, 2015. The data for the index was retrieved from the Roper Center's iPOLL database (<http://ropercenter.cornell.edu/ipoll-database/>) using key words "death penalty" and "capital punishment." This is the most comprehensive assessment of public opinion on the death penalty so far presented, and is an updated version of that presented by Baumgartner, De Boef, and Boydston (2008; Appendix B, pp. 254 ff.). The scale of the index was then adjusted to have a value of zero in 1995, the year when it reached its maximum over the 1976 to 2015 period.

Source:

Baumgartner, Frank R., Suzanna L. De Boef and Amber E. Boydston. 2008. *The Decline of the Death Penalty and the Discovery of Innocence*. New York: Cambridge University Press.