No.

IN THE

Supreme Court of the United States

LEDELL LEE,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
ARKANSAS SUPREME COURT

BRIEF OF THE FAIR PUNISHMENT PROJECT *AMICI CURIAE* IN SUPPORT OF PETITIONER

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The Fair Punishment Project (FPP) is a joint project of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute, both at Harvard Law School. FPP's mission is to address ways in which our laws and criminal justice system contribute to excessive punishment.

INTRODUCTION

After failing to use its execution chamber for over ten years, Arkansas scheduled eight executions over eleven days to occur this month. It has become clear from the litigation that ensued that each of the men scheduled for execution has either a crippling mental illness, an intellectual impairment, or experienced unspeakable childhood trauma. At least two men have plausible claims of innocence, but they were repeatedly denied access to testing to prove it.

The Arkansas Supreme Court has thus far stopped the execution dates for four of the men: Stacey Johnson, because he has a colorable innocence claim and needs to receive DNA testing; Bruce Ward, a paranoid schizophrenic, both because he might be legally insane and because the trial judge refused to provide him an independent mental health expert; Don Davis, an intellectually

[1] Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), the parties have consented to the filing of the brief of *amici curiae* and their letters of consent accompany this brief.

impaired—if not disabled—man to whom the court also refused an independent mental health expert at trial; and Jason McGehee, a man who suffers from bipolar disorder and endured horrific childhood abuse, because he received a clemency recommendation due to his young age at the time of the offense and because he demonstrated exemplary behavior during his nearly two decades in prison.

Unless this Court intervenes, Ledell Lee, a man who appears to have Fetal Alcohol Syndrome, borderline intellectual ability, and a plausible but under-investigated innocence claim, will be executed tonight. He has repeatedly been denied the opportunity to investigate and prove this evidence because of his abysmal representation that he received at every level. His case involves conflicted counsel, a drunk attorney, and a mentally ill lawyer. The three remaining men scheduled for execution are Jack Jones, a man with bipolar disorder who tried to commit suicide on two occasions; Marcel Williams, who experienced horrific and continuous sexual and physical abuse as a child; and Kenneth Williams, whose 70 IQ score appears to place him within the intellectual disability range. Like Mr. Lee, inadequate lawyering prevented these men from ever showing this to a jury or even to an appellate court for meaningful review.

These men were convicted of crimes warranting severe punishment. But taken together, these are not cases that inspire confidence that the death penalty is limited, as the Eighth Amendment mandates, to those "whose extreme culpability makes them 'the most deserving of execution.'" *Roper v. Simmons*, 543 U.S. 551, 548 (2005) (barring

the death penalty for juveniles) (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (barring the death penalty for the intellectually disabled)). Quite the opposite. If, as this Court recently reiterated, "impos[ing] the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being," *Hall v. Florida*, 134 S.Ct. 1986, 1992 (2014), then the principle of equal dignity also bars Arkansas from executing Ledell Lee or the other three men who remain under warrant of execution.

These eight cases situate Arkansas as a microcosm of what remains of the death penalty in America. Of the executions nationwide within the past five years, at least two-thirds involved people with significant intellectual impairments or serious mental illness, people who endured unspeakably traumatic childhood abuse, or those who, at the time of the offense, were not old enough to legally purchase alcohol. The juries in many of these cases, like the juries in most of the eight Arkansas cases, never heard the men's full stories because the trial lawyers failed to adequately investigate and present these crucial facts. In Mr. Lee's case, which has featured a veritable circus of ill-prepared and under-performing lawyers, no lawyer has *ever* conducted the sort of basic life history investigation that the Constitution requires. *See Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003).

Forty years ago, in *Gregg v. Georgia,* 428 U.S. 153 (1976), this Court ushered in the modern era of capital punishment on the hypothesis that the then newly created state statutes would ensure the rarity and fairness of the death penalty. Today, the death

penalty has become increasingly obsolete—in a nation of 324 million people and approximately 15,000 homicides, juries nationwide returned only 29 death sentences last year. But as these Arkansas cases demonstrate, the premise that as the death penalty becomes rarer it will also capture an increasingly culpable group of people has proven powerfully incorrect. Instead, the handful of people exposed to the death penalty today are not the worst of the worst, but the unluckiest of the unlucky: the people with the most crippling impairments and the worst lawyers.

The time to end the charade is now. The Constitution positions this Court as the ultimate arbiter of whether Mr. Lee's death sentence—and capital punishment generally—is unconstitutionally disproportionate. It also places upon this Court the heavy burden to vigorously engage with the question. Justice Anthony Kennedy said last year that the Court's decisions on controversial issues "draw down on a capital of trust." Justice Anthony M. Kennedy, Remarks at the 9th Circuit Judicial Conference (July 15, 2015). The opposite is true, too. A failure to intervene to affirm and protect the most basic dignity interests of the most vulnerable and impaired citizens draws from the people's "reservoir of trust" and erodes the institutional and moral credibility of the Court itself. This Court should stay the execution, grant certiorari, and add to the briefing schedule the additional question of whether the death penalty violates the Eighth Amendment's prohibition on cruel and unusual punishment.

ARGUMENT

I. THE DEATH PENALTY MUST BE RESERVED FOR PEOPLE WITH THE MOST EXTREME MORAL CULPABILITY.

The Eighth Amendment "reaffirms the duty of the government to respect the dignity of all persons" through its prohibition against excessive punishment "even [for] those convicted of heinous crimes." A finding of penal excess is appropriate where no compelling evidence exists to suggest that the punishment meaningfully contributes to a legitimate penological purpose. *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008). This is so because the State "suffers nothing and loses no power" if a less severe sanction—one of "just, not tormenting severity"—results in "the purpose of [the] punishment [being] fulfilled." *Weems v. United States*, 217 U.S. 349, 381 (1910).

The constitutionality of capital punishment hinges predominantly on its retributive force beyond what a life without parole sentence could fulfill. *Kennedy*, 554 U.S. at 420. But there is a risk inherent in relying on retribution to justify a death sentence. The desire for retribution "can contradict the law's own ends" and, when the death penalty is involved, it "risks [the law's] own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." *Id.* To protect against this grave risk, the Court limits death penalty eligibility to the people who commit the most aggravated homicides *and* whose "extreme culpability makes them the most deserving of execution." *Id.* (internal quotation omitted).

To ensure that the government only enacts the most extreme punishment on the worst of the worst, this Court has carved out several categorical bars to execution. *Roper*, 543 U.S. at 548. "Once the diminished culpability of juveniles is recognized," this Court held, "it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." *Id.* at 571. And in *Atkins* and again in *Hall* this Court precluded the imposition of the death penalty on the intellectually disabled. However heinous the offense, this Court concluded that "[n]o legitimate penological purpose is served by executing a person with intellectual disability." *Hall*, 134 S.Ct. at 1992. "[T]o impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being." *Id.*

There is, however, not much daylight between the culpability of those with a serious mental illness such as paranoid schizophrenia, a person with traumatic brain injury or other intellectual impairment, a man suffering from the after-effects of a lifetime of abuse, and those with intellectual disabilities or who are seventeen. And yet there is good reason to conclude that the typical person sentenced to death or executed in America suffers from such crippling impairments. *See* Smith, Cull, & Robinson, *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221 (2014) (finding evidence of serious intellectual or mental impairments in the case records of an overwhelming majority of the then 100 most recently executed people in America); Charles Hamilton Houston Institute for Race & Justice, Death Penalty 2015 Year End Report (2015) (http://charleshamiltonhouston.org/wp-content/

uploads/2015/12/2015-CHHIRJ-Death-Penalty-Report.pdf) (finding that "of the 28 people executed [in 2015], 75% were mentally impaired or disabled, experienced extreme childhood trauma and abuse, or were of questionable guilt" and that "[i]t's frequently not just one impairment, such as a low IQ score, that defines these cases, but rather multiple forms of disability and impairment").

Just as those with an intellectual disability are "categorically less culpable than the average criminal," *Hall*, 134 S.Ct. at 2002, so too are those who suffer from a debilitating mental illness or a traumatic brain injury that undermines decision-making. There is no meaningful difference among the blameworthiness of these groups. And if executing one set of these people violates their "inherent dignity as a human being," then so too does executing the others. *See Hall*, 134 S.Ct. at 1992; *Cf. Obergefell v. Hodges,* 135 S.Ct. 2584, 2608 (2015) ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

II. ARKANSAS EXEMPLIFIES THE ENDEMIC INABILITY OF STATES TO LIMIT THE DEATH PENALTY TO PEOPLE WITH THE MOST EXTREME CULPABILITY.

The men who Arkansas scheduled for execution this month show that the state has failed to condemn only those with the most extreme moral culpability. These men's cases highlight two undeniable truths about America's 40-year experiment with capital punishment—that it punishes the most vulnerable people who have also had the worst lawyers. Collectively, these men are

among the nation's most impaired and marginalized citizens. And the woefully deficient lawyering that drips off of the appellate records and court opinions in these cases reveals the intractable problem of inadequate investigation and presentation of mitigation evidence in capital cases. Such inadequate representation precludes juries from hearing why they should decline to impose the harshest form of punishment.

Ledell Lee's case presents a striking example. Mr. Lee's adjusted IQ score, obtained just days ago, is a 79, placing him in only the eighth percentile, and inside Arkansas' range of intellectual disability. *See* ECF 166 at 23; *Sasser v. Norris*, 735 F.3d 833, 844 (8th Cir. 2013) (noting that "[u]nder Arkansas law, mental retardation is not bounded by a fixed upper IQ limit, nor is the first prong a mechanical 'IQ score requirement'"); *see also State v. Agee*, 364 P.3d 971, 983, 989 (Or. 2015) (finding that the defendant may have a claim of intellectual disability with an IQ score between 82 and 84 given his significant adaptive deficits and evidence of fetal alcohol syndrome). Lee was in special education classes his entire life, consistently scored poorly on standardized testing, earned abysmal grades, and repeated both the seventh and eighth grades, before finally dropping out in the ninth grade. ECF No. 166 at 19-21; ECF No. 162. Lee also has exhibited "[s]ignificantly subaverage" functioning on nearly every neuropsychological test performed, and there is evidence to suggest that he has brain damage on his right hemisphere and frontal lobe. ECF No. 166 at 19-22. He also likely has Fetal Alcohol Syndrome, a diagnosis corroborated by his mother's chronic drinking while pregnant. ECF 166 at 22-23. This is

compelling evidence that death is a disproportionate sentence for Mr. Lee.

No jury—or court for that matter—ever heard any of this evidence. Mr. Lee's trial attorneys asked the court to remove them from his case due to a conflict, and while the request was denied, there is no evidence to suggest they ever investigated his case. Lee's first state post-conviction attorney was so intoxicated during the proceedings that the prosecutor asked for a drug test and the federal district judge could later discern his impairments by reading a cold transcript. ECF 166 at 13. His next state post-conviction attorneys conducted no mitigation investigation and presented essentially the same evidence as Mr. Lee's drunk lawyer. And one of Mr. Lee's two federal post-conviction attorneys suffered from a mental illness that eventually rendered him a threat to his clients. ECF 166 at 9. In short, in a process that resulted in a death warrant scheduled for this evening, Mr. Lee received representation that would make any judge, prosecutor, defendant, or court-watcher in misdemeanor court cringe.

Kenneth Williams, like Ledell Lee, is cognitively impaired. He has a full-scale IQ of 70, which places him in the IQ range to qualify for a diagnosis of intellectual disability, and a history of adaptive deficits which include learning disabilities and neuropsychological problems. He began failing and repeating grades when he was nine, and there is a lengthy history of intellectual disability in his family. Trial Testimony of Mark D. Cunningham at 9-10, 14, 24. Also like Ledell Lee, no court has ever reviewed the *Atkins* claim that he is categorically

ineligible for execution because of his intellectual disability. Mr. Williams experienced "significant head injuries," and may also have brain damage. In an expert evaluation, he exhibited mild stuttering, a mild tremor, attention and focus problems, "deficiencies of judgment and reasoning, problems with reading comprehension, problems with comprehending oral instructions and problems with mental flexibility." His brain, said one expert, "is not working the way it should." Trial Testimony of Mark D. Cunningham at 16.

The extraordinary abuse Kenneth Williams experienced as a child provides further evidence that he falls into the category of society's most impaired, and not the most culpable. *See Wiggins*, 539 U.S. at 535 (holding that defense counsel had an obligation to investigate and present evidence of severe abuse by the defendant's alcoholic and absentee mother, as well as evidence of molestation and repeated sexual assault as a teenager). As a child, he moved among at least six different foster homes, some of which were "rat and roach infested," experienced "extreme economic deprivation" with utilities regularly shut off, and watched his parents abuse various substances. His father held his mother at gunpoint for several days and regularly beat her. And Mr. Williams' father routinely whipped him. There also is evidence that he suffered sexual abuse as a teenager. *Id.* at 6, 26, 18-20, 26, 28.

Marcel Wayne Williams is no stranger to this Court—*Williams v. Hobbs*, 562 U.S. 1097 (2010) (Sotomayor, J., dissenting from the denial of certiorari). Mr. Williams's mother beat him savagely, with belts, switches, boiling water, and extension

cords. *See* Appendix I at 4, 22-23, 27-28; *Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009) (No. 5:02-cv-00450). By the time he was nine or ten, his mother started pimping him out to older friends in exchange for "food stamps, for food, for a place to stay." And he was violently gang-raped while in prison. *Id.* at 20-28.

This type of trauma and abuse often convinces jurors to spare a defendant's life. *See* Garvey, *Aggravation And Mitigation In Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998). But the jury never heard this evidence of extraordinary sexual and physical abuse because his trial lawyers failed to uncover it. Indeed, his lawyer presented almost no evidence at the penalty phase of the trial despite conceding Mr. Williams's guilt at the guilt phase. *See Williams v. Norris*, 2007 WL 1100417, at *1 (E.D. Ark. Apr. 11, 2007), *aff'd in part, rev'd in part*, 576 F.3d 850 (8th Cir. 2009).

Jack Jones suffers from bipolar disorder and a history of depression. As a child, he thought he saw "bugs, ants and spiders" that would attack him. He believed the "only way to be safe from [them] was to hold very still." Sometimes, he would bang his head against the cupboards, rocking back and forth. As a teenager, a doctor recommended psychotherapy and family counseling, but the family did not follow this advice. *See* Declaration of David Freedman, M.S., at 9-16, on file with the Fair Punishment Project; Amended Petition for Writ of Habeas Corpus at 6, 9, *Jones v. Norris*, No. 5:00-cv-401 (E.D. Ark. Sept. 14, 2005); Response to Amended Petition for Writ of Habeas Corpus at 6, *Jones v. Norris*, 5:00-cv-401 (E.D. Ark. Oct. 4, 2005). He tried to commit suicide

in 1989 and again in 1991, when he jumped off a bridge. Only then did he receive psychiatric attention. Months before the murder, he committed himself to the hospital, again reporting suicidal ideation. It is then that he finally received his bipolar diagnosis. *See* Freedman Declaration at 11-17.

Jones also is a victim of sexual abuse, both by his father and then later at the hands of three strangers who raped him. *Id.* But his jury never heard that evidence. His lawyers, who spent a mere $6,641.95 on his defense, which included the cost of plane tickets for the witnesses, lodging, and food, did not investigate or present any meaningful mitigation evidence, instead arguing primarily that he had an attention-deficit disorder. Supplemental Response to Motion for Leave to File Second Amended Petition at 7, *Jones v. Norris*, No. 5:00-cv-401 (E.D. Ark. Feb. 14, 2006); Amended Petition for Writ of Habeas Corpus at 7, *Jones v. Norris*, No. 5:00-cv-401 (E.D. Ark. Sept. 14, 2005).

Stacey Johnson. There is no evidence that anyone has ever conducted even the most minimal of investigation into Stacey Johnson's life history. He does, however, have a strong claim of his innocence. Therapy records reveal that the decedent's family members may have pressured the main witness in the case, a young child, into identifying Mr. Johnson as the culprit. The trial judge kept this information from Mr. Johnson's jury. *See Johnson v. State*, 27 S.W.3d 405, 411 (Ark. 2000). The trial judge also excluded evidence that the decedent's ex-boyfriend had a history of abusing her and biting breasts—relevant testimony given the presence of a bite mark

on her breast when police arrived on the scene. *Id.* at 415. For years, Mr. Johnson requested DNA testing that was unavailable at the time of his trial. Yesterday, the Arkansas Supreme Court stayed his execution and granted the request to test the DNA; the State is appealing.

These are the five men who remain on Arkansas's expedited execution schedule. The three others who were scheduled for execution but received stays of execution follow the same pattern of devastating impairments coupled with utterly deficient and embarrassing lawyering:

Jason McGehee. The clemency board recently recommended clemency for Jason McGehee, who suffers from bipolar disorder, an illness that runs in his family. He has exhibited symptoms for most of his life, but never received treatment as a child because his mother believed he was just "possessed by the Devil." *See* Petition for Writ of Habeas Corpus at 34; *McGehee v. Norris*, No. 5:03-cv-143 (E.D. Ark. Oct. 10, 2003). He also experienced horrific trauma as a child. Jason's father killed two family dogs when Jason was young, slitting their throats with a knife. Later, he got another dog, Dusty, who he took with him everywhere, carrying it "around . . . like he was a baby," "dress[ing] [it] up" in "clothes," including a "jogging suit." His constant companion, the dog even slept with him. Jason's step-father killed the dog, kicking it to death with his pointy toed shoes while forcing Jason to watch. According to relatives, "[t]hat was the turning point. Jason was never the same after that." Jason's mother's cruelty also knew no bounds. She once forced him to live outside in a dog run because he missed curfew. *See* Petition for

Writ of Habeas Corpus; *McGehee*, at 21-22, 31-33. Jason's trial lawyer uncovered very little of this evidence. *McGehee v. Norris*, 588 F.3d 1185, 1196 (8th Cir. 2009).

Bruce Ward's case follows the same pattern. A paranoid schizophrenic, Mr. Ward does not appear to understand he will be executed and instead thinks he will "walk out of prison to great riches and public acclaim." He receives "revelations from God directly (voices), and through scripture." He believes he is in prison because of demonic forces God has allowed to "prepare him for a special mission as an evangelist," and is certain that his dead father and resurrected dogs are in the prison. Complaint for Declaratory and Injunctive Relief at 7-16; *Ward v. State*, 455 S.W.3d 303, No. 35-cv-15-558 (Ark. 2015). None of this information was presented to a jury; indeed, Mr. Ward never even received an evaluation from an independent expert, a fact which formed one of the two bases for his eventual stay.

Don Davis, like Ledell Lee and Kenneth Williams, might have intellectual disability. But as in Mr. Ward's case, the trial judge denied funding for an independent expert to help the defense investigate Mr. Davis's intellectual and mental health, forming the basis for his current stay of execution. *Davis v. Norris*, 423 F.3d 868, 875 (8th Cir. 2005). He too has experienced ineffective lawyering -- by the time Mr. Davis's lawyers raised the issue of his intellectual disability in a successive habeas petition, the Eighth Circuit found he had defaulted the claim. *Id.* at 879.

These eight men are not among the "worst of the worst." Rather, their cases show, in breathtaking fashion, that the death penalty fails to capture only those with the most extreme culpability. And the records reveal that they received their sentences not after trials (or even appeals) involving heightened procedures and well-litigated cases, but after losing the perverse lottery of lawyers, where the most impaired defendants receive the least help.

While the Arkansas cases are devastating in the scope of their deficiencies, they are not unique. With death sentences and executions at all-time or near all-time lows, it is now possible to survey the whole of America's death penalty, and all that is left is rotten to the core. We routinely execute the severely mentally ill, the intellectually impaired, combat veterans who come back home with traumatic brain injuries and post traumatic stress disorder, and those not old enough to legally purchase alcohol. *See* Death Penalty Information Center, The Death Penalty in 2016: Year End Report (2016) (https://deathpenaltyinfo.org/documents/2016YrEnd.pdf) (concluding that "at least 60% of the prisoners executed [in 2016] showed significant evidence of mental illness, brain impairment, and/or low intellectual functioning"); Fair Punishment Project, Too Broken To Fix: An In-Depth Look at America's Outlier Death Penalty Counties (2016) (*available at* http://fairpunishment.org/part-ii-of-our-report-on-americas-outlier-death-penalty-counties-released/) (Examining every case decided on direct appeal between 2006 and 2015 in the sixteen counties in America that return the most death sentences and finding that "fifty-six percent of cases involved defendants with significant mental

impairments or other forms of mitigation, such as the defendant's young age. Forty percent of cases involved a defendant who had an intellectual disability, brain damage, or severe mental illness.")

Because inadequate defense lawyering pervades death penalty trials, as it does in the eight Arkansas cases, it is almost certainly true that what is known about the crippling impairments of those under sentence of death dramatically under-represents their frequency, degree, and kind. *See Part II of Our Report Released*, Fair Punishment Proj. (Oct. 12, 2016) (http://fairpunishment.org/part-ii-of-our-report-on-americas-outlier-death-penalty-counties-released/) ("During the mitigation phase, the defense lawyer is supposed to present all of the evidence showing that the defendant's life should be spared–including testimony from mental health and other experts. This presentation can last several weeks if the lawyers prepare properly. [Yet,] In most of the [sixteen highest use] counties, the average mitigation presentation at the penalty phase of the trial lasted less than one and half days."); *The Failure of Mitigation?* at 1254 (noting that "a significant number of [the 100] executed offenders [studied] did not present (or adequately present) the mitigation evidence found in their post-conviction claims at the trial level"); Robert J. Smith, *Forgetting Furman*, 100 Iowa L. Rev. 1149 (2015) (explaining that most mitigation is not uncovered until federal habeas, at which point the Court applies a strong presumption of finality and deference to the verdict). This failing alone is enough to call into question the constitutionality of the death penalty, because access to vigorous representation that allows a "jury be able to fully

and fairly evaluate 'the characteristics of the person who committed the crime'" is "a bedrock premise on which our system of capital punishment depends." *Elmore v. Holbrook*, 137 S.Ct. 3, 11 (2016) (Sotomayor, J., dissenting) (citing *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)).

III. THIS COURT SHOULD END THE FAILED EXPERIMENT WITH CAPITAL PUNISHMENT.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), this Court provided a constitutional stamp of approval to capital punishment on the premise that newly drafted statutes would ensure that the death penalty be returned only in the most aggravated and least mitigated cases. Forty years later, there is no rational basis for concluding that this experiment has been a success. *See Kennedy v. Louisiana,* 554 U.S. 407, 436 (2008) (emphasizing that the Court's attempt to regulate capital punishment through procedural rules "has produced results not all-together satisfactory" and refusing to permit an expansion of the death penalty to non-homicide offenses because it would require "experimentation in an area where a failed experiment would result in the execution of individuals undeserving of the death penalty"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) ("The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments").

In response to a four-decades long failed experiment, the results of which plainly and

frequently include the "execution of individuals undeserving of the death penalty," the obligation to end this punishment rests squarely and unmistakably with this Court. The Constitution charges the Court with the duty to vigorously enforce its "broad provisions [designed] to secure individual freedom and preserve human dignity." *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). The role of the judiciary is to engage with the overzealous exercise of government power, regardless of how controversial the matter might be, when the rights of the most vulnerable and voiceless people in our society are at risk. *See United States v. Carolene Products, Inc.*, 304 U.S. 144, 153 n.4 (1938) (noting that "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . may call for a correspondingly more searching judicial inquiry"); *McCleskey v. Kemp*, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting) ("Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment. It is the particular role of courts to hear these voices, for the Constitution declares that the majoritarian chorus may not alone dictate the conditions of social life."). There is a sentiment that when this Court renders controversial decisions it "draw[s] down on a capital of [public] trust." Justice Anthony M. Kennedy, Remarks at the 9th Circuit Judicial Conference (July

15, 2015). Inaction, too, draws down from the "reservoir of [public] trust."

CONCLUSION

Amici urge this Court to stay the execution, grant certiorari, and add to the briefing schedule the additional question of whether the death penalty violates the Eighth Amendment's prohibition on cruel and unusual punishment.

Respectfully submitted,

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