No. 16-9725

IN THE

Supreme Court of the United States

RONALD PHILLIPS,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, SUMMIT COUNTY

BRIEF OF JUVENILE LAW CENTER, ATLANTIC CENTER FOR CAPITAL REPRESENTATION AND VINCENT SCHIRALDI AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici[2] individually and collectively work to integrate research regarding adolescent development into juvenile justice practice and policy. This research shows that youth who enter the justice system need extra protection and special care, and that adolescent immaturity often manifests in ways that implicate culpability, including a diminished ability to assess risks, make good decisions, and control impulses. For these reasons, *Amici* believe that youth should be held accountable, but also that youth cannot be held to the same standards of blameworthiness and culpability as their mature adult counterparts.

SUMMARY OF ARGUMENT

This Court has long recognized that imposition of the death penalty upon certain classes of individuals constitutes excessive punishment in violation of the

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[1] Pursuant to SUP. CT. R. 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici, its members, or its counsel, has made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[2] Statements of Interest for Amici appear at Appendix A.

Eighth Amendment. Juveniles are exempt from that punishment based upon this Court's recognition of their diminished culpability due to characteristics that typify youth—immaturity, impetuosity, susceptibility to negative peer influences and a lack of fully formed character. These characteristics, more than the specific age of the offender, determine the class of individuals for whom the death penalty is unconstitutional.

Although this Court has acknowledged that it is the *characteristics* of youth that require constitutional protection, and not a specific chronological age, it has also recognized that an age-based line must be drawn. In determining where to draw this line, the Court has looked to the current national consensus on the demarcation of adulthood, as reflected in state sentencing practices and legislation, as well as the scientific community's own growing understanding of human development. Accordingly, in the context of the death penalty, this Court has repeatedly revised or altered its articulation of the line between juveniles and adults to account for society's evolving views.

In *Roper* v. *Simmons*, 543 U.S. 551, 562 (2005), this Court ruled that subjecting juvenile offenders who committed capital crimes to the death penalty prior to 18 constituted cruel and unusual punishment in violation of the Eighth Amendment. Citing developments in the law and social science that reflected a new national consensus regarding juvenile development, the Court overruled its earlier decision in *Stanford* v. *Kentucky*, 492 U.S. 361

(1989), which upheld the death penalty for juveniles convicted of homicide when they were 16 or 17 years old.

In the twelve years since *Roper* was decided, the objective indicia of national consensus—including state death penalty and sentencing practices, legislative developments, and empirical research—have once again evolved, requiring this Court to revisit prior case law and compelling the conclusion that the line between childhood and adulthood must now be moved to 21.

From laws regulating the consumption, purchase or possession of tobacco and marijuana to laws extending the period of time for provision of child support and foster care, recent legislative changes evince a national consensus that individuals under the age of 21 should be considered less culpable for their criminal acts than fully-developed adults. Moreover, these legislative trends have been informed by neuroscientific research, which demonstrates that the portions of the brain associated with the developmental characteristics identified in *Roper*, including the regulation of judgment and self-control, are still maturing in individuals at least through 21.

Accordingly, the age range this Court associates with the characteristics of youth is ripe for revisit. This Court should grant certiorari in order to reexamine this issue and extend the line of adulthood to 21 in accordance with the nation's clear consensus.

I. THIS COURT SHOULD GRANT CERTIORARI TO ENSURE THAT THE IMPOSITION OF THE DEATH PENALTY ON JUVENILE OFFENDERS ACCORDS WITH EVOLVING STANDARDS OF DECENCY, AS REFLECTED IN OBJECTIVE INDICIA AND CURRENT SCIENTIFIC RESEARCH.

Because of the death penalty's unique "severity and irrevocability," *Gregg* v. *Georgia*, 428 U.S. 153, 187 (1976), this Court has held that "[u]nless the imposition of the death penalty . . . 'measurably contributes to [either retribution or deterrence of capital crimes by prospective offenders],' it 'is nothing more than purposeless and needless impositions of pain and suffering,' and is hence an unconstitutional punishment.'" *Atkins* v. *Virginia*, 536 U.S. 304, 319 (2002).

To ensure that imposition of the death penalty comports with these standards, certain classes of offenders are categorically exempt from the punishment, including juveniles. *See Roper*, 554 U.S. at 571. This conclusion is based on the irrefutable premise that juvenile offenders have diminished culpability due to specific characteristics that typify youth, including (1) a lack of maturity and an underdeveloped sense of responsibility, (2) increased susceptibility to negative influences and outside pressures, and (3) unformed or underdeveloped character. *See id.* at 569-71 (imposition of the death penalty on juveniles does not contribute to either retributive or deterrent goals

because the culpability or blameworthiness of a juvenile is "diminished, to a substantial degree, by reason of youth and immaturity").

Consistent with its Eighth Amendment jurisprudence accounting for evolving standards of decency, this Court has periodically revised its determination of which offenders qualify for a categorical exemption to the death penalty. S*ee, e.g., Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (concluding that the Eighth Amendment did not mandate a categorical exemption from the death penalty for intellectually disabled offenders in part because only two States had barred such imposition of the death penalty); *Atkins*, 536 U.S. 304 (barring execution of intellectually disabled offenders and rejecting *Penry* due to evolving standards of decency, as demonstrated by the fact that only a minority of states allowed such execution); *Hall* v. *Florida*, 134 S. Ct. 1986 (2014) (updating the definition of intellectually disabled in light of society's and the medical community's evolving standards).

In the context of juveniles, this Court has recognized a need to revisit the appropriate *age* for juvenile offenders in light of society's evolving understanding of the age and characteristics that define youth.

Prior to 1988, only juveniles under 7 years old were clearly exempt from the death penalty (or any other criminal sanction). *See In re Gault*, 387 U.S. 1, 16 (1967) ("At common law, children under seven were considered incapable of possessing criminal

intent. Beyond that age, they were subjected to arrest, trial and in theory to punishment like adult offenders."). In 1988, a plurality of this Court expanded the constitutional protection owed to juvenile offenders to include individuals who committed capital crimes before the age of 16. *Thompson* v. *Oklahoma*, 487 U.S. 815 (1988). One year later, this Court declined to extend its protection against execution to 16 and 17 year olds. *Stanford*, 492 U.S. at 380.

Just over fifteen years later in *Roper*, this Court again reconsidered the application of the juvenile death penalty and reversed *Stanford*, extending its ban in *Thompson* to cover all youth convicted of homicides committed under the age of 18. *Roper*, 543 U.S. at 574. *Roper*'s holding was based on this Court's view that society had once again evolved in its understanding of where to draw the line for juvenile status, as reflected in states' death penalty practices, by the lines drawn by the states between "childhood and adulthood" for many purposes outside the context of the death penalty and in then-current scientific developments. *Id*. ("To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989 . . . it suffices to note that those indicia have changed.").

Today, reference to the indicia cited in *Roper* demonstrates that society's view of where to draw the line between childhood and adulthood for purposes of the death penalty has once again evolved. State death penalty practices, other state legislation and scientific developments all indicate a

clear national consensus that this line should now be set at 21.

II. THERE IS NOW A CLEAR NATIONAL CONSENSUS THAT THE LINE BETWEEN CHILDHOOD AND ADULTHOOD SHOULD BE SET AT 21 WHEN CONSIDERING THE SAME FACTORS IDENTIFIED AND RELIED ON IN *ROPER*

Since *Roper*, objective indicia demonstrate that states are revisiting and reexamining the age of adulthood in the context of the death penalty as well as in other contexts and, when considering society's evolving views on the characteristics relied on in *Roper*—immaturity, vulnerability and susceptibility, and an underdeveloped character—are now drawing the line for adulthood at 21.

A. State Death Penalty Practice Continues to Evince a Trend Toward Abolishing the Death Penalty for Individuals Under 21

In banning juvenile death penalty in *Roper*, the Court relied upon data showing that the majority of states rejected juvenile death penalty and that, even where valid, it was infrequently imposed on individuals under 18. A similar pattern is now emerging regarding application of the death penalty to individuals between the ages of 18 and 21.

In the twelve years since this Court's last review, the majority of states have not executed anyone under 21, and no state has decreased the minimum

age of execution. *See* Brief for Petitioner at 22-23, *Phillips* v. *Ohio*, __ U.S. __, 24 (2017).

With respect to those states which still retain the death penalty, there has been a marked and consistent decline in executions of individuals under 21 at the time of the offense. *Id.* (citing a study finding that executions of offenders between the ages of 18 to 20 are "rare and occur in just a few states"). The practice in Ohio is illustrative of this trend: while the state imposed 42 death sentences on individuals aged 18 to 21 between 1981 and 1996, only 8 of those individuals have been executed. *Id.*

This trend is compelling in view of this Court's prior cases. In *Graham* v. *Florida*, the Court prohibited life-without-parole sentences for juveniles committing non-homicide offenses, even though *39* jurisdictions permitted that sentence. 560 U.S. 48, 82 Appendix, Part I (2010). In *Atkins*, *Roper*, and *Thompson*, the Court banned the death penalty in circumstances in which "less than *half*" "of the States that permit[ted] capital punishment" had previously chosen to do so. *See Atkins, 536 U.S.* at 342 (Scalia, J. *dissenting*); *Roper* 543 U.S. at 564-65; *Thompson*, 487 U.S. at 826-29.

B. Since *Roper*, State Legislation now Consistently Sets 21 as the Age of Adulthood When Considering the Same Factors Relied on by the *Roper* Court to Draw the Line at 18

In addition to state death penalty practice, the *Roper* Court focused primarily on where society drew the line "between childhood and adulthood" for "many purposes" outside the context of the death penalty. *Roper*, 543 U.S. at 574. Since then, when considering the same characteristics relied on in that case, states have either reexamined and amended *existing* legislation, created *new* legislation, or *retained* legislation, which shift the line between childhood and adulthood to 21, rather than 18.

1. States Have Modified Existing Legislation to Conform with Society's Evolved View that the Line for Adulthood Should be 21

Over the last decade, legislation has consistently extended the age of adulthood to 21.

For example, many states and municipalities have raised the age for purchasing tobacco—one of the four primary legislative comparisons noted in *Roper*—from 18 to 21.[3] At least 22 additional states have similar legislation pending.[4]

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[3] *See, e.g.*, N.Y.C. Administrative Code § 17-706 (2014); Cal. Penal Code § 308 (2016) and Cal. Bus. & Prof. Code § 22963

The legislative history behind this trend in tobacco laws is premised on the notion that today, society now widely recognizes that certain characteristics encapsulating youth, including "maturity" and "susceptib[ility]" to "addictive properties," extend to 21. The Council of the City of New York, *Committee Report of the Human Services Division*, Committee on Health, at 12 (2013); *see also* State of California, Hearing Before the Assembly Committee on Public Health and Developmental Services, 2015 Second Extraordinary Session, at 3 (August 25, 2015) (Bill Analysis) ("[Today,] the evidence and need are clear on the legal age for tobacco and now is time for us to make this

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(2016); Haw. Rev. Stat. § 712-1258 (2015); Chi., Ill., Code of Ordinances § 4-64-190 (2017); Kansas City, Mo., Code of Ordinances § 50-253 (2017); St. Louis County, Mo., Code of Ordinances § 602.367 (2017); Cleveland, Ohio, Code of Ordinances § 607.15 (2016).

[4] *See* H.R. 5384, Gen. Assemb., Reg. Sess. (Conn. 2017); H.R. 3208, 100th Gen. Assemb., Reg. Sess. (Ill. 2017); S. 1218, 190th Gen. Court. (Mass. 2017); H.R. 52, Gen. Assemb., Reg. Sess. (Vt. 2017); H.R. 7737, Gen. Assemb., Reg. Sess. (R.I. 2016); H.R. 1628, Gen. Asemb., Reg. Sess. (Pa. 2015); S. 5, 87th Gen. Assemb., (Iowa 2017); S. 754, (Or. 2017); H.R. 229, Leg., 16th Reg. Sess. (Ky. 2016); H.R. 391, 128th Leg., 1st Reg. Sess. (Me. 2017); S. 669, Reg. Sess., (Md. 2017); H.R. 4736, 99th Leg., Reg. Sess. (Mich. 2017); S. 2370, 90th Leg., (Minn. 2017); H.R. 73, 105th Leg., 1st Sess. (Neb. 2017); H.R. 435, Gen. Assemb., Reg. Sess. (N.C. 2017); S. 359, 217th Leg., Reg. Sess. (N.J. 2016); S. 319, 53rd Leg., 1st Sess. (N.M. 2017); H.R. 273, Gen. Assemb., Reg. Sess. (N.Y. 2017); H.R. 2317, 55th Leg., 2nd Sess. (Okla. 2016); H.R. 1908, 86th Leg., Reg. Sess. (Tex. 2017); H.R. 2331, Leg., Reg. Sess. (W. Va. 2017); H.R. 1054, 65th Leg., Reg. Sess. (Wash. 2017).

change."); Tobacco 21, *Hawaii Voters Favor Raising the Legal Age for the Sale of Tobacco to Age 21*, at 2 (2014), http://tobacco21.org/wp-content/uploads/2016/03/raisetheagepollcombined.pdf (explaining that "voters remain solidly in support of the proposal to raise the legal age for the sale of cigarettes and other tobacco products to age 21").

The same rationale underpinning these new tobacco laws has also led states to update laws in many other areas. For example, since *Roper*, 24 states, prompted in part by federal guidance,[5] have extended the age at which young people can remain in foster care to 21. This legislation—and federal support for extending the age to 21—is based on the notion that young people may not be prepared for independent living at 18, when their character is not yet fully formed and when propensity for risky behavior still exists. *See* Miriam Aroni Krinsky & Theo Liebmann, *Charting a Better Future for Transitioning Foster Youth: Executive Summary of Report From a National Summit on the Fostering Connections to Success Act*, 49 FAM. CT. REV. 292-300 (2011) (citing evidence that individuals ages 18 to 21 are "far less likely to be victims or perpetrators of crime and violence"); *cf. Roper*, 543 U.S. at 570

[5] Fostering Connections to Success and Increasing Adoptions Act of 2008 (P.L. 110-351) Sec. 201 (continuing federal support for children in foster care after 18 based on evidence that youth who remain in foster care until 21 have better outcomes when they leave the foster care system); and Sec. 202 (requiring child welfare agencies to help youth at 18, 19, 20, and 21 plan for their transition to independence from the foster care system).

(identifying as a salient characteristic of youth an individual's "vulnerability and comparative lack of control over their immediate surroundings").

In keeping with this trend, states have, among other areas, (1) created at least 50 special courts targeted specially at young adults ages 18 to 21;[6] (2) adopted "youthful offender" laws awarding a hybrid of special protections to individuals 18-21;[7] and (3) extended the obligation to pay child support to at least 21.[8]

2. States Have Created New Legislation or Retained Existing Legislation, Which Sets Adulthood at 21

When society today attempts to set the line between childhood and adulthood—or when society has done so in the past—based on characteristics relied on *in Roper*, the line is consistently set at 21.

For example, *all* of the states that have legalized recreational marijuana to date have proscribed its use by persons under 21.[9] States drew the line at 21

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[6] *See* https://www.ncjrs.gov/pdffiles1/nij/249902.pdf.

[7] *See e.g.*, MICH. COMP. LAWS ANN. § 762.11 (2015).

[8] *See* Ind. Code § 31-16-6-6 (1997); Mass. Gen. Laws Ann. ch. 209, § 37 (1991); Mo. Rev. Stat. § 452.340(5) (1990*)* N.Y. Dom. Rel. Law § 413(1)(a) (1990); N.C. Gen. Stat.§ 50-13.4 (1989); Okla. Stat. Tit. 43 § 112(E) (2005); Or. Rev. Stat. § 107.108(1)(B) (1989).

[9] *See* Colo. Rev Stat. Ann. § 12-43.4-402 (2013); Alaska Stat. § 17.38.070 (2014); Or. Rev. Stat. § 475B.270 (2015); Wash. Rev.

based on consideration of the same factors relied on in *Roper*—the ability for impulse control, susceptibility to peer pressure, and propensity for risky behavior. *See, e.g.*, H.R. 128-88, 1st Sess., at 1 (Me. 2017) ("[E]nsuring that possession and use of recreational marijuana is limited to persons who are 21 years of age and older is necessary to protect those who have not yet reached adulthood from the potential negative effects of irresponsible use of a controlled substance.").

Similarly, there are a significant number of longstanding laws that use 21 as the marker between children and adults for the regulation of activities that require particular maturity and impulse control. For instance, *all fifty states* require an individual to be 21 to purchase alcohol. *See* National Minimum Drinking Age Act, 23 U.S.C § 158 (1984). The corresponding federal legislative history affirms that 21 was chosen out of concern for the "recklessness" and "immaturity" of those under 21. National Minimum Drinking Age: Hearing Before the Subcommittee on Alcoholism and Drug Abuse of the Committee on Labor and Human Resources, 98th Cong., 48 (1984) (Testimony of National Safety Council) ("TNSC"). Notably, this legislative history cites empirical evidence that raising the age to 21, because of qualities of susceptibility and vulnerability between the ages of 18 and 21, decreases deaths and injuries "among [] youthful drivers." TNSC at 48.

Code § 69.50.560 (2015); D.C. Code Ann. § 48-904.01 (2015); Nev. Ballot Measure 2 § 6.

In addition, 10 out of the 18 states with casinos restrict entrance to individuals at 21;[10] the Federal Juvenile Delinquency Act shields juveniles under 21, *see* 18 U.S.C. § 5031 (2014); youth is defined in the United States Code to extend to 21 or older in many, if not most, statutes;[11] and federal law (and at least 15 state laws) set 21 as the age for purchasing handguns.[12]

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[10] *See* Colo Rev. Stat. § 12-47.1-809 (1991); Del Code Tit. 29, § 4810 (1974); Ind. Code § 4-33-9-12 (1993); Iowa Code § 99B.43 (2015); La Rev. Stat. § 14:90.5 (2004); Miss. Code § 75-76-155 (1990); Mo. Rev. Stat. § 313.817 (1991); Nev. Rev. Stat. § 463.350 (1955), N.J. Stat. § 5:12-119 (1977); S.D. Codified Laws § 42-7B-35 (1989).

[11] *See, e.g.*, 8 U.S.C. § 1101(b)(1), (c)(1) (2014) (defining "youth" for purposes of immigration, nationality and naturalization as under 21); 42 U.S.C. § 290bb-25b(a)(3) (2016) (defining "youth" at 21 for programs established to reduce underage drinking; 42 U.S.C. § 290bb-36(l)(4) (defining "youth" at 10 to 24 for youth suicide early intervention and prevention strategies as determined by the Substance Abuse and Mental Health Services Administration); 42 U.S.C. § 13925(a)(45) (2013) (defining youth at 11 to 24 for purposes of the Violence Against Women Act).

[12] *See generally* The Gun Control Act of 1968, 18 U.S.C. § 922(b)(1) (1968). *See also* Cal. Penal Code 27505(a) (2010); 21 Conn. Gen. Stat. § 29-28(b)(10) (2001); Del. Code Ann. tit. 24 § 903 (1953); D.C. Code Ann. § 22-4507 (1994); Haw. Rev. Stat. Ann. § 134-2(a),(d) (2006); 430 Ill. Comp. Stat. 65/4 (1961); Iowa Code § 724.22 (1994); Md. Code Ann., Pub. Safety § 5-133 (2003); Mass. Gen. Laws ch. 140, § 130 (1997); Neb. Rev. Stat. § 69-2404 (1991); N.J. Stat. Ann. § 2C:58-6.1 (1979); N.Y. Penal Law § 400.00(1) (1965); Ohio Rev. Code Ann. § 2923.21(B) (1972); R.I. Gen. Laws §§ 11-47-35(a)(1),11-47-37 (1956)..

C. Legislation Declaring Adult Status at 18 is Premised on Different Considerations and Rationales Than Those Identified in *Roper* as Requiring Categorical Constitutional Protection

Although states continue to set 18 as the relevant marker for certain other regulated activities noted in *Roper*—*i.e.* voting, marrying without consent, entering the military and serving on juries—the rationales sustaining those laws are based on different characteristics than those underpinning the Court's decision.

For example, voting, marriage and jury duty are not activities that are highly susceptible to impulsive or risky behavior: they allow a person time to "gather evidence, consult with others and take time before making a decision." Laurence Steinberg, *A 16-Year-Old is as Good as an 18-Year-Old—or a 40-Year-Old—at Voting*, L.A. TIMES (Nov. 3, 2014), http://www.latimes.com/opinion/op-ed/la-oe-steinberg-lower-voting-age-20141104-story.html.

By contrast, the purchase or use of tobacco or alcohol, living without parental guidance or committing a capital crime are all emotionally arousing activities, where maturity, vulnerability and susceptibility to influence and underdeveloped character come into play. *See generally* Part II.

The national consensus, as evinced by state legislation, now clearly sets the line for adulthood at 18 or lower when considering activities characterized

by considered, logical decision-making, while simultaneously recognizing that when it comes to activities characterized by "emotionally arousing conditions," the age of adulthood should be set at 21. J. Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 652 (2016); *see also infra* Part III.A.

For example, while most states set 18 as the demarcation for securing a driver's license, federal law requires an individual to be 21 to operate a *commercial* motor vehicle, noting that when considering characteristics including heightened propensity for "risk[y]" behavior or lack of impulse control, the age should be extended to 21. Linda C. Fentiman, *A New Form of WMD? Driving with Mobile Device and Other Weapons of Mass Destruction*, 81 UMKC L. Rev. 133, 142 (2012). Similarly, this distinction and society's evolved view of the age range during which the *Roper* characteristics are present prompted states to extend the age for tobacco purchase to 21.

The distinction between these two distinct strains of legislation is confirmed by this Court's prior opinions. In *Atkins*, the Court held that the ability of a class of persons to know right from wrong is *not* the test for determining whether the imposition of the death penalty on that class of persons is constitutional. 536 U.S. at 318. Rather, it is an individual's inability to "control impulses, and to understand the reactions of others," that warrant exemption from criminal culpability. *Roper*, 543 U.S.

at 593 (citing *Atkins*, 536 U.S. at 318*). See, e.g.*, *Roper*, 543 U.S. at 571 ("[R]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.").

When looking at legislation which is based on the same set of characteristics identified in *Roper*, execution now fits squarely into the category of laws that set the line for adulthood at 21.

III. SINCE *ROPER*, SCIENTIFIC RESEARCH ESTABLISHES THAT BRAIN FUNCTIONS RELEVANT TO THE CHARACTERISTICS OF YOUTH RELIED ON BY THIS COURT IN *ROPER* ARE STILL DEVELOPING AT 21

This Court has repeatedly looked to science to inform its constitutional analysis of evolving standards of decency. *See, e.g., Miller* v. *Alabama*, 567 U.S. 460, 471 (2012) ("Our decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well.") (quoting *Roper*, 543 U.S. at 569).

Since *Roper*, scientific and medical developments have made clear that the characteristics of youth that typify diminished culpability, as articulated by the *Roper* Court, are still developing in individuals through 21 in much the same way as they are in individuals under 18. These developments have influenced both legislators and lower state and federal courts, who have increasingly acknowledged

in our nation's laws and judicial decisions that these relevant characteristics of youth extend to 21.

A. The Vast Body of Empirical Research Since *Roper* Now Evinces A Clear Consensus That The Characteristics of Youth Are Still Developing Through 21

In *Roper*, this Court relied on three scientific and sociological studies—from 1968, 1992 and 2003—to "confirm" its analysis of society's evolving standards.[13] These studies have since become outdated, and a growing body of research now establishes that the portions of the brain associated with the characteristics relied on in *Roper* continue to mature at 21.

For example, the *Roper* Court relied on the 2003 Steinberg & Scott study to confirm its understanding that the appropriate line between childhood and adulthood should be set at 18.

In the ten years since his 2003 study, Dr. Steinberg has published numerous papers concluding that research *now* shows that the parts of the brain active in most "crime situations," including those associated with characteristics of impulse

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[13] *See* 543 U.S. at 568-72 (citing E. Erikson, Identity: Youth and Crisis (1968) ("Erikson"); Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992) ("Arnett"); Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) ("Steinberg & Scott")).

control, propensity for risky behavior, vulnerability, and susceptibility to peer-pressure, are still developing at 21. Laurence Steinberg, *Does Recent Research on Adolescent Brain Development Inform the Mature Minor Doctrine*, 38 Journal of Medicine and Philosophy 256 (2013); *see also* Lawrence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting,* 80 Child Dev. 28, 40-41 (2009) ("[C]hanges in impulse control and planning . . . mature[] more gradually and over a longer period of time, into early adulthood.").

In fact, there is now a large body of scientific research supporting the view that the characteristics relied on in *Roper* exist "far later than was previously thought," through 21. Vincent Schiraldi & Bruce Western, *Why 21 year-old offenders should be tried in family court,* Wash. Post (Oct. 2, 2015), https://www.washingtonpost.com/opinions/time-to-raise-the-juvenile-age-limit/2015/10/02/948e317c-6862-11e5-9ef3-fde182507eac_story.html?utm_term=.89ea7517d232. ("Young adults are more similar to adolescents than fully mature adults in important ways. They are more susceptible to peer pressure, less future-oriented and more volatile in emotionally charged settings.").[14]

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[14] *See, e.g.*, Andrew Michaels, *A Decent Proposal: Exempting Eighteen- to Twenty-Year-Olds From the Death Penalty*, 40 N.Y.U. Rev. L. & Soc. Change 139, 163 (2016) (citing to research that found antisocial peer pressure was a highly significant predictor of reckless behavior in emerging adults 18

Notably, this body of research specifically addresses the distinction between laws regulating activities relating to informed decision-making and logical reasoning, such as voting, and laws regulating activities relating to impulse control and susceptibility to peer pressure, such as capital crimes and the purchase and use of controlled substances. Specifically, the science confirms that the portions of the brain associated with the former set of characteristics develop earlier and more quickly, meaning that "adulthood" begins earlier, while the latter set of characteristics—relied on in *Roper*—take longer to develop, and require setting the age of "adulthood" past 18 till at least 21. *See, e.g.*, Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 Temple L. Rev. 769, 787 (2016) (defining "young

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to 21); Alexander Weingard et al., *Effects of Anonymous Peer Observation on Adolescents" Preference for Immediate Rewards*, 17 Developmental Science 71 (2013) (finding that a propensity for risky behaviors, including "smoking cigarettes, binge drinking, driving recklessly, and committing theft," exists into early adulthood past 18, because of a young adult's "still maturing cognitive control system"); Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 Crime and Justice: A Review of Research 577, 582 (2015) (finding that the development of the prefrontal cortex which plays an "important role" in regulating "impulse control," decision-making, and pre-disposition towards "risk[y]" behavior, extends at least to 21); Brief for the Am. Med. Ass'n et al. as Amici Curiae in Support of Neither Party, Miller v. Alabama, 132 S. Ct. 2455, 183 L. Ed. 2d (2012) at 19-20 ("'[R]esponse inhibition, emotional regulation, planning and organization . . . continue to develop between adolescence and young adulthood.'" (citations omitted)).

adulthood" at 21 for purposes of cognitive capacity and the ability for "overriding emotionally triggered actions," and finding that 21 is the "appropriate age cutoff[] relevant to policy judgments relating to risk taking, accountability, and punishment.").

As Dr. Steinberg explains,

> [T]o the extent that we wish to rely on developmental neuroscience to inform where we draw age boundaries between adolescence and adulthood for purposes of social policy, it is important to match the policy question with the right science. . . . For example, although the APA was criticized for apparent inconsistency in its positions on adolescents' abortion rights and the juvenile death penalty, it is entirely possible for adolescents to be too immature to face the death penalty but mature enough to make autonomous abortion decisions, because the circumstances under which individuals make medical decisions and commit crimes are very different and make different sorts of demands on individuals' abilities.

Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, AMERICAN PSYCHOLOGIST (Nov. 2009), at 744; *cf. Roper*, 543 U.S. at 620 (O'Connor, J., *dissenting*) (questioning why the age for abortion without parental involvement "should be any different" given that it is a "more complex decision for a young person than whether to kill an innocent person in cold blood.").

B. The Growing Body of Research Since *Roper* Has Informed Legislative Trends and Court Decisions

Both state legislatures and the judiciary have accepted the research described in Part III.A, relying on it to inform both legislation and judicial decision-making.

For example, much of the legislation now revisiting the appropriate age for juvenile status, *see supra* Part I, has cited this medical evidence to support the conclusion that the parts of the brain associated with characteristics of maturity, susceptibility to outside influences and underdeveloped character are still developing past 18.[15]

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[15] *See, e.g.*, California Senate, Bill Analysis, SB 7 X2, at 4 (2016), last visited at http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0001-0050/sbx2_7_cfa_20160303_100126_asm_floor.html ("The author notes that adolescent brains are more vulnerable to nicotine addiction, and people who reach the age of 21 as non-smokers have a minimal chance of becoming a smoker."); New York City Council Committee on Health, Testimony of Daniel McGoldrick, Vice President, Research Campaign for Tobacco-Free Kids, In Support of Proposed Int. 250A, Int. 1020-2013, Int. 1021-2013, May 2, 2013, at 4 (relying on over ten U.S. studies to find that "[a]dolescent and even young adult brains are still developing, and as a result, they are more *susceptible* to nicotine addiction."); Mich. Legislature, House Fiscal Agency Legislative Analysis, House Bill 4069, as enacted, at 5 (2015) (finding that "development of the brain" connected to the ability to make good decisions and judgments" occurs at ages later

Similarly, lower courts have acknowledged that this growing body of evidence is "widely-accepted." *In re Detention of Leyva*, 181 Wash. App. 1004 (Wash. App. Div. 3 2014) (affirming that it is a "widely-accepted premise" that a juvenile brain is "not fully formed and appears to develop until a person's mid-twenties."); *see also People* v. *House*, 72 N.E.3d 357, 387 (Ill. App. 1st Dist. 2015) (holding that *Roper* does not create a bright-line rule demarcating juvenile from adult at 18, and that recent research in neurobiology and developmental psychology justifies extending the ban on mandatory life sentences for juveniles to the 19-year-old defendant); *United States* v. *C.R.*, 792 F. Supp. 2d 343, 409-11 (E.D.N.Y. 2011) (recognizing that brain developments relating to maturity occur past 18). Indeed, in April, one federal district court granted a hearing on whether this Court's juvenile jurisprudence should be extended past 18 based on significant advances in our understanding of brain and youth development since *Roper*. *See Cruz* v. *U.S.*, 11-CV787 (JCH) (D.C.C. Apr. 3, 2017).

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than 18); Hawaii SB 1340 (2014) (basing its legislation in part on brain development research); Nina Williams-Mbengue & Meghan McCann, The Adolescent Brain – Key to Success in Adulthood, *Extending Foster Care Policy Toolkit* (premising its 21 age cutoff on brain growth and development relating to "decision-making and impulse control"); Alaska DHSS , *Get the Facts About Marijuana*, http://dhss.alaska.gov/dph/Director/Pages/marijuana/facts.aspx (last visited July 7, 2017) (basing marijuana legislation in part on studies showing when the brain develops characteristics for impulse control).

In sum, current scientific research confirms that the characteristics of youth underpinning this Court's ban of the juvenile death penalty in *Roper* are in fact present among young adults 18 to 21. Accordingly, *Roper*'s ban should necessarily be extended to this category of offenders.[16]

CONCLUSION

For all of the above reasons, the petition for certiorari should be granted.

Respectfully submitted,

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[16] The concurrent development in caselaw barring the imposition of the death penalty on those with intellectual disabilities is instructive on this point. Twelve years after determining that executing intellectually disabled individuals violated the Eighth Amendment in *Atkins*, 536 U.S. at 304, this Court recognized that its understanding of how society views intellectual disability, and accordingly where the line protecting such individuals must be drawn, had to be updated in light of evolving standards, as reflected in state practice, but also largely based on the medical community's changed consensus. *See Hall*, 134 S. Ct. 1986 (2014). *Hall's* reasoning applies with equal force here: just as "[i]ntellectual disability is a condition, not a number," youth is more than a "chronological fact," *Eddings* v. *Oklahoma*, 455 U.S. 104, 569, and must similarly be informed by and conformed to society's evolving standards.

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APPENDIX A

Amici Statements of Interest:

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and; that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

Atlantic Center for Capital Representation Center for Capital Representation (the "Center") is a nonprofit organization based in Philadelphia, Pennsylvania. The Center's mission is to serve as a clearinghouse for capital litigation, and to provide litigation support to attorneys with clients facing capital prosecution or execution. The Center focuses on the Mid-Atlantic Region. It furthers its mission through consultation with capital defense teams, training lawyers and mitigation specialists, and conducting trial and post-conviction litigation. The Center has conducted trainings and consultations in Delaware, including with the Delaware Office of Defense Services. The Center has a significant

interest in the manner in which capital jurisprudence is administered in Delaware.

Vincent Schiraldi is Senior Research Fellow at the Harvard Kennedy School Program in Criminal Justice. Before that, he was Commissioner of New York City Probation and Director of Washington, DC's executive branch juvenile justice agency, the Department of Youth Rehabilitation Services. He writes and lectures extensively on young adults in the criminal justice system.