No. 19-1054

In the Supreme Court of the United States

CHRISTA PIKE, *Petitioner*,

v.

GLORIA GROSS, WARDEN, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE, THE CHILDREN'S LAW CENTER, INC. AND THE INSTITUTE FOR COMPASSION IN JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

National Association for Public Defense (NAPD) is a national organization that brings together more than 15,000 practitioner members practicing in all fifty (50) states. NAPD members specialize in the defense of constitutional rights, particularly the rights of indigent clients, and NAPD members represent young people against whom the death penalty is sought. As such, NAPD members have a direct and substantial interest in the issue of whether individuals aged eighteen at the time of their offense are ineligible to be sentenced to the death penalty. NAPD members have expertise in Eighth Amendment and Fourteenth Amendment jurisprudence and are able to provide insight into relevant law and research not fully addressed by the parties.

The Children's Law Center, Inc. (CLC) is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. For thirty years, CLC has worked in many settings, including the fields of special education, custody, and

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[1] *Counsel of Record for Amici* authored this brief together with named counsel from Salmon P. Chase College of Law, Children's Law Center and the Institute for Compassion in Justice. No monetary contributions were made to fund the submission of the brief. *Counsel for Amici* provided notice to Counsel of Record of intent to file this Brief on March 12, 2020. Counsel for Petitioner consents to the filing of the *amicus* brief. Counsel for Respondent is not opposed to the filing of the *amicus* brief.

juvenile justice, to ensure that youths are treated humanely, provided access to legal services, and represented by counsel. CLC has worked on issues across a broad spectrum of issues in the areas of juvenile justice and civil rights laws. This participation also persists in the ongoing discussion related to the imposition of the death penalty on young adults across the country. Due to this commitment in these particular areas of the law, CLC has a substantial interest in the foregoing case.

The Institute for Compassion in Justice (ICJ) is a nonprofit civil rights law firm devoted to building capacity for creative and sustaining legal and community-based advocacy for young people and their families in Kentucky because all children and young adults deserve to be treated justly. ICJ believes that, in order to serve young people well, justice can only be achieved when the law acts with compassion and responds intelligently to the realities of youthful immaturity for those persons between the ages of birth and twenty-five years. Children and young adults deserve respect, protection and compassionate treatment in order to be held appropriately accountable for their actions in a balanced system of justice. ICJ defends young adults in capital cases in state and federal court. ICJ has partnered several times in the past with other nonprofit organizations and the indigent defense system to submit *amici* briefs on issues pertaining to justice for children and young adults.

SUMMARY OF THE ARGUMENT

This Brief will assist the Court by demonstrating that (1) emerging adults are a distinct class because of their unique developmental status; (2) emerging adults are a distinct class because of their unique legal and cultural status; (3) a categorical exemption is warranted because (a) a national consensus against the execution of 18-year-olds exists based on the infrequency of the practice; and (b) the practice of executing 18-year-olds is disproportionate because it serves no penological purpose; and (4) a categorical exemption is warranted.

ARGUMENT

The Eighth Amendment requires courts to assess a challenged sentencing practice in light of the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). To determine evolving standards of decency, courts are to consider objective criteria and their own independent judgment. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). A court may exempt a class of offenders from a punishment if it finds a national consensus against the practice and it independently determines that the punishment is disproportionate to the level of culpability of the class members. *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

After considering national trends and newly-discovered developmental data, this Court declared the death penalty unconstitutional as applied to the mentally disabled in 2002, *see Atkins,* 536 U.S. at 304, and youths seventeen and under, in 2005, *see Roper*,

543 U.S. at 577. In deciding those cases, the Court overruled cases of significant precedent: *Penry v. Lynaugh*, 492 U.S. 302 (1989)(holding that the execution of individuals deemed mentally retarded was permissible) and *Stanford v. Kentucky*, 492 U.S. 361 (1989)(holding that the execution of individuals under eighteen years of age was permissible.)

In *Atkins*, this Court found a national consensus against the practice of executing such individuals and that members of each class were categorically less culpable than traditional adult offenders. *Atkins*, 536 U.S. at 316; *Roper*, 543 U.S. at 571. Five years after *Roper*, this Court categorically exempted youths 17 and under from life incarceration without the possibility of parole (Juvenile Life Without the Possibility of Parole, "JLWOP") sentences for non-homicide crimes. *Graham v. Florida*, 560 U.S. 48, 50 (2010). In *Graham* this Court found a national consensus against JLWOP for non-homicide crimes where the practice was rarely imposed even where statutorily allowed, with one state imposing a "significant majority" (77 of 123 or 62.6%) of JLWOP sentences and ten others imposing the remainder (46 of 123 or 37.39%). *Id.* at 64. In *Miller v. Alabama* this Court categorically exempted youths 17 and under from mandatory JLWOP sentences, emphasizing that youths presented greater possibility of rehabilitation than adults. *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (citing *Roper*, 543 U.S. at 570). The *Miller* Court grounded its decision "not only on common sense . . . but on science and social science" that demonstrated fundamental differences between youths and adults. *Id.* at 471.

This evolution in the law is consistent with the nature of the Eighth Amendment. It is also consistent with national trends and norms. In 2018, the American Bar Association adopted a resolution urging each jurisdiction that imposes the death penalty to prohibit its imposition on any individual who is twenty-one or younger at the time of the offense. *See* ABA Resolution 111: Death Penalty Due Process Review Project Session of Civil Rights and Social Justice, Report to the House of Delegates, (Feb. 5, 2018), https://www.americanbar.org/groups/committees/death_penalty_representation/resources/dp-policy/late-adolescent-death-penalty-resolution (last visited March 25, 2020).

Each of this Court's above-mentioned cases held that a categorical exemption to a permanent penalty was appropriate. A categorical exemption is also proper in Ms. Pike's case. Data shows that capital punishment is imposed upon individuals sentenced at age eighteen at a frequency similar to the imposition of JLWOP for non-homicide crimes in *Graham*. *Graham*, 560 U.S. at 64-66. Eighteen-year-olds are frequently treated differently than older adults, both under the law and within the culture. Recent developmental research indicates that, like the youths in *Roper*, 18-year-olds are less culpable than older adult offenders. Applying newly-available developmental data to the 18-year-old population, it becomes clear that the death penalty does not serve a legitimate penological purpose because 18-year-olds suffer from a legally comparable lack of development to youths 17 and under.

I. EMERGING ADULTS ARE A DISTINCT CLASS BECAUSE OF THEIR UNIQUE DEVELOPMENTAL STATUS

In addition to the line of adolescent development cases following *Roper*, the Court recently re-examined the limitations on a government's power to execute individuals with intellectual disabilities in *Moore v. Texas*, 137 S. Ct. 1039, 1048–49, 197 L. Ed. 2d 416 (2017). The *Moore* Court determined that, when analyzing the Eighth Amendment, courts are not at liberty to ignore the medical community's current diagnostic framework. 137 S. Ct. at 1043. A logical extension of *Moore* requires that, when a sentencing court considers the imposition of the most severe sanctions on 18-year-olds, it must apply the medical community's current diagnostic framework. *Id.*

A Kentucky trial court heard testimony from Dr. Laurence Steinberg in *Commonwealth v. Diaz*, No. 15-CR-00584-001 (Fayette Circuit Court), and *Com. v. Smith*, No. 15-CR099584-002 (Fayette Circuit Court) during a hearing on a challenge to Kentucky's Death Penalty statute. (VR 7/17/17, 8:33:13-9:31;32). This Court has previously cited and relied on Dr. Steinberg's research on youth development. *See Roper,* 543 U.S. at 569, 570, 573; *Miller,* 567 U.S. at 471. Dr. Steinberg testified in *Diaz* and *Smith* that "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen, nineteen, and twenty year-olds that were made about sixteen and seventeen year-olds in *Roper*." (VR 7/17/17, 9:02:32-50.)

Empirical research now demonstrates that the developmental and neurological traits of youths are also present in young adults. "Recent advances in behavior and neuroscience research confirm that brain development continues well into a person's twenties, meaning that young adults have more psychological similarities to children than to older adults." Vincent Schiraldi et al., *Community-Based Responses to Justice-Involved Young Adults*, New Thinking in Community Corrections (National Institute of Justice, Washington, D.C.), Sept. 2015, at 1,3.

Magnetic Resonance Imaging of the brain (MRIs) have informed scientists over the past decade that young adulthood is a time of dramatic change in basic thinking structures apparent in scientifically reliable images of the brain. *See* E.R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Post-Adolescent Brain Maturation*, 21 Journal of Neuroscience 8819 (2001). New research into neurodevelopment shows that profound development continues to occur into the mid-twenties. *See* Christian Bealieu & Catherine Lebel, *Longitudinal Development of Human Brain Wiring Continues from Childhood Into Adulthood*, 27 Journal of Neuroscience 21 (2011). The National Institute of Health tracked more than 5,000 children into adulthood and found their brains did not fully mature until they were at least 25 years old. Nico U.F. Dosenbach et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 (5997) Science 1358, 1358-59 (2010).

"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." 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=.82fc4353830d. Like juveniles, 18-year-olds' cognitive maturity is not fully developed; the prefrontal cortex, an area of the brain that helps maintain impulse control and influences decision-making, continues to develop until a person is at least 21. Kathryn Monahan et al., *Juvenile Justice Policy and Practice: A Developmental Perspective*, 44 Crime & Just. 577, 582 (2015). Young adults 18-20 are more likely than juveniles to engage in risk-taking behaviors. Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 35 (2009). In addition, young adults are more likely to take risks in the presence of their peers than either younger adolescents or older adults. Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study,* 41 Dev. Psychol. 625, 632, 634 (2005). Two of this Court's concerns in *Roper*—maturity and peer influence—apply with equal measure to 18-year-olds; in the case of peer pressure, an 18-year-old is actually at a higher risk.

It is now established medical practice to recognize 18-year-olds as having different psychological and behavioral attributes than other adults. *See* Elizabeth

S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 644 (2016). These scientific advances meet the standards of admissibility in a criminal trial and, in particular, in the penalty phase of a death penalty case and thus must be accepted by courts of law whose task it is to apply the standards of decency required by the Eighth Amendment. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.") That holding rested "on the predicate that the penalty of death is qualitatively different" from any other sentence. *Id*. In line with *Moore* and in keeping with the long-standing principles of *Lockett*, a trial court's failure to take into consideration the scientific community's perspective on the youthfulness of young adults in determining whether the death penalty should be applied merits reversal. In the instant case, it should be held categorically unconstitutional because of the developmental similarities between juveniles and eighteen-year-olds.

II. EMERGING ADULTS ARE A DISTINCT CLASS BECAUSE OF THEIR UNIQUE LEGAL AND SOCIAL STATUS

A. Emerging Adults are Frequently Subject Different Legal Standards Than Adults 21 and Over

In *Roper* this Court considered where states drew the line between youth and adulthood when assigning adult responsibilities. *Roper*, 543 U.S. at 574. Considering new developmental data, many jurisdictions have raised the age for exercising adult rights until twenty-one. For example, after following many states and municipalities, Congress raised the age for tobacco purchase from 18 to 21 in 2019 with the *Tobacco to 21 Act*. 21 U.S.C. § 387f(d)(3)(A)(ii). The *National Minimum Drinking Age Act* requires young adults to be age 21 to purchase alcohol. 23 U.S.C.S. § 158. The federal government prohibits youths under 21 from purchasing handguns (*see* 18 U.S.C. § 922(b)(1),(b)(2),(c)(1)). The military requires parental consent for 18-20-year-olds to enlist as an aviation cadet. 10 U.S.C. § 6911. The federal government also allows young people to remain in foster care until their twenty-first birthday. *Fostering Connections to Success and Increasing Adoption Act of 2008* § 201(a), 42 U.S.C. § 6751(8)(A)-(8)(B)(i)(III)(2016) (defining a child eligible for foster care as an individual who "has not attained 18,19, or 20 years of age"). The *Patient Protection and Affordable Care Act* § 1001, 42 U.S.C. 300gg-14 (2016) extended youths' ability to receive parents' health care coverage to age 26. Each of these provisions is aimed at ensuring protection for vulnerable young adults.

In 2014, the U.S. Department of Justice recommended in a report that the age of juvenile court jurisdiction should be raised to twenty-one due to the fact that "young adult offenders are, in some ways, more similar to juveniles than adults." U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, *Young Offenders: What Happens and What Should Happen*, Doc. No. NCJ 242653, at 2 (Feb. 2014). This is consistent with the federal definition of a juvenile in court proceedings: (defining juvenile as "a person who is under 18 years of age, or for purposes of proceedings and disposition because of an act of juvenile delinquency, a person who is under 21 years of age"). *See* 18 U.S.C. § 5031.

In addition to youth-protection efforts generally, in recent years, several states have adopted provisions that allow certain protections for young adults in the criminal justice system. Florida, for example, set an upper age of 18 for juvenile court jurisdiction, but also an extended age of 21; this allows a juvenile who commits a delinquent act at seventeen to remain under supervision of the juvenile court until 21 for dispositional purposes. Heather Perkins, *Using What We Know About Young Adults to Inform State Justice System Policies*, (Sep. 14, 2017), https://knowledgecenter.csg.org/kc/content/using-what-we-know-about-young-adults-inform-state-justice-system-policies. As of 2015, thirty-five states had extended jurisdiction to age 20, and six had set the age between 21 and 24. *Id*.

As an alternative, other jurisdictions have designated a category of "youthful offenders" under the criminal law. *See, e.g.* VT. STAT. ANN. tit. 33, § 5201

(2019) ("A State's Attorney may commence a proceeding in the Family Division of the Superior Court concerning a child who is alleged to have committed an offense after attaining 14 years of age but not 22 years of age that could otherwise be filed in the Criminal Division."). In some jurisdictions, youthful offender categories allow emerging adult cases to be heard in juvenile or family court. Perkins, *Using What We Know About Young Adults to Inform State Justice System Policies*. Several jurisdictions have taken this a step further and created specialized facilities, courts, and probation to accommodate the population; for example, San Francisco has developed a specialty court that only deals with cases involving defendants ages eighteen to twenty-five. *Id.* The court collaborates with the district attorney's office, public defender's office, adult probation, youth services, public health officials, and local law enforcement. *Id.* The Transitional Age Youth Unit within San Francisco's Adult Probation Department provides eighteen to twenty-five-year-olds on probation with programming specifically geared toward the cognitive-behavioral challenges they face. *Id.* Connecticut has developed a Young Adult Offender program, a specialized correctional unit for young adults ages eighteen to twenty-five, with the focus being on youth development, mental health, and de-escalation of conflict. In partnership with the Vera Institute of Justice, the Connecticut Department of Correction provides emerging-adult-specific training to corrections officers, counselors, and others that will staff the unit. *Id.* The program model focuses on education, employment and family engagement, and involves

assigning mentors to small cohorts of emerging adults. *Id.*

These new legal developments, coupled with cultural norms and scientific data, support a declaration that the death penalty is inappropriate when imposed on an 18-year-old.

B. Emerging Adults Are Frequently Subject to Different Cultural Norms than Older Adults

As the scientific understanding of adolescent development has evolved with advances in brain development science, as reflected in *Roper* and its progeny, American cultural norms have also evolved to reflect a better understanding of adolescence. An analysis of census data from 2014 indicates that people aged 18-20 are more likely to be living with their parents than alone or with a partner for the first time in the modern era. Richard Fry, *For the First Time in Modern Era, Living with Parents Edges Out Other Living Arrangements for 18-to-34-Year Olds* (Pew Research Center, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/3/2016/05/2016-05-24_livingarrangemnet-final.pdf (last visited June 19, 2018). In 1960, the average age at a first marriage was 20 for women and 23 for men; in 2017, it had climbed to 27.4 for women and 29.5 for men. *U.S. Census Bureau, Census Historical Marital Status Tables, Table MS-2 Estimated Median Age at First Marriage, by Sex: 1890 to Present* (Nov. 2017), https://www.census.gov/data/tables/time-series/demo/families/marital.html (last visited June 19, 2018). In addition to deferring independent living and marriage, a 2012 study from The National

Center for Education Statistics found that seventy percent of young people in the United States now pursue education and training beyond secondary school, which has implications for independence. Jeffrey J. Arnett, *Emerging Adulthood*, NOBA Textbook Series (2018) (ebook), http://noba.to/3vtfyajs (last visited June 19, 2018). An individual is dependent on his or her parents for educational financial aid purposes until age twenty-four. Federal Student Aid, U.S. Department of Education, *Dependency Status* (2018), https://studentaid.ed.gov/sa/fafsa/filling-out/dependency (last visited June 19, 2018).

Individuals aged 18-20—once considered full adults—are treated in recent academic literature as not fully adult. Jeffrey J. Arnett, an expert in emerging adulthood, describes the emerging adult population as "no longer adolescents, but not yet adults, on the way to adulthood, but not there yet." Jeffrey J. Arnett, *Does Emerging Adulthood Theory Apply Across Social Classes? National Data on a Persistent Question*, (2015), http://www.jeffreyarnett.com/emergingadulthoodsocialclass2016.pdf. Arnett provides five characteristics of emerging adulthood that distinguishes it from other stages of adulthood: (1) the age of identity explorations; (2) the age of instability; (3) the self- focused age; (4) the age of feeling in-between; and (5) the age of possibilities. *Id.* Arnett describes emerging adults as being self-focused, and engaged in a process of identity development. *Id.*

The qualities of emerging adults can be easily compared to those used to describe juveniles in *Roper*, where this Court found that juveniles lack maturity

and have an underdeveloped sense of responsibility. *Roper*, 543 U.S. at 569. *Roper* describes youths' traits as transitory because "the character of a juvenile is not as well formed as that of an adult." *Id.* at 570. The characteristics of teens described in *Roper*—which meant juveniles could not be considered "the worst offenders"—are comparable to the characteristics of emerging adults, and are consistent with the characteristics used to distinguish emerging adulthood from other stages of adulthood. Cultural norms and academic research indicate that individuals in their late teens and early twenties are regarded differently as a group—and more like adolescents—now than in years past.

III. THIS COURT'S TWO-PART EXEMPTION ANALYSIS REQUIRES A CATEGORICAL EXEMPTION

A. National Consensus Exists Against Execution of 18-Year-Olds Based on Infrequency of the Practice

In *Roper*, this Court indicated that the sufficient objective indicia of a national consensus were (1) the rejection of the juvenile death penalty in a majority of States; (2) the infrequency of its use in the States that still have the death penalty; and (3) the trend towards abolishing the practice. *Id.* Building on the reasoning in *Roper*, this Court in *Graham v. Florida* found a national consensus against JLWOP for non-homicide crimes where eleven jurisdictions imposed the penalty with one state imposing a "significant majority" (77 of 123) of the sentences. *Graham*, 560 U.S. at 64. This Court in *Graham* considered both the number of

offenders who were sentenced to JLWOP and the "frequency of the practice in proportion to the opportunities for its imposition." *Id.* at 66. At the time *Graham* was decided, six states had abolished life without parole sentences for juvenile offenders while thirty-seven states and the District of Columbia still allowed them. *Id.* at 49. Seven states permitted JLWOP sentences, but limited the sentences to homicide crimes only. *Id.* Eleven states imposed life without parole sentences on non-homicide offenders, with Florida imposing 77 of the 123 sentences (62.6%). *Id.* at 64.

Death penalty rates have declined for the entire population. Currently, twenty-two states and the District of Columbia have abolished the death penalty. Death Penalty Information Center, *States With and Without the Death Penalty*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited March 25, 2020). The governors of three additional states (Colorado, Oregon and Pennsylvania) have imposed explicit moratoria on executions. *Id.* Eleven additional states have not carried out executions in over five years. Death Penalty Information Center, *Death Penalty on Hold in Most of the Country*, (July 30, 2014), https://deathpenaltyinfo.org/node/5829. Of states that do allow the death penalty and have no explicit moratoria, eight have *de facto* moratoria. Death Penalty Information Center, *Death Penalty in Flux*, https://deathpenaltyinfo.org/death-penalty-flux (last visited June 19, 2018). In addition, execution is highly localized as only three percent of the nation's 3,066 counties account for fifty percent of death sentences. Kentucky Coalition to Abolish the Death Penalty,

Unfair, Broken, and Arbitrary, http://kcadp.org/why-abolish-the-death-penalty-in-kentucky/unfair-broken-abitrary/ (last visited June 19, 2018).

Capital sentences are imposed on 18-year-olds at a rate similar to youths sentenced to JLWOP for non-homicide crimes in *Graham*. *Graham*, 560 U.S. at 64-66. Between 2005 (when *Roper* was decided) and 2017, sixteen (16) states imposed capital sentences on fifty-four (54) individuals who were 18 at the time of the offense. *See* Blume, John H. and Freedman, Hannah and Vann, Lindsey and Hritz, Amelia, *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles From 18 to 21* (February 25, 2019) (data set on file with the article's authors) Texas Law Review, Forthcoming; Cornell Legal Studies Research Paper No. 19-17, available at SSRN: https://ssrn.com/abstract=3341438 (last visited March 25, 2020); *see also* Death Penalty Information Center, *Execution Database*, https://deathpenaltyinfo.org/views-executions (last visited March 25, 2020); NAACP Legal Defense Fund, *Death Row USA Quarterly Reports*, http://naacpldf/death-row-usa (last visited March 25, 2020). Fourteen (14) of those sentences have since been vacated. *Id.* Sixty-one (61) percent of the sentences came from just four states: Alabama (11.11%), California (22.22%), Florida (16.66%), and Texas (11.11%). *Id.* No death sentences were imposed on 18-year-olds in 2018 or 2019. Only two death sentences were imposed on 18-year-olds in 2017. *Id.* No death sentences were imposed on 18-year-olds in 2016. *Id.* The peak was 2007, when death sentences were imposed eight times on 18-year-olds, and there has

been a steady decline since, with an average of just under three (2.91) between 2008 and 2020. *Id.*

Eighteen-year-olds are also executed less frequently than older adults. Between January 1, 2005 and March 25, 2020, ten states executed 29 individuals who were 18 at the time of sentencing, with approximately 65.5% percent of those executions coming from one state alone: Texas. Clark County Prosecuting Attorney, Indiana, *U.S. Executions Since 1976*, http://clarkprosecutor.org/html/death/esexecute.htm (last visited March 25, 2020); Death Penalty Information Center, *Execution List 2014*, https://deathpenaltyinfo.org/execution-list-2014 (last visited March 25, 2020); Death Penalty Information Center, *Execution List 2015*, https://deathpenaltyinfo.org/execution-list-2015 (last visited March 25, 2020); Death Penalty Information Center, *Execution List 2016*, https://deathpenaltyinfo.org/execution-list-2016 (last visited March 25, 2020); Death Penalty Information Center, *Execution List 2017*, https://deathpenaltyinfo.org/execution-list-2017 (last visited March 25, 2020); Death Penalty Information Center, *Execution List 2018*, https://deathpenaltyinfo.org/execution-list-2018 (last visited March 25, 2020); Death Penalty Information Center, *Execution List 2019*, https://deathpenaltyinfo.org/execution-list-2019 (last visited March 25, 2020); Death Penalty Information Center, *Execution List 2020*, https://deathpenaltyinfo.org/execution-list-2020 (last visited March 25, 2020).

Applying the reasoning in *Graham*, a national consensus against execution of 18-year-olds is

evidenced by the infrequency of its practice. This Court in *Graham* found a national consensus based on infrequency where JLWOP sentences had been imposed for non-homicide crimes one hundred twenty-three times by eleven states with one state (Florida) imposing a "significant majority" of the sentences (77 of 123). *Graham*, 560 U.S. at 64. In the years since *Roper*, the death penalty has been imposed on 18-year-olds in ten states with one state (Texas) imposing a significant majority of the sentences (19 of 29 or 65.52%). Clark County Prosecuting Attorney, Indiana, *U.S. Executions Since 1976*, http://clarkprosecutor.org /html/death/esexecute.htm (last visited March 25, 2020). The instant numbers and those considered in *Graham* are significantly similar when considering the "frequency of the practice in proportion to the opportunities for its imposition." *Graham*, 560 U.S. at 66.

B. The Death Penalty is a Disproportionate Penalty When Imposed on 18-Year-Olds Because it Serves No Legitimate Penological Purpose

Roper outlines two penological justifications for the death penalty as applied to those eligible: deterrence and retribution. *Roper*, 543 U.S. at 571-72. Both of these goals are proportional to the level of culpability of the offending class in question. *Id.* If neither goal is served by the imposition of death onto a certain class, then the punishment is disproportional to the offender of the crime and should be barred. *Id.* These two goals serve the purpose of punishing those offenders who

most greatly deserve the punishment and help to keep future crimes from occurring.

Developments in both national trends and neuroscience have led to the abolition of the death penalty for those under the age of eighteen and for those who are considered mentally disabled. *See Roper*, 543 U.S. 551 (2005); *see also Atkins v. Virginia*, 536 U.S. 304 (2002). These classes of people, juveniles and the mentally disabled, are not culpable enough to receive the worst kinds of punishment under the law. *Atkins*, 536 U.S. at 318-20. Following from this Court's decision in *Thompson*, this Court determined that the behavior of an immature juvenile is less morally culpable than that of an adult. *Thompson*, 487 U.S. at 834-36. *Roper* extended the categorical protection recognized in *Thompson* to all minors, and held that minors under the age of eighteen are less culpable for their crimes due to their lack of brain development. *Roper*, 543 U.S. at 571-72. In addressing the penological purposes of the death penalty, Justice Kennedy remarked, "[o]nce the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." *Id.* at 571. If this same diminished capacity can be shown for those aged eighteen to twenty, then this same result must also apply.

As decided in *Roper*, the retribution rationale against an offender is only proportional when the offender is fully capable of understanding his or her actions. *Id.* Those under the age of eighteen have a diminished capacity, meaning that they lack the full

understanding and consequences of their actions. *Id.* It is precisely because of this diminished capacity that those under the age of eighteen are excluded from receiving the death penalty. *Id.* This was also recognized in *Roper's* progeny decisions, *Graham v. Florida* and *Miller v. Alabama.* Current neuroscience supports the conclusion that people aged eighteen to twenty suffer from the same lack of development as those under the age of eighteen. *See generally* ABA Resolution 111. People aged 18-20 are less capable of weighting long-term consequences and exhibit more susceptibility to peer influence than those 21-and-over. *See, e.g.,* Graham Bradley & Karen Wildman, *Psychological Predictors of Emerging Adults' Risk and Reckless Behaviors*, 31 Journal of Youth & Adolescence, 253, 253-54, 260 (2002). Individuals in this age group also exhibit more impulsiveness than those over the age of twenty. *See Miller v. Alabama*, 567 U.S. 460, 472 (2012); *Graham v. Florida*, 560 U.S. 48, 68 (2010). This diminished capacity necessarily means that 18-year-olds cannot be considered the "worst of the worst" offenders to which the death penalty may be imposed.

The imposition of the death penalty on 18-year-olds does not promote the penological purpose of deterrence. There is no consensus as to whether capital punishment has a deterrent effect on the general population. John J. Donohue & Justin Wolters, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 Stan. L. Rev. 791, 843 (2005). Even if it were proven that the death penalty had a deterrent effect on some adults, this Court in *Thompson, infra,* observed that the diminished culpability of juveniles

makes them less susceptible to its effects. *Thompson v. Okla.*, 487 U.S. 815 (1988). As their brains are still developing, youths cannot perform the appropriate cost-benefit analysis necessary to understand the full consequences of their actions. *Id*. at 837. The cognitive and behavioral capacities that reduce moral culpability also "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Atkins*, 536 U.S. at 320. Given the reduced capacity to comprehend the possibility of execution as a consequence, capital punishment does not serve the penological purpose of deterrence for 18-year-olds.

IV. A CATEGORICAL EXEMPTION IS PROPER RATHER THAN ARGUING MITIGATION ON A CASE-BY-CASE BASIS

Courts give significant leeway as to the types of mitigating evidence permitted in the sentencing phase of a death penalty case. A jury may, however, be unable to properly assess youth as a mitigating factor when "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course." *See Roper*, 543 U.S. at 572-73. *See also Atkins*, 536 U.S. at 320-21; *Graham*, 560 US. at 77-78. This would be especially true in a case like the one at hand, where no evidence was introduced about youth as a mitigator and no argument presented on the inappropriateness of such a sentence for a young person who was eighteen years of age at the time of the offense. A case-by-case approach exposes an offender to the death penalty by

a subjective decision and places a tremendously difficult responsibility on trial court judges to differentiate between offenders who are truly incorrigible and those who have the ability to change. *Graham*, 560 U.S. at 77. In addition, young people have a difficult time trusting counsel, controlling impulsivity, and weighing long-term consequences, all of which increases the risk of ineffective representation. *Id.* at 78. A categorical approach minimizes the risk of a case being skewed by an immature defendant who understands neither the proceedings of the case nor the consequences of his or her decisions. *Id.* at 78-79, or an ill-informed defense counsel. Adherence to a bright-line rule, rather than considering mitigation on a case-by-case basis is appropriate, efficient, and best ensures fairness for 18-year-olds.

A categorical exemption is supported by both the Eighth Amendment and the Fourteenth Amendment. Current scientific data, discussed in Section I, *supra*, indicates that the scientific community believes that individuals' brains—and consequently, their maturity, susceptibility to peer influence, and capacity to change—continues into the mid-twenties. There is no cognitive developmental difference between a normal 17-year-old brain and a normal 18-year-old brain. Therefore, there is no rational basis to distinguish between 17-year-olds and 18-year-olds for death penalty purposes. Even if the State may serve the legitimate penological purposes of deterrence and retribution when imposing the death penalty on older adults, those purposes are not met when applied to 18-year-olds (*see* Section III(B), *supra*.) As such, in

addition to violating the Eighth Amendment, imposing the death penalty on 18-year-olds violates the Fourteenth Amendment's Equal Protection Clause.

CONCLUSION

Based upon the foregoing, the Court must find that the death penalty is unconstitutional when imposed on 18-year-olds.

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