In the Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI

IN RE: 18 US CODE CHAPTER 228

Counsel for Petitioners: /u/hurricaneoflies
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QUESTIONS PRESENTED

1. Whether the death penalty, *per se*, violates the Eighth Amendment's protection against cruel and unusual punishment.
2. Whether the wanton and persistent racially disparate impact of the death penalty violates the Fifth Amendment's guarantee of equal protection.

INTRODUCTION

Petitioner, the American Civil Liberties Union, by and through undersigned counsel, brings this action against the United States to facially challenge the validity of the federal death penalty as repugnant to the Fifth and Eighth Amendments to the United States Constitution.

In July 1976, "Silly Love Songs" by Wings climbed to the top of the Billboard charts, *A New Hope* wrapped up principal photography in England, and this Court permitted, after a four year hiatus, the resumption of capital punishment in the United States.

In 2021, Sir Paul McCartney is nearing completion of his definitive life's memoirs, *Star Wars* has begrudgingly labored to the conclusion of its nine-film saga, but yet the fundamental holding of *Gregg v. Georgia* has remained unchanged for forty-five long years—a growing anachronism in an evolving society.

REASONS TO GRANT CERTIORARI

A. The death penalty is no longer consistent with the evolving standards of decency of a liberal society committed to humane justice.

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. XIII. The amendment limits the scope of criminal punishment in three distinct ways: "[f]irst, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (cleaned up).

When interpreting the limits of permissible punishment, this Court has firmly "established the propriety and affirmed the necessity of referring to the evolving standards of decency that mark the progress of a maturing society to determine which punishments are so disproportionate as to be cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 561 (2005), quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).

This Court has cited a variety of factors in determining the precise contours of the standards of decency, but it is clear that the death penalty is impermissible under any previously enumerated standard.

First, this Court has accorded great weight to "objective indicia of society's standards, as expressed in pertinent legislative enactments and state practice." *Roper*, 543 U.S. at 552. Analysis of this indicium reveals the unanimous concurrence of all state legislatures that the death penalty is repugnant to the criminal justice system, as shown in a brief survey of recent state enactments:

- Atlantic: "...nor shall any person be held to answer for a capital crime and be deprived of life." Atl. Const., art. I, § 5.
- Dixie: "Capital punishment shall be prohibited." Dix. Const., art. I, § 10.

- Fremont: "The State Assembly finds that the death penalty is a highly irregular punishment that violates the basic dignity of mankind…" Death Penalty Abolition Act, State Bill 01-01 (2021).
- Greater Appalachia: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted; *nor the death penalty imposed*." G.A. Const., art. XVII, § J.
- Superior: "The accused shall never, for any reason, be sentenced to death." Sup. Const., art. I, § 3(g).

Second, this Court has required punishments to further "the two penological justifications for the death penalty—retribution and deterrence of capital crimes by prospective offenders." *Roper v. Simmons*, 543 U.S. 551, 553 (2005). By now, the consensus of the academic community has become absolutely crystal clear: the death penalty is no deterrent at all. Independent surveys conducted among the nation's criminologists in 1996 and 2009 find overwhelming rejection of the deterrent effect of the death penalty, while systematic reviews of the evidence conducted by the National Research Council in 1978 and 2012 have failed to unearth any compelling evidence to support a deterrent effect for the death penalty.

Third, this Court has "referred to the laws of other countries and to international authorities as instructive." *Roper v. Simmons*, 543 U.S. 551, 575 (2005). The death penalty is clearly condemned by the "virtual unanimity" of "[t]he civilized nations of the world" under this metric, *Dulles*, 356 U.S. 103, with particularly strident opposition from the "other nations that share the Anglo-American heritage" and "the leading members of the Western European community" whose views this Court has historically granted significant weight. *Thompson v. Oklahoma*, 487 U.S. 815, (1988). This fact is evinced by the following developments:

- The "Western European community"—and indeed, the entire European community—has prohibited the death penalty from the entirety of the continent (*see*, Protocol 13, European Convention on Human Rights);

- The United States' fellow Anglo-American common law jurisdictions have not only abolished the death penalty, but they have even expressly singled out the United States as a jurisdiction engaged in inhumane deprivations of life under color of law:

    - Canada: *United States v Burns*, [2001] 1 S.C.R. 283 (extradition of suspect to United States for capital murder violates his right to life);
    - Ireland: *Soering v the United Kingdom*, 161 Eur. Ct. H.R. (1989) (extradition of suspect to United States for capital murder violates his right against inhumane treatment)[1];
    - Malta: *Soering*, *supra*;
    - New Zealand: Extradition (United States) Order 1970 (prohibiting extradition to United States without assurances against death penalty);
    - South Africa: *Mohamed v President of South Africa*, [2001] 3 S.A. 893 (extradition of suspect to United States for capital terrorism violates his rights to life and dignity);
    - United Kingdom: *Soering*, *supra*.

- 89 nations, including virtually the entirety of the global North and the United States' fellow heirs to the liberal democratic tradition, have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, binding them to death penalty abolition; and
- On December 16, 2020, the United Nations General Assembly adopted Resolution A/75/478/Add.2, which calls for a global moratorium on the death penalty, by an overwhelming 123-38 vote.

Accordingly, the statutes offend society's evolving standards of decency and are by consequence repugnant to the Eighth Amendment.

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[1] *Soering* is a decision of the European Court of Human Rights that applies to all three European common law jurisdictions: Ireland, Malta and the United Kingdom.

B. Despite decades of reforms, the death penalty retains a persistently stark pattern of racially disparate treatment. *McCleskey v. Kemp* should be overruled.

Furthermore, despite decades of reforms initiated by all three branches of government to reduce the arbitrariness by which death sentences are imposed, the death penalty is still applied in a manner which is starkly disparate on the basis of race. 77 percent of all people on federal death row are racial or ethnic minorities, a staggering number incommensurate to the number of minorities in the general number—even controlling for differential crime rates. Moreover, decades of clear scientific evidence indicate intractable racial bias in the application of the death penalty, with Black defendants and defendants in cases involving White victims being more likely to be sentenced to death compared to others who commit similarly situated crimes.

Accordingly, Petitioners suggest that the racial disparity of the death penalty is innate to the punishment itself and violates the Equal Protection Clause, as incorporated against the federal government by the Fifth Amendment.

While this conclusion may be barred at first glance by *McCleskey v. Kemp*, 481 U.S. 279 (1987), Petitioners believe that the decision is no longer consistent with recent developments and this Court's evolving jurisprudence and should be overruled. Although many jurists have already deftly made the case against *McCleskey*, here are three more reasons for the Court's consideration:

First, this Court has recently reaffirmed the cognizability of disparate-impact claims. In *Assorted Homosexuals v. FDA*, 101 M.S.Ct. 115 (2020), a blood-donation regulation was invalidated for its "disparate impact on gay men" despite no finding of discriminatory intent in the trial record.[2] This is fundamentally incompatible with *McCleskey*'s requirement of a racially discriminatory purpose.

[2] Some variation of the term "disparate impact" appears five times in the opinion, while intent does not appear once.

Second, the Court's non-cognizance of disparate impact liability under the Fourteenth Amendment is puzzling given its decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that Congress cannot expand substantive rights under its Fourteenth Amendment enforcement power. Since the Civil Rights Act of 1964, Voting Rights Act of 1965, Fair Housing Act of 1968, and Americans with Disabilities Act of 1990 all purport to abrogate State immunity under the Eleventh Amendment via the enforcement power, it is hard to imagine how these statutes can admit disparate-impact liability against the states if the Fourteenth Amendment does not.[3]

Third, *McCleskey*'s reasoning where the majority "[declined] to assume that what is unexplained is invidious" is simply specious and indefensible nearly forty years later, when it has been established to a high degree of academic, social and political consensus that unconscious racism exists and continues to affect many elements of the American criminal justice system. 481 U.S. at 313.

McCleskey was wrong in 1987, and it is plainly indefensible in 2021. Accordingly, the Court should overrule *McCleskey* and find the federal death penalty regime unconstitutional under a disparate-impact theory of equal protection for stark and persistent insidious discrimination on the basis of race.

Respectfully submitted,

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Attorneys for Petitioner

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[3] *City of Boerne* only admits *remedial* uses of the enforcement power which are *congruent and proportional* to "unconstitutional behavior" by the states. *Kimel v. Florida Board of Regents*, 528 U.S. 62, 82 (2000). If disparate impact alone does not violate the Fourteenth Amendment, what unconstitutional behavior does disparate-impact liability under federal civil rights law seek to remedy?