

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2025-0273

Michael Addison,

Petitioner,

v.

Michael A. Zenk, Warden,
New Hampshire Prison for Men,

Respondent.

**BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES
UNION OF NEW HAMPSHIRE, AND
DEATH PENALTY SCHOLARS
IN SUPPORT OF PETITIONER**

Petition Seeking Exercise of this Court's Original Jurisdiction
Pursuant to Supreme Court Rule 11, Per Suggestion of
Merrimack County Superior Court (St. Hilaire, J.) at
Docket No. 217-2016-cv-00726

Gilles R. Bissonnette
(N.H. Bar No. 265393)
Henry R. Klementowicz
(N.H. Bar No. 21177)
American Civil Liberties Union of
New Hampshire
18 Low Avenue
Concord, NH 03301
Tel.: 603.224.5591
gilles@aclu-nh.org
henry@aclu-nh.org

Brian W. Stull, *Pro Hac Vice pending*
Megan D. Byrne, *Pro Hac Vice pending*
American Civil Liberties Union
Capital Punishment Project
201 W. Main Street, Suite 402
Durham, NC 27701
Tel.: 919.682.9469
bstull@aclu.org
mdbyrne@aclu.org

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<i>Woodson v. North Carolina</i> , 428 U.S. 280 (1976).....	26

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<i>Rauf v. State</i> , 145 A.3d 430 (Del. 2016)	22
<i>State v. Cross</i> , 132 P.3d 80 (Wash. 2006).....	30
<i>State v. Dixon</i> , 283 So.2d 1 (Fla. 1973).....	31

<i>State v. Gregory</i> , 147 P.3d 621 (Wash. 2018).....	26
<i>State v. Gregory</i> , 192 Wash. 2d 1 (2018)	34
<i>State v. Peeler</i> , 140 A.3d 811 (Conn. 2016).....	21
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OTHER SOURCES

Br. of Amici Curiae Legal Historians & Scholars in <i>State v. Santiago</i> , No. SC17413 Amici Br. 2012 WL 7985132 (Dec. 12, Conn.).....	18, 19
Catherine M. Grosso, Jeffrey A. Fagan & Michael Laurence, <i>The influence of the Race of Defendant and the Race of Victim on Capital Charging and Sentencing in California</i> , 21(3) J. of Empirical Legal Stud., 482–531 (2024), https://doi.org/10.1111/jels.12390	32
Dave Solomon, “Death penalty repeal passes NH Senate with veto-proof majority,” <i>Union Leader</i> (April 11, 2019), https://www.unionleader.com/news/politics/state/death-penalty-repeal-passes-nh-senate-with-veto-proof-majority/article_6ba91bd6-fcf8-5986-add0-4dfb3f24fa09.html	16

Death Penalty Information Center, “New Hampshire Becomes 21st State to Abolish Death Penalty,” (May 30, 2019) (updated March 14, 2025), https://deathpenaltyinfo.org/new-hampshire-becomes-21st-state-to-abolish-death-penalty (discussing attempts to repeal the New Hampshire death penalty in 2000, 2014, and 2018).....	16
Death Penalty Information Center, “States with and without the Death Penalty – 2025,” https://deathpenaltyinfo.org/state-and-federal-info/state-by-state	16
Death Penalty Information Center, <i>Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty</i> (2020), https://dpic-cdn.org/production/documents/reports/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf	35
Death Penalty Information Center, Execution Database (filter to Colorado), https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Colorado&federal=No	21
Death Penalty Information Center, Execution Database (filter to Connecticut), https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Connecticut&federal=No	21
Death Penalty Information Center, Execution Database (filter to Delaware), https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Delaware&federal=No	22
Death Penalty Information Center, <i>Execution Database</i> , https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Maryland&federal=No	23
Death Penalty Information Center, <i>Execution Database</i> , https://deathpenaltyinfo.org/facts-and-research/data/executions?state=New+Mexico&federal=No	24
Death Penalty Information Center, <i>Execution Database</i> , https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Oregon&federal=No	25
<i>Death Row Executions</i> , Del. Dep’t. Corr., https://doc.delaware.gov/views/executions.blade.shtml [https://perma.cc/7NP3-A2B7].	22

Delaware House Democrats, <i>House Passes Dorsey Walker Bill to Eliminate the Death Penalty</i> , House Democrats (June 18, 2024), https://housedems.delaware.gov/2024/06/18/house-passes-dorsey-walker-bill-to-eliminate-the-death-penalty	34
Frank R. Baumgartner, Amanda J. Grigg & Alisa Mastro, <i>#BlackLivesDon'tMatter: race-of-victim effects in US executions, 1976–2013</i> (Univ. of North Carolina at Chapel Hill & Georgetown Univ. Law Ctr., 2015), https://fbaum.unc.edu/articles/BlackLives-2015.pdf	32
Frederick C. Millett, <i>Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment</i> , 6 <i>Pierce L. Rev.</i> 547, 643 (2008)	30
General Court of New Hampshire- Bill Status System, HB455 Roll Call, https://gc.nh.gov/bill_status/legacy/bs2016/Roll_Calls/billstatus_rcdetail.aspx?vs=127&sy=2019&lb=S&eb=HB0455&sortoption=&txtsessionyear=2019&txbillnumber=HB455&ddlspendors=&lrs=185 ; https://gc.nh.gov/bill_status/legacy/bs2016/Roll_Calls/billstatus_rcdetail.aspx?vs=71&sy=2019&lb=H&eb=HB0455&sortoption=&txtsessionyear=2019&txbillnumber=HB455&ddlspendors=&lrs=185	15
Governor's Office, <i>Governor Kate Brown Commutes Oregon's Death Row – Sentences commuted to life in prison without the possibility of parole</i> (Dec. 13, 2022), https://apps.oregon.gov/oregon-newsroom/OR/GOV/Posts/Post/governor-kate-brown-commutes-oregon-s-death-row-15087	25
Holly Ramer, <i>Despite two cases, capital murder trials are rare in New Hampshire</i> , <i>The Barre-Montpelier Times Argus</i> (Sep. 22, 2008), https://www.timesargus.com/news/despite-two-cases-capital-murder-trials-are-rare-in-new-hampshire/article_85d4beea-9e25-5f29-b3f8-ea0d5534510b.html	29
Holly Ramer, <i>New Hampshire Repeals Its Death Penalty</i> , PBS News (May 30, 2019), https://www.pbs.org/newshour/nation/new-hampshire-repeals-its-death-penalty	34
James Anderson, <i>Bill to End Death Penalty Heads to Full Colorado Senate</i> , <i>Colorado Politics</i> (Mar. 7, 2019), https://www.coloradopolitics.com/2019/03/07/bill-to-end-death-penalty-heads-to-full-colorado-senate-video	34

- James R. Acker & Brian W. Stull, *Life After Sentence of Death: What Becomes of Individuals Under Sentence of Death After Capital Punishment Legislation is Repealed or Invalidated*, 54 Akron L. Rev. 267, 275 & n. 29, 284-85 (2021)*passim*
- Jeffrey M. Jones, “Drop in Death Penalty Support Led by Younger Generations,”<https://news.gallup.com/poll/653429/drop-death-penalty-support-led-younger-generations>. 17
- Jennifer L. Eberhardt, P.G. Davies, Valerie J. Purdie-Vaughns, & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, Cornell Law Faculty Pubs, Paper 41 (2006), <https://fbaum.unc.edu/articles/BlackLives-2015.pdf> 31
- Jessica Saunders & Greg Midgette, *A Test for Implicit Bias in Discretionary Criminal Justice Decisions*, 47 Law & Hum. Behav. 217 (2023) <https://psycnet.apa.org/fulltext/2023-54964-015.html> 30
- Katherine Beckett & Heather Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2014* (Dept. of Sociology, Univ. of Wash. Dep’t of Sociology Oct. 13, 2014), <https://cyberlaw.stanford.edu/content/files/legacy/documents/washracestudy2014.pdf> 31
- Kyle Gamache, Judith Platania, & Matt Zaitchik, *Perceptions of criminal responsibility through the lens of race*, 16(1) *Appl. Psychol. in Crim. Just.* 60 (2021), https://docs.rwu.edu/cgi/viewcontent.cgi?article=1426&context=fcas_fp 33
- M. Eve Hanan, *Remorse Bias*, 13 Nev. L.J. 575 (2018), <https://scholars.law.unlv.edu/facpub/1144/> 33
- Madeleine Carlisle, *Why It's Significant That Virginia Looks Set to End the Death Penalty*, Yahoo News (Feb. 9, 2021) , <https://www.yahoo.com/news/why-significant-virginia-looks-set-214711680.html> 34
- Michael Mello, *Certain Blood for Uncertain Reasons: a Love letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 Vermont L. Rev. 765, 855 (2008) 30
- Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the “Empathic Divide,”* 45 (1) *Law & Soc’y Rev.* 69 (2011), <https://doi.org/10.1111/j.1540-5893.2011.00428.x> 32, 33

Quentin Blaine, “Shall Surely Be Put To Death: Capital Punishment in New Hampshire 1623-1985,” <i>Bar Journal</i> Vol. 27, No. 3 (Spring 1986).	16
Rich Morin, <i>Exploring Racial Bias Among Biracial and Single-Race Adults: The IAT</i> (Pew Research Center, 2015)	32
Samuel R. Sommers, <i>On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations</i> , 90 J. Personality & Soc. Psychol. 597 (2006)	32
WMUR9, <i>Notable NH convicts serving life without parole</i> (slide 9 of slides how)(Aug. 9, 2014), https://www.wmur.com/article/notable-nh-convicts-serving-life-without-parole/5134344	30

IDENTITY OF *AMICI CURIAE*

The American Civil Liberties Union Foundation (“ACLU”) is a nationwide, non-profit, nonpartisan organization with approximately two million members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions. Within the ACLU, the Capital Punishment Project upholds those rights in the context of death penalty litigation, systematic reform, racial equity, and public education and advocacy.

The American Civil Liberties Union of New Hampshire (“ACLU-NH”) is the New Hampshire affiliate of the ACLU, with over 9,000 New Hampshire members and supporters. The ACLU-NH engages in litigation by direct representation and as *amicus curiae* to encourage the protection of individual rights guaranteed under state and federal law, including the right under Part I, Article 33 of the New Hampshire Constitution to be free from “cruel or unusual punishments.” The ACLU-NH—then the New Hampshire Civil Liberties Union—filed an *amicus* brief with this Court in *State v. Addison*, 160 N.H. 732 (2010).

Amici also include the following legal scholars whose scholarship and teaching focus on legal history, legal institutions of punishment and control, and discrimination in the application of the death penalty. These scholars have an interest in ensuring that legal history is accurately interpreted and that the death penalty is imposed in nondiscriminatory manner:

James R. Acker, a Distinguished Teaching Professor Emeritus at the School of Criminal Justice, at the University at Albany (State University of New York). He has

authored and edited numerous scholarly articles and books focusing on capital punishment, including works addressing New York's older and recent history regarding the death penalty, and he is co-founder of the National Death Penalty Archive, a repository of historical materials pertaining to capital punishment.

Sandra Babcock, a Clinical Professor at Cornell Law School, and is the Faculty Director of the Cornell Center on the Death Penalty Worldwide. In 2018, she launched the Alice Project, which seeks to build awareness of how gender bias affects the capital prosecutions of women and gender minorities, and in 2023, she co-founded the Center on Gender and Extreme Sentencing. Together with her students, she defends women serving extreme sentences around the world. She is also a principal investigator in NSF-funded research exploring the nature and prevalence of gender biased language in the capital trials of women in the United States. She has published law review articles and op-eds focusing on gender-based violence, gender bias, and trial dynamics in women's capital proceedings. In 2021, she received the American Bar Association Justice John Paul Stevens Guiding Hand of Counsel Award in recognition of her leadership and contribution to systemic reform in the area of capital case representation. She received her B.A. from Johns Hopkins University in 1986, and her J.D. from Harvard Law School in 1991.

Frank R. Baumgartner, the Richard J. Richardson Distinguished Professor of Political Science at UNC-Chapel Hill. He has written two books about the death penalty, other books on issues of racial disparities in the criminal legal system, and numerous articles, chapters, and law review articles conducting statistical analyses of the trends and patterns of usage of the death penalty.

Eric M. Freedman, the Siggi B. Wilzig Distinguished Professor of Constitutional Rights at Hofstra Law School. He is the author of numerous scholarly and popular publications respecting both the history of habeas corpus and the death penalty. He has testified on these subjects before legislative bodies and as an expert witness in judicial proceedings. His most recent books are *Habeas Corpus: Rethinking the Great Writ of Liberty* (2003) and *Making Habeas Work: A Legal History* (2018), which was based in substantial part on original research he conducted in the New Hampshire State Archives.

Jeffrey Fagan, the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School and Professor of Epidemiology at the Mailman School of Public Health at Columbia University. He also is a Faculty Associate of the Columbia Data Science Institute. His scholarship focuses on fairness and equity in the administration of justice. His research examines race and criminal law, capital punishment, policing and police reform, firearm violence and regulation, and juvenile crime and punishment. He has testified as an expert witness before several courts across the country, as well as Congress, the American Law Institute, and the National Research Council Committee on Deterrence and the Death Penalty. He is a Fellow of the American Society of Criminology.

Samuel Gross, the Thomas and Mabel Long Professor of Law Emeritus at the University of Michigan and founding editor of the National Registry of Exonerations. Professor Gross has published extensively on false convictions and exonerations, capital punishment and racial profiling, including books and articles on racial discrimination in the use of the death penalty, public opinion on capital punishment, and the risk of conviction and execution of innocent capital defendants.

Catherine M. Grosso, a professor of law at Michigan State University College of Law, serving as a visiting research scholar at UC Berkeley School of Law for the 2025-26 academic year. Professor Grosso is an applied empirical legal scholar whose interdisciplinary scholarship examines the role of race and other extralegal factors in criminal investigations, trials, and the administration of capital punishment. She conducted analysis of jury selection and charging and sentencing decisions. Her work has been published in law reviews and peer review journals and has been introduced in legal proceedings.

Michael L. Radelet, a Professor Emeritus in the Department of Sociology at the University of Colorado in Boulder. Over the past thirty years he has published nearly 100 books and articles on various aspects of the death penalty, including on the history of the death penalty in Colorado and the history of all U.S. cases in which white defendants were executed for crimes against Black victims.

Austin Sarat, the William Nelson Cromwell Professor of Jurisprudence & Political Science at Amherst College, has authored or edited many books about the death penalty, including *When the State Kills, Mercy on Trial: What It Means to Stop an Execution* (2007), *Gruesome Spectacles: Botched Executions and America's Death Penalty* (2014), and *The Death Penalty in Decline* (2005).

Carol Steiker, the Henry J. Friendly Professor of Law at Harvard Law School. She is the author or co-author of numerous scholarly articles, and her most recent books are *Comparative Capital Punishment*, co-edited with Jordan Steiker (Edward Elgar 2019), and *Courting Death: The Supreme Court and Capital Punishment*, co-authored with Jordan Steiker (The Belknap Press of Harvard University Press 2016). She has served as a

consultant and expert witness on issues of criminal justice and capital punishment for non-profit organizations and has testified before Congress and state legislatures. She is a fellow of the American Bar Foundation and a member of the American Law Institute and the American Academy of Arts and Sciences.

The ACLU, ACLU-NH, and death penalty legal scholars believe that their experience in these issues will make their brief of service to this Court.

SUMMARY OF ARGUMENT

Separate and in addition to constitutional protection against “cruel or unusual punishments” *see* N.H. Const. pt. I, art. 33, New Hampshire’s capital sentencing statute bars executions that are “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” RSA 630:5, XI(c).

Amici write to direct the Court’s attention to three considerations relevant to this determination. *First*, this Court should prioritize the evidence of contemporary community values conveyed by the Legislature’s 2019 bipartisan and overwhelming repeal of the death penalty. *Second*, this Court should be hesitant to place New Hampshire in the anomalous position it would occupy were it to become the first and only state to execute someone under a repealed death penalty statute; the diametrically opposite approach of every other repeal state should weigh heavily in the Court’s current renewed proportionality review. *Third*, this Court should consider the legion of social science research explaining the ways that race likely contributed to the death sentence of a poor, Black man who did not “purposefully kill” the victim, particularly when the sentence came in the same year that a rich, white man was given a life sentence after purposefully bludgeoning

someone to death with a sledgehammer alongside two others he had hired to kill the victim. Should New Hampshire nevertheless execute Mr. Addison—despite the death penalty repeal by its state Legislature, despite every other state declining to execute people under a repealed statute, and despite the likely role that race played in his sentence—the execution would be aberrational and disproportionate several times over.

ARGUMENT

I. The Legislature’s overwhelming repeal of the New Hampshire death penalty expressed contemporary values pivotal to the proportionality question.

As courts across the country have long recognized, “the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” *State v. Addison*, 165 N.H. 381, 568 (2013) (hereafter *Addison II*) (citing *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); see also *Fleming v. Zant*, 386 S.E.2d 339, 343 (Ga. 1989) (“[L]egislative enactments constitute the clearest and most objective evidence of how contemporary society views a particular punishment.”). Although contemporary community values bear heavily on the question of whether a punishment for a particular crime would be cruel and/or unusual under Part 1, Article 33 of the New Hampshire Constitution or the Cruel and Unusual Punishment Clause of the Eighth Amendment, *Addison II*, 165 N.H. at 568 (quoting *Atkins*, 536 U.S. at 312), this Court has also invoked such values in its statutory proportionality jurisprudence. *State v. Addison*, 160 N.H. 732, 779 (2010) (hereafter *Proportionality Framework*);¹ *Addison III*, 167 N.H. at 569. While in

¹ This title follows this Court’s nomenclature. See *State v. Addison*, 167 N.H. 562, 569 (2015) (hereafter *Addison III*) (referring to the 2010 case as “*Proportionality Framework*”).

the proportionality context, the Court has primarily looked thus far to jury verdicts to express community values “regarding whether the punishment of death is appropriate for a particular crime committed by a particular defendant,” *Addison III*, 167 N.H. at 569 (quoting *Proportionality Framework*, 160 N.H. at 779), as noted above, a broader appraisal of those values should assess legislative action. *See Addison II*, 165 N.H. at 568; *see Gregg v. Georgia*, 428 U.S. 153, 175–176 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.) (“[I]n a democratic society[,] legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people[.]”).

In New Hampshire, the Legislature’s actions have communicated contemporary values that repudiate the death penalty in a way that was both widespread and long overdue.

The decision by the Legislature to repeal the death penalty in 2019 demonstrates, on its own, this state’s contemporary values opposing executions, but so do the circumstances surrounding the repeal. The repeal bill was passed not only by a small portion of the legislature, or purely along party lines, but rather with a two-thirds margin of members present in both the Senate (17-6, or 73% margin) and the House (279-88, or 76% margin), and by a subsequent vote of 247-123 (or 66.7% margin) in the House and a vote of 16-8 (or 66.67% margin) in the Senate in overriding the Governor’s veto.² And the repeal

² *See* General Court of New Hampshire- Bill Status System, HB455 Roll Call, https://gc.nh.gov/bill_status/legacy/bs2016/Roll_Calls/billstatus_rcdetails.aspx?vs=127&sy=2019&lb=S&eb=HB0455&sortoption=&txtsessionyear=2019&txtbillnumber=HB455&ddlspansors=&lrs=185;

communicated the values of New Hampshire, but also values that permeate state lines.

After all, no state touching New Hampshire (nor any state touching a state touching New Hampshire) currently permits the death penalty.³

The repeal was also long coming, arriving in 2019 after multiple attempts at repeal over twenty years.⁴ And this longstanding fight aligned with New Hampshire's history, where, in addition to not having had an execution since 1939,⁵ New Hampshire Governor William Badger was one of the first to call for abolition of the death penalty as early as 1834.⁶ Even across the country, the timing of New Hampshire's repeal came amidst a momentum of sentiment against the death penalty in which, in the past decade alone, five

https://gc.nh.gov/bill_status/legacy/bs2016/Roll_Calls/billstatus_rcdetails.aspx?vs=71&sy=2019&lb=H&eb=HB0455&sortoption=&txtsessionyear=2019&txtbillnumber=HB455&ddlspponsors=&lsr=185;
https://gc.nh.gov/bill_status/legacy/bs2016/bill_docket.aspx?lsr=0185&sy=2019&sortoption=billnumber&txtsessionyear=2019&txtbillnumber=hb455. See also Dave Solomon, "Death penalty repeal passes NH Senate with veto-proof majority," *Union Leader* (April 11, 2019), https://www.unionleader.com/news/politics/state/death-penalty-repeal-passes-nh-senate-with-veto-proof-majority/article_6ba91bd6-fcf8-5986-add0-4dfb3f24fa09.html.

³ Including, in the former group, Vermont, Maine, and Massachusetts, and in the latter group New York, Connecticut, and Rhode Island, none of which have the death penalty. See Death Penalty Information Center, "States with and without the Death Penalty – 2025," <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>.

⁴ See Death Penalty Information Center, "New Hampshire Becomes 21st State to Abolish Death Penalty," (May 30, 2019) (updated March 14, 2025), <https://deathpenaltyinfo.org/new-hampshire-becomes-21st-state-to-abolish-death-penalty> (discussing attempts to repeal the New Hampshire death penalty in 2000, 2014, and 2018).

⁵ Felice Belman, "New Hampshire's Last Execution Was 80 Years Ago," *Boston Globe* (May 30, 2019), <https://www.bostonglobe.com/metro/2019/05/30/new-hampshire-last-execution-was-years-ago/3ttZdrLC55WIoGa7yixpKO/story.html> (noting that Howard Long "was hanged just after midnight on July 14, 1939, in a converted storeroom at the state prison — a seven-minute process described in gruesome detail in the newspaper").

⁶ See Quentin Blaine, "Shall Surely Be Put To Death: Capital Punishment in New Hampshire 1623-1985," *Bar Journal* Vol. 27, No. 3 (Spring 1986).

states have abolished the death penalty,⁷ and public opinion in favor of the death penalty has steadily dropped to its lowest since the early 1970s.⁸

As have the three other state high courts to have considered the propriety of executing post legislative-repeal in the last 20 years, this Court should consider these objective indicia of contemporary values opposing executions when it determines the proportionality and appropriateness of Mr. Addison’s death sentence in light of the state’s repeal. *See State v. Rogers*, 499 P.3d 45, 48 (Or. 2021) (“That different treatment—of persons whose conduct the legislature has now determined does not differ in a way that justifies death—violates Article I, section 16.”); *Fry v. Lopez*, 447 P.3d 1086, 1097 (N.M. 2019) (“The repeal represents a profound change in the legislative attitude toward the death penalty and a shift in the standards of decency.”) (citing *State v. Santiago*, 318 Conn. 1, 122 A.3d 1, 62 (2015) (“The prospective abolition of the death penalty . . . provides strong support for the conclusion that capital punishment no longer comports with contemporary standards of decency.”)).⁹

⁷ These include Delaware (2016), New Hampshire (2019), Colorado (2020), Virginia (2021), and Washington (2023). *See* Death Penalty Information Center, “States Without The Death Penalty,” <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>.

⁸ *See* Jeffrey M. Jones, “Drop in Death Penalty Support Led by Younger Generations,” Gallup (Nov. 14, 2014), <https://news.gallup.com/poll/653429/drop-death-penalty-support-led-younger-generations>.

⁹ *Cf. also Fleming*, 386 S.E.2d at 342 (finding in light of prospective-only legislative repeal of the death penalty for persons with intellectual disability (before *Atkins v. Virginia*, 536 U.S. 304 (2002), that “under the Georgia Constitution, the execution of the [intellectually disabled] constitutes cruel and unusual punishment”).

II. No American state has executed a person previously condemned to die under a since repealed statute, and the same holds true throughout the world.

When this Court first considered how to conduct statutory proportionality review under RSA 630:5 XI (c), it found it appropriate to look to out-of-state cases, particularly because this case involved the only in-state death sentence available for comparison. *State v. Addison*, 160 N.H. 732, 779-80 (2010). Whether an execution remains proportionate “to the penalty imposed in similar cases,” RSA 630:15 XI(c), under a repealed capital statute similarly poses a question that cannot be answered by prior state practices: the question has never before been asked or answered in this state.

But numerous states have passed this way before. In 2012, after Connecticut abolished the death penalty prospectively, Conn. Gen. Stat. Ann. § 53a-35a (1)(A), eleven men remained on the state’s death row, and the state’s supreme court confronted the question whether their executions could be lawfully carried out. *See* James R. Acker & Brian W. Stull, *Life After Sentence of Death: What Becomes of Individuals Under Sentence of Death After Capital Punishment Legislation is Repealed or Invalidated*, 54 Akron L. Rev. 267, 275 & n. 29, 284-85 (2021) (hereafter *Life After Sentence of Death*) (discussing *State v. Santiago*, 122 A.3d 1 (Conn. 2015)). Undersigned counsel Brian W. Stull authored an amici brief in *Santiago*, on behalf of amici curiae legal scholars (three of whom are also amici here), demonstrating that—of 30 separate repeals, including 16 in then-current repeal states and the District of Columbia and 14 repeals in states that later reinstated the death penalty—no state had ever executed a person based on a sentence for a crime returned under a since-repealed statute. *See generally* Br. of Amici Curiae Legal

Historians & Scholars in *State v. Santiago*, No. SC17413 Amici Br. 2012 WL 7985132 (Dec. 12, Conn.). Connecticut then elected to continue that practice. *See State v. Santiago*, 122 A.3d 1, 9 (Conn. 2015).

In 2021, one of the amici common to the Connecticut amici brief and this brief, Professor James Acker, authored the aforementioned *Life After Sentence of Death*, with undersigned counsel Stull, expanding on and updating the findings in the Connecticut brief. *See generally Life After Sentence of Death*, 54 Akron L. Rev. 267 (2020). The article includes additional information explaining states' decisions not to execute up to the time of the *Santiago* brief, and then updates that research with evidence that, following all four other death-penalty repeals between 2012 and 2021 (Delaware, Maryland, Virginia and Washington), states continued to refrain from executing based on sentences obtained under the repealed statutes. In turn, the information in this brief relies in large part on our extensively-sourced article and the prior Connecticut brief, but also further updates the research in the article with Oregon's moves to spare those once condemned under its 2019 sweeping partial repeal.¹⁰ *See* n. 40, *infra*.

As *Life After Sentence of Death* describes in minute detail, and summarized more succinctly below, throughout history, states have categorically reprieved those condemned under a since-repealed statute through all three branches of traditional state governments. First, in six states (Iowa, New Jersey, New Mexico, North Dakota, Virginia and

¹⁰ Where particularly salient, this brief shares the underlying sources of information. Amici refer the interested reader to *Life After Sentence of Death*, and its detailed footnotes, for additional sources.

West Virginia), the repealing legislation expressly stated that the repeal would apply not only prospectively but to sentences obtained prior to the repeal. *See* nn. 22, 32, 33, 26, 42, 45, 48, *infra*. Second, in ten states (Arizona, Colorado, Hawaii, Iowa, Maryland, Minnesota, New Jersey, New York, Oregon, and West Virginia), governors and/or state parole boards commuted the death sentences of those remaining on death row at the time of repeal. Third, in six states (Connecticut, Delaware, New Mexico, New York, Oregon, and Washington) plus the District of Columbia, the states' high courts barred post-repeal executions on state statutory or constitutional grounds.¹¹ *See* nn. 16, 18, 34, 35, 40, 47, *infra*. Only in Kansas did all three branches decline to affirmatively protect from execution those remaining on death row at the time of repeal (in 1907); but, ultimately, Kansas still refrained from carrying out the executions that state law and state actors apparently would have permitted. *See* n. 24, *infra*.

In the table below, and accompanying footnotes, amici provide for each repeal state the date and type of repeal and the date of the last execution under the repealed statute (or late operative statute) to demonstrate that the repealing state never executed under the authority of a repealed statute. As explained in the footnotes, several repeals were partial, i.e., a repeal of the death penalty except for murders by persons serving life sentences of imprisonment. A handful of states repealed more than once, after initially

¹¹ These categories are not mutually exclusive for two reasons: 1) some states repealed more than once; and 2) in some instances, both the legislature made the repeal retroactive and the governor issued a commutation. In the latter instance, although the governor's action was controlling, the legislature had still acted to prevent any post-repeal execution and, like belt and suspenders, the legislature's action alone would have sufficed to save the condemned person from execution.

having reinstated the death penalty. In each case, the answer to what became of those sentenced to death under repealed sentencing laws remain the same: they are never executed.

Last Executions Under Repealed American Death-Penalty Laws

State	Date & Type of Repeal	Date of Last Execution
Alaska	March 30, 1957, Legislative	April 4, 1950 ¹²
Arizona	Dec. 8, 1916, Voter-Initiative	July 7, 1916 ¹³
Colorado	June 29, 1897, Legislative	June 26, 1896 ¹⁴
Colorado Second	July 1, 2020, Legislative	Oct. 13, 1997 ¹⁵
Connecticut	April 12, 2012, Legislative	May 13, 2005 ¹⁶

¹² *Id.* at 277-78. No one appears to have been under sentence of death at the time of the repeal.

¹³ *Id.* at 279. Like several other repeals in this era, this one proved short lived. Only two years later, in 1918, Arizonans voted to reinstate the death penalty. *Id.* Two men remained on death row who had been sentenced under the pre-1916 repeal. *Id.* at 280. The Arizona Board of Pardons and Parole commuted their sentences to life. *Id.*

¹⁴ *Id.* at 282. Like New Hampshire's repeal, Colorado's 1897 repeal was prospective only. *Id.* The Governor commuted to life imprisonment five condemned men who remained eligible for execution because of the date of their crimes, emptying death row. *Id.* at 282. In 1901, Colorado reinstated the death penalty and in 1904, the state executed for the first time under the new statute. *Id.* at 283.

¹⁵ See Death Penalty Information Center, Execution Database (filter to Colorado), <https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Colorado&federal=No>. As had his predecessor over a century earlier, in 2020, Governor Jared Polis commuted the sentences of the three men remaining on death row after the state's explicitly prospective repeal. *Life After Sentence of Death*, at 283.

¹⁶ See Death Penalty Information Center, Execution Database (filter to Connecticut), <https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Connecticut&federal=No>. Although Connecticut's repeal, too, was prospective only, the Connecticut Supreme Court ruled that executing anyone condemned prior to the repeal would violate the state constitution. See *State v. Santiago*, 122 A.3d 1 (Conn. 2015); *State v. Peeler*, 140 A.3d 811 (Conn. 2016); *Life After Sentence of Death* at 284-85.

Delaware	April 2, 1958, Legislative	1946 ¹⁷
Delaware second	August 2, 2016, Judicial; Sept. 26, 2024 Legislative	April 20, 2012 ¹⁸
District of Columbia	February 26, 1981, Legislative	1957 ¹⁹
Hawaii	June 5, 1957, Legislative	1944 ²⁰
Illinois	July 1, 2011, Legislative	1999 ²¹
Iowa	May 1, 1872, Legislative	1865 ²²

¹⁷ *Id.* at 286. Delaware too reinstated the death penalty after it's early repeal, doing so in 1961. *Life After Sentence of Death* at 286. The state's next execution was three decades later in 1992 – of 34 year-old Steven Pennell. *Id.* at 286 & n. 72 (citing *Death Row Executions*, Del. Dep't. Corr., <https://doc.delaware.gov/views/executions.blade.shtml> [<https://perma.cc/7NP3-A2B7>]).

¹⁸ See Death Penalty Information Center, Execution Database (filter to Delaware), <https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Delaware&federal=No>. Delaware's high court ruled its statute unconstitutional in *Rauf v. State*, 145 A.3d 430 (Del. 2016) (per curiam), and then held that *Rauf* would apply retroactively, *Powell v. State*, 153 A.3d 69 (Del. 2016) to other pending death sentences, and the Legislature never reinstated the death penalty. *Life After Sentence of Death* at 286. Although the statute remained inoperative, in 2024, the Legislature enacted House Bill 70, eliminating the death penalty in Delaware. 84 Del. Laws, c.433§4209 (2024).

¹⁹ *Life After Sentence of Death* at 287. The U.S. Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) rendered the then extant statute and sentences rendered thereunder unconstitutional. See *United States v. Lee*, 489 F.3d 1232, 1246-47 (D.C. Cir. 1973). The 1981 legislation repealed the invalidated legislation. *Life After Sentence of Death* at 287 and n. 81.

²⁰ *Id.* at 287. Hawaii became a state in 1959, after the 1957 repeal. The 1944 execution occurred under civilian authority in territorial Hawaii. *Life After Sentence of Death*, at 287-88. The governor commuted the death sentences of the two men remaining under sentence of death at the time of the territorial repeal. *Id.* at 288.

²¹ *Id.* When he signed the state's prospective repeal bill in 2011, Illinois's governor commuted the death sentences of the fifteen men remaining under sentence of death. *Life After Sentence of Death* at 289.

²² *Id.* at 290. After successfully petitioning the governor to delay the execution of William Stanley, so that it could consider abolition legislation, the Legislature enacted retroactive abolition. *Id.* at 290. This saved the life of Mr. Stanley, the last-remaining person on Iowa's death row. *Id.*

Iowa	July 4, 1965, Legislative	1962 ²³
Kansas	Jan. 30, 1907, Legislative	1870 ²⁴
Maine	1876, Legislative	1875 ²⁵
Maine second	1887, Legislative	1885 ²⁶
Maryland	2013, Legislative	2005 ²⁷
Massachusetts	1984, Judicial	1947 ²⁸
Michigan	1847, Legislative	1836 ²⁹
Minnesota	1911, Legislative	1906 ³⁰
Missouri	1917, Legislative	1916 ³¹

²³ *Id.* at 291. Iowa's first repeal too proved short lived. The Legislature reinstated the death penalty in 1878, and no one was executed between the 1872 repeal and this reinstatement. *Id.* at 290-91. One month before Iowa's second repeal, in 1965, the governor commuted the death sentence of the lone offender awaiting execution in the state. *Id.*

²⁴ *Id.* at 291. Kansas is another state that repealed before reinstating, this time nearly three decades later in 1935. *Life After Sentence of Death* at 291. Numerous people remained on death row at the time of the 1907 repeal, which the Kansas Supreme Court subsequently held to have only prospective effect. *Id.* at 292. Nevertheless, the state executed none of these condemned persons. *Id.* at 292-93. After Kansas reinstated the death penalty in 1935, the first execution did not occur until 1944 for a murder that occurred in 1943. *Id.* at 293.

²⁵ *Id.* at 293.

²⁶ *Id.* Maine reinstated the death penalty in 1883, seven years after its first abolition. *Id.* The three executions the state carried out in 1885, the state's last, were for murders that occurred after the 1883 reinstatement. *Id.* at 293-94.

²⁷ Death Penalty Information Center, *Execution Database*, <https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Maryland&federal=No> (filter to Maryland). Five people remained on death row at the time of repeal, one of whom died of natural causes; the governor subsequently commuted the death sentences of the remaining four. *Id.* at 294-95.

²⁸ *Id.* at 295. In a per curiam opinion applying *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court invalidated the state's death penalty. *See Life After Sentence of Death* at 294 & n. 127 (citing *Stewart v. Massachusetts*, 408 U.S. 845, 845 (1972)). Although the state's legislature attempted to enact a statute that complied with *Furman*, the state's high court twice invalidated the new statutes on state constitutional grounds. *Id.* at 296.

²⁹ *Id.* at 297. Michigan became a state in 1837, a year after the territory's last execution. *Id.* at 297 & n.133.

³⁰ *Id.* at 297. The State Board of Pardons commuted the sentences of the two men remaining on death row at the time of the 1911 repeal. *Life After Sentence of Death* at 298.

³¹ *Id.* Missouri reinstated the death penalty two years later. *Id.* After the 1917 repeal, Missouri reinstated the death penalty in 1919. *Id.* But after the pre-repeal executions of 1916,

New Jersey	2007, Legislative	1963 ³²
New Mexico first	1969, Legislative	1960 ³³
New Mexico second	2009, Legislative	2001 ³⁴
New York	2004, Judicial; 1965 Legislative (partial)	1963 ³⁵
North Dakota	1915, Legislative (partial); 1975, Legislative (full)	1905 ³⁶

the next two occurred post-reinstatement in 1921, each for a murder committed in 1920. *Id.* at 299.

³² *Id.* at 300. Although the legislation allowed for resentencing to life imprisonment upon filing of a petition for resentencing, the governor mooted that possibility when he commuted the remaining death sentences to life imprisonment on the eve of the effective date for the repeal. *Id.* at 301.

³³ *Id.* at 302. The legislation abolished the death penalty for all crimes except the murder of law enforcement officers or certain second capital felonies, and expressly revoked prior death sentences, reducing them to life imprisonment. *Id.*

³⁴ Death Penalty Information Center, *Execution Database*, <https://deathpenaltyinfo.org/facts-and-research/data/executions?state=New+Mexico&federal=No>. Citing the need to conduct a more robust proportionality review in light of the state's historic repeal of the death penalty, the New Mexico Supreme Court ruled in 2019 that the death sentences of the two people remaining on death row at the time of the 2009 repeal were statutorily disproportionate and thus invalid. *Id.* at 302-03 & n. 167 (citing *Fry v. Lopez*, 447 P.3d 1086, 1092, 1097-98 (N.M. 2019)).

³⁵ *Id.* at 303. Decisions in 2004 and 2007 by the New York Court of Appeal held that the state's 1995 capital-sentencing statute violated the state constitution and invalidated all extant sentences. *Id.* at 305 & nn. 176 & 177. The state never reinstated. *Id.* at 305. The state's prior statute, enacted in 1965, and limiting the death penalty to murders by life imprisoned persons who committed a deliberate and premeditated murder of a police officer, was invalidated based on *Furman v. Georgia* in 1973. *Id.* at 304 & n. 172. The 1965 statute, in turn, had itself dramatically narrowed the state's death penalty. When that narrowing provision took effect, the governor commuted to life imprisonment the sentences of the five persons condemned to die before that narrowing. *Id.* at 304.

³⁶ *Id.* at 306. The state abolished the death penalty for all crimes except treason and murder while serving a life sentence. *Id.* at 305. The legislature made the law expressly retroactive, to prevent the execution of a man remaining on death row at the time. *Id.* Having never used this vestigial provision, the state fully repealed the death penalty in 1975. *Id.*

Oregon first	1914, Voter Initiative & Constitutional Amendment	1913 ³⁷
Oregon second	1964, Voter Initiative & Constitutional Amendment	1962 ³⁸
Oregon third	1981, Judicial	1962 ³⁹
Oregon fourth	2019, Legislative (partial)	1997 ⁴⁰

³⁷ *Id.* at 308. The governor commuted the death sentences of the last two persons remaining on death row at the time of the voter initiative. *Id.* The voters, however, reinstated the death penalty in May of 1920, permitting an execution in November of that year for a capital crime that took place in July of 1920. *Id.*

³⁸ *Id.* Once again, at the time of this 1964 repeal, a governor commuted the sentences of those (three) remaining on death row. *Id.*

³⁹ The judicial repeal was a ruling by Oregon’s Supreme Court invalidating the statute on state constitutional grounds for violating the right to trial by jury. *Id.* at 307 & n. 189 (citing *State v. Quinn*, 623 P.2d 630 (1981)). In 1984, the voters changed both the constitution and the capital statute, affording jury sentencing and thus curing the infirmity found in *Quinn*. *Id.* at 307. The next execution occurred in 1996. *Id.* at 308.

⁴⁰ Death Penalty Information Center, *Execution Database*, <https://deathpenaltyinfo.org/facts-and-research/data/executions?state=Oregon&federal=No> (filter to Oregon). Although a partial repeal, the 2019 law significantly restricted the use of the death penalty prospectively. *Life After Sentence of Death* at 309-10. The new law allows the death penalty only for acts of terrorism in which two or more persons are killed, murder of a child under 14, murder by a person already incarcerated for murder, or premeditated and intentional murder of a law enforcement officer related to the victim’s official duties, generally rare occurrences. *Id.* & n. 204. At the time of this partial repeal, 31 people remained on death row. Thereafter, the state’s supreme court ruled death sentences returned before the 2019 law, for crimes which would no longer be death eligible, were disproportionate under the state constitution. *Thompson v. Fhuere*, 545 P.3d 1233, 1237 (Or. 2024) (recounting this history and citing *State v. Rogers*, 499 P.3d 45 (Oregon 2021) (state constitutional ruling under proportionality review)). After similar judicial rulings, by 2022, 17 people remained on Oregon’s death row; the governor commuted their sentences to life imprisonment, ensuring that no one would be executed who would no longer remain eligible for execution after the 2019 law. Governor’s Office, *Governor Kate Brown Commutes Oregon’s Death Row – Sentences commuted to life in prison without the possibility of parole* (Dec. 13, 2022), <https://apps.oregon.gov/oregon-news-room/OR/GOV/Posts/Post/governor-kate-brown-commutes-oregon-s-death-row-15087>.

Rhode Island	1852, Legislative; 1979, Judicial; Legislative, 1984	1845 ⁴¹
South Dakota	1915, Legislative	1913 ⁴²
Tennessee	1915, Legislative	1913 ⁴³
Vermont	1965, Legislative	1954 ⁴⁴
Virginia	2021, Legislative	2017 ⁴⁵
Washington	1913, Legislative	1911 ⁴⁶
Washington second	2018, Judicial	2010 ⁴⁷
West Virginia	1965, Legislative	1959 ⁴⁸

⁴¹ *Life After Sentence of Death*, at 310. Rhode Island abolished the death penalty in 1852, but reinstated a narrow version for murder committed by a life-term prisoner in 1872. *Id.* at 310-11. Under what turned out to be a misguided interpretation of *Furman*, the Legislature withdrew the statute and required a mandatory death sentence for murder committed by any prisoner. *Id.* & nn. 210 & 211. Applying *Woodson v. North Carolina*, 428 U.S. 280 (1976), the state's supreme court declared the mandatory law unconstitutional in 1979, and the legislature subsequently abolished the death penalty, making life imprisonment the state's maximum penalty for murder. *Id.* at 310-11 & nn. 212-213 (citing *State v. Cline*, 397 A.2d 1309 (R.I. 1979)). The state never executed under either of the murder-in-prison provisions. *Id.*

⁴² *Id.* at 311-12. The state reinstated the death penalty in 1939, and the next execution occurred in 1947 for a 1946 murder. *Id.*

⁴³ *Life After Sentence of Death*, at 313. Tennessee's 1915 legislation eliminated the death penalty for all crimes but rape and murder committed by a life-term prisoner. *Id.* at 312-13. In January of 1919, it reinstated the death penalty for murder, and in 1920 executed the first person convicted under that provision, for a murder committed in June of 1919. *Id.*

⁴⁴ *Id.* at 314. No one remained on death row at the time of abolition, as the governor had years earlier commuted the last person sentenced to death. *Id.*

⁴⁵ *Id.* at 315. The Legislation converted the sentences of death of those remaining on death row (two men) to life imprisonment. *Id.* at 316 & n. 239.

⁴⁶ *Id.* at 316. Washington reinstated the death penalty eight years later in March of 1919. The next execution occurred in 1921, for a murder committed in December of 2019. *Id.*

⁴⁷ *Id.* at 316-17 & nn. 246, 248 (citing *State v. Gregory*, 147 P.3d 621, 642 (Wash. 2018)). In *Gregory*, the state's high court invalidated the state's statute on state constitutional grounds, and (citing a provision in the statute governing such a contingency) declared all death sentences in the state are "hereby converted to life imprisonment." 147 P.3d at 642.

⁴⁸ *Life After Sentence of Death*, at 317-18. Although the law applied retroactively as well as prospectively, the governor commuted the death sentence of the last remaining person on death row at the time of the repeal. *Id.*

Wisconsin	1853, Legislative	1851 ⁴⁹
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These 38 separate repeals and partial repeals span from Michigan ten years after it became a state in 1847, note 29 *supra*, to the 2021 repeal by Virginia, which as a colony held the first documented execution on American soil in 1608 and as a jurisdiction (both colony and state) conducted more executions than any other. *Life After Sentence of Death*, at 315.

Whether the execution of Michael Addison remains proportionate “to the penalty imposed in similar cases,” RSA 630:15 XI (c), is a question the Court should answer in light of the larger universe of practices in states that, like New Hampshire, repealed and then confronted the question of whether to executed those already condemned to die. Throughout American history,⁵⁰ and even world history, *Life After Sentence of Death* at 319-20,⁵¹ the answer has always emphatically been no. States that repeal never execute a person sentenced to die under the repealed statute. Whether due to the protective actions

⁴⁹ *Id.* at 318-19. In this era in which executions happened rapidly after trial, it appears that no one remained sentenced to death at the time of the repeal.

⁵⁰ Additionally, “no juveniles who were sentenced to death in states that originally authorized capital punishment for 16- or 17-year-old offenders, but subsequently raised the minimum age for death-eligibility to 18 prior to the Supreme Court’s decision in *Roper v. Simmons*, [543 U.S. 551 (2005)], remained under sentence of death when *Roper* was decided, or were executed after relevant state laws raised the minimum age.” *Life After Sentence of Death*, at 327 (reviewing this data).

⁵¹ “The laws enacted in other countries may not be explicit about whether executions can or should be carried out following the abolition of capital punishment, but the actual practices are much clearer. It does not appear that executions in other countries, including Canada, Great Britain, throughout Europe, or elsewhere in the world, have gone forward under such circumstances.” *Life After Sentence of Death*, at 319-20. *See also id.* at 320-24 (documenting in text and tables).

of governors, parole boards, legislatures, or courts, each jurisdiction has arrived at this same proportionate decision. So too should this Court. If this Court permits the execution of Mr. Addison in light of this history, this Court would become the first in the country to sanction such an execution after a prospective repeal of the death penalty, with the effect of making New Hampshire an extreme outlier both regionally and nationally.

III. Proportionality review can protect against an execution decision infected by racial bias.

Mr. Addison was convicted in 2008 for firing a single gunshot at a police officer that penetrated his helmet while attempting to evade arrest, ultimately leading to the officer's death the next day. *Addison II*, 165 N.H. at 414. The jury found that the state failed to prove that Mr. Addison "purposely killed" the officer but did find proof that he "purposely inflicted serious bodily injury which resulted in death." *Id.* at 572. While this made Mr. Addison "equally culpable under the law" as necessary to sustain a conviction of capital murder, *see id.*, this Court has in the past remarked that "what is done against life deliberately, indicates a much more depraved character and purpose than what is done hastily, or without contrivance." *State v. Greenleaf*, 71 N.H. 606, 613 (1902) (quoting *Nye v. People*, 35 Mich. 16, 19 (1876)).

Contrast the case of John Brooks, the only other capital trial that took place the same year. The case posed no question as to whether the murder was deliberate. In fact, the defendant hired and paid men to murder a handyman two years prior to the actual killing. *State v. Brooks*, 164 N.H. 272, 276 (2012). Even after multiple failed murder attempts, Brooks persisted in his long-held plan. *Id.* When those he hired to kill finally

attacked the victim with a sledgehammer, Brooks was not only present, but himself delivered the final blows that killed the victim. *Id.* at 277. Despite this level of premeditation and the indisputable specific intent to kill not present in Mr. Addison's case, Brooks' trial ended in a life verdict while Mr. Addison's ended in death. But these differences appear not to be the most significant between the two cases: as the history of the death penalty and social science could have easily predicted, Mr. Brooks (sentenced to life) was rich and white while Mr. Addison (condemned to die) was poor and Black.

The disparate treatment between Mr. Addison and Mr. Brooks happened in the long shadow of an even more aggravated officer killing in this state that resulted in a sentence of life imprisonment. In the summer of 1997, Gordon Perry had just been released from prison on parole, forbidden by his parole conditions from possessing a gun.⁵² When Epsom Police Officer Jeremy Charron approached Mr. Perry's parked car before dawn at a swimming hole, Mr. Perry shot the officer several times, finally killing him with a shot in the side that evaded the protection of the officer's bulletproof vest.⁵³ Mr. Perry and a co-defendant then fled, with his co-defendant shooting at other officers in pursuit.⁵⁴ After Mr. Perry was arrested and charged with capital murder, "he avoided the death penalty by

⁵² Katharine Webster, Suspect charged in killing of Epsom police officer, *South Coast Today* (Aug. 26, 1997).

⁵³ *Id.*

⁵⁴ *Id.* See also Holly Ramer, *Despite two cases, capital murder trials are rare in New Hampshire*, *The Barre-Montpelier Times Argus* (Sep. 22, 2008), https://www.timesargus.com/news/despite-two-cases-capital-murder-trials-are-rare-in-new-hampshire/article_85d4beea-9e25-5f29-b3f8-ea0d5534510b.html.

pleading guilty to first-degree murder in 1998.”⁵⁵ Gordon Perry is white.⁵⁶ Michael Addison is not, and his crime was decidedly less aggravated. But he too ““offered to plead guilty in exchange for a life sentence,”” and his offer was rejected by the State.⁵⁷

One cannot handwave these racial disparities because meaningful proportionality review is necessary for a state to “take seriously its obligation to safeguard against the imposition of death sentences that are arbitrary or infected by impermissible considerations such as race[.]” *Walker v. Georgia*, 129 S. Ct. 453 (Oct. 20, 2008) (Stevens, J., statement respecting the denial of certiorari)); *State v. Cross*, 132 P.3d 80, 103-04 (Wash. 2006) (“The goal [of proportionality review] is to ensure that the sentence, in a particular case, is proportional to sentences given in similar cases, is not freakish wanton or

⁵⁵ Frederick C. Millett, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment*, 6 *Pierce L. Rev.* 547, 643 (2008). This plea occurred after 14 months of litigation and preparation by his defense team, consuming between 3,000 and 4,000 hours and costing between 700,000 and one million dollars. Michael Mello, *Certain Blood for Uncertain Reasons: a Love letter to the Vermont Legislature on Not Reinstating Capital Punishment*, 32 *Vermont L. Rev.* 765, 855 (2008).

⁵⁶ WMUR9, *Notable NH convicts serving life without parole* (slide 9 of slides how) (Aug. 9, 2014), <https://www.wmur.com/article/notable-nh-convicts-serving-life-without-parole/5134344>.

⁵⁷ *Addison II*, 165 N.H. at 644 (quoting prosecutor’s argument to the jury). Amici acknowledge this Court’s decision in *Proportionality Framework*, 160 N.H. at 764-65 to refrain from considering guilty-plea cases in its proportionality review in light of the “prosecutorial discretion” used in deciding whether to accept a plea or reduce a charge. *Id.* Amici respectfully urge the Court to reconsider, in light of the well-recognized fact that discretionary decisions pose the greatest danger of infection with racial bias. *See, e.g.,* Jessica Saunders & Greg Midgette, *A Test for Implicit Bias in Discretionary Criminal Justice Decisions*, 47 *Law & Hum. Behav.* 217 (2023), <https://psycnet.apa.org/fulltext/2023-54964-015.html> (“Although decentralized decisions are foundational to the function of the criminal justice system, they provide an opportunity for implicit bias to seep in.”). In any case, the Gordon case adds context to the Stewart comparator.

random; and is not based on race or other suspect classifications.”); *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973) (proportionality review by the court means that “[n]o longer will one man die and another live on the basis of race”); *In re Proportionality Rev. Project (II)*, 1455A.2d 168, 170 (N.J. 2000) (“We turned to proportionality review therefore as a means through which to monitor and thereby to prevent any impermissible discrimination in the imposition of the death penalty.”) (internal citation and quotation omitted).

In turn, the Court’s proportionality review should place great weight on the disparity between the treatment of Mr. Addison on the one hand and Mr. Brooks on the other, not only because New Hampshire itself is only about 1.6% Black, but given all that we have learned about the effect of race on capital trials. For instance, in Washington, a state with a 4% Black population, a recent study found that, even with no disparities in prosecutorial decision making, implicit racial biases made it such that “black defendants are four and one half times more likely than similarly situated non-black defendants to be sentenced to death, after controlling for all other variables included in the model.”⁵⁸ And while previous studies found that being “stereotypically Black” in appearance made a death sentence even more likely,⁵⁹ “[t]he single most reliable predictor of whether a defendant in the USA will be executed is the race of the

⁵⁸ Katherine Beckett & Heather Evans, *The Role of Race in Washington State Capital Sentencing, 1981-2014*, at 30 (Dept. of Sociology, Univ. of Wash. Dep’t of Sociology Oct. 13, 2014), <https://cyberlaw.stanford.edu/content/files/legacy/documents/washracestudy2014.pdf>.

⁵⁹ Jennifer L. Eberhardt, P.G. Davies, Valerie J. Purdie-Vaughns, & Sheri Lynn Johnson, *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, Cornell Law Faculty Pubs, Paper 41 (2006), http://scholarship.law.cornell.edu/lrsp_papers/41.

victim.”⁶⁰ This risk to Black defendants heightens precipitously where racial disparities converge, and a Black defendant is convicted of killing a white victim.⁶¹

Findings such as these are often exacerbated by the prevalence of juries that are all-white or even overwhelmingly white such as Mr. Addison’s, particularly where those juries include white males, as they have “demonstrated significant racial bias against [a] black defendant relative to [a] white defendant” in sentencing experiments.⁶² Such effects are not neutralized by the presence of a single Black person on a jury, not only because Black jurors are themselves not inherently immune to such biases,⁶³ but also because “[a] minority of one has unique psychological properties when it comes to conformity and social influence” such that “[m]inorities of one are [] less likely to exert the consistent pressure necessary to have an influence on a majority.”⁶⁴

⁶⁰ Frank R. Baumgartner, Amanda J. Grigg & Alisa Mastro, *#BlackLivesDon’tMatter: race-of-victim effects in US executions, 1976–2013* (Univ. of North Carolina at Chapel Hill & Georgetown Univ. Law Ctr., 2015), <https://fbaum.unc.edu/articles/BlackLives-2015.pdf>.

⁶¹ See, e.g., Catherine M. Grosso, Jeffrey A. Fagan & Michael Laurence, *The influence of the Race of Defendant and the Race of Victim on Capital Charging and Sentencing in California*, 21(3) J. of Empirical Legal Stud., 482–531 (2024), <https://doi.org/10.1111/jels.12390> (“Black defendants who were accused of killing at least one white victim faced between 2.6 and 5.3 times the odds of being sentenced to death higher than white defendants accused of killing at least one white victim.”).

⁶² Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the “Empathic Divide,”* 45 (1) Law & Soc’y Rev. 69 (2011).

⁶³ See, e.g., Rich Morin, *Exploring Racial Bias Among Biracial and Single-Race Adults: The IAT* (Pew Research Center, 2015). (finding that while 48% of takers of the Implicit Association Test showed a bias against Black people (as compared to white people), the same also held true for 29% of Black test takers).

⁶⁴ Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. Personality & Soc. Psychol. 597 (2006) (discussing the significance of having more than one Black person on a jury).

Racial disparities in jury sentencing decisions become less surprising when one considers the role that implicit bias plays in many of the subjective determinations necessary to determine whether a person should be sentenced to life or death, such as the determination of remorse, “dangerousness,” or the weighing of mitigation. For instance, “[s]tudies suggest that capital jurors tend to see black men as more remorseless, dangerous, and cold-blooded than white defendants who have similar histories and committed similar crimes.⁶⁵ This includes findings that Black defendants are more likely to be rated as “more dangerous” than defendants of other races, and particularly so when the victim was white.⁶⁶ Other research has discussed the psychological phenomenon in which there was “a tendency for White jurors—especially White male jurors—to interpret many common penalty phase facts and circumstances as potentially mitigating for a White defendant but to see those same things as irrelevant or even aggravating for a defendant who is Black.”⁶⁷

Given the findings of all of this research, and society’s growing understanding of the effects of implicit bias on capital punishment, it is understandable that this issue has regularly motivated the legislators and courts who have abolished the death penalty over the past decade. For instance, Colorado State Senator Angela Williams noted that “all

⁶⁵ M. Eve Hanan, *Remorse Bias*, 13 Nev. L.J. 575 (2018), <https://scholars.law.unlv.edu/facpub/1144/>.

⁶⁶ Kyle Gamache, Judith Platania, & Matt Zaitchik, *Perceptions of criminal responsibility through the lens of race*, 16(1) *Appl. Psychol. in Crim. Just.* 60 (2021), https://docs.rwu.edu/cgi/viewcontent.cgi?article=1426&context=fcas_fp.

⁶⁷ Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the “Empathic Divide,”* 45(1) *Law & Soc’y Rev.* 69 (2011), <https://doi.org/10.1111/j.1540-5893.2011.00428.x>.

three people facing execution in Colorado are African American” which she felt constituted “evidence of racial inequities in the criminal justice system.”⁶⁸ Similarly, Delaware State Representative Sherry Dorsey noted that “[t]he death penalty has disproportionately affected communities of color, with Blacks and Hispanics making up over 50 percent of inmates on death row.”⁶⁹ Virginia State Representative Michael Mullin observed that “a large majority of Virginians believe that the death penalty is inherently racist, unfair and can’t be executed in a proper fashion.”⁷⁰ And in *State v. Gregory*, the Washington Supreme Court recognized, after reviewing reports regarding the role that race played in death sentences, that the death penalty violated its own constitution because it was “administered in an arbitrary and racially biased manner.” 192 Wash. 2d 1, 18–19 (2018). Even in New Hampshire itself, State Senator Melanie Levesque discussed the importance of getting rid of the “archaic, costly, discriminatory, and final” punishment.⁷¹

In other words, as many legislators have acknowledged and countless studies have found, “[r]ace can act as a silent aggravating factor, putting a thumb on the scale in favor

⁶⁸ James Anderson, *Bill to End Death Penalty Heads to Full Colorado Senate*, Colorado Politics (Mar. 7, 2019), <https://www.coloradopolitics.com/2019/03/07/bill-to-end-death-penalty-heads-to-full-colorado-senate-video>.

⁶⁹ Delaware House Democrats, *House Passes Dorsey Walker Bill to Eliminate the Death Penalty*, House Democrats (June 18, 2024), <https://housedems.delaware.gov/2024/06/18/house-passes-dorsey-walker-bill-to-eliminate-the-death-penalty>.

⁷⁰ Madeleine Carlisle, *Why It's Significant That Virginia Looks Set to End the Death Penalty*, Yahoo News (Feb. 9, 2021), <https://www.yahoo.com/news/why-significant-virginia-looks-set-214711680.html>.

⁷¹ Holly Ramer, *New Hampshire Repeals Its Death Penalty*, PBS News (May 30, 2019), <https://www.pbs.org/newshour/nation/new-hampshire-repeals-its-death-penalty>.

of death” and “[t]his effect can be particularly pronounced in interracial murders.”⁷²

When conducting its proportionality review, the Court should be particularly wary of, and take very seriously, the possibility that race has acted as a silent aggravating factor in the only New Hampshire death sentence and possible execution in almost a century. To allow a post-repeal execution where race very likely acted as a silent actor, against the historical practices of every other jurisdiction that has repealed the death penalty, would doubly offend the proportionality promise of this state’s capital-sentencing statute. RSA 630:15 XI(c).

CONCLUSION

A finding that Mr. Addison’s death sentence is excessive is supported by the New Hampshire Legislature’s repeal of the death penalty, the actions of other states post-repeal, and consideration of the racial aspects of this case making it particularly vulnerable to an unfair and disproportionate death sentence. For these reasons, *Amici* ask that this Court vacate Mr. Addison’s death sentence as excessive.

⁷² Death Penalty Information Center, *Enduring Injustice: The Persistence of Racial Discrimination in the U.S. Death Penalty* (2020), <https://dpic-cdn.org/production/documents/reports/Enduring-Injustice-Race-and-the-Death-Penalty-2020.pdf>.

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, AND DEATH PENALTY SCHOLARS

By their attorneys,

/s/ Henry R. Klementowicz

Gilles R. Bissonnette (N.H. Bar No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301
Tel.: 603.224.5591
gilles@aclu-nh.org
henry@aclu-nh.org

Brian W. Stull, *Pro Hac Vice pending*
Megan D. Byrne, *Pro Hac Vice pending*
American Civil Liberties Union
Capital Punishment Project
201 W. Main Street, Suite 402
Durham, NC 27701
Tel.: 919.682.9469
bstull@aclu.org
mdbyrne@aclu.org

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STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 4,784 words, which is fewer than the 9,500 words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Henry R. Klementowicz
Henry R. Klementowicz

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 30th day of October 2025 to all counsel of record.

/s/ Henry R. Klementowicz
Henry R. Klementowicz