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CLERK OF THE SEDGWICK COUNTY DISTRICT COURT
CASE NUMBER: 2020-CR-000879-FE

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT OF SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS,		
	Plaintiff,	Case No. 2020-CR-879
	v.	
KYLE D. YOUNG,		
	Defendant.	

DEFENDANT'S MOTION CHALLENGING DEATH QUALIFICATION AND CAPITAL PUNISHMENT AS APPLIED IN KANSAS AS UNCONSTITUTIONAL UNDER THE STATE AND FEDERAL CONSTITUTIONS

EVIDENTIARY HEARING REQUESTED

Comes now the accused, Kyle D. Young, by and through counsel and respectfully moves this Court to find unconstitutional the death penalty as applied in Kansas, including the process of death qualifying juries in capital cases. For the reasons explained below and as set forth in detail in the expert reports appended to this motion, death qualifying a jury would violate Mr. Young's right to an impartial jury under Sections 5 and 10 of the Kansas Constitution Bill of Rights, and would violate prospective jurors' rights under Sections 1 and 2. Application of the Kansas death penalty to Mr. Young would violate his right to be free from cruel or unusual punishment pursuant to Section 9 and his right to life under Section 1 of the Kansas Constitution Bill of Rights, as well as his concomitant federal constitutional rights, including those contained within the Sixth, Eighth, and Fourteenth Amendments.

Mr. Young moves this Court to schedule an evidentiary hearing pursuant to his rights to due process and the effective assistance of counsel under the Fifth, Sixth, and Fourteenth

Amendments to the U.S. Constitution and Sections 1, 2, and 10 of the Kansas Constitution Bill of Rights, Kansas Statute Annotated 60-252(a)(1) and Kansas Supreme Court Rule 165(a)(1). In support of this request and his motion to find death qualification and capital punishment in Kansas unconstitutional, Mr. Young relies upon the attached Memorandum of Points and Authorities and the fourteen expert reports included as exhibits:

Exhibit A: Mona P. Lynch
Exhibit B: Wanda Foglia
Exhibit C: Scott Sundby
Exhibit D: Elisabeth Semel
Exhibit E: Shawn Leigh Alexander
Exhibit F: Jeffrey Fagan (Deterrence)
Exhibit G: Jeffrey Fagan (Sedgwick County capital prosecutions)
Exhibit H: Frank R. Baumgartner (Statewide capital prosecutions)
Exhibit I: Tricia Rojo Bushnell
Exhibit J: Floyd Bledsoe
Exhibit K: Frank R. Baumgartner (Media)
Exhibit L: Marc Bookman & Sean O'Brien
Exhibit M: Philip J. Cook & Frank R. Baumgartner
Exhibit N: Carol Steiker

Dated: October 20, 2022

Respectfully submitted,

/s/ Bria Nelson

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STATE OF KANSAS,	)	
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v.	)	
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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS CHALLENGE TO DEATH QUALIFICATION AND CAPITAL PUNISHMENT AS APPLIED IN KANSAS PURSUANT TO THE STATE AND FEDERAL CONSTITUTIONS

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INTRODUCTION AND FACTUAL BACKGROUND

The State seeks the death penalty against Mr. Young, a Black man, in connection with the deaths of George Kirksey and Alicia Roman on January 2, 2020. Mr. Young will show that neither the State's plan to death qualify a jury nor its goal of obtaining a death sentence for Mr. Young can pass constitutional muster.

A host of national and state experts have undertaken an unprecedented factual examination of the death penalty as applied in Sedgwick County and the State of Kansas. *See* Exhibits A-N. This examination reveals a system of capital punishment tainted by racial bias and arbitrariness, from charging and jury selection to convicting and sentencing.

Death qualification in practice discriminates against potential jurors who are Black or women, with Black women facing the most pernicious discrimination. It warps the jury from a cross-section of peers to a whiter, more heavily male body that is more conviction prone, less likely to debate the evidence, and far more likely to sentence a defendant to death. This process not only ensures that capital juries in Kansas are less fair than any other juries, but also impermissibly excludes women and Black jurors from a key democratic function—a problem that the Kansas Supreme Court recognized is ripe for review as recently as January 2022. This case provides the opportunity to conduct the careful and necessary review of the factual record that was deemed warranted by our Supreme Court, that death qualification is inconsistent with the guarantees in our state and federal constitutions.

Nor can the Kansas death penalty statute survive constitutional scrutiny. Far from severing its historical ties to racial violence and terror, the death penalty continues to perpetuate racial discrimination. Racial bias drives jury selection, the use of discretion by prosecutors and police, and the imposition of jury verdicts. With no executions in the modern era, the Kansas death penalty has no valid penological purpose: it does not deter and it costs more than the alternative sentence,

life in prison. These grave conclusions rest not on speculation or theory, but on the undisputable facts of the death penalty's record of application in Kansas and Sedgwick County since its reinstatement in 1994.

BURDEN OF PROOF

Whenever the State takes action that "implicate[s]" fundamental rights, it "bears the burden" of proving that its action passes strict scrutiny. *Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 493-97 (Kan. 2019) (internal quotation omitted). Prior to *Hodes*, Kansas courts typically applied a presumption of constitutionality in challenges brought under the state constitution, and therefore placed the burden of proof with the challenger. *See, e.g.*, *Farley v. Engelken*, 740 P.2d 1058, 1061 (Kan. 1987). This mirrored the federal approach to equal protection claims involving non-suspect classifications. *See, e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 673, 681 (2012) ("[B]ecause the classification is presumed constitutional, the burden is on the one attacking the legislative arrangement . . . ."") (internal quotations omitted). *Hodes*, however, declared that "government infringement of a fundamental right is inherently suspect," and therefore abolished the presumption of constitutionality. 440 P.3d at 499. Accordingly, when a challenger brings a claim involving "fundamental interests," *id*., "courts peel away the protective presumption of constitutionality and . . . the burden of proof is shifted" to the State. *Id*. (internal quotations omitted).

Hodes considered a Section 1 challenge, *see id.* at 466, but its implications extended beyond that provision. *See Hilburn v. Enerpipe Ltd*., 442 P.3d 509, 513 (Kan. 2019) (plurality opinion). In *Hilburn*, the Kansas Supreme Court found the Section 5 jury right "fundamental," so statutes that implicate it enjoy no presumption of constitutionality. *Id.* Following *Hodes* and *Hilburn*, Kansas courts now recognize that fundamental constitutional rights require review without a presumption of constitutionality. *See, e.g.*, *State v. Dixon*, 492 P.3d 455, 478 (Kan. Ct.

App. 2021) ("But when a statute implicates 'fundamental interests,' the presumption of constitutionality does not apply.") (quoting *Hilburn*, 442 P.3d at 513)).

Once a citizen identifies state action that implicates a fundamental right under the Kansas Constitution, courts determine whether that action is constitutional by subjecting it to strict scrutiny. *Hodes*, 440 P.3d at 493-98. Strict scrutiny review proceeds in two steps. First, "the State must establish a compelling interest." *Id.* at 493. A compelling interest is "one that is not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests." *Id.* (internal quotation omitted). Second, the State must "prove its action is narrowly tailored to serve that interest." *Id.* at 497. State action is narrowly tailored only when it is neither overinclusive nor underinclusive, and it achieves the compelling interest by the least restrictive means available. Richard H. Fallon, Jr., Strict Judicial Scrutiny, 54 UCLA L. Rev. 1267, 1326-32 (2007); *see also Hodes*, 440 P.3d at 493 (citing favorably to Fallon).

Strict scrutiny is a difficult test, and that is no accident. A "searching judicial inquiry" is required when the State implicates fundamental rights "as a way to smoke out illegitimate governmental action by assuring that the government is pursuing a goal important enough to warrant use of a highly suspect tool." *Hodes*, 440 P.3d at 499 (internal quotation omitted). The *Hodes* Court recognized it was placing a significant burden on the State. *Id.* However, it also recognized that it was interpreting a constitution which held fundamental natural rights sacred. *See id*. at 497 ("[B]y placing their acknowledgment of these individual rights in the first section of Kansans' Constitution Bill of Rights, the drafters and adopters of our Constitution made clear the rights are foremost."). Thus, the Court determined that nothing short of strict scrutiny would suffice. *Id.* at 497-98.

Mr. Young challenges death qualification and the death penalty as applied in Kansas under Sections 1, 2, 5, 9, and 10 of the State Constitution. Sections 1 and 5 have already been recognized as fundamental and therefore subject to strict scrutiny review. *See id.* at 499 (rights protected by Section 1 are fundamental); *Hilburn*, 442 P.3d at 513 (right to jury protected by Section 5 is fundamental). Kansas courts have not yet had occasion to consider whether the burden shifting mandated by *Hodes* likewise applies to Sections 2, 9, or 10, but as discussed herein, each of these rights is undoubtedly fundamental pursuant to the framework adopted in *Hodes*. Because each of the following claims implicates fundamental rights, the presumption of constitutionality dissipates and the burden rests with the State to prove the constitutionality of its death penalty scheme under strict scrutiny review.

Mr. Young bears the burden of proving his federal constitutional claims.

ARGUMENT

I. Death Qualification Violates the Kansas Constitution.

The practice in death penalty trials of disqualifying jurors based on their views of the death penalty disproportionately discriminates against Black and women jurors, and fundamentally breaks the promise of a fair cross-section of the community. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). It violates both Mr. Young's state constitutional rights to an impartial jury and equal protection, and the excluded jurors' constitutionally protected political rights to participate in key democratic functions.

A. The State's Death Qualification Procedures Violate Section 5 and Section 10 by Impeding Mr. Young's Right to an Impartial Jury.

All Kansans have the right to "an impartial jury," and the Constitution declares that this right "shall be inviolate." Kan. Const. Bill of Rights, §§ 5, 10. The Kansas Supreme Court has interpreted this "uncompromising" language to require the "highest protection" by courts of this

state. *Hilburn*, 442 P.3d at 515 (internal quotations omitted). Wherever State action "interfer[es] with the jury's fundamental function" or attempts to "modify it in ways that destroy the substance of th[e] right," the Kansas Constitution requires courts to intervene. *Id.* at 514-15 (internal quotation omitted).

No court has had occasion to decide whether Kansas's practice of death qualification, as applied in Sedgwick County, interferes with a capital defendant's inviolate right to an impartial jury. Indeed, no Kansas court has considered any as-applied challenge to death qualification based on Sections 5 and 10. In *State v. Carr*, the Kansas Supreme Court considered a *facial* challenge to Kansas' death qualification framework based on the historical definition of the word "jury." 502 P.3d 546, 579-83 (Kan. 2022). In rejecting that challenge, the Court invited the as-applied challenge Mr. Young raises here:

> Finally, [amicus curiae party NAACP Legal Defense and Educational Fund, Inc. ("LDF")] claims death qualification disparately impacts the racial composition and biases of juries in capital sentencing proceedings, contrary to [appellant's] section 5 right to trial by jury. Specifically, the LDF argues death qualification disproportionately excludes Black venirepersons and produces a jury with higher levels of implicit and explicit racial bias; and such juries are 'disproportionately guilt-prone and death-prone.'
>
> *These allegations most certainly warrant careful analysis and scrutiny*. But the issue—whether death qualification disparately impacts the racial composition of the jury or its propensity to convict and sentence a defendant—raises a question of fact . . . . [T]he issue was not raised or developed at trial. As a result, the district court made no factual findings related to the LDF's claim . . . [a]nd the absence of such findings precludes us from conducting any meaningful review of this issue.

Id. at 583 (emphasis added).

This Court will be the first to apply the "careful analysis and scrutiny" that the Supreme Court prescribed. *Id.* This Court should apply strict scrutiny to determine whether the State can

justify death-qualifying Mr. Young's jury in light of his Section 5 and Section 10 rights. *Hilburn*, 442 P.3d at 513 (holding the Section 5 jury trial right is "fundamental" and statutes implicating that right are not entitled to a presumption of constitutionality). Regardless of what standard of review is applied, however, the evidence adduced demonstrates that death qualification impermissibly interferes with Mr. Young's inviolate right to an impartial jury. As applied, death qualification systematically excludes Black and female jurors, biases jurors against the defendant, and produces a jury disproportionately prone to conviction and death.

1. *Through discriminatory impact and implicit biasing, death qualification produces a conviction-prone and death-prone jury.*

    (a) Black jurors, and especially Black female jurors, are disproportionately likely to be excluded by the death qualification process.

Mr. Young is a Black man, and if he is subjected to a death-qualified jury in Sedgwick County, he is likely to be tried by a disproportionately white, male jury. "Social science research [demonstrates] that Black Americans are significantly more likely than White Americans to be excluded from capital juries as a consequence of the death qualification process . . . ." Rep. of Mona P. Lynch ¶ 8 (Exhibit A). This is true regardless of geography: studies conducted across the country uniformly show that Black prospective jurors are excluded by the death qualification process at substantially higher rates than their white counterparts. *Id.* ¶¶ 8-9. The primary reason for this disparity is differing views of the death penalty among Black and white Americans. Specifically, a long and unbroken line of studies consistently shows that Black Americans are significantly more likely than white Americans to oppose the death penalty. That difference in opinion is "so robust that it was observed in nearly every public opinion poll and social scientific survey undertaken within this country over the past fifty years." *Id.* ¶ 6 (quoting John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty Support*, 34 J. Crim. Just.

85, 85 (2006)). The result is that the death qualification process, where jurors are screened for their views on the death penalty, often functions in practice as a filter for juror race.

Sedgwick County is no exception. To determine the effect that death qualification would have on the modern Sedgwick County population, Dr. Mona Lynch conducted a survey assessing the death penalty views of jury-eligible adults in Sedgwick County. *See id.* ¶¶ 10-14. Dr. Lynch then analyzed the data to determine whether death qualification would be race neutral or race discriminatory in this county. *Id.* The results are deeply troubling.

According to Dr. Lynch's analysis, Black prospective jurors in Sedgwick County are approximately *50% more likely* to be excluded by the death qualification process than white prospective jurors. *Id.* ¶ 18 (emphasis added); *see also id.* ¶¶ 16-18 (finding that a majority of Sedgwick County's white population supports the death penalty, while a majority of Sedgwick County's Black population opposes it, and that those who opposed the death penalty were much more likely to be excludable in the death qualification process). In other words, the data unequivocally shows that the death qualification process will result in the exclusion of a disproportionate share of Sedgwick County's Black citizens from serving on a jury in Mr. Young's case. *See id.* ¶ 18.

Death qualification in Sedgwick County would also disproportionately exclude female jurors. Women in Sedgwick County are more likely to oppose the death penalty than men, *id.* ¶ 19, and accordingly are more likely to be excluded by death qualification, *id.* These racial and gender disparities have their most insidious effect when they compound; Black women in Sedgwick County are nearly twice as likely as white men to be excluded by the death qualification process. *Id.* ¶ 20. Dr. Lynch's analysis demonstrates that if the State is allowed to use death qualification

procedures, approximately 40% of all jury-eligible Black women in Sedgwick County would be ineligible to serve on the jury that decides whether Mr. Young lives or dies. *Id.* ¶¶ 20-21.

(b) The death qualification process itself biases jurors towards conviction and a death sentence.

Death qualification will not only disproportionately exclude Black Kansans from the jury pool, but will also produce an unfairly biased jury that is prone both to conviction and to imposing the death penalty. Statistical analyses have repeatedly shown that jurors are significantly more likely to vote for conviction and execution when they have been through the death qualification process. *See, e.g.*, Decl. of Wanda Foglia ¶¶ 26-28, 36-39 (Exhibit B); Rep. of Mona Lynch ¶¶ 7, 9 (Exhibit A); Rep. of Scott Sundby ¶ 16 (Exhibit C). In other words, once passed through the discriminatory and biasing filter of death qualification, a jury would be less likely to afford Mr. Young a fair trial. *See Glossip v. Gross*, 576 U.S. 863, 913 (2015) (Breyer & Ginsburg, JJ., dissenting) ("For over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death[.]" (internal quotation and alteration omitted)).

This is in large part because questioning jurors "about the death penalty at the outset of the process makes jurors think that the authority figures in the courtroom, the judge, the prosecutor and defense attorney, must think the defendant is guilty and deserves death." Decl. of Wanda Foglia ¶ 27 (Exhibit B). This phenomenon has been repeatedly tested and validated in mock juries; jurors subjected to death qualification questions are more likely to convict and vote for death than jurors who are not subjected to such questioning, even when none are excluded for cause. *Id.* This pernicious influence is so palpable that many jurors who have served on real capital juries are conscious of it, and report that the process of death qualification caused them to believe that "the defendant 'must be' or 'probably was' guilty." *Id.*

The most comprehensive study of this phenomenon was conducted by the Capital Jury Project ("CJP"), which interviewed approximately 1,200 actual capital jurors who underwent death qualification. *Id.* at ¶ 13. CJP found that large swaths of those interviewed held troubling beliefs that were incompatible with constitutional mandates in death penalty cases. For example, though capital defendants are guaranteed a bifurcated sentencing proceeding, *see* Kan. Stat. Ann. § 21-6617, CJP found that about half of all capital jurors had made up their minds about whether to impose death before the sentencing proceeding had even begun. *Id.* ¶¶17-21; *see also* Rep. of Scott Sundby ¶ 14 (Exhibit C). Even more alarming, CJP found that more than half of death-qualified jurors believed the law required death for any premeditated murder. Decl. of Wanda Foglia ¶¶ 23-24 (Exhibit B). In Kansas, *every* capital murder, by definition, is premeditated. Kan. Stat. Ann. § 21-5401; *see also State v. Scott*, 183 P.3d 801, 845 (Kan. 2008) ("The crime of capital murder always requires an intentional and premeditated killing.") (*overruled on other grounds by State v. Dunn*, 375 P.3d 332 (Kan. 2016)) . Thus, research demonstrates that roughly half of all death-qualified jurors would automatically vote to execute any defendant convicted of capital murder, regardless of the substance or extent of mitigating evidence. Decl. of Wanda Foglia ¶¶ 23-24 (Exhibit B).

The data further show that these fundamental failures cannot be remediated. *See id.* ¶¶ 17-19. Given the wide breadth of serious misconceptions held by many capital jurors, lead CJP researcher Dr. Wanda Foglia concluded that the likelihood of seating a death-qualified jury without these misconceptions is "infinitesimal[ly]" small, *id.* ¶ 48, and cannot be raised to constitutionally acceptable levels by curative instructions from the Court:

> I do not believe that the problems with the way jurors make their decisions in capital cases can be solved. There are ways of ameliorating these problems to a limited extent, but the evidence suggests that it would be impossible to get 12 jurors who would

> actually decide the sentence in accordance with the legal standards established by the United States Supreme Court.

Id. ¶ 47.

Nor can the court rein in discrimination through the procedures set out in *Batson v. Kentucky*, 476 U.S. 79 (1986). As a threshold matter, *Batson* applies only to peremptory strikes, while death qualification allows prosecutors to strike an unlimited number of jurors for cause (without having to exercise or "use up" any of their peremptory strikes). And in any event, *Batson* has proven to be an ineffective guard against racial discrimination. *See generally* Rep. of Elisabeth Semel (Exhibit D). A review of peremptory strikes in this State found that "Kansas prosecutors have disproportionately exercised peremptory strikes against Black jurors, and despite the intent of *Batson*, relied upon racial stereotypes to justify their strikes." *Id.* at 4. Indeed, in about one in every four Kansas cases, prosecutors remove "every juror of color from the pool." *Id.* Nevertheless, "there is only one published *Batson* decision in Kansas reversing for the wrongful exclusion of a juror of color." *Id. Batson*, therefore, neither precludes the constitutional failures of death qualification nor adequately protects capital defendants' Section 5 and 10 rights.

2. Death qualification cannot survive constitutional scrutiny under Sections 5 and 10.

Ultimately, the death qualification process cannot be squared with a criminal defendant's fundamental constitutional right to an impartial jury. It is unlawful to cull the jury of prospective jurors who maintain "general objections to the death penalty" or "conscientious or religious scruples against its infliction." *Carr*, 502 P.3d at 581 (internal quotations omitted). Yet, death qualification does exactly that. Rep. of Mona Lynch ¶ 14 (Exhibit A). And data demonstrates that excluding those with "general objections" disproportionately excludes Black jurors, *id.*, watering down the jury pool representing a cross-section of Mr. Young's peers and leaving a non-diverse, predominantly white pool instead. Non-diverse juries are more likely than diverse juries to engage

in racially discriminatory sentencing, *id.* ¶ 7, more likely to disregard mitigating evidence, Rep. of Scott Sundby ¶ 16 (Exhibit C), and more likely to sentence defendants to death, Decl. of Wanda Foglia ¶¶ 36-39 (Exhibit B). In sum, a large body of research—both nationally and in Sedgwick County—leads to an inescapable choice: courts can have a death-qualified jury, or they can have a fair jury, but they cannot have both. By declaring the jury right "inviolate," the Kansas Constitution mandates the latter.

The State bears the burden of showing that death qualification can survive strict scrutiny because death qualification implicates the right to an impartial jury, and that right is fundamental. *See Hilburn*, 442 P.3d at 513; *State v. Wills*, No. 122,493, 2021 WL 5143798, *5 (Kan. Ct. App. 2021) (unpublished) (per curiam) ("Although we usually presume a statute is constitutional and look for any reasonable way to interpret the statute to avoid a constitution, such a presumption is inapplicable to fundamental interests protected by the Kansas Constitution, *such as the right to a trial by jury*.") (emphasis added). In other words, the State must prove that death qualification serves a compelling governmental interest, and that it is narrowly tailored towards achieving that interest. *See Hodes*, 440 P.3d at 493-98. The State may not avail itself of any presumption of constitutionality. *Hilburn*, 442 P.3d at 513; *Wills*, 2021 WL 5143798 at *5.

Kansas' death qualification procedures do not survive strict scrutiny. The State has no legitimate interest—let alone a compelling interest—in obtaining unjust convictions or unreliable death sentences through skewed jury procedures.[1] Death-qualification is not narrowly tailored to the interest of ensuring "that justice shall be done." *State v. Pabst*, 996 P.2d 321, 328 (Kan. 2000)

[1] Indeed, because death qualification serves only the illegitimate end of biasing the jury towards conviction and execution, it would be impermissible even under a rational basis standard. State action only passes rational basis review if it "can be said to advance a *legitimate* government interest." *Romer v. Evans*, 517 U.S. 620, 632 (1996) (emphasis added).

(internal quotation omitted) (explaining that justice is the only legitimate interest prosecutors may seek to vindicate). Far from being necessary to achieving justice, death qualification impedes justice by increasing the risk of an erroneous conviction or death sentence and biasing the jury against the defendant. Disparate racial treatment, unrepresentative juries, and a thumb on the scale in favor of the prosecution are not the hallmarks of a system narrowly tailored towards achieving justice. Instead, they are the symptoms of a practice that risks the opposite.

B. Death Qualification Violates Kansas' Citizens' Rights to Serve on a Jury Pursuant to Sections 1 and 2 of the Kansas Bill of Rights.

The corollary to Mr. Young's inviolate right to trial by jury is each qualified Kansas citizen's right to serve on a jury.[2] This right is protected by Sections 1 and 2 of the Kansas Constitution Bill of Rights, which provide:

> § 1. Equal rights. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.
>
> § 2. Political power; privileges. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency.

While Sections 1 and 2 have been considered to "have much the same effect as the Due Process and Equal Protection Clauses found in the Fourteenth Amendment to the United States Constitution," *Hodes*, 440 P.3d at 469 (internal quotations omitted), these Sections "acknowledge[] rights that are distinct from and broader than the United States Constitution." *Id.*

[2] Mr. Young has standing to challenge Kansas' death qualification process on the basis that it violates the constitutional rights of other Kansas citizens. *See, e.g., Powers v. Ohio*, 499 U.S. 400, 410-16 (1991); *State v. Pham*, 136 P.3d 919, 928-29 (Kan. 2006) (affirming that criminal defendants have standing to raise a *Batson* challenge based on the striking of venirepersons).

at 471. Accordingly, as the Kansas Supreme Court has held, claimed violations of Sections 1 or 2 must be evaluated independently from claimed violations of the more limited Fourteenth Amendment. *Id.* at 471-72, 477-78.

1. Section 2 protects political privileges, including the right to serve on a jury.

Section 2 of the Kansas Constitution Bill of Rights has no counterpart in the federal constitution. Section 2 explicitly protects rights that are not expressly included in the Fourteenth Amendment or elsewhere in the federal constitution: "political privileges," which Kansas courts have referred to interchangeably as "political rights." *See Farley v. Engelken*, 740 P.2d 1058, 1061 (Kan. 1987). The explicit protection of political rights offers Kansans greater protection than under the federal constitution, in which "political rights" are never mentioned. *See Hodes*, 440 P.3d at 472 ("no provision of the United States Constitution uses the term 'natural rights,' " in contrast to Section 1 of the Kansas Constitution Bill of Rights, requiring an independent analysis of the state constitutional right).

Kansas courts have held that Section 2's protection of political privileges must be "interpreted with sufficient liberality to carry into effect the principles of government which it embodies." *Id.* at 478 (quoting *Winters v. Myers*, 140 P.1033, 1038 (Kan. 1914)). The Kansas Supreme Court has previously referenced jury service as a political privilege or right encompassed by Section 2. *See Atchison St. Ry. Co. v. Missouri Pac. Ry. Co*., 3 P. 284, 287 (Kan. 1884) (listing paradigmatic examples of the types of political privileges within the scope of Section 2, including serving in the militia and "*as jurors*.") (emphasis added); *see also Herken v. Glynn*, 101 P.2d 946, 954 (Kan. 1940). Several other states' courts have also affirmed that jury service is a political right or privilege. *See, e.g., Anderson v. State*, 5 Ark. 444, 454 (1844); *Me-shing-go-me-sia v. State*, 36 Ind. 310, 317 (1871); *Wall v. Williams*, 11 Ala. 826, 837 (1847); *State v. Bussay*, 96 A. 337, 339

(R.I. 1916); *State v. Sims*, 197 S.E. 176, 177 (N.C. 1938); *State v. Thigpen*, 397 A.2d 912, 913 (Conn. Super. Ct. 1978).

The courts' widespread recognition of jury service as a political right also accords with the historical record. At common law during the eighteenth and nineteenth centuries, the right to serve on a jury—like the right to vote—was broadly recognized as an essential component of citizens' participation in American democracy. Jury trials were not only a valued right afforded to an accused person, but also "an allocation of political power to the citizenry." Albert Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 876 (1994). Alexis de Tocqueville described jury service as quintessential to a system of government by the people and equivalent to the right of suffrage. *See* Alexis de Tocqueville, *Democracy in America*, vols. I & II, 291-93 (H. Reeve transl., Duke Classics (2012)) (explaining that jury service and universal suffrage are two institutions of equal power in American democracy). "The inestimable privilege of trial by jury . . . is counted by all persons to be essential to political and civil liberty." *Id.* at 514 n.198 (quoting J. Joseph Story, *Commentaries on the Constitution of the United States*, vol. III, 631 (1833)).

At the time of the framer's debates in the late 1700s, both Federalist and Anti-Federalists agreed that juries act as a crucial political tool in checking government overreach. *See, e.g.*, Alschuler & Deiss, *supra*, at 871 ("[T]he desirability of safeguarding the jury may have been the most consistent point of agreement between the Federalists and Anti-Federalists."). *See also* Letters from The Federal Farmer to the Republican, Letter IV (Oct. 12, 1787), published in The Complete Anti-Federalist, U. Chi. Press (Herbert Storing, ed., 1981) (describing jury service as the most important democratic process by which people not in government can to "protect[] themselves" and serve as "centinels and guardians of each other"). There is no question the

Kansas Framers also viewed the right to serve on a jury as a foundational component of the political privileges in Section 2. Both the Framers' explicit commentary on juries in Section 5, as well as widely accepted academic theory, confirm this view. The Constitution's Framers described Section 5 as securing a "very valuable right" for the people of Kansas by "retaining the right of trial by jury, intact." *Hilburn*, 442 P.3d at 515 (quoting Wyandotte Const. Convention 462-63 (July 25, 1859)). In light of this and the decades of American framers and scholars affirming, in universal agreement, the indispensable importance of the jury system in a functioning democracy, there can be little doubt the Kansas Framers shared this view. Thus, in explicitly reserving "political rights" to the people, Section 2 encompasses, at minimum, the most distinguished and lauded political rights—jury service and suffrage.

Kansans' Section 2 right to serve on a jury is violated by the practice of death qualification. In explicitly reserving political privileges to the people, the Kansas Framers "show[ed] an intent to broadly and robustly protect [political rights] and to impose limitations on government intrusion into [those rights]." *Hodes*, 440 P.3d at 471. Thus, the right of an eligible citizen to serve on a jury is a fundamental right subject to strict scrutiny. The practice of death qualification impermissibly violates that right.

Death qualification leads to for-cause removal of individuals who are otherwise qualified to serve on the jury. The practice is confined only to capital cases, when a government official is using their entirely discretionary power to seek a defendant's execution. The same jurors could not be disqualified for cause from hearing and adjudicating the exact same case, with the same defendant, absent a government official's choice to seek the individual's execution. Thus, the State both seeks to use its most extraordinary power to take human life *and* exclude from the process those who disagree. Indeed, the practice of death qualification directly contravenes the jury's

historical purpose: to reserve political power to the common people, allowing them to protect themselves against the more powerful citizens comprising government. *Cf. Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) (affirming that a criminal jury is "no mere procedural formality, but a fundamental *reservation of power* in our constitutional structure" ensuring "the people's ultimate control") (emphasis added). Yet in Kansas, those who would object to the government's most forceful use of authority are systematically excluded, thwarting the ability of citizen juries to ensure the law continues to reflect the will of the people. *Cf. Glasser v. United States*, 315 U.S. 60, 86 (1942) ("[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a truly representative of the community, and not the organ of any special group or class.").

This deprivation of political privileges is particularly insidious because it principally impacts Kansans who are Black and women. *See supra* § I.A.1.; *see also* Rep. of Mona Lynch ¶¶ 8-9 (Exhibit A). This result cannot be disconnected from long history of exclusion of these same groups in political life and from juries. As the U.S. Supreme Court has recounted, both Black citizens and women have "suffered . . . at the hands of discriminatory state actors during the decades of our Nation's history" and "share a history of total exclusion" from jury service. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994). Thus, continued exclusion from this vital form of political participation "denigrates the dignity of the excluded juror and . . . reinvokes a history of exclusion from political participation." *Id.* at 142. *See also Powers*, 499 U.S. at 407 (1991) ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

Views about whether the death penalty is a legitimate exercise of government authority—and about the government's ability to fairly select which individuals should be executed—are

necessarily informed by one's own life experiences, as well as the shared experiences of families and communities. In the case of Black Kansans, those experiences reflect a long history of governmental abuse of power. "[F]rom the [S]tate's origins the white population set up a system that still had Black Kansans encountering discrimination in public services and in the administration of justice; segregation in schools, hotels, restaurants, and theaters; and exclusion from white hospitals, churches, and neighborhoods." *See* Rep. of Shawn Leigh Alexander at 33-34 (Exhibit E). There is a direct link between Black Kansans' extensive history of governmentally enforced oppression and their skepticism about the government's ability to neutrally administer the death penalty. *See, e.g.*, Rep. Mona Lynch ¶ 5 (Exhibit A) (explaining that Black and white Americans greatly diverge in their views about the fairness and equitability of the criminal justice system). Therefore, death qualification enables the State to remove political power from Black Kansans because of their beliefs, even though those beliefs can largely be traced back to the State's own troubled history of racial discrimination. Exclusion on a basis that is directly attendant to a minority group's experiences with pervasive discrimination is no less insidious than the outright exclusion of these groups based on immutable characteristics.

2. Section 1 also protects Kansans' right to serve on a jury.

Kansas citizens also have a Section 1 right to serve on a jury, and an affirmative right to not be excluded by the systematic discrimination inherent in death qualification. As two Kansas appellate courts have recognized, Section 1 of the Kansas Constitution Bill of Rights protects Black Kansans' right to self-determination, which is inherent in the inalienable right to liberty protected by Section 1—and this, in turn, directly implicates the ability to serve as a juror. As the courts explained, Section 1 was "aimed at ending slavery and government endorsement of involuntary servitude impressed upon a class of people and their descendants defined essentially by race." *State v. Reed*, No. 120,613, 2021 WL 1228097, *7 (Kan. Ct. App. Apr. 2, 2021)

(unpublished), *rev. denied* (Aug. 31, 2021); *see also State v. Brooks*, No. 120,538, 2021 WL 3578009, *9 (Kan. Ct. App. Aug. 13, 2021) (unpublished), *rev. denied* (Sept. 27, 2021) (same). This purpose is frustrated by "government sanctioned exclusion of African-Americans from jury service" because such a system "represents a denial of self-determination, as a component of the inalienable right of liberty, and effects a continuing badge of slavery." *Reed*, 2021 WL 1228097 at *7; *Brooks*, 2021 WL 3578009 at *9. *See also supra* §I.B. (discussing generally the central role of jury service in preserving liberty, democracy, and rule by the people).

As the Kansas Supreme Court has held, alleged violations of the fundamental rights protected by Section 1 rights must be reviewed under a standard of strict scrutiny. *See Hodes*, 440 P.3d at 496.

In sum, the practice of death qualification results in the starkly disproportionate disqualification of Black jurors, and particularly Black female jurors. Exclusion from capital juries continues to signify their subordinate status in the administration of justice. It is a vestige of slavery, oppression, and exclusion from the rights of full citizenship and political influence. It cannot withstand strict scrutiny analysis under either Section 1 or Section 2 of the Kanas Constitution Bill of Rights.

II. The Kansas Death Penalty Is Cruel And/Or Unusual Within the Meaning of Section 9 of the Kansas Constitution Bill of Rights and the Eighth Amendment to the U.S. Constitution.

The federal constitution prohibits the imposition of "cruel and unusual punishments." U.S. Const. amend. VIII. Kansans enjoy a broader set of rights; Section 9 prohibits "cruel *or* unusual punishments," Kan. Const. Bill of Rights, § 9 (emphasis added). These rights, whether read together or separately, are incompatible with the record of the death penalty's implementation in Kansas and in Sedgwick County. The new data and evidence that Mr. Young will present at an evidentiary hearing demonstrate that this State's most severe punishment—on the highly unusual

occasions when it is inflicted—is arbitrary, racially discriminatory, unreliable, and unnecessary. It is therefore also unconstitutional.

A. Whether Kansas' Death Penalty Violates Section 9, as Applied, Is a Matter of First Impression and Is Subject to Strict Scrutiny Review.

This challenge raises new issues of fact and law that have not been considered by any court in this state. Though the Kansas Supreme Court has declined to find that the death penalty violates Section 9 *per se*, it has neither considered nor decided whether the record of the application of the death penalty in Kansas renders it unconstitutional. Accordingly, this question remains unresolved and is a matter of first impression for this Court. *See, e.g.*, *Stewart Title of the Midwest, Inc. v. Reece & Nichols Realtors, Inc.*, 276 P.3d 188, 196 (Kan. 2012) (explaining that a law may "survive[] a facial interpretation" but nevertheless "fail[] under an 'as applied' interpretation"); *cf. State v. Kleypas*, 40 P.3d 139, 223, 252 (Kan. 2001) (deciding only that capital punishment does not amount to a *per se* violation of Section 9, but sustaining an as-applied challenge to the aggravating and mitigating factor weighing scheme).

Moreover, past cases challenging the death penalty under Section 9 were decided before *Hodes*, a seminal case that structurally changed Kansas constitutional law. *See Carr*, 502 P.3d at 578 (explaining that *Kleypas* was decided "under a substantially different legal framework that predated this court's decision in *Hodes*"). Those decisions applied a presumption of constitutionality without analyzing whether Section 9 enshrined a fundamental right. *See, e.g.*, *Kleypas*, 40 P.3d at 233. *Hodes* requires this Court to conduct that analysis and determine as a matter of first impression whether the death penalty violates Section 9 under the newly-established fundamental right framework.

Whether a right is "fundamental" depends on its grounding in history, its recognition across the country, and its connection to the text of the Kansas Constitution. *See, e.g.*, *Hodes*, 440 P.3d

at 480. The *Hodes* court, for example, found a fundamental right to personal autonomy. Though such a right was not explicit in the Kansas Constitution, the Court held it was nevertheless present and fundamental because: (1) it could be found in John Locke's 17th-century treatises, which influenced the writers of Section 1; (2) it had gained widespread recognition by the federal judiciary and the courts of other states; and (3) it could be derived from the explicit rights of "liberty" and "the pursuit of happiness." *Id*. at 481-83.

In contrast, the right to be free from penal cruelty *is* explicitly protected in the Kansas Constitution, and the right is more deeply rooted in history and accepted throughout the country when compared to the right to personal autonomy. Therefore, because personal autonomy is a fundamental right, *Hodes*, 440 P.3d at 480, the right to be free from cruel and/or unusual punishment must be fundamental as well.

This Section 9 right is firmly grounded in history. In 1689, the exact same year that Locke published his *Two Treatises on Government*, Parliament passed the English Bill of Rights and prohibited the King from inflicting "cruel and unusual punishments." Bill of Rights, 1689, 1 William & Mary, 2d Sess., ch. 2. Americans later imported that exact language into the Eighth Amendment, and either adopted it verbatim or wrote slight variations on it into their state constitutions. *See Furman v. Georgia*, 408 U.S. 238, 242-44, 317-22 (1972) (Douglas & Marshall, JJ., concurring) (discussing the influence of the English Bill of Rights). Kansas has similarly enshrined the right to be free from cruel or unusual punishments since its founding. Section 9 employs the terms "cruel" and "unusual," coined by the English Bill of Rights and tracked through the Eighth Amendment, to describe intolerable "punishments." Kansans today enjoy a modern version of the three-hundred-year-old right to be free from penal cruelty. Just like the right to personal autonomy, the right to be free from penal cruelty is rooted in deep historical tradition.

The right to be free from penal cruelty is also universally recognized in the United States today. The Eighth Amendment has protected all citizens since 1791, 48 state constitutions contain explicit prohibitions on penal cruelty, and the two remaining states have interpreted their constitutions as supplying implicit protection against cruel and unusual punishments. *See* William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1252 (2020); *State v. Burlington Drug Co.*, 78 A. 882, 885 (Vt. 1911); *State v. Santiago*, 122 A.3d 1, 14 (Conn. 2015). In contrast, when the *Hodes* Court recognized a fundamental right to personal autonomy, it drew support from only six other states that had done the same. *See* 440 P.3d at 482.

Moreover, the Kansas Supreme Court has readily accepted as fundamental those rights that the Constitution explicitly declares. *See, e.g.*, *Hilburn*, 442 P.3d at 513 ("[W]e have little difficulty deciding that the right protected by [S]ection 5 is a 'fundamental interest' expressly protected by the Kansas Constitution Bill of Rights."); *Carr*, 502 P.3d at 569 ("We have no hesitation recognizing a right to life under [S]ection 1. Unlike the implicit right to personal autonomy . . .life is explicitly enumerated as one of the natural rights protected by [S]ection 1.").[3]

Thus, the Section 9 right to be free from penal cruelty is historically grounded, enjoys widespread acceptance, and is explicitly enumerated. It is therefore fundamental. The presumption of constitutionality dissipates and "the burden of proof is shifted" to the State when fundamental rights are involved. *Hodes*, 440 P.3d at 499 (internal quotation omitted). Therefore, in considering

[3] Because Section 5 is "unquestionably" implicated here, *State v. Love*, 387 P.3d 820, 834 (Kan. 2017), the Court need not conduct the type of historical analysis normally required in Section 5 cases to determine whether the proceeding at issue was "triable to a jury under the common law extant in 1859." *Hilburn*, 442 P.3d at 514 (internal quotation omitted). Capital defendants have always enjoyed the right to a jury trial in Kansas. *See* Gen. Laws of the Terr. of Kan., vol. 1. ch. 27 § 175, at 208 (1859).

the constitutionality of capital punishment in Kansas, this Court must place the burden of proof on the State.

B. Section 9 Is Broader and More Protective Than the Eighth Amendment.

The plain text of Section 9—which prohibits "cruel *or* unusual punishments," Kan. Const. Bill of Rights, § 9 (emphasis added)—is broader than that of the corresponding federal constitutional prohibition (which bars only punishments that are both "cruel *and* unusual"), U.S. Const. amend. VIII (emphasis added). *See, e.g.*, *State v. Freeman*, 574 P.2d 950, 956 (Kan. 1978) (requiring proportionality review of long sentences under Section 9 even though such reviews are not required under the federal constitution). *See also State v. Petersen-Beard*, 377 P.3d 1127, 1141 (Kan. 2016) (observing in another context that the word "or" in Section 9 is a "key distinction"); *see also Wright v. Noell*, 16 Kan. 601, 607 (Kan. 1876) (announcing that the "best and only safe rule" for constitutional interpretation is to presume a design for every word inserted or omitted); *State v. Albano*, 487 P.3d 750, 756 (Kan. 2021) (quoting and reaffirming the same).

Kansas is not an outlier in this regard; many states have interpreted their state constitutional prohibitions on cruel and/or unusual punishments more broadly than the corresponding federal right. *See, e.g.*, *State v. Gregory*, 427 P.3d 621, 633-34 (Wash. 2018) (holding capital punishment violated state constitution); *Santiago*, 122 A.3d at 73 (same); *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (holding method of execution unconstitutional under state constitution); *Dawson v. State*, 554 S.E.2d 137, 144 (Ga. 2001) (same); *Van Tran v. State*, 66 S.W.3d 790, 804-10 (Tenn. 2001) (holding that executions of persons with intellectual disabilities violate the broader state constitution); *Fleming v. Zant*, 386 S.E.2d 339, 343 (Ga. 1989) (same); *Singleton v. State*, 437 S.E.2d 53, 61 (S.C. 1993) (holding forcible medication for competency to execute unconstitutional under the state constitution); *State v. Perry*, 610 So. 2d 762, 765-66 (La. 1992) (same). This Court should do the same.

The Supreme Court's 2001 decision in *Kleypas* does not foreclose such a ruling. Although the *Kleypas* court concluded that Section 9 was not broader than the Eighth Amendment, its decision rested in large part on the fact that—at that time—no state other than California or Massachusetts had engaged in different analyses of the Eighth Amendment when interpreting the cruel and/or unusual punishment clause under their state constitutions. *Kleypas*, 40 P.3d at 251. Two decades later, the landscape has shifted dramatically, and the foundation on which the *Kleypas* ruling was based no longer stands. *See supra* § II.B. (noting that at least Connecticut, Georgia, Louisiana, Nebraska, South Carolina, Tennessee, and Washington have interpreted their state constitutional protections more broadly than the federal constitution).

This Court should therefore accept the invitation to reconsider the relationship between Section 9 and the Eighth Amendment extended by the Kansas Supreme Court in *State v. Scott*: "[i]n [future challenges to §9], we are free to further consider the historical record and decide whether § 9 should be interpreted in a manner which deviates from that given to the Eighth Amendment by the United States Supreme Court." 183 P.3d 801, 830 (Kan. 2008).

Mr. Young's evidence demonstrates that Kansas' death penalty would be unconstitutional as-applied even if Section 9 and the Eighth Amendment were identical, as Kansas's death penalty is both cruel and unusual. But Mr. Young need not satisfy that burden. It is this Court's duty to apply the Kansas Constitution as it was written and adopted, and the binding text here prohibits any punishment that is either cruel ***or*** unusual, not just those which are both.

C. The Record of the Application of Kansas' Death Penalty Demonstrates It Is Both Cruel and Unusual.

The death penalty in Kansas is a cruel and discriminatory lottery, where the only predictability is supplied by impermissible factors such as race, gender, and geography. With no executions—and exceptionally rare sentencing—the Kansas death penalty serves no legitimate

penological purpose. The arbitrary application of the death penalty cannot be squared with *Furman*'s prohibition of death penalty schemes that "create a substantial risk that the punishment will be inflicted in arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (citing *Furman*, 408 U.S. 238).

1. Kansas' death penalty is unusual.

Kansas' death penalty is indisputably unusual. A punishment is "unusual" if it is "infrequently imposed" or "extraordinarily rare." *Furman*, 408 U.S. at 309 (Stewart, J., concurring) ("[I]t is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare.") *Id.*; *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019) (defining "unusual" as "long disused"); *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958) (defining "unusual" as "different from that which is generally done"). It is hard to imagine a more unusual phenomenon in Kansas than an execution. Kansas has not executed anyone in more than a half-century. *See* Rep. of Jefferey Fagan on Deterrence at 10 (Exhibit F). The odds of any Kansan convicted of murder being sentenced to death are "less than one tenth of one percent." *Id.* at 11. Executions in Kansas are "infrequent," *Furman*, 408 U.S. at 309 (Stewart, J., concurring), "extraordinarily rare," *id.*, and "different from that which is normally done," *Trop*, 356 U.S. at 101 n.32. As Mr. Young's evidence will demonstrate, the death penalty in Kansas is—by any definition—highly unusual.

2. Kansas' death penalty is racially discriminatory.

Racial bias in the imposition of the death penalty is patently unconstitutional and "poisons public confidence in the judicial process." *Buck v. Davis*, 137 S. Ct. 766, 778 (2017) (internal quotation omitted); *see also id.* at 775 (explaining that "race [is] among [the] factors that are 'constitutionally impermissible or totally irrelevant to the sentencing process'") (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)); *Gregory*, 192 Wash. 2d at 18-19 (holding the death penalty

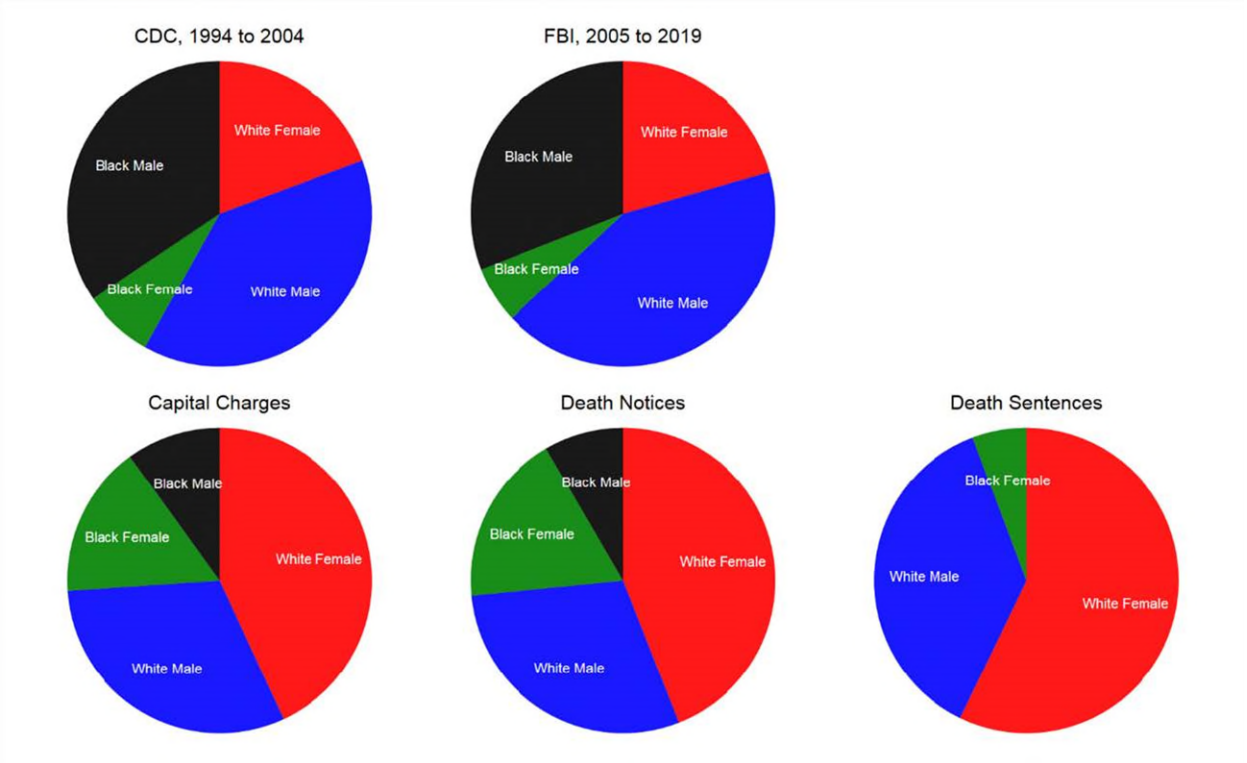
as-applied in Washington violated the cruel punishment clause of the state constitution because it was "administered in an arbitrary and racially biased manner").

As Mr. Young will show, bias plagues Sedgwick County's death penalty. Dr. Jeffrey Fagan analyzed Sedgwick County's murder prosecutions between 1994 and 2020. *See* Rep. of Jeffrey Fagan on Capital Prosecutions at 1-2 (Exhibit G). Dr. Fagan found that the demographics of the victim and defendant significantly influence the likelihood that Sedgwick County prosecutors will seek the death penalty. *Id.* at 3-4. Cases in which one or more victims are white or female are more likely to be death-noticed than all other cases, and cases with white female victims are overwhelmingly more likely to be death-noticed. *Id.* at 3. Dr. Fagan also found that prosecutors are significantly more likely to seek the death penalty against Black or Hispanic defendants who kill white victims, as compared to other death-eligible cases. *Id.* at 4. Thus, the death penalty in Sedgwick County is disproportionately used against persons of color and on behalf of white female victims. As explained by Dr. Shawn Leigh Alexander in his report, this type of racial discrimination "follows a direct historical line of disproportionate police violence and lynchings against Black men." Rep. of Shawn Leigh Alexander at 2 (Exhibit E).

These findings track Kansas' statewide practices. Dr. Frank R. Baumgartner analyzed statewide capital prosecutions since Kansas reinstated the death penalty in 1994 and found results that mirror Dr. Fagan's findings for Sedgwick County. *See* Rep. of Frank Baumgartner on Capital Prosecutions at 1 (Exhibit H). While the vast majority of homicide victims in this State are men, Dr. Baumgartner found that the majority of death penalty cases involve female victims. *Id.* at 12, 18. Defendants who murder Black men in particular are almost certain to avoid the death penalty. *Id.* at 17, 20. Though Black men account for roughly a third of all Kansas homicide victims, this State has never imposed the death penalty for the murder of a Black man. *See id.* at 7, 12, 17, 20.

Dr. Baumgartner summarized the stark role of race and gender in the capital process cases with the following figure:

Homicides and Capital Cases Compared: Victim Race and Gender.



Id. at 20 (Figure 5).

Bias infects every stage of the capital process in Kansas. Black homicide defendants in cases with white or female[4] victims—are more likely than their white counterparts to be charged capitally and then subjected to a death notice. *See* Rep. of Jeffrey Fagan on Capital Prosecutions

[4] It is well-settled that gender-based discrimination, like racial discrimination, is illegitimate. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 532-33 (1996); *see also State v. Robinson*, 363 P.3d 875, 1093 (Kan. 2015) (Johnson, J., dissenting) (observing that the death penalty would violate the Eighth Amendment if its imposition was based on factors "such as . . . gender") (internal quotation omitted). Moreover, given the death penalty's deep historical connection between Black defendants and "white female victims," *see* Rep. of Shawn Leigh Alexander at 2 (Exhibit E), data about race and gender in capital sentencing are inextricably linked, *see, e.g.*, Rep. of Frank R. Baumgartner on Capital Prosecutions at 20 (Exhibit H).

at 3-4, 13-14 (Exhibit G). Thereafter, they are likely to watch the State exclude almost every Black prospective juror through death qualification, *see* Rep. of Mona Lynch ¶ 8 (Exhibit A), and peremptory strikes, *see* Rep. of Elisabeth Semel at 4 (Exhibit D). They are then more likely to be judged based on racial stereotypes, *see* Rep. of Mona Lynch ¶¶ 7, 9 (Exhibit A) and ultimately convicted and sentenced to die, *see* Rep. of Wanda Foglia at ¶¶ 27, 36-39 (Exhibit B).

Moreover, recently-disclosed text messages between officers of the Wichita Police Department ("WPD") reveal that "the racially skewed process does not begin with discretionary decisions by prosecutors to seek death," but starts at the investigation and arrest stages of a case. Rep. of Jeffrey Fagan on Capital Prosecutions at 27-29 (Exhibit G). Reporting by the *Wichita Eagle* in March 2022 uncovered astonishingly racist text messages exchanged between WPD officers. *See id.* at 28. These messages used racial slurs to describe Black citizens and "praised the 'hunting' and killing of Black people by police officers." *Id.* (quoting the *Wichita Eagle*). Racial bias in policing—undeniably present amongst at least some members of the WPD—injects discrimination into the inception of the capital process by "produc[ing] a racially skewed supply of capital-eligible defendants." *Id.* at 27. Thus, in Sedgwick County, Black capital defendants experience discrimination from the moment police begin investigating until the moment the jury sentences them to die, and at every step in between. Mr. Young is entitled to present this stark and troubling evidence.

3. Apart from its discriminatory connection to factors like race and gender, the Kansas death penalty is arbitrarily imposed.

Once race and gender are removed from the analysis, Kansas' death penalty utterly fails to provide any "meaningful basis for distinguishing the few cases in which the penalty is imposed from the many cases in which it is not." *Godfrey*, 446 U.S. at 427 (internal quotation and alteration omitted). "[I]f a State wishes to authorize capital punishment it has a constitutional responsibility

to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty." *Id.* at 428. Kansas has not lived up to that responsibility, instead subjecting only a "capriciously selected random handful" of its murder defendants to capital procedures. *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).

The frequency with which Kansas imposes the death penalty has no relationship to the murder rate. Evidence demonstrates that murders and death sentences fluctuate completely independently of one another in this State. *See* Rep. of Frank R. Baumgartner on Capital Prosecutions at 22 (Exhibit H) ("Overall, the correlation between homicides and death sentences is almost exactly zero . . . [t]he complete lack of connection between homicides and death sentences suggests *no causal relation* between the two.") (emphasis added).

Moreover, the death penalty in Kansas is disparately doled out based on the inherently arbitrary fact of where the crime occurred. *See Perry*, 610 So.2d at 764 ("When an individual is singled out because of an accident of geography for unusually severe treatment, it seems particularly cruel."); *Glossip*, 576 U.S. at 918 (Breyer & Ginsburg, JJ., dissenting) (observing that geography "ought *not* to affect the application of the death penalty") (emphasis in original). In Kansas, geography plays a leading role in determining who will face the State's most severe punishment. A defendant's odds of being capitally charged, subjected to a death notice, or sentenced to die all depend heavily on which of Kansas' counties is prosecuting him. *See* Rep. of Frank R. Baumgartner on Capital Prosecutions at 24-25 (Exhibit H). There is "very wide variability in the use of the death penalty across the geographic units of the state." *Id.* at 25. Such disparities render the death penalty cruel and unusual "in the same way that being struck by lightning is cruel and unusual"—because it is random. *See Furman*, 408 U.S. at 309 (Stewart, J., concurring). "These substantively large variations in rates of death penalty use, even controlling

for the number of homicides, suggest a system that is substantially driven by random chance." Rep. of Frank Baumgartner on Capital Prosecutions at 28 (Exhibit H). "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Furman*, 408 U.S. at 310 (Stewart, J., concurring).

4. Kansas' death penalty is unreliable.

The state and federal constitutions impose heightened reliability standards for capital cases. *See e.g.*, *Satterwhite v. Texas*, 486 U.S. 249, 262 (1988) ("The awesome severity of a sentence of death makes it qualitatively different from all other sanctions.") (Marshall, J., concurring in part); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) (same). But prominent exonerations erode confidence in the system's ability to meet this standard. Kansas has wrongfully convicted several innocent citizens, including in murder cases. *See, e.g.*, Rep. of Tricia Rojo Bushnell at 31-38 (Exhibit I). It has accused and convicted innocent Kansans like Olin "Pete" Coones, Jr. of cold-blooded double-murders, *id.* at 36-38, Lamonte McIntyre of brutal shotgun-murders, *id.* at 34-36, and Floyd Bledsoe of vicious rape-murders, *id.* at 32-24. If they had been amongst the "capriciously selected random handful" for whom the State had sought execution, *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring), the State might have killed them before evidence of their innocence could have been discovered.[5] As Floyd Bledsoe stated: "I am lucky to have received a life sentence and not a death sentence." Rep. of Floyd Bledsoe at 3 (Exhibit J).

[5] Tragically, decades normally pass before evidence emerges to exonerate innocent prisoners who were sentenced to death. "More than half of the exonerations since 2013 have taken 25 years

Many factors have contributed to wrongful convictions in Kansas. Tricia Rojo Bushnell, Director of the Midwest Innocence Project who has studied Kansas' record of wrongful convictions, has identified some of the root causes. *See generally* Rep. of Tricia Rojo Bushnell (Exhibit I). These root causes include: eyewitness misidentifications, *id.* at 18-21, flawed forensic science and testimony, *id.* at 21-23, official misconduct, *id.* at 15-18, false confessions, *id.* at 23-25, and perjured jailhouse informant testimony, *id.* at 25-26. Wrongful convictions are also caused by intense public pressure in the wake of serious local crime, *see, e.g.*, *id.* at 15, which is in turn driven by sensational and biased local news coverage. A study of Kansas media outlets in particular showed consistent patterns of distorted and racialized reporting in capital cases. Rep. of Frank R. Baumgartner on Media at 18-19 (Exhibit K). Meanwhile, indigent defense lawyers with the Kansas State Board of Indigent Defense Services ("BIDS") are hampered by insufficient funding and "chronically high and ethically concerning caseloads." *See* Rep. of Marc Bookman and Sean O'Brien at 14 (Exhibit L) (internal quotation omitted).

The death penalty is, itself, a driver of wrongful convictions. *See Glossip*, 576 U.S. at 912 (Breyer and Ginsburg, JJ., dissenting) (observing that "exonerations occur far more frequently where capital convictions . . . are at issue" in part because capital procedures induce "a greater likelihood of an initial wrongful conviction") (emphasis omitted). The death penalty has several pernicious effects on the merits phase of the trial. The existence of the death penalty makes it less likely that a defendant will even avail himself of his right to trial, and more likely that he will agree to plead guilty in exchange for his life:

> False confessions occur at a higher rate when the accused is threatened with death, and prosecutors frequently leverage the threat of death to secure guilty pleas. It is incredibly difficult to maintain

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or more." Death Penalty Info. Ctr., *Time on Death Row*, deathpenaltyinfo.org/death-row/death-row-time-on-death-row (last visited Sept. 30, 2022).

> one's innocence when, for example, officials display photos of death row, point to the location on the arm where the needle is inserted during a lethal injection, then promise life in exchange for a confession.

Rep. of Tricia Rojo Bushnell at 16 (Exhibit I).

As discussed at length in Section I.A., death-qualified juries are significantly more likely than non-capital juries to find defendants guilty. *See, e.g.*, Rep. of Wanda Foglia at 15-16 (Exhibit B) (explaining that there is a strong statistical connection between a juror's opinions on the death penalty and the juror's propensity to convict).

In sum, the system on which a capital defendant's life or death depends is error-prone and unreliable, and therefore unconstitutional.

5. Kansas' death penalty does not advance a penological purpose.

When the infliction of capital punishment no longer serves a penological goal, its imposition represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Furman*, 408 U.S. at 312 (White, J., concurring). Any state that wishes to impose death must demonstrate that its capital system serves the two valid social ends of "retribution and deterrence of capital crimes by prospective offenders." *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (internal quotation omitted). "Unless the imposition of the death penalty . . . measurably contributes to one or both of these goals, it is nothing more than the purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (internal quotations omitted); *see also Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008). As Mr. Young will demonstrate, the death penalty in Kansas does not serve any valid penological goal.

Dr. Jeffrey Fagan examined whether the death penalty "measurably contributes" to deterrence in Kansas. *See Atkins*, 536 U.S. at 319. "[T]he theory of deterrence in capital sentencing

is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct." *Id.* at 320.

Dr. Fagan analyzed homicide rates statewide and in Sedgwick County specifically, and found "no statistical correlation" between the death penalty and the frequency of murder. Rep. of Jeffrey Fagan on Deterrence at 2, 10-13 (Exhibit F). Rather, murder rates in both the county and State have continuously fluctuated independently of death sentences. *Id.* These results track national trends, which indicate that the death penalty has not curbed, or even affected, the rate of violent crime in America. "The consensus in the scientific community, including the National Academy of Science, National Research Council's 2012 report, is that there is no reliable evidence of a deterrent effect of the death penalty on homicide rates." *Id.* at 2. Moreover, because this State imposes and carries out capital punishment so rarely, "[t]he death penalty is particularly ineffective as a deterrent in Kansas." *Id.*

Nor can retribution sustain Kansas' death penalty. While retribution may be considered alongside deterrence when evaluating the death penalty, *see Atkins*, 536 U.S. at 319, retribution may not, on its own, justify the imposition of the death penalty. *See, e.g.*, *Furman*, 408 U.S. at 345 (Marshall, J., concurring) ("The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper."); *Williams v. New York*, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law."); *Baze v. Rees*, 553 U.S. 35, 80 (2008) (Stevens, J., concurring) ("[O]ur society has moved away from public and painful retribution.").

Even assuming, *arguendo*, that retribution was a sufficient penological justification for the death penalty, Kansas' death penalty system does not meaningfully serve retributive ends. Kansas only subjects a vanishingly small and "capriciously selected random handful" of defendants to

capital procedures. *See Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). And, since 1965, it has not carried out a single execution. "[W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied." *Id.* at 311 (White, J., concurring). If any state has reached that "certain degree of infrequency," *id.*, it is Kansas; no other state that currently authorizes the death penalty has come anywhere close to fifty seven years without using it. *See* Death Penalty Info. Ctr., *State By State*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Sept. 30, 2022).

Perversely, the only measurable impact the death penalty has had on Kansans is an economic one: the death penalty has cost Kansans millions of dollars. *See* Rep. of Philip J. Cook and Frank R. Baumgartner on Cost at 35-36 (Exhibit M). Because death penalty cases require longer and more involved procedures—both at the trial and appellate stages—they are substantially more expensive to taxpayers than non-capital murder cases. *Id.* at 17-23. Based on data from 2014-2018, statistician Frank Baumgartner and economist Philip Cook estimate that the death penalty costs Kansas taxpayers more than two million dollars every year. *Id.* at 31-36.[6]

6. Kansas' near-total abandonment of capital punishment shows a statewide consensus against the death penalty.

When a society's standards of decency evolve past the use of a punishment, that punishment must be deemed cruel and unusual. *See Ford v. Wainwright*, 477 U.S. 399, 406 (1986) ("[T]he Eighth Amendment's proscriptions are not limited to those practices condemned by the common law in 1789. . . . Not bound by the sparing humanitarian concessions of our forebears,

[6] Dr. Cook and Dr. Baumgartner noted that this figure is almost certainly an underestimate, as it excludes several categories of costs (such as the cost of holding death-sentenced inmates in administrative segregation) that could not be quantified with certainty. *See id.* at 36.

the Amendment also recognizes the 'evolving standards of decency that mark the progress of a maturing society.' " (quoting *Trop*, 356 U.S. at 100-01)); *Atkins*, 536 U.S. at 311-12 (same); *Kennedy*, 554 U.S. at 419-20 (same); *Roper v. Simmons*, 543 U.S. 551, 560-61 (2005) (same); *Miller v. Alabama*, 567 U.S. 460, 469-70 (2012) (same).

The U.S. Supreme Court has directed that, when deciding whether a practice is compatible with evolving standards of decency, "review under those evolving standards should be informed by objective factors to the maximum possible extent." *Atkins*, 536 U.S. at 312 (internal quotation omitted). Legislative authorization of a punishment is one objective indicia of society's standards, but "[t]here are measures of consensus other than legislation." *Kennedy*, 554 U.S. at 433; *see, e.g.*, *Graham v. Florida*, 560 U.S. 48, 62 (2010) (finding a societal consensus against juvenile life-without-parole sentences for non-homicide offenses even though the vast majority of jurisdictions formally authorized them). Courts looking for objective indicia of society's evolving standards emphasize actual sentencing to determine whether a practice "has become truly unusual." *Atkins*, 536 U.S. at 316; *see also Simmons*, 543 U.S. at 563. In *Coker v. Georgia*, for example, the Court invalidated Georgia's death penalty for rape by observing that, in that state, "at least 9 out of 10" convicted rapists had not been sentenced to death. 433 U.S. 584, 597 (1977).

Mr. Young will present evidence demonstrating that a similar analysis shows the death penalty cannot stand in Kansas. "[L]ess than one percent" of people who commit "death-eligible murders" in Kansas are actually sentenced to die. Rep. of Jeffrey Fagan on Deterrence at 10-11 (Exhibit F). If nine out of 10 rapists avoiding the death penalty indicated that society no longer accepted that punishment for rape, *see Coker*, 433 U.S. at 597, then ninety nine out of one hundred death-eligible murderers avoiding the death penalty in Kansas must similarly indicate that execution is no longer an acceptable punishment for murder in the State. There are no statistics on

the rate of executions per murder under Kansas' reinstated death penalty, as Kansas has not carried out a single execution. Short of repeal, there could not be a more definitive societal repudiation of a criminal punishment.

Courts also look for "broader social and professional consensus" by consulting "organizations with germane expertise." *Atkins*, 536 U.S. at 316 n.21. The professional organization most relevant to Kansas' death penalty is the American Law Institute, which wrote the Model Penal Code's capital punishment provision upon which Kansas' capital punishment statute was based. *See* Rep. of Carol Steiker ¶ 40 (Exhibit N). Here too, we find a repudiation of the death penalty; the organization has since repealed that provision due to "intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." *Id.* ¶ 12 (internal quotation omitted).

The United States Supreme Court has "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." *Simmons*, 543 U.S. at 560-61 (quoting *Trop*, 356 U.S. at 100-01). Any honest look at the evolving standards of decency in Kansas will find that the death penalty is no longer acceptable. It is therefore cruel and/or unusual under Section 9 and the Eighth Amendment.

III. Pursuing the Death Penalty Against Mr. Young Would Violate His Section 1 Right to Life.

As shown below, pursuing the death penalty against Mr. Young would implicate his natural right to life under Section 1, and thus triggers strict scrutiny. The State cannot satisfy this standard. Far from being narrowly tailored to achieve a compelling government interest, the death penalty utterly fails to advance any legitimate government interest. The only legitimate goals that the

government may pursue with the death penalty are deterrence and retribution. *See, e.g.*, *Enmund*, 458 U.S. at 798. The Kansas death penalty advances neither. *See supra* § II.C.5.

A. The State Bears the Burden of Proving That Its Proposed Capital Prosecution Does Not Violate Mr. Young's Section 1 Right to Life.

Section 1 of the Kansas Bill of Rights protects a right to life, an explicitly enumerated right. *See Carr*, 502 P.3d at 569. When the State threatens a citizen's fundamental rights—including the right to life—it "bears the burden" of proving that its action passes strict scrutiny. *Hodes*, 440 P.3d at 493-97 (internal quotations omitted). Thus, there are two questions this Court must answer: (1) Does Mr. Young have a Section 1 right to life; and (2) Does the State's pursuit of the death penalty against him implicate that right to life? The answer to both questions is "yes" and the State thus bears the burden of satisfying strict scrutiny. *See id.*

1. Mr. Young retains his right to life.

Mr. Young is presumed innocent and accordingly has not forfeited his unalienable right to life. The *Carr* court held that "the natural right to life is forfeitable," 502 P.3d at 569, but repeatedly stated that forfeiture occurs only *after* conviction for a capital crime. *See, e.g.*, *id.* at 578 ("Instead, *when a person is convicted* of capital murder beyond a reasonable doubt, he or she forfeits the inalienable right to life under [S]ection 1.") (emphasis added); *id.* at 579 ("We hold that *once a defendant has been convicted* of capital murder beyond a reasonable doubt, the defendant forfeits his or her natural rights under [S]ection 1.") (emphasis added); *id.* ("[W]here a defendant *has been lawfully convicted* of capital murder, the imposition of the capital sentence *no longer* implicates his or her inalienable natural rights under [S]ection 1.") (emphasis added).

The *Carr* defendants appeared before the Supreme Court duly convicted of multiple capital murders. *See Kansas v. Carr*, 577 U.S. 108, 114-15 (2016). At the time they asserted the violation of Section 1, they retained "no [S]ection 1 protections at all." *Carr*, 502 P.3d at 630 (Stegall, J.,

concurring). Accordingly, the court rejected their claim. *See id*. at 579. Mr. Young, by contrast, appears before this Court "presumptively innocent." *See, e.g.*, *Betterman v. Montana*, 578 U.S. 437, 442 (2016); *see also State v. Johnson*, 50 P. 907, 911 (Kan. Ct. App. 1897) (Mahan, P.J., concurring) ("[T]o this presumption [of innocence] every defendant put upon trial for a crime is entitled, and without qualification or restriction, but an absolute, full, and free presumption, without the power of the court to in the least modify or limit."). It is a bedrock principle of our legal system that the State cannot dislodge the absolute presumption of innocence with a bare allegation. *See, e.g.*, *In re Winship*, 397 U.S. 358, 363 (1970) (describing the "presumption of innocence" as "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' ") (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)); *Coyne v. United States*, 246 F. 120, 121 (5th Cir. 1917) ("An indictment is a mere accusation, and raises no presumption of guilt. On the contrary, the indicted person is presumed to be innocent until his guilt is established, by legal evidence beyond a reasonable doubt . . . ."). Mr. Young, therefore, wears a "cloak of presumed innocence." *State v. Netherton*, 3 P.2d 495, 499 (Kan. 1931). To find that he has forfeited his Section 1 rights would require this Court to assume guilt, which is prohibited. *See, e.g.*, *State v. Knox*, 603 P.2d 199, 207 (Kan. Ct. App. 1979) (reversing a trial court ruling that "apparently assumed guilt" because it was "decided before trial when the presumption of innocence still cloaked the defendant"). Therefore, Section 1 protects Mr. Young and the *Carr* decision does not impede his right to make this point in his defense. *See* Mot. Mins. Sheet, *Kansas v. McNeal*, 2014-CR-003129-FE (Kan. Dist. Ct. Feb. 23, 2022) (allowing "the defense to proceed with the evidentiary hearing currently scheduled . . . .").

2. The State bears the burden of proof once a Section 1 claim is alleged.

The State bears the burden once a Section 1 claim is *alleged*. *See, e.g.*, *Hodes*, 440 P.3d at 499 ("Presuming that any state action *alleged* to infringe [a fundamental right] is constitutional

dilutes the protections established by our Constitution.") (emphasis added); *Carr*, 502 P.3d at 569 (quoting the same). Indeed, in *Carr*, the court ultimately found that no Section 1 right was implicated. *Id.* at 579. In reaching that conclusion, however, the *Carr* court expressly recognized that because a Section 1 violation had been alleged, the State's action could not be presumed constitutional. *See id.* at 569 ("[B]ased on established precedent, we apply no such presumption [of constitutionality] to this [S]ection 1 challenge."). Like the *Carr* defendants, Mr. Young has alleged an infringement of a Section 1 right. Thus, the State's action here is not presumed constitutional, and "the burden of proof is shifted" to the State. *Hodes*, 440 P.3d at 499 (internal quotations omitted).[7]

B. The Death Penalty Violates Mr. Young's Right to Life Under Any Standard.

Even if this Court concludes that rational basis applies instead of strict scrutiny, this State's death penalty would not pass constitutional muster because it does not achieve any legitimate

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[7] Strict scrutiny is the appropriate approach under *Hodes.* However, the State would also have to make a substantial showing under the alternative standard urged by Justice Stegall in his *Hodes* dissent: "rational basis with bite." *Id.* at 550-51 (Stegall, J., dissenting). While rational basis with bite accords the State *some* deference, it "does not load the dice—relentlessly—in government's favor." *Id.* (internal quotations omitted). Instead, "a court must examine the *actual* legislative record to determine the *real* purpose behind any law in question before it can conclude the law is within the limited constitutional grant of power possessed by the State." *Id.* at 551 (emphases in original). If the State's purpose is arbitrary, irrational, or discriminatory, the Court must prevent it from proceeding. *See id.* ("The people have not authorized the State to act in arbitrary, irrational, or discriminatory ways.").

Justice Stegall reiterated his position in *Carr*, arguing that rational basis with bite "is the test we should now apply to the death penalty . . . ." 502 P.3d at 631 (Stegall, J., concurring). He declined to do so in that case because the issue was not before the Court: "The lower courts have not inquired into the subject, the parties have not briefed the issue, and this court has declined to take it up." *Id.* Justice Stegall observed, however, that because the Kansas death penalty has never been subjected to rational basis with bite, no one yet knows "how such an inquiry would play out." *Id.* He therefore announced that, if the issue had been before the Court, he would have been "inclined" to "remand" for an evidentiary hearing. *Id.* Justice Stegall explained that close constitutional inspection is particularly important in the death penalty context because of "the monumental consequences of the State's exercise of this most final, most irreversible, and most grave use of power—killing a human person . . . ." *Id.*

penological goal. *See Romer*, 517 U.S. at 632 (explaining that a practice only survives rational basis review if it "can be said to advance a legitimate government interest"). Thus, under any standard of review, the State cannot justify seeking to execute Mr. Young consistent with his natural right to life.

IV. Kansas' Death Penalty and Death Qualification Violate the Federal Constitution.

In addition to the Eighth Amendment, discussed *supra* § II.C., Kansas' death penalty violates Mr. Young's Sixth and Fourteenth Amendment rights. Death qualification, as applied in Sedgwick County, would violate Mr. Young's Sixth and Fourteenth Amendment right to an impartial jury for the same reasons that it would violate his Section 5 and Section 10 rights; it has a profoundly disparate impact on prospective jurors and produces a conviction-prone and death-prone jury. *See supra* § I.A.; *see also Morgan v. Illinois*, 504 U.S. 719, 739 (1992).

The death penalty also violates Mr. Young's Fourteenth Amendment right to due process by denying him an unbiased jury, *see supra* § I., and unduly placing him at risk of wrongful conviction and execution, *see supra* § II.C. Finally, the death penalty violates Mr. Young's Fourteenth Amendment right to equal protection by subjecting him to a death qualification process with significant racial and gender bias, *see supra* § I.A., and a punishment doled out based on impermissible factors, including race, *see supra* § II.C.

V. Mr. Young Is Entitled to an Evidentiary Hearing in Order to Make a Full Record.

A. Mr. Young Has a Fundamental Due Process Right to a Hearing.

Mr. Young has a fundamental due process right "to be heard at a meaningful time and in a meaningful manner." *In re J.D.C.*, 159 P.3d 974, 982 (Kan. 2007). *See also* U.S. Const. amend. VI; U.S. Const. amend. XIV; Kan. Const. Bill of Rights, §§ 1, 2. Kansas courts have repeatedly held that "[d]istrict courts are the places to hold evidentiary hearings. Appellate courts are not." *State v. Barlow*, 368 P.3d 331, 339 (Kan. 2016) (internal quotation omitted).

Kansas Supreme Court Rule 165 provides that "[i]n a contested matter submitted to the court without a jury . . . the court must state its findings of fact and conclusions of law in compliance with K.S.A. 60-252." Kan. Sup. Ct. R. 165(a). Kansas Statute 60-252(a)(1) provides that the Court "must find the facts specially and state its conclusions of law separately." Kan. Stat. Ann. 60-252(a)(1). These findings and conclusions must either be stated on the record after the close of evidence, or appear in the opinion or memorandum of decision filed by the court. *Id.* The Kansas Supreme Court has further clarified that Rule 165 is broader than the statute "in that it requires [the court] . . . in addition to stating the controlling facts required by 60-252, [to] briefly state the legal principles controlling his decision." *In re Marriage of Case*, 856 P.2d 169, 172 (Kan. 1993) (internal quotation omitted).

The Kansas Supreme Court has explicitly applied Rule 165 to criminal pre-trial motions. *See, e.g.*, *State v. Dolack*, 533 P.2d 1282, 1294 (Kan. 1975) (admonishing the trial court's failure to make findings of fact and conclusions of law regarding a motion to dismiss, which hindered appellate review and failed to treat the matter "with appropriate gravity.").[8] Moreover, the Kansas Supreme Court has repeatedly held that "a factual record is required for any meaningful appellate review." *State v. Espinoza*, 462 P.3d 159, 160 (Kan. 2020). The responsibility to ensure the district court creates an adequate record falls solely upon criminal defense counsel. When counsel fails to ensure the court actually makes an adequate record of both the factual and legal issues related to a defendant's challenge, the claim is considered waived on appeal—even if the constitutional challenge was raised and brought to the court's attention. *See id.* at 161 (considering criminal defendant who failed to request specific findings of fact and conclusions of law on constitutional challenges and holding that "*[i]n the future, a defendant who wishes to appeal on the basis of a*

[8] Kansas Supreme Court Rule 165 was previously cited as Rule 116.

constitutional challenge to a sentencing statute must ensure the findings and conclusions by the district judge are sufficient to support appellate argument" pursuant to Rule 165) (emphasis added) (internal quotation omitted).

B. Mr. Young Is Entitled to Make a Record.

Mr. Young also has a constitutional entitlement to make a full and adequate record where deemed necessary by his counsel. This entitlement arises out of his right to effective assistance of counsel pursuant to the Sixth Amendment of the U.S. Constitution and Section 10 of the Kansas Constitution Bill of Rights. Counsel has a professional obligation to consider and present, when strategic, every potential legal claim in a capital case. The American Bar Association Guidelines specifically direct counsel to "consider all legal claims potentially available; and thoroughly investigate the basis for each potential claim . . . in light of . . . the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited. Am. Bar. Ass'n, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1028 (Rev. ed. 2003) (at Guideline 10.8); *see also United States v. Cheever*, 423 F. Supp. 2d 1181, 1193 n.9 (D. Kan. 2006) ("The court is sensitive to defendant's counsels' responsibility to raise every conceivable argument on defendant's behalf and does not fault them for doing so. Given the ever-changing nature of death penalty jurisprudence, the court understands counsels' need to 'make a record' for purposes of appeal.).

Because death is different, the U.S. Constitution requires that "extraordinary measures [be taken] to ensure that" Mr. Young "is afforded [a] process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake." *Caldwell*, 472 U.S. at 329 n.2 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982)

(O'Connor, J., concurring)). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 704-05 (1984)).

Other jurisdictions have recognized that trial courts are the appropriate forum for challenges to the constitutionality of the death penalty that rest on heavily factual records. *See generally United States v. Fell*, 224 F. Supp. 3d 327 (D. Vt. 2016) (federal district court took evidence from sixteen expert witnesses at a two-week evidentiary hearing on the constitutionality of federal death penalty statute); Entry Order at 1, *United States v. Fell*, No. 5:01-cr-12-01 (D. Vt. Feb. 9, 2016) (concluding that "an opportunity for presentation of evidence and judicial fact finding on the factual issues raised . . . is necessary"); *State v. Astorga*, No. CR 2006-1670 (D.N.M. Aug. 7, 2007) (New Mexico District Court granting a week-long evidentiary hearing on the constitutionality of the New Mexico death penalty statute); *see also State v. Gregory*, 427 P.3d 621, 630-31 (Wash. 2018) (striking the death penalty as unconstitutional after ordering a remand to a special magistrate for evidentiary fact finding relevant to the constitutionality of the death penalty in Washington); *Cox v. Commonwealth*, 218 A.3d 384 385 (Pa. 2019) (per curiam) (after ordering briefing and oral argument about whether to use extraordinary relief to hear and decide a systemic challenge to the death penalty system, Pennsylvania Supreme Court denied to exercise jurisdiction and ordered the evidence and claims to be heard in individual cases in the courts below). The Kansas Supreme Court in *Carr* stressed the importance of litigants presenting empirical evidence, including the specific challenge to death qualification, to the trial court so that the district court can make factual findings and ensure meaningful appellate review. *Carr*, 502 P.3d at 567-68. Mr. Young seeks that opportunity here.

CONCLUSION

For the foregoing reasons, Mr. Young moves this Court to order an evidentiary hearing and ultimately conclude that the death penalty and death qualification as applied in Kansas are unconstitutional. Mr. Young seeks to present further evidence and testimony on these matters at an evidentiary hearing.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this October 20, 2022 a true and correct copy of the foregoing Application was sent via email to Marc Bennett and Justin Edwards of the Office of Sedgwick County District Attorney and Jeffrey Goering District Court Judge.

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