No. _____

IN THE

Supreme Court of the United States

DARRYL BRYAN BARWICK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE WITH AN EXECUTION SCHEDULED FOR WEDNESDAY, MAY 3, 2023, AT 6:00 P.M.

KARIN L. MOORE
Counsel of Record
DREW A. SENA
Office of the Capital Collateral Regional Counsel—North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
karin.moore@ccrc-north.org
drew.sena@ccrc-north.org

CAPITAL CASE

QUESTIONS PRESENTED

In *Trop v. Dulles*, this Court held that the Eighth Amendment "must draw its meaning from the evolving standards of decency to mark the progress of a maturing society." 356 U.S. 86, 100 (1958). Additionally, this Court has made clear that Eighth Amendment determinations regarding which individuals should be exempt from execution must be informed by the views of the scientific community. *See, e.g., Hall v. Florida*, 572 U.S. 701, 710, 723 (2014); *Moore v. Texas*, 581 U.S. 1, 20-21 (2017).

Petitioner Darryl Bryan Barwick—an individual with a severe neuropsychological disorder, lifelong cognitive deficits and brain damage, and low mental age—is scheduled to be executed by the State of Florida on May 3, 2023, for a crime committed when he was only 19 years of age. The Florida Supreme Court, bound by a unique state constitutional provision precluding the state from offering any protection against cruel and unusual punishment that is not explicitly ordered by this Court, ruled that it "simply does not have the authority" to exempt Mr. Barwick from execution based on his myriad vulnerabilities. *Barwick v. State*, __ So. 3d __, 2023 WL 3151079 (Fla. Apr. 28, 2023), Appendix A at 6, hereinafter "App. A".

The questions presented are:

1. Does a state constitutional provision which prohibits any consideration of evolving standards of decency violate the Eighth Amendment?

2. In light of the American Psychological Association's August 2022 resolution calling for an end to the late-adolescent death penalty, does this Court's holding that "the death penalty is disproportionate punishment for offenders under 18," *Roper v. Simmons*, 543 U.S. 551, 575 (2005), apply with equal force to those under 21?

PARTIES TO THE PROCEEDINGS

Petitioner Darryl Bryan Barwick, a death-sentenced Florida prisoner scheduled for execution on May 3, 2023, was the appellant in the Florida Supreme Court.

Respondent, the State of Florida, was the appellee in the Florida Supreme Court.

RELATED PROCEEDINGS

Per Supreme Court Rule 14.1(b)(iii), the following cases relate to this petition:

Underlying Criminal Trial:
Circuit Court of Bay County, Florida
State of Florida v. Darryl Barwick, Case No. 1986 CF 940
Judgment Entered: January 30, 1987

Direct Appeal:
Florida Supreme Court (No. 70997)
Darryl Barwick v. State, 547 So. 2d 612 (Fla. 1989)
Judgment Entered: June 15, 1989 (reversing and remanding for retrial)

Re-trial:
Circuit Court of Bay County, Florida
State of Florida v. Darryl Barwick, Case No. 1986 CF 940
Judgment Entered: August 11, 1992

Direct Appeal:
Florida Supreme Court (No. 80446)
Darryl Barwick v. State, 660 So. 2d 685 (Fla. 1995)
Judgment Entered: July 20, 1995 (affirming)
Rehearing Denied: September 19, 1995

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 95-6964)
Darryl Barwick v. Florida, 516 U.S. 1097 (1996)
Judgment Entered: January 22, 1996

Postconviction Proceedings:
Circuit Court of Bay County, Florida
Barwick v. State, 1986 CF 940
Judgment Entered: August 28, 2007 (denying motion for postconviction relief)

Florida Supreme Court (Nos. SC07-1831; SC08-1377)
Barwick v. State, 88 So. 3d 85 (Fla. 2011)
Judgment Entered: June 30, 2011 (affirming)
Rehearing Denied: May 7, 2012

Federal Habeas Proceedings:
District Court for the Northern District of Florida (No. 5:12-cv-159-RH)
Barwick v. Tucker, No. 5:12-cv-159-RH

Judgment Entered: March 19, 2014 (denying federal habeas relief and partially granting a certificate of appealability)
Reconsideration Denied: April 14, 2014

Eleventh Circuit Court of Appeals
Barwick v. Sec'y, Fla. Dep't of Corr., No. 14-11711
Judgment Entered: July 21, 2015 (affirming denial of habeas relief)

Petition for Writ of Certiorari Denied:
Supreme Court of the United States (No. 15-8213)
Darryl Brian Barwick v. Julie L. Jones, 578 U.S. 947 (2016)
Judgment Entered: April 25, 2016

First Successive Postconviction Proceedings:
Circuit Court of Bay County, Florida
Barwick v. State, 1986 CF 940
Judgment Entered: October 16, 2017 (denying motion for postconviction relief)

Florida Supreme Court (No. SC17-2057)
Barwick v. State, 237 So. 3d 927 (Fla. 2018)
Judgment Entered: February 28, 2018

Petition for Writ of Certiorari Denied
Supreme Court of the United States (No. 18-5354)
Darryl Brian Barwick v. Florida, 139 S. Ct. 258 (2018)
Judgment Entered: October 1, 2018

Second Successive Postconviction Proceedings:
Circuit Court of Bay County, Florida
Barwick v. State, 1986 CF 940
Judgment Entered: April 13, 2023 (denying postconviction relief and stay of execution)

Florida Supreme Court (No. SC23-531)
Barwick v. State, __ So. 3d __, 2023 WL 3151079 (Fla. Apr. 28, 2023)
Judgment Entered: April 28, 2023 (affirming denial of postconviction relief and stay of execution)

Related Proceedings Under 42 U.S.C. § 1983:
District Court for the Northern District of Florida (No. 4:23-cv-146-RH)
Barwick v. DeSantis, et al., No. 4:23-cv-146-RH
Judgment Entered: April 18, 2023 (denying a stay of execution)

Eleventh Circuit Court of Appeals

Barwick v. Governor of Florida, et al., No. 23-11277
Judgment Entered: April 26, 2023 (denying a stay of execution)

Petition for Writ of Certiorari Filed
Supreme Court of the United States (No. 22-7412)
Darryl Bryan Barwick v. Governor of Florida, et al.
Judgment Pending

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases:

Statutes

Other Authorities

DECISION BELOW

The decision of the Florida Supreme Court is not yet reported but is available at 2023 WL 3151079 (Fla. April 28, 2023), and is reprinted in the Appendix at A.

JURISDICTION

The judgment of the Florida Supreme Court was entered on April 28, 2023. App. at A. This Court has jurisdiction under 28 U.S.C. § 1257(a).[1]

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI provides, in relevant part:

> The Constitution, and the laws of the United States which shall be made in pursuance thereof…shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[1] Petitioner requests that the Court expedite consideration of this petition in order to ensure that it is circulated together with the accompanying stay application.

STATEMENT OF THE CASE

I. Procedural History

On April 28, 1986, Mr. Barwick was indicted for first degree murder and related offenses in Bay County, Florida. R. 241-42.[2] He was tried and convicted. R. 652-53. Following the jury's 9-3 recommendation, the trial court sentenced Mr. Barwick to death. R. 654. On direct appeal, the Florida Supreme Court reversed and remanded for a new trial. *Barwick v. State*, 547 So. 2d 612 (Fla. 1989).

Mr. Barwick's second trial resulted in a mistrial. R. 1183. His third trial commenced on July 6, 1992. The jury found Mr. Barwick guilty as charged and recommended a sentence of death by a vote of 12-0, R. 1236-38, which the trial court imposed. R. 1293-99.[3]

On direct appeal, the Florida Supreme Court affirmed. *Barwick v. State*, 660 So. 2d 685 (Fla. 1995). Certiorari was denied on January 22, 1996. *Barwick v. Florida*, 516 U.S. 1097 (1996).

On March 17, 1997, Mr. Barwick filed a postconviction motion. The state circuit court denied relief on August 28, 2007. Mr. Barwick appealed and filed a

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[2] Citations to Mr. Barwick's underlying capital case record are as follows: References to the record on direct appeal of Mr. Barwick's capital case are designated as "R. __" for the record, and "TR. __" for the trial transcript. References to the record of Mr. Barwick's evidentiary hearing related to his initial postconviction proceeding are designated as "EH. __". References to the record of Mr. Barwick's second successive postconviction proceedings following the issuance of the warrant, and filed with the Florida Supreme Court on April 14, 2023, are designated as "PCR3. __". All other references are self-explanatory or otherwise explained herewith.

[3] The trial court found the following aggravating circumstances: prior violent felony based on a 1983 conviction for sexual battery and burglary; attempted sexual battery; avoiding arrest; pecuniary gain; heinous, atrocious or cruel (HAC); and cold, calculated and premeditated (CCP). R. 1281-86.

petition for writ of habeas corpus. The Florida Supreme Court denied all relief. *Barwick v. State*, 88 So. 3d 85 (Fla. 2011).

On May 25, 2012, Mr. Barwick filed a federal habeas petition in the Northern District of Florida. The petition was denied, and the Eleventh Circuit affirmed the denial. *Barwick v. Sec'y*, 794 F.3d 1239 (11th 2015).

On December 15, 2016, Mr. Barwick filed a successive motion for postconviction relief based on *Hurst v. Florida*, 577 U.S. 92 (2016). The Bay County circuit court denied the motion and the Florida Supreme Court affirmed. *Barwick v. State,* 237 So. 3d 927 (Fla. 2018). Certiorari was denied on October 1, 2018. *Barwick v. Florida*, 139 S. Ct. 258 (2018).

On April 3, 2023, Mr. Barwick's death warrant was signed and his execution was scheduled for May 3, 2023. Pursuant to the Bay County circuit court's scheduling order, Mr. Barwick filed a second successive motion for postconviction relief on April 8, 2023, arguing in relevant part that: (1) a new scientific consensus regarding adolescent brain development established that Mr. Barwick's execution for a crime committed when he was 19 years old would violate the Eighth Amendment (Claim 2 of postconviction motion); and, (2) Mr. Barwick's execution would violate the Eighth and Fourteenth Amendments due to the combined impact of his severe neuropsychological disorder, lifelong cognitive impairments, and low mental age (Claim 3 of postconviction motion). The circuit court denied all relief on April 13, 2023. Mr. Barwick filed an appeal to the Florida Supreme Court on April 18, 2023.

On April 28, 2023, The Florida Supreme Court affirmed the circuit court's denial of relief. *Barwick v. State*, __ So. 3d __, 2023 WL 3151079 (Fla. Apr. 28, 2023).

II. Additional Relevant Facts

Darryl Barwick is facing imminent execution for a crime he committed when he was 19 years old. Before the crime, Mr. Barwick's life was marred with severe physical abuse beginning before he left his mother's womb. EH. 53-54. Transparent about wishing to abort the unborn Mr. Barwick, Ima Jean Barwick was on birth control pills for the duration of Mr. Barwick's gestation, received no prenatal care, and experienced a late-term fall down the stairs that was believed to be an intentional attempt to terminate her pregnancy. *Id*. The legacy of being an unwanted child would psychologically damage Mr. Barwick in years to come, but the physical *in utero* trauma severely damaged Mr. Barwick's brain even before he took his first breath. *See id.*; *see also* PCR3. 391. That physical damage caused a serious mental illness that has pervaded the remainder of Mr. Barwick's life, and was exacerbated by his immaturity, and exposure to trauma and abuse.

Early in Mr. Barwick's life, a neurodevelopmental disorder manifested. *See* PCR3. 392, 398-400. Neurodevelopmental disorders occur during the developmental period—often manifesting by the time a child reaches school age—and are characterized by developmental deficits or differenced in brain processes that produce impairments of personal, social, academic, or occupational functioning ranging from "limitations of learning or control of executive functions to global impairments of social skills or intellectual ability." American Psychiatric Association, *Diagnostic and*

Statistical Manual of Mental Disorders 35 (5th ed. Text Rev. 2022) (hereinafter "DSM-5-TR").

In Mr. Barwick's case, the disorder had already manifested by the age of four. He was deemed to have a significant speech and language delay, which led to academic and social difficulties from the age of 4, and was so profound that his believed IQ at that age was a mere 16. By the time of his pretrial evaluations at the chronological age of 19, he had a mental age between 11 and 13. Summing this up, Dr. Holmes explained that:

> Each psychologist that evaluated him, pre-trial as well as post-conviction, obtained test scores that were commensurate from early childhood until 2006 when he was last tested. They all show a statistically and clinically significant difference between Mr. Barwick's intelligence (ability) and his achievement (learning). In fact, the difference was 2 standard deviations, which is clinically quite substantial.

See PCR3. 398.

These early manifestations of Mr. Barwick's disorder led to his further abuse. Although Ira Barwick was abusive to his wife and all of his children, Darryl Barwick was especially victimized. He "received beatings because of his own deficiencies…because of all of his limitations." EH. 64. As Dr. Eisenstein explained in 2006:

> [T]here was so severe emotional abuse that Darryl received. If it wasn't the sexual abuse and physical abuse, the emotional abuse is finally the third prong that really just set him off. He was called stupid, idiot, illiterate dummy, jack ass, son of a bitch, the milkman's son, because Darryl has blonde hair, ass hole…

EH. 65. This was of significant impact to Mr. Barwick, as opposed to others who are called similar names, because of the constancy and because:

> [S]ome of it has a kernel of truth, which makes it even more hurtful. He was illiterate until the tenth grade, he was stupid…[T]hat certainly addresses some huge issues in terms of his academic failings, in terms of his language failings, in terms of the organic problems that I mentioned earlier…so when you zero in on, and you depict someone's failings and they are actually true, to a certain extent the level of humiliation and degradation is even greater, so that was unique to Darryl.

EH. 65-66. This resulted in Mr. Barwick becoming like "a shell" and exacerbated his neurodevelopmental disorder by also stunting his psychological development. EH. 66; PCR3. 392. "[T]here was nothing that was held back from dehumanizing and the vulgar insulting and the entire psychological fabric of what we refer to as self-esteem, one's make-up in terms of feeling self-worth, confidence, it was all shattered. It was all knocked out." EH 65.

Mr. Barwick's psychological functioning was not all that was knocked out. Throughout his childhood, he received such intense beatings from his father that he lost consciousness on "at least" several occasions. EH. 54; *see also* TR. 727-28 (Ira Barwick acknowledging "tearing" Mr. Barwick up with two-by-fours or anything he could get his hands on, to the point of knocking Mr. Barwick unconscious). One of those occasions occurred while Mr. Barwick was assisting his father at a job site but proved less capable than his brothers due to his cognitive and developmental deficits. EH. 67-68. Mr. Barwick's father—wielding a three-foot piece of lumber with protruding rebar—initially struck Mr. Barwick on the left side of his head, then after Mr. Barwick fell to the ground unconscious, struck him again in the back of his head.

See, e.g., EH 52-55; TR. 653. On another occasion, Mr. Barwick was knocked unconscious when his father punched him, knocking him down into a rocking chair as he fell to the floor. TR. 653. On still another occasion, Mr. Barwick's skull was so badly bruised that his father took him on vacation for several days to recover from the infliction. EH. 55.

Adding to Mr. Barwick's head trauma, he suffered additional head injuries and apparent concussions as a wrestler and football player throughout middle and high school. This coincided with the onset of puberty, at which point the tertiary area of the brain (the frontal lobe nearest the forehead, and most susceptible portion of the brain to injury) begins to develop. Due to Mr. Barwick's organic brain damage and lifelong history of severe head wounds, this portion of Mr. Barwick's brain did not develop, leading to an additional neuropsychological deficit: clinical impulsivity. *See* PCR3. 392.

These physical insults to Mr. Barwick's brain further impacted his adaptive functioning:

> Well, he's considered to be odd. He was considered to be somewhat asocial. He had difficulties relating to others. He was considered to be a little different. Um, again the words that the father depict showed off all of these deficiencies, again with that kernel of truth, are indicative of the difficulties that he had socially relating, vocationally being able to function, and academically and intellectually being able to either process or deal with information in a different manner.

EH. 74-75. And again, his intellectual deficiencies, brain damage, and adaptive impairments circularly led to heightened abuse as compared to his siblings:

> It may have explained why he was not able to fight. I am not sure what comes, you know, the chicken or the egg, but it certainly, he, he was

> hiding emotionally, physically, intellectually, which was limited because of the brain damage, the response, and there was, there was no other option, there was no option B for him.

EH. 102.

Because the science regarding neuropsychological conditions was comparatively nascent at the time of Mr. Barwick's childhood, adolescence, and prior litigation, his neurocognitive disorder was not diagnosed prior to the conclusion of the developmental period (recognized as occurring sometime in the 20s). Thus, although it is clear Mr. Barwick's symptoms began in the developmental period, the most proper diagnosis to attach at age 56 is a cognitive disorder rather than a developmental disorder. *See* PCR3. 392. Whereas "dementia is the customary term for disorders [in this realm] that usually affect older adults, the term *neurocognitive disorder* is widely used and often preferred for conditions affecting younger individuals, such as impairment secondary to traumatic brain injury[.]" DSM-5-TR at 667 (emphasis in original). As with Mr. Barwick's corollary childhood/adolescent condition (neurodevelopmental disorder), neurocognitive disorders impair functioning across multiple realms, including attention; executive function (planning, decision-making, responding to feedback, error correction, overriding habits, inhibition, and mental flexibility), learning; memory; language; perception; and social cognition (recognition of emotions and ability to consider another person's mental state). *Id*. at 669-71.

REASONS FOR GRANTING THE WRIT

I. A State Must Not Opt Out of Considerations Required by the Eighth Amendment

The Eighth Amendment is unique among constitutional principles, in that it inherently "draw[s] its meaning" through active state participation as it pertains to evolving standards of decency. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). Its basic concept is "nothing less than the dignity of man[,]" standing to assure that a state's "power to punish…be exercised within the limits of civilized standards." *Id.* at 100.

In accordance with its lofty purpose, Eighth Amendment principles as articulated through this Court's jurisprudence presuppose that states will actively work to bring society closer to "the Nation we aspire to be[,]" *Hall v. Florida*, 572 U.S. 701, 708 (2014), by reflecting and advancing "the evolving standards of decency to mark the progress of a maturing society." *Trop*, 356 U.S. at 101; *see also id.* at 100 (this Court remarking that the reason it had not previously defined "cruel and unusual" or given "precise content to the Eighth Amendment" was that the United States functioned as an "enlightened democracy"). State participation in facilitating evolving standards of decency ensures that the Eighth Amendment "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910).

But Florida has abdicated its critical role in this process, claiming that its adoption of a unique constitutional amendment known as "the conformity clause" prohibits it from conducting any Eighth Amendment analysis that could lead to protection of an individual not already explicitly protected by this Court's prior

holdings. Left undisturbed, this abdication means that Mr. Barwick will die based on a systemic constitutional flaw in Florida's death penalty scheme, and with no meaningful consideration of his allegation that he deserves exemption from execution.

Although the harm to Mr. Barwick is pronounced and itself warrants this Court's intervention, the harm does not stop with him. Florida's use of the conformity clause violates the Eighth Amendment by effectively foreclosing evolving standards of decency in Florida and bypassing critical safeguards to ensure constitutional administration of the death penalty. It rejects core federalist principles of state autonomy and individualism. It stands to hinder this Court's own function by obstructing Eighth Amendment analysis of state practice and by forcing this Court to act as a court of first instance for Eighth Amendment issues arising out of Florida. And, it underscores Florida's shameful legacy of flouting scientific and sociolegal advancements in the realm of criminal punishment.

For these reasons, Mr. Barwick seeks this Court's intervention.

A. Florida's Eighth Amendment conformity clause

Art. I, § 17 of the Florida State Constitution, otherwise known as "the conformity clause," states:

> The prohibition against cruel or unusual punishment, and the prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution….This Section shall apply retroactively.

Although innocuously worded, a brief foray into the provision's legislative and judicial history sheds light on its regressive purpose. The amendment was originally proposed in 1998 but was overturned in 2000, after the Florida Supreme Court held that the ballot had been misleading to voters:

> The ballot title and summary are misleading because the latter portion of the title ("UNITED STATES SUPREME COURT INTERPRETATION OF CRUEL AND UNUSUAL PUNISHMENT") and the second sentence in the summary ("Requires construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment.") imply that the amendment will promote the rights of Florida citizens through the rulings of the United States Supreme Court.

Armstrong v. Harris, 773 So.2d 7, 17 (Fla. 2000). The court in *Armstrong* noted that because (a) Florida's system of constitutional government was "grounded on a principle of 'robust individualism' and [its] state constitutional rights thus provide greater freedom from government intrusion into the lives of citizens than do their federal counterparts", *id.*; and (b) the amendment would "nullify a longstanding constitutional principle that applies to all criminal punishments, not just the death penalty", *id.* at 18; a citizen "could well have voted in favor of the proposed amendment thinking that he or she was protecting state constitutional rights when in fact the citizen was doing *the exact opposite*—i.e., he or she was voting to nullify those rights." *Id*.

The ballot summary preceding the amendment's 2002 adoption was clearer:

> The amendment *would prevent state courts, including the Florida Supreme Court, from treating the state constitutional prohibition against cruel or unusual punishment as being more expansive than the federal constitutional prohibition against cruel and unusual punishment or*

> *United States Supreme Court interpretations thereof*. The amendment effectively nullifies rights currently allowed…which may afford greater protections for those subject to punishment for crimes than will be provided by the amendment. Under the amendment, the protections afforded those subject to punishment…will be the same as the minimum protections provided under the "cruel and unusual" punishments clause of the Eighth Amendment to the United States Constitution.

Fla. HJR 951 (2001) at 2-3 (ballot summary regarding proposed amendment to art. I, § 17, Fla. Const.) (emphasis added).

In ensuing years since the Eighth Amendment conformity clause—the only one of its kind—became part of the Florida constitution, the Florida courts have cited its purported restriction, and have increasingly relied upon it to opt out of critical Eighth Amendment analyses, including judicial determinations related to evolving standards of decency. *See, e.g.*, *Bowles v. State*, 276 So. 3d 791, 796 (Fla. 2019) (Florida Supreme Court relying on the conformity clause to refuse any consideration of whether national death penalty trends warranted exemption from execution under the Eighth Amendment); *Lawrence v. State*, 308 So. 3d 544, 545 (Fla. 2020) (Florida Supreme Court relying on the conformity clause to eliminate Eighth Amendment proportionality review); *Hart v. State*, 246 So. 3d 417, 420-21 (Fla. 4th DCA 2018) (Florida appellate court relying on the conformity clause in a non-capital context to refuse to consider whether a juvenile sentence violated *Graham v. Florida*, 560 U.S. 48 (2010)); *see also Covington v. State,* 348 So. 3d 456, 479-480 (Fla. 2022) (relying in part on conformity clause to refuse to consider whether defendant's alleged insanity at the time of the crime rendered his death sentence cruel and unusual); *Allen v.*

State, 322 So. 3d 589, 602 (Fla. 2021) (seemingly implying that the conformity clause may justify limiting a mitigation presentation in certain cases involving waiver).

B. This Court has authority to intervene in Florida's unconstitutional use of its conformity clause, and should exercise that authority here

Where a state constitution conflicts with the federal constitution—including this Court's interpretive jurisprudence—the state constitution must yield. *See Reynolds v. Sims*, 377 U.S. 533, 584 (1964) ("When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."); *see also Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (rejecting the idea that states and federal government are coequal sovereigns because "[i]t has long been a settled principle that federal courts may enjoin unconstitutional action by state officials."); *Democratic Executive Comm. of Florida v. Lee*, 915 F.3d 1312, 1331 (11th Cir. 2019) ("while federalism certainly respects states' rights, it also demands the supremacy of federal law when state law offends federally protected rights.").

And, although it is "fundamental that state courts be left free and unfettered by [this Court] in interpreting their state constitutions," *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940), it is equally important that those state adjudications

> do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.…For no other course assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states.

Id.

Here, there is no question that the issue at bar is of this Court's purview. Florida has—through its implementation of the conformity clause and abdication of any judgment apart from this Court's verbatim holdings—explicitly interwoven its determinations regarding cruel and unusual punishment with this Court's Eighth Amendment jurisprudence. Paradoxically, by virtue of this inflexible binding process, Florida has wholly repudiated a critical aspect of Eighth Amendment determinations: consideration of ever-evolving societal, legal, and scientific standards. Thus, Florida does not merely treat this Court's holdings as both the "floor" and "ceiling" of protections against cruel and unusual punishment: it also falls below the "floor" established by this Court's jurisprudence by failing to adhere to this Court's minimum prescribed standards for evaluating the applicability of Eighth Amendment protections. In other words, Florida's purported "conformity" with the Eighth Amendment actually violates it. Art. I, § 17 of the Florida State Constitution must therefore yield to the U.S. Constitution and this Court's jurisprudence.

Further, this Court's precedent illustrates its well-established authority to intervene when faced with a state constitutional provision that conflicts with federal constitutional rights. *See generally, e.g., Cook v. Gralike*, 531 U.S. 510 (2001) (granting certiorari despite lack of a split of authority due to the importance of the case and summarily affirming lower courts' opinions that portions of the Missouri Constitution were unconstitutional); *Rice v. Cayetano*, 528 U.S. 495 (2000) (reversing lower court's judgment on certiorari review and finding that Hawaii's state constitutional provision violated the Fifteenth Amendment); *Romer v. Evans*, 517

U.S. 620 (1996) (holding that a Colorado state constitutional amendment adopted by statewide voter referendum violated equal protection clause of the Fourteenth Amendment); *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779 (1995) (holding amendment to Arkansas state constitution invalid as conflicting with Article I of the federal constitution); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (holding provision of Oregon state constitution violated due process clause of the Fourteenth Amendment); *Quinn v. Millsap*, 491 U.S. 95 (1989) (holding provision of Missouri state constitution violated federal constitution, and finding that Missouri Supreme Court's judgment upholding the provision reflected a significant misreading of this Court's precedent).

This Court should exercise its authority here. Without this Court's intervention, Florida's use of the conformity clause to ostensibly—but falsely—bind itself to this Court's mandates will result in Florida acting as a flawed "final arbiter[] of important issues under the federal constitution[.]" *National Tea Co.*, 309 U.S. at 557. This Court's intervention is necessary to prevent such an upending of federal authority, and to prevent Mr. Barwick from being executed due to Florida's systemically defective implementation of this Court's Eighth Amendment jurisprudence.

C. This case is a proper vehicle for consideration of the question presented

This case provides an excellent opportunity for this Court to determine the constitutional question presented, because this Court's jurisdiction to hear the case is not impeded by an independent or adequate state law ground.

Indeed, in utilizing the conformity clause to deny both of Mr. Barwick's Eighth Amendment claims below, the Florida Supreme Court's merits determinations were inextricably bound with federal issues and this Court's determinations. In reference to Mr. Barwick's claim that he should receive an exemption from execution via the Eighth Amendment due to a new scientific consensus related to juvenile brain development, the Florida Supreme Court's entire merits determination rested on its interpretation of federal law:

> [T]his Court lacks the authority to extend *Roper*. The conformity clause of article I, section 17 of the Florida Constitution…means that the Supreme Court's interpretation of the Eighth Amendment is both the floor and the ceiling for protection from cruel and unusual punishment in Florida, and this Court cannot interpret Florida's prohibition against cruel and unusual punishment to provide protection that the Supreme Court has decided is not afforded by the Eighth Amendment.
>
> Because the Supreme Court has interpreted the Eighth Amendment to limit the exemption from execution to those whose chronological age was less than eighteen years at the time of their crimes, this Court is bound by that interpretation and is precluded from interpreting Florida's prohibition against cruel and unusual punishment to exempt individuals eighteen or more years old from execution on the basis of their age at the time of their crimes. This Court simply does not have the authority to extend *Roper* to Barwick[.]

App. A at 18-19.

With regard to Mr. Barwick's claim that new objective indicia—in the form of state practice and legislation—reflect a societal consensus that evolving standards of decency warrant Mr. Barwick's exemption from execution due to his serious mental illness (including a severe neuropsychological disorder, lifelong cognitive deficits and brain damage, and a mental age much lower than his chronological age), the Florida Supreme Court stated:

> [L]ike Barwick's *Roper*-extension claim, under the Eighth Amendment conformity clause in article I, section 17 of the Florida Constitution, this Court must interpret Florida's prohibition against cruel and unusual punishment in conformity with decisions of the Supreme Court, which has limited the categorical ban announced in *Atkins* so that individuals with mental deficiencies other than intellectual disability are outside the scope of the ban. Just as this Court lacks the authority to extend *Roper* to individuals over the age of seventeen, it also lacks the authority to extend *Atkins* to individuals who, like Barwick, are not intellectually disabled as provided in *Atkins*.

Id. at 23-24.[4]

To the extent that the lower court found a procedural impediment to Mr. Barwick's entitlement to relief on these claims, those findings are incorrect. *See, e.g., infra*, at 27-33. But more importantly, the lower court did not *actually* rely on any adequate or independent state ground (such as a procedural or time bar) because it engaged in detailed merits rulings which are wholly inextricable from the federal question. In finding that it *had no authorization* to extend Eighth Amendment protections due to this Court's precedent, the Florida Supreme Court necessarily found that federal law required denial of Mr. Barwick's claims. *See Foster v. Chatman*, 578 U.S. 488, 499 n.4 (2016) ("[W]hether a state law determination is characterized as entirely dependent on, resting primarily on, or influenced by a question of federal law, the result is the same: the state law determination is not independent of federal law and thus poses no bar to our jurisdiction.") (cleaned up);

[4] Although the Florida Supreme Court also referenced its own "reiterat[ions]" that individuals without a specific intellectual disability diagnosis are not entitled to categorical exemption from execution under the Eighth Amendment, App. at A at 23, this does not constitute an adequate or independent state ground because the cases relied upon by the Florida Supreme Court either: (1) possess significantly distinguishable factual circumstances; or (2) were decided prior to this Court's instruction in *Hall* and its progeny that Eighth Amendment exemption determinations should be informed by views of the scientific community. *See, e.g., Hall v. Florida*, 572 U.S. 701, 710–11, 721–23 (2014).

see also Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (even when adequacy and independence of possible state law grounds are not clear from the opinion, "this Court will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.").

D. This issue is of great national importance

Florida's abdication, via the conformity clause, from Eighth Amendment consideration warrants this Court's intervention because it is dispositive to whether Mr. Barwick lives or dies. But the impact of leaving this issue unaddressed would extend far beyond harm to Mr. Barwick, and even beyond the potential harm to other similarly-situated individuals in Florida. Indeed, there are many other concerns underscoring the need for this Court's certiorari review.

First, Florida's use of the conformity clause to abdicate all responsibility for considering and perpetuating evolving standards of decency undermines bedrock principles of federalism and state autonomy dating as far back as the Founding. *See, e.g., Alden v. Maine*, 527 U.S. 706, 748 (1999) (referring back to "the founding generation" in declaring that "our federalism" requires states to be treated consistently "with their status as…joint participants in the governance of the Nation.").

It is virtually unquestioned among states and lower circuits that precepts of federalism empower states to provide higher "ceilings" of individual rights than the "floor" provided by the U.S. Constitution. *See, e.g.*, *State v. Griffin*, 339 Conn. 631, 690 (Conn. 2021) (discussing the "settled proposition that 'the federal constitution

sets the floor, not the ceiling, on individual rights'") (quoting *State v. Purcell*, 331 Conn. 318, 341 (Conn. 2019)); *Brown v. State*, 62 N.E.3d 1232, 1236-37 (Ind. 2016) (referencing the federal constitution as "the floor, not the ceiling, of individual rights" and stating that where "the protections of the federal and state constitutions are not co-extensive" the more protective standard must apply"); *Ark Encounter, LLC v. Parkinson*, 152 F.Supp.3d 880, 927 (E.D. Ky 2016) ("The federal Constitution may only be a floor and not a ceiling, but it is a floor nonetheless."); *Downey v. State*, 144 So.3d 146, 151 (Miss. 2014) ("[Supreme Court precedent] does not require Mississippi to follow the minimum standard that the federal government has set for itself…However, we are not allowed to abrogate or diminish clearly-articulated federal rights[.]"); *State v. Baldon*, 829 N.W.2d 785, 791 & n.1 (Iowa 2013) (The United States Supreme Court's jurisprudence "makes for an admirable floor, but it is certainly not a ceiling….The incorporation doctrine commands that we no longer use independent state grounds to sink below the federal floor."); *GE Commercial Finance Business Property Corp. v. Heard*, 621 F.Supp.2d 1305, 1309 (M.D. Ga. 2009) ("it is abundantly clear that states 'are free to extend more sweeping constitutional guarantees to their citizens than does federal law as federal constitutional law constitutes the floor, not the ceiling, of constitutional protection.'" (citing *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1269 (3d Cir. 1992)));

Even Florida, in non-Eighth Amendment contexts, takes this view:

> Federal and state bills of rights thus serve distinct but complementary purposes. The federal Bill of rights facilitates political and philosophical homogeneity among the basically heterogenous states by securing, as a uniform minimum, the highest common denominator of freedom that

> can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation.
>
> *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992).
>
> [T]he federal Constitution sets the floor, not the ceiling, and this Court retains the ability to interpret the right against self-incrimination afforded by the Florida Constitution more broadly than that afforded by its federal counterpart. *See, e.g., In re T.W.*, 551 So. 2d 1186, 1191 (Fla. 1989) ("State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law….[W]ithout [independent state law] the full realization of our liberties cannot be guaranteed." (quoting William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977))).

Rigterink v. State, 2 So. 3d 221, 241 (Fla. 2009) (*cert. granted, judgment vacated on other grounds sub nom., Florida v. Rigterink*, 559 U.S. 965 (2010)).

And, this Court has long supported the use of state action to provide greater protection than the federal constitution. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975) ("a State is free *as a matter of its own law* to impose [greater protections for individual citizens] than those this Court holds to be necessary upon federal constitutional standards") (emphasis in original); *Cooper v. State of Cal.*, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose [greater protections on individual rights] than required by the Federal Constitution if it chooses to do so"); *Brigham City v. Stuart*, 547 U.S. 398, 409 (2006) (Stevens, J., concurring) ("Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.").

Citing many of these cases, Justice Brennan reflected in 1977:

> [I]t is both necessary and desirable under our federal system – state courts no less than federal are and ought to be guardians of our liberties. But the point I want to stress here is that state courts cannot rest when they have afforded the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). He continued:

> [D]ecisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and members of the bar seriously err if they so treat them.
>
> * * *
>
> Adopting the premise that state courts can be trusted to safeguard individual rights, the Supreme Court has gone on to limit the protective role of the federal judiciary…our liberties cannot survive if the states betray the trust the Court has put in them.

Id. at 502-03; *see also id.* (stating a "confident[] conjecture that James Madison, Father of the Bill of Rights," would have agreed). This Court should grant review to enforce the expectation of robust state involvement in upholding our most precious national principles, such as the Eighth Amendment proscription on cruel and unusual punishment.

Second, Florida's practice of abdication obstructs important aspects of this Court's judicial function as it pertains to Eighth Amendment determinations, and hinders national progress related to evolving standards of decency. When this Court is faced with determinations regarding whether societal standards of decency have

evolved to the point of warranting additional Eighth Amendment protections, it looks to the actions of individual states, including their judicial practice. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002); *Roper v. Simmons*, 543 U.S. 551, 559-60, 565-66 (2005) (tallying, as part of evolving standards analysis, the number of states that have embraced or abandoned a particular death penalty practice). Thus, although the federal constitution does not *require* a state court to offer more protection in a particular case than this Court's jurisprudence has established, a state cannot *prohibit* itself wholesale from independently considering evolving standards of decency. By declaring itself unauthorized to engage in this independent action, Florida has abdicated its "critical role in advancing protections and providing [this] Court with information that contributes to an understanding" of how Eighth Amendment protections should be applied. *Hall v. Florida*, 572 U.S. 701, 719 (2014). This Court should grant review so that it can provide guidance for Florida to correct that ill.

Third, Florida's continued refusal to confer any independent judgment in the Eighth Amendment context would cut against its own decree that state courts are meant to "function daily as the prime arbiters of personal rights[,]" *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992), and would require this Court to become a court of first instance in all Florida cases involving even arguably novel Eighth Amendment issues. Florida's conformity clause conflicts with this Court's recent Eighth Amendment decisions holding that views of the scientific community must inform determinations of the Eighth Amendment's evolving standards of decency and who is

eligible for the death penalty. *See, e.g., Hall v. Florida*, 572 U.S. 701 (2014); *see also Moore v. Texas*, 581 U.S. 1 (2017). Put more bluntly, Florida's adherence to the conformity clause means Florida refuses to consider views of the scientific community, because it refuses to consider *anything* in the context of Eighth Amendment exemption claims, save for whether this Court has already explicitly required protections in a factually identical case (i.e., a conclusive intellectual disability diagnosis recognized by the courts; or chronological age under 18 at the time of the capital crime).

And, tellingly, Florida has made abundantly clear—through its legislative history and judicial decisions related to the conformity clause—that nothing, save for this Court's intervention, will compel it to engage in the aforementioned considerations. Florida's misguided self-limitation forestalls "one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Chandler v. Florida*, 449 U.S. 560, 579 (1981) (quoting *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Thus, with no state-recognized avenue to effect Eighth Amendment progress in the Florida state courts, this Court—if it does not intervene here—will be forced into the undesirable and untenable position of being a court of first instance for any Eighth Amendment issue arising out of Florida that is not factually and legally identical to this Court's prior holdings.

E. Without this Court's intervention, Florida will continue to routinely violate the Eighth Amendment and maintain a constitutionally impermissible outlier status with regard to evolving standards of decency and death penalty jurisprudence

Florida's self-imposed prohibition against even the slightest consideration of whether Eighth Amendment protections should be extended to an individual not already exempted from execution under this Court's precedent violates *Trop* and its Eighth Amendment progeny. *See, e.g., Hall*, 572 U.S. at 708 ("The Eighth Amendment's protection of dignity…[affirms] that the Nation's constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force"); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) ("Evolving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule"); *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) ("the [Eighth] Amendment has been interpreted in a flexible and dynamic manner"); *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) ("Central to the application of the [Eighth] Amendment is a determination of contemporary standards regarding the infliction of punishment"); *see also Weems v. United States*, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. Therefore [a constitutional principle], to be vital, must be capable of wider application than the mischief which gave it birth.").

As Florida itself championed the importance of independent state judgment and the maintenance of state autonomy to more robustly champion individual rights than the federal constitution (should the state so choose), Florida's use of the conformity clause in the Eighth Amendment context is all the more egregious. Florida

is not simply declining to extend particular protections, and justifying that decision with the fact that they are not required under the federal constitution. Florida is weaponizing this Court's judicial restraint and respect for state sovereignty by proffering them as justification to wholly ignore legitimate Eighth Amendment claims.

Although this is shocking to the conscience, it is not altogether surprising. Florida has a demonstrated history of unconstitutionality and outlier status related to its implementation of the death penalty and punishment in general, and its standards of decency have long since lagged behind other states. Florida's flawed punishment system has necessitated this Court's intervention on numerous occasions. *See, e.g., Hall v. Florida*, 572 U.S. 701, 704 (2014) (this Court holding as unconstitutional Florida's "rigid rule" withholding Eighth Amendment protection from individuals who had valid claims for categorical exemption from execution); *Hurst v. Florida*, 577 U.S. 92, 94 (2016) (this Court holding Florida's death sentencing scheme unconstitutional); *Graham v. Florida*, 560 U.S. 48, 76 (2010) (this Court discussing the "flaws in Florida's [punishment] system" in finding that Florida's imposition of life without parole was an unconstitutional sentence for juveniles who committed nonhomicide crimes). Even in the wake of this Court's instruction, Florida continuously attempts to circumvent vital federal constitutional protections, such as this Court's ruling in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), that the Eighth Amendment forbids imposition of the death penalty in cases of child rape with no

homicide;[5] and the unanimous capital sentencing jury requirement previously implemented in response to this Court's decision in *Hurst*.[6]

Florida's draconian state related to science, punishment, mental health, and moral culpability is further illustrated in this case by the Florida Supreme Court's treatment of Mr. Barwick's serious mental health issues. When discussing Mr. Barwick's claim that his catastrophic, lifelong vulnerabilities (including a severe neurodevelopmental / neurocognitive disorder; organic brain damage predating his birth; severe cognitive deficits; adaptive deficits rising to the level of those found in intellectual disability diagnoses; extreme trauma at the hands of his caretakers; and low mental age as compared to his chronological age) warranted consideration of exemption from execution under the Eighth Amendment, the Florida Supreme Court mocked Mr. Barwick's "trifecta of vulnerabilities".[7] And, by hiding behind the conformity clause, it failed to even acknowledge—much less consider—Mr. Barwick's arguments that objective indicia of state practice justifies exempting him from execution on account of his serious mental illness. Florida is not constitutionally *obligated* to exempt Mr. Barwick from execution due to the fact that at least 38 states

[5] *See, e.g.,* 2023 Florida House Bill No. 1297, Florida One Hundred Twenty-Fifth Regular Session, https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=78093 (last accessed: April 30, 2023).

[6] *See, e.g.,* 2023 Florida Senate Bill No. 450, Florida One Hundred Twenty-Fifth Regular Session, https://www.flsenate.gov/Session/Bill/2023/450 (last accessed: April 30, 2023).

[7] Basic reading comprehension principles indicate that this was not an attempt to directly quote language from Mr. Barwick's brief, as no citation was given for the quotation marks, and no substantive acknowledgement was made by that Court regarding Mr. Barwick's devastating impairments.

have rejected the execution of seriously mentally ill individuals[8]—but Florida is not entitled to completely disregard the information before it.

Florida's past and present state action demonstrates that if it is allowed to maintain its current practice of blindly freezing any and all Eighth Amendment determinations in lockstep with this Court's explicit holdings, Florida will remain an unenlightened outlier and will not progress in a maturing society.

F. Conclusion

Without this Court's intervention, Florida's actions will "risk[] turning the Federal Constitution into a ceiling, rather than a floor, for the protection of individual liberties." *Kansas v. Carr*, 577 U.S. 108, 132 (2016) (Sotomayor, J., dissenting). That risk will have far-reaching implications outside of Florida. And, in Florida, that risk will manifest as reality. Evolving standards of decency—the living breath of the Eighth Amendment—will be stilled.

II. A Scientific Consensus Has Established that Executing Individuals Under 21 Violates Evolving Standards of Decency

Eighteen years ago, this Court decided *Roper v. Simmons*, which held that the death penalty was categorically prohibited for individuals who were under age eighteen when they committed their capital offenses. 543 U.S. 551, 578 (2005). By holding that the Eighth Amendment protected all juveniles from execution, this Court overturned its precedents of *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and

[8] *See, e.g.*, Death Penalty Information Center, State by State, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last accessed: April 21, 2023); Death Penalty Information Center, Execution Database, https://deathpenaltyinfo.org/executions/execution-database (last accessed: April 21, 2023).

Stanford v. Kentucky, 492 U.S. 361 (1989), which had previously maintained the constitutional line at sixteen.

The *Roper* Court's holding was not based on a radical breakthrough in understanding of the adolescent brain. On the contrary, the commonsense reality that a juvenile's brain differs from an adult's—and that those differences warranted special consideration by the legal system—was already broadly known by scientists, courts, and laypeople alike when *Thompson* and *Stanford* were decided. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. . . . Even the normal 16-year-old customarily lacks the maturity of an adult."). Rather, what had changed in the sixteen years between *Stanford* and *Roper* was the determination, in both law and science, of when those maturational differences ceased to be legally significant. It was a newly established *interpretation* of steadily accruing data, not altogether new data itself, as the Court readily acknowledged. *See Roper*, 543 U.S. at 571 ("We conclude **the same reasoning** [as *Thompson*] applies to all juvenile offenders under 18.") (emphasis added).

After *Roper*, neurobiologists and psychologists continued to study the adolescent brain and the timeline on which it develops. Years of research and cross-disciplinary studies universally pointed towards an inescapable conclusion: "[T]here is no neuroscientific bright line regarding brain development that indicates the brains of 18-to-20-year-olds differ in any substantive way from those of 17 year-olds."

PCR3. 427. This realization prompted the American Psychological Association (hereinafter APA) to overwhelmingly pass a resolution in August 2022 calling for a prohibition on executing late adolescents—those who, like Mr. Barwick, were under age twenty-one when they committed their capital crimes.[9] *See* PCR3. 427-31.

The adoption of the APA resolution was a key turning point in what had been an ongoing discussion among psychologists and other scientists. As "the leading scientific and professional organization representing psychology in the United States," PCR3. 427, the APA's endorsement signaled that a proposition that had previously been up for debate had crystallized into a near-universal scientific consensus after the gradual accumulation of evidence pointed towards the conclusion that late adolescents are largely indistinguishable from juveniles for criminal-sentencing purposes.

The APA's reputation as a valuable participant at the forefront of the scientific community is firmly entrenched, and its policy positions historically have been given great weight. The Court has tacitly recognized this fact by frequently turning to the APA's research when nuanced psychological questions have arisen across a broad spectrum of cases. *See, e.g.*, *Moore v. Texas*, 139 S. Ct. 666, 669, 670 (2019) (referencing APA *amicus* brief); *Moore v. Texas*, 581 U.S. 1, 17 (2017) (same); *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015) (same); *Hall v. Florida*, 572 U.S. 701, 710 (2014) (same); *Perry v. New Hampshire*, 565 U.S. 228, 244, 245 (2012) (same);

[9] *APA RESOLUTION on the Imposition of Death as a Penalty for Persons Aged 18 Through 20, Also Known as the Late Adolescent Class*, American Psychological Association (August 2022), https://www.apa.org/about/policy/resolution-death-penalty.pdf.

Panetti v. Quarterman, 551 U.S. 930, 962 (2007) (same); *Clark v. Arizona*, 548 U.S. 735, 775 n.43 (2006) (same); *Sell v. United States*, 539 U.S. 166, 181 (2003) (same); *Maryland v. Craig*, 497 U.S. 836, 855, 857 (1990) (same); *Washington v. Harper*, 494 U.S. 210, 214, 227, 230 (1990) (same); *Kentucky v. Stincer*, 482 U.S. 730, 746 n.20 (1987) (same); *see also Bostock v. Clayon Cnty., Ga.*, 140 S. Ct. 1731, 1756 n.6, 1761 n. 14, 1772 n.29, 1773 n.31 (2020) (Kavanaugh, J., dissenting) (same).

And nowhere has the APA's role been more apparent than in this Court's juvenile-sentencing precedent, as its research has been repeatedly referenced when discussing the constitutionally significant distinctions between the juvenile and adult brain that justify heightened safeguards in juvenile criminal sentencing. *See, e.g.*, *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 68, *Miller v. Alabama*, 567 U.S. 460, 472 n. 5 (2012).

A critical component of a resolution such as the APA's is that it will be based upon individual scientific propositions that pre-existed the resolution itself and form the basis of the consensus. For example, the APA resolution noted that in the years since *Roper* "much more extensive research has been conducted in developmental science . . . including research on both the structure and function of brain development" and on the maturation process of "the key brain systems" that govern a person's decision-making under stressful circumstances, which has shown that these systems continue to develop through at least age twenty. PCR3. 428. The resolution also discussed society's increasing recognition of this neurobiological reality, including how many states have enacted legislation prohibiting individuals

under age twenty-one from engaging in certain conduct that can lead to "highly stressful and extremely arousing circumstances," where the gap in maturity between late adolescents and adults is at its peak. PCR3. 428. In isolation, each of the statements contained within the APA resolution is insufficient to show that late adolescents are indistinguishable from juveniles. But, when considered in tandem, they "significantly add[] to the quantity and quality of existing scientific knowledge," and lead to a fundamentally different conclusion than what came before. PCR3. 428.

The APA's methodology is consistent with how the *Roper* Court reached its consensus that juveniles should be categorically exempt from the death penalty. The Court did not rely on one single source to support that holding. Instead, it used a compilation of multiple studies spanning decades—from as far back as 1968—and addressing various facets of the differences between juveniles and adults, to **collectively** do so. *See, e.g.*, *Roper*, 543 U.S. at 566, 569, 570, 573 (citing sources from 1968, 1976, 1992, 1994, 1997, 1999, 2000, 2003).

Such an incremental striving towards new conclusions on the back of prior knowledge is a bedrock principle of the scientific process and is in large part why scientific evidence is seen as so reliable—and, conversely, is why courts strictly guard against the admission of unreliable science, the weight and imprimatur of which could mislead a factfinder to draw erroneous conclusions. *See Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 589 (1993) ("[A]ny and all scientific testimony or evidence admitted [must be] not only relevant, but reliable."). Scientific progress, which tends to build on itself in order to generate a consensus, should go hand-in-hand with the

Eighth Amendment, which this Court has recognized "is not static" and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Yet the Florida courts have routinely taken the opposite view and restricted the availability of gradually emerging scientific principles when demarcating the scope of litigants' constitutional rights under the Eighth Amendment. *See, e.g.*, *Foster v. State*, 258 So. 3d 1248, 1253 (Fla. 2018) (rejecting Eighth Amendment claim that relied on new scientific research); *Branch v. State*, 236 So. 3d 981, 984-87 (Fla. 2018) (same); *Schwab v. State*, 969 So. 2d 318, 325 (Fla. 2007) (same). In Mr. Barwick's case, they have done so again by insisting that, because some pieces of information contained in the APA resolution were already known to the scientific community in isolation, the c*ollective* body of evidence they generated—and the resolution that overwhelmingly passed as a result of its cumulative impact—has no legal value in determining the existence of a scientific consensus. App. A at 13-14, 17-18. But that squarely contravenes the *Roper* Court's blueprint for determining when a class of individuals is categorically exempt from execution under the Eighth Amendment's evolving-decency standard, which heavily drew from the APA's input and other "developments in psychology and brain science," *Graham*, 560 U.S. at 68, when looking for "objective indicia of consensus" against the juvenile death penalty. *Roper*, 543 U.S. at 564.[10] Without this Court's intervention, the persistent refusal of Florida

[10] Florida courts also expressly disregard the second step in the process this Court outlined in *Roper* for deciding when a categorical exemption to the death penalty applies; namely, "exercis[ing] [its] own independent judgment" in analyzing these objective indicia and deciding whether a punishment is disproportionate for a particular class of individuals. *Roper*, 543 U.S. at 564. Here, the state courts

courts to engage with scientific evidence when setting the boundaries of the Eighth Amendment's protections is likely to continue, allowing Mr. Barwick and others like him to be sentenced to death and executed despite undisputed evidence of their diminished culpability.

CONCLUSION

The Court should grant Mr. Barwick's application for a stay of execution and grant a writ of certiorari to review the decision below.

Respectfully submitted,

KARIN L. MOORE
Counsel of Record
DREW A. SENA
Office of the Capital Collateral
Regional Counsel—North
1004 DeSoto Park Drive
Tallahassee, Florida 32301
(850) 487-0922
karin.moore@ccrc-north.org
drew.sena@ccrc-north.org

MAY 1, 2023

ruled that they could not grant Mr. Barwick any greater constitutional protections than this Court already has. Functionally, the courts view themselves as barred from exercising their independent judgment on this issue.