IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 89824

ROBERT YBARRA, JR.,

Appellant,

v.

TERRY ROYAL, WARDEN,

Respondent.

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Appeal From
The Seventh Judicial District, White Pine County
The Honorable Steve L. Dobrescu, District Judge

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT

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Docket 89824 Document 2025-22516

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Pursuant to Rule 29(c) of the Nevada Rules of Appellate Procedure, the American Liberties Union of Nevada (ACLUNV) and the American Civil Liberties Union (ACLU), respectfully move for leave to file a brief as *amicus curiae* in support of Appellant. NRAP 29(a) authorizes an *amicus curiae* to file a brief "if accompanied by the written consent of all parties." Both Appellant and Respondent, through their respective counsel, have consented to the filing of the proposed brief submitted with this motion. Writings confirming parties' consent accompany the proposed brief, attached as EXHIBIT A and EXHIBIT B, as required by NRAP 29(a).

DATED: May 20, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amicus* Brief electronically with the Nevada Supreme Court on May 20, 2025. Electronic Service of the foregoing *Amicus* Brief shall be made in accordance with the Master Service List as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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TERRY ROYAL, WARDEN,

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Appeal From
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AMICI BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NEVADA AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF REVERSAL

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Statement of Identity, Interest, and Authority of *Amici*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in the federal and state constitutions. The ACLU engages in litigation and advocacy protecting the rights and liberties of all people, including individuals with physical and mental disabilities, as well as individuals involved in the criminal justice system. As part of this mission, the ACLU works to ensure that people with severe mental illness are not executed unjustly and contrary to their state constitutional protections, and its attorneys have considerable expertise in the death penalty, disability rights, and state constitutional challenges.

The American Civil Liberties Union of Nevada (ACLUNV) is the ACLU's state affiliate with over 7,000 members dedicated to protecting and defending the civil rights and civil liberties granted to Nevadans by both the Nevada and United States Constitutions. The ACLUNV's work encompasses protecting the constitutional rights of those subject to a sentence of death.

The State of Nevada has consented to the filing of this brief, which is being filed alongside a motion seeking leave of the court to file this brief per NRAP 29(a).

Disclosure Statement Pursuant to NRAP 26.1

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the justices of this court may evaluate possible disqualification or recusal.

Amici have no parent corporations and no publicly held company owns 10% or more of their stock.

The following law firms representing *amici* have appeared and/or are expected to appear in this court:

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Statement of the Case and Introduction

Even though the existence of a mental illness is an inherently mitigating circumstance for purposes of capital punishment, the opposite is often true in practice. Instead, capital defendants who live with severe mental illness, like Mr. Ybarra, are *more* likely to be sentenced to death. This is because symptoms of their mental illness, especially when those symptoms are not taken into account, often impair trial and appellate proceedings, making the reliability in capital sentencing required under the Nevada Constitution impossible to accomplish. Mr. Ybarra's case presents this Court with an opportunity to address this injustice both by recognizing that the execution of a capital defendant with serious mental illness violates this state's protection from cruel or unusual punishment and by establishing a categorical exemption from execution for this population.

Amici join Appellant Robert Ybarra, Jr. in showing that, in addition to the protection the Eighth Amendment affords him, Article 1, Section 6 of the Nevada Constitution prohibition on cruel or unusual punishment precludes the execution of all those with severe mental illness, including Mr. Ybarra.

First, the "cruel or unusual" provision of the Nevada Constitution, Article 1, Section 6, provides broader protection than its Eighth Amendment counterpart. This conclusion is compelled by the plain reading of the text, precedent from this Court interpreting similar language, persuasive precedent from other state courts

interpreting identical provisions in their state constitutions, and a historical analysis of the provision.

Second, the broader protection of the Nevada Constitution in turn mandates a categorical bar from execution for capital defendants with severe mental illness. This position finds support in the U.S. Supreme Court's categorical bar against execution for juveniles and those with intellectual disabilities, the current treatment of those with the most severe form of mental illness under the law, and evidence of evolving standards of human decency, particularly with relation to mental illness. While this brief illustrates that executing people with severe mental illness is both cruel and unusual, this Court need only find that such executions are either cruel or unusual to justify the requested categorical bar under the Nevada Constitution. Therefore, this Court should grant Mr. Ybarra's requested relief.

Argument

I. ARTICLE 1, SECTION 6 OF THE NEVADA CONSTITUTION PROVIDES GREATER PROTECTION THAN THE EIGHTH AMENDMENT.

There is no question that the rights afforded by the federal constitution "establish[] a minimal national standard" which serves as a floor upon which the state may build in providing its citizens even greater protection. *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 414 (2001). Through Article 1, Section 6 of its Constitution, Nevada has done just that, extending the Eighth Amendment's protection from "cruel and unusual punishment" to reach punishments that are either cruel *or* unusual.

Just last year, in *Floyd v. Gittere*, the appellant cited Nevada's "cruel or unusual" provision to argue that his fetal alcohol spectrum disorder exempted him from the death penalty. 559 P.3d 1275, No. 83436, 2024 WL 4865438 (Nev. Nov. 21, 2024) (unpublished). The Court did not address the "cruel or unusual" distinction in that case because, unlike here, the appellant had "offer[ed] no meaningful analysis of the state provision, what additional protection it might afford, or what different analytical framework should be used to address challenges under the state provision." *Id.* at *7, n.1. But meaningful analysis shows that the distinction between "cruel *and* unusual" and "cruel *or* unusual" is a substantive one. The plain language of this provision makes this clear, as does the treatment of similarly worded

provisions in other states, and this Court's dedication to zealously safeguarding the greater rights enshrined in Nevada's Constitution. All of these tools of construction make clear that the "cruel or unusual" provision offers greater protection than the federal standard, such that the execution of those with severe mental illness merits more rigorous scrutiny under the Nevada Constitution than under the Eighth Amendment.

A. A plain reading of Article 1, Section 6 demonstrates that the "cruel or unusual" provision of Nevada Constitution is more protective than the Eighth Amendment.

In determining the meaning of any provision of the Nevada Constitution, courts must "give that provision its plain effect, unless the language is ambiguous." *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 645–46 (2007). Language is considered ambiguous only when "it is susceptible to 'two or more reasonable but inconsistent interpretations.'" *Id.* (quoting *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599 (1998)). "[W]hen a constitutional provision's language is clear on its face, [courts] may not go beyond that language in determining the framers' intent." *Id*. at 646. Additionally, courts must construe "each sentence, phrase, and word," *Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 117 Nev. 835, 841 (2001), in such a way "that gives meaning to all of the terms and language." *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 274 (2010).

Article 1, Section 6 bars the State from inflicting "cruel *or* unusual"

punishments, Nev. Const. art. 1, § 6 (emphasis added), while the Eighth Amendment—which predates section 6 by 73 years—bars punishments that are "cruel *and* unusual." U.S. Const. amend. VIII (emphasis added). The Nevada Constitution drafters' selection of the disjunctive "or" rather than the conjunctive "and" is significant, unambiguous, and requires a plain meaning analysis. Such analysis yields only one conclusion: the Nevada Constitution, unlike the Eighth Amendment, prohibits punishment that is *either* cruel or unusual. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) ("Under the conjunctive/disjunctive canon, *and* combines items while *or* creates alternatives."). This distinction is not trivial, as Eighth Amendment claims are regularly dismissed where the challenged punishment is not deemed *both* cruel *and* unusual. *See, e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (upholding severe mandatory penalties under the Eighth Amendment that, although cruel, are not unusual); *see also State v. Vang*, 847 N.W.2d 248, 263 (Minn. 2014) ("This difference in wording is not trivial because the United States Supreme Court has upheld punishments that, although they may be cruel, are not unusual.") (internal citation and quotations omitted).

This reading of section 6 aligns with this Court's consistent reading of the word "or" with a plain, disjunctive meaning. *See, e.g.*, *Spencer v. Klementi*, 136 Nev. 325, 466 P.3d 1241, 1245 n.3 (2020) ("Because the three bases for malicious-

prosecution liability are joined by the disjunctive *or*, a party need prove only one of them to succeed on a defamation claim." (emphasis in original)); *State v. Catanio*, 120 Nev. 1030, 1033–34 (2004) (finding the term 'or' in the statutory definition of lewd acts "unambiguous" in meaning that either of the conditions separated by the term constitute a lewd act); *Coast Hotels & Casinos, Inc. v. Nevada State Labor Comm'n*, 117 Nev. 835, 841 (2001) (noting that the use of the word "or" to separate phrases signals that the latter phrase is an "alternative to, and is not conditioned by, the preceding clause"); *Anderson v. State*, 109 Nev. 1129, 1134 (1993) ("[T]he legislature used the disjunctive 'or,' and not the conjunctive 'and,' when it defined 'under the influence,' thereby requiring one or the other, but not necessarily both."); *Jensen v. Sheriff, White Pine Cty.*, 89 Nev. 123, 125 (1973) ("The statute spells out the several specific acts in the disjunctive, and any one of them is sufficient to taint the act with criminality."). Similarly, the federal district court in this state has already held that section 6 "forbids punishments either 'cruel or unusual,'" explicitly noting that "[t]he terms are used disjunctively[.]" *Mickle v. Henrichs*, 262 F. 687, 689 (D. Nev. 1918) (holding the Nevada Constitution prohibits forced sterilization as unconstitutionally *unusual* punishment).

Other states' efforts to replace the "or" with "and," and vice versa, in their own constitutional provisions further demonstrate that the textual difference carries substantive significance. The Florida Supreme Court accurately articulated this

significance in *Armstrong v. Harris*,[1] when it overturned the results of a statutory ballot measure that "[r]equire[d] construction of the prohibition against cruel and/or unusual punishment to conform to United States Supreme Court interpretation of the Eighth Amendment" because the measure failed to make clear the radical change such a change would entail. 773 So. 2d 7, 17 (Fla. 2000):

> [T]he federal Constitution . . . represents the floor for basic freedoms; the state constitution, the ceiling. In the present case, by changing the wording of the Cruel or Unusual Punishment Clause to become "Cruel *and* Unusual" and by requiring that our state Clause be interpreted in conformity with its federal counterpart, the proposed amendment effectively strikes the state Clause from the constitutional scheme. Under such a scenario, the organic law governing either cruel or unusual punishments in Florida would consist of a floor (i.e., the federal constitution) and nothing more.

Id. at 17. Therefore, the electorate's vote to conform to the Eighth Amendment constituted a vote to "eliminate rights or protections already in existence" under the state constitution, *id*. at 18, and would result in a "loss or restriction of an independent fundamental state right" with the appearance of creating a new right. *Id*. at 17 (quotation omitted).

A plain reading of the text of Article 1, Section 6 thus demonstrates that the

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[1] After the decision in *Armstrong*, Florida amended the relevant section of its state constitution to say "and" rather than "or". However, since Nevada's constitution continues to use "or" rather than "and", the reasoning in *Armstrong* remains instructive.

Nevada Constitution is more protective than the Eighth Amendment. This conclusion is supported by caselaw from this Court repeatedly and consistently interpreting the meaning of the word "or" in other contexts, as well as persuasive precedent from other courts reading their similarly worded cruel or unusual provisions in this manner. *See also infra* § I (B) (collecting state cases with similar analysis).

B. Other states' precedent supports interpreting Nevada's "cruel or unusual" provision as more protective than the Eighth Amendment, including in the capital punishment context.

An expansive reading of this State's prohibition on cruel or unusual punishment is supported by precedent from other states.

As an initial matter, even in states whose constitutions use language *identical* to the Eighth Amendment, some high courts have held that their state protections against impermissible punishment are nevertheless more robust, particularly in the context of capital punishment. *See, e.g.*, *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008) (finding the "cruel and unusual punishment" clause under the Nebraska Constitution prohibits death by electrocution and distinguishing U.S. Supreme Court cases finding this method of execution permissible under the Eighth Amendment); *Dawson v. State*, 554 S.E.2d 137, 144 (Ga. 2001) ("[W]e hold that death by electrocution, with its specter of excruciating pain and its certainty of cooked brains

and blistered bodies, violates the prohibition against cruel and unusual punishment in Art. 1, Sec. 1, Par. XVII of the Georgia Constitution.").

Other states that—like Nevada—use constitutional language distinct from federal law have relied on those textual differences to support more robust protection from impermissible punishment. As set forth by the Supreme Court of Michigan, for example, "a bar on punishments that are either cruel *or* unusual is necessarily broader than a bar on punishments that are both cruel *and* unusual." *People v. Parks*, 510 Mich. 225, 242 (2022) (emphasis in original)); *see also State v. Perry*, 610 So.2d 746, 762 (La. 1992) (noting that Louisiana's prohibition on cruel or unusual punishment "affords no less, and in some respects more, protection than that available to individuals under the Cruel and Unusual Punishments Clause of the Eighth Amendment"). Even the United States Supreme Court, in interpreting the Federal Constitution, has expressly acknowledged that state constitutions often have either "identical or more expansive wording (*i.e.*, 'cruel *or* unusual')." *Harmelin*, 501 U.S. at 983 (parentheses and emphasis in original).

Some sister courts interpreting a "cruel or unusual" provision have further explained the role that each adjective plays in assessing the validity of a given.[2]

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[2] This, of course, includes states, such as Washington, whose constitutions forbid "cruel punishment" without mention of "unusual." *See State v. Bassett*, 192 Wash. 2d 67, 80 (2018) (finding the Washington constitution offers broader

When Massachusetts found its death penalty violated its own "cruel *or* unusual" clause, it explicitly decided to concentrate on one condition but not the other. *Dist. Attorney for Suffolk Dist. v. Watson*, 381 Mass. 648, 661 (1980). Similarly, Minnesota courts "separately examine whether the sentence is cruel and whether it is unusual," with the former inquiry focusing on "the proportionality of the crime to the punishment" and the latter on "whether the punishment comports with the evolving standards of decency that mark the progress of a maturing society." *State v. Hassan*, 977 N.W.2d 633, 645 n.2. (Minn. 2022) (Chutich, J., concurring).

After determining that their state constitutions provide broader protections than the Eighth Amendment through any of the above reasoning, sister states have then used these broader protections to shield their citizens from state actions which contravene their standards of decency. For some states, this has meant the invalidation of capital punishment altogether. *See, e.g.*, *State v. Gregory*, 192 Wash. 2d 1, 19 (2018) ("[W]e strike down Washington's death penalty as unconstitutional under article 1, section 14."); *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972) (finding "that the death penalty may no longer be exacted in California consistently with Article 1, Section 6, of our Constitution"), *superseded by constitutional*

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protection "because it prohibits conduct that is merely cruel; it does not require that the conduct be both cruel and unusual").

amendment, Cal. Const., art. I, § 27; *State v. Santiago*, 122 A.3d 1, 73 (Conn. 2015) ("[C]apital punishment also violates article first, §§ 8 and 9, of the Connecticut constitution because it no longer serves any legitimate penological purpose."); *Watson*, 381 Mass at 665 (finding "the death penalty is unconstitutionally cruel under art. 26 of the Declaration of Rights"). Others have continued to allow executions but have restricted the government from acting in cruel *or* unusual ways that are permitted under federal Eighth Amendment caselaw. *See, e.g.*, *State v. Perry*, 610 So. 2d 746, 762 (La. 1992) (rejecting, on state law grounds, the government's proposal to medicate person with mental illness so that he could be constitutionally executed).

And for Tennessee and Georgia, finding broader protections in their state constitutions led them to create a categorical ban on executing those with intellectual disabilities even before the U.S. Supreme Court reached this same conclusion under the Eighth Amendment. *See Van Tran v. State*, 66 S.W.3d 790, 804-806 (Tenn. 2001) (holding that executing individuals with intellectual disabilities is "grossly disproportionate" under article 1, § 16 of the Tennessee Constitution); *Fleming v. Zant*, 386 S.E.2d 339, 343 (Ga. 1989) (extending recent statutory protection against death sentences in new trial cases to all offenders based on Georgia's "constitutional guarantee against cruel and unusual punishment"). In a similar fashion, the broader protections of Nevada's constitution provide an opportunity for this Court to assess

current standards of decency and to develop its state constitutional law in relation to the execution of those with severe mental illness.

C. History and state-specific context further support a broader, more protective, reading of the "cruel or unusual" provision.

Alongside the Constitution's plain text and the protections afforded by sister states, the history and context surrounding the provision itself, as well as Nevada's general history of protecting individual rights, support interpreting this State's "cruel or unusual" provision more broadly than the federal standard.

1. History of the "cruel or unusual" provision

To the extent necessary, resort to section 6's history likewise demonstrates that the Nevada Constitution provides broader protection than the Eighth Amendment.

This Court has previously turned to precedent from other states to interpret provisions in Nevada's constitution, particularly when the provision in question was expressly modelled on language from the other states' constitution. *See, e.g., Zahavi v. State*, 131 Nev. 51, 62 n.5 (2015) ("find[ing] cases interpreting [article 1, section 22] of the Indiana Constitution informative" because article 1, section 14 of the Nevada Constitution had its origins in Indiana's parallel provision). This is particularly true regarding California, from which much of the early Nevada population, including 29 of the 39 members of the 1863 Constitutional Convention, came. *See* Andrew Marsh, *Official Report of the Debates and Proceedings in the*

Constitutional Convention of the State of Nevada 14 (Eastman 1866) (hereinafter Marsh, *Debates and Proceedings*) ("[T]his Territory is peopled almost exclusively by Californians—by men that have lived and acquired property there for years past— who have lived under and are acquainted with the Constitution of that State as it has been construed from time to time by the Supreme Court of that State."). Thus, Nevada relied on California's constitution for much of its own, including in the construction of Article 1, Section 6 of the Nevada Constitution

When first incorporating California's "cruel or unusual" clause into Nevada's constitution in 1863, the "or" provision was "read and adopted" as is without amendment or debate. This is true even though he Eighth Amendment's ban on "cruel *and* unusual" punishment had existed for 73 years at the time Nevada adopted its state constitution. This further demonstrates the Nevada drafters' intent to use disjunctive phrasing to abolish punishments that are cruel only, along with those that are unusual only.

In *People v. Anderson*, the California Supreme Court gave the disjunctive "or" term "its ordinary meaning" and held that punishments that are either cruel or unusual are prohibited. 493 P.2d 880, 885–86 (1972) (superseded by Cal. Const., art.

1, § 27).[3] Moreover, the court flatly rejected the suggestion that "the reach of the Eighth Amendment and that of Article 1, Section 6, are coextensive, and that the use of the disjunctive form in the latter is insignificant." *Id.* at 883. This Court should likewise exercise its duty to interpret and apply the Nevada Constitution to Mr. Ybarra's case, and hold that, unlike the Eighth Amendment, Article 1, Section 6 bars punishments that are *either* cruel *or* unusual.

2. Nevada's history of protecting individual rights

This Court has also repeatedly discharged its duty to independently interpret and apply this state's constitution and "expand the individual rights of [its] citizens under state law beyond those provided under the Federal Constitution." *State v. Bayard*, 119 Nev. 241, 246 (2003). In *Bayard*, this Court declined to follow the Fourth Amendment precedent set out by the U.S. Supreme Court in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), and instead relied on article 1, section 18 of the Nevada Constitution to adopt a stricter standard governing when a police officer may arrest a person suspected of a mere traffic offense. *Bayard*, 119 Nev. at 247. While the Fourth Amendment only requires probable cause that the suspect has committed the offense, *id*. at 244 (citing *Atwater*, 532 U.S. at 354), the Nevada test requires this

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[3] Although the voters of California subsequently amended the words of their state constitution by referendum, rendering *Anderson*'s analysis inapplicable going forward in California, *Anderson*'s textual analysis remains a model for this Court.

probable cause in addition to "circumstances that require immediate arrest," *id*. at 247 (emphasis added). Thus, the Nevada Constitution provides greater protection from this particular government intrusion.

This Court has also found broader protections in the Nevada Constitution to correct prosecutorial misconduct. *See, e.g.*, *Thomas v. Eighth Judicial Dist. Court in and for Cty. of Clark*, 133 Nev. 468, 474 (2017) (declining to follow, on state constitutional grounds, *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982), and instead holding that the double-jeopardy "protections of article 1, section 8 of the Nevada Constitution also attach . . . when a prosecutor intentionally proceeds in a course of egregious and improper conduct that causes prejudice to the defendant which cannot be cured by means short of a mistrial"); *Roberts v. State*, 110 Nev. 1121, 1131-32 (1994) (declining to follow, on state constitutional grounds, *United States v. Bagley*, 473 U.S. 667, 674 (1985), "instead constru[ing] the due process clause in the Nevada Constitution, *see* Nev. Const. art. 1, § 8, to require a standard more favorable to the accused" when a prosecutor suppresses exculpatory evidence), *overruled on other grounds Foster v. State*, 116 Nev. 1088 (Nev. 2000). The same is true for this Court's implementation of restrictions on governmental takings. *See, e.g.*, *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 661-62, 675 (2006) (relying on textual differences between the Nevada Constitution and Fifth Amendment in finding broader state protection that requires compensation *prior* to a government taking).

This history reflects an oft-repeated recognition that the Nevada Constitution, written to address the concerns of Nevada citizens and tailored to Nevada's unique regional location, is a source of protection for individual rights that is independent of and supplemental to the protections provided by the Federal Constitution. As concerning as are illegal searches and seizures, prosecutorial misconduct, and unlawful governmental takings, the need to check government action against the greater protections enshrined in Nevada's Constitution rises to its zenith when the State seeks to end human life as a criminal punishment. Both the structure of our federalist system and the dictates of the state constitution compel this Court to exercise primary oversight over Nevada's capital punishment system, including as it is applied to those with severe mental illness.

II. EXECUTING PEOPLE WITH SEVERE MENTAL ILLNESS, WHICH CAN ONLY BE REGARDED AS CRUEL OR UNUSUAL, VIOLATES THE NEVADA CONSTITUTION.

A categorical ban on the execution of people with severe mental illness is warranted both because it is cruel and because it is unusual. What rises to the level of unconstitutionally cruel or unusual punishment has "not [been] spelled out in either state or federal constitutions." *Naovarath v. State*, 105 Nev. 525, 529 (1989). Instead, the task has been delegated "to future generations of judges who have been guided by the 'evolving standards of decency that mark the progress of a maturing society.'" *Id*. (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). As with the Eighth

Amendment, such analysis under the Nevada Constitution "depends largely, if not entirely, upon the humanitarian instincts of the judiciary." *Id*. at 529–30. However, such instincts may be guided by considerations such as that considered by the District of Nevada in *Mickle v. Henrichs*, which noted that cruel punishment may include consideration of "physical suffering" but also includes "the humiliation, the degradation, [and] the mental suffering" of the person punished. 262 F. 687, 690 (D. Nev. 1918).

These considerations are particularly of concern when it comes to the execution of capital defendants with severe mental illness.[4] The term "capital defendants" is used because it is important to note that the vast majority of people with severe mental illness do not commit any violent offenses, much less capital ones—just as the vast majority of minors and people with intellectual disabilities do

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[4] The American Psychological Association ("APA") defines serious mental illness as a mental, behavioral, or emotional disorder that significantly impairs a person's ability to function in daily life, such as schizophrenia, major depressive disorder, bipolar disorder or schizoaffective disorder. *See* APA, *Mental illness and violence: Debunking myths, addressing realities, available at* *https://www.apa.org/monitor/2021/04/ce-mental-illness*. As the APA also makes clear, the overwhelming majority of people with serious mental illness are not violent. *Id.* This brief addresses only the few people with serious mental illness who have been convicted of a capital offense.

not commit violent or capital offenses. But, as with minors and people with intellectual disabilities, this Court should be particularly concerned with the execution of people with severe mental illness who *have* been convicted of a capital offense. That concern is warranted because people with severe mental illness who are convicted of capital crimes are vulnerable to distinct harms in addition to the lifelong stigma and mistreatment many people with severe mental illnesses already face. In particular, in many cases, their symptoms of mental illness contribute to their underlying offense, and negatively and unjustly affect their treatment in the capital sentencing process. The prospect of this state strapping a person with severe mental illness to a gurney and executing them under such circumstances should shock the conscience of this Court.

The U.S. Supreme Court's rationale for creating categorical bans for both juveniles and those with intellectual disabilities provides ample support for extending such a ban to reach capital defendants with severe mental illness. In addition, current doctrinal protections, such as the Not Guilty by Reason of Insanity defense (NGRI)[5] and standards for competency to be executed, were specifically

[5] While still used in the legal terms "insanity defense" and "legally insane," the words "insanity" and "insane" are closely associated with the eugenics era in U.S. law and policy. *See, e.g.*, *Buck v. Bell*, 143 Va. 310, 313, 319 (1925) (quoting Virginia sterilization act which permitted forced sterilization of inmates deemed "***insane***, idiotic, imbecile, feeble-minded, or epileptic" based on a theory that they

designed to prevent the unconstitutional treatment of those with severe mental illness that created significant limitations in their abilities to understand right from wrong and/or to control their own actions. Such protections, which have deep roots in the criminal laws of this state and the country as a whole, reflect a widespread recognition that the death penalty as applied to those whose severe mental illness created these limitations in understanding is unconstitutionally cruel.

But even if this Court disagrees that the execution of capital defendants with severe mental illness is unconstitutionally cruel, this Court should still create the

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will parent "socially inadequate offspring likewise afflicted" and noting Virginia's claim of authority to "take into custody and deprive ***the insane***, the feeble-minded and other defective citizens of the liberty which is otherwise guaranteed them by the Constitution") (emphasis added), *aff'd by* 274 U.S. 200, 205-06 (1927) (noting Virginia legislation permitting forced sterilization to prevent purported "hereditary . . . transmission of ***insanity***, imbecility, etc.") (emphasis added).

Congress and the Nevada state legislature have periodically updated outdated language regarding disabilities. *See*, *e.g.*, Rosa's Law, PL 111-256, 124 Stat. 2643 (Oct. 5, 2010) (changing "mental retardation" to "intellectual disability" throughout U.S. Code); Nevada S.B. 491 (Chapter 255), effective July 1, 2007 (updating statutory language used in Nevada Code to refer to persons with physical, mental or cognitive disabilities); Immigration Act of 1990, Pub. L. 101-649, 104 Stat 4978, § 601-603 (Nov. 29, 1990) (deleting and replacing language in 8 U.S.C. § 1182 excluding "[a]liens who are insane" and "[a]liens who have had one or more attacks of insanity"). Some jurisdictions, such as California, increasingly use the phrase "mental disorder defense" in place of the "insanity defense." *Amici* refer to the "insanity" defense as the NGRI defense in this brief for the convenience of this Court, though a more acceptable phrasing would be "not criminally responsible on account of mental disorder (NCR-MD), as adopted by the Canada legislature in 1992. *See Criminal Code of Canada*, R.S.C., 1985, c. C-46, s. 487.051.

categorical exemption requested because such executions violate Nevada's constitutional ban on unusual punishments. Given the general decline in the use of the death penalty, combined with already existing protections for those with the most extreme form of severe mental illness (i.e., those who are deemed NGRI or incompetent for execution), people with severe mental illness are not often executed. But, as Mr. Ybarra's case illustrates, only a categorical ban will guarantee prevention of the unconstitutional execution of those with this disability.

A. Executing capital defendants with severe mental illness is cruel, as supported by the reasoning of *Atkins v. Virginia* and *Roper v. Simmons*, barring the death penalty for people with intellectual disabilities and juveniles.

The determination of what is considered cruel and unusual punishment under the Eighth Amendment has been guided largely by two fundamental principles. First, death sentences must be justified by legitimate penological reasons for resorting to the most extreme punishment available. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 183 (1976) ("[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering[.]"). Second, death sentences must have "a greater degree of reliability" so that they are only imposed on the most culpable offenders. *McCarty v. State*, 132 Nev. 218, 232 (2016) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). The U.S. Supreme Court heavily relied on both of these principles in creating categorical bars on the death penalty for people with intellectual disabilities and juvenile defendants

in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Roper v Simmons*, 543 U.S. 551 (2005), respectively. But the Court's reasoning related to the cruel and excessive nature of the penalty as applied to those with intellectual disabilities or juveniles is even more compelling when applied to people with severe mental illness who are on death row.

1. Executing capital defendants with severe mental illness lacks penological justification.

It is well established that the only two legitimate justifications for the death penalty are "retribution and deterrence of capital crimes by prospective offenders." *Roper*, 543 U.S. at 571. "Unless the imposition of the death penalty on a person [with severe mental illness] '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*, 536 U.S. at 319 (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

The categorical bars to execution for individuals with intellectual disabilities and juveniles derives from the U.S. Supreme Court's finding that death sentences as applied to these groups serve no retributive or deterrent value. Specifically, the Court identified cognitive and behavioral disabilities and limitations typical of individuals with intellectual disabilities and juveniles that "do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." *Id.* at 318.

"With respect to retribution, . . . the severity of the appropriate punishment

necessarily depends on the culpability of the offender." *Id.* at 319. Diminished personal culpability in turn diminishes the retributive effect. *Id.* As concerns deterrence, the Court reasoned that there is a "low likelihood that offenders [with such cognitive and behavioral impairments] engage[] in 'the kind of cost-benefit analysis that attaches any weight to the possibility of execution,' mak[ing] the death penalty ineffective as a means of deterrence." *Roper*, 543 U.S. at 561–62 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 836–38 (1988)). Given the gravity of the impairments and limitations identified in *Atkins* and *Roper*, and their inherent connection to the crimes that land such individuals on death row, the Court concluded, "it [was] evident that neither of the two penological justifications for the death penalty…provide adequate justification for imposing that penalty" on these two groups. See *id.* at 553.

The same rationale should exempt from the death penalty people convicted of capital crimes whose severe mental illness created the same – or sometimes greater – limitations on their capacities. Leading legal and medical professionals alike agree that the impairments and limitations emphasized by the Court in both *Atkins* and *Roper* will often translate "virtually word for word to defendants with severe mental illness [who are on death row.]." ABA, *Severe Mental Illness*, at 28. *See also* Lyn Entzeroth, *The Challenge and Dilemma of Charting A Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant From the Death Penalty*, 44

Akron L. Rev. 529, 559 (2011) (arguing that "the parallels between [individuals with severe mental illness on death row] and the individuals protected by *Atkins* and *Roper* are remarkable").

In *Atkins*, the impairments the Court highlighted include "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Atkins,* 536 U.S. at 318. These impairments and limitations mirror those typical of individuals with severe mental illness who are on death row. Indeed, "hallucinations, delusions, grossly disorganized thinking – among other symptoms of mental illness – also significantly interfere with an individual's thinking, behavior, and emotion regulation." ABA, *Severe Mental Illness*, at 3. Just as these impairments diminish the personal culpability of those with intellectual disabilities, they too diminish the personal culpability of capital defendants with severe mental illness.

Similarly, the impairments described by the Court in *Roper* include "susceptibility . . . to immature and irresponsible behavior," "vulnerability and comparative lack of control over their immediate surroundings," and the "struggle to define their identity." *Roper,* 543 U.S. at 570. These characteristics, according to the Court, make it "less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* These

characteristics can also be true not only for those with intellectual disabilities, but for capital defendants with severe mental illness. Because the execution of people whose severe mental illness significantly impairs their capacities does not meaningfully advance either of the recognized penological goals of capital punishment, this Court should create a categorical bar exempting such individuals from the death penalty.

2. Impairments characteristic of severe mental illness increase the likelihood of unreliability in sentencing.

"A further reason for not imposing the death penalty on [people with limited capacities] is to protect the integrity of the trial process." *Hall v. Florida*, 572 U.S. 701, 709 (2014); *see also Atkins* 536 U.S. at 320–21. In both *Atkins* and *Roper*, the Court recognized that creating a categorical exemption from the death penalty was the only way to adequately protect groups of people who face "a special risk of wrongful execution." *Atkins*, 536 U.S. at 320–21; *see also Roper*, 543 U.S. at 569 ("[J]uvenile offenders cannot with reliability be classified among the worst offenders."). Symptoms of severe mental illness, too, can harm and distort a defendant's case at every stage of the trial and post-conviction proceedings in the same, and in some respects, more damaging ways than concerned the Court in *Atkins* and *Roper*.

As with intellectual disability and youth, severe mental illness can significantly hinder defendants' ability "to give meaningful assistance to their

counsel" and effectively participate in their defense. *Atkins*, 536 U.S. at 320. People with severe mental illness are often poor historians of their own lives and "are typically poor witnesses." *Id.* at 321. Both medication and a distorted sense of reality can interfere with memory and the ability to accurately recall. ABA, *Severe Mental Illness*, at 14. This can both increase "the possibility of false confessions," and prevent defendants with severe mental illness from communicating crucial information that they alone possess to both law enforcement and their defense team. *Atkins*, 536 U.S. at 320. Symptoms of mental illness can also impair defendants' judgment, causing them to make irrational and ill-thought out decisions related to their defense, such as choosing to represent themselves or waiving their appeals. ABA, *Severe Mental Illness*, at 32. Delusions and paranoia can cause defendants to distrust, misunderstand, and refuse to cooperate with their counsel. *Id.* at 23.

Similarly, delusions, paranoia, and fear of stigmatization may interfere with the opportunity of such defendants to provide the jury and court system (in post-conviction review) with mitigating evidence related to their illness. *Id*. at 32. When severe mental illness operates in this manner, decisionmakers are deprived of "the fullest information possible concerning the defendant's life and characteristics" recognized by the Supreme Court as "essential" to sentencing. *Williams v. People of State of N.Y.*, 69 S. Ct. 1079, 1083 (1949). This of particular concern in the capital context, where the constitution requires an individualized sentencing that focuses on

the "particularized circumstances" of the individual defendant as a safeguard against capricious death sentences. *Gregg*, 428 U.S. at 199.

Additionally, symptoms of severe mental illness can unfairly prejudice jurors' impressions of the defendant, thereby skewing the reliability of the resulting sentence. People with severe mental illness face the risk that jurors considering their fate will view them through the lens of stereotype, as intrinsically dangerous, and therefore more likely to constitute a future danger. Jurors can easily misinterpret symptoms of mental illness that manifest during trial, only exacerbating the risk. A person "suffering from a psychotic episode [during trial] may become agitated, unable to control his movements, or make inappropriate comments – all of which can be interpreted by jurors as dangerous, impulsive behavior and thus increase the likelihood that jurors find a death sentence appropriate." ABA, *Severe Mental Illness*, at 23. Conversely, defendants with severe mental illness may be heavily medicated during trial, which can cause a flat affect that can "create an unwarranted impression of lack of remorse for their crimes." *Atkins*, 536 U.S. at 321.

For all of the above reasons, the risk of execution because of – not simply in spite of – a defendant's severe mental illness proves significant. And as this Court has previously recognized, "[m]ental illness is not a crime." *Maatallah v. Warden, Nev. State Prison*, 86 Nev. 430, 433 (1970). "This is not to say that under current law [Mr. Ybarra and other] persons with [severe mental illness] who meet the law's

requirements for criminal responsibility may not be tried and punished. They may not, however, receive the law's most severe sentence." *Hall*, 572 U.S. at 709 (quotations omitted). Just as "impos[ing] the harshest of punishments on an intellectually disabled person [or juvenile] violates his or her inherent dignity as a human being," so too does sentencing to death a person with a mental illness that significantly impairs their capacities. *Id.* at 708. "Not all murderers are executed, and capital punishment is not justified if it chooses the vulnerable in society, no matter how despised, for execution." Koenig, Dorean M., *Mentally Ill Defendants: Systemic Bias in Capital Cases*, 3 Hum. Rts. 10, (Summer 2001, vol. 28). And "where mitigation defie[s] reliable assessment," as it does in the case of people with severe mental illness, "the only constitutional answer [is] a categorical removal of those cases from the death penalty." Sundby, *The True Legacy of* Atkins *and* Roper: *the Unreliability Principle, Mentally Ill Defendants and the Death Penalty's Unraveling*, 23 Wm. & Mary Bill of Rts J. 487, 506 (2014).

B. The execution of capital defendants with severe mental illness is unusual, as shown by evolving standards of decency.

In the last handful of years, Ohio and Kentucky have made acknowledgements in terms of prohibiting the execution of people with severe mental illness, and this prohibition tracks the more informed treatment of people with severe mental illness more broadly. Moreover, the national trend towards abolition of the death penalty, the abundance of state court decisions vacating death sentences on the basis of

mental illness, and the public calls for categorical bans by judges in state and federal court evince an even greater consensus in favor of a categorical ban here than there was at the time of *Atkins* and *Roper* for those populations.

First, nationwide, states have moved dramatically away from execution. Since the *Atkins* and *Roper* decisions, eleven more states have abolished the death penalty.[6] Some states, including Nevada, continue to authorize executions, but have not carried any out in decades. This further explains the "little need to pursue legislation barring the execution of the [severely mentally ill] in those States." *Hall*, 572 U.S. at 716 (quoting *Atkins*, 536 U.S. at 316). Of the 27 states that currently authorize the death penalty, three have gubernatorial moratoriums on executions.[7] Of the remaining 24 states that have the death penalty and no governor-imposed moratorium, only 12 have carried out executions in the last five years.[8] Nevada is

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[6] **New Jersey** (2007); **New York** (2007); **New Mexico** (2009); **Illinois** (2011); **Connecticut** (2012); **Maryland** (2013); **Delaware** (2016); **Washington** (2018); **New Hampshire** (2019); **Colorado** (2020; and **Virginia** (2021). *See* Death Penalty Information Center (DPI), *State by State*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (hereinafter DPI, State by State).

[7] **Oregon** (2014), **Pennsylvania** (2015); **California** (2019). *See* DPI, State by State.

[8] *See* DPI, Executions by State, https://deathpenaltyinfo.org/executions/executions-overview/executions-by-state-and-year.

not among them, as this state has not carried out an execution since 2006. Regardless of the reason for their de facto moratoriums, the states that do not actively execute anyone from their death row population are not executing anyone with severe mental illness.

Moreover, many people with severe mental illness who have been sentenced to death are prevented from being executed specifically because of their disease or disorder. In addition to the legislative categorical bars of Ohio and Kentucky, several state courts, including this Court, have vacated death sentences on proportionality review based on severe mental illness. *See, e.g.*, *Haynes v. State*, 103 Nev. 309 (1987) (finding the death penalty disproportionate when imposed on a man with severe mental illness who was likely delusional at the time of the crime); *see also State v. Roque*, 213 Ariz. 193, 141 P.3d 368, 405-06 (2006) (finding a death sentence disproportionate based on the defendant's mental illness and low intellectual capacity), *abrogated on other grounds by State v. Escalante-Orozco*, 241 Ariz. 254 (2017); *State v. Thompson*, No. E2005-01790-CCA-R3-DD, 2007 WL 1217233, at *36 (Tenn. Crim. App. Apr. 25, 2007) (modifying a death sentence to life imprisonment for "a defendant who possessed a long and documented history of mental illness spanning his adult life"); *Offord v. State*, 959 So. 2d 187, 193 (Fla. 2007) (finding a death sentence disproportionate where there was only one aggravating factor and the defendant had a lifelong, well-established history of

severe mental illness).

More recently, governors too have begun relying on severe mental illness as a basis for clemency decisions. Though governors do not frequently award clemency to those on death row, in the last two decades governors from Georgia, Ohio, Virginia, and Indiana have done so, stopping the executions of five death row prisoners on the basis of their severe mental illness not rising to the level of legal "insanity." Death Penalty Information Center, *Clemency*, https://deathpenaltyinfo.org/facts-and-research/clemency. While these cases illustrate a consensus against executing those with mental illness, clemency and proportionality review are not sufficient to prevent the unconstitutional execution of Nevadans with severe mental illness. *See* II (C), *infra*.

Across the country, numerous state and federal judges have explicitly called for a categorical rule barring people with severe mental illness from facing the death penalty. *See, e.g., State ex rel. Strong v. Griffith*, 462 S.W.3d 732, 739 (Mo. 2015) (Teitelman, J., dissenting) ("I would hold that the reasoning in *Ford v. Wainwright*, *Atkins v. Virginia*, and *Roper v. Simmons*, applies to individuals who … were severely mentally ill at the time the offense was committed."); *State v. Lang*, 954 N.E.2d 596, 649 (Ohio 2011) (Lundberg Stratton, J., concurring) ("If executing persons with mental retardation/developmental disabilities or executing juveniles offends 'evolving standards of decency,' then I simply cannot comprehend why

these same standards of decency have not yet evolved to also prohibit execution of persons with severe mental illness at the time of their crimes."); *State v. Scott*, 748 N.E. 2d 11, 20 (Ohio 2001) (Pfeifer, J., dissenting) ("As a society, we have always treated those with mental illness differently from those without. In the interest of human dignity, we must continue to do so."). *See also Com. v. Baumhammers*, 960 A.2d 59, 101-08 (Pa. 2008) (Todd, J., concurring); *Baird v. State*, 833 N.E.2d 28, 34-36 (Ind. 2005) (Boehm, J., dissenting); *State v. Nelson*, 803 A.2d 1, 41-50 (N.J. 2002) (Zazzali, J., concurring); *Bryan v. Mullin*, 335 F.3d 1207, 1228 (10th Cir. 2003) (Henry, J., concurring in part and dissenting in part).

Similarly, every major mental health association in the United States has taken an affirmative stance in favor of categorically prohibiting the execution of individuals with severe mental illness. *See, e.g*., Mental Health America, *Position Statement 54: Death Penalty and People with Mental Illness* (approved June 14, 2016); Murder Victims' Families for Human Rights and National Alliance for the Mentally Ill, *Double Tragedies – Victims Speak Out Against the Death Penalty for People with Severe Mental Illness* (2009); American Psychological Association, *The Death Penalty in the United States* (approved August 2001), https://www.apa.org/about/policy/death-penalty; American Psychiatric Association, *Position Statement on Moratorium on Capital Punishment in the United States* (approved October 2000). And in 2006, an ABA task force, comprised

of both legal and mental health professionals, joined the conversation and called for a categorical ban. ABA, *Mental Illness Resolution* (2006). Ten years later, the ABA reiterated its recommendation in a comprehensive report, relying heavily on the rationale in *Atkins* and *Roper*. ABA, *Severe Mental Illness*, at 26-31.

Finally, the American public is also in favor of exempting those with severe mental illness from the death penalty. In 2021, a national poll found that 60% of Americans opposed seeking a death sentence against a person with a diagnosed mental illness. Justice Research Group, *New Poll: The Modern American Death Penalty Is Massively Unpopular* (Feb. 17, 2022). Similarly, a 2015 "multi-state voter survey" found 66% of people in the United States oppose the death penalty for people with mental illness. David Binder Research, *Multi-State Voter Survey: Death Penalty and Mental Illness* (Survey conducted: November 30th – December 7th, 2015). After hearing further details about how a severe mental illness exemption would operate in practice, voter support for the exemption rose to 72%. *Id*.

C. Current legal protections to prevent the unconstitutional execution of people with severe mental illness prove insufficient.

While severe mental illness has long been regarded as a relevant factor in determining the appropriate punishment for criminal behavior, the standard Mr. Ybarra seeks here acknowledges that most people with severe mental illness will not be found NGRI under the unforgiving "insanity" test adopted in Nevada or

incompetent to stand trial under *Ford*,[9] but nonetheless have significant impairments warranting protection from execution (even if they still warrant the reduced but severe punishment of life imprisonment). Additionally, the right to present mitigation evidence of mental illness in capital cases does not prevent unconstitutional death sentences and executions. As the facts of Mr. Ybarra's case demonstrate, people with profound impairments can and do slip through the cracks. Therefore, the only adequate form of protection is a categorical bar against executing those with severe mental illness.

The NGRI defense, while reflective of a widespread understanding that people with the most severe mental illness should not be subject to criminal liability, is an insufficient barrier to prevent the execution of individuals in this group. Nevada applies the *M'Naghten* test, which requires proof of one of two prongs: that "at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." *M'Naghten's Case*, 10 Cl. & Fin. 200, 209, 8 Eng. Rep. 718, 722 (1843). However, this rule has long been criticized for its inefficacy such that many

[9] The law also forbids states from subjecting incompetent defendants to trial. *Dusky v. United States*, 362 U.S. 402 (1960). For similar reasons as discussed in this text, that protection too does too little to protect those with serious mental illness from cruel or unusual executions.

jurisdictions have foregone the strict *M'Naghten* rule for a more expansive one. Linda Sanabria, *The Insanity Defense Among the States* (last updated Nov. 28, 2023), https://www.findlaw.com/criminal/criminal-procedure/the-insanity-defense-among-the-states.html. Because Nevada has not done so, this leaves defendants with severe mental illness who could be found NGRI in other states vulnerable to possible execution. Moreover, many people with severe mental illness and their lawyers elect not to assert NGRI at capital trials, in part because death-qualified jurors are often inherently skeptical of the defense. *Not Guilty by Reason of Insanity: Reference Manual for Community Services Boards & Behavioral Health*, Virginia Dep't of Behavioral Health & Developmental Servs. 10 (2016).

Nor is the protection against execution for those found incompetent under *Ford v. Wainwright* sufficient to prevent the execution of people with severe mental illness. 477 U.S. 399 (1986). In holding such executions violate the Eighth Amendment, the Court, like in *Atkins* and *Roper*, noted the lack of "retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life." *Id*. at 409. But both this Court and the U.S. Supreme Court have acknowledged that there is a "high threshold showing" for *Ford* claims. *Calambro v. Second Judicial Dist. Court*, 114 Nev. 961, 970 (1998) (quoting *Ford*, 477 U.S. at 425-26). To succeed under *Ford*, the condemned must lack a rational understanding of the government's reason for executing them at the

time of the impending execution. *Panetti v. Quarterman*, 551 U.S. 930, 933 (2007). Because this standard erects a high bar for proving incompetence while wholly ignoring the individual's mental state at the time of the offense, it does not adequately protect those with severe mental illness from unconstitutional execution.

Nor are those with severe mental illness adequately protected by the opportunity to present mitigating evidence. In fact, in the hands of talented prosecutors seeking death sentences, and even in the minds of death-qualified jurors not subject to such prosecutorial arguments, mental illness, despite being a constitutionally protected mitigating factor, may be transformed into aggravating evidence weighing in favor of execution. *See, e.g.*, Sundby, *Legacy of* Atkins *and* Roper, 23 Wm. & Mary Bill of Rts J. at 518-19 (drawing on empirical evidence to describe the phenomenon of mental illness recast as "future dangerousness"); David Baldus et al., *Equal Justice and the Death Penalty* (Northeastern U. Press ed., 1990) (finding that a defendant's NGRI defense or incompetence claim was one of the strongest correlates with a death sentence, suggesting that most jurors view mental illness as aggravating rather than mitigating). The U.S. Supreme Court expressed similar concerns with juries' consideration of juveniles and defendants with intellectual disabilities in capital cases. *Atkins*, 536 U.S. at 321 ("[R]eliance on [intellectual disability] as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be

found by the jury."); *Roper*, 543 U.S. at 573 ("[T]he prosecutor argued [the defendant's] youth was aggravating rather than mitigating. While this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, that would not address our larger concerns."). The same logic applies in the context of those with severe mental illness.

Conclusion

For the foregoing reasons, *amici* respectfully request this court find in favor of Appellant Robert Ybarra, Jr. by declaring the death penalty unconstitutional as applied to those with severe mental illness, reversing the district court, vacating Mr. Ybarra's death sentence, and remanding this case for proceedings consistent with such relief.

Respectfully submitted,

/s/ Christopher Peterson
Christopher Peterson
Counsel for *Amici*

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font, Times New Roman style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 8,429 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Respectfully submitted this 20th day of May 2025.

/s/ Christopher Peterson
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing *Amicus* Brief electronically with the Nevada Supreme Court on May 20, 2025. Electronic Service of the foregoing Amicus Brief shall be made in accordance with the Master Service List as follows:

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Counsel for Ybarra consents to the filing of these amicus briefs.

I have cc'd opposing counsel, White Pine District Attorney Melissa Brown, so she can take a position on these briefs if she would like to.

Best,

-Randy

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