IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

STATE OF OHIO,	
Plaintiff,	Case No. B9600135
v.	Judge: Tom Heekin
	Death Penalty Case
WALTER RAGLIN,	
Defendant.	

MOTION OF AMICI CURIAE

NATHANIEL R. JONES CENTER FOR RACE, GENDER, AND SOCIAL JUSTICE AT THE UNIVERSITY OF CINCINNATI COLLEGE OF LAW,

THE CINCINNATI BLACK UNITED FRONT,

THE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION,

IGNITE PEACE,

OHIOANS TO STOP EXECUTIONS,

OHIO JUSTICE AND POLICY CENTER,

THE OHIO INNOCENCE PROJECT AT THE UNIVERSITY OF CINCINNATI SCHOOL OF LAW,

THE CENTER FOR SOCIAL JUSTICE AT THE URBAN LEAGUE OF GREATER SOUTHWESTERN OHIO,

THE CINCINNATI BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND

METROPOLITAN AREA RELIGIOUS COALITION OF CINCINNATI

FOR LEAVE TO FILE BRIEF INSTANTER IN SUPPORT OF DEFENDANT

Amici Curiae Nathaniel R. Jones Center for Race, Gender, and Social Justice, The Cincinnati United Front, The American Civil Liberties Union Of Ohio Foundation, Ignite Peace, Ohioans To Stop Executions, Ohio Justice And Policy Center, The Ohio Innocence Project At The University Of Cincinnati School Of Law, The Center For Social Justice At The Urban League Of Greater Southwestern Ohio, The Cincinnati Branch, National Association For The Advancement Of Colored People, and Metropolitan Area Religious Coalition of Cincinnati hereby respectfully move this Court for leave to file an *amici curiae* brief *instanter* in support of Defendant Walter Raglin. *Amici*, both individually and collectively, have a vested interest in advancing legal equality and civil rights for people of all races, genders, and sexualities, as well as the just application of constitutional principles. *Amici* believe the attached *amici curiae* brief will provide helpful legal context to the Court as it considers whether new evidence of systematic racial bias within the criminal punishment system in Hamilton County, Ohio negatively impacted the fair execution of Mr. Raglin's trial, thereby violating the Equal Protection & Benefit Clause of the Ohio Constitution and requiring a new trial as requested by Mr. Raglin. As such, *amici* respectfully request leave to file said brief.

Dated: 9.11.23

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on September 11, 2023 a true and accurate copy of the foregoing was sent via electronic mail to the following counsel of record:

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I. INTRODUCTION[1]

Art. I, §2 of the Ohio Constitution contains the Equal Protection and Benefit Clause (EPBC) which states, "all political power is inherent to the people. Government is instituted for their equal protection and benefit…" The EPBC sets out a wider range and broader scope of rights and protections than the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The responsibility to uphold and enforce these rights under the state constitution ultimately rests with the Ohio courts, but Ohio courts have too often deferred to the federal courts which were interpreting the federal and not the state constitution. *Amici* aim to show that treating the Equal Protection and Benefit Clause of the Ohio Constitution as simply a tautology of the Fourteenth Amendment's Equal Protection clause is unjustifiable based on the EPBC's unique text and history. The text of the EPBC clearly sets out a greater scope, and it was drafted seventeen years before the Fourteenth Amendment. In the instant case, *Amici* submit that the Equal Protection and Benefit Clause provides greater protection than the federal constitution against racially discriminatory death sentences. *Amici* submit this brief to supplement the arguments presented by Defendant Raglin and to provide additional context, historical background, and a new perspective on interpreting the Ohio Constitution.

II. INTEREST OF AMICI CURIAE[2]

The Nathaniel R. Jones Center for Race, Gender, and Social Justice (the "Center") is an academic, educational, and legal advocacy organization, housed within the University of

[1] This brief would not have been possible without the hard work of students at the University of Cincinnati College of Law. Special thanks to Susana Tolentino, JD, Travis A. Hardee (2024), Elizabeth Beach (2025), and Madeline Brown (2025) for their contributions to the drafting of this document and research support. Special thanks is also extended to Columbia Law student Angela Larsen (2024) who helped with research and drafting. Finally, the assistance of Attorney Rebecca Dussich in research and drafting was invaluable.

[2] No party or its counsel authored this brief in whole or in part and no person or entity other than *amici* or their counsel made any monetary contribution to the preparation or submission of this brief.

Cincinnati College of Law. Founded in 1995, the Center began as the nation's first Joint Degree program in Law and Women's, Gender, and Sexuality Studies and has since grown into an academic, educational, and legal advocacy institution that cultivates scholars, leaders, and activists committed to social change.

Among other issues, the Center's scholarship focuses on combatting racial injustice, state violence, and economic inequality, with a particular emphasis on the impacts of law and policy on people living at the intersections of multiple marginalized identities. As legal scholars and experts in the field, the Center holds a vested interest in ensuring the fair and equal administration of justice, upholding the United States and Ohio Constitutions, and advancing civil and human rights under the law. The legal and constitutional right to a fair trial, regardless of the race of the victim of that crime or the race of the accused perpetrator, and a criminal legal system free from racial bias are essential to racial equity and the elimination of racism in the United States. As such, the protection and advancement of these rights is essential to the work of the Center.

The Cincinnati Black United Front (CBUF) is a grass roots advocacy organization that seeks to promote equality for African Americans in all respects, frequently through litigation. As part of its advocacy, CBUF promotes policies, procedures, and practices geared toward reducing the risk of harm to those ensnared in the criminal legal system. For more than twenty years CBUF has helped implement the Collaborative Agreement which promotes reforms in Cincinnati, particularly reforms that reduce the arrests of people of color. CBUF works to reduce mass incarceration and believes the criminal legal system should be transparent, free of bias, and fundamentally fair at all stages, particularly with respect to charging, prosecuting and sentencing people to death.

The American Civil Liberties Union (ACLU) of Ohio Foundation is the Ohio affiliate of the ACLU Foundation, one of the oldest and largest organizations in the nation dedicated to protecting the civil rights and liberties guaranteed in the United Sates Constitution and the laws of the United States. The ACLU of Ohio Foundation, with more than two hundred thousand members, has been at the forefront of efforts to protect the full array of civil rights and liberties in the United States Constitution and the Constitution of the State of Ohio. The ACLU of Ohio Foundation has appeared in numerous cases to protect the constitutional rights of the accused in the criminal justice system. *See, e.g., State v. Foreman*, 166 Ohio St.3d 204, 2021-Ohio-3409, 184 N.E.3d 70 (argued as amicus in support of challenge to conviction for narcotics "possession" based on presence of metabolites); *State v. Chapman*, 163 Ohio St.3d 290, 170 N.E.3d 6, 2020-Ohio-6730 (argued as amicus in support of challenge to community control restrictions on right to reproduce); *Soto v. Siekfer*, No. 21-4229 (6th Cir. Aug. 21, 2023) (argued as amicus that the double jeopardy clause forbids the prosecution of a defendant for charges that were dismissed as part of a plea agreement.)

Ignite Peace was founded in 1985 as Intercommunity Justice and Peace Center and works through a framework of racial equity, centering the elimination of systemic racism and the creation of equitable opportunities for all humans. Ignite Peace believes these priorities are integral to its mission of promoting the creation of a nonviolent society. It works to end white supremacy, educate the public about how racism continues to harm people today, and build an anti-racist future. One core issue Ignite Peace works on is criminal justice, specifically abolition of the death penalty. Ignite Peace believes that the death penalty has proven to be an expensive, racist, arbitrary system that convicts innocent people and disproportionally affects the poor and marginalized. Ignite Peace further believes that the death penalty system has too many flaws, is the most egregious part of criminal justice system with roots in racial lynchings, and needs to be eradicated.

Ohioans to Stop Executions (OTSE) is a single-issue organization that brings together a diverse coalition of groups and individuals of all backgrounds and beliefs to work together to end the death penalty. OTSE holds the following principles as guideposts for its work: affirming the humanity and dignity of all people; acknowledging and addressing the needs of people who have been harmed; acknowledging and addressing systemic harms; and committing to racial equity in all of its work. OTSE believes everyone must acknowledge and address our country's history of racial injustice and recognize that the death penalty evolved from the racial terror of our country's past. Today, people of color are more likely to be prosecuted for capital murder, sentenced to death, and executed, especially if the victim is white. OTSE pledges to work to end the death penalty by exposing and challenging the racial bias inherent in the criminal justice system, most visible in the death penalty, and to build a culture of racial equity.

The Ohio Justice and Policy Center (OJPC) is a nonprofit law firm with offices in Cincinnati and Columbus, Ohio. OJPC offers a spectrum of free legal services, programs, and resources to help people navigate the complexities of our criminal legal system. Its mission is to create fair, intelligent, redemptive criminal-justice systems through zealous client-centered advocacy, innovative policy reform, and cross-sector community education.

As advocates for people who have been directly impacted by a criminal legal system plagued by gross racially disparate outcomes, OJPC is deeply invested in dismantling systems of racial discrimination and injustice. OJPC's investment is noted in efforts to legislate recommendations of Ohio Supreme Court's Joint Task Force (2014) pertaining to the extrajudicial role race plays in the administration and implementation of capital cases.[3] Among other initiatives,

[3] OJPC worked to promote the adoption of recommendations 33, 34, and 35 from the Task Force's Final Report and Recommendations. See Supreme Court of Ohio and Ohio State Bar Association, Joint Task Force to Review the Administration of Ohio's Death Penalty, Final Report and Recommendations (April 2014) available at https://www.supremecourt.ohio.gov/docs/Boards/deathPenalty/resources/finalReport.pdf.

OJPC advances its racial equity and reform priorities through signature programing such as its Human Rights in Prison project, which specializes in federal civil rights claims concerning inadequate medical care, excessive force, and inhumane practices; its Second Chance project, which offers free legal services focused on criminal record sealing and expungement for people who qualify; and its Beyond Guilt project, which fights for the release of excessively-punished Ohio prisoners who admit guilt and can demonstrate rehabilitation. OJPC compliments its legal work with a robust policy reform agenda, which includes collaborative advocacy designed to eliminate vestiges of racial discrimination that remain in our criminal legal system.

The Ohio Innocence Project at the University of Cincinnati School of Law (OIP) engages faculty and students in the investigation and litigation of cases on behalf of those who have been wrongfully convicted. Since its founding in 2003 OIP litigation has led to the release of 42 wrongfully convicted Ohioans, who collectively served more than 800 years behind bars. OIP advocacy includes the development and pursuit of lasting criminal justice reform through legislation as well as launching Ohio Innocence Project University, an active network of student groups at colleges across the state. Important in all of its advocacy is a commitment to racial equity in every aspect of the criminal legal system, including the charging, prosecution and sentencing of Ohioans in capital cases.

The Center for Social Justice ("CSJ") at the Urban league of Greater Southwestern Ohio is the regional catalyst for collaborative police reform efforts between communities and police departments in Southwestern Ohio. In addition to police reform, CSJ advocates for voting rights, education and health equity, and other issues related to social justice. Established in 2020 in response to the nationwide protests, CSJ collaborates with local communities and policymakers to

advocate for police reforms to address racial profiling and bias, police misconduct, excessive force, accountability, and oversight of law enforcement throughout Greater Southwestern Ohio. The CSJ engages in policy and practice advocacy, data collection and reporting, community education, restoration of rights and criminal records relief, and organizing to advance equity and transparency in our region.

As such, CSJ has a strong interest in the equitable administration of the criminal legal system and the outcomes it produces, and ensuring that civil rights, human rights, and constitutional rights are upheld in the highest regard. The constitutional right to a fair trial and the equitable administration of punishment, regardless of the race of the accused and/or the victim, are necessary in the pursuit of racial equality and equity in the United States, Ohio, and their combined institutions. The advancement of civil and human rights, upholding constitutional rights, and the elimination of racial profiling and bias within the legal system are critical in the achievement of true social parity and are vital to the work of the Center for Social Justice at the Urban League of Greater Southwestern Ohio.

The Cincinnati Branch of the National Association for the Advancement of Colored People (NAACP) is a unit of the national NAACP, a 114 year old civil rights organization. The Cincinnati branch is organized as a 501 (C) 4 non-profit and is an active advocacy organization. The national NAACP mission is to achieve equity, political rights, and social inclusion by advancing policies and practices that expand human and civil rights, eliminate discrimination, and accelerate the well-being, education, and economic security of Black people and all persons of color. In 1970 and 2001 the national NAACP approved resolutions in support of the abolition of the death penalty, and in 2009 the national NAACP launched a campaign to reverse the trends leading to more and more of Black Americans on Death Row. Racial bias is still prevalent in the

criminal justice system and Black Americans are disproportionately given death sentences. In 2022 the national NAACP reaffirmed its support for abolishing the death penalty across the United States and called for racial equity throughout the criminal justice system. The Cincinnati NAACP fully supports abolition of the death penalty and elimination of racism throughout the criminal justice system.

The Metropolitan Area Religious Coalition of Cincinnati (MARCC), is an interfaith coalition of judicatories including:

American Baptist Churches – Miami Association

Archdiocese of Cincinnati – Roman Catholic

Baptist Ministers Conference of Greater Cincinnati and Vicinity

Cincinnati Islamic Community Center

Diocese of Southern Ohio – Episcopal

Disciples of Christ Southwest Ohio

Interdenominational Ministerial Alliance of Greater Cincinnati

Jewish Community Relations Council of Cincinnati Jewish Federation

Great Miami River District – United Methodist Church

Presbytery of Cincinnati

Religious Society of Friends of Greater Cincinnati

Unitarian-Universalist Council of Greater Cincinnati

United Church of Christ-Southern Ohio Northern Kentucky Association

Volunteers of America of Ohio and Indiana

MARCC works to improve public policy on social justice issues locally in Hamilton County, Ohio and in the process, civic discourse in this community. MARCC members work

together on various social issues that are capable of local resolution, where there is a moral, religious concern. MARCC was founded in October 1968 as a non-profit for the foundational purpose of racial reconciliation. One example of a social concern that demonstrates the work of MARCC is community-police relations-justice reform. MARCC's action in this area seeks to reduce the use of force by law enforcement and increase equal and just treatment within the justice system. MARCC has worked on the design and implementation of Collaborative Agreement which involves Cincinnati Police reforms; the University of Cincinnati Safety and Reform Compliance Committee; the MARCC Photo ID Card program for persons without formal government identification; and the MARCC CourtWatch Project involving all levels of the Hamilton County Ohio Courts (in collaboration with the League of Women Voters Cincinnati Area and the Woman's City Club of Greater Cincinnati). The findings of its Municipal Court observations are documented in the Metropolitan Area Religious Coalition of Cincinnati Hamilton County CourtWatch Report October 11, 2020. Erasing racial disparity in all aspects of the criminal justice system, including with respect to the death penalty, is central to MARCC's work.

III. STATEMENT OF FACTS

Defendant's Motion for New Trial and other filings from Defendant in the instant case sufficiently establish the facts surrounding the incidents which gave rise to Mr. Raglin's original trial, the background of this case, and the reasons Defendant seeks a new trial. Defendant's Motion For New Trial, at 6-7. *Amici* hereby adopt and incorporate by reference the facts as presented by Defendant Walter Raglin.

The Columbia Human Rights Law Review recently published an analysis of all aggravated murder cases in Hamilton County, Ohio between the years 1992 and 2017. Grosso, O'Brien, Roberts, *Local History, Practice, and Statistics: A Study on the Influence of Race on the*

Administration of Capital Punishment in Hamilton County, Ohio (January 1992-August 2017), 51 Colum. Hum. Rts. L. Rev. 902 (2020). As more fully described *infra*, the Grosso study found that "a defendant charged with killing at least one white victim faced odds that the prosecutor would charge the case capitally 4.54 times higher than those of similarly situated defendants with no white victims." *Id.* at 903. Additionally, a Black defendant charged with killing a white person was 3.79 times more likely to receive a death sentence than all other similarly situated defendants. *Id.* In all cases in which the prosecutor sought death, a Black defendant with at least one white victim was 5.33 times more likely to receive a death sentence. *Id.* This study only compared cases with each other if defendants were "similarly situated," meaning the authors took into account race-neutral factors to examine whether the disparities could be explained by those race-neutral factors. *Id.* The study also traced the unique history of racism in the criminal legal system of Hamilton County that provides context for capital cases. Ultimately, the disparities in the imposition of the death penalty in Hamilton County could not be explained in a race-neutral manner. The authors found that the chances that capital punishment decisions in Hamilton County Ohio were made in a race-neutral manner were less than one in one thousand. *Id.* at 927.

This brief explains developing Ohio EPBC jurisprudence and applies it to the blatant inequality evident in the imposition of the death penalty on the Hamilton County defendant in this case. The result of this analysis demands that Mr. Raglin receive a new trial.

IV. ARGUMENT

Article I of the Ohio Constitution states:

> All political power is inherent to the people**. *Government is instituted for their equal protection and benefit,*** and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that they may not be altered, revoked, or repealed by the General Assembly.

Ohio Constitution, Article I, § 2 (emphasis added). This clause, referred to as the "Equal Protection and Benefit Clause" was included in our state's foundational document for the express purpose of guaranteeing that no group of citizens was advantaged or disadvantaged under the law. *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 2022-Ohio-65 ¶ 151, 167 Ohio St. 3d 255, 298-299, 192 N.E.3d 379, 418-419 (Brunner, J., concurring) (noting that the EPBC "builds into the Ohio Constitution foundational reasons for the existence of state government.") This language is broader and more expansive in both text and substance. Ohio, therefore, can and must independently interpret this vital portion of our state constitution, irrespective of how the federal courts have interpreted the federal Constitution.

Defendant and *Amici* do not rest their case on evidence of societal, national, or even statewide racial bias in the criminal legal system, though it surely exists throughout our nation. Rather, the study that inspired Mr. Raglin's motion for a new trial examines the racial bias at play specifically in death penalty cases arising out of *one* county, in *one* prosecutor's office, run by *one* elected official, under the purview of *one* trial-level criminal court, *during the window of time in which Mr. Raglin was prosecuted, convicted, and sentenced* in that county. Attempts to separate the outcomes in this case from a data set that, given the timeline, must necessarily include Mr. Raglin's specific experience strains credulity. The state has no legitimate interest sufficient to justify ignoring this new information. When viewed through the lens of Ohio's EPBC, it is clear that Hamilton County's death penalty sentencing system is intolerably discriminatory against Black defendants, including Mr. Raglin, in clear and irreversible violation of his fundamental state constitutional rights. Mr. Raglin is entitled to a new trial.

A. The Equal Protection and Benefit Clause of the Ohio Constitution guarantees more expansive constitutional rights than the United States Constitution's Equal Protection Clause.

Given the available interpretive models, the text and history of the EPBC, and trends in existing Ohio precedent, it is most appropriate to adopt an approach that treats the Ohio Constitution as what it is—an independent document with its own power and meaning, that can (and in this case does) offer more expansive protection to its citizens than the United States Constitution.

> 1. The "primacy" approach to state constitutional interpretation, which appropriately places authority over the meaning and application of state constitutions in the hands of that state's courts, is gaining favor nationwide and should be used in this case.

Judge Pierre Bergeron of the Ohio First District Court of Appeals has outlined why the Ohio constitution is "rightfully promine[nt]" in state court judicial review. Bergeron, *A Tipping Point in Ohio: The Primacy Model as a Path to a Consistent Application of Judicial Federalism*, 90 U. Cin. L. Rev. 1061, 1063 (2022). Opinions on the most appropriate interpretive method vary, but the generally accepted approaches typically fall into one of four categories: (a) the "lockstep" approach; (b) the "interstitial" approach; (c) the "dual sovereignty" approach; and (d) the "primacy" approach. *Id.* at 1063-1066. Historically, many jurisdictions have simply interpreted their state constitution in "lockstep" with the federal constitution; which is to say, they saw their constitution as the same as the federal constitution. Williams, *Equality Guarantees in State Constitutional Law*, 63 Tex. L. Rev. 1195, 1219 (1985). Historically, this has held true in Ohio as well. Williams, *The New Judicial Federalism in Ohio: The First Decade*, 51 Clev. St. L. Rev. 415, 429 (2004) (citing *State ex rel. Struble v. Davis*, 132 Ohio St. 555, 560, 9 N.E.2d 684 (1937)) is the earliest known case explicitly identifying Ohio and federal constitutional equal protection principles as "substantially the same"). In the equal protection context, Ohio courts have used the

lockstep approach, and turned to federal equal protection doctrine as the primary guidance in interpreting state EPBC claims. *See, e.g., State v. Thompson*, 95 Ohio St. 3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶ 11 (describing Ohio's EPBC as "functionally equivalent" to its federal counterpart).

Unsurprisingly, the "lockstep" approach has been criticized in Ohio and elsewhere. Why interpret a state constitution clause whose text and history are different in the same way as its closest federal analogue? Does that not essentially erase the power and protection of our constitution, eroding the state's sovereignty? Critics of this model posit that blind capitulation to federal court interpretation of federal constitutional provisions when evaluating state constitutional claims, without regard for variations in language or history of the state constitutional counterpart, relinquishes tremendous power to the United States Supreme Court. Ronald K.L. Collins, *Reliance on State Constitutions—the Montana Disaster*, 63 Tex. L. Rev. 1095, 1116 (1985). What's more, opponents of the lockstep approach find that this method of interpretation changes the constitution, essentially usurping the authority of the people, with whom the power to modify the constitution rests. *Id.* And, for nearly as long as the lockstep approach has been in use in Ohio, our courts have also acknowledged the limits of this model. *E.g. Direct Plumbing Supply Company v. City of Dayton*, 138 Ohio St. 540, 545, 38 N.E.2d 70 (1941) ("If…this long history of parallelism [between state and federal constitutional rights] seems threatened by a narrowing federal interpretation of federal guaranties, it is well to remember that Ohio is a sovereign state"). Ohio courts have likewise made explicit that decisions which adopt the lockstep approach "should not…be taken to mean that the precedent is unchangeable." *Stolz v. J & B Steel Erectors, Inc.*, 155 Ohio St.3d 567, 2018-Ohio-5088, 122 N.E.3d 1228, ¶ 29 (Fischer, J., concurring).

In recent years, many of the states that previously relied upon the lockstep approach to state constitutional interpretation are undergoing a clear and meaningful shift toward the "primacy" model in their courts of last resort—including the Ohio Supreme Court.[4] *See* Williams, *The New Judicial Federalism*, at 429-30.[5] The primacy approach is a state constitutional method of interpretation which mandates that "[c]laims raised under the state constitution should always be dealt with and disposed of" before turning to federal interpretations. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 Miss. L. J. 225, 239 (2007) (quoting Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125, 135 (1970)). Courts utilizing this method place state constitutional analysis at the center of decisions arising under state constitutional principles, only turning to federal analysis if protection of the rights at issue cannot be found under state law and treats state constitutional provisions as "independent sources of

[4] This has also been the case in states which adopted the interstitial or dual sovereignty approaches, mentioned briefly above. As these interpretive methods are not frequently used in Ohio courts, this brief does not discuss these methods in depth. Courts utilizing the "interstitial" approach begin by evaluating whether the federal constitution protects the right at issue; then, if (and *only* if) no such protection can be found, the court will proceed to the state constitution for further analysis. Bergeron, *A Tipping Point*, at 1064. Courts adopting this approach "[view] the U.S. Supreme Court's interpretation of federal constitutional rights as the floor, while the state court of last resort determines whether supplemental protection is afforded as a matter of state law." *Id*. at 1064. (quoting Nathan Sabourin, *We're from Vermont & We Do What We Want: A "Re"-Examination of the Criminal Jurisprudence of the Vermont Supreme Court*, 71 Alb. L. Rev. 1163, 1168 (2008), internal citations omitted). This method of interpretation is less restrictive than the lockstep approach, while still giving priority to United States Supreme Court's interpretation of the federal constitution, even where the claim at issue is brought under the relevant state's constitution. *Id*. at 1064. This approach effectively relegates state constitutions to secondary status, as they are relied upon only "to fill gaps in federal constitutional protections." Williams, *The New Judicial Federalism in Ohio*, at 423. Meanwhile, the dual sovereignty approach is a model in which courts look to *both* federal *and* state rights to inform decisions, "and thus weave the two constitutions together." Bergeron, *A Tipping Point*, at 1064 (quoting Sabourin, *We're from Vermont*, at 1167, internal citations omitted). As one would expect, this can "muddy the distinction between the state and federal constitutional law," particularly where state courts fail to distinguish between their reliance on state versus federal constitutional principles in their decisions, as is often the case. *Id*. at 1065; Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 Miss. L. J. 225, 243 (2007).

[5] Herein, Williams illustrates this point by citing to recent cases out of the Supreme Courts of Indiana (*Collins v. Day*, 644 N.E.2d 72 (Ind. 1994)); Vermont (*Baker v. State*, 744 A.2d 864 (Vt. 1999)); Minnesota (Ann L. Iijima, *Minnesota Equal Protection in the Third Millennium: "Old Formulations" or "New Articulations"?*, 20 Wm. Mitchell L. Rev. 338, 348-81 (1994)); Alaska (*Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 402 (Alaska 1997)); and Idaho (*Concerned Taxpayers of Kootenai County v. Kootenai County*, 50 P.2d 991, 994 (Idaho 2002)). Williams, *The New Judicial Federalism*, at 429-430.

individual rights." Bergeron, *A Tipping Point*, at 1065;[6] Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 Loy. U. Chi. L. J. 965, 966 (2013); Williams, *Equality Guarantees in State Constitutional Law* at n. 2; Saphire, *Ohio Constitutional Interpretation*, at 438.

The Ohio Supreme Court's decision in *Arnold v. City of Cleveland* presents notable evidence of the shift toward the primacy approach in Ohio. 67 Ohio St. 3d 35, 616 N.E.2d 163 (1993). In 1989, the City of Cleveland passed an ordinance banning the possession and sale of assault weapons within city limits. Plaintiffs challenged the constitutionality of the law under the Ohio Constitution, claiming the Article I, Section 4 right to bear arms was so similar to protections laid out by the Second Amendment to the United States Constitution that Ohio courts must necessarily interpret them in the same way. *Id*. The Court rejected this argument, advising that "states may not deny individuals or groups the minimum level of protections mandated by the federal Constitution. However, there is *no prohibition* against granting individuals or groups *greater* or *broader* protections." *Id*. at 42 (emphasis added). Therefore, though it rejected the state constitutional claim, the Court asserted its authority to interpret the Ohio constitution independently of the federal constitution. The Court went on to state that the movement toward independent state constitutional interpretation has been "met with considerable approval"[7] and noted:

> we believe that the Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor

[6] Bergeron notes here as well that many proponents of the primacy approach also apply this methodology to so-called "subconstitutional" claims, requiring courts to look first at *all* state law and only proceed to reliance on federal constitutional principles "if no state law, including the state constitution, resolves the issues." *Id*. at 1065 (quoting Williams, *State Constitutional Methodology*, internal citations omitted).

[7] Here, the Court cites favorably to multiple cases out of other states, as well as legal scholarship on the subject, including: *Davenport v. Garcia*, 834 S.W.2d 4, 12, fn. 21 (Tex. 1992); *State v. Johnson*, 68 N.J. 349, 353, 346 A.2d 66 (NJ 1975); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism* (106 Harv. L. Rev. 1147 (1993).

> below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Id. at 42. Here, the Court explicitly "join[ed] the growing trend in other states," repeating the admonition from a Texas court facing a similar challenge that "when a state court interprets the constitution of its state merely as a restatement of the Federal Constitution, it both insults the dignity of the state charter and denies citizens the fullest protection of their rights." *Id*. at 42 (quoting *Davenport v. Garcia*, 834 S.W.2d 4, 12, fn. 21 (Tex. 1992)). Ultimately, Cleveland's assault weapons ban was upheld by the Court in *Arnold*. *Id*. But this ruling was also impactful throughout the state as it marked a clear and dramatic shift in attitudes regarding accepted methods of constitutional interpretation. Williams, *The New Judicial Federalism*, at 417 (calling the decision in *Arnold* "the standard citation supporting the independent force of the Ohio Constitution").

Following *Arnold*, the Ohio Supreme Court again asserted its authority to depart from federal interpretation, this time in the search-and-seizure context, finding that the Ohio Constitution provides broader protections from unreasonable search than the United States Constitution's Fourth Amendment. *E.g. State v. Brown*, 99 Ohio St.3d 323, 2003-Ohio-3931, 792 N.E.2d 175 (hereinafter "*Brown*"); *State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438, 39 N.E.3d 496 (hereinafter "*Brown II*").[8] In 2001, police found illegal narcotics during a custodial search of an individual under arrest for a misdemeanor jaywalking infraction. *Brown* at ¶¶ 1-2. The individual was indicted for drug possession but was cleared of the charge when the trial court

[8] Despite similar captions, these cases are unrelated to one another.

granted his motion to suppress evidence obtained during the search. *Id*. at ¶ 3.[9] In doing so, the lower court relied upon Ohio Supreme Court precedent, which mandated that arrests for minor misdemeanors are unconstitutional and evidence obtained during such arrests must be excluded. *Id*. at ¶¶ 3-5 (citing *State v. Jones*, 88 Ohio St.3d 430, 727 N.E.2d 886 (2000)). The State appealed, pointing to changes in federal precedent which had occurred since the Ohio Supreme Court had last reviewed this issue. *Brown* at ¶¶ 3-5. However, the Court rejected this argument and affirmed the suppression of evidence, finding that Art. 1 § 14 of the Ohio Constitution independently prohibits arrests for minor misdemeanors. *Brown* at ¶ 21-22 (rejecting *Atwater v. Lago Vista*, 532 U.S. 318, 121 S.Ct. 1536, 149 L.E.2d 549 (2001)). Though the *Brown* court ultimately reached the same conclusion as pre-*Atwater* cases out of Ohio, unlike those prior cases, the reasoning here rested entirely on the Ohio Constitution, which the Court held to be "a document of independent force" that state courts are entitled to interpret of their own accord, including cases where it would result in "imposing more stringent constraints on police conduct than does the Federal Constitution." *Brown* at ¶ 21 (citing *Arnold*, 67 Ohio St.3d 35).

The Ohio Supreme Court revisited its relationship to federal search-and-seizure jurisprudence in 2015 and, like in *Brown*, again held that "the Ohio Constitution affords greater protection than the Fourth Amendment against searches and seizures conducted by members of law enforcement who lack authority to make an arrest." *Brown II* at ¶ 23. Here, a township police officer stopped the defendant for a marked lane violation on an interstate highway. *Id*. at ¶¶ 4-5. During the stop, oxycodone and marijuana were found in the defendant's vehicle and the defendant

[9] The trial court in *Brown* did initially deny defendant's motion to suppress but reversed its own decision upon reconsideration before trial. *Id*. at ¶¶ 3-5.

was subsequently arrested and indicted for aggravated possession of drugs.[10] *Id*. Brown initially pled no contest, then appealed his sentencing, citing a state law that prohibited the officer from making arrests outside his jurisdiction, including on interstate highways. *Id*. at ¶¶ 6-7. The Court held that this arrest (and all arrests conducted by officers operating outside their jurisdiction) constituted a violation of the Ohio Constitution's search-and-seizure provision and that evidence obtained during such an arrest must be excluded. *Id*. Relying in part on its own decisions in *Brown* and *Arnold*, the Court acknowledged that federal Fourth Amendment jurisprudence would not have mandated the same result, but that state courts have a responsibility "to determine and not to disturb the clear protections provided by the drafters of [the Ohio] Constitution" and ruled that the Ohio provision did indeed confer more extensive rights than those set forth in the Federal Constitution. *Id*. at ¶ 24 (quoting *Arnold*, at 43). The impact of these decisions is clear: Ohio courts are not bound to make decisions in "lockstep" to federal rulings and the Ohio Constitution can provide greater protections than its federal counterpart.

The Ohio Supreme Court discussed its approach to state constitutional interpretation yet again (this time in far greater depth) in *State v. Mole*, a case that challenged the constitutionality of a statute prohibiting sexual conduct with minors by law enforcement officers. 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368. In *Mole*, a peace officer was convicted under this statute after a sexual encounter with a fourteen-year-old girl. *Id*. The defendant challenged the constitutionality of this law as a violation of state and federal equal protection and due process principles. *Id*. at ¶ 9. The Court acknowledged that Ohio equal protection and benefit jurisprudence had, historically, treated Ohio's EPBC as "substantively equivalent" to the United States

[10] Defendant was also discovered to be driving on a suspended license and had an active warrant in another state, but the record does not indicate whether the officer or the canine handler accompanying the officer during the stop were aware of this at the time of the search. *Id*. at ¶ 5.

Constitution's Fourteenth Amendment equal protection provision, noting that these clauses had been "construed and analyzed identically" by Ohio courts for some time. *Id*. at ¶ 14 (O'Connor, C.J., plurality opinion, quoting *Am. Assn. of Univ. Professors, Cent. State Chapter v. Cent. State Univ.*, 87 Ohio St. 3d 55, 60, 717 N.E.2d 286 (1999)).

However, the Court also noted, as laid out in *Arnold v. City of Cleveland*, "[t]he United States Supreme Court has repeatedly reminded state courts that they are free to construe their state constitutions as providing different or even broader individual liberties than those provided under the federal Constitution." *Mole*, at ¶ 14 (quoting *Arnold*, 67 Ohio St.3d at 41-42). The Court went on to assert that state courts need not "irreversibly tie [them]selves to an interpretation of the language of the Ohio Constitution just because it is consistent with the language of the federal Constitution." *Mole*, at ¶ 17 (citing *Simmons-Harris v. Goff*, 86 Ohio St.3d 1, 10, 711 N.E.2d 203 (1999). Likewise, the *Mole* court cited to *Humphrey v. Lane*, in which the Ohio Supreme Court held that departure from federal interpretation is appropriate where there are clear "qualitative" differences in the language between state and federal clauses or where the federal doctrine previously relied upon by Ohio courts has changed since Ohio courts last discussed the implicated constitutional rights. *Mole*, at ¶ 17 (citing *Humphrey v. Lane*, 89 Ohio St. 3d 62, 728 N.E.2d 1039 (2000)). In its decision, the *Mole* court explained that:

> [w]e can and should borrow from well-reasoned and persuasive precedent from other states and the federal courts, but in so doing we cannot be compelled to parrot those interpretations. Instead, we embrace the notion that we may, and should, consider Ohio's conditions and traditions in interpreting our own state's constitutional guarantees. In doing so, we are cognizant that the individual-rights guarantees of the [federal] Bill of Rights were based on pre-existing state constitutional guarantees, not the other way around. This is particularly important to remember whenever the United States Supreme Court's decisions dilute or underenforce important individual rights and protections.

Mole, at ¶ 22 (quoting, in part, Jeffrey S. Sutton, *Why Teach—And Why Study—State Constitutional Law*, 34 Okla. City. U.L. Rev. 165, 173-174 (2009)).[11] The Ohio Supreme Court in *Mole* asserted itself as "the ultimate arbiter of the meaning of the Ohio Constitution" and reaffirmed that Ohio courts "are not confined by the federal courts' interpretations of similar provisions in the federal Constitution any more than [they] are confined by other states' high courts' interpretations of similar provisions in their states' constitutions." *Mole*, at ¶ 21.

The Court in *Mole* did also acknowledge some "inconsistency" in the cases following *Arnold*.[12] *Mole*, at ¶ 16-20. But these periodic departures from the path toward a new interpretive model need not negate the path in its entirety. Rather, the existence of a few disconsonant cases must compel this Court to "thoroughly reexamine the Ohio and federal equal protection clauses and question whether they are indeed functional equivalents." Bergeron, *A Tipping Point*, at 1077 (quoting *Stolz*, 2018-Ohio-5088, at ¶ 39) (Fischer, J., concurring), internal citations omitted). Mr. Raglin's case presents an opportunity for such a reexamination. Practically speaking, Ohio courts (and, in fact, all state courts nationwide) need "a jurisprudence of state constitutional law…that will make more predictable the recourse to and the results of state constitutional law analysis." Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 Rutgers L. Rev. 707, 708 (1983). More importantly, this Court has an opportunity to solidify, once and for all, the Ohio Constitution's position as "a document of independent force." *Arnold*, 67 Ohio St. 3d at 42.

i. Other States' departures from federal law in holding the death penalty unconstitutional under their state constitution are instructive.

[11] In this passage, the Court also cites to *Davenport v. Garcia*, 834 S.W.2d 4, 20-21 (Tex. 1992) and *State v. Short*, 851 N.W.2d 474, 481-482 (Iowa 2014). *Mole*, at ¶ 21.

[12] For additional discussion of the inconsistent case law following *Arnold*, *see generally* Saphire, *Ohio Constitutional Interpretation*; Bergeron, *A Tipping Point*.

First, in 1980, the Supreme Judicial Court of Massachusetts held that capital punishment was impermissibly cruel under Article 26 of the Massachusetts Declaration of Rights, which prohibits cruel and unusual punishments, when judged by contemporary standards of decency. *Dist. Att'y for Suffolk Dist. v. Watson*, 381 Mass. 648, 411 N.E.2d 1274 (1980). Here, the court acknowledged that while the public opinion was not squarely against the death penalty, what actually occurred in practice with the death penalty—that no one had been executed in Massachusetts from 1948 to 1972, and many people had their sentences reduced—shows that society now considers the death penalty unacceptable. *Id.* at 662. Additionally, and most important for our purposes, the court found that the death penalty will inevitably be applied arbitrarily, particularly against racial minorities. *Id.* at 665. Further, since out of the thousands of murders committed, only a few will ever see the death penalty—"the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction." *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 293, 92 S. Ct. 2726, 2754, 33 L. Ed. 2d 346 (1972) (Brennan, J., concurring)).[13] Reacting to the Supreme Court's directives in *Furman*, the court found that no rational basis exists to divide up the "worst" murders. *Id.* "Channeling" the death penalty to only the worst of the worst by guiding jury discretion is impossible. *Id.* at 667. Moreover, while *Furman* mandated guided jury discretion, there was no limitation on prosecutorial discretion in bringing the death penalty charges among similarly-situated, death-eligible cases. *Id.* at 668. Thus, following the mandate of Furman by creating

[13] *Furman* invalidated the death penalty as it existed in the United States in 1972. The majority did not issue a decision beyond declaring the death penalty as applied to petitioners unconstitutional. *Furman*, 408 U.S. at 293, So the meaning of *Furman* had to be pieced together from five separate concurrences. The Supreme Court later interpreted *Furman* as requiring sentencing procedures that did not create a substantial risk that the death penalty would be inflicted in an arbitrary and capricious manner. *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S. Ct. 2909, 2932, 49 L. Ed. 2d 859 (1976). Thus, states could impose the death penalty so long as they sufficiently narrowed the class of eligible murders, by enumerating specific aggravating and mitigating factors. *Id.* at 197.

distinctions between murders would be impossible to do while also following the mandates of the Massachusetts Declaration of Rights. *Id.*

In 2018, the Supreme Court of Washington held that their death penalty was unconstitutional because it is imposed in an arbitrary and racially biased manner, thereby violating Art. I, § 14 of the Washington State Constitution, which forbids cruel and unusual punishments. *State v. Gregory*, 192 Wash. 2d 1, 5, 427 P.3d 621, 627 (2018). *Gregory* relied on statistical findings that: 1) whether the death penalty is imposed varies by county, and some of that variation stems from the size of the Black population in each county; 2) case characteristics explain only a small portion of the variance in decisions to seek or impose the death penalty; and 3) black defendants were four and a half times more likely to be sentenced to death than similarly situated white defendants. *Id.* at 11-12. Washington State takes the "primacy" approach to state constitutional interpretation, deciding the issue under the state constitution first if possible. *Id.* at 14. The "most important" consideration identified by the court was that race has a "meaningful impact" on whether a defendant receives the death penalty. *Id.* at 20. The court came to this conclusion "by way of legal analysis, not pure science." *Id.* The court was convinced by the statistical analysis put forth, but also relied on case law and history in Washington State showing racial bias throughout the criminal legal system. *Id.* at 20-23. Therefore, it necessarily followed that the death penalty served no legitimate penological goals. *Id.* 24-25.

Next, after the Connecticut legislature prospectively forbade capital punishment, the Connecticut Supreme Court held that their state constitution therefore prohibited execution of offenders who committed their crimes before the death penalty was forbidden. *State v. Santiago,* 318 Conn. 1, 9, 122 A.3d 1, 10 (2015). As a result of the prospective repeal, Santiago raised the claim that the death penalty is "no longer consistent with standards of decency in Connecticut and

does not serve any valid penological objective." *Id.* at 13. The court gave several reasons that, taken together, meant the death penalty was no longer acceptable: 1) the prohibition against the death penalty for offenses committed on or after the effective date of the new law reflected evolving standards of decency; 2) historians and legal scholars had given the court new perspectives on the devolution of the death penalty and the original understanding of the constitutional prohibition against cruel and unusual punishments; 3) the risk of capital punishment falls disproportionately on people of color; 4) the number of executions and states that allow the death penalty continues to decline, and most death row prisoners are unlikely to actually be executed; and 5) the federal constitutional requirement that the jury be provided with objective standards to guide its decision, while giving it unfettered discretion to decline to sentence a person to death are "fundamentally in conflict" and "inevitably open the door to impermissible racial and ethnic biases." *Id.* at 14-15. Regarding the fifth point, the court concluded that the current state of the federal constitutional law about the death penalty "paradoxically" requires states to limit and carefully define which offenses are death-eligible, while, at the same time, giving prosecutors and juries ample discretion as to whether to charge an offense capitally, and whether to sentence someone to death, respectively. *Id.* at 25. When there is a likelihood that someone is chosen to be on death row for any reason other than the heinousness of their crime, then capital punishments cannot be morally proportionate and in service of a legitimate retributive function. *Id.* at 115.

The experience of Massachusetts, Washington, and Connecticut shows that it is possible to depart from federal constitutional law and hold the death penalty *per se* unconstitutional. If many states have held based on their state constitution that the death penalty cannot be imposed at all, then it is surely possible for the Ohio courts to only hold that the discriminatory imposition of the death penalty is unconstitutional. Each state found statistical evidence that the death penalty

disproportionately falls on minorities to be highly significant. Further, both Massachusetts and Connecticut reasoned that the two aims of the Supreme Court's post-*Furman* jurisprudence–limiting the class of death-eligible murders, while giving juries broad discretion to reject the death penalty if they choose–failed to meaningfully change the fact that the death penalty had been, and continued to be, applied arbitrarily. The arbitrariness identified by these state courts exists in Hamilton County, Ohio, as discussed throughout this brief. The court should take into account the extensive evidence of arbitrary and capricious use of the death penalty against those who kill white persons, as compared to similarly situated persons who murder Black persons.

2. The History of the Ohio EPBC strongly suggests that it provides greater protection against arbitrary and unequal enforcement of the laws than the federal constitution.

Central to the primacy approach is establishing a thorough understanding of the text and history of the state constitutional provision under review. Williams, *The New Judicial Federalism*, at 418. Unlike the primacy model, Courts employing the lockstep approach to interpretation of state and federal constitutions "fail to acknowledge the differing text, history, and purposes of its state constitutional equality guarantees." *Id*. at 429. Yet some early state constitutions contained their own bill of rights which served as inspiration for the first ten amendments to the United States Constitution—not the other way around—and the Federal Constitution initially only provided protections from federal government action, while state constitutions retained their authority over the conduct of state government.[14] This history must not be ignored.

The preservation and enforcement of civil liberties was the main purpose motivating the framers of the 1851 Ohio Constitution. *City of Cleveland v. Clements Bros. Const. Co.*, 67 Ohio St. 197, 214, 65 N.E. 885 (1902). The constitutional debates which lead to the ratification of this

[14] Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship between State and Federal Courts*, 63 Tex. L. Rev. 977, 979-80 (1985).

document provide insight into the meaning of the EPBC at the time. Certainly, as it was exclusively white men taking part in these debates, we can safely assume that they meant the EPBC to ensure the government provided equal protection and benefit to white men. However, it is not the sphere of people that the EPBC served in 1851 that dictates how it is applied today. Since that time, full citizenship has been expanded under the law to include women and people of all races and, by extension, eligibility for equal treatment and benefits under the law has grown as well. But the *purpose*, as explained below, the drafters of the EPBC had for adding the Clause remains instructive. We should apply the EPBC today with that purpose in mind.

In 1851, the people of Ohio were frustrated with the prior version of the Ohio Constitution, which was ratified in 1802, as they believed it had given rise to a state legal regime that operated primarily to the benefit of corporations and economically privileged classes, to the detriment of the majority of Ohioans. Randall & Ryan, *History of Ohio: The Rise and Progress of an American State*, Vol. 4, 111-13 (1912). In response, Ohioans added the EPBC to the new edition of the Ohio Constitution with the express purpose of addressing this specific problem. Its purpose was not to completely eliminate any differentiation between groups under the law; instead, the EPBC was added to this document to ensure equal application and *impact*, such that no law distributed special benefits to one group and by doing so harmed another group. *Id*. Permitting the state to enact such laws, or to enforce laws in such a way, would be the antithesis of "equal protection and benefit." Mr. Ranney, a future Ohio Supreme Court Justice who took part in the 1851 constitutional debates, opined that "whenever [the EPBC] is lived up to and carried out in its true spirit, all special privileges will cease and die away as an accursed thing." Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, Vol. 2, 478 (1850-1851). There was no mention of a requirement that these "special privileges" arise from explicit

animosity toward or an intent to discriminate against an easily defined group before the "accursed thing" should "die away." *Id*. The intent of the framers of the Equal Protection and Benefit Clause was to jettison all special privileges and unequal treatment, without regard to the intent of the governmental actors who may cause unequal treatment.

Today, though many state constitutions do articulate provisions that speak to equality *generally*, most do not contain an *explicit* "equal protection" clause. Williams, *Equality Guarantees in State Constitutional Law*, at 1196, fn. 7. Ohio's EPBC stands out as particularly broad.[15] *Id*. As mentioned, *supra*, the EPBC states, in part, that "[a]ll political power is inherent in the people. Government is instituted for their equal protection *and benefit*." Ohio Constitution, Article I, § 2 (emphasis added). Added to Ohio's Constitution in 1851, this language is believed to have been derived from similar clauses in early documents out of Virginia and Pennsylvania which both provide that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community." Virginia Declaration of Rights of 1776, § 3; Pennsylvania Constitution of 1776, Article V. Notably, the drafters of Ohio's EPBC added the "equal" language and removed the phrase "or ought to be." *Stolz*, 2018-Ohio-5088, at ¶ 32 (citing Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution,* 85 (2011)). These linguistic changes have been interpreted to indicate that the Virginia and Pennsylvania clauses "were more descriptive of a political philosophy than clauses, like the Ohio Equal Protection Clause, that specifically confer rights." *Id*.

[15] In addition to this early and relatively unique "equal protection and benefit" language, the Ohio Constitution contains other clauses which speak directly to equality including Article I, Section 1 which states that "[a]ll men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty…and seeking and obtaining happiness and safety." Ohio Constitution, Article I, Section 1. This clause is not the subject of the instant litigation, but this does speak to the Ohio Constitution's clear commitment to equality, well before ratification of the Fourteenth Amendment to the United States Constitution. *See* Williams, *The New Judicial Federalism*, at 430.

In contrast, the Fourteenth Amendment of the United States Constitution says that "no state shall…deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amendment XIV, Section 1. The federal Equal Protection Clause was ratified in 1868, a full seventeen years after Ohio's own EPBC was drafted, so it is likely that the drafters of the Fourteenth Amendment were familiar with the language of Ohio's EPBC. *Stolz*, 2018-Ohio-5088, at ¶ 36. But the federal Equal Protection Clause was drafted through a negative lens, in that it "contains proscriptions against taking or denying benefits, especially by the states." *League of Women Voters*, 2022-Ohio-65, ¶ 151 (Brunner, J.,, concurring). Unlike its federal counterpart, the thrust of the Ohio EPBC is positive, establishing not merely a prohibition against discrimination but an affirmative right to a government that must protect the interests of all Ohioans equally and identifying the "equal protection and benefit" of Ohioans as the central purpose of government. *Id*.

In the seventeen years that elapsed between the 1851 Constitutional Convention in Ohio and the ratification of the Reconstruction Amendments in 1868, the Ohio Supreme Court did not explicitly apply the EPBC in any of its decisions. However, insight into the understanding of equity under the law during this time can be derived from at least one Ohio Supreme Court case. In 1853, Exchange Bank of Columbus filed for an injunction against Hines (then Ohio Secretary of State) to enjoin an 1852 tax statute. *Exch. Bank of Columbus v. Hines*, 3 Ohio St. 1 (1853). The statute would levy higher taxes on banks, specifically, over and above taxes required of other property owners. *Id*. Ultimately, the Court held that the tax law in question was constitutional but, important for our purposes here, the Court did hold that Section 10 of that tax law was "repugnant to the

constitution" as it would unfairly disadvantage one group (bankers) in comparison to another (property owners).[16] *Id*. at 6.

The *Hines* court expressed concern about the disproportionate individualized burdens the tax would impose, suggesting that although devising a totally equal system of taxation may not be plausible, the principles of "equity and fairness" established by the constitution "admits of an approximation to such a standard." *Id*. at 14.

The Court's discussion here is instructive of the scope and meaning of the 1851 changes to the Ohio Constitution and, by extension, instructive of the differences between those changes and the motivations behind the Reconstruction Amendments, which were quite explicitly a response to the Civil War, the abolition of slavery, and a rapidly changing society undergoing dramatic structural change. *See* Williams, *The New Judicial Federalism*, at 429; Williams, *Equality Guarantees in State Constitutions*, at 1207 (explaining that state constitutional equality provisions "were placed in different constitutions at different times by different men to enact different historic concerns into constitutional policy" than ostensibly similar federal clauses). Like the framers of the Ohio Constitution—and markedly *unlike* the drafters of the Fourteenth Amendment—the *Hines* court was not concerned with classifications of race or sex at the time. For Ohio, these equality provisions were not inspired by the same principles; rather, protecting the citizens from the actions of a legislature dominated by corporate interests to the detriment of Ohioans was the central driving force behind the state's 1851 constitutional convention. Randall & Ryan, *History of Ohio*, at 113-14 (1912). The EPBC drafters envisioned a legal system that protects citizens from the machinations of corrupt elected officials whose personal and political interests do not reflect the best interests of the citizenry. When viewed through this lens, one cannot help but question the

[16] Here, the Court did not explicitly cite to Article 1, Section 2 of the Ohio Constitution, but did discuss principles of "equal protection" generally. *Id.*

wisdom of demanding an equal protection and benefit doctrine in "lockstep" with federal courts and their (vastly different) constitutional clauses.

Ohio courts have agreed that Ohio's EPBC and its federal counterpart are so "significantly different" in text and history that a number of interpretive methods "could well lead to the determination that the Ohio clause is too distinct from the federal clause for them to be considered 'functional equivalents.'" *Stolz*, at ¶ 36 (citing Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980)). As articulated in *Stolz*, given that Ohio's current constitution predates the federal Fourteenth Amendment by seventeen years, "there can be no legitimate argument that the Ohio [EPBC] was the 'functional equivalent' of the federal Equal Protection Clause" during the intervening years as "there was no federal clause to which it could be equivalent, functional or otherwise." *Id*. at ¶ 31; *see also* Bergeron, *A Tipping Point*, at 1077. This case presents an opportunity for Ohio courts to clarify and articulate an EPBC doctrine truly based on the Ohio Constitution, independent from fluctuating federal doctrine or a federal constitution so distinct from the one our state has adopted for itself.

3. Inconsistencies in both federal and Ohio case law have opened the door to a new standard for establishing equal protection and benefit claims under the Ohio Constitution.

Ohio EPBC jurisprudence has been inconsistent. From *Arnold v. City of Cleveland* forward, the state's approach to constitutional interpretation is lacking direction and is in need of a unifying principle. The Ohio Supreme Court has made clear that it "can and will interpret our Constitution to afford greater rights to our citizens when we believe that such an interpretation is both prudent and not inconsistent with the intent of the [Ohio] framers" but has not provided a clear guide as to *how* equal protection principles should be interpreted differently under Ohio's EPBC. *Mole*, 149 Ohio St. 3d, at ¶ 21. However:

> Ohio has a rich constitutional heritage, and the primacy model would appropriately honor that history by reinvigorating Ohio constitutional interpretation…The primacy approach would compel Ohio courts to consider…Ohio's constitutional provisions first, before turning to the federal constitution. It would shine a spotlight on all of those areas where courts have treated state constitutional claims differently without explaining why or how and hopefully provide answers to those questions…Lawyers and courts, working together, can restore the independent force of the Ohio Constitution that our founders intended.

Bergeron, *A Tipping Point*, at 1087 (quoting, in part, *State v. Banks*, 1st Dist. Hamilton, Nos. C-200395 & C-200396, 2021-Ohio-4330, ¶ 49) (Bergeron, J., concurring), internal citations omitted). In other words, it is time for a new conception of state-based equal protection and benefit claims in Ohio.

B. Ohio's EPBC supports a finding that the discovery of new social science evidence of racial discrimination in Hamilton County's capital punishment system necessitates a reconsideration of Mr. Raglin's conviction and sentence.

The Ohio Supreme Court has found the death penalty scheme in Ohio to be constitutional several times. *See, e.g., State v. Stallings*, 2000-Ohio-164, 89 Ohio St.3d 280, 297, 731 N.E.2d 159 (2000) (holding that the death penalty is constitutional in "all respects"); *State v. Steffen*, 31 Ohio St. 3d 111, 111, 509 N.E.2d 383 (1987) (holding that the proportionality review set out in O.R.C. §2929.04(B)(7) passes constitutional muster). Yet the Ohio Supreme Court has never considered whether the death penalty is imposed in any particular Ohio county in a racially discriminatory manner. Further, the death penalty system in Ohio has never been specifically scrutinized under the Equal Protection and Benefit clause. Mr. Raglin's case presents the opportunity to scrutinize prosecutorial discretion and jury discretion in these life-or-death matters and ensure fairness in the imposition of the death penalty. *Amici* urge the court to allow Raglin a new trial where he will establish that the imposition—charging, and sentencing--of the death penalty in Hamilton County

is racially discriminatory and violates the Equal Protection and Benefit Clause of the Ohio Constitution.

Amici do not posit that all disparities will state a claim under the EPBC. It is true that many laws may treat people differently, with no invidious discrimination. The EPBC forbids the denial of equal protection and benefits of the law to similarly situated white and Black persons charged with murder—i.e., government distinctions between white and Black persons charged with murder that are arbitrary and have the effect of substantially unequal outcomes.

C. Ohio's Constitution is well-suited for an equal protection jurisprudence that considers adverse impact in the imposition of the death penalty reversible error and does not require a showing of discriminatory intent.

In the case of the death penalty, the intent of the relevant government actor is particularly unreviewable because the prosecutor's decision-making process is by nature non-public. Additionally, no rational prosecutor would state explicitly, even in private notes, that they are making their decision based on the race of the defendant or the race of the victim.[17] The impact is what matters to the Ohio Constitution. The text of the EPBC affirmatively requires the government to take action to ensure that all citizens receive the equal protection and benefit of the laws. Therefore, intent is irrelevant.[18]

As posited by the United States Supreme Court in *Furman*:

> a law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fail, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed.

[17] Evidence of widespread implicit bias also makes an approach that requires a showing of intent unworkable, because much of modern-day racism is expressed subconsciously or unconsciously. Richard Byyny, *Cognitive Bias: Recognizing and Managing Our Unconscious Biases*, The Pharos (Winter 2017) https://www.med.upenn.edu/inclusion-and-diversity/assets/user-content/cognitive-bias.pdf

[18] In the alternative, *Amici* argue that the evidence of such extreme disparate impact is itself evidence of intent to discriminate based on race, and therefore Mr. Raglin's death sentence is invalid.

> A law which, in the overall view, reaches that result in practice has no more sanctity than a law which in terms provides the same.

Furman,408 U.S. at 256 (Douglas, J., concurring). What Justice Douglas describes in *Furman* is precisely the practical reality that exists in Hamilton County. Although United States Supreme Court death penalty jurisprudence has required states to formally narrow the class of death-eligible offenders, the application of this precedent in practice has not sufficiently curtailed arbitrary imposition of the death penalty.[19] However, Ohio EPBC can and should fill this gap.

As discussed above~~,~~ the Grosso study found that a defendant charged with killing at least one white victim is 4.54 times more likely to be charged capitally, and, out of all capitally charged cases, a Black defendant with at least one white victim was 5.33 times more likely to receive a death sentence. *Grosso, supra,* at 903. The adverse impact of Hamilton County's death penalty charging decisions is blatant. The fact that the Hamilton County Prosecutor's Office has no explicit policies forbidding charging a white person accused of killing a black person capitally, or mandating charging a Black person accused of killing a white person is irrelevant when the state has a duty to provide equal protection. Nor is it relevant that there may be no direct e evidence of the conscious use of race in charging decisions by prosecutors.

Nothing in the Ohio Constitution states that equal protection should only be guaranteed where claimants can point to incontrovertible evidence of clear discriminatory intent on the part of statutory drafters. In *Exchange Bank of Columbus,* the court did not consider the intent of the legislature who drafted the law at issue. 3 Ohio St. 1. Justice Thurman, in concurrence, wrote that at the time of the 1851 constitutional convention, "the existing evil was inequality. It was to be remedied, not by establishing a different kind of inequality, but by ordaining a uniform, equal

[19] *See generally* Carol Streiker and Jordan Streiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

law." 3 Ohio St. at 47. The point of the Equal Protection and Benefit Clause is equality, and when inequality exists, the people are entitled to a remedy. In other words, to allow inequality in substance so long as the inequality does not exist in the explicit words of the legislature or government actors would simply create a "different kind" of inequality.

Mr. Raglin's trial took place within a county-level criminal legal structure that regularly and systematically generated discriminatory outcomes in the lives of the Black defendants before it, directly infringing upon the most fundamental rights. Especially where the consequence for those discriminated against is death, the Equal Protection and Benefit Clause forbids the unequal application of the laws.[20]

1. The guarantee of proportionality in punishment imposed by Art. I, §9 of the Ohio Constitution and O.R.C. §2929.04 must be considered in tandem with the Equal Protection and Benefit Clause.

The Ohio Supreme Court has found that the protection against Cruel and Unusual Punishments in Art. I, §9 of the Ohio Constitution provides "protection independent of the protection provided by the Eighth Amendment." *In re C.P.*,131 Ohio St. 3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 60 (invalidating juvenile sex offender registration and notification requirements under Art. I, § 9). *Accord State v. Morris,* 2022-Ohio-4609, ¶7 (stating that Art. I. §9 of the Ohio Constitution provides "independent protection"). Under the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution, the acceptability of a punishment must

[20] Implicit in the guarantee of equal protection and benefit of the laws is that the human dignity of all, even those who have committed acts society rightfully finds morally repugnant. *Cf. Sherman v. Ohio Pub. Emps. Ret. Sys.*, 163 Ohio St.3d 258, 2020-Ohio-4960, 169 N.E.3d 602, ¶ 14 (the EPBC requires that the government treat similarly situated persons alike). Another problem identified by Justice Brennan in his *Furman* concurrence is the denial of human dignity that comes with punishing only certain persons for arbitrary reasons. He wrote that "the true significance of [cruel and unusual punishments] is that they treat members of the human race as nonhumans...They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity." *Furman*, 408 U.S. at 272-273 (Brennan, J., concurring). The state certainly has a role in assigning punishment to criminal acts; however, punishment must be measured, equal and free of irrational arbitrariness.

be measured by the "evolving standards of decency" in society. *Roper v. Simmons*, 543 U.S. 551, 587, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (holding that imposition of the death penalty for a crime committed when the defendant was under eighteen is unconstitutional). The Ohio Supreme Court considers a "lack of proportionality" a "key factor" in determining whether a particular punishment is excessive. *In re C.P.*, at ¶ 60. A punishment violates the Ohio Constitution if it is so "greatly disproportionate" as to "shock the sense of justice of the community." *Id.* (citing *State v. Chaffin*, 30 Ohio St.2d 13, 282 N.E.2d 46 (1972)). Intent is not a factor when determining whether a sentence is disproportionate. Under the Ohio Constitution, it will be a "rare" case where a punishment is so "shocking to the sense of justice of the community" as to be unconstitutional. *State v. Blankenship*, 145 Ohio St. 3d 221, 2015-Ohio-4624, 48 N.E.3d 516, ¶ 32-36. Read together, the EPBC and the cruel and unusual punishment clause of the Ohio Constitution require the state to impose punishments in not only a manner proportional to the offense, but also in a manner that is fair and free of arbitrariness.[21]

The Grosso study indicates that race unduly influences which cases the Hamilton County Prosecutor chooses to charge capitally. *Grosso, supra*, at 905. Controlling for factors that legislatures, judges, and juries use to separate the group of murders that are sufficiently serious and heinous to necessitate the death penalty, the authors find that race is a significant factor in at least some cases. *Id. Cf. Furman*, 408 U.S. at 293 ("when the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that

[21] *Amici* do not challenge at this juncture that the death penalty is *per se* unconstitutional and disproportionate to murder, principally because that argument is foreclosed by precedent. *See, e.g., State v. Zuern*, 32 Ohio St. 3d 56, 64, 512 N.E.2d 585, 593 (1987); *State v. Phillips*, 74 Ohio St.3d 72, 103, 1995-Ohio-171, 656 N.E.2d 643. The death penalty may be proportional to murder if it is imposed on every similarly situated murderer, but disproportional when similarly situated murderers, or even more culpable murderers, escape it. *Cf. Glossip v. Gross*, 576 U.S. 863, 917, 135 S. Ct. 2726, 2760, 192 L.Ed.2d 761 (2015) (Breyer, J., dissenting) (arguing that it is "increasingly clear" that the death penalty is imposed arbitrarily, and without limitation to the worst offenders). The time may come when the Ohio courts must decide whether the death penalty is constitutional at all. At the very least, imposing the death penalty on Mr. Raglin, a Black man, but not a similarly situated white murderer is disproportionate.

it is being inflicted arbitrarily.") (Brennan, J., concurring). It is surely "shocking to the sense of justice of the community" that one defendant—a Black man who killed a white person—is 3.79 times more likely than a Black man who killed a Black person to receive the death penalty. *Blankenship*, 2015-Ohio-4624 at ¶ 32-36; *Grosso*, *supra,* at 903.

2. The Equal Protection and Benefits Clause provides greater protection against the discriminatory imposition of the death penalty.

As discussed throughout, several portions of the Ohio constitution have been found to have independent force and provide even greater protection than the federal constitution. Interpreting the EBPC under the primacy model, this court must find that the EPBC prohibits the discriminatory imposition of the death penalty, even absent evidence of discriminatory intent.[22]

Following its obligations under the federal constitution to guide jury discretion in sentencing, Ohio law provides aggravating and mitigating factors to consider when deciding whether the defendant should be sentenced to death. *See generally* R.C. §§2929.04(A) (aggravating factors) and 2929.04(B) (mitigating factors). This scheme has recently been criticized as inadequately narrowing the range of murders that are considered when conducting a proportionality review. *State v. Graham,* 164 Ohio St.3d 187, 2020-Ohio-6700, 172 N.E.3d. 841, ¶¶ 218-227 (Donnelly, J., concurring). The Ohio Supreme Court in *Graham* vacated the death sentence imposed on Mr. Graham. *Id.* at 231. Justice Donnelly wrote that the felony murder aggravating factor is "particularly problematic" because any murder that occurs in conjunction with a felony, such as robbery, is eligible for a death sentence under R.C. §2929.04(A)(7). *Id.* at 235-236. But a "cold-blooded murderer who acted with prior calculation and design and

[22] The Ohio Supreme Court has rejected a challenge to the death penalty under the EPBC, but in doing so, did not independently analyze the EPBC, or the other provisions of the Ohio constitution raised by the defendant. *State v. Jenkins*, 15 Ohio St. 3d 164, 168-179, 473 N.E.2d 264, 272-281 (1984).

committed the murder in a particularly brutal manner is not eligible for the death penalty unless an additional aggravating factor under R.C.§2929.04(A) can be proved." *Id.* (Donnelly, J., concurring). Mr. Raglin was convicted of the felony murder aggravating factor—causing the death of Mr. Bany during the commission of an aggravated robbery. *See State v. Raglin*, 83 Ohio St.3d 254, 255, 1998-Ohio-110, 699 N.E.2d 482. While nine others were murdered in Over-the-Rhine in 1995, only Mr. Raglin killed a white person, and only Mr. Raglin was sentenced to death. Exhibits to Proposed Motion for New Trial, Exhibit E. Under Ohio's scheme, every robbery-murder is death penalty eligible without requiring the state prove the crime was particularly heinous. *Graham*, 164 Ohio St.3d at 236. In other words, Raglin's crime was tragically common, and does not qualify him as the "worst of the worst". As a result, Justice Donnelly has urged that the Ohio Supreme Court include similarly situated cases *not charged capitally* in its proportionality review, instead of simply comparing other capital cases. *Id.* at 237-240. Indeed, cases which involve Black defendants and white victims are at a special risk of arbitrariness. *Id.* at 239 (citing *Grosso, supra*). Therefore, to impose capital punishment on Mr. Graham would be "arbitrary" under the Supreme Court's Eighth Amendment jurisprudence. *Id.* (Donnelly, J., concurring). In relation to the sentence imposed on "other heinous crimes," Justice Donnelly would have found that Graham's death sentence was disproportionate. Similarly, Mr. Raglin's death sentence should be treated with additional suspicion because of the breadth of the aggravating factor he was charged capitally under. *Cf. State v. Flynt*, 63 Ohio St. 2d 132, 134, 407 N.E.2d 15 (1980), *writ dismissed*, 451 U.S. 619, 101 S. Ct. 1958, 68 L. Ed. 2d 489 (1981) (holding that a defendant may mount a defense, under the federal constitution, based on selective prosecution if he can show that he has been "singled out" for prosecution and he was selected for prosecution based on impermissible characteristics such as race).

For too long, the Ohio courts have simply held in a conclusory manner that a death sentence is proportional and valid. *See, e.g., State v. Fautenberry*, 72 Ohio St.3d 435, 443, 650 N.E.2d 878 (1995). Justice Donnelly correctly diagnoses the problem with the Ohio courts' proportionality analysis, but his analysis can be strengthened with an analysis of the Equal Protection and Benefit clause. The EPBC provides an independent protection against arbitrary enforcement of the laws. Ohio courts have long held that "preservation and enforcement of [civil liberties] was the main purpose in view when the [1851 Ohio Constitution] was enacted." *Clements Bros. Const. Co.*, 67 Ohio St. at 214.

Hamilton County frequently charges defendants non-capitally, and Hamilton County juries frequently do not recommend the death penalty when a defendant may meet the aggravating factor of felony murder under R.C. §2929.04(A)(7). *Grosso*, *supra*, at 921 (finding that out of five hundred ninety-nine aggravated murder cases, the state filed capital specifications in 102 cases). As compared to Raglin, similarly situated murder defendants who have Black victims have been given a "special privilege" prohibited by the Ohio constitution. *See* Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, Vol. 2, 478 (1850-1851), discussed *supra* section A. By the same token, Mr. Raglin has been denied the equal protection and benefits of the law. The Ohio constitution requires that the felony murder aggravating factor in R.C. §2929.04(A)(7) be read to ensure the equal protection and benefit of the laws for all capital murder defendants. When an aggravating factor does not actually describe a particularly horrible kind of murder, but instead describes a common form of homicide, the problem of standardless discretion identified by the United States Supreme Court in *Furman* re-

emerges in substance if not in form.[23] In Ohio, the standardless discretion implicitly allowed by R.C. §2929.04(A)(7) is particularly vulnerable to being used in a racially discriminatory manner. Grosso and her co-authors have shown that race-neutral factors do not account for the vast difference in how the Hamilton County prosecutor and Hamilton County juries treat murder defendants by controlling for fifty relevant factors. Grosso, *supra,* at 927.

3. Hamilton County's history of racism in the criminal legal system supports a finding that the discriminatory imposition of the death penalty is a result of Hamilton County failing to meet its burden to provide Equal Protection and Benefit of the laws.

As Grosso stated in her study: "as significant as these statistical disparities are, they should not be considered in isolation, but in the context of a long history of racial tensions in Hamilton County." Grosso, *supra* at 932. Given that the impacts of racism on Mr. Raglin's trial is the central issue under review at this time, a clear understanding of this history is warranted.

Cincinnati's racial history is unique, and makes it particularly susceptible to racial inequality; while geographically North, its proximity to the South created vast economic incentives in the lead up to the civil war for white residents to sympathize with the Confederacy.[24] In 1807, Ohio legally prohibited Black people from testifying in cases in which white people were a party, effectively allowing crimes to be committed against Black people white people with impunity.[25] In 1829, officials in Cincinnati, Ohio issued a notice to all Black residents that they must obtain

[23] Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 MICH.L.REV. 2590, 2608–2609 (1996) (finding that aggravating factors used in many capital murder statutes "describe the circumstances surrounding most murders").

[24] K. Luci Petlack, A Dilemma of Civil Liberties, Cincinnati's Black Community 1862-63, 120 Ohio History 47, 53 (2013)

[25] On this Day—April 1, 1807—Ohio Prohibits Any Black Person from Testifying Against a White Person, Equal Justice Initiative, https://calendar.eji.org/racial-injustice/apr/1 (last accessed July 2, 2023).

proof of freedom and register with the clerk's office, in order to prevent fugitive enslaved persons from fleeing to Cincinnati.[26]

Ratification of the Thirteenth Amendment eradicated slavery as a system (at least for those who are not currently incarcerated) but, to this day, Black Americans are still disproportionality impacted by this country's death penalty system.[27] After the end of slavery, lynching arose as a means for white people to control Black people through fear of random, unpunished killings.[28] Indeed, the death penalty was seen in the early twentieth century as a "necessary antidote to lynching."[29] Supporters of the death penalty saw it as a lesser evil to lynching.[30] Retribution is a judicially legitimized justification for punishment, and in other contexts, relatively unproblematic. Yet in the death penalty context, retribution is inextricable from the legacy of lynching, and the racial animus which animated lynching.[31] The specific historical roots of the death penalty must be taken into account when assessing the constitutionality of a specific death sentence under Ohio's EBPC.

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[26] On This Day—June 30, 1829—Cincinnati, Ohio Forces Hundreds of Black People to Leave. Equal Justice Initiative, https://calendar.eji.org/racial-injustice/jun/30 (last accessed July 2, 2023).

[27] Kubbins, *Racial Bias in Ohio's Death Penalty Is Part of National Pattern New Report Illustrates Death Penalty's Roots in Slavery, Lynching, Segregation*, Ohioans to Stop Executions (Sep. 15, 2020).

[28] Jamiles Lartey and Sam Morris, *How White Americans Used Lynchings to Terrorize and Control Black People*, THE GUARDIAN, available at https://www.theguardian.com/us-news/2018/apr/26/lynchings-memorial-us-south-montgomery-alabama (April 26, 2018). Lynch mobs "turned the act into a symbolic rite in which the black victim became the representative of his race, and, as such, was being disciplined for more than a single crime...[t]he deadly act was a warning to the Black population not to challenge the supremacy of the white race." *Id.* (quoting from Howard Smead, *Blood Justice: The Lynching of Mack Charles Parker* (1986)).

[29] G. Ben Cohen, McCleskey's *Omission: The Racial Geography of Retribution*, 10 Ohio St. J. Crim. L 65, 93 (2012) (citing Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. Crim. L. & Criminology 643, 646 (2010)).

[30] *Id.*

[31] *Id.* Cohen concludes:

> ...*Gregg* [*v. Georgia*, 428 U.S. 153 (1975)] is the [*United States v. Cruikshank*, 92 U.S. 542 (1876)] of our time. The Court in *Cruikshank* chose to not address the significant constitutional injury inflicted on African-Americans in Colfax, Louisiana. It tolerated the rise of vigilante justice...Instead of holding fast to the premise that those who lunch and seek vigilante justice should be prosecuted to the fullest extent of the law, *Gregg* held the death penalty constitutional based upon the need for retribution—accommodate the instinct to lynch and terrorize.
>
> *Id.* at 101.

Furthermore, Cincinnati's specific racial history is unique, and makes it particularly susceptible to racial inequality; while geographically North, its proximity to the South created vast economic incentives in the lead-up to the Civil War for white residents to sympathize with the Confederacy and the region's legal treatment of Black residents reflected this reality.[32] In 1807, for example, Ohio adopted legislation that legally prohibited Black people from testifying in cases in which white people were a party, effectively allowing crimes to be committed against Black people by white people with impunity.[33] Similar Ohio laws, such as those requiring Black people to obtain proof of their freedom and register with their local clerk's office, were "rigidly enforced" in Cincinnati, in an effort expressly aimed at preventing Black people from settling in the area after fleeing slavery in neighboring states.[34] Even when situated in a so-called "free" state, Cincinnati has a long history of participation in and capitulation to the racist violence of chattel slavery.

The criminal legal system in Hamilton County has continued to disadvantage Black residents even after Reconstruction, and into the present day. As recently as 1967, Black Cincinnatians rebelled against anti-loitering ordinances which were used to selectively arrest Black people.[35] In 1971, there were 9,411 people incarcerated in Ohio's state prisons, but the population began to rise dramatically in the 1980s.[36] Ohio's prison population peaked in 2008 at 51,273, but

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[32] K. Luci Petlack, *A Dilemma of Civil Liberties, Cincinnati's Black Community 1862-63*, 120 Ohio History 47, 53 (2013)

[33] *On this Day—April 1, 1807—Ohio Prohibits Any Black Person from Testifying Against a White Person*, Equal Justice Initiative, https://calendar.eji.org/racial-injustice/apr/1 (last accessed July 2, 2023).

[34] *On This Day—June 30, 1829—Cincinnati, Ohio Forces Hundreds of Black People to Leave*. Equal Justice Initiative, https://calendar.eji.org/racial-injustice/jun/30 (last accessed July 2, 2023).

[35] Elizabeth Hinton, *America on Fire: The Untold History of Police Violence and Black Rebellion Since the 1960s* 263 (2021).

[36] Fiscal Year Intake and Population on July 1, 1971-2016, Ohio Department of Rehabilitation and Corrections (August 15, 2016), https://drc.ohio.gov/wps/wcm/connect/gov/d5266d7a-e1d0-4a56-a129-86e51217429c/Fiscal+Year+Intake+and+Population+on+July+1+%281971+-+2016%29.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-d5266d7a-e1d0-4a56-a129-86e51217429c-obgKBGv

has gone down to 44,376 as of May 2023.[37] And Black people have been significantly overrepresented among those incarcerated populations—today, they make up 43% of incarcerated people, despite comprising only 12% of the population overall.[38] In the 1990s, Cincinnati's rates of income inequality across racial lines were the second-worst in the nation.[39] And this stark racial wealth gap persists even into the present day.[40] Decades of frustration with the Cincinnati Police Department's inequitable practices led to an uprising after the shooting of Timothy Thomas in 2001 and led to the 2002 Collaborative Agreement[41] and the Memorandum of Agreement with the Department of Justice.[42]

Hamilton County has been sending people to death row since at least 1789.[43] Despite a lower murder rate and a smaller population than Franklin and Cuyahoga Counties, Hamilton County has the largest number in inmates on death row in the state.[44] After *Gregg*, 428 U.S. 153, reinstated the death penalty in America, Ohio sought to begin executing people once again, but did not complete an execution until 1999.[45] The American Bar Association passed resolutions in 1988

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[37] May 2023 Fact Sheet, Ohio Department of Rehabilitation and Corrections, https://drc.ohio.gov/wps/wcm/connect/gov/d8de8204-8800-4bb8-8f4d-151eac19bdf5/May+2023+Fact+Sheet+%281%29.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_K9I401S01H7F40QBNJU3SO1F56-d8de8204-8800-4bb8-8f4d-151eac19bdf5-ozFPPc2

[38] Ohio Profile, Prison Policy Initiative, https://www.prisonpolicy.org/profiles/OH.html (last accessed July 29, 2023).

[39] Elizabeth Hinton, *America on Fire: The Untold History of Police Violence and Black Rebellion Since the 1960s*, 263 (2021).

[40] City of Cincinnati, *Cincinnati Financial Freedom Blueprint*, https://www.cincinnati-oh.gov/sites/manager/assets/20230714_ODP_CFF-Blueprint_v11_DIGITAL.pdf, at 4 (2023).

[41] *In re Cincinnati Policing*, 209 F.R.D. 395 (S.D. Ohio 2002).

[42] Memorandum of Agreement Between the United States Department of Justice and the City of Cincinnati, Ohio, and the Cincinnati Police Department (April 12, 2002), https://www.justice.gov/crt/memorandum-agreement-between-united-states-department-justice-and-city-cincinnati-ohio-and

[43] Dan Horn, *Yes, We Used to Hang People on Fifth Street: A Brief History of Cincinnati Executions*, THE CINCINNATI ENQUIRER (February 15, 2018), https://www.cincinnati.com/story/news/politics/2018/02/15/yes-we-used-hang-people-fifth-street-brief-history-cincinnati-executions/319605002/

[44] *Outlier Counties: Death Sentences, Executions More Likely in Hamilton County Than Elsewhere in Ohio*, DEATH PENALTY INFORMATION CENTER (February 28, 2018), https://deathpenaltyinfo.org/news/outlier-counties-death-sentences-executions-more-likely-in-hamilton-county-than-elsewhere-in-ohio

[45] Ohio History of the Death Penalty, DEATH PENALTY INFORMATION CENTER, available at https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/ohio (last accessed July 11, 2023).

and 1991 calling to eliminate racial discrimination in the administration of the death penalty.[46] The State of Ohio has known that there are racial disparities in how the death penalty is used since at least 1999.[47] Three people were sentenced to death in Hamilton County in 1996—two Black men, including Raglin, and one white man.[48] In 2007, the American Bar Association studied Ohio's death penalty system, and noted that the Hamilton County Prosecutor's Office had been "repeatedly rebuked" by the Ohio Supreme Court for prosecutorial misconduct in death penalty cases.[49] Already, evidence of racial bias in the death penalty system was known.[50] In 2014, a Joint Task Force was convened to study the administration of the death penalty in Ohio.[51] The Task Force stressed the need for jurisdictions to "fully investigate and evaluate the impact of racial discrimination" on the criminal legal system.[52] The Hamilton County Prosecutor along with two members of the Task Force filed a "Dissenting Report" stubbornly refusing to recognize racial bias in the administration of the death penalty, and the need to study and address the issue.[53] The Grosso study, however, provides strong evidence of racial bias in the administration of the death penalty in Hamilton County. Grosso, *supra*, at 927.

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[46] American Bar Association Resolution on the Death Penalty (1997), at 1.
[47] Ohio Commission on Racial Fairness, The Report of the Ohio Commission on Racial Fairness, 36-56 (1999).
[48] Office of the Ohio Attorney General, *2022 Capital Crimes: State and Federal Cases*, at 55. The white man sentenced to death in 1996 killed three persons in the same shooting spree at his workplace. *State v. Clemons*, 82 Ohio St. 3d 438, 696 N.E.2d 1009 (1998).
[49] *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report*, AMERICAN BAR ASSOCIATION 162 (2007) https://www.fpd-ohn.org/sites/default/files/files/4_%202007%20ABA%20Ohio%20Death%20Penalty%20Assessment.pdf
[50] *Id.* at 362.
[51] *Joint Task Force to Review the Administration of Ohio's Death Penalty: Final Report and Recommendations* (April 2014), https://www.supremecourt.ohio.gov/docs/Boards/deathPenalty/resources/finalReport.pdf
[52] *Joe Deters, Ron O'Brien, Stephen Schumaker,* Dissenting Report from Members of the Joint Task Force to Review the Administration of Ohio's Death Penalty. (April 2014) https://www.supremecourt.ohio.gov/docs/Boards/deathPenalty/resources/dissentingReport.pdf .
[53] *Id.* at 9.

Former Chief Justice O'Connor in 2020 wrote movingly of the need to address racial bias and discrimination in Ohio's court system:[54] "[W]e, as judges, must examine how people are treated, especially in criminal matters."[55] Homicides understandably cause emotions to run high, on the part of prosecutors and judges. Yet the urge to "get back at" a defendant through the ultimate retributory punishment must not cloud the judgement of prosecutors such that they allow racial bias to influence their decision making. Throughout our history, white lives have been valued over Black lives in the criminal legal system.[56] This phenomenon is perhaps most potent in the imposition of the death penalty.[57] If a Black person is accused of killing a white person, they are more likely to get the death penalty than if the victim was white.[58] This contemporary phenomenon cannot be separated from Hamilton County's history of *de jure* racial discrimination and modern day *de facto* segregation and injustice in the criminal legal system.

C. Prior cases addressing the equal protection implications of race and capital punishment do not control the outcome in this case.

In 1987, the United States Supreme Court discussed the use of social science data to challenge the constitutionality of a death sentence. *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Arguing that Georgia's death penalty system was so racially biased as to constitute a violation of the Federal Equal Protection Clause, the defendant cited a study of over two thousand Georgia murder prosecutions between 1973 and 1979, which concluded that Black defendants were more likely to receive the death penalty over white defendants, particularly

[54] Chief Justice Maureen O'Connor, *Chief Justice O'Connor Issues Independence Day Statement on Criminal Justice Reform* (July 3, 2020), ttps://www.courtnewsohio.gov/bench/2020/ChiefStatementCJReform_070320.asp#.Yr5E6ezMK3K
[55] *Id.*
[56] Tyra Patterson, *Opinion: Repeal Death Penalty and Eliminate Racial Bias*, THE CINCINNATI ENQUIRER (September 24, 2020), https://www.cincinnati.com/story/opinion/2020/09/24/opinion-repeal-death-penalty-and-eliminate-racial-bias/5817809002/
[57] *Id.*
[58] *Id.*

in cases with white victims. *Id.* Justice Powell, writing for the court, rejected the Equal Protection claim, stating that a successful Equal Protection challenge requires both proof of purposeful discrimination by the state and proof that discrimination influenced the outcome of that specific case. *Id*. The Court concluded that the statistical study presented by the defendant was not enough to prove purposeful discrimination, as it did not sufficiently establish *intent* to discriminate on the basis of race. *Id.* In other words, the death penalty system in Georgia could be empirically racially biased yet could not be challenged under the federal Equal Protection Clause because there was no evidence of specific discriminatory intent by the prosecutors. However, the Ohio Equal Protection and Benefit Clause does not support a similar outcome. The EPBC does not fear "too much justice." *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting). Further, the Grosso study has key differences compared to the study cited in *McCleskey*, which makes it even more apparent that *McCleskey* does not control the outcome in this case.

Unlike the statewide study discussed in *McCleskey* (the "Baldus Study"), Grosso's study on Hamilton County is a highly localized examination of one county, which has had the same prosecutor for the bulk of the last thirty years.[59] This fact may distinguish Mr. Raglin's case enough on its own to mean *McCleskey* need not control. Nevertheless, *Amici* posit that the positive thrust of the EPBC means that the proof of intent discussed in *McCleskey* is not necessary under Ohio law. Indeed, requiring proof of discriminatory purpose fundamentally misconstrues the meaning and purpose of equal protection principles. Barnes & Chemerinsky, *What Can Brown Do for You?: Addressing* McCleskey v. Kemp *as a Flawed Standard for Measuring the Constitutionally Significant Risk of Race Bias,* 112 NW. U.L. Rev. 1293, 1301 (2018).

[59] Hamilton County Prosecuting Attorney's Office, About the Prosecuting Attorney's Office, https://hcpros.org/about-the-prosecuting-attorneys-office/ (last accessed August 8, 2023).

The demand for proof of the purpose and intent of individuals who drafted, advocated for, and passed a law ignores the omnipresence of systemic oppression and unconscious bias in our society. *Id*. at 1302. Even ostensibly well-intentioned people can make decisions based in these types of biases "at an unconscious level that [is] often out of step with the egalitarian values that many espouse and may influence their decision-making processes in ways of which they are completely unaware." *Id*. at 1303. And even where harmful legislation is indeed driven by overt bias, "discriminatory motivation will rarely be expressed outright and benign purposes can typically be articulated for most laws. Therefore, many laws will be upheld simply because of evidentiary problems inherent in requiring proof of such a purpose." Barnes and Chemerinsky, at 1302-03. Excessively burdening defendants in their EPBC claims would only serve to re-entrench the racial discrimination that led to the unequal outcome they allege and prevent Ohio courts from being effective guardians of the Ohio Constitution. *Cf. Id.* at 1306-1307 (discussing how the definition of "intent" adopted by the United States Supreme Court in *McCleskey* makes discrimination excessively difficult to prove).

D. Newly discovered social science evidence of racial bias in Hamilton County death penalty decisions establishes a prima facia claim of adverse racial impact on death penalty prosecution sufficient to mandate a new trial.

Barnes and Chemerinsky argue that the *McCleskey* court made two "disturbing" assertions regarding social science: first, that the Baldus study failed to prove a causal link between race and the imposition of the death penalty; and 2) that the study did not show a "constitutionally significant risk" of racial bias affecting death sentences. *Id.* at 1295. By contrast, the Supreme Court in *Brown v. Board of Education* relied on social science research showing that racial segregation led to feelings of inferiority and low self-esteem in Black children.[60] The disparate

[60] Barnes and Chemerinsky, at 1321; *Brown v. Bd. of Edn*., 347 U.S. 483, 494-495, 74 S.Ct. 686, 98 L.Ed. 873 (1954)

treatment of social science research in *McCleskey* and *Brown* has generated confusion as to which social science studies are convincing to the Supreme Court when considering claims of racial bias.[61] Unfortunately, *Brown* did not set a clear standard itself for the use of social science.[62] This case presents a necessary opportunity for the Ohio courts to ensure that social science research proffered by litigants is reliable and accurate, using a set of clear standards.

The use of social science evidence in cases alleging disparate impact under Title VII, (42 U.S.C. 2000e et. seq.); the Age Discrimination in Employment Act (ADEA) (29 U.S.C. §621 et seq.), and the Fair Housing Act (FHA) (42 U.S.C. §3601 et seq.), should be considered a blueprint for examining a claim of disparate impact under the EPBC. Following Title VII, the ADEA, and the FHA, *Amici* argue that intent is irrelevant under the EPBC because the text refers to the consequences of the action, not the intent of the actor. *Cf. Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 531, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015). Disparate impact liability can make a more effective weapon against racial discrimination because it allows plaintiffs to "counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Id.* at 540.

The Ohio Civil Rights Act prohibits discrimination on the basis of race, color, religion, sex, military status, national origin, disability, age, and ancestry in employment, housing, education, and labor organizing. R.C. 4112 et seq. The Ohio courts have largely adopted the United States Supreme Court's interpretations of federal anti-discrimination law in interpreting the state counterparts. *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio C.R. Comm'n,* 66 Ohio St. 2d 192, 196, 421 N.E.2d 128 (1981) (noting that the Ohio Supreme Court has found federal case law interpreting Title VII is applicable to cases involving violations of R.C. 4112). Ohio law

[61] Barnes and Chemerinsky, at 1326.
[62] *Id.*

follows federal anti-discrimination law and considers intent irrelevant when a plaintiff alleges disparate impact. *Little Forest Med. Ctr. of Akron v. Ohio Civ. Rts. Comm.,* 61 Ohio St. 3d 607, 610, 575 N.E.2d 1164 (1991).

The United States Supreme Court first explained how the text of a statute that does not indicate whether disparate impact claims should be allowed could nonetheless be read as allowing a disparate impact claim in *Griggs v. Duke Power Co*., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Title VII was intended to remove all "artificial, arbitrary, and unnecessary" barriers to employment, when the barriers operate to discriminate on the basis of race. *Id. at* 431. The law prohibits actions that "adversely affect," an employee, and so the analysis starts and ends with the effects. *Smith v. City of Jackson, Miss.,* 544 U.S. 228, 236, 125 S. Ct. 1536, 161 L. Ed. 2d 410 (2005) (When the focus of a statute is on the consequences of an action, intent is immaterial). The Court also applied this standard to the FHA. For example, 42 U.S.C. 3604(a) forbids not only refusing to sell or rent to someone on the basis of race, but also "otherwise mak[ing] unavailable" a dwelling on the basis of race. *Texas Dep't of Housing,* 576 U.S. at 534. This phrase refers to the consequences of the action, not what the actor intended to do. *Id.* The same argument applies to the EPBC: the clause refers to the effects, not the intent of the actor. When the state has a positive duty—to establish government for the equal protection and benefit of all citizens—then there is no reason to defer to the government action that has an empirically proven disparate impact based on the (possibly self-serving) assertion by the government actor that discriminatory intent cannot be proven.

1. Reliable statistical evidence like the Grosso study can show disparate impact.

Statistical evidence has long been accepted in discrimination claims. *Little Forest Med. Ctr.,* 61 Ohio St.3d at 610 (holding that statistical evidence may establish a prima facie case of

disparate impact under Title VII and R.C. §4112). The Ohio Civil Rights Act requires that the complaint be proven by "reliable, probative, and substantial evidence." *Id.* at 609-610. Ohio courts have determined that "reliable, probative, and substantial evidence" gives a plaintiff the same burden of proof as under Title VII. *Id.* at 610. In a disparate impact case under the Ohio Civil Rights Act, once a plaintiff has met her initial burden to show a statistical disparity, the employer has the burden of producing evidence of a neutral business justification. *Id.* at 610-611. *See also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977) (holding that statistical evidence that African-Americans and people with Hispanic surnames had been given lower paying jobs, and discriminated against with respect to promotions and transfers established a prima facie case of discrimination). The statistical evidence offered must be of the "kind and degree" sufficient to show the challenged practice caused the discrimination. *Brown v. Worthington Steel, Inc.*, 10th Dist. Franklin No. 05AP-01, 2005-Ohio-4571, ¶ 8 (Sept. 1, 2008) (quoting from *Watson v. Fort Worth Bank and Trust* 487 U.S. 977, 986–987, 108 S.Ct. 2777, 101 L.Ed.2d 827 (1988)). For example, statistics that indicated that fifty-nine percent of the salaried work force at the defendant corporation was over age forty, but ninety-one percent of those terminated were over age forty, did not, standing alone, show disparate impact. *Sobolewski v. Manoir Electroalloys Corp.*, 120 Ohio App. 3d 225, 230, 697 N.E.2d 688 (1997). The Grosso study which relies on regression analysis, meets that standard.

The Ohio Rules of Evidence assign responsibility for determining the admissibility of expert testimony to the trial court judge. Evid. R. 104(A); *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶ 9, 850 N.E.2d 383. When reviewing such testimony, "the trial judge has a special obligation to ensure that scientific testimony is not only relevant but *reliable*." *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 118 (emphasis added). This

"gate-keeping obligation is extended to all expert testimony–i.e., testimony based on technical and other specialized knowledge." *Id*. Ohio courts have adopted a four-part test for assessing the reliability of expert testimony and the scientific and social science data on which it is based, "solely on principles and methodology, not on the conclusions that they generate." *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 611-612, 687 N.E.2d 735 (1998). This test includes the following factors: "(1) whether the theory or technique has been tested, (2) whether it has been subjected to peer review, (3) whether there is a known or potential rate of error, and (4) whether the methodology has gained general acceptance." *Id*. at 611. The Grosso study uses regression analyses which allowed the authors to take into account fifty race-neutral factors to examine whether the disparities identified could be explained by race-neutral factors. Grosso, supra, at 927-9. Regression analysis is a widely used statistical method determining which variables have an impact on outcomes.[63] The Ohio courts have long recognized regression analysis as a reliable method. Nilavar v. Osborn, 137 Ohio App. 3d 469, 493, 738 N.E.2d 1271 (2000). To be probative in discrimination claims, statistics must take into account possibly non-discriminatory reasons for the disparities. *Boggs v. The Scotts Co.*, 10th Dist. Franklin No. 04AP-425, 2005-Ohio-1264, ¶ 16 (Mar. 22, 2005) (quoting from *Adams v. Indiana Bell Telephone Co., Inc.*, 2 F.Supp.2d 1077, 1098 (S.D. Ind. 1998), *reversed on other grounds sub. nom. Adams v. Ameritech Servs., Inc.*, 231 F.3d 414 (7th Cir. 2000)).

Social science experts regularly rely upon a method of analysis known as "regression analysis" for determining which variables have an impact on outcomes;[64] Ohio courts have,

[63] Amy Gallo, A Refresher on Regression Analysis, Harvard Business Review https://hbr.org/2015/11/a-refresher-on-regression-analysis (November 4, 2015).

[64] Amy Gallo, *A Refresher on Regression Analysis*, Harvard Business Review https://hbr.org/2015/11/a-refresher-on-regression-analysis (November 4, 2015).

likewise, long recognized regression analysis as a reliable method. *Nilavar v. Osborn*, 137 Ohio App. 3d 469, 493, 738 N.E.2d 1271 (2000).

The Grosso study easily clears the reliability standard set forth in *Boggs*. When Grosso and her co-authors analyzed all aggravated murder cases in Hamilton County between 1992 and 2017, they found that a defendant who killed at least one white victim was 4.54 times more likely to be charged capitally than a case with no white victims. *Grosso, supra*, at 903. A Black defendant who killed at least one white victim faced odds of receiving a death sentence that were 3.79 times higher, and a Black defendant who was charged capitally and had at least one white victim was 5.33 times more likely to receive a death sentence than other similarly situated cases. *Id.* Using regression analysis techniques, the Grosso study evaluated *fifty* potential alternative explanations but found that no race-neutral factor could account for these shocking disparities. *Grosso, supra*, at 903, 927-9. There is less than a one in one thousand chance that the charging decisions were actually made in a race-neutral manner. *Id.* at 927. This disparity is arbitrary and severely disproportionate. The Equal Protection and Benefit Clause does not tolerate such extreme adverse impact.

Still, a prima facie case of race discrimination could be rebutted by a showing by the state that the difference in treatment was based on non-discriminatory reasons. By analogy, an employer may defeat a prima facie case of disparate impact sex discrimination under Title VII by showing that a "bona fide occupational qualification" prevented the employer from hiring women. *Little Forest Med. Ctr.*, 61 Ohio St. 3d at 612. This defense may only be raised if the requirement was something related to the "essence of the business," not merely considered necessary by the employer. [65] *Id.* The state bears a heavy burden to show a compelling state interest for the

[65] *Id.* Additionally, the evidence that Raglin puts forth shows an extreme adverse impact; *Amici* do not suggest that a small disparity would state a claim under the EPBC.

disparities shown. *DeRolph v. State*, 1997-Ohio-84, 78 Ohio St. 3d 193, 257, 677 N.E.2d 733 (Douglas, J., concurring).

Here, the State must do more than simply showing Raglin's offense was eligible for the death penalty under R.C. §2929.14. There are surely many murders that are death-eligible that are not charged capitally, and the relatively small class of persons who are actually charged and sentenced capitally out of all potentially eligible offenders indicates a high risk of arbitrary enforcement. *See Graham*, 164 Ohio St.3d at ¶ 231 (Donnely, J., concurring) (collecting cases and concluding "even a cursory review of the most recent appeals involving a fatal shooting during the course of a robbery shows that the death penalty is not usually sought let alone imposed, for this type of crime"). Justice Donnelley's fear is the reality in Hamilton County: Grosso's study found that controlling for relevant race-neutral factors, the race of the defendant and victim predict whether someone is charged capitally and sentenced to death. *Grosso, supra* at 927-929.

In light of this, the state should be required to present a non-discriminatory reason that Raglin's murder was worth charging capitally, as compared to similarly situated defendants who did not face the death penalty.[66] There is simply no adequate explanation for Raglin's death sentence, particularly not an explanation that would show that his death sentence was essential to public safety. *Cf. Little Forest Med. Ctr.*, 61 Ohio St. 3d at 612 (holding that business practices that have a disparate impact must be of the "essence" of the business).

[66] Three persons from Hamilton County were sentenced to death in 1996: Mr. Raglin; Gerald Clemons, who committed his crime in Everdale, 2022 Capital Crimes Report, *supra*, at 55, 257; and Carlos Sanders, who was tried in Hamilton County after a change of venue from Scioto County, for his role in the 1993 riot at Southern Ohio Correctional Facility. *Id.* at 55, 185. Therefore, looking only at 1996, one finds that Mr. Raglin was sentenced to death alongside two other men: one, who shot and killed three people at his workplace; and another, who killed a prison guard during a riot. It strains credulity to find that Raglin's crime is anywhere near as severe. However, *Amici* do not rely on this rather anecdotal sample to make their case, but simply wish to point out that 1996 is illustrative of the arbitrariness animating the death penalty in Hamilton County.

In sum, Hamilton County has failed to meet its affirmative burden under the Ohio Constitution to provide equal protection and benefit of the laws. Regardless of the intent of the Hamilton County Prosecutor's Office when they made their charging decisions in these cases, and regardless of the intent of the jury who sentenced Mr. Raglin to death, the outcome shows a clear disparity. Outcomes in the criminal legal system provide an implicit commentary on which lives matter.[67] The Hamilton County Prosecutor's Office has sent a message that white lives matter more than Black lives, and that the harshest punishments should be reserved for Black people who take white lives. The criminal legal system in Hamilton County is racially biased in its imposition of the death penalty. Fortunately, this court is not powerless to stop it. The court should not be blinded by the State's attempts to distract the court from the vital issue at hand by graphically recounting details of Mr. Raglin's offense that all parties involved already know. *See* State's Mot. in Opp to Mot. for New Trial, at 6-8, 10. The point is not that Mr. Raglin is innocent, but that of all who have committed a potentially capital offense in Hamilton County, he is one of the select few chosen arbitrarily to die, based on his race and the race of his victim. *Amici* urge that this court draw on the robust protections of Ohio's Equal Protection and Benefit Clause to ensure justice is served in Mr. Raglin's case, and ensure that a death sentence earned by racially discriminatory prosecution and sentencing does not stand.

V. CONCLUSION

The language of Ohio's Equal Protection and Benefit Clause provides broader protections to Ohioans than the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As outlined by *amici*, Ohio courts have the authority and responsibility to interpret this important aspect of Ohio's constitution independently, regardless of federal interpretations.

[67] *See* Mario L. Barnes, *Foreword: Criminal Justice for Those (Still) At the Margins—Addressing Hidden Forms of Bias and the Politics of Which Lives Matter*, 5 U.C. Irvine L. Rev. 711, 728 (2015).

Hamilton County criminal courts impose harsher sentences on Black defendants accused of violent crimes against white victims. This reality disproportionately and differently infringes upon the fundamental constitutional rights of some Ohioans, while imposing no similar harms on other groups. Systemic racism has a well-documented and severe impact on the fairness of criminal trials in Hamilton County Ohio, and the state has a responsibility to account for these biases in their treatment of Black defendants, both to protect those individuals' rights and to ensure the fair and accurate administration of justice across the entire system. When appropriately placed in the context of Ohio's Equal Protection and Benefit Clause, the conditions of Mr. Raglin's trial present a clear violation of a fundamental constitutional right and a new trial must be granted.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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