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**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

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Nos. 102 EM 2018 & 103 EM 2018

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JERMONT COX and KEVIN MARINELLI,

Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

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# BRIEF OF THE PENNSYLVANIA PRISON SOCIETY AND LEGAL SCHOLARS AS *AMICI CURIAE*

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## INTEREST OF *AMICI*

*Amici* are The Pennsylvania Prison Society, the oldest prison reform society in the world, and legal scholars whose scholarship and teaching focus on the history of Pennsylvania's Constitution and unique penal system, which sets the state apart from the rest of the country.[1] We believe that this history is critical to the Court's interpretation of the state's Constitution, especially with regard to the present analysis of capital punishment pursuant to Article I, Section 13, of the Pennsylvania Constitution.

The King's Bench Petition is fully supported by Article I, Section 13 of the Pennsylvania Constitution and the history of independent judicial review by the Supreme Court of the Declaration of Rights of the Pennsylvania Constitution.

## ARGUMENT

Pennsylvania has a long history of independent state constitutional protection of the fundamental rights and liberties set forth in the Declaration of Rights, above and beyond the rights guaranteed by the U.S. Constitution. In this *amicus* brief we address the history of this Court's enforcement of the Declaration of Rights with a particular focus on the salience of the 1968 constitutional convention. *See generally*, Seth F. Kreimer, *Still Living After Fifty Years: A Census of Judicial Review Under the Pennsylvania Constitution of 1968*, 71

[1] A complete list of *amici* is attached as Appendix A.

Rutgers L. Rev. __ (forthcoming 2019) (hereinafter "*Still Living*") available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3255768.

## I. THE HISTORY OF PENNSYLVANIA'S CONSTITUTIONS: 1776-1968

In 1776, even before the signing of the Declaration of Independence, Pennsylvania adopted its first Constitution, Article I of which was the Declaration of Rights. Pa. Const. of 1776, art. I. The Constitution established a Council of Censors charged with determining "whether the constitution has been preserved inviolate," recommending repeal of unconstitutional statutes, and convening any subsequent constitutional conventions where supported by a two-thirds vote. Pa. Const. of 1776, art. II, § 47.

In 1789, the Council of Censors was petitioned by approximately 18,000 persons who sought a new constitution. *See* Rosalind L. Branning, *Pennsylvania Constitutional Development* 12–13 (1960). After the Council failed to vote for a convention by the required two-thirds majority, the Assembly issued a call for a convention. Delegates were elected and, in September of 1790, the convention adopted a new constitution that incorporated the Declaration of Rights of the 1776 Constitution and added new provisions, including Section 13's prohibition of "Cruel Punishment," a product of the commitment to penal reform. Pa. Const. of 1790, art. IX, § 5. This Constitution also provided for lifetime appointment of judges and justices. Pa. Const. of 1790, art. II, § 8; Pa. Const. of 1790, art. V, § 2.

And significantly, in these early years of constitutional governance, Justices asserted the power of judicial review, years before Justice Marshall famously declared that power in *Marbury v. Madison*, 5 U.S. 137, 177 (1803). *See, e.g., Austin v. Trs. Of Univ. of Pa.*, 1 Yeates 260, 261 (Pa. 1793) (declaring "act was unconstitutional" when adopted).

In 1835, a referendum authorized a new constitutional convention. *See* John L. Gedid, *Pennsylvania Constitutional Conventions—Discarding the Myths*, 82 Pa. B. Ass'n Q. 151, 157 (2011). Importantly, the convention considered and soundly rejected proposals to restrict this Court's power of judicial review, and instead limited tenure of Supreme Court Justices to fifteen years. Branning, *supra* at 31. In 1838, the electorate ratified the new Constitution.

In light of the popular adoption of the Constitution, Chief Justice John Bannister Gibson, a leading critic of judicial review, reversed course, recognizing that his position had been "tacitly disavowed by the late convention, which took no action on the subject, though the power had notoriously been claimed and exerted." *Menges v. Wertman*, 1 Pa. 218, 222 (1845). In 1850, the Constitution was amended to provide for popular election of judges, but independent judicial review remained a core judicial function. *See, e.g.*, *In re Wash Ave.*, 69 Pa. 352, 363 (1871) (invalidating assessment as contrary to "the inherent and indefeasible right of property"); *Craig & Blanchard v. Kline*, 65 Pa. 399, 413–14 (1861) (holding log

owners entitled to notice and opportunity to show that they did not set logs afloat contrary to law).

Following the Civil War, industrialization, urbanization, and corporate corruption of the political processes precipitated calls for another constitutional convention. Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. Pitt. L. Rev. 797, 810–11 (1987) ("Legislative abuses led to the specific limitations on legislative procedure inserted into the Pennsylvania Constitution in 1874."); *see also Washington v. Dep't of Pub. Welfare of Pa.*, 188 A.3d 1135, 1145 (Pa. 2018) ("By the time of the Civil War, large corporations, particularly the railroads, and other wealthy special interest groups and individuals had acquired such influence over the General Assembly that they routinely secured the passage of legislation which exclusively served their narrow interests to the detriment of the public good.").

The resulting convention was not authorized to "alter in any manner" the Declaration of Rights, even though the convention ultimately strengthened several of those rights. Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 Widener J. Pub. L. 383, 463 n.322 (1993) ("[The convention] added the prohibition on civil or military interference with the right of suffrage, Pa. Const. of 1874, art. I,

§ 5; somewhat strengthened the protection of the press, *id.* § 7; required that the 'just compensation' for private property taken for public use be 'made or secured' *prior* to the taking, *id.* § 10; and prohibited the legislature from 'making irrevocable any grant of special privileges or immunities,' *id.* § 17.").

These constitutional revisions were "decisively" ratified by popular vote in 1873. Branning, *supra*, at 122 n.49. The structural changes included (by one count) over sixty prohibitions on legislative overreach. *Perkins v. City of Philadelphia*, 27 A. 356, 360 (Pa. 1893). These prohibitions dramatically expanded the power of the judiciary via judicial review. *See Appeal of Ayars*, 16 A. 356, 364 (Pa. 1889). The electorate rejected repeated legislative attempts to repeal these limitations on their own power, notwithstanding the approval of other amendments. Robert Sidman, *Constitutional Revision in Pennsylvania—Problems and Procedures*, 71 W. Va. L. Rev. 306, 307–10 (1969).

The most recent comprehensive amendments culminated in the Constitution of 1968. 1 Pa. Const. § 906(b) (2018). Among other changes, the People augmented the long standing constitutional commitment in Article I, Section 1 to the inherent and indefeasible right of "enjoying and defending life" on the part of citizens born "equally free and independent" by broadening prohibition on "special laws" in Article III, Section 32 and adding a prohibition against "discriminat[ion] against any person in the exercise of any civil right." Pa. Const. art. I, § 26. The

original draft of Article I, Section 26 had been limited to a prohibition of discrimination on the basis of race, color, or nationality, but the version ultimately proposed by the legislature and adopted by the People extended equality rights against discrimination more generally. *See Still Living*, 50–55, 116–23. Finally, in 1971, the Pennsylvania legislature Article I, Section 28, passed an Equal Rights Amendment.

## II. THE SIGNIFICANCE OF THE 1968 CONSTITUTION

As we have shown, the Declaration of Rights of the Pennsylvania Constitution has from the very beginning of our state constitutional history reflected the values and interests in liberty and equality of the people of Pennsylvania. Moreover, the debates and discussions regarding the Declaration of Rights in the ratification process of the 1968 Constitution made clear that the Declaration of Rights was intended to provide protections beyond those provided by the U. S. Constitution. The content and structure of the Declaration of Rights, as informed by constitutional history and the endorsement of the citizens of Pennsylvania in 1968, was a starting point for the development of a more coherent methodology for enforcement of the State Constitution and this Court embraced that challenge.

On at least 372 occasions since 1968, this Court has engaged in independent constitutional review of a broad range of constitutional provisions "in ways that

change rights and obligations." *Still Living,* at 19. In this process, the Supreme Court of Pennsylvania has continued a tradition of independent constitutional construction and has led a jurisprudential movement that has seen numerous state supreme courts vindicate individual rights and liberties under their own constitutions, breaking what had been a widespread practice of "instinctively following the U.S. Supreme Court's interpretation of the Federal Constitution when interpreting their own state constitutions, a phenomenon called lockstepping." Book Note, 132 Harv. L. Rev. 811, 811 (2018) (reviewing Jeffery S. Sutton, *Imperfect Solutions: States and the Making of American Constitutional Law* (2018)); *see also* Justice John Paul Stevens, *The Other Constitutions*," N.Y. Rev. of Books 33 (Dec. 6, 2018).

Courts, scholars and commentators today recognize the framework for this "New Federalism." *See* Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule*, 59 N.Y.U. Ann. Surv. Am. L. 283, 286 (2003) (discussing "the increased tendency of state courts to interpret state charters as sources of rights independent of the Federal Constitution and interpretations of the United States Supreme Court"); Goodwin Liu, *Brennan Lecture: State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. Rev. 1307, 1309–10 (2017).

## III. THE INITIAL PHASE IN THE PENNSYLVANIA SUPREME COURT: 1968-1991

This Court's post -1968 interpretations of the Declaration of Rights are characterized by a search for the concepts and interests that inhere in the Declaration's broad range of liberty, privacy, and equality provisions. *See, e.g., Chalk Appeal*, 441 Pa. 376, 381 (1971) (ruling that a government employee's public criticism of his department's personnel and policies were protected speech; "It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.") (internal citations omitted). This approach, which placed significant emphasis on the conditions, issues, and relationships that characterize Pennsylvania life in the second half of the Twentieth Century, influenced the Court's understanding of a wide range of rights secured by the Pennsylvania Constitution. *See, e.g., Di Florido v. Di Florido*, 459 Pa. 641, 649–50 (1975) (overturning prior precedent and finding that married couples jointly owned all possessions in light of the "modern" prevalence of women in the workplace and the enactment of Article I, Section 28); *Commonwealth, Dep't of Envtl. Res. v. Locust Point Quarries, Inc.*, 483 Pa. 350, 356 (1979) (finding that Article I, Section 27 and modern, widespread "[p]olicy considerations" justified the legislature's power to protect air resources to the degree necessary for the protection of the health, safety, and wellbeing of citizens);

*Fernley v. Bd. of Supervisors*, 509 Pa. 413, 425 (1985) (invalidating prohibition of multi-family dwelling as impermissible exclusionary zoning).

At the same time, the Court developed standards for assessing the differences in how the U.S. and Pennsylvania Constitutions protected fundamental rights, and in this process continued to find good reason on a wide range of issues to depart from a "lockstep" approach. The Court has emphasized that "state court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees." *Commonwealth v. Sell*, 504 Pa. 46, 49 (1983) (quoting Justice William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977)).[2]

For example, in *Commonwealth v. De John*, the Court recognized an expectation of privacy in bank records under Article I, Section 8, notwithstanding case law from the U.S. Supreme Court that reached the opposite result under the Fourth Amendment. 486 Pa. 32 (1979). This Court rejected the federal

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[2] In *Sell*, the Court rejected the U.S. Supreme Court's Fourth Amendment standing doctrine that limited who could assert a claim of an illegal search or seizure as inconsistent with Pennsylvania's protection of personal privacy. *Id.* at 66–68.

constitutional standard after finding that it "establishes a dangerous precedent, with great potential for abuse[]," *id.* at 44, and employed a "realistic approach to modern economic realities" in its interpretation of Article I, Section 8. *Id.* at 48. Thus, even where the Court interprets a clearly analogous constitutional provision, it has engaged in an analysis of whether Pennsylvania's "differing jurisprudential theories of the function and responsibilities of government [] based also on a regional, versus a national perspective" calls for a differing conclusion. *Ins. Adjustment Bureau v. Ins. Comm'r for Pa.*, 518 Pa. 210, 224 (1988) (departing from the U.S. Supreme Court's test for restrictions on commercial speech and opting for more robust protections under Article I, Section 7).

The jurisprudence of state constitutional law ultimately required the Court to develop a specific methodology of judicial review for understanding the conceptual framework in distinguishing between the U.S. and Pennsylvania constitutional protections of individual rights and liberties. Having approached this process on a case-by-case and specific provision basis for two decades, the Court took the next step in 1991 of codifying this process with specific standards that would govern judicial review in the future. We turn to that development in the next section.

## IV. THE FORMAL CONSOLIDATION OF THE DOCTRINE OF STATE CONSTITUTIONAL PRIMACY: *COMMMONWEALTH V. EDMUNDS*

In 1991, the Pennsylvania Supreme Court decided the seminal case of *Commonwealth v. Edmunds*, ruling that Pennsylvania would not recognize the federal constitutional good faith exception to the exclusionary rule. 526 Pa. 374, 390 (1991). The Court re-affirmed the principle of state constitutional primacy: "Although the wording of the Pennsylvania Constitution is similar in language to the Fourth Amendment of the United States Constitution, we are not bound to interpret the two provisions as if they were mirror images, even where the text is similar or identical." *Id.* at 391. The *Edmunds* Court also recognized that in the years following the ratification of the 1968 Constitution, the Pennsylvania Supreme Court "began to forge its own path . . . notwithstanding federal cases to the contrary." *Id.* at 396. Pennsylvania was "free to reject the conclusions of the United States Supreme Court," *id.* at 390, as part of Pennsylvania's "strong resurgence of independent state constitutional analysis." *Id.* at 389.

Most significantly, the Court adopted standards for review in cases in which a party claimed that state constitutional provisions should prevail where the federal Constitution, as interpreted by the U.S. Supreme Court, did not provide grounds for relief. This new mode of analysis provided a structure for litigants and the Pennsylvania courts to ensure that the proper factors and issues were fully

considered in the judicial review process. The *Edmunds* Court instructed litigants to brief and analyze four factors: (1) the provision's text; (2) the provision's history, including case law; (3) other jurisdictions' treatment of related issues; and (4) "policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence." *Id.* at 390.

The fourth *Edmunds* factor made clear that the Pennsylvania Constitution is a living document that must be interpreted under evolving societal standards. *Id.* at 402. The Court's focus on policy issues and contemporary societal conditions has become a critical part of the *Edmunds* process. As the Court made clear, past practices and rulings were not necessarily controlling, whether by the U.S. or Pennsylvania Supreme Courts. To the contrary: "We recognize that, in analyzing any state constitutional provision, it is necessary to go beyond the bare text and history of that provision as it was drafted 200 years ago, and consider its application within the modern scheme of Pennsylvania jurisprudence." *Id.* .

*Edmunds* has had a significant impact on this Court's state constitutional jurisprudence. Subsequent decisions focused judicial analyses on the factors most relevant to state constitutional interpretation where competing visions of liberty, privacy, equality or other constitutional norms were at stake. And with special relevance to the issues before the Court on this King's Bench Petition, these cases provide strong support for the proposition that Article I, Section 13 requires

independent analysis and application and that the "Cruel Punishment" clause is violated by the current arbitrary capital punishment process in Pennsylvania.

## V. POST-*EDMUNDS* DEVELOPMENTS

*Edmunds* formalized the Court's state constitutional review methodology in a manner that signaled a new era for state constitutional law. This blueprint opened the door to a robust application of the Declaration of Rights and, given the *Edmunds* Court's emphasis on "the importance of state constitutions with respect to individual rights and criminal procedure," the cases decided under its principles are critical to a proper resolution of this case under the "Cruel Punishment" Clause of Section 13.

This Court has engaged in independent judicial review in over 100 cases post-*Edmunds* and, in doing so, has regularly addressed and evaluated the "policy considerations" inherent in the specific provision of the Declaration of Rights by analyzing current relevant conditions and circumstances and the proper functioning of systems, laws and programs. This Court's rulings have been broad and deep. *Still Living*, at 19 (finding that in 372 decisions since 1968, the Court has utilized independent constitutional review to address matters concerning each branch of government, statutes, and criminal trial procedures). The Court has invoked numerous sections of the Declaration of Rights and has been willing to order sweeping and fundamental changes in governmental programs and practices, even

where doctrinal rationales had been rejected in earlier rulings by the Court or where the U.S. Constitution had been interpreted in a different manner. *See, e.g., In re Fortieth Statewide Investigating Grand Jury,* 197 A.3d 712, 715 (2018) (explaining the duty of the judicial branch under Article I, Section 1 to guard "against unjustified diminution of due process protections for individuals whose right to reputation might be impugned"); *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 642 Pa. 236, 305 (2017) (finding justiciable a challenge to state-wide school funding standards that provided unequal educational opportunities in violation of Article III, Section 14, the "thorough and efficient education" provision; the Court is never "bound to follow precedent when it cannot bear scrutiny, either on its own terms or in light of subsequent developments"); *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 801–02 (Pa. 2018); (striking down the legislature's 2011 Congressional district map; finding constitutional standards in Article I, Section 5's "free and equal elections" clause for assessing partisan gerrymandering); *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (holding that Article I, Section 27 environmental rights provision invalidates fracking statutes; "[W]e are not constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven to be unworkable or badly reasoned."); *Holt et al. v. 2011Legislative Reapportionment Comm'n*, 614 Pa. 364, 442 (2012) ("[While o]ur prior precedent

sounds in constitutional law; to the extent it is erroneous or unclear, or falls in tension with intervening developments, this Court has primary responsibility to address the circumstance.").

The Court has highlighted a wide range of considerations for the *Edmunds* policy analysis: "[p]olicy is distilled through, among other things, observation of common practices, customs and legislation reflecting the will of the people." *Commonwealth v. Means*, 565 Pa. 309, 331 (2001). Indeed, a sampling of this Court's post-*Edmunds* rulings makes clear that the Court's policy analysis of various provisions of the Declaration of Rights includes an array of factors tied to the rights and interests secured by the provision and contemporary conditions. *See, e.g., Pap's A.M. v. City of Erie*, 571 Pa. 375, 409 (2002) (Article I, Section 7) (employing a "common sense" and a "regional, versus a national perspective[,]" analysis that prompted the Court to decline to incorporate federal constitutional speech tests "as a matter of policy").

This process has been of special significance in cases involving the rights of criminal suspects and defendants where the Court has invoked the Pennsylvania Constitution to ensure that police and prosecutors do not infringe fundamental rights and where the Court has limited the legislature's powers of punishment. *See, e.g., In re J.B.*, 107 A.3d 1, 14 (Pa. 2014) (SORNA's lifetime registration for juveniles is an unconstitutional conclusive presumption at odds with right to

reputation under Article I, Section 1); *Commonwealth v. Muniz*, 164 A.3d 1189, 1223 (Pa. 2017) (SORNA registration requirements constituted "punishment" under Article I, Section 17 and these *ex post facto* protections are greater than those provided by U.S. Constitution); *Commonwealth v. Gindlesperger*, 743 A.2d 898, 898 (Pa. 1999) (use of thermal imaging device was a search in violation of Article I, Section 8, a ruling later duplicated under the Fourth Amendment by the U.S. Supreme Court in *Kyllo v. United States*, 533 U.S. 27, 40 (2001)); *Commonwealth v. Brion*, 652 A.2d 287, 290 (Pa. 1994) (rejecting rule of *United States v. White*, 401 U.S. 745, 747 (1971) and prohibiting the warrantless entry into defendant's residence by a confidential informant to electronically record conversations); *Commonwealth v. Arter*, 637 Pa. 541, 549, 567 (2016) ("[C]onclud[ing] that the policy interests in this Commonwealth weigh more strongly in favor of applying the exclusionary rule to parole and probation proceedings" despite the fact that the U.S. Supreme Court "specifically declined to extend application of the exclusionary rule to parole revocation proceedings."); *Commonwealth v. Molina*, 628 Pa. 465, 500 (2014) ("[W]e conclude that our precedent, and the policies underlying it, support the conclusion that the right against self-incrimination [via Article I, Section 9] prohibits use of a defendant's pre-arrest silence as substantive evidence of guilt, unless it falls within an exception such as impeachment of a testifying defendant or fair response to an

argument of the defense."); *Commonwealth v. Mason*, 535 Pa. 560, 571–72 (1993) ("[W]e hold that where police seize evidence in the absence of a warrant or exigent circumstances by forcibly entering a dwelling place, their act constitutes a violation of Article I, Section 8 of the Pennsylvania Constitution [but not the Fourth Amendment] and items seized pursuant to their illegal conduct may not be introduced into evidence in a subsequent criminal prosecution."); *Commonwealth v. Johnson*, 624 Pa. 325, 327 (2014) (following *Edmund*s and holding that good faith exception to exclusionary rule enshrined in Article I, Section 8 would not be adopted for purpose of admitting physical evidence seized incident to arrest based solely on an expired arrest warrant).

Even where this Court has decided cases on federal constitutional grounds, it has referenced Pennsylvania constitutional standards, and has reserved the option of deciding on state constitutional grounds. *See, e.g., Commonwealth v. Fulton*, 179 A.3d 475, 479, n.3 (Pa. 2018) (extending the U.S. Supreme Court's ruling on the limits of searches of cell phones and expanding the "fruit of the poisonous tree doctrine to exclude evidence"); *Kuren v. Luzerne Cy.*, 146 A.3d 715, 751 (Pa. 2016) (permitting pre-trial adjudication of claim of ineffective assistance of counsel based on systemic underfunding of public defender office).

The breadth and scope of these cases reflect a process that is fully consistent with the public understanding of the role of the judiciary by the People who adopted the Pennsylvania Constitution:

> The Pennsylvania Constitution is not, as the late Justice Scalia would have it, "dead, dead, dead." The Pennsylvania Supreme Court has engaged in a continuing process of judicial statesmanship that looks to text, history, structure, and ongoing doctrinal elaboration to bring evolving constitutional traditions and values to bear on the issues confronting the Commonwealth. This process is not always unanimous, or without contention, but it is exactly what the people of the Commonwealth had reason to expect when they reenacted the constitution in 1968.

*Still Living*, at 20 (internal citations omitted).

## VI. THE PROPER APPLICATON OF ARTICLE I, SECTION 13

The *Edmunds* analysis of Article I, Section 13 is properly guided and informed by the same interpretive tools this Court has repeatedly in its construction of other provisions of the Declaration of Rights. First, this Court should consider the relevant history of criminal punishment in the Commonwealth. Second, the entire corpus of cases invoking the protections of the Declaration of Rights are instructive, and there is special relevance to cases in which this Court has invoked rights that limit the power of the Commonwealth to punish individuals.

### A. Relevant History with Respect to the Prohibition of "Cruel Punishment"

From the very beginning of our constitutional history, ideals of temperance above tyranny have had significant impact on our social and constitutional norms. The adoption of a republican form of government was a means of preventing terror and limiting forms of punishment. This principle is reflected in Article I, Section 13, which, distinct from the Eighth Amendment of the U.S. Constitution, protects Pennsylvanians from punishment that is "cruel," regardless of whether it is unusual. This language was included in the Declaration of Rights, proposed December 23, 1789, and ratified on September 2, 1790, by a vote of 61 to 1. Indeed, as early as 1825, this Court recognized the significance of Section 13 in considering whether sanguinary punishment (dunking defendant in water) was authorized by statute or permissible under the Constitution. *James v. Commonwealth*, 12 Serg. & Rawle 220, 226, 1825 WL 1899 (Pa. 1825) (punishment found not to be authorized in light of its violation of republican ideals and its disparate impact on women and the poor).

Accordingly, the inquiry into the Constitution's prohibition of cruel punishments requires an examination of the historical and philosophical landscape at the time. Contemporaneous with the Commonwealth's early Constitution were the recurring efforts of penal reformers to develop a penal code that departed from cruel, arbitrary, and disproportionate punishment. Constitutional founders, such as Benjamin Rush and Benjamin Franklin, advocated for punishments that were

utilitarian in nature, rather than sanguinary. Those leaders drew heavily from Eighteenth Century philosophers, such as Cesare Beccaria and Montesquieu, who focused on punishment as a social necessity, to be evaluated with evolving standards that assesses punishment in its administration.

### 1. Punishment as a "utilitarian calculation of social necessity" [3]

In 1787, Benjamin Rush, along with Benjamin Franklin and other distinguished Pennsylvanians, founded The Philadelphia Society for Alleviating the Miseries of Public Prisons (hereinafter "The Society"), "the oldest prison reform society in the world." Negley K. Teeters, *Citizen Concern and Action Over 175 Years*, 42 Prison J. 2 (April 1962).[4] The Society was a reflection of Pennsylvania's early commitment to a progressive penal system and recommended several reforms in Pennsylvania's penal law, which were adopted in 1789 and 1790. The Society also sent delegates to Pennsylvania's constitutional convention of 1789 -1790. It was at that convention that Section 13 – and its prohibition of cruel punishments – was adopted with just one dissenting vote. *Id.* [5]

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[3] In *The Penitential Ideal in Late Eighteenth-Century*, Michael Meranze presents a roadmap of the philosophical underpinnings upon which Pennsylvania's groundbreaking penitentiary system developed. 108 The Pa. Mag. of Hist. and Biography 419, 423 (1984).

[4] In 1886, the Philadelphia Society for Alleviating the Miseries of Public Prisons was renamed The Pennsylvania Prison Society.

[5] Having founded the first penitentiary in the country, The Society continued its work and embraced the "progressive growth" model from its founder, Benjamin Rush. For over two

The Society was heavily informed by eighteenth century penal philosophers, who taught that punishment should be "based on a utilitarian calculation of social necessity." Michael Meranze, *The Penitential Ideal in Late Eighteenth-Century Philadelphia*, 108 The Pa. Mag. of Hist. and Biography 419, 423 (1984).[6, 7] Published in 1748, Montesquieu's *The Spirit of the Laws* is a political treatise examining the implications of three types of government: republic, monarch, and despot. Montesquieu linked "corruption not to innate human depravity, but to the administration and organization of the laws." *Id.* at 422. Evaluating punishment under each government, Montesquieu observed that the "severity of punishments is fitter for despotic governments, whose principle is terror." Charles de Secondat & Baron de Montesquieu, *The Spirit of Laws* 99 (1752) (Thomas Nugent trans., 2001). In "moderate governments," by contrast, "a good legislator is less bent upon punishing than preventing crimes, he is more attentive to inspire good morals than to inflict penalties." *Id.* Such a government, he reasoned, should enact punishments that are in proportion to the crimes, with a level of severity that was necessary. *Id.*

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hundred years, the Society has continued to work toward humane punishment, including advocating for prisoner contact with families, fair and rational sentencing, mental health treatment and courts, and to improve conditions of confinement.

[6] These ideas were prevalent in the public sphere of Philadelphia at that time. *See* Michael Meranze, *Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1835* 68–72 (2012).

[7] As discussed in part 2 of this section, the analysis of cruelty is an ongoing process and one that must evaluate the punishment in practice. Though the penitentiary system was groundbreaking in the 1700's, as our society has progressed and as we have observed the actual administration of penitentiaries, it was understood that solitary confinement can itself be cruel punishment.

at 107. He disfavored torture, for example, because it was not "in its own nature necessary." *Id.* at 108.

This latter point is the cornerstone of Beccaria's 1764 treatise, *An Essay on Crimes and Punishments*. *See* Cesare Bonesana di Beccaria, *An Essay on Crimes and Punishments* 7 (1767) ("Every punishment, which does not arise from absolute necessity, says the great Montesquieu, is tyrannical."). The government's right to punish crimes, he wrote, is "founded . . . upon the necessity of defending the public liberty entrusted to his care." *Id.* "Every act of authority of one man over another, for which there is not an absolute necessity, is tyrannical." *Id.* To deem a punishment necessary, "it should have only that degree of severity which is sufficient to deter others." *Id.* at 108. Beccaria rejected the theory that a harsher punishment would be more of a deterrent; rather, deterrence would be achieved with the consistency of the laws. *See* Meranze, *supra*, at 422-23. Legal "certainty" was achieved with a combination of three principles:

> First . . .that all crimes be punished according to a determined scale; second, that all punishments be proportioned to the crime, so that a clear association existed between the crime and the penalty; and third, that all penalties be legislated at their most moderate or minimal level—any excess in the penalty was an arbitrary act and hence unjust.

*Id.* at 422.

### 2. The "Cruelty" inquiry must consider the actual imposition and administration of the punishment.

A careful review of early penal philosophy reveals another point critical to this Court's inquiry: instituting punishments without cruelty is an ongoing and experience based endeavor, in which punishments must be evaluated in practice, rather than in theory. The period immediately following the Revolutionary War was one in which officials in Pennsylvania experimented with various attempts at creating what they saw as a reformed penal code, which they understood would be one that avoided the excesses of England's overreliance on the death penalty. Erin Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. Crim. L. & Criminology 405, 443–53 (2016). During this period, Pennsylvania first experimented with the public infliction of forced labor as an alternative to a frequent infliction of capital punishment. *Id.* at 447. When public labor proved to be too cruel, Pennsylvania then implemented one of the first systems of imprisonment at the Walnut Street Jail. Throughout these experiments the focus of reformers was on reducing cruelty in punishments and, significantly for the questions in this case, they saw cruelty as an evolving concept that would be tested through practice.

Beccaria and Montesquieu favored the punishment of forced labor/public punishments, because they were long lasting examples to observers. While in theory these punishments appeared to be humane, in practice they were not. In his

treatise against public punishment, Benjamin Rush recognized that public punishment fails because one cannot always predict the actions and reactions of the subject or the crowd. Thus, punishments were difficult to assess on a theoretical level. Benjamin Rush, *An Enquiry into the Effects of Public Punishments* (1787). In practice, Rush wrote, public punishment "made bad men worse and increased crime." *Id.* at 4. For these reasons, Rush argued that punishments should be meted in private. Private punishments, he reasoned isolated criminals, protected society, and protected the wellbeing of the prisoners. *Id.*[8]

Rush's analysis can be seen clearly through the short-lived "wheelbarrow" law. In effect from 1786-90, the wheelbarrow law was sponsored by the well-respected and distinguished Chief Justice William McKean as an alternative sentence for some capital offenses. Negley K. Teeters, *Citizen Concern and Action Over 175 Years*, 42 Prison J. 5, 7-9 (April 1962). The law required offenders to undertake hard labor with "their heads shaved, carrying in their wheelbarrows,

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[8] Rush's advocacy of private prisons was part of the evolution of punishment at that time. While in theory, solitary confinement allowed for repentance, in practice, a host of issues have emerged. Further, the solitary penance contemplated by Rush was clearly not that practiced in prisons today. Early solitary confinement was never prolonged (rarely longer than two weeks) and was only almost entirely imposed by judges as part of a prisoner's sentence rather than by prison officials as part of prison discipline. More prolonged forms of solitary confinement were not adopted until Eastern State was constructed in the early 19th century (and then, of course, abandoned less than a century later). *See e.g.,* William Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania*, 12 Am. J. Legal Hist. 122, 154 (1968) (suggesting that solitary confinement should rarely be longer than 20-30 days); *id.* at 174 (citing John Howard's argument that prolonged solitary confinement could be inhumane).

balls and chains riveted to their ankles, and dressed in a bizarre distinctive dress of multi-colors." *Id.* at 7. Public punishments like this were initially seen as a deterrent, but their implementation revealed barbarism. "Not only was the work onerous and humiliating, but the convicts were the butt of ridicule of the idle and coarse members of the city who followed them about, sometimes hurling garbage or stones at the victims of the Chief Justice's law." *Id.* at 8.

In arguing that in practice the public punishments inflicted under the wheelbarrow law were cruel, Rush recognized that his views would be unpopular because they critiqued the "established opinions and practices." Rush, *supra*, at 4. The fact that they were established, however, did not automatically mean that they were humane or just. Rush wrote of the evolution of punishment as a "progressive growth." *Id.* at 3. "In government," he wrote, "we arrive at [truth] after divorcing our first thoughts." *Id.* He likened this progression to the field of medicine and science, wherein "we can discover [] chymical [sic] relations only by experiment." *Id.* at 3-4. Thus, according to Rush, cruelty was neither stagnant nor bright lined, but instead a reasoned evaluation deriving from "experience and observation." *Id.* at 4. Rush's view of criminal sanctions as an evolving science is clearly reflected in the founding documents of The Society, in which he writes that he founded the Society on the principal that "such degrees and modes of punishment as may be discovered and suggested, as may, instead of continuing the habits of vice, become

the means of restoring our fellow creatures to virtues and happiness." The Pennsylvania Prison Society, Constitution (1787).

Of course, penal punishment, as it developed in Pennsylvania, was also subject to evaluation and debate and would be subject to the prohibition on cruel punishment in its working administration, as can be seen in the work of the English prison reformer, John Howard. *See, e.g.,* John Howard, *The State of Prisons* (1929). Howard painted a ghastly picture of unreformed penal life in eighteenth century Europe, which he observed during his many tours of prison. *Id.* In response, Howard proposed regulations to improve conditions. *Id.* at 19. The Philadelphia Society for Alleviating the Miseries of Public Prisons was directly influenced by and in communication with Howard. Harry Elmer Barnes, *The Evolution of Penology in Pennsylvania: A Study in American Social History* 78 (1927). His recommendations form the basis for the many of The Society's reforms.[9]

It is through this lens of history that this Court should conduct its inquiry in this case. To correctly interpret and apply Article I, Section 13's prohibition against cruel punishment, this Court should consider the penal philosophy that

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[9] Prisons should be built so as to allow the free circulation of fresh air, with access to clean water, and individual cells to allow for "[s]olitude and silence [which] are favourable to reflection." *Id.* at 19-24. Prisons should have clean infirmaries that are separate, and debtors and felons should not be held together. *Id.* 25-26. And an inspector should be appointed to observe the conditions. *Id.* at 37. Howard's recommendations are clearly reflected in the writings of Rush, which argued in favor of a "house of repentance." *See* Meranze, *supra*, at 435.

emerged in this Commonwealth in the founding period.[10] Such an analysis, as urged by Beccarria, Montesque, Rush, and Howard, focuses on the issues of whether the severity of the punishment is necessary, and even if it might be, is it cruel in its administration as it has evolved over time?

### B. The Significance of This Court's State Constitutional Jurisprudence

As noted, while the entire corpus of cases in which this Court has invoked its powers to enforce the Declaration of Rights is informative, the Court's rulings with respect to Article I, Section 13 and related criminal justice provisions, have some special relevance. For example, in *Commonwealth v. Eisenberg*, 626 Pa. 512 (2014), the Court ruled that Article I, Section13 of the Pennsylvania Constitution prohibited the mandatory minimum fine of $75,000.00 for first degree misdemeanor thefts. *See* 4 Pa. C.S. § 1518(a) (17).[11] In declaring this fine excessive, the Court warned that "comparative and proportional justice is an

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[10] Many legal historians argue that contemporary practice is relevant in evaluating original meaning. *See, e.g.*, Erin Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. Crim. L. & Criminology 405 (2016); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L. J. 1012 (2015); Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 Fordham L. Rev. 721 (2013); Jack Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 San Diego L. Rev. 575 (2011).

[11] Although the Court was also concerned about trial judges' lack of discretion to choose the amount an offender would be fined, the Court expressly articulated the real issue to be the excessiveness of the minimum amount allowed by the statute. *Eisenberg*, 626 Pa. at 544-45 ("That the fine is mandatory merely exacerbates the disproportion.").

imperative within Pennsylvania's own borders, to be measured by Pennsylvania's comparative punishment scheme . . . it may be that the existing Eighth Amendment approach does not sufficiently vindicate the state constitutional value at issue[.]" *Id.* at 535.

Finding that "this intra-Pennsylvania approach is particularly persuasive" in cases involving Article I, Section 13, the Court's analysis focused on specific Pennsylvania based policy concerns. *Id.* at 538, 542 ("the minimum wage in Pennsylvania is currently $7.25 per hour, and the average Pennsylvania household earns approximately $51,000 per year. The fine imposed here would exhaust approximately five years of pre-tax income of a minimum wage worker, and the average family would not fare much better . . the provision could act to effectively pauperize a defendant for a single act."). Although "mandatory fines are not unheard of in Pennsylvania's statutory scheme," the Court was wary of their "unusual" status. *Id.* at 530. Thus, the fine provision "both in an absolute sense and in a comparative sense, is strikingly disproportionate to the manner in which other crimes are punished in Pennsylvania" and thus could not stand under Article I, Section 13 of the Pennsylvania Constitution. *Id.* at 544-45

## CONCLUSION

This Court should apply these state constitutional standards and precepts to this King's Bench challenge to the current application of the Pennsylvania's capital

punishment statute (and its attendant procedures). The Petition sets forth in significant detail the systemic constitutional failings of the death penalty process, both historic and current. These include racial disparities in the prosecution of cases (including discriminatory jury selection by prosecutors) and in the actual imposition of the death penalty, the high risk of convicting and executing innocent defendants, the failure of police and prosecutors to fairly disclose *Brady* material, the high reversal rate of death penalty judgments for constitutional violations, pervasive patterns of ineffective defense counsel, often due to lack of adequate funding and resources, and disparate impact on defendants with mental illness or intellectual disabilities.

The King's Bench Petition shows a system that in its actual operation is dysfunctional and flawed from root to branch, and this Court has recognized these problems in its review of death penalty cases. "Cruel punishment" is not a static concept as the fairness, proportionality, and efficacy of punishment must be judged, at least in part, in the full context of the operation of the punishment scheme. Where, as here, systemic injustices result from the cumulative effect of flawed procedures, the death penalty and its processes are "Cruel." Whatever principles of federalism counsel the U.S. Supreme Court to hesitate to apply the Eight Amendment to state systems of punishment, that doctrine has no place in an analysis of Pennsylvania's death penalty system under Article I, Section 13. On

this record, the Pennsylvania capital punishment system lacks any claim to any legitimate penological goals and this Court should grant the Petitioner's King's Bench Petition.

Respectfully submitted,

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February 22, 2019

## COMBINED CERTIFICATES

1. Pursuant to Pa. R.A.P. 127, I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

2. Pursuant to Pa R.A.P. 1115, I certify that that the word count complies with the word limitation and contains 6,930 words, excluding those parts exempted by the rules.

/s/Jennifer Merrigan

Counsel for Amici Curiae

DATED: February 22, 2019

## Appendix A

## List of Amici

**The Pennsylvania Prison Society** is the oldest human rights organization in the United States. Since 1787, the Society has worked to ensure humane prison and jail conditions and advocate for sensible criminal justice policies.

**Erin Braatz** is an Assistant Professor of Law at Suffolk University Law School and is a scholar of the history of the Eighth Amendment and its application in the United States.

**Francis Catania** is an Associate Professor of Law at Widener University Delaware Law School. He was formerly a prosecutor and private practitioner in Pennsylvania and served as the Chair of the Hearing Committee 2.02 of the Disciplinary Board of the Supreme Court of Pennsylvania.

**John Culhane** is a Professor of Law and Co-Director of the Family Health Law & Policy Institute at Widener University Delaware Law School.

**Seth Kreimer** is the Kenneth W. Gemmill Professor of Law at the University of Pennsylvania Law School. He has researched, taught and written on issues of state and federal constitutional since he joined the University of Pennsylvania Law School's faculty in 1981.

**Michael Meranze** is a Professor of History at the University of California, Los Angeles who specializes in United States intellectual and legal history with an emphasis on early America, including the history of the American death penalty.

He has special expertise in Pennsylvania's constitutional history and is the author of *Laboratories of Virtue: Punishment, Revolution, and Authority in Philadelphia, 1760-1835*.

**Louis Natali** is a Professor of Law at Temple University Beasley School of Law who has published numerous articles on death penalty litigation, and also serves on the Board of Directors for the Pennsylvania Innocence Project.

**Judith Ritter** is a Distinguished Professor of Law at Widener University Delaware Law School, and founded and directs its Pennsylvania Criminal Defense Clinic. Her scholarship is focused in the areas of criminal law, criminal procedure, post-conviction remedies and clinical legal education.

**Sozi Pedro Tulante** is a Policy Fellow and Lecturer-in-Law at the University of Pennsylvania Law School and a Fellow at Perry World House at the University of Pennsylvania. He previously served as the City Solicitor for the City of Philadelphia under Mayor Jim Kenney.