No. 11-1484

In the Supreme Court of the United States

TERRANCE CARTER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

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

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF FOR I WANT TO SERVE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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July 9, 2012

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MOTION FOR LEAVE TO FILE
***AMICUS* BRIEF**

Amicus curiae I Want To Serve ("*Amicus*") hereby moves, pursuant to Sup. Ct. R. 37.2(b), for leave to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari to the Louisiana Supreme Court. Counsel of record for Petitioner and Respondent were timely notified of the intent to file this brief. Counsel for Petitioner responded and consented to this filing. Counsel for Respondent did not respond and thus this motion became necessary.

As set forth in the accompanying brief's "Statement of Interest," *Amicus* represents a coalition of excluded jurors, concerned citizens, churches and church conferences, and other organizations that oppose the government's intrusion on their right to freely express their religion during capital jury selection process. *Amicus* have an interest in serving on juries and believe that the death qualification standard improperly infringes on their First Amendment rights. Accordingly, *Amicus* respectfully request that the Court grant leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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QUESTION PRESENTED

The First Amendment prohibits states from interfering with an individual's right to freely practice his or her faith unless a state can demonstrate that the interference is necessary to serve a compelling interest and is also narrowly drawn to achieve that end. Louisiana, and all other states that allow imposing the death penalty, allow the exclusion of jurors from service on capital juries because their religious views prohibit or, at a minimum, strongly encourage against, imposing the death penalty. This practice, more commonly called "death qualification," then, requires jurors to choose between expressing their faith or forfeiting their right to partake in this civic duty.

Should the Court re-evaluate the death qualification practice utilized in Louisiana (and many other states) because of its negative impact upon First Amendment freedoms?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

Amicus curiae, I Want to Serve, is a coalition of excluded jurors, concerned citizens, churches and church conferences, and other organizations that oppose the government's intrusion on theirs and others' religious freedoms during the jury selection process. More specifically, *Amicus* support Petitioner because any state interest in excluding potential jurors in capital cases based on their religiously-driven views infringes upon the religious freedoms protected by the First Amendment.[1]

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[1] No counsel for any party to this case authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person or entity other than the *Amicus Curiae* or their counsel made such monetary contribution.

SUMMARY OF ARGUMENT

The First Amendment guarantees individuals the fundamental right to freely exercise their religion. U.S. Const. amend. I. Death qualification interferes with potential jurors' right to freely express their constitutionally-protected religious beliefs by excluding those religious Americans from serving on capital juries because they maintain deeply-held beliefs that the death penalty is immoral, and they desire to not apply (or avoid) that form of punishment. Prosecutors use membership in a particular religious group (for example, Catholics) as a proxy by which to strike jurors out of fear that they will prove unwilling to impose the death penalty.

No compelling state interest exists that supports preventing religious citizens from expressing their religion and serving on capital juries. Instead, the purported state interests are either contrary to death qualification or are otherwise outweighed by First Amendment rights. First, and perhaps foremost, states have an interest in fair adjudication and reducing error costs at trial. But, death penalty verdicts—including such verdicts under Louisiana's capital punishment statute—are unusual because there are no wrong answers (within a certain statutorily compelled range of results), only morally divergent ones. Louisiana law permits jurors to consider "any . . . relevant mitigating circumstances," when employing their reasoned judgment to determine the appropriate punishment. *See* La. Code Crim. Proc. Ann. art. 905.5(h). Thus, jurors are given enormous discretion to reject death for any reason or no reason at all. *Cf. Gregg v. Georgia*, 428 U.S. 153 (1976). Because jurors may consider "any mitigating

circumstance," presumably, as long as the jury does not return a verdict of death in the absence of the statutory aggravating factors, there is no objective "error" to avoid. Consequently, death qualification's intrusion into First Amendment rights may be unnecessary to further any state interest concerning juror qualification.

This Court should grant *certiorari* to decide whether the death qualification process impermissibly burdens prospective jurors by excluding them from capital juries as a result of their religious beliefs.

ARGUMENT

The Court Should Grant *Certiorari* Because Death Qualification Infringes Upon the First Amendment Rights of Potential Jurors.

The death qualification process followed in Louisiana—and all other states that allow for capital punishment—impermissibly interferes with religious freedoms because it forces prospective religious jurors to either express their religious beliefs or forfeit the opportunity to serve on a capital jury.[2]

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[2] In Louisiana, the death qualification process is codified and provides that "It is good cause for challenge on the part of the state, but not on part of the defendant, that: . . . (2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it known: (a) That he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him; (b) That his attitude toward the death penalty would prevent or substantially impair him from making an impartial decision as a juror in accordance

Members of a variety of religions, from Catholics to Muslims, want to serve as jurors on capital cases.[3] The prevailing precedent, however, allows these states to systematically exclude these individuals because of their deeply-held views about the morality of capital punishment. That violates these individuals' First Amendment right to freely exercise their religion. The Court should grant *certiorari* to consider whether death qualification is constitutional when considering its relationship to, and effect upon, the First Amendment right to freely express one's faith.

I. Death Qualification Naturally Excludes Religious Americans from Juries.

The current death qualification effectively relegates many Americans to "automatic" disqualification from serving on a capital jury because their religious beliefs lead them to oppose the death penalty. Leaders of several religions practiced in the United States consider the death penalty to run contrary to their religion's teaching. In the Catholic Church, Pope Benedict XVI is a vocal opponent of the death penalty and strongly supports Catholic campaigns "to

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with his instructions and his oath; or (c) That his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt. . . ." See La. Code Crim. Proc. Ann. art 798.

[3] *See* I Want To Serve, http://www.iwanttoserve.org (last visited July 4, 2012).

eliminate the death penalty.[4] Furthermore, the U.S. Conference of Catholic Bishops (U.S.C.C.B.) operates an active campaign to end the death penalty in the United States.[5] Unsurprisingly, many Catholics cannot qualify to serve on capital juries because the death penalty is contrary to their religious convictions.[6]

Catholics are not the only people who suffer from death qualification. The American Baptist Church Convention, the Episcopal Church, the Presbyterian Church, the Unitarian Universalist Association of Congregations, the United Methodist Church, and the National Council of Churches also oppose the death penalty,[7] as do denominations of Judaism.[8] The net

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[4] *Pope Seeks To End Death Penalty*, CBS News, Nov. 30, 2011, http://www.cbsnews.com/8301-501714_162-57333965/pope-seeks-end-to-death-penalty/.

[5] *See* U.S.C.C.B., A Culture of Life and the Penalty of Death (2005), *available at* http://www.priestsforlife.org/magisterium/ bishops/penaltyofdeath.pdf.

[6] *See* Alicia Summers, R. David Hayward & Monica K. Miller, Death Qualification as Systematic Exclusion of Jurors With Certain Religious and Other Characteristics, 40 J. App. Psych. 3218, 3229 (2010).

[7] American Baptist Resolution on Capital Punishment (1982), *available at* http://www.abc-usa.org/LinkClick.aspx?fileticket=m8skSMEwmz8%3D&tabid=199; 1992 Journal of the General Convention of the Episcopal Church 377 (1991), *available at* http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=1991-D056; Minutes of the 197th General Assembly of the Presbyterian Church 84 (1985), *available at* http://gamc.pcusa.org/ministries/101/capital-punishment/; Resolution of the 39th Annual General Assembly of the Unitarian

result, then, for numerous prospective jurors with these religious convictions, and who live in either Louisiana or other capital punishment states is that they can expect to be disqualified from capital jury service if they express their true religious beliefs.

A. Death Qualification Systematically Excludes Religious Jurors from Louisiana Juries

The effects of death qualification are particularly problematic in Louisiana, a state in which more than half of the population are active members of religious congregations. Louisiana is home to over 1.2 million people who identify as Catholic, as well as 146,000 United Methodists and a host of other religions that oppose the death penalty.[9]

Many excluded jurors have been practicing Catholics. A recent study examining the beliefs of jurors in a mock sentencing exercise found that "Catholics were more than twice as likely as others to

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Universalist Association (2000), *available at* http://www.uua.org/statements/statements/14011.shtml; Book of Resolutions of the United Methodist Church (2000); Statement by Gen. Sec'y Robert W. Edgar, NCC Supports Moratorium on Death Penalty (June 26, 2000), *available at* http://www.ncccusa.org/news/00news74.html.

[8] Central Conference of American Rabbis, Resolution affirming opposition to death penalty, Phoenix, Ariz., Mar. 26-29, 1979.

[9] *State Membership Report*, Assoc. of Religion Data Archives, http://www.thearda.com/rcms2010/r/s/22/rcms2010_22_state_name_2010.asp (last visited July 4, 2012).

be excluded by the death-qualification process."[10] Given that Catholics constitute approximately 25 percent of the overall Louisiana population,[11] and that the Louisiana Conference of Catholic Bishops has actively organized against the death penalty, arguing that "opposition to the death penalty as necessary to a consistent ethic of life,"[12] it is highly likely that a significant proportion of the Louisiana population finds themselves subject to exclusion from capital jury service in Louisiana merely because they are Catholic. Indeed, Catholics who follow the teachings of the church, such as Sandra Taylor-Peterson, a prospective juror "opposed to the death penalty because of [her] religious principles," believe they will never be able to "serve on a capital jury because of the way the law is set up."[13]

The instant case took place in Lincoln Parish, where at least 21 percent of the population belongs to a religious denomination that opposes the death

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[10] Alicia Summers, R. David Hayward & Monica K. Miller, Death Qualification as Systematic Exclusion of Jurors With Certain Religious and Other Characteristics, 40 J. App. Psych. 3218, 3229 (2010).

[11] *State Membership Report*, Assoc. of Religion Data Archives, http://www.thearda.com/rcms2010/r/s/22/rcms2010_22_state_name_2010.asp (last visited July 4, 2012).

[12] Jesuit Social Research Institute, *Diminishing All of Us: The Death Penalty in Louisiana* (2012).

[13] *Excluded Jurors' Voices*, I Want To Serve, http://www.iwanttoserve.org/excluded-jurors-voices (last visited July 5, 2012).

penalty.[14] Unsurprisingly, then, sixteen jurors in the instant case—constituting 60 percent of the state cause challenges granted—were struck because they expressed a religious opposition to the death penalty.[15] At least one juror (Amy Marcus) was expressly excluded as a result of her belief that her Catholic religion compelled her to impose the death penalty only if the offender would "imminent[ly]" repeat the crime:

> Maybe this will help you all understand where I'm coming from. If I did [vote for the death penalty] I believe I would pay a price for it, because I don't believe I actually have the God given right to take another person's life. If you're not Catholic you're not going to understand this, but in my mind I believe I would probably spend time in purgatory for that. But, I would have to do it if I felt so strongly that the offense would be repeated."

Petition for Writ of Certiorari, *Carter v. State of Louisiana*, (No. 11-1484). Any and all jurors who share this juror's and the church's belief that the death penalty is immoral can expect to be excluded from

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[14] *See Lincoln Parish, Louisiana (LA) Religion Statistics Profile*, City-Data.com, http://www.city-data.com/county/religion/Lincoln-Parish-LA.html (16.2% United Methodist, 4.2% Catholic, 1.0% American Baptist).

[15] One juror struck for cause was Catholic, and two were Baptists. Another was a Sunday School teacher; still another sought to consult with his pastor before deciding on the death penalty; and two others identified the Bible as the source of their belief that they could not impose death.

capital jury service in Lincoln Parish, throughout Louisiana, and other states that apply the death qualification process.

B. Death Qualification Infringes Upon the First Amendment Rights of Only Some, but Not All, Religious Individuals

Death qualification results in differing levels of freedom between members of different religions. More specifically, those who reject the death penalty are excluded from juries due to their faith while other individuals who practice a religion which either has no qualms with, or supports, imposition of a death sentence may freely serve. In *State v. Campbell*, 983 So.2d 810, 863 (La. 2008) the court dismissed a juror who expressed that she would have to "pray . . . and see the evidence" before voting for death, but then later admitted she "could sit on a death penalty [jury]" and consider death. But, at the same time, the court refused to dismiss a juror who stated that he would require the defense to prove mitigating circumstances "beyond a really reasonable doubt." *Id*. at 861; *see also State v. Lucky*, 755 So. 2d 845 (La. 1999) (excluding juror for religious reasons while accepting jurors strongly predisposed to the death penalty); *State v. Howard*, 751 So. 2d 783 (La. 1999) (same).

Justice Black stated, in his dissent in *Witherspoon*, that he "would not dream of foisting on a criminal defendant a juror who admitted that he had conscientious or religious scruples against not inflicting the death sentence on any person convicted of murder (a juror who claims, for example, that he adheres literally to the Biblical admonition of 'an eye for an eye')." *Witherspoon v. Illinois*, 391 U.S. 510, 535-

36 (1968). But Louisiana courts have done exactly that. *See, e.g.*, *State v. Juniors*, 915 So. 2d 291, 312 (La. 2005) (affirming denial of a defense challenge to juror who believed in an "eye for an eye and a tooth for a tooth" and stated that she would automatically impose death if she thought that he "d[id] it" but then agreed she could follow the law); *State v. Miller*, 776 So. 2d 396, 408-409 (La. 2000) (affirming denial of a defense challenge under similar circumstances to *Juniors*).

In Louisiana, then, courts exclude willing citizens from jury service where their religion leads them to oppose the death penalty, but retain jurors whose religious views lead them to support the death penalty. The Court should grant *certiorari* to determine whether the use of death qualification—which interferes with First Amendment freedoms—is necessary when considering it against the arbitrary jury selection backdrop in which it is applied.

II. The Court Should Grant *Certiorari* to Examine the Constitutionality of Death Qualification in Relation to First Amendment Rights

Death qualification, by its nature, burdens prospective jurors' right to exercise their religion beyond what is necessary. But despite that, the Court has neither discussed the religious freedom of jurors in its death qualification decisions nor the burden it places on religious people. *See Witherspoon*, 391 U.S. at 515, 519 (upholding the exclusion of prospective jurors who expressed "'conscientious or religious scruples against the infliction of the death penalty' or against its infliction 'in a proper case'" without

discussing the religious freedom of jurors); *Wainwright v. Witt*, 469 U.S. 412, 433 (1985) (failing to discuss how the Court's new "prevent or substantially impair" test would impact prospective jurors excluded because of their religious views); *Lockhart v. McCree*, 476 U.S. 162, 177-78 (1986) (holding that removing *Witherspoon* excludables from the jury pool did not deprive a defendant of his right to an impartial jury, without discussing the disproportionate effect on religious jurors). Thus, the Court has developed its death qualification jurisprudence without any reference to or analysis of the impact of those decisions and the resulting state processes on the religious freedom of prospective jurors.

The Court's silence is especially problematic because death qualification impinges on the freedom of religious citizens to take part in an important civic duty and does so when that duty most strongly implicates their religious beliefs. The Catholic Church, Quakers, Unitarians and Universalists, and certain Protestant and Jewish denominations have denounced the death penalty at various times.[16] Barring members of those faiths who oppose the death penalty from serving on capital juries because of their religious beliefs burdens their freedom to follow and exercise the teachings of their religion. More specifically, any of the 1.3 million Catholics in Louisiana who follow their church's invocation to oppose the death penalty will be subject to exclusion from serving on death penalty juries. These

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[16] *See The Churches Speak On: Capital Punishment* (J. Gordon Melton ed., 1989); John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 303-04 (1998).

individuals face a Hobson's choice: either honestly express their beliefs and face statutory disqualification or answer dishonestly under oath and denounce their faith.

Archbishop Gregory Aymond once stated, "as a people of faith we have the right to believe what we believe, and that should not exclude us from the democratic process. . . . I believe that we as Catholics have the right to sit on a jury that has to do with capital defense."[17] The same is true for those who practice other religions with deeply held beliefs that the death penalty is immoral. This Court recognizes that "freedom of thought, which includes freedom of religious belief, is basic in a society of free men." *See U.S. v. Ballard*, 322 U.S. 78, 86 (1944). Accordingly, it should grant *certiorari* to either correct the ongoing violation of religious jurors' First Amendment rights or clarify why death qualification is constitutional in light of these infringements.

III. The Death Qualification Process Should Receive Heightened Scrutiny

Death qualification warrants strict scrutiny because such statutes, while burdening religious conventions, are not neutral or generally applicable. After *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Court has subjected neutral, generally applicable laws to rational basis scrutiny, even if the law has the incidental effect

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[17] I Want To Serve – Archbishop Gregory Aymond, http://www.iwanttoserve.org/2012/02/archbishop-gregory-aymond. (last visited July 5, 2012).

of burdening a particular religious practice. But, "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

In *Lukumi*, a city ordinance limiting animal slaughter was so under-inclusive that in practice, it was illegal to kill animals only when the killing was part of a Santeria ritual. *Id*. at 543. Death qualification is similarly under-inclusive because it is impossible to detect and exclude all prospective jurors who have an undesirable bias; the courts tend mostly to exclude those who express anti-capital punishment views grounded in religious teaching. *See* Summers et al., *supra* note 6. In practice, then, a prospective juror is much more likely to be disqualified from serving on a capital jury if he or she exhibits religious tendencies or specific religious views that counsel against the imposition of the death penalty. As this practice of excluding biased jurors is a state action that is so under inclusive that it operates upon "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display," *Smith,* 494 U.S. at 877, death qualification is constitutionally suspect and subject to strict scrutiny.

Here, then, the state must have a compelling reason for burdening the religious freedom of jurors, and the death qualification process must be the least restrictive means to achieve this end.

A. Death Qualification Is Not Necessary To Support Any State Interest

Amicus recognizes that states have an interest in removing jurors who will not deliberate on guilt, or whose views on the death penalty would cause them to render a not-guilty verdict at the guilt stage. But *Amicus* believes removal of any such jurors should occur through the state's twelve peremptory strikes, as it allows for the removal of anyone antagonistic to its position for almost any reason. *Amicus* does not believe it is constitutional for a state to promulgate a rule and follow a process that provides free reign to remove all religious jurors without utilizing peremptory strikes. The Louisiana law, however, does just that. With the state's practice of sweeping from the jury "all who express[] . . . religious scruples against capital punishment . . . , the State [has] crossed the line of neutrality." *Witherspoon*, 391 U.S. at 520. While states have an interest in ensuring jurors uphold the law, there is no compelling state interest in removing jurors who are able to deliberate fairly with regard to guilt and render a statutorily acceptable verdict (albeit a life sentence) at the penalty stage.

The need to examine whether death qualification serves any compelling interest may be wholly unnecessary when considering that the need for the death penalty is questionable. In *Gregg*, this Court stated that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." 428 U.S. at

183.[18] But, as Justice Brennan identified in his concurring opinion in *Furman*, "[t]he question, however, is not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than imprisonment." *Furman*, 408 U.S. at 308. Recent research, at a minimum, casts doubt into the effectiveness of the death penalty, and, whether it furthers these interests. For example, "[d]espite many studies conducted over the past fifty years, no evidence has been found to support the hypothesis that the death penalty deters the commission of crimes more effectively than life imprisonment."[19] And, "[t]he few studies purporting to show some net deterrent effect have been thoroughly discredited in the research community for their faulty methodologies and failure to stand up under attempted replication."[20]

Thus, when the death penalty itself may not support any compelling interest, it is highly suspect that death qualification is necessary.

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[18] Incapacitation is also recognized as an interest for the death penalty. *See Furman v. Georgia*, 408 U.S. 238, 311 (1972) (Brennan, J. concurring) ("It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime.").

[19] Ursula Bentele, Does the Death Penalty, By Risking Execution of the Innocent, Violate Substantive Due Process?, 40 Hous. L. Rev. 1359, 1381 (2004); *see also* Craig J. Albert, Challenging Deterrence: New Insights On Capital Punishment Derived From Panel Data, 323 ("[D]ata garnered from fifty-one American jurisdictions during the years 1982-1994 [indicates] that capital punishment does not have a deterrent effect.")

[20] Bentele, *supra* note 19, at 1382.

B. Death Qualification Is Not the Least Restrictive Means to Protect Any State Interest, Much Less One That Is Compelling

While it has been argued that *voir dire* and death qualification serve to ensure that jurors uphold the law, a closer review of death qualification demonstrates that it is not the least restrictive means for achieving that end. Rather, excluding those with strong religious views against the death penalty work against the state's interest in upholding the law.

The death penalty statutes of Louisiana and an overwhelming majority of states define the proper role of the juror to include granting mercy based on personal moral views. *See* La. Code Crim. Proc. Ann. art. 905.5(h) (allowing capital jurors to consider "any . . . mitigating factor" in deciding whether to apply the death penalty); *see also Gregg*, 428 U.S. at 164 ("The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the [Georgia capital punishment] statute"). That is, these rules allow jurors to apply their religious opinions to the work of "weighing" or "balancing" the required sentencing factors.

Further, the historical evolution of juror discretion supports the notion that death qualification is unnecessary to protect any state interest in upholding the law. The shift from the unbridled juror discretion of the pre-*Furman* era to the narrowly prescribed post-*Furman* statute brought a corresponding shift in the law of capital jury selection. Under the pre-*Furman* regime, the Court had held that a trial court could not grant a challenge for cause based on attitudes toward

the death penalty unless the jurors would "automatically" reject the death penalty, regardless of the facts of the case. *Witherspoon*, 391 U.S. at 522 n.21. In 1985, though, the Court expanded the class of excludable jurors to include those whose views would "prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath." *Wainwright,* 469 U.S. at 425 (internal quotation marks and citation omitted). Jurors, the Court explained, must "apply the law." *Id.* at 423. Prior to 1978, the law required only that jurors at least contemplate imposition of the death penalty. Under *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Woodson v. North Carolina*, 428 U.S. 280 (1976), they must consider mitigating circumstances regardless of the statutory procedure. Thus, the Court concluded, a juror whose views would likely "substantially impair" his performance as a juror—that is, a juror who would not or could not follow the statute—was also likely not "apply[ing] the law." Thus, most states adopted statutes expressly requiring juries to make findings regarding statutory factors but allowed significant discretion in how to apply those findings. *See, e.g.*, La. Code Crim. Proc. Ann. art. 905.5(h).

For all of the Court's emphasis on guidance and careful instruction, it is significant that the Louisiana statute (as well as most others) leaves substantial opportunities for jurors to employ their individual judgment. *See* La. Code Crim. Proc. Ann. art. 905.5(h) (allowing capital jurors to consider "any . . . mitigating circumstance" in deciding whether to apply the death penalty); *see also Gregg*, 428 U.S. at 164 (finding that "[t]he scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the [Georgia capital punishment] statute"); *Zant v.*

Stephens, 462 U.S. 862, 879 (1983) (stating that the Constitution does not require a jury to ignore other possible aggravating factors in the process of selecting which defendants will be sentenced to death because it is important to make "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime") (emphasis in original); *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence . . .") (emphasis in original).

Thus, a death penalty juror is instructed—by the Constitution and by the Louisiana statute—to follow his or her conscience in deciding whether to apply the death penalty. Of course, he or she must also follow "fixed rules of law." *See Gregg*, 428 U.S. at 193. At a minimum, those rules of law, in Louisiana and elsewhere, direct jurors to exercise discretion. Consequently, there is no conflict between the religious juror's application of the law and her religious views.

The wording of Louisiana's death penalty statute allows jurors to promise ex ante to find mitigation. La. Code Crim. Proc. Ann. art. 905.5(h). Each juror is free to consider any mitigating factors that he or she deems relevant, even those not proffered by the defendant. Thus, much like the jurors in *Morgan v. Illinois*, 504 U.S. 719 (1992), although commanded to consider all the aggravating factors supported by the evidence, the jury is free to conclude that any given fact is mitigating. *Cf. Morgan*, 504 U.S. at 742-43 (Scalia, J., dissenting). A juror who admits in *voir dire* that his or

her religion requires him or her to find facts that would outweigh the statutory aggravating circumstances does not contravene the language of the statute. That is, the juror's religious commitment against the death penalty does not mean the juror will refuse to recognize the proven statutory factors as aggravating. Instead, the juror plans to "weigh" the factors at sentencing; he or she simply knows that they will not find those factors weighty enough to merit capital punishment. Only where the state statute specifically forbids consideration of the factors that prevail for that juror would the juror actually be violating the language of the law. *See Morgan*, 504 U.S. at 742 (Scalia, J., dissenting); *see also* Garvey & Coney*, supra* n.10, 81 Marq. L. Rev. at 338-39.

Furthermore, statutes like Louisiana's arguably call on jurors to exercise their own personal philosophy, including their religious beliefs.[21] In Louisiana's scheme, the State's interest should be limited to preventing the possibility that the challenged juror will refuse to recognize a defined aggravating factor. And because no rational juror would do that when he or she could accomplish the same result through a permissible weighing—that is, a weighing that by statute may include any mitigating circumstances the juror wants to consider—and stay within the bounds of the statute, the process of ferreting out such views cannot serve the government's interest in upholding the law.

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[21] See Laura S. Underkuffler, *Agentic and Conscientic Decisions in Law: Death and Other Cases*, 74 Notre Dame L. Rev. 1713, 1724-25 (1999).

Finally, even if the Louisiana statute is read to allow juror discretion only in assigning relative weights to permissible aggravating and mitigating factors, because each juror likely brings a different view on the relative weight of each factor, there is no genuine state interest in excluding some jurors in such a calculated manner. To exclude a juror simply because he or she will allow their religious beliefs to inform the relative weights of the sentencing factors violates the First Amendment. *A fortiori*, most states cannot claim that jurors who are only likely or inclined—rather than compelled—to vote for or against the death penalty threaten the state's interest in upholding its law. Only in Delaware, Mississippi, New Jersey, Texas, and, arguably, Georgia, Indiana, Nevada, and Tennessee are there serious textual arguments that a juror cannot use his or her religious beliefs in weighing whether to impose death. Even in those states, jurors are expected to make full use of their range of moral learning. *See* Brian Galle, Note, *Free Exercise Rights of Capital Jurors*, 101 Colum. L. Rev. 569, 603 (2001).

In short, death qualification discriminates against religious jurors by infringing upon the core American value of freedom of religion and does so without serving any compelling state interest. The process thus requires the Court's attention because it is ineffectual at best and counterproductive at worst.

CONCLUSION

Based on the foregoing, the Court should grant *certiorari* to review the decision of the Supreme Court of Louisiana.

Respectfully Submitted,

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