ELECTRONICALLY FILED
2024 Oct 15 PM 8:18
CLERK OF THE WYANDOTTE COUNTY DISTRICT COURT
CASE NUMBER: 2018-CR-000640
PII COMPLIANT

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IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS
CRIMINAL DEPARTMENT

STATE OF KANSAS,	)	
Plaintiff,	)	Case No. 18 CR 640
v.	)	
ANTOINE FIELDER,	)	
Defendant.	)	

ANTOINE FIELDER'S MOTION CHALLENGING DEATH QUALIFICATION AS UNCONSTITUTIONAL UNDER THE STATE AND FEDERAL CONSTITUTIONS

Antoine Fielder respectfully moves this Court to find unconstitutional the process of death qualifying juries in capital cases. For the reasons explained below and as set forth in detail in the expert reports appended to this Motion, death qualifying a jury would violate Mr. Fielder's right to an impartial jury, as well as prospective jurors' right to serve, pursuant to Sections 1, 2, 5, 7 and 10 of the Kansas Constitution Bill of Rights, K.S.A. § 43-156, and the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution.

In support of this Motion, Mr. Fielder relies upon the attached Memorandum of Points and Authorities and the following expert reports included as exhibits:

Exhibit A: Mona P. Lynch (2023 Report)
Exhibit B: Wanda Foglia
Exhibit C: Scott Sundby
Exhibit D: Elisabeth Semel
Exhibit E: Shawn Leigh Alexander
Exhibit F: Jeffrey Fagan (2024 Deterrence Report)
Exhibit G: Charles Epp
Exhibit H: Frank R. Baumgartner (2024 Race Study Report)
Exhibit I: Tricia Rojo Bushnell
Exhibit J: Jeffrey Fagan (2023 Race Study Report)
Exhibit K: Brent M.S. Campney
Exhibit L: Carol Steiker
Exhibit M: Frank Baumgartner (2022 Media Report)
Exhibit N: Frank Baumgartner & Phil Cook (2023 Cost Report)

Dated: October 15, 2024

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IN THE DISTRICT COURT OF WYANDOTTE COUNTY, KANSAS
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Plaintiff,	)	Case No. 18 CR 640
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MR. FIELDER'S CHALLENGE TO DEATH QUALIFICATION AS UNCONSTITUTIONAL UNDER THE STATE AND FEDERAL CONSTITUTIONS

TABLE OF CONTENTS

INTRODUCTION

Robust empirical evidence demonstrates that the process of death qualifying jurors in capital cases fundamentally skews capital trials. It discriminates against potential jurors on the bases of race, gender, and religion. It warps the jury from a cross-section of peers to a whiter, more heavily male body that is uncommonly conviction- and death-prone. This process not only ensures that capital juries in Kansas are less impartial than other juries, but also impermissibly excludes women, Black jurors, and jurors with certain religious beliefs from a key democratic function. The Kansas Supreme Court recognized this problem as ripe for review as recently as January 2022. This case provides the opportunity to conduct the careful and necessary review of the factual record that was deemed warranted by our Supreme Court, and to find that death qualification is inconsistent with the guarantees in our state and Federal Constitutions.

Mr. Fielder thus asks this Court to rule that the practice of death qualification in Kansas violates Sections 1, 2, 5, 7, 9, and 10 of the Kansas Constitution Bill of Rights, K.S.A. § 43-156, as well as the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution.

LEGAL STANDARD AND BURDEN OF PROOF

Mr. Fielder challenges the death penalty as applied in Kansas under the Federal Constitution and Sections 1, 2, 5, 7, 9, and 10 of the State Constitution. Sections 1 and 5 of the Kansas Constitution have been recognized as "fundamental" rights. *See Hodes & Nauser, MDs, P.A. v. Schmidt*, 440 P.3d 461, 499 (Kan. 2019)

("*Hodes I*"), *aff'd sub nom. Hodes & Nauser, MDs, P.A. v. Kobach*, 551 P.3d 37, 46 (Kan. 2024) ("*Hodes II*") (rights protected by Section 1 are fundamental); *Hilburn v. Enerpipe Ltd.*, 442 P.3d 509, 513 (Kan. 2019) (plurality op.) (right to jury protected by Section 5 is fundamental).

Whenever the State takes action that "implicate[s]" fundamental rights, it "bears the burden" of proving that its action passes strict scrutiny. *Hodes I,* 440 P.3d at 493-97 (internal quotation omitted). Strict scrutiny review proceeds in two steps. First, "the State must establish a compelling interest." *Id.* at 493. A compelling interest is "one that is 'not only extremely weighty, possibly urgent, but also rare—much rarer than merely legitimate interests and rarer too than important interests.' " *Id.* Second, the State must "prove its action is narrowly tailored to serve that interest" and furthers that interest "not merely in theory, but in fact." *Id.* at 497. State action is narrowly tailored only when it is neither overinclusive nor underinclusive, and it achieves the compelling interest by the least restrictive means available. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1326-32 (2007); *see also Hodes I*, 440 P.3d at 493.

Mr. Fielder's claims under section 2 and section 7, relating to prospective jurors, should likewise be recognized as fundamental and subject to strict scrutiny. section 2 explicitly protects "political rights" which includes jury service, and section 7 prohibits government infringement of religious beliefs. The Kansas Supreme Court has recognized as fundamental those rights the State Constitution explicitly protects,

particularly where it provides greater protection than the Federal Constitution, as do sections 2 and 7. *See Hilburn*, 442 P.3d at 513.

This Court must also apply strict scrutiny to determine whether the State can justify death-qualifying Mr. Fielder's jury in light of his fundamental Section 10 rights. *Hilburn*, 442 P.3d at 513 (holding the Section 5 jury trial right is "fundamental" and statutes implicating that right are not entitled to a presumption of constitutionality); *cf. State v. Albano*, 487 P.3d 750, 755 (Kan. 2021) (Section 10 encompasses the right to jury protected by Section 5).

Mr. Fielder bears the burden of proving his federal constitutional claims under the Sixth, Eighth, and Fourteenth Amendment. *See, e.g.*, *Duren v. Missouri*, 439 U.S. 357, 364-68 (1979) (citing *Taylor v. Louisiana*, 419 U.S. 522, 531-38 (1975)); *Graham v. Florida*, 560 U.S. 48, 61 (2010).

ARGUMENT

I. Death Qualification Violates the Kansas Constitution.

The practice in death penalty trials of disqualifying jurors based on their views of the death penalty disproportionately discriminates against jurors who are Black, women, and/or religious, fundamentally breaking the promise of a fair cross-section of the community. *See, e.g.*, *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). It violates both Mr. Fielder's state constitutional rights to an impartial jury and equal protection, and the excluded jurors' constitutionally protected political rights to participate in key democratic functions.

A. This Court Should Interpret K.S.A. § 22-3410(2) in Harmony with the Constitutional Rights of Mr. Fielder and the Jurors Excluded by the Discriminatory Death Qualification Process.

The practice of death qualification in Kansas is not tethered to any statute or constitutional provision. Historically, Kansas law authorized the exclusion of jurors whose death penalty views would render them unable to fairly assess guilt or innocence. *See* K.S.A. § 62-1404 (repealed 1970) ("If the offense charged be punishable with death, any person entertaining such conscientious opinions as would preclude his finding the defendant guilty shall not serve as a juror."); K.S.A. § 62-1405 (repealed 1970) ("No person who believes the punishment fixed by the law to be too severe for the offense or entertains any opinion that would preclude his finding the defendant guilty, shall be sworn as a juror."). These statutes were enacted when guilt and punishment were decided in a unitary proceeding, in contrast to modern, bifurcated capital trials. Kansas courts relied on these statutes to uphold exclusion of jurors who stated that their views on the death penalty would impact their decision regarding guilt or innocence. *See, e.g.*, *State v. Theus*, 207 Kan. 571, 577 (1971) (exclusion proper where juror stated their views on the death penalty would impact their determination of guilt or innocence). But Kansas repealed these sections requiring death qualification in 1970, and the U.S. Supreme Court struck down death penalty laws in 40 states, including Kansas, in 1972. *See Furman v. Georgia*, 408 U.S. 238 (1972). When the Kansas legislature reenacted the death penalty in 1994, it did not reenact those provisions or add any new provisions requiring death qualification.

Instead, the practice of death qualification is now justified by a statute permitting challenges for cause based on general language of impartiality. *See* K.S.A.

§ 22-3410(2)(i) (permitting challenge for cause against juror whose "state of mind with reference to the case or any of the parties is such that the court determines there is doubt that he can act impartially and without prejudice to the substantial rights of any party[]"). The practice of death qualification as justified under K.S.A. § 22-3410 implicates Mr. Fielder's constitutional rights to an impartial jury under Section 5 and Section 10 of the Kansas Constitution. *See infra* Section I.B. Furthermore, the discriminatory practice of death qualification impedes on Kansans' fundamental right to serve on a jury under Sections 1, 2, and 7 of the Kansas Constitution by disproportionately excluding potential jurors who are Black, female, or religious. *See infra* Section I.C. To protect Kansans' constitutional rights to an impartial jury and to serve on a jury, this court should interpret K.S.A. § 22-3410(2)(i) so as not to include the practice of death qualification. *Cf. Witherspoon v. Illinois*, 391 U.S. 510, 523 (1968) (upholding a statute permitting exclusion of those opposed to capital punishment).

This interpretation of K.S.A. § 22-3410(2)(i) would still allow citizens to serve as jurors if they could return a lawful verdict of life without parole. Kansas law requires jurors in a penalty phase to decide: (1) whether an aggravating circumstance exists; (2) whether mitigation exists, including mercy; and (3) whether the aggravating circumstance or circumstances are outweighed by mitigation. K.S.A. § 21-6617(c)-(e); *see also*, PIK 54.050 Capital Murder- Death Sentence- Mitigating Circumstances (4th ed) ("The appropriateness of exercising mercy can itself be a mitigating circumstance in determining whether the State has proved beyond a

reasonable doubt that the death penalty should be imposed"); *State v. Carr*, 331 P.3d 544, 718 (Kan. 2014), *overruled on other grounds*, *Kansas v. Carr*, 577 U.S. 108 (2016) ("Mercy may overcome even the most obvious imbalance between forceful evidence of aggravators from the State and a defense mitigation case that is so weak it would not pull the skin off a rice pudding."). Nothing in Kansas law requires jurors to exclude their morals or values from their decision regarding the appropriate punishment. *Id.*; *see also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 264 (2007) (constitution demands that jury be permitted to give a "reasoned moral response" to mitigating evidence). *See also Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Jurors are not biased when they return a sentence that the law prescribes and has been overwhelmingly imposed in Kansas. Rep.of Frank Baumgartner (Exhibit H) (the vast majority of those individuals convicted of capital murder in Kansas receive a life sentence).

B. Kansas's Death Qualification Procedures Violate Section 5 and Section 10 by Impeding Mr. Fielder's Right to an Impartial Jury.

All Kansans have the right to "an impartial jury," and the Constitution declares that this right "shall be inviolate." Kan. Const. Bill of Rts. §§ 5, 10. The Supreme Court has interpreted this "uncompromising" language to require the "highest protection" by courts of this state. *Hilburn*, 442 P.3d at 515 (internal quotations omitted). Wherever State action "interfer[es] with the jury's fundamental function" or attempts to "modify it in ways that destroy the substance of th[e] right,"

the Kansas Constitution requires courts to intervene. *Id.* at 514-15 (internal quotation omitted).

No court has decided whether Kansas's practice of death qualification, as applied in Wyandotte County, interferes with a capital defendant's inviolate right to an impartial jury. Indeed, no Kansas court has considered any as-applied challenge to death qualification based on Sections 5 and 10. In *State v. Carr*, the Kansas Supreme Court considered a *facial* challenge to Kansas' death qualification framework based on the historical definition of the word "jury." 502 P.3d 546, 579-83 (Kan. 2022). In rejecting that challenge, the Court invited the as-applied challenge Mr. Fielder raises here:

> Finally, [amicus curiae party NAACP Legal Defense and Educational Fund, Inc. ("LDF")] claims death qualification disparately impacts the racial composition and biases of juries in capital sentencing proceedings, contrary to [appellant's] section 5 right to trial by jury. Specifically, the LDF argues death qualification disproportionately excludes Black venirepersons and produces a jury with higher levels of implicit and explicit racial bias; and such juries are 'disproportionately guilt-prone and death-prone.'
> *These allegations most certainly warrant careful analysis and scrutiny.* But the issue—whether death qualification disparately impacts the racial composition of the jury or its propensity to convict and sentence a defendant—raises a question of fact . . . . [T]he issue was not raised or developed at trial. As a result, the district court made no factual findings related to the LDF's claim . . . [a]nd the absence of such findings precludes us from conducting any meaningful review of this issue.

Id. at 583 (emphasis added).

This Court will be the first to apply the "careful analysis and scrutiny" that the Supreme Court prescribed. *Id.* Regardless of what standard of review is applied, however, the evidence adduced demonstrates that death qualification systematically excludes Black, female, and religious jurors, biases jurors against the defendant, and

produces a jury disproportionately prone to conviction and death, and therefore impermissibly interferes with Mr. Fielder's inviolate right to an impartial jury.

1. Black citizens and women are disproportionately likely to be excluded by the death qualification process.

If Mr. Fielder, a Black man, is subjected to a death-qualified jury in Wyandotte County, he is likely to be tried by a disproportionately white, male jury. "Social science research [demonstrates] that Black Americans are significantly more likely than White Americans to be excluded from capital juries as a consequence of the death qualification process . . . ." 2023 Rep. of Mona P. Lynch ¶ 8 (Exhibit A). This is true regardless of geography: studies conducted across the country uniformly show that Black prospective jurors are excluded by the death qualification process at substantially higher rates than their white counterparts. *Id.* ¶¶ 8-9. The primary reason for this disparity is differing views of the death penalty among Black and white Americans: a long and unbroken line of studies consistently shows that Black Americans are significantly more likely than white Americans to oppose the death penalty. That difference in opinion is "so robust that it was observed in nearly every public opinion poll and social scientific survey undertaken within this country over the past fifty years." *Id.* ¶ 6 (quoting John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty Support*, 34 J. Crim. Just. 85, 85 (2006)). The result is that the death qualification process, where jurors are screened for their views on the death penalty, often functions in practice as a filter for juror race.

This divide is documented in Kansas. To determine the effect that death qualification would have on the modern Sedgwick County population, Dr. Mona

Lynch conducted a survey assessing the death penalty views of jury-eligible adults in Sedgwick. *See id.* Dr. Lynch then analyzed the data to determine whether death qualification would be race neutral or race discriminatory in this county. *Id.* The results are deeply troubling.

According to Dr. Lynch's analysis, a majority of Sedgwick County's white population supports the death penalty, while a majority of Sedgwick County's Black population opposes it. *See id.* ¶¶ 16-18. Those who opposed the death penalty were much more likely to be excludable in the death qualification. Black prospective jurors in Sedgwick County are approximately *50% more likely* to be excluded by the death qualification process than white prospective jurors. *Id.* ¶ 18 (emphasis added).

Death qualification in Wyandotte County would also disproportionately exclude female jurors. The same study of prospective jurors in Sedgwick County showed that women are more likely to oppose the death penalty than men, *id.* ¶ 19, and accordingly are more likely to be excluded by death qualification, *id.* These racial and gender disparities have their most insidious effect when they compound: Black women in Sedgwick County are nearly twice as likely as white men to be excluded by the death qualification process. *Id.* ¶ 20. Dr. Lynch's analysis suggests that if the State is allowed to use death qualification procedures, approximately 40% of all jury-eligible Black women in Wyandotte County would be ineligible to serve on the jury that decides whether Mr. Fielder lives or dies. *Id.* ¶¶ 20-21.

2. Death qualification removes jurors of specific faiths.

Many organized religions oppose the death penalty as religious doctrine. *See, e.g.,* Catechism of the Catholic Church § 2267 (May 11, 2018) ("[T]he death penalty is

inadmissible because it is an attack on the inviolability and dignity of the person[.]"); Episcopal Church Gen. Convention, Resolution 1991-D056, *Reaffirm Opposition to Capital Punishment* (1991) (urging the Church to "work actively to abolish the death penalty in their states"); Presbyterian Church USA, *What We Believe: Capital Punishment* (last visited Oct. 14, 2024) ("[C]apital punishment cannot be condoned by an interpretation of the Bible based upon the revelation of God's love in Jesus Christ[.]"); Evangelical Lutheran Church in Am., *A Social Statement on the Death Penalty,* 1991, p.5, https://elcamediaresources.blob.core.windows.net/cdn/wp-content/uploads/Death_PenaltySS.pdf (last visited Oct. 14, 2024) ("[W]e urge the abolition of the death penalty[.]"); Aron Hirt-Manheimer, *Why Reform Judaism Opposes the Death Penalty*, ReformJudaism.org (2022) ("[B]oth in concept and in practice, Jewish tradition found capital punishment repugnant[.]"); Quakers in the World, *Campaigning Against Capital Punishment in Britain* (last visited Oct. 14, 2024) (Quakers today campaign against the "presence of the death penalty" worldwide.).[1] Adherents of these religious teachings are removed from capital cases through death qualification. *See* Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 119 (2016).

Catholics are one of the religious groups that may be underrepresented in capital juries as a result of death qualification. For example, in *State v. Kleypas*, a capital case prosecuted by Crawford County but tried in Wyandotte County in 1997

[1]https://www.quakersintheworld.org/quakers-in-action/53/Campaigning-against-Capital-Punishment-in-Britain (last visited Oct. 14, 2024).

after a change of venue, five religious jurors were removed as a result of death qualification. 40 P.3d 139, 217-18 (Kan. 2001). Former Wyandotte County Sheriff Donald Ash, who is Catholic, was one of veniremembers disqualified from jury service because of his religious views. *Id.* at 218. At the time of the trial in 1997, the Catechism of the Catholic Church permitted the death penalty only if necessary to defend human life against an unjust aggressor. Catholic opposition to the death penalty has only grown since then. *See* Kate Scanlon, *5 Years After Catechism Update, Activists See 'Renewed Momentum' to End Death Penalty*, The Pilot (Jan. 4, 2024), https://www.thebostonpilot.com/article.php?ID=196394 (quoting the director of Catholic Mobilizing Network stating that "an impressive and growing number of Catholics" are actively working to abolish the death penalty"). In 2018, Pope Francis revised the Catechism to dictate that the death penalty is "inadmissible" as an "attack on the inviolability and dignity of the person."[2] There are significant numbers of Catholic parishioners in Kansas (18% of Kansas identify as Catholic)[3] and Wyandotte County alike (15% of Wyandotte County residents are adherents of Catholic congregations).[4]

[2] Pope Francis expanded on this in a letter to the bishops of the Catholic Church in 2020, writing that the death penalty is "inadequate from a moral standpoint and no longer necessary from that of penal justice." Pope Francis, *Encyclical Letter Fratelli Tutti of the Holy Father Francis on Fraternity and Social Friendship*, Vatican (Oct. 3, 2020), https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html.

[3] Pew Rsch. Ctr., *Religious Landscape Study: Adults in Kansas*, https://www.pewresearch.org/religious-landscape-study/database/state/kansas (last visited Oct. 14, 2024).

[4] 2020 U.S. Religion Census, 2020 Group Detail Data by Nation, State, County and Metro, Available at https://www.usreligioncensus.org/node/1639 (last visited October 14, 2024).

3. Death qualification results in juries biased towards convictions and death sentences.

In addition to excluding groups from service, statistical analyses have repeatedly shown that death qualified juries are significantly more likely to vote for conviction and execution. *See Glossip v. Gross*, 576 U.S. 863, 913 (2015) (Breyer & Ginsburg, JJ., dissenting) ("For over fifty years, empirical investigation has demonstrated that death qualification skews juries toward guilt and death[.]" (internal quotation and alteration omitted)). *See, e.g.*, Aff. of Wanda Foglia at 13-16 (Exhibit B); 2023 Rep. of Mona Lynch ¶¶ 7, 9 (Exhibit A).

First, as described above, death qualification disproportionately excludes Black jurors. Empirical evidence shows that juries with fewer Black jurors are more likely to convict. *See* Marian R. Williams & Melissa W. Burek, *Justice, Juries, and Convictions: The Relevance of Race in Jury Verdicts*, 31 J. Crime & Just. 149, 164 (2008) (finding in an analysis of felony trial outcomes that "juries with a higher percentage of Whites serving on them were more likely to convict black defendants," after controlling for legally relevant case factors); *see also* Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 The Q. J. of Econ. 1017, 1032-35 (2012), (examining 712 non-capital criminal trial outcomes in two Florida counties, and finding that conviction rates for Black and White defendants did not differ from each other among juries when there were Black potential jurors in the jury pool, but Black defendants were convicted at a higher rate when no Black citizens were in the pool).

Death-qualified jurors are also less likely to give weight to mitigating factors because of the death qualification process and the accompanying exclusion of Black jurors. As compared to non-death qualified jurors, death-qualified juries are less likely to consider and value mitigating evidence and are more likely to overvalue aggravating factors. *See* Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 Law & Hum. Behav. 481, 486 (2009) (finding that between 14% and 30% of pro-death jurors on a death-qualified panel "actually weighed mitigating evidence as favoring a death sentence," interpreting this evidence as aggravation instead); Brooke M. Butler & Gary Moran, *The Role of Death-Qualification on Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 Law & Hum. Behav. 175, 183 (2002) "[D]efendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances.").[5]

In one study, researchers found that white jurors who served on South Carolina capital juries were more than twice as likely to vote for death at the

[5] *See also,* William J. Bowers, Thomas W. Brewer & Marla Sandys, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim in White*, 53 DePaul L. Rev. 1497, 1513 (2004) (finding that "black and white males differ substantially, not only with respect to strong aggravating and mitigating considerations, such as dangerousness, remorse, and lingering doubt, but also in the ways they see the crime (i.e., vicious versus not cold-blooded) and in the degree to which they personalize the defendant and identify with him and his family"); William J. Bowers, Benjamin Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Const. L. 171, 207 (2001) (finding that black jurors were "far and away the most likely to have lingering doubts and to regard such doubts as important in making the punishment decision"); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 47 (2000) (finding that black jurors are more likely than white jurors to differentiate between the crime and the defendant when deciding penalty).

sentencing stage than Black jurors. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude toward the Death Penalty*, 30 J. of Legal Studies 277, 286 (2001). In another study, of mock jurors, researchers found that "the higher the proportion of Whites on the jury, the more likely the jury was to favor death." Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 L. & Hum. Behav. 481, 485 (2009). The quality of deliberations suffers with less diverse juries. *See* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. of Personality and Social Psych. 597, 606-08 (2006).

The process of death qualification itself works as to increase bias and discrimination, leaving a jury less likely to afford Mr. Fielder a fair trial. This is in large part because questioning jurors "about the death penalty at the outset of the process makes jurors think that the authority figures in the courtroom, the judge, the prosecutor and defense attorney, must think the defendant is guilty and deserves death." Aff. of Wanda Foglia at 15 (Exhibit B). This phenomenon has been repeatedly tested and validated in mock juries; jurors subjected to death qualification questions are more likely to convict and vote for death than jurors who are not subjected to such questioning, even when none are excluded for cause. *Id.*; *see also* Rick Seltzer, Grace M. Lopes, Marshall Dyan & Russell F. Canan, *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 How. L.J. 571, 573, 581 (1986); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of*

the Death-Qualification Process, 8 L. & Hum. Behav. 121, 123-25 (1984). This pernicious influence is so palpable that many jurors who have served on real capital juries are conscious of it, and report that the process of death qualification caused them to believe that "the defendant 'must be' or 'probably was' guilty." Aff. Of Wanda Foglia 15–16.

In a study by the Capital Jury Project ("CJP") of approximately 1,200 people who had served on capital juries and undergone death qualification, about half the jurors said that they had decided whether to impose the death penalty before the penalty phase even began. *See* Foglia Decl. ¶¶ 17-21[6]; *see also* William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. L. Bull. 51 (2003); William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision-Making*, 83 Cornell L. Rev. 1476, 1488 (1998) (study finding similar results with 916 capital jurors in eleven states). Seventy percent of these jurors were "absolutely convinced" of this premature decision. *See* Bowers & Foglia, *Still Singularly Agonizing* at 57. And more than half erroneously believed that the law required death for certain crimes like premeditated murder. *See* Aff. of Wanda Foglia ¶¶ 23-24. Because mitigating evidence is not presented until the penalty phase, jurors who have made up their mind about punishment at the guilt phase cannot comply with the constitutional

[6] https://www.aclu.org/cases/kansas-v-kyle-young?document=Declaration-of-Wanda-Foglia (last accessed October 11, 2024).

requirement that jurors consider and give effect to all mitigating evidence before deciding to execute.

Nor can the court rein in discrimination through the procedures set out in *Batson v. Kentucky*, 476 U.S. 79 (1986). As a threshold matter, *Batson* applies only to peremptory strikes, while death qualification allows prosecutors to strike an unlimited number of jurors for cause (without having to exercise or "use up" any of their peremptory strikes). And because the process of death qualification serves to disproportionately exclude minority jurors through cause challenges, there are fewer remaining minority jurors when prosecutors exercise their peremptory challenges. But even where minority jurors have not first been disproportionately excluded through death qualification, *Batson* has proven to be an ineffective guard against racial discrimination. *See generally* Rep. of Elisabeth Semel (Exhibit D). A review of peremptory strikes in this State found that "Kansas prosecutors have disproportionately exercised peremptory strikes against Black jurors, and despite the intent of *Batson*, relied upon racial stereotypes to justify their strikes." *Id.* at 4-5. Indeed, in about one in every three Kansas cases, prosecutors remove "every member of a cognizable minority racial or ethnic group from the panel." *Id.* at 5. Nevertheless, "there is only one published *Batson* decision in Kansas reversing for the wrongful exclusion of a juror of color." *Id. Batson*, therefore, neither precludes the constitutional failures of death qualification nor adequately protects capital defendants' Sections 5 and 10 rights.

4. Death qualification cannot survive constitutional scrutiny under Sections 5 and 10.

Ultimately, the death qualification process cannot be squared with a criminal defendant's fundamental constitutional right to an impartial jury. Kansans' fundamental "inviolate right" to an impartial jury is more robust than its federal counterpart, and must be interpreted accordingly. *See, e.g.*, *Albano*, 487 P.3d at 756 ("[There is a] presumption that the framers of the Kansas Constitution carefully weighed every word and neither inserted nor omitted any 'without a design for so doing.'"). 'Impartial' is defined as "not favoring one side more than another; unbiased and disinterested; unswayed by personal interest." Black's Law Dictionary (12 ed. 2024).

By disproportionately excluding certain groups from jury service, the process of death qualification silences their voices and results in juries that favor the prosecution: they are predominantly white, male, uncommonly conviction-prone, more punitive, less likely to debate the evidence, more likely to engage in racially discriminatory sentencing, more likely to disregard mitigating evidence, and more likely to sentence a defendant to death. 2023 Rep. of Mona Lynch ¶ 14 (Exhibit A); Rep. of Scott Sundby ¶ 16 (Exhibit C); Aff. of Wanda Foglia at 22-23 (Exhibit B).

That death qualification is utilized because of how unlikely it is that 12 randomly selected jurors from Wyandotte County would return a sentence of death supports the conclusion that death qualified juries are partial. And, the process of asking death qualification questions imbues the jury with partiality towards conviction and death from the outset. In sum, a large body of research—both

nationally and in Wyandotte County—leads to an inescapable choice: courts can have a death-qualified jury, or they can have an impartial jury, but they cannot have both. By declaring the jury right "inviolate," the Kansas Constitution mandates the latter.

The State bears the burden of showing that death qualification can survive strict scrutiny because death qualification implicates the right to an impartial jury, and that right is fundamental. *See Hilburn*, 442 P.3d at 513; *State v. Wills*, No. 122,493, 2021 WL 5143798, at *5 (Kan. Ct. App. Nov. 5, 2021) (unpublished) (per curiam) ("Although we usually presume a statute is constitutional and look for any reasonable way to interpret the statute to avoid a violation, such a presumption is inapplicable to fundamental interests protected by the Kansas Constitution, *such as the right to a trial by jury*.") (emphasis added); *Hodes I*, 440 P.3d at 490 ("The Kansas Constitution initially denied women the right … to serve on juries, and to exercise other rights that we now consider fundamental to all citizens of our state."). In other words, the State must prove that death qualification serves a compelling governmental interest, and that it is narrowly tailored towards achieving that interest. *See Hodes I*, 440 P.3d at 493-98. The State may not avail itself of any presumption of constitutionality. *Hilburn*, 442 P.3d at 513; *Wills,* 2021 WL 5143798, at *5.

Kansas' death qualification procedures do not survive strict scrutiny. The State has no legitimate interest—let alone a compelling interest—in obtaining unjust

convictions or unreliable death sentences through skewed jury procedures.[7] Death-qualification is not narrowly tailored to the interest of ensuring "that justice shall be done." *State v. Pabst*, 996 P.2d 321, 328 (Kan. 2000) (internal quotation omitted) (explaining that justice is the only legitimate interest prosecutors may seek to vindicate). Far from being necessary to achieving justice, death qualification impedes justice by increasing the risk of an erroneous conviction or death sentence and biasing the jury against the defendant. Disparate racial treatment, unrepresentative juries, and a thumb on the scale in favor of the prosecution are not the hallmarks of a system narrowly tailored towards achieving justice.

C. Death Qualification Violates Kansans' Fundamental Rights to Serve on a Jury Pursuant to Sections 1, 2, and 7 of the Kansas Constitution Bill of Rights.

The corollary to Mr. Fielder's inviolate right to trial by jury is each qualified Kansas citizen's right to serve on a jury.[8] This right is protected by Sections 1, 2, and 7 of the Kansas Constitution Bill of Rights, which provide:

> § 1. Equal rights. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.
>
> § 2. Political power; privileges. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their

[7] Indeed, because death qualification serves only the illegitimate end of biasing the jury towards conviction and execution, it would be impermissible even under a rational basis standard. State action only passes rational basis review if it "can be said to advance a *legitimate* government interest[.]" *Romer v. Evans*, 517 U.S. 620, 632 (1996) (emphasis added).

[8] Mr. Fielder has standing to challenge Kansas' death qualification process on the basis that it violates the constitutional rights of other Kansas citizens. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 410-16 (1991); *State v. Pham*, 136 P.3d 919, 928-29 (Kan. 2006) (affirming that criminal defendants have standing to raise a *Batson* challenge based on the striking of venirepersons).

> equal protection and benefit. No special privileges or immunities shall ever be granted by the legislature, which may not be altered, revoked or repealed by the same body; and this power shall be exercised by no other tribunal or agency.
>
> § 7. Religious liberty; property qualification for public office. The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief.

Although Sections 1 and 2 have been considered to "have much the same effect as the Due Process and Equal Protection Clauses found in the Fourteenth Amendment to the United States Constitution," *Hodes I*, 440 P.3d at 469 (internal quotation marks omitted), these Sections "acknowledge[] rights that are distinct from and broader than the United States Constitution." *Id.* at 471. Accordingly, as the Kansas Supreme Court has held, claimed violations of Sections 1 or 2 must be evaluated independently from claimed violations of the more limited Fourteenth Amendment. *Id.* at 471-72, 477-78.

Likewise, Section 7 protects broader rights than the federal constitution and must be evaluated independently of the First Amendment, which states only that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

1. Section 2 protects political privileges, including the right to serve on a jury, and is subject to strict scrutiny review.

Section 2 of the Kansas Constitution Bill of Rights has no counterpart in the federal constitution. Section 2 explicitly protects rights that are not expressly included in the Fourteenth Amendment or elsewhere in the federal constitution: "political privileges," which Kansas courts have referred to interchangeably as "political rights." *See Farley v. Engelken*, 740 P.2d 1058, 1061 (Kan. 1987). The explicit protection of political rights offers Kansans greater protection than under the federal constitution, in which "political rights" are never mentioned. *See Hodes I*, 440 P.3d at 472 ("no provision of the United States Constitution uses the term 'natural rights,' " in contrast to Section 1 of the Kansas Constitution Bill of Rights, requiring an independent analysis of the state constitutional right); *see Rivera v. Schwab*, 512 P.3d 168, 199 (Kan. 2022), *cert. denied sub nom. Alonzo v. Schwab*, 143 S. Ct. 1055 (2023) (Rosen, J., concurring in part and dissenting in part) ("The text and the historical distinction between the origins of section 2 and the Fourteenth Amendment make it plain" that section 2 "is a rich and generous declaration that guarantees the people of Kansas protections that are broader than those found in the federal Equal Protection Clause.").

Kansas courts have held that Section 2's protection of political privileges must be "interpreted with sufficient liberality to carry into effect the principles of government which it embodies." *Hodes I*, 440 P.3d at 478 (quoting *Winters v. Myers*, 140 P.1033, 1038 (Kan. 1914)). The Kansas Supreme Court has previously referenced jury service as a political privilege or right encompassed by Section 2. *See Atchison*

St. R.R. Co. v. Missouri Pac. R.R. Co., 3 P.284, 287 (Kan. 1884) (listing paradigmatic examples of the types of political privileges within the scope of Section 2, including serving in the militia and "*as jurors*.") (emphasis added); *see also Herken v. Glynn*, 101 P.2d 946, 954 (Kan. 1940). Several other states' courts have also affirmed that jury service is a political right or privilege. *See, e.g.*, *Anderson v. State*, 5 Ark. 444, 454 (1844); *Me-shing-go-me-sia v. State*, 36 Ind. 310, 317 (1871); *Wall v. Williams*, 11 Ala. 826, 837 (1847); *State v. Bussay*, 96 A.337, 339 (R.I. 1916); *State v. Sims*, 197 S.E. 176, 177 (N.C. 1938); *State v. Thigpen*, 397 A.2d 912, 913 (Conn. Super. Ct. 1978).

The courts' widespread recognition of jury service as a political right also accords with the historical record. At common law during the eighteenth and nineteenth centuries, the right to serve on a jury—like the right to vote—was broadly recognized as an essential component of citizens' participation in American democracy. Jury trials were not only a valued right afforded to an accused person, but also "an allocation of political power to the citizenry." Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 876 (1994). Alexis de Tocqueville described jury service as quintessential to a system of government by the people and equivalent to the right of suffrage. *See* Alexis de Tocqueville, *Democracy in America*, Vols. I & II, 291-93 (H. Reeve transl., Duke Classics (2012)) (explaining that jury service and universal suffrage are two institutions of equal power in American democracy). "The inestimable privilege of trial by jury . . . is counted by all persons to be essential to political and civil liberty."

Id. at 514 n.198 (quoting J. Joseph Story, *Commentaries on the Constitution of the United States*, Vol. III, 631 (1833)).

At the time of the framer's debates in the late 1700s, both Federalists and Anti-Federalists agreed that juries act as a crucial political tool in checking government overreach. *See, e.g.*, Alschuler & Deiss, *supra*, at 871 ("[T]he desirability of safeguarding the jury may have been the most consistent point of agreement between the Federalists and Anti-Federalists."). *See also* Letters from The Federal Farmer to the Republican, Letter IV (Oct. 12, 1787), published in The Complete Anti-Federalist, U. Chi. Press (Herbert Storing, ed., 1981) (describing jury service as the most important democratic process by which people not in government can "protect[] themselves" and serve as "centinels and guardians of each other").

There is no question the Kansas Framers also viewed the right to serve on a jury as a foundational component of the political privileges in Section 2. Both the Framers' explicit commentary on juries in Section 5, as well as widely accepted academic theory, confirm this view. The Constitution's Framers described Section 5 as securing a "very valuable right" for the people of Kansas by "retaining the right of trial by jury, intact." *Hilburn*, 442 P.3d at 515 (quoting Wyandotte Const. Convention 462-63 (July 25, 1859)). In light of this and the decades of American framers and scholars affirming, in universal agreement, the indispensable importance of the jury system in a functioning democracy, there can be little doubt the Kansas Framers shared this view. Thus, in explicitly reserving "political rights" to the people, Section

2 encompasses, at minimum, the most distinguished and lauded political rights—jury service and suffrage.

The practice of death qualification violates Kansans' Section 2 right to serve on a jury. In explicitly reserving political privileges to the people, the Kansas Framers "show[ed] an intent to broadly and robustly protect [political rights] and to impose limitations on governmental intrusion into [those rights]." *Hodes I*, 440 P.3d at 471. Thus, the right of an eligible citizen to serve on a jury is a fundamental right subject to strict scrutiny. The practice of death qualification impermissibly violates that right.

Death qualification leads to for-cause removal of individuals who are otherwise qualified for jury service. The practice is confined only to capital cases, when a government official is using their entirely discretionary power to seek a defendant's execution. The same jurors could not be disqualified for cause from hearing and adjudicating the exact same case, with the same defendant, absent a government official's choice to seek the individual's execution. Thus, the State seeks both to use its most extraordinary power to take human life *and* to exclude from the process those who disagree. Indeed, the practice of death qualification directly contravenes the jury's historical purpose: to reserve political power to the common people, allowing them to protect themselves against the more powerful citizens comprising government. *Cf. Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) (affirming that a criminal jury is "no mere procedural formality, but a fundamental *reservation of power* in our constitutional structure" ensuring "the people's ultimate control")

(emphasis added). Yet in Kansas, those who would object to the government's most forceful use of authority are systematically excluded, thwarting the ability of citizen juries to ensure the law continues to reflect the will of the people. *Cf. Glasser v. United States*, 315 U.S. 60, 86 (1942) ("[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a truly representative of the community, and not the organ of any special group or class.").

a. Black and female Kansans are disproportionately deprived of the political privileges protected by Section 2.

This deprivation of political privileges is particularly insidious because it principally impacts Kansans who are Black and/or women. *See supra* § I.A.1.; *see also* 2023 Rep. of Mona Lynch ¶¶ 8-9 (Exhibit A). This result cannot be disconnected from long history of exclusion of these same groups in political life and from juries. As the U.S. Supreme Court has recounted, both Black citizens and women have "suffered . . . at the hands of discriminatory state actors during the decades of our Nation's history" and "share a history of total exclusion" from jury service. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994). Thus, continued exclusion from this vital form of political participation "denigrates the dignity of the excluded juror, and . . . reinvokes a history of exclusion from political participation." *Id.* at 142. *See also Powers*, 499 U.S. at 407 ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

Views about whether the death penalty is a legitimate exercise of government authority—and about the government's ability to fairly select which individuals

should be executed—are necessarily informed by one's own life experiences, as well as the shared experiences of families and communities. In the case of Black Kansans, those experiences reflect a long history of governmental abuse of power and the exclusion of Black communities:

> At Kansas' founding and in the years after, Black Kansans were often the victims of racial terror and violence that aimed to keep Black Kansans apart from the rest of the community. This forced separation could be found in every aspect of life. Black Kansans were forced to live in segregated neighborhoods and to attend segregated schools. They were pushed to segregated sections of hotels, restaurants, and theaters. They were regularly turned away from institutions that purported to provide care, such as white hospitals or churches.

Rep. of Shawn Leigh Alexander at 33-34 (Exhibit E); *see also generally* Rep. of Brent Campney (Exhibit K).

After the civil war, an influx of Black migrants sought to settle in Kansas. They were met with violence and exclusion. In the late 19th and early 20th centuries, race riots erupted across Kansas as white mobs attacked Black people on the streets or in their neighborhoods, burned their houses or businesses, and sometimes expelled some or all of them. Rep. of Brent Campney at 3-6, 8-9 (Exhibit K); *id.* at 10-13 (describing incidents including a "lynching outbreak" that claimed the lives of at least nine Black men across Kansas, including incidents where white mobs left "corpses on display," and discussing that Kansas City Klansmen directed the city's affairs for three decades); *id.* at 16 (between 1861-1930, white Kansans lynched at least 56 Black men); Rep. of Shawn Leigh Alexander at 6 (Exhibit E) ("Between 1866 and 1874, lynch mobs executed at least 25 Black men in sixteen incidents"); Rep. of Shawn Leigh Alexander at 7 (Exhibit E) (white Kansans lynched eight more Black men

between 1882-1889); *id.* at 12 (discussion of Klan control of Kansas politics). In the worst year for lynchings in the United States (1892), there were 18 lynchings of Black victims in Kansas. *Id.* at 9 (emphasis added). White men also perpetrated widespread sexual violence against Black women. Rep. of Brent Campney at 6 (Exhibit K).

That these acts were largely perpetrated with total impunity "transform[ed] personal acts of vengeance into communal ones." *Id.* at 7-8. Wyandotte County was at the center of much of this racialized violence. *See id.* at 10-13. Worse, for much of the twentieth century, Kansas City law enforcement officers "became the chief dispensers of lethal vengeance against Black Kansans." *Id.* at 14. *See also id.* at 15-25; Rep. of Shawn Leigh Alexander at 16 (Exhibit E) (similar). And, "[a]s lynchings declined and became less publicly palatable, legislators across the western and southern states began to propose a state sanctioned alternative—a more rigorous application of the death penalty." Rep. of Shawn Leigh Alexander at 19 (Exhibit E). *See also id.* at 2 ("[T]he death penalty [ ] has been used disproportionately against Black men in Kansas, often on behalf of white female victims, and follows a direct historical line of disproportionate police violence and lynchings against Black men").

This history of discrimination and racialized violence—including violence perpetrated by law enforcement—has continued to present day. As described in his report, University of Kansas Distinguished Professor Charles Epp interviewed 27 Black men in Kansas City, Kansas. "Nearly all" of those men "told some version of the following: they have experienced repeated and sometimes brutal harassment by Kansas City [Kansas] police for much of their lives and, as a result, they do not trust

the police and do not feel comfortable calling them for help. Instead, they feel safer taking matters into their own hands." Rep. of Charles R. Epp at 2-3 (Exhibit G). Among the 52 people interviewed in total (27 Black men, 18 Black women, four white men, three white women), just ten stated that they trust the Kansas City, Kansas Police. *Id.* at 2, 5. "Every person who [said] they distrusted the police described troubling personal experiences with the Kansas City police. They described experiencing four types of police actions that especially troubled them: harassment of teenagers; repetitive stops and searches based on no apparently legitimate justification; disrespectful or abusive behavior by police responding to calls for service; and outright violence by officers." *Id.* at 7-8. *See also id.* at 7-15 (describing specific incidents).

There is a direct link between Black Kansans' extensive history of governmentally enforced oppression and their skepticism about the government's ability to neutrally administer the death penalty. *See, e.g.*, 2023 Rep. Mona Lynch ¶ 5 (Exhibit A) (explaining that Black and white Americans greatly diverge in their views about the fairness and equitability of the criminal justice system). Experiences such as those discussed above directly implicate the trust of Black Kansans in the criminal justice system's ability to fairly administer the death penalty, particularly given the role of police as its "gatekeepers."[9] More broadly, opposition to the death penalty in

[9] James Unnever, Francis Cullen & Cheryl Lero Johnson, *Race, Racism, and Support for Capital Punishment*, 37 Crime & Just. 45, 83 (2008); *See also* John K. Cochran & Mitchell B. Chamlin, *The Enduring Racial Divide In Death Penalty Support*, 34 J. Crim. Just 85, 97-98 (2006), https://doi.org/10.1016/j.jcrimjus.2005.11.007 ("Given the role of the police as the 'gatekeepers' of the criminal justice system with whom 'first impressions' are often made, it may be of no surprise that negative perceptions of the police lead to minority skepticism, distrust, and a lack of confidence in the

the Black community is best explained by a historically rooted skepticism of state power.[10] In our Nation, Black people have frequently experienced the state as an institution that protects white interests and the criminal justice system "as unjust and . . . potentially an instrument of oppression," a fact which has "fostered wariness among African Americans about the state's power to take life."[11]

As Justice Brennan observed in *McCleskey v Kemp*, "[W]e remain imprisoned by the past as long as we deny its influence in the present." 481 U.S. 279, 344 (1987) (Brennan, J., dissenting). The "long-standing, durable racial divide" in death penalty support cannot be treated as the product of chance; it must be understood within a legacy of state-supported racial subordination.[12] Death qualification compounds prior discrimination by removing from capital juries those most affected by the history of racism and white superiority that gave rise to slavery, societal segregation, and the racialized violence that served as the predecessor to the death penalty.

The inescapable consequence of death qualification is that it perpetuates the exercise of the state's authority against Black community members by excluding them from capital juries. Particularly concerning is that death qualification enables the State to remove political power from Black Kansans because of their beliefs, even though those beliefs can largely be traced back to the State's own troubled history of racial discrimination. And through death qualification, the State of Kansas in this

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criminal justice system as a whole. Lower levels of support for capital punishment may simply be symptomatic of a much larger and more serious problem[.]"); Mark Peffley & Jon Hurwitz, *Persuasion and Resistance: Race and the Death Penalty In America*, 51 J. Pol. Science 996 (2007), https://www.jstor.org/stable/4620112.

[10] *Id.*

[11] Unnever et al., *supra* note 10, at 82.

[12] *Id.* at 81.

case could garner a death sentence for a Black man in part by bearing the fruit of its own past discrimination against Black community members. Past and ongoing discrimination drives current exclusion of Black community members under the rationale of death qualification. Exclusion on this basis, one directly attendant to a minority group's experiences with pervasive discrimination, is no less insidious than the outright exclusion of these groups based on immutable characteristics. Where the government has "actively silenced and diminished the political voices of marginalized people," it has "an obligation to correct that injustice . . . to restor[e] that lost political voice." Monica C. Bell, *Reckoning with State-Sanctioned Racial Violence: Lessons from the Tulsa Race Massacre*, Just Sec. (May 29, 2021).[13]

2. Section 7 protects religious privileges, including the right to serve on a jury without being subject to any religious test.

Death qualification also excludes potential jurors on the basis of their religious beliefs, which independently violates the Kansas Constitution. To protect Kansans' right to worship, Section 7 of the Kansas Constitution states that the right "shall *never* be infringed." Kan. Const. Bill of Rights § 7 (emphasis added). It further prohibits "any control of or interference with the rights of conscience," that "any preference be given by law to any religious establishment," as well as any "religious test" for an officer of public trust. Section 7 is far broader than the First Amendment to the U.S. Constitution, which provides only that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *Id.*;

[13] https://www.justsecurity.org/76699/reckoning-with-state-sanctioned-racial-violence-lessons-from-the-tulsa-race-massacre/.

State v. Smith, 127 P.2d 518, 522 (Kan. 1942) (citation omitted). The right to serve on a jury is also protected by Kansas Statues § 43-156 ("No person shall be excluded from service as a grand or petit juror in the district courts of Kansas on account of race, color, *religion*, sex, national origin, or economic status.") (emphasis added). Kansas law further prohibits the government from burdening religious exercise. See KSA §§ 60-5303 and 60-5304.

As described *supra*, opposition to the death penalty is a tenant of faith for a number of organized religions. While the U.S. Supreme Court has held that capital jurors may not be excused based on "general objections" or "conscientious or religious scruples" against the death penalty, *see Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), it nonetheless upheld the exclusion of jurors whose personal views of capital punishment would "prevent or substantially impair" their ability to comply with the jury instructions and oath. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (citation omitted). The Kansas Supreme Court has similarly held that "jurors cannot be discriminated against on the basis of their religious belief or lack of belief" but can be excluded if those views render it "impossible" to act with "impartiality under the rule of law." *State v. Carr*, 331 P.3d 544, 632 (2014), *rev'd and remanded on other grounds*, 577 U.S. 108, 136 (2016).

For many religious Kansans, this is a distinction without difference. Under these standards, a devout Catholic who adheres to the Church's position against the death penalty, for example, would be subject to removal based on those religious beliefs. This practice discriminates against devout individuals in violation of

Section 7 of the Kansas Constitution Bill of Rights and Kansas Statues 43-156, and serves to exclude specific groups of religious Kansans from consequential community decisions. *See* Pew Rsch. Center, *supra* note 4 (finding that 18 percent of Kansans identify as Catholic).

While the right to be free from religious discrimination is rooted in both the state constitution and state law, the practice of death qualification is not expressed in any state statute or constitutional provision. After repealing Kansas Statues Sections 62-1404 and 62-1405 in 1970, the Kansas legislature passed Kansas Statues Section 43-156, stating that "no person shall be excluded from service as a grand or petit juror in the district courts of Kansas on account of race, color, religion, sex, national origin, or economic status." Thus, the legislature provided new, explicit protection from being disqualified based on religious beliefs, and repealed any reference in Kansas law to exclusion from capital cases based on conscientious religious scruples. And when Kansas reintroduced the death penalty in 1993 following a 20-year hiatus after *Furman,* the statutes permitting exclusion were not reenacted.

Thus, there are no laws that contemplate exclusion of jurors in death penalty cases based on their conscientious or religious beliefs. Instead, Kansas has justified the practice of death qualification by a statute permitting challenges for cause based on general language of impartiality. *See* Kansas Statues § 22-3410(2)(i). As the Kansas Supreme Court has recognized, this statute is in tension with Kansas Statues Section 43-156 when a juror's religious beliefs render the juror never able to

participate in proceedings involving the death penalty. *State v. Carr*, 331 P.3d 544, 632 (Kan. 2014), *rev'd and remanded*, 577 U.S. 108 (2016). The Court has attempted to draw a line between "belief" and "behavior," *id.*, but this distinction rings false for those jurors whose religious beliefs are indistinct from their moral and behavioral code. It is inconsistent with the newly established fundamental rights framework established in *Hodes*.

Nor has the Court ever specifically considered the following arguments, based in the text of Section 7 and Kansas Statutes, as to how the process of death qualification violates the state constitution.

Death qualification violates Section 7 of the Kansas Constitution Bill of Rights in several ways. First, death qualification "infringes on the right to worship according to the dictates of conscience" and constitutes State "control of or interference with the right of conscience." *See* Kan. Const. Bill of Rights § 7. It infringes on and interferes with the right to religious freedom because the State is permitted to ask individuals about their religious beliefs during *voir dire.* The government can then dictate that adherence to the principles of one's faith precludes them from a fundamental right that other Kansas citizens enjoy. And even if a juror of faith does not wish to impose the death penalty themselves, they must still reckon with the result that the juror selected in their place is more likely to support the death penalty and impose a death sentence.

Second, death qualification violates Section 7 by giving preference to certain religious establishments. Many world religions oppose the death penalty, and many

Kansans identify with a major world religion. Death qualification that excludes jurors who ascribe to Catholicism or other religious beliefs that oppose the death penalty results in preferencing other religious establishments that do not oppose the death penalty.

Third, death qualification constitutes an impermissible "religious test" for jurors in an "office of public trust." Sections 5 and 10 of the Kansas Constitution contemplate the office of juror, and Kansas Statutes Section 21-5111(aa)(3) defines a "public officer" to include a "juror" or "any other person appointed by a judge or court to hear or determine a cause or controversy." *See also* 18 U.S.C. 201(a)(1); *Cf.*, *Kleypas*, 40 P.3d at 218 (noting the argument that a juror is a "public officer" but concluding that death qualification is not a religious test). The decision in *Kleypas* holding otherwise was rooted in the fact that the jurors cited to other non-religious reasons. It is simply inescapable that jurors who oppose the death penalty for religious reasons are excluded public officers who fail the religious test.

Finally, even assuming that the state could overcome Section 7 under a strict scrutiny analysis as it relates to death sentencing, there is no legal support for excluding members of certain religious groups from the guilt or innocence determination. Capital defendants receive a bifurcated sentencing proceeding. Kansas law specifically outlines procedures for instances when an individual who served during the merits phase is unable to serve on the sentencing jury. K.S.A. § 21-6617. Thus, there is no basis to exclude religious individuals based on their beliefs about the death penalty.

3. Section 1 also protects Kansans' right to serve on a jury.

Kansas citizens also have a Section 1 right to serve on a jury, and an affirmative right to not be excluded by the systematic discrimination inherent in death qualification. As two Kansas appellate courts have recognized, Section 1 of the Kansas Constitution Bill of Rights protects Black Kansans' right to self-determination, which is inherent in the inalienable right to liberty protected by Section 1—and this, in turn, directly implicates the ability to serve as a juror. As the courts explained, Section 1 was "aimed at ending slavery and government endorsement of involuntary servitude impressed upon a class of people and their descendants defined essentially by race." *State v. Reed*, No. 120,613, 2021 WL 1228097, at *7 (Kan. Ct. App. Apr. 2, 2021) (unpublished), *rev. denied* (Aug. 31, 2021); *see also State v. Brooks*, No. 120,538, 2021 WL 3578009, at *9 (Kan. Ct. App. Aug. 13, 2021) (unpublished), *rev. denied* (Sept. 27, 2021) (same). This purpose is frustrated by "government sanctioned exclusion of African-Americans from jury service" because such a system "represents a denial of self-determination, as a component of the inalienable right of liberty, and effects a continuing badge of slavery." *Reed*, 2021 WL 1228097, at *7; *Brooks*, 2021 WL 3578009, at *9; *see also supra* §I.B. (discussing generally the central role of jury service in preserving liberty, democracy, and rule by the people).

As the Kansas Supreme Court has held, alleged violations of the fundamental rights protected by Section 1 rights must be reviewed under a standard of strict scrutiny. *See Hodes I*, 440 P.3d at 496.

In sum, the practice of death qualification results in the starkly disproportionate disqualification of Black jurors, and particularly Black female jurors. Exclusion from capital juries continues to signify their subordinate status in the administration of justice. It is a vestige of slavery, oppression, and exclusion from the rights of full citizenship and political influence. It cannot withstand strict scrutiny analysis under either Section 1 or 2 of the Kansas Constitution Bill of Rights, nor can the exclusion of religious jurors withstand scrutiny under Section 7.

II. Death Qualification and Kansas' Death Penalty Violate the Federal Constitution.

Death qualification, as applied in Wyandotte County, would violate Mr. Fielder's Sixth and Fourteenth Amendment right to an impartial jury from a fair cross-section of the community for the same reasons that it would violate his Section 5 and Section 10 rights; it has a profoundly disparate impact on prospective jurors and produces a conviction-prone and death-prone jury. *See supra* § I.A.; *see also Morgan v. Illinois*, 504 U.S. 719, 739 (1992). Mr. Fielder's evidence will include a body of nearly 40 years of empirical research since the United States Supreme Court's decision in *Lockhart v. McCree*, 476 U.S. 162 (1986). The Court in *Lockhart* rejected the claim that death qualification violates the federal constitutional right to a fair cross section in part because there was an inadequate factual record that death qualification resulted in a conviction-prone jury, *id.* at 169-170*; see also*, 476 U.S.. at 188-89 (Marshall, J., dissenting). That record is far different today, as shown above.

Furthermore, when *Lockhart* was argued in 1986, only 22% of Americans opposed the use of the death penalty. Gallup, *In Depth: Topics A to Z: Death Penalty*,

https://news.gallup.com/poll/1606/death-penalty.aspx. Today, the percentage of Americans opposed to the death penalty is more than double that number—44%. Death qualification today is a dramatic and prejudicial narrowing of the cross section of jurors to whom Mr. Fielder is entitled under the constitution.

Death qualification in Kansas also violates Mr. Fielder's Eighth Amendment right to be free from cruel and unusual punishment that is informed by "evolv[ing] standards of decency." Death-qualified juries are less likely to consider mitigation, *see supra* § I.B.3, and do not reflect "the conscience of the community on the ultimate question of life or death," *Furman*, 408 U.S. at 299, 327 (Brennan, J., concurring) (citation omitted). Additionally, the death qualification process injects proceedings with "an infusion of race" that has an arbitrary impact on decisions to execute. *See Buck v. Davis*, 580 U.S. 100, 126 (2017).

The death penalty also violates Mr. Fielder's Fourteenth Amendment right to due process by denying him an unbiased jury, and unduly placing him at risk of wrongful conviction and execution, *see supra* § I.B.

CONCLUSION

For the foregoing reasons, Mr. Fielder moves this Court to conclude that death qualification as applied in Kansas is unconstitutional. Mr. Fielder seeks to present further evidence and testimony on these matters at an evidentiary hearing.

Dated: October 15, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Kansas Supreme Court Rule 116(d)(1)(D), I, Mark Manna, hereby certify that on October 15, 2024, I served a true and correct copy of the foregoing filing and the accompanying motion and memorandum of points and authorities in support thereof by email to all counsel of record:

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