No. 03-90198-S

IN THE
SUPREME COURT
OF THE
STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

Vs.

JONATHAN D. CARR,
Defendant-Appellant

BRIEF OF *AMICI* LAW PROFESSORS AND SCHOLARS IN SUPPORT OF DEFENDANT-APPELLANT

Appeal from the District Court of Sedgwick County, Kansas,
Honorable Paul W. Clark, District Judge,
District Court Case No. 00CR2979

Elizabeth Cateforis
Kansas Bar # 16687
Clinical Professor of Law
University of Kansas School of Law
1535 West 15th Street
Lawrence, KS 66045
Ph: (785) 864-5571
Fax: (785) 864-5054
escat@ku.edu

Counsel on behalf of amici law professors and scholars

Oral Argument: May 24, 2021

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INTERESTS OF AMICI CURIAE[1]

Amici are law professors and scholars in the fields of criminal law and procedure and constitutional law who have been teaching and writing about constitutional interpretation, criminal adjudication, and related fields throughout their careers. We include Clinical Professor Elizabeth Cateforis, Clinical Associate Professor Melanie Daily DeRousse, Clinical Associate Professor Meredith A. Schnug, Professor Corey Rayburn Yung of the University of Kansas School of Law; Professor John Francis of Washburn University School of Law; and Research Scholar and Lecturer Alexis J. Hoag of Columbia Law School. We have no personal interest in the outcome of this case, but a professional interest in constitutionalism and the fair and just application of the law in criminal matters.

ARGUMENT

When Kansas entered the Union as a free state 160 years ago, its citizens were proud of its independent and freethinking views on individual rights. Kansas's founders placed those ideals at the forefront of the state's Constitution by prohibiting slavery (Kan. Const. Bill of Rts. §6), protecting women's property and parental rights (Kan. Const., art. 15, §6), and providing public funding for schools (Kan. Const. art. 6). *See* Wyandotte Constitution, July 29, 1859. This founding document also contained the guarantee that "[a]ll men are possessed of equal and inalienable natural rights, among which are life,

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[1] On April 8, 2021, this Court granted the application of amici, the group of law professors and scholars, to file an amicus brief in this appeal.

liberty, and the pursuit of happiness." Kan. Const. Bill of Rts. §1. It was with these words that the founders secured the fundamental right to life for all Kansans.

Amici urge this Court to exercise its authority to interpret its Constitution independently from the federal Constitution and find capital punishment in Kansas unconstitutional under section 1 of the Kansas Bill or Rights. If this Court were to find the death penalty unconstitutional under its State Constitution, Kansas would join Massachusetts, Connecticut, and Washington, states that have found their respective state death penalties unconstitutional based on interpretations of their own constitutions. *See Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984), *State v. Santiago*, 122 A.3d 1 (Conn. 2015), and *State v. Gregory*, 427 P.3d 621 (Wash. 2018).

I. This Court Has the Power to Interpret Individual Rights Based on Its Own Constitution

This nation was founded on the notion of federalism, the separation of state and national powers. This unique structure enabled individual states to maintain independent power in relation to the newly formed centralized government. Federalism extended to the relationship between state and federal courts, empowering state supreme courts to operate independently of federal courts when interpreting state constitutional law. *See Montoy v. State*, 278 Kan. 769 (2006) (holding that the State school funding system violated the Kansas Constitution, but not the federal Equal Protection Clause).

Although the federal Bill of Rights defined and guaranteed certain civil rights and liberties for individuals, the framers expected each state to define and protect rights for their own citizens. *See* Stephen R. McAllister, *Individual Rights Under a System of Dual*

Sovereignty: The Right to Keep and Bears Arms, 59 U. Kan. L. Rev. 867, 871 (2011) ("state constitutions may include express rights that are not included at all, or at least not in the same fashion, as the U.S. Constitution"). Section 1 of the Kansas Bill of Rights is one such example, which lacks an identical comparator in the U.S. Constitution. This Court recently explained the subtle, but meaningful, textual differences between section 1 and the federal Declaration of Independence and the Fourteenth Amendment. *See Hodes & Nauser, Mds, P.A. v. Schmidt*, 309 Kan. 610, 626-27 (2019) (per curiam) (describing section 1's list of "natural rights" as non-exhaustive "substantive rights," distinct and broader than those found in the Fourteenth Amendment). Moreover, individual state bill of rights, such as those identified in Kansas's Constitution, protected individual liberties long before the Fourteenth Amendment incorporated the federal Bill of Rights to the states. *See* Helen Hershkoff, *State Constitutions: A National Perspective*, 3 Widener J. Pub. L. 7, 14-15 (1993).

The balance of power between the individual states and the United States—forged over two hundred and thirty years ago—enables individual state supreme courts to rely on their state constitutions to protect the rights of their citizens. In 1977, Justice Brennan's seminal article on state constitutionalism encouraged state supreme courts to flex their inherent judicial power to independently interpret state constitutions. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). State courts answered the call, particularly when assessing the protections their state constitutions afforded criminal defendants, finding that state law provided greater protections than federal law. *See* Stephen R. McAllister, Comment,

Interpreting the State Constitution: A Survey and Assessment of Current Methodology, 35 Kan. L. Rev. 593, 600 (1987). For example, this Court "found that a disproportionately long prison term could violate the Kansas Constitution, even though it would not violate the federal constitution at that particular time." *State v. Lawson*, 296 Kan. 1084, 1092 (2013) (citing *State v. McDaniel*, 228 Kan. 172, 184 (1980)).

As argued more fully below, based on this nation's founding principles, longstanding authority, and contemporary practice, this Court can and should apply section 1 of the Kansas Bill of Rights to Kansas's death penalty statute and find it unconstitutional. This Court is empowered to rest its decision solely on the protections found within Kansas's Constitution and independent of any analogous rights found in the federal Constitution.

A. State constitutions are significant sources of independent constitutional law that may offer greater protections than the federal Constitution

The founding structure of this nation enabled states to adopt separate and independent constitutions. The federal Constitution established a floor under which no state law could fall, but state laws could go above and beyond federal law in protecting its citizens' rights. *See* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 Stan. L. Rev. 1629, 1635-36 (2010). In *State v. Gleason*, this Court clarified that "[n]either our legislature nor this court are subordinate to a federal test that merely denotes the federal constitutional floor when state law requires more." 305 Kan. 794, 805 (2017) (determining the constitutionality of penalty-phase jury instructions in a capital case).

When interpreting these independent sources of state law, state courts may deviate from the rationale that the U.S. Supreme Court has used to interpret similar federal laws. The U.S. Supreme Court has repeatedly explained that "a state court is entirely free…to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982). Importantly, a state supreme court decision, "based clearly and independently on state law," is then "immune from U.S. Supreme Court review[.]" McAllister, *Individual Rights Under a System of Dual Sovereignty*, 59 U. Kan. L. Rev. at 875. This Court has recognized that it "can construe our state constitutional provisions independent of federal interpretation…" *State v. Schultz*, 252 Kan. 819, 823 (1993); *see also Hodes & Nauser*, 309 Kan. at 621.

Beyond interpreting state law *differently* than federal courts would similar federal laws, state courts may interpret state law to offer *greater* protections than analogous federal rights. In addition to Justice Brennan, Justice Ginsburg encouraged state courts to interpret their state constitutions more broadly. *See Ohio v. Robinette*, 519 U.S. 33, 42 (1996) (Ginsburg, J., concurring) (critiquing Ohio's reliance on the Fourth Amendment where the state court could have relied solely and independently on Ohio's constitution to broaden protections). Although, Justice Brennan's article may have served as a catalyst for an increase in state constitutionalism, state courts had long been "announcing broad state constitutional protections that extended well beyond existing federal law." Hershkoff, *State Constitutions*, 3 Widener J. Pub. L. at 14-15 (noting that this was

especially true before the U.S. Supreme Court incorporated the Bill of Rights to the states).

B. Kansas's Constitution is based on a distinct history and culture that both support and encourage this Court to interpret its Constitution more broadly

Within federalism, each state is a somewhat autonomous entity, operating according to independent and shared authority relative to the federal government. Although this autonomy is part of the shared power structure, it is also a reflection of each state's distinct history, economy, geography and population. *See* Dorothy Toth Beasley, *Federalism and the Protection of Individual Rights: the American State Constitutional Perspective*, 11 Ga. St. U. L. Rev. 681, 691 (1995). All of these aspects factor into the unique character of a state, its constitution, and the way in which its state supreme court interprets its constitution. Scholar Stephen McAllister explained that "[b]ecause state courts have better knowledge and understanding of local conditions and attitudes, they can tailor their interpretations to enforce constitutional protections aggressively where the United States Supreme Court lacks the familiarly to do so." McAllister, *Interpreting the State Constitution*, 35 Kan. L. Rev. at 613.

That Kansas entered the union as a "free state" on the precipice of the Civil War is foundational to the state's identity. Before ratifying the Constitution at the Wyandotte Convention in 1859, Kansas founders met at three prior constitutional conventions between 1855 and 1858, debating the question of slavery. *See Hodes & Nauser*, 309 Kan. at 628. After settling the question and gaining admission to the Union, Kansas formed an identity as an independent and freethinking state. *See* Daniel E. Monnat & Paige A.

Nichols, *The Loneliness of the Kansas Constitution*, 34 J. Kan. Assoc. Just. 1, 10 (2010). Kansas's local conditions and attitudes are a product of the state's distinct history, which supports and encourages this Court to interpret its constitutional provisions to offer greater protections to its citizens than federal courts would analogous federal rights.

Although this Court has sometimes declined to deviate from the U.S. Supreme Court's interpretation of analogous federal law when interpreting Kansas law, *see Murphy v. Nelson*, 260 Kan. 589, 597 (1996), it is well-situated to do so given Kansas's distinct history and culture. This is particularly relevant for the Court's interpretation of the cruel or unusual punishment clause. Kan. Const. Bill of Rts. §9. From the state's founding, lawmakers debated the question of capital punishment, some arguing that it was a relic of barbarism. "Debate in Committee of the Whole on the Bill to Abolish Capital Punishment," *The Kansas State Record*, Jan. 31, 1869, at 1. The appropriateness of capital punishment is an inherently subjective, Kansas-specific inquiry based on unique Kansas concerns. *See State v. Freeman*, 223 Kan. 362 (1978) (establishing three-part test to determine whether a punishment is cruel or unusual under section 9). This is an ideal situation where this Court could deviate from federal jurisprudence to determine the best course for Kansans.

C. This Court has interpreted its own Constitution to offer greater protections to its citizens than the federal Constitution in certain areas

On occasion, this Court has viewed provisions of the Kansas Constitution more broadly than the federal Constitution, including analogous provisions. In *Farley v. Engelken*, when interpreting sections 1 and 18 of the Bill of Rights, this Court held that

"the Kansas Constitution affords separate, adequate, and greater rights" than the Fourteenth Amendment. 241 Kan. 663, 671 (1987). Three decades later, this Court further clarified its reasoning in *Hodes & Nauser*, pointing to the subtle, yet distinct textual differences between section 1 and the Fourteenth Amendment, the historical record of the Kansas Bill of Rights, and the definition of a natural right, which both the plain language and Kansas's history informed. 309 Kan. at 624-40 (reviewing lawmakers' statements from the 1859 convention, including "that section 1's language was intended to be 'broad enough for all to stand upon' and that it not be 'any narrow, contracted conception' of rights").

This Court has also extended greater protections than federal law when it recognized the right to a jury trial for minors. *In re L.M.*, 286 Kan. 460 (2008). Section 10, like the Sixth Amendment, protects an individual's right to a jury trial for all prosecutions. *See* Kan. Const. Bill of Rts. §10 and U.S. Const., amend. VI. Although the Kansas Juvenile Justice Code (KJJC) initially intended to provide "paternalistic protections" to minors, juvenile laws "tilt toward applying adult standards of criminal procedure and sentencing." *In re L.M.*, 286 Kan. at 471. Accordingly, this Court reasoned that because KJJC proceedings against a minor constitute a prosecution, such minors are entitled to a jury trial according to section 10. *In re L.M.* 286 Kan. at 473. Notably, this Court also found that the federal Constitution protected L.M.'s right to a jury trial, although the only U.S. Supreme Court decision that engages with the issue ruled to the contrary. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971). Regardless, nothing

in the federal Constitution prevents the Kansas Supreme Court from extending the jury trial right to minors.

These limited situations serve as important examples of this Court exercising its authority to provide greater protections to Kansans than would be possible under federal law.

II. Other State Courts Have Repealed the Death Penalty Under an Interpretation of State Law

Before this Court is the constitutionality of Kansas's death penalty statute under state constitutional law. Although the decision will require this Court to review Kansas's history, founding documents, and its own jurisprudence, amici encourage the Court to consider how its sister courts have handled the issue under their constitutions. The decisions that rendered the death penalty unconstitutional in Massachusetts, Connecticut, and Washington came on the heels of deeply conflicting views in each state over capital punishment. *See Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984); *State v. Santiago*, 122 A.3d 1 (Conn. 2015); and *State v. Gregory*, 427 P.3d 621 (Wash. 2018). There was no consensus on ending capital punishment in any of these three states. However, in the delicate balance that is federalism, state supreme courts serve a vital role in interpreting state constitutions and ensuring that every citizen's rights are protected.

A. The Massachusetts Supreme Judicial Court ended the Commonwealth's use of capital punishment, laying to rest longstanding debate over the death penalty

In 1984, the Massachusetts Supreme Judicial Court (MSJC) ended the Commonwealth's debate over capital punishment when it ruled "that the imposition of

the punishment of death is forbidden" under the Commonwealth's constitution. *Colon-Cruz*, 470 N.E.2d at 121. At the time, the court's ruling ran counter to public support for the death penalty. In fact, two years before *Colon-Cruz*, Massachusetts "voters approved a constitutional amendment" enabling capital punishment. *Colon*-Cruz, 470 N.E.2d at 117-18. The court's ruling, relying solely on the Commonwealth's constitution, is a constructive example for this Court to consider.

In the decades before *Colon-Cruz*, the Commonwealth's support for capital punishment oscillated. In the late 1950s, the governor created a death penalty commission to study its use. *See* Alan Rogers, "*Success-at Long Last": The Abolition of the Death Penalty in Massachusetts, 1928-1984*, 22 B.C. Third World L.J. 281, 317-20 (2002) (describing 15-member commission that spent 18 months reviewing national data and local arguments about capital punishment). Despite the commission's findings that the death penalty harmed the legal and social order of the Commonwealth, *id.* at 320, the legislature rejected a bill that would abolish capital punishment. *Id.* at 326-27. However, in 1965, a subsequent governor, exercising his executive authority, issued a death penalty moratorium. *Id.* at 329. Lacking consensus among lawmakers, the question of capital punishment was placed before voters in 1968, who voted overwhelmingly to retain its use. *Id.* at 335 (noting that only 12 of Massachusetts's 351 cities voted to end capital punishment).

The U.S. Supreme Court's capital punishment decisions in the 1970s intensified the need for Massachusetts to clarify its stance on the death penalty. *Id.* at 337-38 and 350 (mentioning *Furman v. Georgia*, 408 U.S. 238 (1972), which held the death penalty

unconstitutional because of its arbitrary and discriminatory application, and *Gregg v. Georgia*, 428 U.S. 153 (1976), which affirmed the constitutionality of death sentencing statutes that provided decision-makers with guided discretion). In response to *Furman*, the Massachusetts legislature tried to pass a mandatory death sentencing bill in 1973, but the governor vetoed it. *Id.* at 283-84. Meanwhile, the MSJC reviewed the constitutionality of the death penalty in a case before it, declining to weigh in on the "debate and controversy" around the question of cruel and unusual punishment presented in *Furman*. *See Commonwealth v. O'Neal*, 327 N.E. 2d 662, 666-67 (Mass. 1975). Instead, the court held "that the right to life [was] fundamental" and then asked the parties to address whether the Commonwealth's death penalty statute met a "compelling state interest." *O'Neal*, 327 N.E.2d at 668-69. After briefing, the court held that a mandatory death sentence statute violated the Commonwealth's constitution, *Commonwealth v. O'Neal*, 339 N.E. 2d 676 (Mass. 1975), and in a concurrence, the Chief Justice reasoned that the evidence was insufficient to demonstrate that the death penalty served as a better deterrent than less severe punishments. *O'Neal*, 339 N.E.2d at 682-85 (Tauro, C.J., concurring).

By the early 1980s, both the legislature and the voters supported the reinstatement of capital punishment. *See* Rogers, *"Success-at Long Last,"* 22 B.C. Third World L.J. at 350 (describing 1980 bill reinstating capital punishment and 1982 voter-initiated constitutional amendment in support of the death penalty). Within two years, the Commonwealth's new statute appeared before the MSJC for review. At issue was whether the law impermissibly burdened a defendant's constitutional right against self-

incrimination and the right to a jury trial. Relying solely on the Commonwealth's constitution, the MSJC held that it did. *Colon-Cruz*, 470 N.E.2d at 127-30 (considering death penalty decisions from Nevada, Washington, and Connecticut). Ultimately, the MSJC provided the clarity that the conflicted Commonwealth needed on the question of capital punishment.

B. In the wake of tragedy, Connecticut's Supreme Court considered history, precedents, and sister court authority to find its death penalty unconstitutional under state law

In 2015, the Connecticut Supreme Court held the death penalty unconstitutional under state law, finding that it failed to comport with contemporary standards of decency and was devoid of any legitimate penological justifications. *See State v. Santiago*, 122 A.3d 1 (Conn. 2015). The court's decision is instructive as this Court examines similar issues. In support of its holding, the court considered the state's "preconstitutional roots of the freedom from cruel and unusual punishment," the adoption of Connecticut's constitution in 1818, the relevant constitutional text and precedents, and persuasive authority from sister state precedents. *Santiago*, 122 A.3d at 20-31.

Although not as circuitous a route as Massachusetts, Connecticut's route to ending capital punishment similarly reflected the state's differing views on the death penalty. In 2007, three members of a family were brutally murdered in their home in Cheshire, Connecticut, a prosperous suburb near New Haven. *See* Thomas J. Lueck & Stacey Stowe, "Woman and 2 Daughters Killed in Connecticut Home Invasion," *N.Y. Times*, July 24, 2007. The lone surviving family member, Dr. William Petit, Jr., staggered from his burning home with a bloody head wound while his wife and two young daughters

perished inside. *Id.* The heinous and senseless crime unsettled a state that had witnessed declining numbers of death penalty trials and executions. In fact, when the state executed Michael Ross, a volunteer, in 2005, it had been over 50 years since the last execution. *See* Peter Applebome, "Death Penalty Repeal Goes to Connecticut Governor," *N.Y. Times*, Apr. 11, 2012 (noting that Mr. Ross voluntarily gave up his appeals).

The triple murder in Cheshire continued to weigh heavily on the state legislature and the court when next considering capital punishment. In 2009, a bill to abolish the death penalty failed when two senators changed their position on the bill, expressing remorse for the slain victims in Cheshire. *See State v. Santiago*, 49 A.3d 566, 695-96 (Conn. 2012) (Harper, J., concurring), *rev'd*, 122 A.3d 1. Three years later, legislative support favored ending the death penalty, but the bill that passed in 2012 did so for future crimes only, it did not impact the eleven remaining men on death row, including the two defendants convicted of the Cheshire murders. *See* Conn. Gen. Assemb., Conn. S. Session TR., April 4, 2012, 2012 Sess. 51 (2012) (statement by Senator John Kissel). However, when the Connecticut Supreme Court considered whether the 2012 law providing prospective abolition adhered to the state's constitution, its holding was unequivocal: "this state's death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose." *Santiago*, 122 A.3d at 9.

C. Diverging from federal jurisprudence, the Washington Supreme Court relied on an independent interpretation of state law to hold its death penalty unconstitutional

In 2018, the Washington Supreme Court declared the state's death sentencing scheme unconstitutional in violation of the state's prohibition on cruel punishment because it was administered in an "arbitrary and racially biased manner." *State v. Gregory*, 427 P.3d 621, 636 (Wash. 2018). The state court's exercise of judicial independence—in the face of contrary federal jurisprudence—is potentially instructive for this Court.

That *Gregory* relied on the racially discriminatory imposition of the death penalty—where Black defendants were 4.5 more likely to receive death—was significant. The decision marked the first time a state supreme court declared capital punishment unconstitutional based on statistical evidence of racial discrimination in sentencing. *See* Recent Case, State v. Gregory, *427 P.3d 621 (Wash. 2018)*, 132 Harv. L. Rev. 1764, 1764 (2019). Relying on statistical evidence to find racial bias is exactly what the U.S. Supreme Court declined to do in *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (holding that "to prevail under the Equal Protection Clause, McCleskey must prove" purposeful discrimination). There, Mr. McCleskey produced evidence that defendants charged with killing white victims were 4.3 times more likely to receive the death penalty than defendants who killed Black victims, and that Black defendants accused of killing white victims were the most likely to receive death. *McClesky*, 481 U.S. at 287. Justice Powell later expressed deep regret over his decision in *McCleskey*, where he voted with the majority in the 5-4 decision. *See* Opinion, "Justice Powell's New Wisdom," *N.Y. Times*, June 11, 1994, at 20 (revealing that Justice Powell confessed to his biographer that he

would change his vote, adding "that he now found capital punishment itself unworkable").

Unbound by the constraints that the U.S. Supreme Court established in *McCleskey*, the Washington Supreme Court based its holding solely on its constitution. *Gregory*, 427 P.3d at 631 (recognizing that state courts have the power to interpret their state constitutional provisions as offering greater protections of individual rights than similar provisions of the federal Constitution). In doing so, the court considered (and then rejected) its prior decisions upholding the state's death penalty, the constitutionality of the death penalty as applied, and the failed penological goals of death sentencing. *Gregory*, 427 P.3d at 632-37. The Washington Supreme Court's holding made clear that the state could no longer participate in a punishment "imposed in an arbitrary and racially biased manner." *Gregory*, 427 P.3d at 642.

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These examples illustrate the important role state constitutional law can play in our federalist system. This Court should join Massachusetts, Connecticut, and Washington in independently finding Kansas's death sentencing scheme in violation of the State Constitution.

CONCLUSION

For the reasons herein, this Court should find Kansas's administration of the death penalty unconstitutional based on its Constitution, and vacate Defendant-Appellant Jonathan Carr's death sentence.

Dated: April 22, 2021

Respectfully submitted,

/s/ Elizabeth Cateforis
Elizabeth Cateforis
Kansas Bar # 16687
Clinical Professor of Law
University of Kansas School of Law
1535 West 15th Street
Lawrence, KS 66045
Ph: (785) 864-5571
Fax: (785) 864-5054
ECateforis@ku.edu

Counsel on behalf of the group of law professors and scholars

Alexis J. Hoag*
Tennessee Bar # 028712
New York Bar # 4720314
Lecturer and Associate Research Scholar
Columbia Law School
435 West 116th Street
New York, NY 10027
Ph: (203) 645-4918
alexis.hoag@law.columbia.edu

**admitted pro hac vice*

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing will be served on counsel for each party and amici law professors and scholars through the Court's electronic filing system, which will send a "Notice of Electronic Filing" to each party's registered attorney and the individual amicus signatories named herein.

/s/ Elizabeth Cateforis
Elizabeth Cateforis

John J. Francis
Kansas Bar # 25235
Professor of Law
Washburn University School of Law
1700 SW College Avenue
Topeka, KS 66621
(785) 670-1685
john.francis@washburn.edu

Meredith A. Schnug
Kansas Bar # 26764
Clinical Associate Professor of Law
University of Kansas School of Law
1535 W. 15th Street
Lawrence, KS 66045
(785) 864-9291
mschnug@ku.edu

Corey Rayburn Yung
New York Bar # 4131439
William R. Scott Research Professor
University of Kansas School of Law
1535 W. 15th Street
Lawrence, KS 66045
(785) 864-4152
coreyyung@ku.edu

Melanie Daily DeRousse
Kansas Bar # 26779
Clinical Associate Professor
University of Kansas School of Law
1535 W. 15th Street
Lawrence, KS 66045
(785) 864-5302
melaniedaily@ku.edu