No. 18-

IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN, *et al.*,
Petitioners,

v.

TONY PARKER, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

EXECUTION SCHEDULED FOR MAY 16, 2019

KELLEY J. HENRY
AMY D. HARWELL
RICHARD TENNENT
KATHERINE DIX
OFFICE OF FEDERAL PUBLIC DEFENDER, MIDDLE DISTRICT OF TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047

KATHLEEN MORRIS
42 Rutledge Street
Nashville, TN 37210
(615) 242-3200

BRADLEY MACLEAN
1702 Villa Place
Nashville, TN 37212
(615) 943-8716

ROBERT N. HOCHMAN *
KELLY HUGGINS
EMILY A. ROSENBERG
SIDLEY AUSTIN LLP
One S. Dearborn Street
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

COLLIN P. WEDEL
SIDLEY AUSTIN LLP
555 W. Fifth Street
Los Angeles, CA 90013
(213) 896-6000

QAIS GHAFARY
CAITLIN MATHENY
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-8430

Counsel for Petitioners

* Counsel of Record

March 7, 2019

CAPITAL CASE

QUESTION PRESENTED

Condemned prisoners facially challenging a state's method of execution must prove both that the state's method will very likely cause severe pain and that there is an available and feasibly implemented alternative that will substantially reduce the prisoners' risk of suffering. The Tennessee Supreme Court rejected petitioners' challenge to Tennessee's three-drug method of execution solely because it concluded that petitioners had failed to demonstrate an available alternative. In reaching that conclusion, the Tennessee Supreme Court credited testimony from state officials that petitioners' proposed drug was not reasonably available. That testimony was based on conversations state procurement officials had with potential suppliers of the alternative drug. Those conversations were shielded from discovery by the Tennessee courts under the state's execution secrecy statute. So the petitioners' claim was deemed to have failed based exclusively on government officials' testimony, the basis of which Tennessee barred petitioners from seeing, exploring, or challenging through cross-examination.

The question presented is:

Does a state deprive condemned prisoners of due process when, to defeat a challenge to the state's method of execution, state officials rely on and the state courts credit testimony regarding privileged communications that the prisoners could not effectively challenge through cross-examination or otherwise because they were barred from reviewing the privileged material and from access to the witnesses covered by the privilege?

PARTIES TO THE PROCEEDING

Petitioners are Abu-Ali Abdur'Rahman, John Michael Bane, Byron Black, Andre Bland, Kevin Burns, Tyrone Chalmers, Lee Hall, Kennath Henderson, Daryl Hines, Henry Hodges, David Ivy, Akil Jahi, Donnie Johnson, David Jordan, David Keen, Donald Middlebrooks, Farris Morris, Pervis Payne, Gerald Lee Powers, William Glenn Rogers, Michael Sample, Oscar Smith, and Charles Wright. All petitioners are inmates incarcerated at the Riverbend Maximum Security Institution.

Respondents are Tony Parker, Tennessee Commissioner of Correction; Tony Mays, Warden of Riverbend Maximum Security Institution; John/Jane Doe Executioners 1–100; John/Jane Doe Medical Examiners 1–100; John/Jane Doe Pharmacists 1–100; John/Jane Doe Physicians 1–100; and John/Jane Does 1–100, all sued in their official capacities.

There are no corporate parties involved in this case.

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PETITION FOR A WRIT OF CERTIORARI

Abu-Ali Abdur'Rahman, John Michael Bane, Byron Black, Andre Bland, Kevin Burns, Tyrone Chalmers, Lee Hall, Kennath Henderson, Daryl Hines, Henry Hodges, David Ivy, Akil Jahi, Donnie Johnson, David Jordan, David Keen, Donald Middlebrooks, Farris Morris, Pervis Payne, Gerald Lee Powers, William Glenn Rogers, Michael Sample, Oscar Smith, and Charles Wright respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Tennessee in this case.

OPINIONS AND ORDERS BELOW

The opinion of the Tennessee Supreme Court (Pet. App. 1a–33a) is reported at 558 S.W.3d 606 (Tenn. 2018). The order of the Tennessee Chancery Court for 83the Twentieth Judicial District, Davidson County (Pet. App. 34a–84a) denying petitioners' claims is not published. The May 7, 2018, May 24, 2018, and June 13, 2018, orders of the Tennessee Chancery Court for the Twentieth Judicial District, Davidson County (Pet. App. 120a–135a, 94a–119a, and 85a–93a), denying petitioners the right to conduct discovery into alternative methods of execution, are not published.

STATEMENT OF JURISDICTION

The judgment of the Tennessee Supreme Court was entered on October 8, 2018. Pet. App. 1a. On January 9, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including March 7, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides, in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Tennessee Code Annotated § 10-7-504(h)(1) provides:

> Notwithstanding any other law to the contrary, those parts of the record identifying an individual or entity as a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection. For the purposes of this section "person or entity" includes, but is not limited to, . . . a person or entity involved in the procurement or provision of chemicals, equipment, supplies and other items for use in carrying out a sentence of death.

Tenn. Code Ann. § 10-7-504(h)(1).

INTRODUCTION

Tennessee intends to execute petitioners in a manner that will very likely cause severe pain. The State's lethal-injection protocol hinges on the ability of one drug, midazolam, to block the torturous sensations of entombment and burning caused by two other drugs.

Petitioners presented substantial evidence that midazolam is unfit for that task. But the Tennessee Supreme Court has approved use of a midazolam three-drug protocol because it concluded that petitioners "offered no direct proof as to availability" of their proposed alternative—a single-drug protocol using pentobarbital, which poses significantly less risk of suffering. Pet. App. 21a.

Tennessee law ensured that petitioners' claim would fail. Tennessee's execution secrecy statute barred discovery into the state's communications with 10 concededly willing suppliers. It also barred petitioners from exploring the details of the suppliers' offers by deposing those suppliers or even the state officials with whom they interacted. At the same time, other state officials testified that they believed pentobarbital was not reasonably available because of information passed onto them by the very persons whom petitioners were prevented from deposing. The Tennessee courts credited the state officials' untested and legally untestable assertion of a failed but supposedly "good-faith effort" to acquire pentobarbital, and declared that petitioners had produced nothing "more than mere speculation . . . [and] hypothetical availability" regarding pentobarbital. Pet. App. 20a–21a.

This Kafkaesque ruling strikes at the core of due process. A state official's assertion on a dispositive issue was simply accepted while state law barred petitioners from testing it. With no fair process to challenge Tennessee's lethal injection protocol, the result is the evisceration of the right to demonstrate that the protocol will inflict cruel and unusual punishment. This Court's review is urgently needed to vindicate basic principles of due process and this Court's Eighth Amendment standards for guarding against executions that produce needless suffering.

The issue merits this Court's review also because it frequently recurs and only this Court can resolve it. See *infra* at pp. 27–30. Secrecy laws like Tennessee's have grown in popularity among states that carry out the death penalty. During litigation, it is and will continue to be all too tempting for state officials to cut off challenges to their assertions that alternative drugs are not available. This Court should ensure that fundamental principles of due process are uniformly applied nationwide to challenges to methods of execution.

To be clear, this petition does *not* challenge the constitutionality of state secrecy laws in general. The question presented here is narrower than that. Petitioners seek only to ensure that those laws are not deployed in ways that defeat petitioners' due process rights to bring their Eighth Amendment challenges. It has been hornbook law, dating back more than a century, that a litigant waives a privilege when it seeks to establish facts based on privileged material. *E.g.*, *Hunt* v. *Blackburn,* 128 U.S. 464, 470 (1888). This petition asks this Court to conclude that that elementary principle of fairness, known as the sword-shield rule, recognized nationwide and applicable in all kinds of disputes, is one of constitutional dimension when state officials seek to use information they maintain as privileged to defeat a claim that they are about to cause needless human suffering in violation of the Constitution. To reject it, as the Tennessee Supreme Court has in capital litigation only, is to deny petitioners due process. Public confidence in the litigation process and capital punishment demands that more than just the say-so of state officials stands behind the decision to use a method of execution with problems as severe and widely reported as the protocol Tennessee has chosen.

STATEMENT OF THE CASE

1. Tennessee's current execution protocol calls for intravenous administration of three drugs. The first drug, midazolam hydrochloride, is a sedative that the State hopes will render the condemned prisoner unconscious, unaware, and insensate to pain. The second drug is a paralytic that restricts movement and breathing. The third drug, potassium chloride, causes the heart to stop beating.

As this Court has observed, there is no dispute that, if the first drug does not work as intended, the prisoner experiences a torturous death from the second and third drugs. *E.g.*, *Glossip* v. *Gross*, 135 S. Ct. 2726, 2739–41 (2015). The paralytic effect of the second drug produces a veneer of tranquility that masks the extreme pain, air hunger, and crushing, suffocating sensation the prisoner feels as he loses his ability to exhale carbon dioxide, which acidifies in the lungs. Separately, the third drug causes excruciating burning as it travels through the prisoner's veins and ultimately stops his heart.

Thus, an execution that satisfies the Eighth Amendment's prohibition against cruel and unusual punishment depends upon the effectiveness of the first drug. *E.g.*, *Baze* v. *Rees*, 553 U.S. 35, 44 (2008) (plurality opinion). For decades, states had relied upon barbiturates for that purpose, as there is no medical dispute that barbiturates, if effectively administered, will reliably produce prolonged and "deep, comalike unconsciousness." *Id.*

Starting in 2010, states began to encounter difficulties obtaining barbiturates for executions because the

sole domestic manufacturer faced regulatory and supply issues and subsequently exited the market altogether.[1]

In 2013, Tennessee adopted a lethal injection protocol consisting of a one-drug overdose of pentobarbital. *West* v. *Schofield*, 519 S.W.3d 550, 552 (Tenn. 2017), *cert. denied sub nom. West* v. *Parker*, 138 S. Ct. 476 (2017), and *cert. denied sub nom. Abdur'Rahman* v. *Parker*, 138 S. Ct. 647 (2018). Other states had shifted to a one-drug protocol. See *Towery* v. *Brewer*, 672 F.3d 650, 657 (9th Cir. 2012) (per curiam) (Arizona); *Pavatt* v. *Jones*, 627 F.3d 1336, 1337 n.1 (10th Cir. 2010) (Washington); *Cooey* v. *Strickland*, 589 F.3d 210, 215 (6th Cir. 2009) (Ohio). As domestic supplies of manufactured pentobarbital grew scarcer, Tennessee amended its protocol in 2014 to specify that it would obtain its pentobarbital from compounding pharmacies, as other states had done.[2] *West*, 519 S.W.3d at 552–53.

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[1] *See* Alan M. Wolf, *Hospira Halts Rocky Mount Production of Death Penalty Drug*, News & Observer, Jan. 21, 2011; Press Release, Hospira, Inc., Hospira Statement Regarding Pentothal™ (Sodium Thiopental) Market Exit (Jan. 21, 2011), https://bit.ly/2HujiHs. Several states abandoned the three-drug approach in favor of a one-drug method using an overdose of a single barbiturate—essentially the method the petitioners in *Baze* had proposed.

[2] *See, e.g.*, *Wellons* v. *Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1262 (11th Cir. 2014) (per curiam) (suggesting that Georgia is using compounded pentobarbital); *In re Lombardi*, 741 F.3d 888, 891 (8th Cir. 2014) (en banc) (Missouri using compounded pentobarbital); *Whitaker* v. *Livingston*, 732 F.3d 465, 468 (5th Cir. 2013) (per curiam) (Texas using compounded pentobarbital); *Chester* v. *Wetzel*, No. 1:08-cv-1261, 2012 WL 5439054, at *7 (M.D. Pa. Nov. 6, 2012) (Pennsylvania using compounded pentobarbital); Brady Dennis & Lena H. Sun, *Execution Chamber Becomes a Laboratory*, Wash. Post, May 1, 2014, at A1.

2. On January 8, 2018, Tennessee adopted its midazolam-based, three-drug protocol as an alternative to its pentobarbital protocol. On February 20, 2018, petitioners filed the declaratory judgment action from which this petition arises.

Petitioners' suit challenged the facial validity of Tennessee's midazolam-based protocol. In the years since this Court in *Glossip* approved the use of a three-drug protocol that includes midazolam, scientific evidence and experience have shown that midazolam is inadequate to render a prisoner insensate to the pain of the second and third drugs. Midazolam belongs to a family of drugs known as benzodiazepines, which includes well-known anti-anxiety medications like Valium and Xanax. As this Court has acknowledged, unlike barbiturates, "midazolam is not recommended or approved for use as the sole anesthetic during painful surgery." *Glossip*, 135 S. Ct. at 2742. Accordingly, petitioners alleged that the midazolam-based protocol posed a substantial risk of serious harm, and that pentobarbital—which was still one of Tennessee's approved methods of execution—was a feasible and readily implemented alternative that would significantly reduce the risk.

Petitioners sought discovery that would establish pentobarbital' s availability to the State. Those efforts led to motion practice and to three court orders relevant here.

2a. On May 7, 2018 (Pet. App. 120a), the trial court granted in part and denied in part petitioners' motion to compel interrogatory responses and document production. As pertinent here, based on a purported "survey of other jurisdictions and approval of those as consistent with the public policy of Tennessee," the court held that Tennessee's execution secrecy statute, Tenn. Code Ann. § 10-7-504(h)(1), protected against identify-

ing in discovery execution drug suppliers, drug manufacturers, and the State employees who procure the drugs. Pet. App. 127a. That ruling meant that petitioners could not obtain discovery from anyone with firsthand knowledge of pentobarbital's availability, for neither the suppliers nor those who dealt with them could be disclosed.

Despite those restrictions, respondents produced a limited subset of redacted documents that showed that Tennessee had contacts with multiple willing potential suppliers of pentobarbital. In particular, these documents included a 17-page PowerPoint summary of Tennessee's searches for pentobarbital. XL 1617–18[3]; X at Ex. 105, p. 1468; XIV at Ex. 126, p. 1969. Those records showed that, over the spring and summer of 2017, a Tennessee official (referred to as the "Drug Procurer") contacted approximately 100 potential sources of pentobarbital. (Petitioners were barred from discovery about precisely how many were contacted and about the nature of those contacts.) He found roughly 10 pharmacies that were willing and able to sell pentobarbital, but that did not have "sufficient quantities of the needed form of Pentobarbital and no source to obtain sufficient quantities." X at Ex. 105, p. 1477. Additionally, there were roughly 70 suppliers who were willing, but did not have any supply on hand. XXXVII 1338–39; X at Ex. 105, p. 1477. Only 20 percent of those contacted stated that they would be unwilling to provide pentobarbital for use in an execution. X at Ex. 105, p. 1477.

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[3] Citations to documents with roman numerals refer to volumes in the record in the manner that the parties and court below cited them.

Of particular note, on April 6, 2017, the Drug Procurer sent a request for "at least 100 grams" of pentobarbital (which would be sufficient for 10 to 20 executions). XI at Ex. 105, p. 1497. At 11:00 a.m., that same day, a supplier responded that it had some pentobarbital for sale, but not "the quantity you need." *Id.* at 1496. No records reflect how or whether state officials responded.

The records also show that, on some other date (concealed by redactions), another supplier offered to sell Tennessee pentobarbital for $24,000 for 10 grams (*i.e.*, at least enough for one execution), with an additional fee of $35,000 to compound 10 grams. XI at Ex. 105, p. 1503. A "time till avail" was listed, but the date/time was redacted. *Id.* Nothing produced to petitioners indicates how or whether state officials responded to this offer either.

2b. On May 24, 2018 (Pet. App. 94a), the trial court issued an order limiting the scope of depositions of respondents Parker and Mays. Petitioners had sought to ask about respondents' efforts to obtain pentobarbital. But, "incorporat[ing] . . . its reasoning and authorities from the May 7, 2018" order, the trial court restricted availability-related questions to "information solely within their possession," Pet. App. 112a–113a, and disallowed any questions about (1) other potentially available alternatives; (2) identifying information about the chemicals necessary to carry out lethal injection executions; (3) identifying information of the State employees who procured those substances; (4) identities and identifying information of the manufacturer, supplier, compounder, prescriber of the drugs, medical supplier, or medical equipment for the execution; and (5) any other topic listed as prohibited in its May 7, 2018 order, Pet. App. 115a–116a.

These restrictions robbed petitioners of any ability to obtain evidence about the availability of pentobarbital or the nature of the State's contacts with suppliers from either Parker or Mays. Neither Parker nor Mays had prepared the PowerPoint, and neither had firsthand knowledge of the facts reflected in it. Nevertheless, each witness that petitioners were allowed to depose asserted that Tennessee could not obtain pentobarbital from any of the suppliers in the PowerPoint. *E.g.*, XL 1610–19; XXXVII 1338–39.

2c. On June 13, 2018, despite petitioners' agreement to abide by an appropriately strict protective order, the trial court denied petitioners' motion to compel the deposition of the Drug Procurer who prepared the PowerPoint and was responsible for outreach to drug suppliers. That individual is the only Tennessee state official with firsthand knowledge of offers to sell pentobarbital that Tennessee has received. See XL 1608–09.

3. Trial of petitioners' claim was scheduled for July 9, 2018. On July 5, 2018, just four days before trial, Tennessee revised its protocol, eliminating the pentobarbital option and making the three-drug midazolam protocol Tennessee's sole method of lethal injection.

At trial, petitioners presented testimony from four experts: Craig Stevens, Ph.D., a neuropharmacologist; Dr. David Greenblatt, a clinical pharmacologist with particular expertise concerning midazolam; Dr. Mark Edgar, a pathologist; and Dr. David Lubarsky, an anesthesiologist. Petitioners also introduced testimony from twelve attorneys who had witnessed their respective clients' executions in other states. Petitioners' evidence showed, among other things, that midazolam does not have the pharmacologic ability to block pain from the second and third drugs and, as a result, the

paralytic and potassium chloride would cause the inmate to suffer severe pain. In an attempt to prove that pentobarbital remained reasonably available, petitioners also introduced the evidence from the PowerPoint suggesting that suppliers had offered to sell pentobarbital to Tennessee.

To rebut petitioners' evidence of the availability of pentobarbital, respondents relied entirely on testimony from corrections officials who were *not* involved in procuring drugs. Those witnesses, citing the same redacted PowerPoint and relaying information passed onto them from others whom petitioners were not allowed to identify or depose, asserted that the state could not get the drug anymore. See, *e.g.*, XXXVII 1313–14 (Parker testifying that "any knowledge [he] had [was] based upon conversations . . . with other individuals").

4. On July 26, 2018, the trial court rejected petitioners' claim. The trial court found that petitioners had failed to prove that an available alternative method to Tennessee's three-drug protocol exists. The court credited the testimony of respondents' witnesses that pentobarbital is unavailable. And, despite finding that petitioners' experts established that "midazolam does not elicit strong analgesic effects and the inmate being executed may be able to feel pain from the administration of the second and third drugs," the trial court also concluded that petitioners failed to prove that the three-drug protocol creates a demonstrated risk of severe pain. Pet. App. 56a.

5. Petitioners' expedited appeal went directly to the Tennessee Supreme Court. See Order, *Abdur'Rahman* v. *Parker*, No. M2018-01385-SC-RDO-CV (Tenn. Aug. 13, 2018) (citing Tenn. Code Ann. § 16-3-201(d)(3)). Briefing was extensive. As relevant here, petitioners

asserted that respondents' "choice to hide the testimony of the one witness who knew what was going on" with respect to the availability of pentobarbital violated fundamental fairness and due process. Brief of Plaintiffs-Appellants at 214, *Abdur'Rahman* v. *Parker*, No. M2018-01385-SC-RDO-CV (Tenn. Sept. 6, 2018). Petitioners catalogued how each ruling that prohibited discovery into the State's interactions with its suppliers compounded petitioners' "extreme[] prejudice[] [from] [their] inability to depose the Drug Procurer and obtain information about documents and information in his control." *Id.* at 317; see also *id.* at 308–22. At bottom, petitioners argued, the trial court's rulings "crafted a complicated maze of questions Plaintiffs could not ask and information they could not obtain," *id.* at 322, which "insulated [the State] from a challenge that [its protocol] violates the . . . constitutional prohibitions against cruel and unusual punishments," *id.* at 320, "effectively deprived Plaintiffs of the ability to obtain evidence to bolster their claims," *id.* at 321, and constituted a "grave injustice," *id.*

The Tennessee Supreme Court affirmed. That court expressly chose not to "address the Plaintiffs' claim that the three-drug protocol creates a demonstrated risk of severe pain." Pet. App. 22a; see also Pet. App. 27a ("[T]he Petitioners' claims and evidence of intolerable pain and torture were not the basis of the trial court's decision and thus not reviewed on appeal."). Instead, it resolved the appeal exclusively on the ground that petitioners failed to carry their burden to prove that pentobarbital is reasonably available.

The Tennessee Supreme Court simply credited the testimony of respondents' witnesses who asserted that pentobarbital was not available. According to the court, it "defies common sense" to suggest that a State official might not "make a good-faith effort to locate

pentobarbital." Pet. App. 21a. The court also expressed the view that the State "would utilize pentobarbital if the drug could be secured." *Id.* at n.21. The Tennessee Supreme Court concluded that petitioners "offered no *direct proof* as to availability," and held that petitioners had offered nothing "more than mere speculation" that pentobarbital is reasonably available. *Id.* at 20a–21a (emphasis added). The court's opinion never questioned the propriety of any of the trial court's discovery orders that prevented petitioners from obtaining the evidence the court now concluded petitioners needed to prove their claim.

Justice Lee dissented. "In Tennessee," she explained, "executions are cloaked in secrecy, which makes it difficult—if not impossible—for the Petitioners to establish an available alternative to the State's method of execution." Pet. App. 27a. In this case, the dissent went on, those policies of secrecy ultimately "prohibited identification of the Department's agents who were involved in procuring execution drugs, such as pentobarbital, and of its potential suppliers." *Id.* Those problems, in addition to the rushed schedule and the State's "evasiveness," *id.* at 28a, about what drugs it had or would use, led the dissent to conclude that the petitioners had been "denied due process in the form of a fundamentally fair process," *id.* at 30a.

REASONS FOR GRANTING THE PETITION

This Court should accept review to ensure that courts conduct litigation regarding methods of execution in accordance with the same basic requirements of due process as all other litigation. In this case, Tennessee was allowed to assert a dispositive fact based on information that state law permitted it to withhold from petitioners. This clear violation of the sword-shield rule is a fundamentally unfair way to determine

key facts in litigation, invites highly unreliable results, and violates due process. This Court should take this opportunity to protect the rights of inmates to bring the Eighth Amendment challenges that this Court has ruled the constitution permits.

The issue merits this Court's review now. It is squarely presented by the Tennessee Supreme Court's decision. It frequently recurs in litigation regarding methods of execution because execution secrecy laws like Tennessee's have become popular in states that carry out executions. Only this Court can set national standards of due process for the vindication of the important Eighth Amendment right at stake here.

Petitioners face executions that will prove to be excruciating. Yet, despite this Court's recognition that "no safeguard for testing the value of human statements is comparable to that furnished by cross-examination," *Greene* v. *McElroy*, 360 U.S. 474, 496–97 (1959), the only evidence supporting the conclusion that petitioners' more humane alternative is not reasonably available are the bare assertions of Tennessee officials—assertions based on information passed onto them by others, and never explored or tested through the adversarial process. The State of Tennessee has, as a matter of law, prevented such testing. Petitioners merit a fair hearing before they are forced to endure such suffering.

I. STATE OFFICIALS' USE OF INFORMATION SHIELDED FROM INMATES BY STATE SECRECY LAWS TO DEFEAT THE INMATES' METHOD-OF-EXECUTION CLAIM VIOLATES DUE PROCESS.

This Court requires a prisoner who asserts that a method of execution is, on its face, cruel and unusual, to prove that the method entails a "substantial risk of

serious harm" *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50), and also that there is "an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* (alterations in original) (quoting *Baze*, 553 U.S. at 52). While this Court has in the past approved findings that a three-drug protocol that includes midazolam does not pose a substantial risk of serious harm, see *id.* at 2740, the Tennessee Supreme Court's ruling in this case sets that question aside. It did not confront the substantial new evidence that has emerged since this Court considered the question. *Infra* at pp. 27-30. In addition, the Tennessee Supreme Court ruling does not doubt that pentobarbital would significantly reduce the risk of suffering. Its ruling is based *only* on its conclusion that pentobarbital is unavailable. Pet. App. 22a.

Further, that conclusion rests entirely on the testimony of Tennessee officials whose view that pentobarbital is not reasonably available was derived from information protected by Tennessee's secrecy laws. The Tennessee courts credited that unchallenged and unchallengeable testimony, Pet. App. 21a–22a, and then criticized petitioners for failing to produce evidence that would rebut that testimony, *id.* In short, the Tennessee Supreme Court allowed state officials to establish a dispositive fact with information it kept secret from petitioners.

This Court has already made clear that in *criminal* cases, where the Confrontation Clause provides a constitutional right to cross-examine witnesses against the accused, the state may not present affirmative testimony on a material issue and then assert a privilege that inhibits the defendant's ability to probe the accuracy of that testimony. *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974) (holding, in criminal case, that permitting

a witness's invocation of privilege to "den[y] the right of effective cross-examination . . . 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it'"). This case presents the civil litigation version of the same fundamental value.

The Due Process Clause protects the same right to challenge evidence offered by the state in civil cases that the Confrontation Clause protects in criminal cases, particularly in civil cases "where governmental action [threatens to] seriously injure[] an individual, and the reasonableness of the action depends on fact findings." *Greene*, 360 U.S. at 496; see also *Tennessee* v. *Lane*, 541 U.S. 509, 522–23 (2004) (observing that Confrontation Clause and Due Process Clause secure overlapping rights to a "meaningful opportunity to be heard" in criminal and civil contexts); *Chambers* v. *Mississippi*, 410 U.S. 284, 295 (1973) (finding that the "essential and fundamental requirement" of cross-examination comes from the Due Process Clause). The heart of due process is an opportunity to be heard "at a meaningful time and in a meaningful manner," which requires "an effective opportunity to . . . confront[] any adverse witnesses," and to "present[] . . . arguments and evidence." *Goldberg* v. *Kelly*, 397 U.S. 254, 267–68 (1970); see also *Mathews* v. *Eldridge*, 424 U.S. 319, 348–49 (1976). Because of the "vital" "importance of cross-examination," "[t]his Court has been zealous to protect these rights," *Greene*, 360 U.S. at 497, and has required that "the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue," *id.* at 496, "[N]o statement (unless by special exception) should be used as testimony until it has been probed and sublimated by" cross-examination. *Id.* at 497.

Petitioners, who were deprived of any "effective opportunity to . . . confront[]" or contest the state officials' assertions, were thereby deprived of their right to be heard in a "meaningful manner" on an essential element of their claim. This Court should accept review to right this fundamental wrong.

1. Petitioners' claim to having been deprived of due process is well rooted in the law. The rule that the holder of a privilege must choose between concealing the information protected by the privilege *or* using it to establish a fact, but not both, is one of long standing. See *Hunt,* 128 U.S. at 470 ("When Mrs. Blackburn entered upon a line of defense which involved what transpired between herself and [her attorney], and respecting which she testified, she waived her right" to invoke privilege over those communications); see also *Davis*, 415 U.S. at 320 (holding, in criminal case, that, while "[t]he State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case," "[t]he State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness"); *Brown* v. *United States*, 356 U.S. 148, 156 (1958) (holding that party witness in a criminal case "could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination"); *Clark* v. *United States*, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused.").

The rule, often referred to as the sword-shield rule, has won extraordinarily broad acceptance. Virtually

every federal[4] and, as Appendix F to this petition demonstrates, state court has adopted a similar doctrine. It applies in all contexts and in every kind of

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[4] *See In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006) ("Once a party announces that it will rely on advice of counsel, for example, in response to an assertion of willful infringement, the attorney-client privilege is waived."); *In re Lott*, 424 F.3d 446, 454 (6th Cir. 2005) ("[L]itigants cannot hide behind the privilege if they are relying upon privileged communications to make their case."); *Willy* v. *Admin. Review Bd.*, 423 F.3d 483, 497 (5th Cir. 2005) ("[W]hen a party entitled to claim the attorney-client privilege uses confidential information against his adversary (the sword), he implicitly waives its use protectively (the shield) under that privilege."); *John Doe Co.* v. *United States*, 350 F.3d 299, 302 (2d Cir. 2003) ("[I]t would be unfair for a party asserting contentions to an adjudicating authority to then rely on its privileges to deprive its adversary of access to material . . . ."); *In re Keeper of Records*, 348 F.3d 16, 24 (1st Cir. 2003) ("'[T]he party asserting the privilege placed protected information in issue for personal benefit through some affirmative act, . . . to allow the privilege to protect against disclosure of that information' would have been unfair to the opposing party."); *United States* v. *Bonner*, 302 F.3d 776, 784 (7th Cir. 2002) ("[T]he law does not provide a sword by which the defendant may selectively testify as to the merits of his prosecution, yet shield himself from comment on his failure to explain incriminating evidence properly admitted prior to his testimony.") (alterations in original); *United States* v. *Workman*, 138 F.3d 1261, 1263–64 (8th Cir. 1998) ("Workman cannot selectively assert the privilege to block the introduction of information harmful to his case after introducing other aspects . . . for his own benefit. . . . The attorney client privilege cannot be used as both a shield and a sword . . . ."); *Frontier Ref., Inc.* v. *Gorman-Rupp Co.*, 136 F.3d 695, 704 (10th Cir. 1998) ("[A] litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion."); *SEC* v. *Lavin*, 111 F.3d 921, 933 (D.C. Cir. 1997) ("[A]ny disclosure by a holder of a privilege inconsistent with maintaining the confidential nature of marital communications waives the privilege"); *Rhone-Poulenc*

case, from patent infringement claims and criminal prosecutions to workplace discrimination litigation and divorce proceedings. *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006) (patent infringement); *Fenceroy* v. *Gelita USA, Inc.*, 908 N.W.2d 235, 241 (Iowa 2018) (workplace discrimination); *In re Marriage of Perry*, 293 P.3d 170, 179 (Mont. 2013) (divorce); *Ex parte Meadowbrook Ins. Grp., Inc.*, 987 So. 2d 540, 551 (Ala. 2007) (insurance coverage litigation); *Steiny & Co., Inc.* v. *Cal. Elec. Supply Co.*, 93 Cal. Rptr. 2d 920, 925 (Ct. App. 2000) (breach of express warranties of merchantability and fitness for intended use); *State ex rel. Stovall* v. *Meneley*, 22 P.3d 124, 142 (Kan. 2001) (ouster action for county sheriff); *Howe* v. *Detroit Free Press, Inc.*, 487 N.W.2d 374, 384 (Mich. 1992) (probation-report privilege in defamation case).

It has also been applied to assertions of a variety of different kinds of privileges. See *Davis*, 415 U.S. at 320 (juvenile-offense record privilege); *Brown*, 356 U.S. at 156 (privilege against self-incrimination); *Arredondo* v. *State*, 411 P.3d 640, 647 (Alaska Ct. App. 2018) (marital communications); *Bainter* v. *League of Women Voters of Fla.*, 150 So. 3d 1115, 1130 (Fla. 2014) (finding waiver of First Amendment associational

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Rorer Inc. v. *Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("In an action for patent infringement . . . where that party asserts as an essential element of its defense that it relied upon the advice of counsel, the party waives the privilege regarding communications pertaining to that advice."); *Cox* v. *Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1417 (11th Cir. 1994) ("[A] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes."); *Chevron Corp.* v. *Pennzoil Co.*, 974 F.2d 1156, 1162–63 (9th Cir. 1992) ("Pennzoil [could] not invoke the attorney-client privilege to deny Chevron access to the very information that Chevron must refute . . . ."); *United States* v. *Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) (per curiam) ("Selective disclosure for tactical purposes waives the privilege.").

privilege because "a party may not insist upon the protection of the privilege for damaging communications while disclosing other selected communications because they are self-serving" (quoting *Hoyas* v. *State*, 456 So. 2d 1225, 1229 (Fla. Dist. Ct. App. 1984))); *Moss* v. *State*, 925 So. 2d 1185, 1193 (La. 2006) (provider-patient privilege); *State* v. *Peseti*, 65 P.3d 119, 127–28 (Haw. 2003) (victim-counselor privilege); *Steiny*, 93 Cal. Rptr. 2d at 925 (trade secret privilege); *D.C.* v. *S.A.*, 687 N.E.2d 1032, 1040–41 (Ill. 1997) (mental health record privilege); *People* v. *Davis*, 637 N.Y.S.2d 297, 301 (Nassau Cty. Ct. 1995) (physician-patient privilege).

Such widespread acceptance testifies to the rule's connection to fundamental fairness and due process. See *Davis*, 415 U.S. at 318. Indeed, courts have expressly recognized that the fairness principles that drive the rule flow from basic due process values. *E.g.*, *Bittaker* v. *Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (en banc) ("In the intervening years [since *Blackburn*], courts and commentators have come to identify this simple rule as the fairness principle."); *John Doe Co.* v. *United States*, 350 F.3d 299, 302 (2d Cir. 2003) ("Forfeiture of this nature is justified by considerations of fairness to the adversary. In some circumstances, courts have ruled that it would be unfair for a party asserting contentions to an adjudicating authority to then rely on its privileges to deprive its adversary of access to material that might disprove or undermine the party's contentions."); *Steiny*, 93 Cal. Rptr. 2d at 925 ("When a party asserting a claim invokes privilege to withhold crucial evidence . . . the proponent of the claim must give up the privilege in order to pursue the claim. Where privileged information goes to the heart of the claim, fundamental fairness requires that it be disclosed for the litigation to proceed."); *Sugg* v. *Field*,

532 S.E.2d 843, 845–46 (N.C. App. 2000) ("This test involves weighing a party's privilege against self-incrimination against the other party's rights to due process and a fair trial." (citing *Cantwell* v. *Cantwell*, 427 S.E.2d 129, 130 (N.C. Ct. App. 1993))); *Pulawski* v. *Pulawski*, 463 A.2d 151, 157 (R.I. 1983) ("When the court deals with private litigants, the privilege against self-incrimination must be weighed against the right of the other party to due process and a fair trial. The shield of the privilege must not be converted into a sword." (citing *Brown* v. *United States*, 356 U.S. 148 (1958))). As Judge Learned Hand explained, "the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; . . . it should not furnish one side with what may be false evidence and deprive the other of the means of detecting the imposition." *United States* v. *St. Pierre*, 132 F.2d 837, 840 (2d. Cir. 1942).

2. Tennessee invoked its execution secrecy statute, Tenn. Code Ann. § 10-7-504(h)(1), to prevent petitioners from learning anything about the conversations between state officials and potential suppliers of pentobarbital. That was Tennessee's right. But a straightforward application of the sword-shield rule, one that complied with basic requirements of due process, should have precluded any state officials from offering testimony about whether the state reasonably could obtain pentobarbital from such suppliers. Such testimony necessarily deploys the state officials' right to *shield* their conversations with those suppliers as a *sword* to establish as a fact what those conversations purportedly revealed.

Respondents had a choice. They could maintain the privilege but give up the ability to offer testimony regarding the supposed unavailability of pentobarbital derived from the protected conversations, or they could assert that pentobarbital is unavailable and "waive

[the] privilege to the extent necessary to give [its] opponent a fair opportunity." *Bittaker*, 331 F.3d at 720. Instead, the Tennessee courts allowed the testimony, maintained the privilege, and treated the testimony as dispositive in the absence of "direct proof" to the contrary. Pet. App. 21a. The effect is an irrebuttable presumption of correctness in the testimony of state officials on a dispositive issue in contested litigation.

Depriving petitioners of the ability to put on case-critical evidence and then dismissing their claims for that very evidentiary shortfall is a quintessential violation of their core due process rights to be heard "at a meaningful time and in a meaningful manner," to be given "an effective opportunity to . . . confront[] any adverse witnesses," to "present[] [their] arguments and evidence," *Goldberg*, 397 U.S. at 267–68, and, "where governmental action [threatens] serious[] injur[y]," to exercise their "vital" right of cross-examination in an effort to "show that [the government's evidence] is untrue," *Greene*, 360 U.S. at 496–97. The ruling below leaves the State entirely in control of what evidence is available to a litigant.

The Tennessee Supreme Court offered no reason to deviate from the sword-shield rule in capital litigation only. As noted above, the rule has been applied to a variety of privileges in all manner of cases. And there is no good reason to treat capital litigation less favorably than other litigation, nor to give special status, above and beyond basic due process values, to the secrecy privilege that protects suppliers and procurers of lethal chemicals. *E.g.*, *Holden* v. *James*, 11 Mass. (9 Tyng) 396, 405 (1814) ("[T]he first principles of civil liberty[,] natural justice, and . . . the spirit of our constitution and laws," forbid "that any one citizen should enjoy privileges and advantages that are denied to all others under like circumstances.").

To begin, applying the sword-shield rule here would not necessarily undermine the state's interest in concealing the information at issue from the public. Sensitive information is shared in litigation routinely, and made subject to protective orders that both restrict public access and place litigants at risk of contempt sanctions for publicly disclosing it. See, *e.g.*, *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34–35 (1984) (observing that protective orders facilitate "[l]iberal discovery" to "assist[] in the preparation and trial . . . of litigated disputes" by safeguarding against public disclosure of sensitive information that would lead to "annoyance, embarrassment, [or] oppression"); *Mikron Indus. Inc.* v. *Tomkins Indus., Inc.*, 178 F.3d 1310, 1310 (Fed. Cir. 1998) (noting that purpose of protective order is to "facilitate discovery between competitors without compromising the integrity of proprietary information"). There is no reason why, as a condition of using this protected information as a sword to establish that pentobarbital is unavailable, the State should not be required to provide petitioners' counsel access to the relevant witnesses, *subject to an appropriate protective order*, as a matter of fundamental fairness.

Beyond that, the privilege at issue here protects the business interests of drug suppliers from consumer response to their participation in the controversial practice of executions. In so doing, the privilege seeks to maintain the state's ability to procure lethal chemicals for executions. See Pet. App. 128a–129a. There is no reason why those public interests should be deemed to trump basic due process values. *Clark*, 289 U.S. at 13 ("The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy."). Indeed, those public interests are not entitled to greater weight than the public in-

terests in full and frank communication between doctor and patient, or lawyer and client. *E.g.*, *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981) ("The attorney–client privilege is the oldest of the privileges . . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."); *Ariz. & N.M. Ry. Co.* v. *Clark*, 235 U.S. 669, 677 (1915) (observing, in weighing issues of waiver, that the patient-physician privilege is meant "to encourage full and frank disclosures to the medical adviser, by relieving the patient from the fear of embarrassing consequences"). Yet those are the effects of singling out this privilege as not subject to the sword-shield rule.

Moreover, as the American Bar Association has noted, even if a drug supplier faced criticism for providing products for use in an execution, such consumer-led, market-based feedback is "part and parcel of the American economic system. It is difficult to imagine other scenarios in which a business's concerns about the public's response to their activities would lead U.S. elected officials to conceal that business's identity from the public." Virginia E. Sloan et al., Am. Bar Ass'n, *Death Penalty Due Process Review Project: Report to the House of Delegates* 12 (2015).

Some courts have reasoned that nondisclosure cannot be surrendered because suppliers would face threats. *E.g.*, *West* v. *Schofield*, 460 S.W.3d 113, 128 (Tenn. 2015) (per curiam) ("Revealing the identities of the Participants, even subject to a protective order, creates a risk that the Participants would be deterred from performing their lawful duties."); *In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 237 (6th Cir. 2016) ("[D]isclosures would cause an undue burden on and prejudice Defendants by subjecting them to the risk of

harm, violence, and harassment and by making it difficult for them to obtain lethal-injection drugs."), *cert. denied sub nom. Fears* v. *Kasich*, 138 S. Ct. 191 (2017); *In re Mo. Dep't of Corr.*, 839 F.3d 732, 737 (8th Cir. 2016) (per curiam) ("[E]ven if M7's fears are unfounded, that does not change the fact that M7 has already declared a clear intention to cease supplying if M7's identity is disclosed"); *McGehee* v. *Tex. Dep't of Crim. Justice*, No. MC H-18-1546, 2018 WL 3996956, at *12 (S.D. Tex. Aug. 21, 2018) (refusing to permit discovery of supplier information "[b]ecause disclosure of the requested information would cause Texas' supplier to stop providing compounded pentobarbital, and real concerns exist about the possibility of inadvertent disclosure."); *Jordan* v. *Hall*, No. 3:15cv295, 2018 WL 1546632, at *11 (S.D. Miss. Mar. 29, 2018) ("[T]he inherent danger and hardship that would follow even an inadvertent disclosure convince the Court that it must protect the information at issue from discovery. For these reasons, the Defendants are entitled to withhold from discovery any material that would identify suppliers of lethal injection drugs or persons involved in the execution process."); *Guardian News & Media LLC* v. *Ryan*, No. CV-14-02363-PHX-GMS, 2017 WL 4180324, at *12 (D. Ariz. Sept. 21, 2017) (Arizona corrections official "testified of being shown an anonymous threat to a potential compounding pharmacy, threatening to ruin that pharmacy's business if the pharmacy did business with ADC"), *appeal docketed*, No. 17-17083 (9th Cir. Oct. 17, 2017). But studies reveal that fear to be unfounded even when the identities are widely disseminated, let alone in the context of discovery pursuant to a protective order. See, *e.g.*, Sloan, *supra*, at 12 (finding that no credible threats to drug manufacturers' safety have ever been verified).

Even more importantly, petitioners are not demanding public disclosure of the names of suppliers. They seek only the right to discovery from those suppliers and state procurement officials, subject to an appropriate protective order, *if* state officials choose to assert as a matter of fact that they have learned from suppliers or other officials that a lethal chemical is not available.

After all, the stakes in this litigation could not be higher. Cf. *United States* v. *Raddatz,* 447 U.S. 667, 696 (1980) (Marshall, J., dissenting) ("[A]s a matter of basic fairness, a person facing the prospect of grievous loss is entitled to relate his version of the fact to the official entrusted with judging its accuracy."). Unlike the prosaic insurance and patent disputes in which the sword-shield doctrine is routinely applied, capital plaintiffs like petitioners here contend that their impending executions will constitute cruel and unusual punishment under the Eighth Amendment. Access to the discovery and cross-examination they seek can make the difference between a lawful and a torturous death. Cf. *Arthur* v. *Dunn*, 137 S. Ct. 725, 729 (2017) (Sotomayor, J., dissenting from denial of certiorari) (observing that the law should not "bar a death-row inmate from vindicating a right guaranteed by the Eighth Amendment . . . if [he] can prove that the State plans to kill him in an intolerably cruel manner."). But the ruling below leaves the constitutionality of a method of execution resting entirely on an official's untested (and untestable) assertion that a given alternative is or is not available. That should not be the law. Accord *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369–70, (1886) ("When we consider the nature and the theory of our institutions of government, . . . they do not mean to leave room for the play and action of purely personal and arbitrary power.").

3. The issue presented is as urgent as it is important. There is growing evidence that the three-drug midazolam protocol—like the one currently implemented in Tennessee—is unconstitutionally painful. See *In re Ohio Execution Protocol Litig.*, 2:11-cv-1016-EAS-MRM, 2019 WL 244488, at *71 (S.D. Ohio Jan. 14, 2019) (denying preliminary injunction but observing that "[t]he case against midazolam is now much stronger [than it was in 2017]. We now know on the best expert testimony available that it does not have any analgesic effect. Moreover, we have good evidence that midazolam will cause the 'waterboarding' effects of pulmonary edema,"); Andrew Welsh-Huggins, *Gary Otte's Reaction to Death Drugs Wasn't Enough to Stop Execution, Judge Says*, Cleveland.com (Sept. 20, 2017), https://bit.ly/2sBdYgW (describing reports that Gary Otte was "conscious, crying, clenching . . . [his] hands, [and] heaving at the stomach" during his execution); Frank Green, *Pathologist Says Ricky Gray's Autopsy Suggests Problems with Virginia's Execution Procedure*, Rich. Times-Dispatch (July 7, 2017), https://bit.ly/2Hophh7 (describing autopsy results from Ricky Gray's execution as, according to a pathologist, "more often seen in the aftermath of a sarin gas attack than in a routine hospital autopsy," and indicating possibly a "severe" and "unbearable" experience of "panic and terror"); Ed Pilkington & Jacob Rosenberg, *Fourth and Final Arkansas Inmate Kenneth Williams Executed*, Guardian (Apr. 28, 2017), https://bit.ly/2Jwrmwr ("Eyewitnesses . . . reported that his whole body shook with 15 or 20 convulsions," in which "his body was described as 'shaking[,'] he lurched forwards quickly multiple times, and he moaned and groaned.").

On this point, it is notable that at the time of *Glossip*, only four states—Oklahoma, Arizona, Florida, and

Ohio—had ever used midazolam in an execution. 135 S. Ct. at 2745. Now, though a few other states have started experimenting with midazolam, all of the initial adopters have ceased using the drug. Oklahoma has not carried out an execution since *Glossip* after a moratorium was imposed because of systemic misconduct, and Arizona, Florida, and Ohio have affirmatively abandoned midazolam.[5] See, *e.g.*, Laura A. Bischoff, *Ohio Gov. Mike DeWine Stops Executions, Wants New Protocol*, Dayton Daily News (Feb. 19, 2019), https://goo.gl/uDYNcY (reporting that Ohio's governor, concerned that the midazolam protocol constitutes "cruel and unusual punishment," has halted all executions until a new method can be devised).

At the same time that midazolam's deficiencies are becoming more apparent, numerous states are invoking—and courts are enforcing—secrecy statues to prevent basic discovery and cross-examination in method-of-execution cases in the way Tennessee did here.[6] *E.g.*, *Ohio Execution Protocol Litig.*, 845 F.3d at 239–

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[5] Arizona has further abandoned use of a paralytic, *see* Stipulated Settlement Agreement at 4, *First Amendment Coal. of Ariz., Inc.* v. *Ryan*, No. 2:14-cv-01447-NVW (D. Ariz. June 21, 2017), ECF No. 186.

[6] At least 20 states have enacted such secrecy statutes. *See* Ark. Code Ann. § 5-4-617 (2015); Ariz. Rev. Stat. Ann. § 13-757 (2009); Fla. Stat. § 945.10 (2000); Ga. Code Ann. § 42-5-36 (2013); Idaho Admin. Code r. 06.01.01.135 (2011); Ind. Code § 35-38-6-1 (2017); La. Stat. Ann. § 15:570 (2012); Miss. Code Ann. § 99-19-51 (2016); Mo. Rev. Stat. § 546.720 (2007); Neb. Rev. Stat. § 83-967 (2009); N.C. Gen. Stat. §15-190 (2015); Ohio Rev. Code Ann. § 2949.221 (2015); Okla. Stat. tit. 22, § 1015 (2011); 61 Pa. Cons. Stat. § 4305(c) (2009); S.C. Code Ann. § 24-3-580 (2010); S.D. Codified Laws § 23A-27A-31.2 (2013); Tenn. Code Ann. § 10-7-504 (2013); Tex. Code Crim. Proc. Ann. art. 43-14 (2015); Va. Code. Ann. § 53.1-234 (2016); Wyo. Stat. Ann. § 7-13-916 (2015).

40 (upholding protective order to conceal from plaintiffs "the identity of drug sources" while acknowledging "due-process concern" of potentially "prevent[ing] Plaintiffs from knowing . . . the means by which Ohio obtained the lethal-injection drugs, and whether Ohio has complied with the manufacturing process (among other information)"); *Mo. Dep't of Corr.*, 839 F.3d at 737 (refusing to require disclosure under a protective order because "it is likely that active investigation of the physician, pharmacy, and laboratory will lead to further disclosure of the identities"); *Arthur* v. *Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1304-05 (11th Cir. 2016) (limiting discovery by requiring the State to produce only a "general description" of its efforts to obtain pentobarbital, identifying whether it had been successful in obtaining the drug, and, if not, why not).

The growing evidence of severe pain from a three-drug protocol including midazolam, taken together with the ubiquity of secrecy statutes, make it critical that this Court establish the fundamental ground rules of fair litigation concerning potential alternatives. Given the great importance to the public of the question presented, the prevalence of secrecy statutes, and the absence of a controlling opinion on the topic from this Court, review is warranted here.

Method-of-execution challenges are quintessentially matters of exceptional importance that reach "beyond the academic." See *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). Petitioner Donnie Johnson is scheduled to be executed on May 16, 2019. Petitioner Charles Wright is scheduled to be executed on October 6, 2019. And the other petitioners' executions will follow in due course because of this fundamentally flawed ruling unless this Court intervenes.

Further "percolation" in other courts is unlikely to facilitate this Court's later review. And it most assuredly will provide no relief for these petitioners facing excruciating executions. Given that only this Court can resolve on a national basis, in light of fundamental constitutional commitments, how execution secrecy statutes should impact litigation about executions, this Court should accept review now. The Tennessee ruling here provides an ideal opportunity to set the rules, and ensure that the litigation process can serve its function to prevent the infliction of cruel and unusual punishment.

II. THIS CASE IS A STRONG VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED.

The Tennessee Supreme Court's decision squarely presents the question at issue here. The dissent would have ruled in favor of petitioners on the same ground petitioners ask this Court to rule. There are no impediments to this Court reaching the issue.

Furthermore, there is especially good reason to believe that the discovery petitioners sought in this case would have been case dispositive. This is no fishing expedition. Petitioners had reason to believe that substantial offers to sell existed and wanted to follow up on specific leads to learn whether and how state officials responded. The State's PowerPoint raised substantial questions and the State officials' testimony, simply accepted by the Tennessee courts, provided far less than fully adequate answers. Rarely will the issue arise before this Court in such an obviously consequential posture.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KELLEY J. HENRY
AMY D. HARWELL
RICHARD TENNENT
KATHERINE DIX
OFFICE OF FEDERAL PUBLIC DEFENDER, MIDDLE DISTRICT OF TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047

KATHLEEN MORRIS
42 Rutledge Street
Nashville, TN 37210
(615) 242-3200

BRADLEY MACLEAN
1702 Villa Place
Nashville, TN 37212
(615) 943-8716

ROBERT N. HOCHMAN *
KELLY HUGGINS
EMILY A. ROSENBERG
SIDLEY AUSTIN LLP
One S. Dearborn Street
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

COLLIN P. WEDEL
SIDLEY AUSTIN LLP
555 W. Fifth Street
Los Angeles, CA 90013
(213) 896-6000

QAIS GHAFARY
CAITLIN MATHENY
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-8430

Counsel for Petitioners

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* Counsel of Record