

No. 18-8415

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IN THE SUPREME COURT OF THE UNITED STATES

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**John L. Lotter,**  
**Petitioner-Appellant,**

**v.**

**State of Nebraska,**  
**Respondent-Appellee.**

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
NEBRASKA SUPREME COURT

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REPLY BRIEF FOR PETITIONER

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## REPLY ARGUMENT

**1. Respondent's protestation that Nebraska is not an outlier state in terms of requiring judges, rather than a jury, to make the findings necessary to impose a death sentence blinkers reality.**

Despite Respondent's utterly baseless protestations, BIO at 2, it cannot escape the fact that Nebraska is an outlier in capital punishment: it is the only active death penalty state in the country to require judges, rather than a jury, to make the findings necessary to impose a death sentence. In his Petition for a Writ of Certiorari, Mr. Lotter methodically addresses, state-by-state, the rejection of judge-made determinations in capital sentencing to illustrate why Nebraska's capital sentencing scheme as a whole and Mr. Lotter's sentence in particular defy the national consensus and evolving standards of decency, in violation of the Eighth Amendment. Pet. at 2-3; 9-13. Respondent altogether fails to address or engage with these facts. Though Respondent may "dispute[] that Nebraska is currently alone" in leaving the findings necessary to impose the death penalty to judges rather than a jury, BIO at 2, Respondent identifies no facts or authority to support its bare assertion, nor presents any legal arguments on the point.

The facts are plain to see: After *Hurst v. Florida*, 136 S. Ct. 616 (2016), Nebraska remains the only active death penalty state that places the ultimate determination of whether to impose a sentence of death exclusively in the hands of judges. Every state in the nation except Nebraska (and functionally abolitionist Montana) has abandoned the practice, including three states in the past three years. Pet. at 9-13. Every other active death penalty state that previously permitted

judge-only determinations of facts necessary to impose the death penalty have switched to jury-only sentencing. *Id.* All of these states have thus recognized that jurors, not judges, are uniquely capable of “express[ing] the ‘conscience of the community on the ultimate question of life or death,’” *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and determining what punishment is appropriate for a specific case. Certiorari should be granted on this important Eighth Amendment question.

**2. The questions presented have not previously been presented to this Court by Petitioner.**

Respondent offers as a reason to deny certiorari in this case that “Lotter’s same *Hurst*-based constitutional claims were denied certiorari a year ago upon review of federal habeas denial.” BIO at 6. This is incorrect. While Mr. Lotter did file a previous petition for certiorari following the federal habeas court’s denial of his habeas petition, that petition for certiorari raised only procedural issues relating to the federal court’s handling of his habeas petition and did not raise the substantive constitutional questions presented here.

Specifically, Mr. Lotter’s prior petition asked this Court to grant certiorari only on the question of whether the federal district court’s denial with prejudice of his habeas petition on the ground that he had not obtained authorization from the Court of Appeals to file a “second or successive” petition deprived the district court of jurisdiction to determine the merits of the habeas petition and required the court in the interests of justice to transfer the case to the Court of Appeals. *See Lotter v. Frakes*, No. 17-6602 (Petition for a Writ of Certiorari filed October 30, 2017). Clearly, these procedural questions are entirely different than the questions



presented here, which go to the heart of the substantive constitutional violations of Nebraska law and Mr. Lotter's judge-imposed death sentence under the Sixth, Eighth, and Fourteenth Amendments.<sup>1</sup>

**3. The questions presented were timely presented to and considered by the Nebraska Supreme Court.**

Respondent also misrepresents the record by arguing that the Nebraska Supreme Court did not consider Mr. Lotter's Eighth Amendment and *Hurst*-related claims because they were untimely. BIO at 4. However, this is patently untrue as the Nebraska Supreme Court found that Mr. Lotter timely appealed the district

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<sup>1</sup> Indeed, Respondent also fails to address the constitutionality of Nebraska law and Mr. Lotter's death sentence under the Sixth Amendment and *Hurst*, beyond noting that under the current version of Nebraska's statute a jury must find aggravating factors beyond a reasonable doubt, BIO at 2 -- an argument that was rejected in *Hurst* itself. 136 S. Ct at 622, 624 (rejecting Florida's argument that the Sixth Amendment was satisfied by the jury's finding of at least one aggravating circumstance beyond a reasonable doubt, since determinations regarding the sufficiency of the aggravating circumstances and the relative weight of aggravating and mitigating circumstances were also factual findings necessary to impose a death sentence under Florida's law). But Respondent entirely misses the threshold issue. It is simple: (1) *Hurst* held that a jury must find each fact necessary to impose a sentence of death; (2) the Nebraska capital sentencing statute, Neb. Rev. Stat. § 29-2522, requires a panel of judges to make three determinations without which a defendant cannot be sentenced to death; (3) thus, the Nebraska capital sentencing scheme is invalid. While Mr. Lotter was sentenced under the previous statute, in which judges also made the finding of the existence of aggravating circumstances, the additional findings that are relevant to Mr. Lotter's *Hurst* claim are the same in both the former and current statute. The fact that Mr. Lotter is one of a tiny fraction of death-sentenced inmates to be sentenced entirely by judges only heightens the egregious and unique nature of his sentence in particular.

court's denial of his Sixth and Eighth Amendment claims and proceeded to address them. Pet.App. A, slip op. at 125, 132.<sup>2</sup>

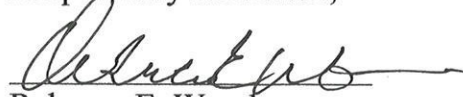
### CONCLUSION

For the foregoing reasons and for the reasons set forth in Mr. Lotter's Petition for a Writ of Certiorari, this Court should grant certiorari.

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<sup>2</sup> Respondent also argues that Mr. Lotter's Eighth Amendment claim was labelled as "claim 2" and that "Lotter did not timely appeal the trial court's denial of claim 2" and so "the Nebraska Supreme Court did not consider it." BIO at 4. Again, this is factually inaccurate. The Nebraska Supreme Court identified and considered Mr. Lotter's *Hurst*-related claims as "Claim 1," which was timely appealed from the district court's denial. Pet.App. A, slip op. at 125, 132. It appears the Respondent is confusing Mr. Lotter's claims presented to the Nebraska Supreme Court. "Claim 2" involved an unrelated claim concerning the death qualification of Mr. Lotter's jury, and that was the claim that the Nebraska Supreme Court found to be untimely. *Id.* at 132, 134.

Respectfully submitted,



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