No. 19-697

IN THE

Supreme Court of the United States

JAMES DWIGHT PAVATT,
Petitioner,

v.

TOMMY SHARP, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF MEMBERS OF THE OKLAHOMA DEATH PENALTY REVIEW COMMISSION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

TEJINDER SINGH
Counsel of Record
CHARLES H. DAVIS
ERICA OLESZCZUK EVANS
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

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INTEREST OF *AMICI CURIAE*[*]

Amici curiae are members of the Oklahoma Death Penalty Review Commission, a diverse group of Oklahomans who studied the death penalty in Oklahoma after a grand jury identified serious flaws with the State's administration of capital punishment. They are:

- Brad Henry, the 26th Governor of Oklahoma and Of Counsel at Spencer Fane LLP;
- Andy Lester, Partner at Spencer Fane LLP;
- Robert H. Alexander, Jr., of The Law Office of Robert H. Alexander, Jr., p.c.;
- Howard Barnett, Jr., President of Oklahoma State University-Tulsa;
- Andrew M. Coats; Dean Emeritus and Arch B & Joanne Gilbert Professor of Law at University of Oklahoma College of Law;
- Valerie Couch; Dean Emeritus and Norman & Edem Professor of Law at Oklahoma City University School of Law, former magistrate judge in the Western District of Oklahoma;
- Kris Steele, former speaker of the Oklahoma House of Representatives and Executive Director of The Education and Employment Ministry;

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[*] Pursuant to Supreme Court Rule 37, counsel for *amici* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties were timely notified of *amici*'s intention to file this brief, and all parties consented.

- Gena Timberman, Director of the Native American Cultural & Educational Authority.

In March 2017, after more than a year of study, the Commission published its report on the death penalty in Oklahoma. The report is a detailed 272-page document making evidence-based observations and recommendations, including a unanimous recommendation that the State's moratorium on the death penalty be extended indefinitely due to grave concerns about the administration of capital punishment in Oklahoma. *See The Report of the Oklahoma Death Penalty Review Commission* vii (2017), https://archive.constitutionproject.org/wp-content/uploads/2017/05/OKDPRC_Final.pdf (*Commission Report*).

Among the issues the Commission considered were whether the death penalty was truly being applied only to the worst offenders. *See Commission Report* at vii, 141. The Commission thus evaluated the State's list of aggravating circumstances, including the "heinous, atrocious, or cruel" factor at issue here, and noted how important it was for courts in Oklahoma to limit the requirement to "torture or serious physical abuse," as the Oklahoma Court of Criminal Appeals (OCCA) did after this Court's decision in *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988), which held Oklahoma's statute was too vague to withstand Eighth Amendment scrutiny without a limiting construction. *See Commission Report* at 152.

As the petition makes clear, the OCCA has now adopted a broad interpretation of the "heinous, atrocious, or cruel" aggravator, and its application in this case illustrates how far Oklahoma's courts have strayed from the original narrowing construction. By holding that the aggravator could be satisfied any time

a victim does not die instantaneously, the OCCA construed the statute to apply in the vast majority of murders—and opened the door to arbitrariness by basing capital punishment determinations on chance events.

Amici believe that the Tenth Circuit's panel decision correctly found the application of this aggravating circumstance unconstitutional as-applied to petitioner, and that the Tenth Circuit's *en banc* decision upholding petitioner's death sentence warrants reversal—either summarily as proposed in the first question presented, or after plenary review as proposed in the second question.

SUMMARY OF ARGUMENT

First, the Court should grant certiorari to ensure that an unconstitutional execution does not occur. A panel of the Tenth Circuit held that petitioner's death sentence violated the Eighth Amendment, and the *en banc* decision did not question the merits analysis, but instead vacated it based on a procedural default argument that was explicitly waived by the State. Absent this Court's intervention, petitioner will be executed based on the application of a law that has been deemed unconstitutional by the highest federal court to consider it. That result is flatly inconsistent with basic principles of justice, and certiorari is warranted to prevent that outcome alone.

Second, the Eighth Amendment question warrants this Court's review. For decades, this Court's precedents have required statutory aggravators to be specific, and to distinguish in a principled way between offenders who deserve the death penalty and those that do not. Oklahoma's interpretation of the "especially heinous, atrocious, or cruel" aggravator, which

allows an execution any time the victim does not die instantaneously, is contrary to those precedents.

Oklahoma's position also undermines uniformity in the law on multiple levels. As the petition makes clear, the application of this and similar aggravators implicates a split among State courts of last resort and federal courts of appeals. But more fundamentally, Oklahoma's interpretation would allow factually indistinguishable cases to be decided differently—when life and death are on the line. This Court should grant certiorari to ensure that the States, and juries within those States, have clear guidance about how the death penalty works.

Finally, it is important to address this issue in Oklahoma, and to address it now. As the Commission's report establishes, the administration of the death penalty in that State raises grave concerns. The State's interpretation of the "especially heinous, atrocious, or cruel" aggravator is a significant cause for concern, and correcting the State courts' error is important to all of the people of Oklahoma, including accused offenders, victims and their families, and the judicial system.

ARGUMENT

I. IT WOULD BE MANIFESTLY UNJUST FOR THIS COURT TO PERMIT PETITIONER'S UNCONSTITUTIONAL EXECUTION.

It would be alarming for this Court to permit the State to execute petitioner without further review after a panel of federal judges found his sentence unconstitutional. The last word on the merits in this case came from the panel, which held unequivocally that

"the OCCA no longer construes 'conscious physical suffering' so that it distinguishes in a principled way between crimes deserving death and the many cases in which the death penalty is not imposed." Pet. App. 102a. Recognizing that this Court's precedents in *Maynard v. Cartwright*, 486 U.S. 356 (1988), and *Godfrey v. Georgia*, 446 U.S. 420 (1980) (plurality opinion), demand more, the panel held that petitioner's sentence violates the Eighth Amendment. Pet. App. 101a-02a. The *en banc* court did not revisit that determination—and so even though the panel opinion has been vacated, it casts grave doubt on the State's decision to seek death here. That is especially true here because the *en banc* court's procedural holding is clearly erroneous, and rests on an argument that the State explicitly waived.

This Court is the pinnacle of our system of justice, and its actions send important signals to courts, governments, and the people about the meaning of justice in America. Those signals are amplified in capital cases because the stakes are so high. If this Court denies review in this case, it will send the disturbing message that the Court is willing to allow States to execute citizens based on laws that have been deemed cruel and unusual by the highest courts to consider them. That outcome would be tragic—not only for petitioner, but for our system of justice as a whole. The Court should grant certiorari to stave it off.

II. OKLAHOMA'S CONSTRUCTION OF ITS "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATOR CONTRAVENES THIS COURT'S PRECEDENTS AND UNDERMINES UNIFORMITY IN THE LAW OF CAPITAL PUNISHMENT.

This Court's precedents stress that "[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (quotation marks omitted). Committing murder is not enough to warrant a death sentence; there must be more. *See Atkins v. Virginia*, 536 U.S. 304, 319 (2002); *Godfrey*, 446 U.S. at 433 (plurality opinion). Loose eligibility criteria create an unacceptable risk that the death penalty will arbitrarily be imposed on some offenders, but not others who committed similar crimes. Indeed, there is a high probability that a process without sufficient principled guidance would become infected with bias that has nothing to do with an offender's culpability.

To prevent such injustice, and the constitutional consequences that would follow, it is essential that a State provide clear and principled guidance to sentencing juries. *See Gregg v. Georgia*, 428 U.S. 153, 192 (1976) (opinion of Stewart, J.). Most States that still apply the death penalty use aggravating factors to narrow the scope of eligible offenses. But in order to perform their constitutional function, aggravators must themselves provide adequate and principled guidance to the jury, and must "reasonably justify the imposi-

tion of a more severe sentence on the defendant compared to others found guilty of murder." *See Zant v. Stephens*, 462 U.S. 862, 877 (1983).

Thus, in *Godfrey*, this Court struck down the application of a statutory aggravating factor for murders that were "outrageously or wantonly vile, horrible and inhuman" because it determined that "[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence," and because the application of the aggravator in that case provided "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 428, 433 (plurality opinion).

In *Maynard*, this Court applied *Godfrey* to strike down the very statutory aggravator at issue in this case: Oklahoma's "especially heinous, atrocious, or cruel" aggravator. The Court explained that "the language of the Oklahoma aggravating circumstance at issue—'especially heinous, atrocious, or cruel'—gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in *Godfrey*," and was constitutionally deficient for the same reason: "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous,'" and the statute accordingly did not cabin the jury's sentencing discretion in any principled way. 486 U.S. at 363-64.

The Court also rejected the argument that a statutory aggravating circumstance is "unconstitutionally vague only if there are no circumstances that could be said with reasonable certainty to fall within reach of

the language at issue." *Maynard*, 486 U.S. at 361. Instead, the Court demanded greater certainty, requiring aggravating circumstances that "channel[] and limit[] . . . the sentencer's discretion in imposing the death penalty [a]s a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Id.* at 362.

The Court recognized, however, that while the case had been pending, the OCCA had adopted a narrowing construction of the aggravator, holding that it applied only "to those murders in which torture or serious physical abuse is present." *Maynard*, 486 U.S. at 365 (citing *Stouffer v. State*, 742 P.2d 562 (Okla. Crim. App. 1987)). The Court acknowledged lower court cases upholding similar constructions elsewhere, and remanded for the Oklahoma courts to consider the issue in the first instance.

As of 1995, Oklahoma courts held that in order to be "especially heinous, atrocious or cruel," a murder must have been "preceded by torture or serious physical abuse, which may include the infliction of either great physical anguish or extreme mental cruelty." *Cheney v. State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995). The court explained that in order to constitute mental cruelty, torture "must be the result of intentional acts by the defendant. The torture must produce mental anguish in addition to that which of necessity accompanies the underlying killing." *Ibid*.

By 2001, the Oklahoma courts had "begun to blur the common understanding of the requisite torture and conscious serious physical suffering, more and more often finding the existence of these elements in almost every murder." *Romano v. Gibson*, 239 F.3d 1156, 1176 (10th Cir. 2001); *see also Thomas v. Gibson*,

218 F.3d 1213, 1228 n.17 (10th Cir. 2000) (noting that application of the aggravator when the only evidence of torture was that the victim suffered multiple injuries raised grave constitutional questions); *Medlock v. Ward*, 200 F.3d 1314, 1324 (10th Cir. 2000) (Lucero, J., concurring) (arguing that it would be unconstitutional to find the aggravator met "based merely on the brief period of conscious suffering necessarily present in virtually all murders").

Oklahoma's permissive approach to this aggravator reached its nadir in this case. As recounted in the petition (at 6), petitioner allegedly shot the victim twice. The victim, however, did not die "instantaneously." *Ibid.* (citation and alteration omitted). Instead, he survived for an unknown amount of time; perhaps up to five minutes. There was no evidence of any intent to torture or prolong the victim's death, and the victim's suffering upon being shot did not appear to be uniquely painful or debased. Nonetheless, a jury found that the State had established the aggravating circumstance on these facts, and the OCCA agreed, holding that it was enough that the victim had not died instantaneously. At this point in time, all parties agree that the State wants the ability to use the "especially heinous, atrocious, or cruel" aggravator whenever death is not instantaneous.

By acceding to that position, the OCCA departed from an acceptable narrowing construction. *See* Pet. App. 373a. As the *en banc* dissent recognized, under the OCCA's interpretation, "conscious physical suffering" would simply be "the natural consequence of being murdered" except in rare circumstances. *Id.* at 60a; *see also id.* at 61a ("In other words, the very act of commit-

ting the murder makes one eligible for the death penalty unless the victim was rendered unconscious immediately upon receiving the fatal blow."). This matters because a broad interpretation of the aggravator invites arbitrariness. A defendant who avoids this aggravator because the victim dies immediately upon being shot receives a "sharpshooter bonus," which makes no sense because the quality of a shooter's aim has nothing to do with his culpability. *Id.* at 62a. In other situations, a victim might die instantaneously purely by luck—but "luck" is simply another way of saying that the aggravating circumstance is "wholly arbitrary and capricious." *Godfrey*, 446 U.S. at 427 (plurality opinion) (citation omitted). Accordingly, the OCCA's construction provides "no principled way to distinguish" the few cases in which the death penalty will be imposed "from the many cases in which it was not" imposed. *Id*. at 433.

The OCCA's decision also necessarily undermines uniformity in the law of capital punishment. As petitioner explains, there is a split among States and circuits over the application of this and similar aggravators. Pet. 28-31. More pointedly, Oklahoma's rule itself promotes disuniformity in capital sentencing. It opens the door to arbitrary and capricious determinations about when to impose the death penalty, making it highly likely that factually indistinguishable cases will be decided differently. *See* Pet. 32-33. Similarly, identical crimes in different States with the same aggravating circumstance will result in differential application of capital punishment. Pet. 28-30. When statutory aggravators fail to provide the necessary guidance, juries may begin to sentence defendants to death

for reasons entirely divorced from the crimes committed—including racial bias, socioeconomic bias, and bias toward individuals with mental illness.

That disuniformity and potential for bias is contrary to this Court's "controlling objective" in cases about whether eligibility factors for capital punishment are unconstitutionally vague, which is to ensure consistency. *Tuilaepa v. California*, 512 U.S. 967, 973 (1994). This Court spent decades "articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition in the case of capital murder." *Kennedy v. Louisiana*, 554 U.S. 407, 440 (2008). But it has been too long since *Godfrey* and *Maynard*, and at least some States seem to have reacted to loosening oversight from this Court by expanding the scope of aggravating circumstances, culminating in the OCCA's unconstitutional view that any intentional killing that does not render the victim immediately dead or unconscious is eligible for capital punishment. This Court should grant certiorari to restore uniformity in the law and provide necessary guidance to the States.

III. THIS COURT SHOULD ADDRESS OKLAHOMA'S BROAD CONSTRUCTION OF THE STATUTORY AGGRAVATOR.

Finally, it is particularly important to address this issue in Oklahoma, and to address it now. As the Commission's Report observed, "Oklahoma has the highest execution rate per capita of any state in the modern era of capital punishment." *Commission Report* at 7. Moreover, although this Court "has emphasized that the death penalty should be applied only to 'the worst of the worst,'" a "review of the evidence demonstrates

that the death penalty" in Oklahoma has not been imposed "fairly, consistently, and humanely, as required by the federal and state constitutions. These shortcomings have severe consequences for the accused and their families, for victims and their families, and for all citizens of Oklahoma." *Id*. at vii.

In other words, Oklahoma currently lacks important safeguards to ensure that the death penalty is implemented in a manner consistent with this Court's precedents and the requirements of the Constitution—and it needs federal guidance to remedy that issue. This case is a perfect place to intervene, because this specific aggravator "is a commonplace in Oklahoma death-penalty cases." Pet. App. 68a.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

TEJINDER SINGH
Counsel of Record
CHARLES H. DAVIS
ERICA OLESZCZUK EVANS
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
tsingh@goldsteinrussell.com

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