

**SUPREME COURT OF THE UNITED STATES**

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MARCO ENRIQUE TORRES,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

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**On Petition for Writ of Certiorari  
To the Nebraska Supreme Court**

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**BRIEF IN OPPOSITION**

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**CAPITAL CASE**

**QUESTION PRESENTED**

Whether the Petitioner's constitutional claims of due process, equal protection, cruel and unusual punishment, and a bill of attainder were violated when the Nebraska Supreme Court decided an issue of state law by concluding that the Petitioner's prior existing death penalty was remained in effect and unchanged when Nebraska voters, by Nebraska's state constitutional referendum process, repealed the state legislature's attempt to repeal the death penalty before the legislature's repeal act went into effect.

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## CONSTITUTIONAL PROVISIONS INVOLVED

### Nebraska State Constitution

Neb. Const. art. III, § 1 states:

The legislative authority of the state shall be vested in a Legislature consisting of one chamber. The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, which power shall be called the power of initiative. *The people also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature, which power shall be called the power of referendum.*

(Emphasis added.)

Neb. Const. art. III, § 3 states, in relevant part:

The second power reserved is the referendum which may be invoked, by petition, against any act or part of an act of the Legislature, except those making appropriations for the expense of the state government or a state institution existing at the time of the passage of such act. Petitions invoking the referendum shall be signed by not less than five percent of the registered voters of the state, distributed as required for initiative petitions, and filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to be referred was passed shall have adjourned sine die or for more than ninety days. Each such petition shall set out the title of the act against which the referendum is invoked and, in addition thereto, when only a portion of the act is sought to be referred, the number of the section or sections or portion of sections of the act designating such portion. No more than one act or portion of an act of the Legislature shall be the subject of each referendum petition. When the referendum is thus invoked, the Secretary of State shall refer the same to the electors for approval or rejection at the first general election to be held not less than thirty days after the filing of such petition.

*When the referendum is invoked as to any act or part of act . . . by petition signed by not less than ten percent of the registered voters of the state*

distributed as aforesaid, *it shall suspend the taking effect of such act or part of act until the same has been approved by the electors of the state.* (Emphasis added.)

## **STATEMENT OF THE CASE**

A jury convicted the Petitioner Marco Torres in 2009 of two counts of first degree murder. Torres was sentenced to death for each of the murders. Torres' convictions and death sentences were affirmed on direct appeal by the Nebraska Supreme Court. *State v. Torres*, 812 N.W.2d 213 (Neb. 2012), *cert. denied*, 568 U.S. 871 (2012).

Torres later sought postconviction relief to collaterally attack his convictions and death penalty sentences for alleged constitutional violations by three successive state court postconviction proceedings. All three postconviction proceedings resulted in the denial of postconviction relief as affirmed by the Nebraska Supreme Court. *State v. Torres*, 894 N.W.2d 191 (Neb. 2017) (denied claims of ineffective assistance of counsel and due process prosecutor misconduct); *State v. Torres*, 915 N.W.2d 596 (Neb. 2018) (denied 6<sup>th</sup> Amendment *Hurst* and due process jury sentencing claims in second successive postconviction proceeding); *State v. Torres*, 936 N.W.2d 730 (Neb. 2020) (third successive postconviction appeal and subject of current cert. petition) (Pet. App. 002-006).

Contrary to the repeated factual misstatements in Torres' certiorari petition, Torres' death sentences were not "re-imposed" nor "affirmed" by Nebraska voters by the Nebraska voter referendum procedure. Torres' factual misstatements in this regard ignore the Nebraska Supreme Court's explanation of Nebraska's legislative and state constitutional voter referendum procedure for the enactment and effective date of legislation. As consistently explained by the Nebraska Supreme Court in three separate death penalty cases, including Torres' case, the Nebraska Legislature's attempt to repeal Nebraska's statutory death penalty provisions "never went into effect" because Nebraska voters rejected the Legislature's repeal effort by a statewide voter referendum when the Legislature's repeal effort was suspended by Nebraska's state referendum process. See, *State v. Torres* (Pet. App. 004-005); *State v. Jenkins*, 931 N.W.2d 851, 879 (Neb. 2019); *State v. Mata*, 934 N.W.2d 475, 480 (Neb. 2019). In short, Torres' death sentences have remained in effect since the Nebraska Supreme Court affirmed his murder and death sentences eight years ago in 2012.

The Nebraska Supreme Court explained Nebraska's voter referendum process that resulted in Nebraska voters rejecting the Legislature's attempt to repeal the death penalty as follows:

In May 2015, the Nebraska Legislature passed 2015 Neb. Laws, L.B. 268—which abolished the death penalty in Nebraska—and then overrode the Governor’s veto of the bill. The Legislature adjourned sine die on May 29. Because L.B. 268 did not contain an emergency clause, it was to take effect on August 30.

Following the passage of L.B. 268 [Legislature’s act to repeal the death penalty], opponents of the bill sponsored a referendum petition to repeal it. On August 26, 2015, the opponents filed with the Nebraska Secretary of State signatures of approximately 166,000 Nebraskans in support of the referendum. On October 16, the Secretary of State certified the validity of sufficient signatures. Enough signatures were verified to suspend the operation of L.B. 268 until the referendum was approved or rejected by the electors at the upcoming election. During the November 2016 election, the referendum passed and L.B. 268 was repealed, that is, in the language of the constitution, the act of the Legislature was “reject[ed].”

...

We conclude that upon the filing of a referendum petition appearing to have a sufficient number of signatures, operation of the legislative act is suspended so long as the verification and certification process ultimately determines that the petition had the required number of valid signatures. . . . Accordingly, the filing of petitions on August 26, 2015—prior to the effective date of L.B. 268—suspended its operation until Nebraskans effectively rejected the bill by voting to repeal it. . . . L.B. 268 never went into effect . . . .

*State v. Jenkins, supra*, at 876–79.

The state postconviction proceeding did not establish as true any of Torres’ certiorari petition’s descriptions of a voter “referendum campaign” with “inflammatory video advertisements”, “highly politicized and emotional ads”, and “significant inflammatory media targeted at Mr. Torres” that resulted in Torres being subjected to “extreme psychological and emotional harm”. Torres’ allegations were never proven or found to be true by any court. Rather, they

are merely Torres' state postconviction proceeding allegations. (Pet. App. 004 and 006 – Per the Nebraska Supreme Court explanation of “insufficiency of allegations” and that Torres “failed to allege sufficient facts that demonstrate a violation of his constitutional rights”.)

Finally, Torres has a pending federal habeas proceeding in the United States District Court for the District of Nebraska in which he has made the same constitutional claims challenging his death sentences that he raises by his current certiorari petition. See, *Torres v. Frakes*, D.Neb., case #4:17-cv-03078 (ECF/Pacer filing no. 28). The Nebraska federal district court has entered orders staying its federal habeas proceeding in view of Torres' current certiorari petition with the requirement that counsel notify the federal court within 14 days whether this Court grants or denies Torres' certiorari petition. (*Id.*, orders at filing nos. 37 and 40). Thus, the Nebraska Supreme Court's decision that is the subject of Torres' is already pending for lower federal court habeas review.

## **ARGUMENT: REASONS FOR DENYING THE PETITION**

### **1. Rule 10: No federal question.**

Torres' constitutional claims rest on the foundation of a matter of state law, not federal law. The Nebraska Supreme Court has the final authority to determine whether, under the Nebraska Constitution, the state legislature's

act in repealing the death penalty had been repealed itself by Nebraska citizens using the state constitutional referendum process.

Nebraska's constitutional provisions concerning the death penalty voter referendum and how they operate were explained by the Nebraska Supreme Court in *State v. Jenkins, supra*. The Nebraska Constitution's provisions on voter referendums can be found in the Constitutional Provisions prior to the Statement of the Case in this brief. The Nebraska Supreme Court has consistently construed the issue of state law and held that the legislature's act in attempting to repeal the death penalty never went into effect because the state voter referendum repealed the legislature's act before it became effective.

(Pet. App. 004-005)

Because Torres' constitutional claims depend on a matter of state law construed by Nebraska's highest court concerning the Nebraska process for enacting or rejecting legislation that was attempted by its State legislature, there is no federal constitutional question. See, *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." "This proposition, fundamental to our system of federalism, is applicable to procedural as well as substantive rules."); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672-73

(1976) (“The reservation of . . . power . . . continues to this day in some States as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision.”)

**2. No Rule 10 conflict among courts.**

There is no Rule 10(b) conflict among the Circuit Courts nor has any “state court of last resort decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals”.

Torres’ petition cites no such conflict. Any attempt by Torres to create a conflict involves citing only general principles stated by the courts with no actual conflict showing that the Circuit Courts or any state court of last result have reached different results when addressing the very same issue. This is because Torres’ questions presented are based on a matter of state law decided by Nebraska’s highest court by application of the unique language of the Nebraska state constitution.

Rule 10(c) further provides for certiorari consideration when “a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.” Rather than showing any actual conflict with relevant decisions of this Court, Torres’ petition argues for a remarkable

suppression and muzzling of the First Amendment right of free speech for a public election dialogue on the issue of whether to repeal or retain the death penalty as a lawful sentence for first degree murder. Such a free speech suppression is contrary to fundamental free speech principles that are well established by this Court’s precedent. Additionally, Torres argues, only by allegations, that a voter referendum with corresponding public debate and media articles were cruel and unusual punishment by subjecting him to extreme emotional distress. Torres’ argument failed to mention *Glossip v. Gross*, 576 U.S. 863 (2015), which relied on this Court’s precedent to conclude that “because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain” and “[h]olding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.” If an inmate’s emotional distress by public debate over the eliminating the death penalty by voter referendum sufficed to constitute cruel and unusual punishment, the voters’ ultimate decision would become meaningless by the mere fact of having a voter election decision on the issue. There is no precedent by this Court supporting such an argument.

**3. Prior cert. denial of due process claim in another case.**

This Court recently denied certiorari in *Mata v. Nebraska*, in which the petitioner Mata raised a due process claim similar to the claim Torres now raises concerning Nebraska's voter referendum rejection of the Nebraska Legislature's attempt to repeal the death penalty. See, *Mata v. Nebraska*, No. 19-8045, 2020 WL 3492696, at \*1 (U.S. June 29, 2020). The recent certiorari denial in Mata is an indication of a lack of conflict among the Circuit Courts, state courts, and this Court on Torres' due process claim.

**4. Torres' pending federal court habeas proceeding.**

As explained at the end of the Statement of the Case in this brief, there is a pending stayed federal habeas proceeding in the United States District Court for the District Court of Nebraska involving the same constitutional claims made by Torres that he makes in his certiorari petition. Thus, Torres will be able to pursue federal judicial review by lower courts of his constitutional claims concerning his death penalty sentences. This Court should allow the federal habeas process to be completed without the need to grant certiorari at this point.

## CONCLUSION

The Respondent State of Nebraska requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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