

No. 20-827

In the **Supreme Court of the United States**

UNITED STATES OF AMERICA, *Petitioner*,

v.

ZAYN AL-ABIDIN MUHAMMAD HUSAYN,
A.K.A. ABU ZUBAYDAH, ET AL., *Respondents*.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**Brief for *Amici Curiae* National Religious Campaign
Against Torture; Church of the Brethren, Office of
Peacebuilding and Policy; General Synod of the
United Church of Christ; National Advocacy Center
of the Sisters of the Good Shepherd; Congregation
of Our Lady of Charity of the Good Shepherd, U.S.
Provinces; Alliance of Baptists; Friends Committee
on National Legislation; Maryknoll Office for Global
Concerns; and Reconstructionist Rabbinical
Association in Support of Respondents
and Affirmance**

ANNA M. GREVE
BRIAN A. MORRIS
TAFT STETTINIUS &
HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202

VIVEK R. HADLEY
TAFT STETTINIUS &
HOLLISTER LLP
One Indiana Square, Suite 3500
Indianapolis, Indiana 46204

MICHAEL K. ROBERTSON
JONATHAN N. OLIVITO
DAVID J. BUTLER
Counsel of Record
TAFT STETTINIUS &
HOLLISTER LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43206
(614) 334-6167
dbutler@taftlaw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

INTEREST OF *AMICI CURIAE*. 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. AMERICA IS COMPRISED OF A DIVERSE
FABRIC OF RELIGIONS 8

II. OUR RELIGIOUS TRADITIONS SHARE A
COMMON BELIEF IN HUMAN DIGNITY
AND AN OBJECTION TO TORTURE. 13

 A. Religions share the core belief that
 human life is sacred. 14

 B. Torture conflicts with the human dignity
 rooted in all religions 16

 C. Churches of all faiths call for
 governments to end torture 18

III. OUR RELIGIOUS TRADITIONS SHARE A
COMMON BELIEF IN REDEMPTION
THROUGH CONFESSION. 22

IV. THE RELIGIOUS OBJECTIONS TO
TORTURE AND BELIEF IN CONFESSION
ARE REFLECTED IN OUR SECULAR
LEGAL TRADITIONS. 27

CONCLUSION. 35

TABLE OF AUTHORITIES

CASES

<i>Carmona v. Ward</i> , 576 F.2d 405 (2d Cir. 1978)	28
<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976).	28
<i>Frank v. Maryland</i> , 359 U.S. 360 (1959).	31
<i>Furman v. Georgia</i> , 408 U.S. 238 (1972).	29, 30, 34
<i>In re Kemmler</i> , 136 U.S. 436 (1890).	28
<i>Marcus v. Search Warrant</i> , 367 U.S. 717 (1961).	31
<i>Maryland v. Shatzer</i> , 559 U.S. 98 (2010).	32
<i>McNeil v. Wisconsin</i> , 501 U.S. 171 (1991).	32
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015).	27, 34
<i>Olmstead v. United States</i> , 277 U.S. 438 (1928).	30, 31
<i>Powell v. Allstate Ins. Co.</i> , 655 So. 2d 354 (Fla. 1995)	27
<i>Schmerber v. California</i> , 384 U.S. 757 (1966).	31

<i>Stack v. Boyle</i> , 342 U.S. 1 (1951)	30
<i>Stanford v. Texas</i> , 379 U.S. 476 (1965)	31
<i>State v. Johnson</i> , 294 A.2d 245 (N.J. 1972)	30
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958)	28, 29
<i>Ullmann v. United States</i> , 350 U.S. 422 (1956)	30, 31
<i>United States v. Ferrara</i> , 771 F. Supp. 1266 (D. Mass. 1991)	27
<i>Wilkerson v. Utah</i> , 99 U.S. 130 (1878)	28
CONSTITUTION	
U.S. Const. amend. IV	31
U.S. Const. amend. V	30, 31, 32
U.S. Const. amend. VIII	28, 29, 30
TREATIES	
<i>The Geneva Convention</i> , Art. 3(1)(a) (Aug. 12, 1949)	22
SENTENCING GUIDELINES	
U.S.S.G. § 3E1.1	32

OTHER AUTHORITIES

- 2 *Institutes of the Christian Religion* 91, tr. John Allen, 6th American ed. (Philadelphia 1936). . . . 25
- 3 J. Elliot's *Debates* (2d ed. 1876) 30
- 40 *Hadiths on Social Justice*, Omar Suleiman, YAQUEEN INST. (2019) (<https://tinyurl.com/36625jz6>) 17
- Ahimsa: Its Theory & Practice in Gandhism*, Ram Ponnu, GHANDHIAN INSTS. (<https://tinyurl.com/7dp32hb>) 15, 21
- Al-Adab Al-Mufrad* 188, 768-769. 16, 17
- Am. Heritage Dictionary* (New College Ed. 1980) 17
- America's Changing Religious Identity*, Daniel Cox & Robert O. Jones, PUBLIC RELIGION RESEARCH INSTITUTE (2017). 12, 13
- America's True History of Religious Tolerance*, Kenneth C. Davis, SMITHSONIAN MAGAZINE (2010) (<https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/>) 8, 9
- An Album of Rhode Island History*, Patrick T. Conley 12
- An Evangelical Declaration Against Torture*, Nat'l Assoc. Evangelicals (2007) (<https://www.nae.net/an-evangelical-declaration-against-torture/>) 19

Thomas Aquinas, <i>The Summa Theologica</i> , Supplement, q. VI, art. 1 (Fathers of the English Dominican Province trans.) (https://tinyurl.com/b2ucxk9f)	23
<i>Asian Religions in America</i> , Thomas A. Tweed & Stephen Prothero (1999).	11
Mahmoud Ayoub, "Repentance in the Islamic Tradition," in <i>Repentance: A Comparative Perspective</i> (ed. Amitai Etzioni and David E. Carney 1997).	26
F. Crawford Burkitt, <i>The Religion of the Manichees</i> , 2 <i>The Journal of Religion</i> 263 (May 1922).	24
Christian Church (Disciples of Christ), <i>GA-1329</i> , <i>Supporting a Treaty for the Prevention of Torture</i> (2007) (https://tinyurl.com/2wmh3bjr).	20
Rev. R. F. Clarke, <i>The Practice of Confession in the Catholic Church</i> , 169 <i>The North American Review</i> 829 (Dec. 1899).	25
<i>Conciliarum aecumenicorum decretal</i> , ed. J Alberigo (3d ed. Bologna, 1973).	23
<i>Confessions</i> , Mary Boyce, 1 <i>A History of Zoroastrianism</i> ENCYCLOPAEDIA IRANICA ONLINE (1975) (https://tinyurl.com/4uahc4y7)	23
John D'Arcy May, <i>Human Dignity, Human Rights, and Religious Pluralism: Christian and Buddhist Perspectives</i> , 26 <i>Buddhist-Christian Studies</i> (2006)	15

<i>Dignitatis Humanae</i> , Pope Paul VI, THE VATICAN (Dec. 7, 1965) (https://tinyurl.com/5bvz7m3c) . . .	14
<i>Early Buddhist Monachism</i> , Sukumar Dutt (1924)	24
<i>Five Cardinal Sins</i> , Soka Gakkai, NICHIREN BUDDHISM LIBRARY (https://www.nichirenlibrary.org/en/dic/Content/F/35)	15
<i>Following the Broad-Shouldered Jesus: The College YMCA and the Culture of Muscular Christianity in American Campus Life</i> , David P. Setran, AMERICAN EDN. HISTORY JOURNAL (2005)	10
<i>For the Health of the Nation</i> , Nat'l Assoc. Evangelicals (2018) (https://tinyurl.com/p8zxc45m)	14, 19
<i>Holy Baptism</i> , The (Online) Book of Common Prayer (https://tinyurl.com/2f5vtzhr)	19
Holy Bible	
<i>Genesis</i> 1:26–27	14
<i>Hebrews</i> 13:3	6, 20
<i>Isaiah</i> 53:5	17
<i>John</i> 3:16	17
<i>Luke</i> 6:35–36	17
<i>Luke</i> 23:34	17
<i>Matthew</i> 5:7–9	17
<i>Matthew</i> 5:14	16

<i>1 Peter 2:24</i>	17
<i>Psalm 37:11</i>	17
C. Quince Hopkins, <i>Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence</i> , 35 <i>Harv. J. L. & Gender</i> 311 (2012).....	32, 33
<i>Human Rights, Democracy & Freedom</i> , Tenzin Gyatso, His Holiness the 14th Dalai Lama of Tibet (https://tinyurl.com/haan9yuv).....	21
<i>Interfaith Grp. Speaks Out Against Torture</i> , Chip Somodevilla, ASSOC. PRESS (2008) (https://tinyurl.com/383cw4eb).....	16
<i>Jain Websites</i> , JAIN CTR. OF AM. (https://www.nyjaincenter.org/Education/Jain-Websites)	21
David L. Johnston, <i>A Muslim & Christian Orientation to Human Rights: Human Dignity & Solidarity</i> , 24 <i>Ind. Int'l & Comp. L. Rev.</i> 899 (2014).....	14, 15, 16, 34
Wulf a Kaal & Timothy A. Lacine, <i>The Effect of Deferred & Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013</i> , 70 <i>Bus. La.</i> 61 (2014)	33
Yishai Kiel, <i>Penitential Theology in East Late Antiquity: Talmudic, Zoroastrian, and East Christian Reflections</i> , 45 <i>Journal for the Study of Judaism in the Persian, Hellenistic, and Roman Period</i> 551 (2014)	26

<i>Measuring Religion in Pew Research Center's American Trends Panel</i> , PEW RESEARCH CENTER (2021) (https://www.pewforum.org/2021/01/14/measuring-religion-in-pew-research-centers-american-trends-panel/)	13
<i>Melton's Encyclopedia of American Religions, Eighth Edition</i> , J. Gordan Melton (2009)	10
<i>Methodism and the Second Great Awakening</i> , Joseph A. Thacker (1975)	9
<i>Mission</i> , Quaker Initiative to End Torture (https://www.quit-torture-now.org/mission/)	20
Alexander Murray, <i>Confession before 1215</i> , 3 Transactions of the Royal Historical Society (1993)	23
<i>Native American Religion in Early America</i> , Christine Leigh Heyrman, NATIONAL HUMANITIES CENTER (2008) (http://nationalhumanitiescenter.org/tserve/eighteen/ekeyinfo/natrel.htm)	8
Bilhah Nitzan, "Repentance in the Dead Sea Scrolls," in 2 The Dead Sea Scrolls after Fifty Years: A Comprehensive Assessment (ed. Peter W. Flint and James C. VanderKam 1998–99)	26
<i>Penitential Prayer in Second Temple Judaism: The Development of a Religious Institution</i> , Rodney A. Werline (1998)	25

Pope John Paul II, <i>The Catechism of the Catholic Church</i> , Part 3, § 1, Ch. 1, Art. 8 (IV) (1992) (https://www.vatican.va/archive/ENG0015/_P6C.HTM).	18
<i>Pope Says Torture is a Mortal Sin; Vatican Urges Help for Drug Abusers</i> , Carol Glatz, CRUX (2018) (https://tinyurl.com/4h3r59rb)	18
<i>QuickFacts</i> , United States Census Bureau (https://www.census.gov/quickfacts/fact/table/US/PST045219).	6
<i>Recognize the Dignity in Every Person</i> , VATICAN MEDIA (Aug. 12, 2020) (https://tinyurl.com/enmuajx5).	14
<i>Religion and the Founding of the American Republic: Religion in Eighteenth-Century America</i> , LIBRARY OF CONGRESS (https://www.loc.gov/exhibits/religion/)	8
<i>Religion in Nineteenth-Century America</i> , Dr. Graham Warder, DISABILITY HISTORY MUSEUM.	9
<i>Religious Events by Date</i> , QUALITY DATA ON RELIGION (https://www.thearda.com/timeline/browse_all_events_date.asp)	11
<i>Religious Events by Date</i> , THE ASSOCIATION OF RELIGION DATA ARCHIVES (https://www.thearda.com/timeline/browse_all_events_date.asp)	10

<i>Religious Landscape Study</i> , PEW RESEARCH CENTER (2021) (https://www.pewforum.org/religious-landscape-study/)	6, 11
Resolution No. 2009-C020, <i>Condemn Torture and Extraordinary Rendition</i> , 76th Gen. Convention, The Archives of the Episcopal Church (https://tinyurl.com/sb6bpkmv)	19
Sahin Muslim 2613	16
<i>Sin: A History</i> , Gary Anderson, (2009)	26
Scott Michael Solkoff, <i>Judicial Use Immunity & the Privilege Against Self-Incrimination in Court Mandated Therapy Programs</i> , 17 Nova L. Rev. 1441 (1993)	32
<i>Some Aspects of Rabbinic Theology</i> , Solomon Schechter (1909)	26
<i>Southern Christian Leadership Conference</i> , NATIONAL PARKS SERVICE (https://www.nps.gov/subjects/civilrights/sclc.htm)	12
<i>The Abolition of the Slave Trade: Christian Conscience and Political Action</i> , John Coffey, CAMBRIDGE PAPERS (2007)	12
The Acharanga Sutra, Chapple 11	15
The Book of Discipline, <i>Social Principles: The Political Community</i> , United Methodist Church (2016) (https://tinyurl.com/388s6tas)	20
<i>The Encyclopedia of American Religious History</i> , Edward Queen (1996)	10

<i>The Ghost-Dance Religion and Wounded Knee,</i> James Mooney (2012)	10
<i>The Holy Qur-an: Text, Translation, and Commentary,</i> Abdullah Yusuf Ali (1938)	24
<i>The Pluralism Project: Hinduism in America,</i> HARVARD UNIVERSITY (https://pluralism.org/hinduism-in-america) . . .	11
The Quran	
The Quran 2:30	15
The Quran 2:191	16
The Quran 5:32	14
The Quran 6:151	14, 16
The Quran 99:7–8	24
<i>The Truth about Mrs. Eddy,</i> NEW YORK TIMES (1906)	10
<i>The Use of Torture or Lesser Forms of Coercion to Obtain Information from Prisoners,</i> Cent. Conf. Am. Rabbis (2005) (https://tinyurl.com/hxs3ufbh)	18
<i>The Wit and Wisdom of the Christian Fathers of Egypt: The Syrian Version of the Apophthegmata Patrum by Anan Isho of Beth Abhe,</i> Ernest A. Wallis Budge (1934)	27
<i>Torture is a Moral Issue: Study Guide 3,</i> U.S. Conf. of Catholic Bishops (2012) (https://tinyurl.com/43yx7e5m)	16

Total Jewish Population in the United States,
 JEWISH VIRTUAL LIBRARY
 (<https://www.jewishvirtuallibrary.org/jewish-population-in-the-united-states-nationally>) . . . 11

United Nations Gen. Assembly, *Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 1 (1984) 18

United Nations Gen. Assembly, *Universal Declaration of Human Rights* (1948) 15, 22

U.S.-Sponsored Torture: A Call for a Commission of Inquiry, UNITARIAN UNIVERSALIST ASSOC.
 (<https://tinyurl.com/4rh8k99n>) 21, 22

What We Do, NRCAT
 (<https://tinyurl.com/xzr9rkk6>) 22

With God on Our Side: The Rise of the Religious Right in America, William Martin (1996) 11

Pei-Yi Wu, *Self-Examination and Confession of Sins in Traditional China*, 39 *Harvard Journal of Asiatic Studies* 5 (June 1979) 23, 24

INTEREST OF *AMICI CURIAE*¹

Amici curiae (*Amici*) are various faith-based organizations committed to ending the practice of torture.

The National Religious Campaign Against Torture (“NRCAT”) is an interfaith membership organization comprised of more than 300 religious organizations committed to advancing the values of human dignity, human rights, and an end to torture—without exception. Since its founding in 2006, NRCAT has engaged in grassroots organizing, public education, and state and national policy advocacy to achieve its mission.

The Office of Peacebuilding and Policy (“OPP”) is a faith-based advocacy group committed to representing the values and interests of the Church of the Brethren in the context of United States policy. As a historic peace church, the Church of the Brethren has opposed war and violence of all kinds since its inception in 1708. This includes a rejection of torture, officially codified in a 2010 resolution, which informs the education, organizing, and advocacy efforts of the OPP on this issue.

The General Synod of the United Church of Christ is the national representative and decision-making body of the United Church of Christ, a Christian

¹ *Petitioner and Respondents have consented to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person or entity besides the undersigned Amici and their counsel made a monetary contribution intended to fund its preparation or submission.*

denomination comprised of over 800,000 members and 4,500 congregations. The General Synod of the United Church of Christ has a long history of resolutions passed in support of civil and human rights in the United States and around the world.

The National Advocacy Center of the Sisters of the Good Shepherd educates and develops strategies to address social justice issues and advocates for the transformation of society to the benefit of all people. As such, we adamantly oppose the use of torture.

The Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces believes that each person should be approached with the same care of Jesus, the Good Shepherd. We are guided by the principle that “One person is of more value than a world.” The use of torture is contrary to our fundamental beliefs in the dignity of each person.

The Alliance of Baptists is a national organization of Baptists seeking to cultivate the beloved community, claiming our identity within the body of Christ in the world and our solidarity with all creation. We welcome and affirm all persons with full respect to gender, sexual, racial, and ethnic identities and welcome and affirm all persons with varying abilities, social standing, or economic status. In 2012, the Alliance of Baptists endorsed the “Statement of Conscience of the National Religious Campaign Against Torture” which states that torture violates the basic dignity of the human person . . . any policies that permit torture and inhumane treatment are shocking and morally intolerable.”

The Friends Committee on National Legislation (“FCNL”) is a national, nonpartisan Quaker organization that lobbies Congress and the administration to advance peace, justice, and environmental stewardship. Governed by members of the Religious Society of Friends, FCNL acts in faith to create a world free from war, a society with equity and justice for all, a community where every person’s potential may be fulfilled and an earth restored. With an intention to see that of God in every person, FCNL supports and influences legislation and government action by urging leaders in government to embrace specific policies and actions. The issues we strive to address are inextricably linked, leading us to focus on the root causes and long-term consequences of injustice, inequality, economic disparity, disproportionate power, and violence.

The Maryknoll Office for Global Concerns represents Maryknoll missionaries – religious sisters, brothers, priests, and lay missionaries – serving around the world, and the communities they accompany. We advocate for peace, justice, and the integrity of creation, bringing the voice and experience of Maryknoll into policy discussions in the United Nations, the United States and other governments, international financial institutions, and the corporate world. As missionaries, we have accompanied survivors of torture, among them members of our own communities. We unequivocally reject the use of torture in any form and for any reason and have committed ourselves to continued advocacy nationally and internationally for an end to torture.

The Reconstructionist Rabbinical Association (“RRA”) is the professional and collegial association of over 350 Reconstructionist rabbis across North America. Based on our religious commitments and the teachings of our faith, we are committed to advancing the values of human dignity, human rights, and an end to torture, without exception. The RRA has been an active member and supporter of NRCAT’s religious organizing against torture since NRCAT’s founding in 2006.

SUMMARY OF ARGUMENT

At this stage of the proceedings, Respondent Zayn Al-Abidin Muhammad Husayn (“Respondent”) asks for nothing more than an opportunity for the district court to determine on remand whether non-privileged information can be separated from privileged information concerning his torture. Information provided by Respondents Mitchell and Jessen in other instances and by the Senate Select Committee on Intelligence suggests that such segregation is feasible.

Petitioner seeks to forego even that inquiry. Aside from being contrary to established legal principles, Petitioner’s stance strays from religious and moral principles that have guided this country from its inception. Across various religious traditions found in the United States today, there exists a strong belief in the sanctity and dignity of the individual and an objection to the debasing and dehumanizing of the individual through suffering and torture. Similarly, there is a shared belief in how transparency and confession can help right prior wrongs. Where there is an opportunity to shine a ray of light on abhorrent physical practices linked to our government without running afoul of the states-secrets privilege, that opportunity must be pursued with solemn resolve—and that opportunity exists here. Only then, with honesty, contrition, and forgiveness may we as a nation forge ahead.

Accordingly, *Amici* respectfully request that this Court affirm the decision of the U.S. Court of Appeals for the Ninth Circuit. In doing so, *Amici* stress four points.

First, our country is guided by a robust religious tradition. From its founding to the present day, the United States has been comprised of a diverse tapestry of faiths, religions, and spiritual movements. Indeed, from Washington’s Farewell Address, to Lincoln’s better angels, to Reagan’s Shining City on a Hill, we have invoked this tradition in order to lead this country onward in its ascent towards a more just, free, and tolerant society. Today, the United States Census Bureau estimates the current U.S. population at over 331 million individuals.² Recent polls suggest that at least three quarters of the population identifies as Christian, Jewish, Muslim, Buddhist, Hindu, or other non-Christian faith.³ The variety of faiths represented in America is an ever-present source of strength.

Second, nearly universal among the religious traditions found in the United States (and around the world) are a shared belief in human dignity and an objection to torture. Religions of all faiths have spoken out against torture and the infliction of needless suffering upon individuals at the hands of mankind and its earthly machinery. As one faith has prescribed, “[r]emember those in prison as if you were their fellow prisoners, and those who are mistreated as if you yourselves were suffering.” *Hebrews* 13:3. When we forget each other’s suffering and engage in the torture of another human being, we violate that sense of dignity for all involved.

² See *QuickFacts*, United States Census Bureau (<https://www.census.gov/quickfacts/fact/table/US/PST045219>).

³ *Religious Landscape Study*, PEW RESEARCH CENTER (2021) (<https://www.pewforum.org/religious-landscape-study/>).

Third, there is also a shared religious belief in the redemptive qualities of openness and confession. Airing one's faults, accepting responsibility, and ultimately seeking forgiveness are powerful forces that can mend religious adherents and institutions alike.

Fourth, running alongside these religious traditions—valuing human dignity, rejecting torture, and providing for confession—are our own uniquely secular traditions embracing the same. Our founding documents are imbued with a moral character, one which recognizes the sanctity of the individual and demands the treatment of humanity with respect. The same principles of confession and redemption are likewise woven into our legal system.

We, as a nation, have not always lived up to these ideals. But we have nonetheless fought wars to secure them and this same religious and moral imperative to value human dignity is aligned with the secular laws of our country. We can reflect these values by, whenever possible, disclosing information related to our government's involvement in the mistreatment of other human beings. Only then, acting with a humble sense of openness and responsibility, can we better align ourselves with the universal religious and moral principles that have long been a part of our nation.

Amici fully respect the necessity of the state-secrets privilege and the Court's prior precedent. As such, *Amici* recognize that this may or may not be a case in which non-privileged information can ultimately be segregated from privileged information. *Amici* only argue that given our shared religious and moral imperatives against torture, and our common belief in

the healing power of openness and confession, the district court be allowed to try.

ARGUMENT

I. AMERICA IS COMPRISED OF A DIVERSE FABRIC OF RELIGIONS

From its founding, the United States has been home to a range of different religious groups. The first Native Americans followed a variety of religious systems.⁴ Other groups—like the Puritans escaping the Church of England—came to the United States seeking religious refuge.⁵ And though the vast majority of early Americans were Christians, there was much variety among Christians through the different denominations and sects, such as Catholics, Protestants, Quakers, and Lutherans to name a few.⁶ The United States has never lacked religious variety.

Although the United States is often idealized as one of religious tolerance, this country has worked hard to increase peaceful coexistence and acceptance among its many religious groups. Hard work was necessary, due to both the number of religious groups in the United States and religious intolerance present from this

⁴ *Native American Religion in Early America*, Christine Leigh Heyrman, NATIONAL HUMANITIES CENTER (2008) (<http://nationalhumanitiescenter.org/tserve/eighteen/ekeyinfo/natrel.htm>).

⁵ *America's True History of Religious Tolerance*, Kenneth C. Davis, SMITHSONIAN MAGAZINE (2010) (<https://www.smithsonianmag.com/history/americas-true-history-of-religious-tolerance-61312684/>).

⁶ *Religion and the Founding of the American Republic: Religion in Eighteenth-Century America*, LIBRARY OF CONGRESS (<https://www.loc.gov/exhibits/religion/>).

country's beginning, sometimes even in state-sponsored action.⁷ This hard work to secure and celebrate religious diversity continues to this day. But it is also indisputable that calls for acceptance of religious groups have been with us from the time of our founding. As Thomas Jefferson wrote while drafting a bill for religious freedom in Virginia, "But it does me no injury for my neighbor to say there are twenty gods or no God. It neither picks my pocket nor breaks my leg."⁸

Under this (albeit at times imperfect) culture of tolerance, the United States has grown, different religious groups have flourished, and new groups have come into existence. During the Second Great Awakening, starting in the early 1800s, religion spread among Presbyterians, Methodists, and Baptists.⁹ The number of Methodists, in particular, grew quickly.¹⁰ This was the time of the circuit riders, who preached to people in the remote frontier locations, assembling in fields for all-day camp meetings.¹¹ In 1836, Joseph Smith founded the first Latter-day Saints temple in

⁷ For example, early on Massachusetts and South Carolina had official, state-sponsored churches. *Id.*

⁸ *America's True History*.

⁹ *Methodism and the Second Great Awakening*, Joseph A. Thacker at 47–48 (1975).

¹⁰ *Id.*

¹¹ *Religion in Nineteenth-Century America*, Dr. Graham Warder, DISABILITY HISTORY MUSEUM.

Kirtland, Ohio.¹² The Third Great Awakening, beginning in the late 1850s, emphasized a “muscular Christianity,” and significantly grew the number of Protestants.¹³ In 1879, Mary Baker Eddy founded the Christian Science movement, which became the fastest-growing religion in the United States for decades, expanding to several hundred thousand members by the late 1930s.¹⁴ And in the 1880s, the Nevada Northern Paiute began the Ghost Dance movement, a practice to awaken the spirits of the dead to fight on behalf of the living.¹⁵ These are only a few examples of religious growth and expansion from that century.

The variety of religions strongly represented in the United States only continued to increase throughout the 1900s. In the early 1900s, peyote groups formed the Native American Church.¹⁶ In 1906, Bosnian immigrants who came to Chicago to help dig subway tunnels formed Dzemijetul Hajrije, the country’s oldest

¹² *The Encyclopedia of American Religious History*, Edward Queen (1996).

¹³ *Following the Broad-Shouldered Jesus: The College YMCA and the Culture of Muscular Christianity in American Campus Life*, David P. Setran, AMERICAN EDN. HISTORY JOURNAL (2005).

¹⁴ *Religious Events by Date*, THE ASSOCIATION OF RELIGION DATA ARCHIVES (https://www.thearda.com/timeline/browse_all_events_date.asp); see also *The Truth about Mrs. Eddy*, NEW YORK TIMES (1906).

¹⁵ *The Ghost-Dance Religion and Wounded Knee*, James Mooney (2012).

¹⁶ *Melton’s Encyclopedia of American Religions, Eighth Edition*, J. Gordon Melton (2009).

existing Muslim organization.¹⁷ Buddhism, recognized as arriving in the United States with Japanese immigrants, was cemented with the establishment of the Buddhist Church of America in 1944.¹⁸ Today, this association has more than sixty temples.¹⁹ In 1949, Billy Graham catapulted the southern evangelist into the spotlight with an eight-week crusade event.²⁰ Graham would later go on to meet with every president of the United States until his death, beginning with Harry Truman and ending with Donald Trump. With the increase in Indian immigrants in the 1970s and early 1980s, there was a burgeoning of Hindu temples across the country.²¹ Throughout the 1900s, the Jewish population increased from 1.5 million to 5.5 million.²² And of course, the most populous religious groups, such as Protestants and Catholics, have only grown in size since the beginning of this country's existence as well.²³

¹⁷ *Religious Events by Date*, QUALITY DATA ON RELIGION (https://www.thearda.com/timeline/browse_all_events_date.asp).

¹⁸ *Asian Religions in America*, Thomas A. Tweed & Stephen Prothero (1999).

¹⁹ *Id.*

²⁰ *With God on Our Side: The Rise of the Religious Right in America*, William Martin (1996).

²¹ *The Pluralism Project: Hinduism in America*, HARVARD UNIVERSITY (<https://pluralism.org/hinduism-in-america>).

²² *Total Jewish Population in the United States*, JEWISH VIRTUAL LIBRARY (<https://www.jewishvirtuallibrary.org/jewish-population-in-the-united-states-nationally>).

²³ Religious Landscape Study at supra n.3.

Throughout the history of the United States, this complex array of religious groups has played a critical role in shaping our society. Even one of our states, Rhode Island came into existence when Roger Williams, a Puritan Separatist who preached against the Church of England, was banished from the Massachusetts Bay. Williams named the place he settled “Providence” for “having a sense of God’s merciful providence unto me in my distress.”²⁴ The drive to abolish slavery was largely led by Christian preachers.²⁵ Continuing the fight for racial equality, the Southern Christian Leadership Conference, which believed that racial equality was a Christian imperative, utilized non-violent protests to combat continued racism and the effect of Jim Crow laws.²⁶ Aside from driving large movements, religion plays smaller, everyday roles too—religion, naturally, helps its followers navigate their own personal lives and struggles.

Today there is more religious variety in the United States than at any other point in our history.²⁷ Christianity and its many denominations and sects, including Presbyterians, Catholics, Orthodox, Jehovah’s Witnesses, Lutherans, Methodists, Evangelists, Anglicans, and Latter-day Saints, among

²⁴ *An Album of Rhode Island History*, Patrick T. Conley.

²⁵ *The Abolition of the Slave Trade: Christian Conscience and Political Action*, John Coffey, CAMBRIDGE PAPERS (2007).

²⁶ *Southern Christian Leadership Conference*, NATIONAL PARKS SERVICE (<https://www.nps.gov/subjects/civilrights/sclc.htm>).

²⁷ *America’s Changing Religious Identity*, Daniel Cox & Robert O. Jones, PUBLIC RELIGION RESEARCH INSTITUTE (2017).

others, represent 65% of the U.S. population.²⁸ There are, of course, non-Christian groups as well, such as Jews, Muslims, Buddhists, Sikhs, and Hindus, to name a few. Currently, Jews comprise about 2% of the population²⁹ while Muslims, Buddhists, and Hindus each constitute roughly 1% of the population.³⁰ But even for religions representing a smaller percentage of the country's total population, their membership still numbers in the millions.

The religious fabric of the United States is today—like it was in its beginning—complex, varied, and ever-changing. From this fabric, we as a nation have drawn strength to help guide us through periods of change. And it is this diverse fabric to which we can once again rely upon to help guide us in addressing our country's more recent indiscretions.

II. OUR RELIGIOUS TRADITIONS SHARE A COMMON BELIEF IN HUMAN DIGNITY AND AN OBJECTION TO TORTURE

Many of these faiths making up America's vast religious fabric look very different from one another. These differences, of course, can create doctrinal debates among Americans. But one topic unifies religions and faiths: Torture is irreligious, immoral, and unethical. This is because torture contradicts the

²⁸ *Measuring Religion in Pew Research Center's American Trends Panel*, PEW RESEARCH CENTER (2021) (<https://www.pewforum.org/2021/01/14/measuring-religion-in-pew-research-centers-american-trends-panel/>).

²⁹ *America's Changing Religious Identity*.

³⁰ *Id.*

fundamental value and dignity of human life, which reflects “humankind’s . . . inherent worth in God’s eyes—all without exception, by virtue of their creation.”³¹

A. Religions share the core belief that human life is sacred.

The Bible teaches that human life is sacred. Indeed, “God created mankind in his own image, the image of God.” *Genesis* 1:26–27. And because God “created us in His image and likeness,” “He has given us a unique dignity, calling us to live in communion with Him, in communion with our sisters and brothers, with respect for all creation.”³² In other words, each individual human life is uniquely sacred because of the value God placed on it.

The Quran teaches the same fundamental value: “take not life, which God hath made sacred.” The Quran 6:151; *see also id.* at 5:32 (“[I]f anyone saved a life, it would be as if he saved the life of all mankind.”). Indeed, the Quran, like the Bible, declares that

³¹ David L. Johnston, *A Muslim & Christian Orientation to Human Rights: Human Dignity & Solidarity*, 24 *Ind. Int’l & Comp. L. Rev.* 899, 901 (2014).

³² *Recognize the Dignity in Every Person*, VATICAN MEDIA (Aug. 12, 2020) (quoting Pope Francis) (<https://tinyurl.com/enmuajx5>); *see also For the Health of the Nation*, NAT’L ASSOC. EVANGELICALS, 25 (2018) (<https://tinyurl.com/p8zxk45m>) (“Because God created human beings in His image, every human life from conception to death bears the image of God and has inestimable worth.”); *Dignitatis Humanae*, Pope Paul VI, THE VATICAN (Dec. 7, 1965) (<https://tinyurl.com/5bvz7m3c>).

humans “represent God on earth.”³³ And thus, in both “the Qur’an and the Bible—human beings are brought into being at the apex of creation and given the responsibility to rule over all the rest with great care, wisdom, and justice.”³⁴

Other religions agree. Buddhism, for example, gives humans a “unique status” in the “scale of existence,” with three of the five cardinal (and most serious) offenses involving the taking of human life.³⁵ And Hinduism, along with Jainism, teaches “the fundamental need for non-violence: ‘All beings are fond of life; they like pleasure and hate pain, shun destruction and like to live, they long to live. To all, life is dear.’”³⁶ This has long been true for all peace-loving States: “All human beings are born free and equal in dignity and rights.”³⁷

Our shared humanity, then, prioritizes the value and dignity of human life.

³³ Johnston, *supra* n.32, at 901 (quoting The Quran 2:30).

³⁴ *Id.* at 902.

³⁵ See John D’Arcy May, *Human Dignity, Human Rights, and Religious Pluralism: Christian and Buddhist Perspectives*, 26 *Buddhist-Christian Studies* 51 (2006); *Five Cardinal Sins*, Soka Gakkai, NICHIREN BUDDHISM LIBRARY (last visited Aug. 15, 2021) (<https://www.nichirenlibrary.org/en/dic/Content/F/35>).

³⁶ *Ahimsa: Its Theory & Practice in Gandhism*, Ram Ponnuru, GHANDHIAN INSTS. (last visited Aug. 15, 2021) (quoting The Acharanga Sutra, Chapple 11) (<https://tinyurl.com/7dp32hb>).

³⁷ United Nations Gen. Assembly, *Universal Declaration of Human Rights*, Art. 1 (1948).

In sum, “all universal cultures, be they religious or secular, ancient or modern, commonly agree on the inviolability of all human beings.”³⁸ America’s “city . . . on a hill” is no exception. *See Matthew* 5:14.

B. Torture conflicts with the human dignity rooted in all religions.

The starting point of human dignity—that everyone has the inherent right to be valued and respected—cannot co-exist with torture. This is not controversial among religions. For example, believers from across the religious spectrum have joined to oppose torture, including “Methodists, Presbyterians, Jews, Muslims, Episcopalians, Lutherans, Quakers and Roman Catholics.”³⁹ These faiths all recognize that torture is “a violation of the human person’s God-given dignity.”⁴⁰

A prime example is Islam. According to Prophet Muhammad, “Allah will torture those who tortured people in this world.” Sahih Muslim 2613. That teaching is rooted in the divine connection between humans and God: “Do not torture the creation of Allah the Exalted.” Al-Adab Al-Mufrad 188. Indeed, the Quran goes a step further, explaining that persecution, and by extension, torture, is worse than killing. *See The Quran* 2:191; *see also id.* at 6:151 (referencing

³⁸ Johnston, *supra* n.32, at 905 (citation omitted).

³⁹ *Interfaith Grp. Speaks Out Against Torture*, Chip Somodevilla, ASSOC. PRESS (2008) (<https://tinyurl.com/383cw4eb>) (“About 300 houses of worship” joined NRCAT in a month-long campaign protesting torture).

⁴⁰ *See, e.g., Torture is a Moral Issue: Study Guide* 3, U.S. Conf. of Catholic Bishops, 5–10 (2012) (<https://tinyurl.com/43yx7e5m>).

“justice and law” to justify only the latter). Instead, the Prophet spoke about dealing with enemies “in the way they treated him”—giving “food in spite of love for the needy, the orphan, and the captive.” *Id.* at 768–9.⁴¹

Jesus’s teachings lead to the same result. This is perhaps most clear in the Sermon on the Mount, where Jesus emphasized love and humility over force. Jesus preached, “Blessed are the merciful, for they will be shown mercy. Blessed are the pure in heart, for they will see God. Blessed are the peacemakers, for they will be called children of God.” *Matthew* 5:7–9; *see also Psalm* 37:11. This requires compassion and forgiveness for others, especially towards “an offender, enemy, prisoner, or other person under one’s power.” *Am. Heritage Dictionary* 821 (New College Ed. 1980) (defining “mercy”). That message strikes at the heart of the New Testament: “But love your enemies, do good to them” and “[b]e merciful, just as your Father is merciful.” *Luke* 6:35–36.

Jesus embodied these teachings. He healed the sick, welcomed strangers, and even pardoned his own persecutors and executioners. *See Luke* 23:34 (“Father, forgive them, for they do not know what they are doing.”). What’s more, Jesus was tortured and crucified for this very reason—so that no one else would need to be “wounded,” “pierced,” or “bruised” in the same way ever again. *See Isaiah* 53:5; *see also John* 3:16. Failing to take steps that would help expose and end the practice of torture undermines that sacrifice. *See, e.g., 1 Peter* 2:24.

⁴¹ *See also 40 Hadiths on Social Justice*, Omar Suleiman, YAQUEEN INST. (2019) (<https://tinyurl.com/36625jz6>).

C. Churches of all faiths call for governments to end torture.

This biblical perspective has inspired countless churches to condemn torture. For example, Pope Francis, the head of the Catholic Church, recently proclaimed, “Torture is a mortal sin!”⁴² A “mortal sin” can lead to “the eternal death of hell” because it “destroys charity in the heart of man by a grave violation of God’s law” and “turns man away from God.”⁴³ Torture, by definition, is godless; destroying both the abuser and the abused. See United Nations Gen. Assembly, *Convention Against Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 1 (1984) (defining “torture” to include “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person”). That is why the Central Conference of American Rabbis, the oldest and largest rabbinic organization in North America, urged the United States to “[d]enounce and oppose the use of torture and other forms of prisoner coercion in violation of the Geneva Conventions.”⁴⁴

⁴² *Pope Says Torture is a Mortal Sin; Vatican Urges Help for Drug Abusers*, Carol Glatz, CRUX (2018) (<https://tinyurl.com/4h3r59rb>).

⁴³ Pope John Paul II, *The Catechism of the Catholic Church*, Part 3, § 1, Ch. 1, Art. 8 (IV) (1992) (https://www.vatican.va/archive/EN_G0015/_P6C.HTM).

⁴⁴ *The Use of Torture or Lesser Forms of Coercion to Obtain Information from Prisoners*, Cent. Conf. Am. Rabbis (2005) (<https://tinyurl.com/hxs3ufbh>).

Evangelical Christians have made a similar declaration. “We renounce the use of torture and cruel, inhuman, and degrading treatment by any branch of our government (or any other government).”⁴⁵ This declaration is grounded in biblical teachings that establish “God’s love and the dignity it gives to all human beings.”⁴⁶ As a result, “every human life has the right not . . . to be tortured.”⁴⁷

The same can be said of the Episcopal Church. The Episcopal Church’s Baptismal Covenant includes the call to its people: “Will you strive for justice and peace among all people, and respect the dignity of every human being?” The people respond: “I will, with God’s help.”⁴⁸ More specifically, the 76th General Convention of the Episcopal Church “condemn[ed] the use of torture and the practice of extraordinary rendition by the United States and any government, individual or organization in any location in the world” and declared that “Episcopalians shall not engage in, order or assist in the torture of any human being, and shall not counsel the use of torture for intelligence gathering or any other purpose.”⁴⁹

⁴⁵ *An Evangelical Declaration Against Torture*, NAT’L ASSOC. EVANGELICALS, 7.12(a) (2007) (<https://www.nae.net/an-evangelical-declaration-against-torture/>).

⁴⁶ *Id.* at 2.1–3.7.

⁴⁷ *For the Health of the Nation*, *supra* n.33, at 38.

⁴⁸ *Holy Baptism*, The (Online) Book of Common Prayer (last visited Aug. 15, 2021) (<https://tinyurl.com/2f5vtzhr>).

⁴⁹ Resolution No. 2009-C020, *Condemn Torture and Extraordinary Rendition*, 76th Gen. Convention, The Archives of the Episcopal Church (last visited Aug. 15, 2021) (<https://tinyurl.com/sb6bpkmv>).

Protestants, Methodists, and Quakers all agree. Protestants have officially called on the United States to prevent torture everywhere.⁵⁰ In doing so, the Disciples of Christ echoed the same universal concerns—*i.e.*, that “any and all use of torture is unacceptable—that it is contrary to traditional understandings of Scripture and in opposition to the principles of dignity, fairness and due process that are the bedrock of a democratic society.”⁵¹ Methodists have joined that call, taking the official position that “the mistreatment or torture, and other cruel, inhumane, and degrading treatment or punishment of persons by governments for any purpose violates Christian teaching.”⁵² Methodists have called on all Christians to condemn torture “wherever and whenever it occurs.”⁵³ So have Quakers, who see torture as “the worst that humans do to one another.”⁵⁴

This condemnation expands well-beyond the Judeo-Christian community. The Jain Center of America, the first Jain temple organized in the United States,

⁵⁰ See Christian Church (Disciples of Christ), *GA-1329, Supporting a Treaty for the Prevention of Torture*, 1–3 (2007) (<https://tinyurl.com/2wmh3bjr>).

⁵¹ *Id.* at 2.

⁵² See The Book of Discipline, *Social Principles: The Political Community*, United Methodist Church (2016) (<https://tinyurl.com/388s6tas>).

⁵³ *Id.*

⁵⁴ See *Mission*, Quaker Initiative to End Torture (last visited Aug. 15, 2021) (<https://www.quit-torture-now.org/mission/>) (quoting *Hebrews* 13:3 (“Remember those who . . . are being tortured, as though yourselves were being tortured.”)).

embraces the ancient Indian principle of nonviolence, or “ahimsa.”⁵⁵ Their scriptures are clear: “Don’t injure, abuse, oppress, enslave, insult, torment, torture, or kill any creature or living being.”⁵⁶ And much like the teachings in Islam and Catholicism, “Harm done to other beings is considered harm to oneself.”⁵⁷ This matches the altruistic teachings of His Holiness, the Dalai Lama, who recognizes that “love and compassion” for “the human family as a whole” is the key principle to ensure dignity for “ourselves, our families, our community and country.”⁵⁸

The list does not stop there. The Unitarian Church sees torture as violating “the basic dignity of the human person.”⁵⁹ Torture goes against the fundamental belief that all persons have “inherent worth and dignity,” and it “degrades everyone involved—from policy-makers to perpetrators to victims.”⁶⁰ *Id.* Worse still, torture “contradicts our

⁵⁵ See *Jain Websites*, JAIN CTR. OF AM. (last visited Aug. 15, 2021) (<https://www.nyjaincenter.org/Education/Jain-Websites>).

⁵⁶ Ponnu, *supra* n.37.

⁵⁷ *Id.*

⁵⁸ *Human Rights, Democracy & Freedom*, Tenzin Gyatso, His Holiness the 14th Dalai Lama of Tibet (last visited Aug. 15, 2021) (<https://tinyurl.com/haan9yuv>).

⁵⁹ *U.S.-Sponsored Torture: A Call for a Commission of Inquiry*, UNITARIAN UNIVERSALIST ASSOC. (July 1, 2009) (<https://tinyurl.com/4rh8k99n>).

⁶⁰ *Id.*

nation's most cherished values."⁶¹ Put simply, there is no place for torture in America.

This message tracks secular ideals, too. The United Nations, for example, avowed that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁶² And the Geneva Convention has long prohibited "violence to life and person," including "cruel treatment and torture." *The Geneva Convention*, Art. 3(1)(a) (Aug. 12, 1949). This prohibition extends to torture "at any time and in any place whatsoever." *Id.*

Without question, people of all faiths agree that torture "degrades humanity and wounds the soul of all involved."⁶³

III. OUR RELIGIOUS TRADITIONS SHARE A COMMON BELIEF IN REDEMPTION THROUGH CONFESSION

In the various historical teachings of the world's religious traditions—many of which are represented today in the United States—there is a near universal belief in the act of confession. It is through this ability to openly acknowledge and repent for one's sins that leads to redemption and the bettering of the human spirit and society as a whole.

⁶¹ *Id.*

⁶² *Universal Declaration of Human Rights*, *supra* n.38, Art. 5.

⁶³ *What We Do*, NRCAT (last visited Aug. 15, 2021) (<https://tinyurl.com/xzr9rkk6>).

The religious practice of airing potential misdeeds, or at least unburdening oneself of keeping them secret, is perhaps most prominently associated with Catholicism. The practice was famously codified in 1215 A.D., when Pope Innocent III decreed the *Omnis utriusque sexus*.⁶⁴ Shortly thereafter, Thomas Aquinas wrote extensively on the subject, exploring the connection between confession and salvation.⁶⁵ Among the devoted, the practice goes back even further.⁶⁶

Acknowledgment, repentance, and confession of sin were integral parts of the Zoroastrian profession of faith, going back centuries if not millennia before the Common Era.⁶⁷

“Confession as a regular feature of religious life has a long history in India, going back to the Vedic times [c. 1750–500 BCE]. With the Buddhists the rite of confession, called *uposatha* in Sanskrit, was as ancient as the first establishment of monastic orders.”⁶⁸ Twice a month, after “fasting and sacrifices ... there was an

⁶⁴ *Conciliorum aecumenicorum decretal*, ed. J Alberigo (3d ed. Bologna, 1973).

⁶⁵ Thomas Aquinas, *The Summa Theologica*, Supplement, q. VI, art. 1 (Fathers of the English Dominican Province trans.) (last visited Aug. 17, 2021) (<https://tinyurl.com/b2ucxk9f>).

⁶⁶ Alexander Murray, *Confession before 1215*, 3 *Transactions of the Royal Historical Society* 51 (1993).

⁶⁷ *Confessions*, Mary Boyce, 1 *A History of Zoroastrianism* 320–21 *ENCYCLOPAEDIA IRANICA ONLINE* (1975) (last visited August 1, 2021) (<https://tinyurl.com/4uahc4y7>).

⁶⁸ Pei-Yi Wu, *Self-Examination and Confession of Sins in Traditional China*, 39 *Harvard Journal of Asiatic Studies* 5, 10 (June 1979).

interrogatory portion, during the recitation of which a guilty monk would confess his offences.”⁶⁹

In Taoist societies of the second century, individuals believed in a form of faith healing that incorporated the confessional; “The patients were asked to kneel, make obeisance, and confess their offences.”⁷⁰ Muslims likewise share this belief in and celebration of accountability.⁷¹

And when archeologists uncovered ancient texts of Manichaeism at Turfan in Xinjiang, China, those texts included “hymnbooks [and] forms for the confession of sins.”⁷²

In many religious traditions, accountability and the airing of facts comes as a matter of conscience which, in turn, is a mix of personal and supernatural forces. To Reformation theologian John Calvin, conscience is “an additional witness” to mankind’s acts which “permits them not to conceal their sins, or to elude accusation,” something “which places man before the Divine tribunal, is appointed, as it were, to watch over man, to observe and examine all his secrets, and

⁶⁹ *Id.* (citing *Early Buddhist Monachism*, Sukumar Dutt, 100–104 (1924)).

⁷⁰ *Id.* at 6.

⁷¹ *The Holy Qur-an: Text, Translation, and Commentary* 1772, Abdullah Yusuf Ali (1938) (“Then shall anyone who has done an atom’s weight of good, see it! And anyone who has done an atom’s weight of evil, shall see it”) (translating The Quran 99:7–8).

⁷² F. Crawford Burkitt, *The Religion of the Manichees*, 2 *The Journal of Religion* 263, 265 (May 1922).

nothing may remain enveloped in darkness.”⁷³ “Hence the old proverb, conscience is a thousand witnesses.”⁷⁴

To many, the airing of facts—potentially unpleasant facts, in particular—is a psychological imperative of one’s conscience, tied in with the religious impulse. “The natural origin and fountain-head of confession is to be found in an instinct of human nature, which leads us to communicate to others any strong emotion present to the soul, any powerful influence engendering in us joy or sorrow, hope or fear, self-approbation or self-reproach.”⁷⁵ Keeping unpleasant facts in the dark, away from the cleansing light of accountability, does not simply fail to do the correct thing; rather, it risks psychological discomfort for the concealer. “If some counter motive render concealment necessary, the suppression will be painful to us, and will aggravate our suffering, where the influence present to the soul is one unfavorable to its happiness.”⁷⁶

Faced with the knowledge that one has wronged, other religions agree that one should face that knowledge so that one may perform the proper penance, the first step toward accountability. That is the tradition in Second Temple Judaism;⁷⁷ in the

⁷³ 2 *Institutes of the Christian Religion* 91, tr. John Allen, 6th American ed. (Philadelphia 1936).

⁷⁴ *Id.*

⁷⁵ Rev. R. F. Clarke, *The Practice of Confession in the Catholic Church*, 169 *The North American Review* 829, 831 (Dec. 1899).

⁷⁶ *Id.*

⁷⁷ *Penitential Prayer in Second Temple Judaism: The Development of a Religious Institution*, Rodney A. Werline (1998)

Qumranic tradition embodied in the Dead Sea Scrolls;⁷⁸ the Rabbinic tradition;⁷⁹ as well as in the Islamic tradition.⁸⁰

In both the Talmudic tradition and early Christian literature, the concept of repentance is associated with the imagery of resolving a debt.⁸¹ With potential wrongs maintained under a shroud of secrecy, that debt remains unsatisfied in perpetuity.

No religious tradition imposes a mandate of perfection upon its adherents. But they do impart the wisdom of acknowledging wrongs rather than keeping them secret, and seeking penance to extinguish the moral debt. An individual, or society, who has wronged—but faces and seeks accountability for the wrong—remains in harmony with creation. Indeed, to the Egyptian Christian Monk Abba Poemen the Great, one who has committed a wrong but repented is to be preferred to one who committed no wrong at all, “for

⁷⁸ Bilhah Nitzan, “Repentance in the Dead Sea Scrolls,” in *2 The Dead Sea Scrolls after Fifty Years: A Comprehensive Assessment* 145–70 (ed. Peter W. Flint and James C. VanderKam 1998–99)

⁷⁹ *Some Aspects of Rabbinic Theology*, Solomon Schechter 293–343 (1909).

⁸⁰ Mahmoud Ayoub, “Repentance in the Islamic Tradition,” in *Repentance: A Comparative Perspective* 96–121 (ed. Amitai Etzioni and David E. Carney 1997). *See also* Yishai Kiel, *Penitential Theology in East Late Antiquity: Talmudic, Zoroastrian, and East Christian Reflections*, 45 *Journal for the Study of Judaism in the Persian, Hellenistic, and Roman Period* 551 (2014).

⁸¹ *See Sin: A History* 43–132, Gary Anderson, (2009).

the former possesses a humble mind and the latter esteems himself in his thoughts a just man.”⁸²

IV. THE RELIGIOUS OBJECTIONS TO TORTURE AND BELIEF IN CONFESSION ARE REFLECTED IN OUR SECULAR LEGAL TRADITIONS

Just as human dignity is the bedrock of various religious traditions, human dignity is also one of the foundation stones on which so many of our Constitutional rights are built. As Justice Thomas explained, “[h]uman dignity has long been understood in this country to be innate. When the Framers proclaimed in the Declaration of Independence that ‘all men are created equal’ and ‘endowed by their Creator with certain unalienable Rights,’ they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built.” *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting).

This core belief in human dignity gives rise to familiar principles of individual autonomy, privacy, and freedom of expression. See *United States v. Ferrara*, 771 F. Supp. 1266, 1285–86 (D. Mass. 1991). Those principles in turn animate the rights and protections contained in the Constitution and the Bill of Rights. See *Powell v. Allstate Ins. Co.*, 655 So. 2d 354, 358 (Fla. 1995) (“The founding principle upon

⁸² Quoted in *The Wit and Wisdom of the Christian Fathers of Egypt: The Syrian Version of the Apophthegmata Patrum by Anan Isho of Beth Abhe* 181–82, Ernest A. Wallis Budge (1934).

which this nation was established is that all persons were initially created equal and entitled to have their individual human dignity respected. This guarantee of equal treatment has been carried forward in explicit provisions of our federal and state constitutions.”). In particular, the tradition of respecting the sanctity of the physical individual and the rejection of violating that sanctity through torture, is reflected most clearly in the Eighth Amendment, as well as the Fifth and Fourth Amendments.

The Eighth Amendment’s prohibition of cruel and unusual punishments is guided by the founding principle of innate human dignity. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958). This prohibition “is a basic part of the American constitutional heritage” and encompasses both the concept that “punishment should be suited to the crime and the idea that punishment should not be barbarous.” *Carmona v. Ward*, 576 F.2d 405, 425 (2d Cir. 1978). Although “the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.” *Trop*, 356 U.S. at 100.

Interpreting the Eighth Amendment, this Court has consistently concluded that torture and other cruel punishments are forbidden. *E.g.*, *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *In re Kemmler*, 136 U.S. 436, 446–47 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878). Justices have arrived at this conclusion in

different ways. But one reason why torture and other cruel punishments violate the Eighth Amendment is because these punishments “do[] not comport with human dignity.” *Furman v. Georgia*, 408 U.S. 238, 270 (1972). (Brennan, J., concurring). “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” *Trop*, 356 U.S. at 100. And a punishment must therefore “not be so severe as to be degrading to the dignity of human beings.” *Furman*, 408 U.S. at 271 (Brennan, J., concurring).

The language of the Eighth Amendment’s cruel and unusual punishments clause comes from the English Bill of Rights of 1689. *Furman*, 408 U.S. at 319 (Marshall, J., concurring). Although there are differing interpretations of what the English Bill of Rights was intended to prohibit, “there is no doubt whatever that . . . our Founding Fathers intended to outlaw torture and other cruel punishments” by adopting this language for the Eighth Amendment. *Id.*

Around the time of the founding, states adopted prohibitions against cruel and unusual punishments similar to the one found in the English Bill of Rights. *Furman*, 408 U.S. at 319 (Marshall, J., concurring). And during the debates of the various state conventions called to ratify the Constitution, some delegates had “great concern for the omission [from the Constitution] of any prohibition against torture or other cruel punishments.” *Id.* at 320. Patrick Henry’s comments during the Virginia Constitutional Convention, for one, are insightful. Henry expressed his concern that Congress “may introduce the practice of France, Spain, and Germany—of torturing, to extort

a confession of a crime” to “punish with still more relentless severity.” 3 J. Elliot’s Debates 447–48 (2d ed. 1876). If Congress were to follow that approach, Henry opined, “[w]e are then lost and undone.” (*Id.*)

Members of the First Congress shared Henry’s view. *Furman*, 408 U.S. at 321 (Marshall, J., concurring). And the Eighth Amendment was later ratified with its prohibition of cruel and unusual punishments.

The right to non-excessive bail secured by the Eighth Amendment and various state constitutions is also founded on the principle of human dignity. The Framers “considered that pretrial release on non-capital charges was a fundamental right founded in freedom and human dignity, reflected in the everpresent presumption of innocence, and requiring firm articulation in the Constitutions.” *State v. Johnson*, 294 A.2d 245, 250 (N.J. 1972). Without the right to bail before trial and, thus, the ability to prepare a defense unhampered by pre-trial incarceration, “the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

This founding principle of human dignity is present in the Fifth Amendment’s guarantee against self-incrimination. See *Ullmann v. United States*, 350 U.S. 422, 445 (1956) (Douglas, J., dissenting). When the Fifth Amendment was adopted, “[f]orce and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture.” *Olmstead v. United*

States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting). Through the Fifth Amendment, the Framers “created the federally protected right of silence and decreed that the law could not be used to pry open one’s lips and make him a witness against himself.” *Ullmann*, 350 U.S. at 446 (Douglas, J., dissenting). This right protects against more than just “self-accusation under legal compulsion.” *Id.* at 445–46. It is “a safeguard of conscience and human dignity and freedom of expression as well.” *Id.* at 445.

Concern for human dignity also animates the Fourth Amendment. The Fourth Amendment’s prohibition of unreasonable searches and seizures “was fashioned against the background of knowledge [gradually developed in English law] that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression.” *Stanford v. Texas*, 379 U.S. 476, 484 (1965) (quoting *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961)). To guard against this danger, the Framers drafted the Fourth Amendment to “safeguard[] not only privacy” but also freedom of expression and “human dignity.” *Id.* at 484–85 (quoting *Frank v. Maryland*, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting)); see also *Schmerber v. California*, 384 U.S. 757, 767 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”).

Similarly, the religious concepts of confession and repentance as virtues are reflected in our legal system. This Court has acknowledged that “confessions . . . are an ‘unmitigated good,’” in our secular legal tradition.

Maryland v. Shatzer, 559 U.S. 98, 108 (2010) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991)). Indeed, an entire body of law has arisen to ensure that confessions are voluntary and a product of one's free will in accordance with the Fifth Amendment's protection against self-incrimination.

In perhaps its most obvious form, the importance of transparency, confession, and personal responsibility can be seen in the U.S. Sentencing Guidelines. In particular, the Guidelines provide for a reduction to a defendant's offense level "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1. No fewer than eight considerations can then be assessed to determine the defendant's acceptance of responsibility. *Id.*

Post-conviction, therapeutic and rehabilitative programs also emphasize the positive effects of confession and acceptance of responsibility. Often a condition of probation, court-mandated therapy programs rely on the psychological benefits and corrective powers of confession.⁸³ "Public truth-telling within the legal system . . . can serve a number of important functions that are beneficial to both individuals and society."⁸⁴ In addition to bestowing rehabilitative benefits on the offender, open

⁸³ Scott Michael Solkoff, *Judicial Use Immunity & the Privilege Against Self-Incrimination in Court Mandated Therapy Programs*, 17 *Nova L. Rev.* 1441, 1448-52 (1993).

⁸⁴ C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 *Harv. J. L. & Gender* 311, 320 (2012).

acknowledgment helps society prevent similar abuses in the future: “others who witness the public admission are both on notice and better equipped to confront future offending behavior and hold the offender accountable.”⁸⁵

In the corporate context, showing remorse and accepting responsibility can lead to the avoidance of criminal prosecution altogether. Non-prosecution agreements and deferred prosecution agreements have become powerful tools in the prosecutor’s arsenal against corporate wrong-doing.⁸⁶ One twenty-year study found that nearly 70% of non-prosecution agreements and deferred prosecution agreements contained provisions requiring the corporate entity to acknowledge and accept responsibility for the commission of past wrongs.⁸⁷

In cases involving torture and mistreatment of an individual, these secular traditions intersect with the religious principles objecting to torture and welcoming confession embraced by so many religious practitioners in America. By its very nature, torture attempts to strip a person of their dignity. Barbaric practices have been condemned not just because they are “attended with acute pain and suffering” but also because “they treat members of the human race as nonhumans, as

⁸⁵ *Id.* at 328.

⁸⁶ See Wulf a Kaal & Timothy A. Lacine, *The Effect of Deferred & Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70 *Bus. La.* 61 (2014).

⁸⁷ *Id.* at 114.

objects to be toyed with and discarded.” *Furman*, 408 U.S. at 272–73 (Brennan, J., concurring).

By attempting to strip the humanity from its victims, torture seeks to deny its victims the inalienable rights they enjoy simply because they are human. *See Obergefell*, 576 U.S. at 735 (Thomas, J., dissenting) This dehumanizing effort demeans all of us—and it inherently conflicts with the belief in innate human dignity upon which this nation was built.

In short, torture shatters the sanctity of life that God created. It has no place in humanity. Yet, “all the good moral theory and theology will go nowhere” unless governments, like the United States, have the courage to act “with compassion and solidarity with their neighbors.”⁸⁸

In the same way that religious scholars have spoken out against human suffering and recognized the value of openness and confession, our courts can demonstrate those same values by ensuring that where there is an opportunity to condemn the torture of individuals and bring such circumstances to light, that opportunity is taken.

Here, affirming the decision of the appellate court, and giving the district court a chance to segregate privileged from non-privileged material regarding the treatment of Respondent, would send a clear message that these values in our religious traditions and secular laws are alive and well.

⁸⁸ *See Johnston*, *supra* n.32, at 919–20 (quoting Pope Francis).

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the decision of the Court of Appeals below.

Respectfully submitted,

ANNA M. GREVE
BRIAN A. MORRIS
TAFT STETTINIUS &
HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, Ohio 45202

VIVEK R. HADLEY
TAFT STETTINIUS &
HOLLISTER LLP
One Indiana Square, Suite 3500
Indianapolis, Indiana 46204

MICHAEL K. ROBERTSON
JONATHAN N. OLIVITO
DAVID J. BUTLER
Counsel of Record
TAFT STETTINIUS &
HOLLISTER LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43206
(614) 334-6167
dbutler@taftlaw.com

Counsel for Amici Curiae