

CAPITAL CASE
No. 17-6068

**IN THE
SUPREME COURT OF THE UNITED STATES**

Abu Ali Abdur'Rahman, et al.,

Petitioners,

v.

Tony Parker, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENNESSEE SUPREME COURT

**REPLY TO RESPONSE IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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Introduction

This case presents a question of great national importance that this Court never has addressed: may state governments willfully violate federal law, specifically the Controlled Substances Act, in using drugs to execute a person? Although this Court has dealt with the issue of whether lethal injection is cruel and unusual punishment, never has this Court considered the question of preemption in a state government using drugs in a manner proscribed by federal law to carry out a death sentence. It is an issue that affects the administration of the death penalty in many states throughout the country.

It is important to note that the State of Tennessee in its brief does not dispute the central premise of Petitioners' claim: the way in which the State would carry out executions uses drugs regulated by federal law in a manner that clearly violates federal law. As explained in the Petition for a Writ of Certiorari, Tennessee's Lethal Injection Protocol would use drugs regulated by the Controlled Substances Act in a way that unquestionably violates that federal law. Thus, the issue posed by this case is whether such use of these drugs is preempted by federal law. This is truly a question of life and death for the many individuals on death row in states across the country that use drugs in a manner that violates the Controlled Substances Act. It is an issue that is squarely and clearly presented in this case and requires resolution by this Court.

The State of Tennessee raises two objections to the grant of certiorari. Neither has merit.

I. The Preemption Issue Is Properly Before This Court.

A. Petitioners' Supremacy Clause Claim Is A Preemption Claim That Was Litigated And Decided In The Court below.

Respondent argues that Petitioner's preemption claim was not litigated in the court below. Respondent is in error. Petitioners seek review of the state court's dismissal of Count V

of their amended complaint which raised a supremacy clause claim. Tennessee courts recognize that “[t]he legal basis for the doctrine of preemption is the Supremacy Clause of the United States Constitution, which mandates that the ‘Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ U.S. Const. art. VI, cl. 2. Pursuant to the Supremacy Clause, a law enacted by Congress may preempt an otherwise valid state law, rendering it without effect.” Lake v. Memphis Landmen, LLC, 405 S.W.3d 47, 55 (Tenn. 2013). When a federal statute preempts an otherwise valid state law, the state law is “render[ed] unenforceable.” City of New York v. F.C.C., 486 U.S. 57, 64 (1988). See also, Geier v. Am. Honda Motor Co., 529 U.S. 861, 886 (2000).

Petitioner specifically invoked these principles in their second amended complaint. M2014-024780SC-R10-CV TR¹ 111-137 (“The Constitution of the United States and all federal statutes and treaties comprise the Supreme Law of the Land (U.S. Const. Art. VI, § 2) and all state law or policy that conflicts with or violates the United States Constitution or federal laws cannot stand.”) The dismissal of this claim was properly appealed and presented in the appellate briefing. West v. Schofield, No. M2015-01952-SC-RDM-CV, Appellants’ Brief, pp. 51-97. The Tennessee Supreme Court decided the claim. West v. Schofield, 519 S.W.2d 550 (Tenn. 2017). Any suggestion that this claim was not litigated in the state court and therefore not preserved by review in this Court is flatly wrong.

¹ At the request of the clerk of the Davidson County Chancery Court, the Tennessee Supreme Court incorporated the technical record from the 2014 interlocutory appeal regarding petitioners’ challenge to the state’s electrocution protocol into the technical record in this case.

The Tennessee Supreme Court found that Petitioners lacked standing because the CSA does not confer a private right of action. But Petitioners do not seek a private right of action. The claim is simply that the State of Tennessee is violating federal law and thus its action is preempted and cannot be carried out to execute Petitioners. They have petitioned the courts to enforce the law, as Justice Scalia suggested in his plurality opinion in Armstrong v. Exceptional Child Center, Inc., 135 S.Ct. 1378, 1385 (2015), when he declared: “a court may not convict a criminal defendant of violating a state law that federal law prohibits.” This case poses the same question: may a state execute a criminal defendant in a manner that federal law prohibits? As Justice Scalia explained, this is not a question of creating a cause of action, but of preemption.²

B. Respondent Does Not Deny That The Lethal Injection Protocol Violates The Controlled Substances Act.

Respondent does not dispute that the acts required by the lethal injection protocol require state actors to violate the Controlled Substances Act. Respondent does not contend that state action in procuring, distributing, and administering the controlled substances fit within any exception to the Controlled Substances Act. Therefore, the issue of preemption is properly before this Court as to whether Tennessee’s use of drugs in a manner that violates the Controlled Substances Act is preempted by federal law.³

² The issue also has been phrased as to whether Petitioners have standing. Of course, they do because they obviously will be injured by the use of these drugs to execute them, and the injury is caused by the Tennessee Lethal Injection Protocol and would be remedied by finding it to be preempted by federal law. Moreover, the Tennessee Supreme Court failed to acknowledge that the Tennessee Lethal Injection Protocol conferred standing to Petitioners because it specifically incorporated compliance with the CSA into the Protocol, setting this case apart from others. Whether the Protocol complies with the CSA is the preemption issue presented by this case.

³ Respondent’s attempt to sever the Supremacy Clause/Preemption claim from the Question Presented is unavailing. The issues are plainly the same. Indeed, this is clear from the statement of the Question Presented, which Respondent repeats in its brief: “May states willfully violate federal drug laws, including the Controlled Substances Act, to cause the death of a human being

II. The Decision Of The Tennessee Supreme Court Conflicts With Decisions Of Other Courts, Including the United States Supreme Court.

In the Petition for a Writ of Certiorari, Petitioners argue that this Court should grant review because there is a conflict between the decision of the Tennessee Supreme Court and those of other courts concerning ability of a state to authorize the use of drugs in a manner that violates the federal Controlled Substances Act. For example, in United States v. Oakland Cannabis Club, 532 U.S. 482, 489-90 (2001), this Court explicitly held that a state may not authorize the use of drugs in a manner that violates the Controlled Substances Act. Other courts have come to the same conclusion. *See, e.g., People v. Crouse*, 388 P.3d 39 (Colo. 2017); Forest City Residential Management, Inc. ex rel. Plymouth Square Ltd. Dividend Hous. Assn. v. Beasley, 71 F.Supp.3d 715, 727 (E.D.Mich. 2014).

But the Tennessee Supreme Court came to the opposite conclusion and rejected the argument that the Tennessee Lethal Injection Protocol is preempted by federal law even though it clearly violates the Controlled Substances Act. This is the conflict in authority that requires resolution by this Court. Respondents do not deny this conflict or its national significance.

Conclusion

For these reasons, and for the grounds set forth in the Petition for a Writ of Certiorari, this Court should grant review.

Respectfully submitted,

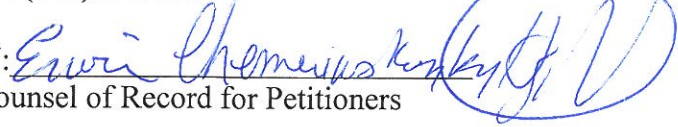
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in order to carry out a death sentence?” This issue squarely presents the issue of preemption to this Court.

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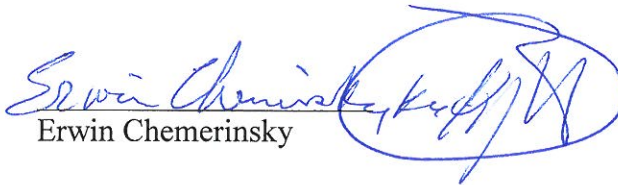
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Certificate of Service

Pursuant to Supreme Court Rule 29.5, I certify that all parties who are required to be served have been served by placing a copy of this Reply in the United States Mail, First Class postage pre-paid copy addressed to counsel for Respondents, Jennifer Smith, 425 Fifth Avenue North, Nashville, Tennessee 37243 and also by electronic mail to Ms. Smith on this 30th day of November, 2017.


Erwin Chemerinsky