No. 18-8332

IN THE

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN, *et al.*,

Petitioners,

v.

TONY PARKER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

BRIEF FOR CONSERVATIVES CONCERNED ABOUT THE DEATH PENALTY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ERIC G. OSBORNE
Counsel of Record
RYAN T. HOLT
AMY R. MOHAN
PHILLIP F. CRAMER
SHERRARD ROE VOIGT & HARBISON
150 3rd Avenue South
Suite 1100
Nashville, TN 37201
(615) 742-4200
eosborne@srvhlaw.com
rholt@srvhlaw.com
amohan@srvhlaw.com
pcramer@srvhlaw.com

Counsel for Amicus Curiae

April 8, 2019

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does a state deprive condemned prisoners of due process when, to defeat a challenge to the state's method of execution, state officials rely on and the state courts credit testimony regarding privileged communications that the prisoners could not effectively challenge through cross-examination or otherwise because they were barred from reviewing the privileged material and from access to the witnesses covered by the privilege?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICUS CURIAE*

In accordance with Supreme Court Rule 37, *amicus curiae* respectfully submits this brief in support of the Petitioner.[1] *Amicus curiae*, Conservatives Concerned About the Death Penalty ("CCATDP"), is a nationwide network of political and social conservatives who question the alignment of capital punishment with conservative values and principles. CCATDP's members comprise a diverse group of conservatives whose reticence toward the death penalty stems from shared principles and values, including:

- A belief in limiting the powers of government and a concern that the death penalty is inconsistent with limited government power because of both the monetary cost and the oft unchecked apparatus necessary to effectuate executions;
- Distrust of the state and its ability to handle matters perfectly, especially with irrevocable matters of life and death;
- A belief that the death penalty is not effective in combatting violent crime and that its implementation ultimately hurts the families of victims; and
- A belief that the death penalty contradicts the value of life, which is of utmost importance to CCADTP and its members.

---

[1] Pursuant to Rule 37.3(a), all parties received timely notice of the intent to file this brief and have consented to the filing of this brief. No party's counsel authored any part of this brief. No party or party's counsel contributed any money to fund the preparation or submission of this brief. No persons or entity other than *amicus* or its counsel contributed any money to fund the preparation or submission of this brief.

Among the many costs of the death penalty are an erosion of public trust in our court system and its fairness toward all citizens. Because of differences in application and implementation, the death penalty raises fairness concerns about who receives the death penalty, whether trials are handled properly and with impartiality, guilt or innocence when the stakes are so high, and how states actually conduct executions and whether state execution procedures are properly vetted and monitored. This case involves fairness to convicted prisoners seeking a fair trial on the constitutionality of the State of Tennessee's execution procedure. It implicates a due process principle called the "fairness principle."

The fact that Tennessee courts refused to follow the "fairness principle" because the State's legislature barred prisoners from obtaining information necessary to vindicate their constitutional rights illustrates precisely why CCADTP's members are so concerned about the death penalty and its effect on due process rights. *Amicus* encourages this Court to be concerned too. CCADTP respectfully asks this Court to grant the Petition.

SUMMARY OF ARGUMENT

Certain procedural practices are so engrained and long-standing in our judicial culture that for them to be denied violates due process. Such is the case with the sword and shield doctrine—the notion that a party cannot use privileged information to prove its case yet still claim the privilege—a procedural practice so fundamental it has been termed the "fairness principle." The fairness principle has been embraced for over a century by virtually every jurisdiction in the country. It is a judicially-created doctrine, universally accepted

and applied, that has become part of the procedural common law.

Via legislation, Tennessee has made it impossible for prisoners challenging the State's method of execution to obtain information necessary to prove their case under this Court's standard set out in *Glossip v. Gross*, 135 S. Ct. 2726 (2015). The fact that a statute has made it impossible for citizens to vindicate their Eighth Amendment rights is a significant constitutional problem in itself, but coupled with the State's use of that same protected information to prove its case, Tennessee's violation has become an affront to both due process and the common law.

Prominent scholars have demonstrated that, at the founding, the Due Process Clause of the Fifth (and later of the Fourteenth) Amendment related to separation of powers—due process originally meant that the legislature should not impinge on powers reserved to the judiciary. In accordance with that original meaning, this Court established long-ago that due process means that procedural rights enjoyed at common law cannot be taken away via legislation. Yet that is what Tennessee has done. And if Tennessee is permitted to do that in this scenario, the erosion of due process and inability of citizens to vindicate their constitutional rights in other contexts may spread. Tennessee has set a dangerous precedent that requires intervention by this Court.

CCADTP is a group of political and social conservatives deeply concerned about due process and fairness in the American system of justice. In Burkean conservative fashion, CCADTP is also deeply concerned about the public's loss of faith in our system of government. This case is doing immense damage to the public's trust, and as a precedent could do even greater

damage in the future. CCADTP requests that this Court grant the Petition.

REASONS FOR GRANTING THE WRIT

This is a due process case.

But this is not just any due process case. This is a case involving denial of a procedural due process right so long-standing and fundamental that it has been termed the "fairness principle."

Moreover, the court below denied fundamental procedural due process when the stakes could not be higher—when the State's power over life and death is at stake. And the reason it did so was because a new state statute termed the Secrecy Act compelled the result. *See* Tenn. Code Ann. § 10-7-504(h)(1). That cannot be allowed to stand.

In the annals of increasing government powers and government assertions that citizens are powerless to contest, this case involves the most extreme example yet—via legislation, the State of Tennessee has taken away the ability of certain citizens to secure a fair hearing to prove that their Eighth Amendment rights are being denied them. If that precedent can be set in this context, what will prevent government actors from taking similar steps in countless other contexts? This brief does not question the constitutionality of the death penalty, but *amicus* asserts that the loss of due process rights is far too dear a price to pay.

The United States exists because our founders would not abide the King taking away basic due process protections. The founding document of our nation, the Declaration of Independence, famously declares the right of the people to "Life, Liberty, and the Pursuit of Happiness" and states that when a government acts

despotically the people may "throw off such Government, and . . . provide new Guards for their future security." The Declaration of Independence, para. 2 (U.S. 1776). Among the offenses committed by the King against the American people, our founders listed specific due process concerns, such as

> For depriving us in many cases, of the benefit of Trial by Jury:
>
> For transporting us beyond Seas to be tried for pretended offences:
>
> For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies: [and]
>
> For taking away our Charters, abolishing our most valuable Laws and altering fundamentally the Forms of our Governments.

Id., paras. 20-23. These points, which are so foundational to our American identity that they are taught to school children at a young age, illustrate just how central due process and government accountability are to the American democratic experiment.

This Court has explicitly looked at that history to enunciate what procedural due process protections American citizens enjoy. In the antebellum era, this Court stated that one of the original purposes of the Due Process Clause was to secure ancient procedural rights available at common law. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 275-77 (1855). By the logic of *Murray's Lessee*, the

fairness principle is one of those fundamental procedural rights. The fairness principle was stated by this Court nearly a century-and-a-half ago and has been adopted and continually reaffirmed by every jurisdiction in the United States. *See Hunt v. Blackburn*, 128 U.S. 464 (1888); Petition for a Writ of Certiorari at 4, 17. It is a common-law doctrine created by judicial decision—not one set out by written rules or statute—that is universal and unquestioned. *See Common Law*, Black's Law Dictionary (10th ed. 2014) ("The body of law derived from judicial decisions, rather than from statutes or constitutions[.]"). To take away that fundamental right would violate the original purpose of the Due Process Clause. There is no exigency present here to justify that.

It is precisely the expansion of government power and erosion of fundamental, individual rights that so deeply troubles *amicus*'s members. *Amicus* writes to draw this Court's attention to what Tennessee has done, why it violates procedural due process, why it contravenes the original intent of the Due Process Clauses of the Constitution, and why the precedent Tennessee has set is a danger to the individual liberty of all Americans.

Amicus respectfully requests that this Court grant the petition so that the fundamental procedural due process rights that have protected American citizens since the founding will continue.

I. The Fairness Principle Is a Fundamental Right Our System of Jurisprudence Has Recognized For Over a Century

In 2018, Petitioners, twenty-six Tennessee prisoners slated for execution, challenged the State's current lethal injection protocol under this Court's two-part

test set out in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), and reaffirmed in *Bucklew v. Precythe,* 587 U.S. ___, No. 17-8151, slip op. at 6, 20 (U.S. Apr. 1, 2019). At the outset of the lawsuit, however, Petitioners were unaware that proof for the second prong of this Court's test of constitutionality—the availability of a proposed alternative—was unattainable because the only such proof was veiled by state secrecy laws and, therefore, wholly unavailable. In other words, Petitioners never had a chance. *Cf. Bucklew* at 6 (noting that a prisoner cannot successfully challenge a method of execution under the Eighth Amendment unless the prisoner identifies an alternative that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain).[2]

All proof showing that a proposed alternative drug is available was in the State's possession. Normally, traditional discovery mechanisms would have allowed Petitioners to uncover the State's information. But in this most important of cases, the Petitioners were given an impossible task—they had to prove that an alternative was available when they were barred by statute from reviewing the only available data on pharmaceutical contacts and drug availability. For example, Petitioners were barred from obtaining

---

[2] This Court's opinion in *Bucklew* provides an additional reason that the Court should grant the Petition. In *Bucklew*, this Court permitted a method of execution because the petitioner had "extensive discovery" into alternative methods of execution. Slip Op. at 6. This Court noted that death sentences are permissible, even if painful, "so long as proper procedures are followed." Slip Op. at 8. But here proper procedures were not followed because there was no discovery—the essential discovery was completely barred. In other words, pursuant to the Court's opinion in *Bucklew*, Tennessee's action must be reversed. That is reason enough for this Court to grant the Petition.

discovery into the State's communications with ten suppliers whom the State conceded were willing to supply an alternative. Pet. at 8; Pet. App. at 127a. The Petitioners were barred from deposing the suppliers or the state officials with whom the suppliers interacted. Pet. at 10. The Petitioners could not effectively cross-examine the state officials who testified that pentobarbital—the alternative drug sought—was not reasonably available because the relevant information was redacted. Pet. at 8-9, 11. In sum, Petitioners had the burden to prove that an alternative was available but no means to contradict the State's untestable assertion that there was no alternative.[3] And this fact was recognized by Tennessee Supreme Court Justice Sharon Lee in her dissent: "In Tennessee, executions are cloaked in secrecy, which makes it difficult—if not impossible—for the Petitioners to establish an available alternative to the State's method of execution." Pet. App. at 27a.

---

[3] What Tennessee has done is precisely what *Bucklew* says states may not do. In *Bucklew,* this Court noted that states may not limit execution alternatives and thereby, via statute, take away a prisoner's right to prove an Eighth Amendment claim. 587 U.S. ___ (slip op. at 19-20) ("But the Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes."); *see also id.* at 34 (Kavanaugh, J. concurring) ("I write to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law[.]"). If states cannot hamper Eighth Amendment claims by legislatively limiting available methods of execution, then it follows that states cannot hamper Eighth Amendment claims by legislatively barring discovery into how available those methods actually are. Otherwise states would be beyond Constitutional scrutiny, and the Eighth Amendment would not be the "supreme law of the land."

This stark example of one party's complete inability to vindicate a constitutional right because of inaccessible information and a complete lack of transparency violates procedural rights at the core of due process. Our system is predicated upon the notion that no one is above the law. But if Tennessee can assert a dispositive fact based on underlying information that was shielded from Petitioners by a state secrecy law, then the bedrock principle that privilege cannot be used as both a sword and shield means nothing.

What Tennessee did is expressly prohibited by universal precedent nearly a century-and-a-half old. The sword-shield rule or "fairness doctrine" is an integral part of American jurisprudence. In *Hunt v. Blackburn*, 128 U.S. 464 (1888), this Court held that Mrs. Blackburn could not use privileged advice from her attorney to defend herself while simultaneously claiming privilege over that very same information. As this Court stated, "When Mrs. Blackburn entered upon a line of defense which involved what transpired between herself and [her attorney], and respecting which she testified, she waived her right to his giving his own account of the matter." *Id.* at 470-71. In other words, this Court instructed that fundamental fairness does not allow one to claim privilege as it suits the litigant or to waive privilege only at one's whim.

Since *Hunt*, this Court has consistently and repeatedly reaffirmed the fairness principle and held that the sword-shield rule is necessary to protect due process. *See Brown v. United States*, 356 U.S. 148, 156 (1958) (holding that a party cannot take the stand in her own behalf and then also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination); *Clark v. United States*, 289 U.S. 1, 15 (1933) ("The privilege takes

flight if the relation is abused."). Indeed, the fairness doctrine is such an integral part of American jurisprudence that nearly every federal and state court has adopted the same or a similar doctrine. *See* Pet. at 17-21 and App'x F.

Remarkably, this is one area of the law that enjoys widespread and virtually universal acceptance. The doctrine is applied in nearly every area of law and with different kinds of privileges. *See, e.g. In re Echostar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006) (patent infringement case); *Ex parte Meadowbrook Ins. Grp., Inc.*, 987 So. 2d 540, 551 (Ala. 2007) (insurance coverage litigation); *Arredondo v. State*, 411 P.3d 640, 647 (Alaska Ct. App. 2018) (marital communications privilege); *People v. Davis*, 637 N.Y.S.2d 297, 301 (Nassau Cty. Ct. 1995) (physician-patient privilege). Moreover, as the foregoing cases illustrate, it is a rule articulated by courts and arising necessarily from the logic of how impartial proceedings take place. In other words, over the past 150 years, the fairness principle has been articulated as a common law procedural right derived, by necessity, from what must be for a litigant to enjoy fair due process.

This Court has never carved out a special exception to the fairness doctrine for capital cases. Neither has the State of Tennessee. To do so would be turn the doctrine on its head, as it exists to protect fundamental fairness and due process, principles that are undoubtedly most important when life and death are at stake.

A textbook application of the fairness principle in this case would have required Tennessee to either maintain the privilege but forego the ability for state officials to testify about the unavailability of an alternative drug, or assert that there is no available

alternative and waive the privilege in the interest of fairness. Instead, Tennessee was essentially given a pass—an opportunity to set aside deep-rooted principles of fairness and due process and to create what Petitioners have aptly described as "an irrebuttable presumption of correctness in the testimony of state officials on a dispositive issue in contested litigation." Pet. at 22. This Court did not envision such an exception in 1888, and it should not permit the procedural common law doctrine to be destroyed now. This Court should grant the Petition.

II. The Original Meaning of the Due Process Clause Was to Protect Rights Such as the Fairness Principle

When the Tennessee courts applied the Secrecy Act against the State's death-row inmates in violation of the fairness principle, they not only contravened decades of precedent from this and other courts but also deprived Petitioners of the type of procedural due process our country's founders originally understood due process to protect.

As Nathan Chapman and Michael McConnell have exhaustively and convincingly argued, at the founding, due process was originally about separation of powers. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L. J. 1672 (2012). From its origin in Magna Carta, due process meant that legislatures could not invade the purview of the judiciary—the law-giver should be separate from the legal adjudicatory.[4] "Legislative acts

[4] The same year this Court decided *Marbury v. Madison*, Henry St. George Tucker wrote an influential commentary on Blackstone and opined on the case of Robert Randall, the first person known to have asserted a Fifth Amendment Due Process Claim. McConnell,

violated due process not because they were unreasonable or in violation of a higher law, but because they exercised judicial power or abrogated common law procedural protections." *Id.* at 1677. Yet that is precisely what the Tennessee legislature has done with the Secrecy Act, which abrogates common law procedural protections over a century old.

In both the antebellum and Reconstruction eras, this Court explicitly stated that the original meaning of due process is that legislatures cannot take away common law procedural rights. First, in *Murray's Lessee*, this Court considered whether seizing property via a special warrant without judicial process violated the Fifth Amendment Due Process Clause. The Court stated that the two tests for due process are "whether th[e] process be in conflict with any of [the Constitution's] provisions" and, if not, whether the process conflicts with the "settled usages and modes of proceeding existing at common and statute law of England." 59 U.S. at 277. The Court went on to clarify that Congress cannot "withdraw from judicial cognizance any matter which, by its nature, is the subject of a suit at the common law[.]" *Id.* a 284. *Murray's Lessee* thus established that common law procedural

---

supra, at 1741. Randall had been detained by the sergeant-at-arms of the House of Representatives without a trial. *Id.* Tucker argued that the House's action violated due process because "all the powers granted by the constitution are either legislative, and executive, or judicial; to keep them for ever [sic] separate and distinct . . . constitutes one of the fundamental principles of the American governments." 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, 204 (St. George Tucker, ed., 1803).

rights enjoyed due process protections, and the legislature cannot take away those rights from the courts.

After the Civil War, this Court again considered the original meaning of due process in *Hurtado v. California*—now in the context of the Fourteenth Amendment Due Process Clause. 110 U.S. 516, 519-20 (1884). This Court elaborated on *Murray's Lessee* and noted that due process means more than just English common law rights, as it includes "settled usage both in England and in this country." *Id.* at 528. This Court further noted that due process is not limited to just ancient rights because the "true philosophy of our historical legal institutions [is] to say that the spirit of personal liberty and individual right . . . was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations" leading to new forms and processes necessary to give effect to "modern ideas of self-government." *Id.* at 529. Due process "refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized." *Id.* at 536 (quoting *Brown v. Board of Levee Com'rs*, 50 Miss. 468, 479 (1874)). But "[a]rbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law." *Id.* at 536. This Court then gave examples of such arbitrary acts which are not due process of law—"acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another[.]" *Id.* at 536. Notably, all of the examples in *Hurtado* of actions violating due process are actions in which a legislature impinges on power that is within the authority of the judiciary—exactly the type of action the Tennessee legislature engaged in here.

Murray's Lessee and *Hurtado* together evince a clear understanding of the original meaning of due process—due process consists of "fundamental rights" that have been recognized in both the common law of England and the United States. These are rights that have become "settled usage" that our system of jurisprudence has "always recognized." The fairness principle meets that test. It is a settled usage employed by all jurisdictions for nearly 150 years to give effect to modern ideas of self-government. In contrast, Tennessee's Secrecy Act, completely depriving Petitioners of the ability to prove their case, impinges on the judiciary's prerogative and is the sort of "arbitrary act" depriving someone of fundamental fairness that, according to this Court, violates due process as the founders understood it.

This Court should grant the Petition because Tennessee's action violates the original meaning of the Due Process Clauses.

III. If This Court Permits Due Process Violations Such as Tennessee's to Continue, Citizens Could Lose Their Ability to Vindicate Constitutional Rights

If this Court permits Tennessee and similarly-situated courts in other states to apply secrecy laws in this manner, the implications could be staggering. At least twenty states have enacted similar secrecy laws, Pet. at 28, n. 6), and that number continues to grow. The interaction of *Glossip, Bucklew,* and these secrecy laws means the Petitioners' fact pattern is certain to recur. Whenever states contend that an alternative drug is unavailable and use their own records as proof, prisoners will be unable to test such claims. As prisoner after prisoner is put to death using drugs that are proved to cause undue suffering, no one will know

if their Eighth Amendment rights were violated under the test this Court established in *Glossip* and affirmed in *Bucklew*. This fundamentally unfair process could further undermine public confidence in the administration of justice.

But the implications extend far beyond executions. There are many other contexts in which a similar application of secrecy laws would prevent citizens from vindicating other constitutional rights. Take guns and the Second Amendment, for example. Just as Tennessee cloaks in secrecy the process leading up to executions, it does the same for the suspension and revocation of a citizen's permit for handguns. In particular, Tennessee law provides that "[a]ny and all records maintained relative to . . . the renewal, expiration, suspension, or revocation of a handgun carry permit" are "confidential . . . and shall not be released in any manner." Tenn. Code Ann. § 10-7-504(o)(1)(C). Although the statute has three exceptions—allowing the release of records to law enforcement, to determine if a person has a handgun permit, and for statistical reports, Tenn. Code Ann. § 10-7-504(o)(2)-(4)—none allow a person whose handgun permit was mysteriously suspended or revoked to learn the reasons why.

If citizens cannot learn why their handgun permits were suspended or revoked, they cannot effectively challenge the State's permitting decisions and thereby seek to vindicate their Second Amendment rights. This concern is not limited to Tennessee; at least four other states currently have such permit-secrecy laws on the books. *See* Ark. Code Ann. § 25-19-105(b)(19) ("It is the specific intent of this section that the following shall not be deemed to be made open to the public under the provisions of this chapter . . . [r]ecords pertaining to the issuance, renewal, expiration,

suspension, or revocation of a license to carry a concealed handgun . . . ."); Kan. Stat. Ann. § 75-7c06(b) ("[R]ecords relating to . . . persons who have had a license denied pursuant to this act shall be confidential and shall not be disclosed pursuant to the Kansas open records act."); Ohio Rev. Code Ann. § 2923.129(B) ("[T]he records that a sheriff keeps relative to the issuance, renewal, suspension, or revocation of a concealed handgun license . . . are confidential and are not public records."); N.J. Stat. Ann. § 47:1A-1.1 ("A government record shall not include the following information which is deemed to be confidential . . . personal firearms records . . . [which includes] . . . any document reflecting the issuance or denial of a permit to purchase a handgun . . . .").

Nor is this problem hypothetical. An article in the Chicago Tribune discussed how, after hundreds of applications for gun permits in Illinois were declined, the applicants were unable to learn the reasons for the denial. *See* Chicago Tribune, *Why such secrecy on gun permits* (July 11, 2014), available at http://www.chicagotribune.com/opinion/ct-xpm-2014-07-11-ct-concealed-carry-permit-edit-0711-20140711-story.html. The article explained:

> [S]ome of those who were turned down say they don't know why—and can't find out. One is Michael Thomas, of Chicago, a former Air Force reservist who was honorably discharged. "I have never been arrested or convicted for any offense, either misdemeanor or felony, in the state of Illinois or any other state," he said in a letter to the Illinois State Police. But neither the state police nor the board will tell him why he was refused.

> So the National Rifle Association is suing the state on behalf of 194 rejected applicants. It argues that the opaque process denies them due process, because they are not informed of the basis for the decision or given the chance to challenge it. We don't often say this, but the NRA has a point. . . . [T]here is no reason for so much secrecy.

Id.

But the Second and Eighth Amendment are not the only constitutional rights at risk. The First Amendment is jeopardized too. Consider teacher evaluations. Tennessee's secrecy law provides that "[a]ll records containing the results of individual teacher evaluations administered pursuant to the policies, guidelines, and criteria adopted by the state board of education . . . shall be treated as confidential." Tenn. Code Ann. § 10-7-504(a)(23). Assume a school district terminates a teacher based on the teacher's evaluation then refuses to disclose the full contents of that evaluation to the teacher. Under the same reasoning of the Tennessee courts below, the teacher would be handcuffed from challenging the termination. Perhaps the teacher was criticized in his evaluation for speaking out on matters of public concern, or for the way he practiced his religion. The teacher would never even know that his First Amendment rights had been violated, and he would be impotent to vindicate those rights. The same is true of the Petitioners in the exercise of their Eighth Amendment rights. If the petition is not granted, these sorts of fact patterns—in the context of executions and otherwise—will proliferate.

That should not be permitted. This Court should grant the Petition.

Respectfully submitted,

ERIC G. OSBORNE
Counsel of Record
RYAN T. HOLT
AMY R. MOHAN
PHILLIP F. CRAMER
SHERRARD ROE VOIGT & HARBISON
150 3rd Avenue South
Suite 1100
Nashville, TN 37201
(615) 742-4200
eosborne@srvhlaw.com
rholt@srvhlaw.com
amohan@srvhlaw.com
pcramer@srvhlaw.com

Counsel for Amicus Curiae

April 8, 2019