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 WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

RESPONDENTS' BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Does the Due Process Clause entitle inmates challenging a State's method of execution under the Eighth Amendment to discover the identities of the individuals and entities who are or may be involved in procuring or supplying the drugs used to carry out lethal injection?

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INTRODUCTION

Petitioners are twenty-three Tennessee death-row inmates whose murder convictions and death sentences were affirmed on direct review decades ago.[1] In 2018, petitioners and ten other death-row inmates filed a declaratory judgment action in state court challenging the facial constitutionality of Tennessee's lethal injection procedures—a three-drug protocol that uses midazolam, vecuronium bromide, and potassium chloride. Like other courts that have considered Eighth Amendment challenges to midazolam-based protocols, the Tennessee Supreme Court rejected that challenge.[2] Although petitioners were required under *Glossip v. Gross*, 135 S. Ct.

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[1] *State v. Bane*, 57 S.W.3d 411 (Tenn. 2001) (affirming sentence), *cert. denied*, 534 U.S. 1115 (2002); *State v. Bane*, 853 S.W.2d 483 (Tenn. 1993) (affirming conviction), *cert. denied*, 510 U.S. 1040 (1994); *State v. Black*, 815 S.W.2d 166 (Tenn. 1991); *State v. Bland*, 958 S.W.2d 651 (Tenn. 1997), *cert. denied*, 523 U.S. 1083 (1998); *State v. Burns*, 979 S.W.2d 276 (Tenn. 1998), *cert. denied*, 527 U.S. 1039 (1999); *State v. Carter*, 114 S.W.3d 895 (Tenn. 2003) (affirming sentence of petitioner Akil Jahi), *cert. denied*, 540 U.S. 1221 (2004); *State v. Carter*, 988 S.W.2d 145 (Tenn. 1999) (affirming conviction of petitioner Akil Jahi); *State v. Chalmers*, 28 S.W.3d 913 (Tenn. 2000), *cert. denied*, 532 U.S. 925 (2001); *State v. Hall*, 958 S.W.2d 679 (Tenn. 1997), *cert. denied*, 524 U.S. 941 (1998); *State v. Henderson*, 24 S.W.3d 307 (Tenn. 2000), *cert. denied*, 531 U.S. 934 (2000); *State v. Hines*, 758 S.W.2d 515 (Tenn. 1988) (affirming conviction); *State v. Hines*, 919 S.W.2d 573 (Tenn. 1995) (affirming sentence), *cert. denied*, 519 U.S. 847 (1996); *State v. Hodges*, 944 S.W.2d 346 (Tenn. 1997), *cert. denied*, 522 U.S. 999 (1997); *State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006), *cert. denied*, 549 U.S. 914 (2006); *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987), *cert. denied*, 485 U.S. 994 (1988); *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990) (affirming convictions and sentence of petitioner Abu-Ali Abdur'Rahman), *cert. denied*, 498 U.S. 908 (1990); *State v. Jordan*, 325 S.W.3d 1 (Tenn. 2010), *cert. denied*, 563 U.S. 919 (2011); *State v. Keen*, 926 S.W.2d 727 (Tenn. 1994) (affirming conviction); *State v. Keen*, 31 S.W.3d 196 (Tenn. 2000) (affirming sentence), *cert. denied*, 532 U.S. 907 (2001); *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn. 1992) (affirming conviction), *cert. granted*, 507 U.S. 1028 (1993), *and dismissed*, 510 U.S. 124 (1993); *State v. Middlebrooks*, 995 S.W.2d 550 (Tenn. 1999) (affirming sentence); *State v. Morris*, 24 S.W.3d 788 (Tenn. 2000), *cert. denied*, 531 U.S. 1082 (2001); *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990), *aff'd*, 501 U.S. 808 (1991); *State v. Powers*, 101 S.W.3d 383 (Tenn. 2003), *cert. denied*, 538 U.S. 1038 (2003); *State v. Rogers*, 188 S.W.3d 593 (Tenn. 2006), *cert. denied*, 549 U.S. 862 (2006); *State v. McKay*, 680 S.W.2d 449 (Tenn. 1984) (affirming convictions and sentence of Michael Sample), *cert. denied sub nom. Sample v. Tennessee*, 470 U.S. 1034 (1985); *State v. Smith*, 868 S.W.2d 561 (Tenn. 1994), *cert. denied*, 513 U.S. 960 (1994); *State v. Wright*, 756 S.W.2d 669 (Tenn. 1988), *cert. denied*, 488 U.S. 1034 (1989).

[2] *See, e.g.*, *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015); *In re Ohio Execution Protocol*, 860

2726 (2015), to plead and prove a "known and available alternative method of execution that entails a lesser risk of pain" than the challenged protocol, *id.* at 2731, petitioners "offered no direct proof as to availability" of their proposed alternative of pentobarbital, Pet. App. 21a. Instead of presenting proof from expert witnesses or otherwise, they "attempted to prove availability of pentobarbital by discrediting the testimony" of state officials. Pet. App. 21a. Because petitioners failed to prove that pentobarbital is available for Tennessee's use in executions, their Eighth Amendment claim necessarily failed. Pet. App. 22a.

Petitioners now argue that the trial court's discovery rulings, preventing them from obtaining the identities of the state employee responsible for procuring lethal injection drugs and the potential suppliers with whom that employee communicated, deprived them of due process. Because they never presented that issue to the Tennessee Supreme Court, and that court never passed on it, this Court is precluded from reviewing it.

Review would not be warranted in any event. The decision below does not conflict with the decision of any other state high court or federal court of appeals. Nor does it conflict with any of this Court's precedents. Courts that have considered whether inmates challenging a State's method of execution are entitled to discover the identities of execution participants have uniformly held that they are not. And denying petitioners access to this information is not, as they contend, tantamount to depriving them of the ability to cross-examine adverse witnesses or allowing the State to use privileged information as both a sword and a shield. The Due Process Clause does not

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F.3d 881, 885-92 (6th Cir. 2017) (en banc), *cert. denied sub nom. Otte v. Morgan*, 137 S. Ct. 2238 (2017); *McGehee v. Hutchison*, 854 F.3d 488, 492 (8th Cir. 2017) (en banc) (per curiam), *cert. denied*, 137 S. Ct. 1275 (2017); *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016), *cert. denied sub nom. Arthur v. Dunn*, 137 S. Ct. 725 (2017); *Kelley v. Johnson*, 496 S.W.3d 346 (Ark. 2016), *cert. denied*, 137 S. Ct. 1067 (2017); *Howell v. State*, 133 So. 3d 511 (Fla. 2014), *cert. denied*, 571 U.S. 1234 (2014).

entitle petitioners to unlimited discovery to support their affirmative claims against the State.

The trial court's discovery rulings appropriately balanced petitioners' need for discovery against the significant burden that disclosure of the identities would impose on the State and execution participants. Requiring the State to disclose the identities of potential suppliers of lethal injection drugs or other execution participants would unduly interfere with the State's ability to carry out executions, because it would subject those participants to harassment and deter participation in the execution process. Petitioners' asserted right to unlimited discovery from the State in method-of-execution challenges wholly fails to account for this burden. And it is untenable given this Court's acknowledgement that there "must be a constitutional means" of carrying out capital punishment. *Glossip*, 135 S. Ct. at 2732-33 (alteration and internal quotation marks omitted).

This Court has already denied two petitions for certiorari seeking review of the Tennessee Supreme Court's decision in this case. *See Zagorski v. Parker*, 139 S. Ct. 11 (2018) (denying certiorari and stay of execution); *Miller v. Parker*, 139 S. Ct. 626 (2018) (denying certiorari and stay of execution). This petition should also be denied.

STATEMENT OF THE CASE

A. Lethal Injection in Tennessee

Petitioners' lawsuit is the latest in a series of challenges to Tennessee's lethal injection procedures. Tennessee adopted lethal injection as the default method of execution in 2000. Tenn. Code Ann. § 40-23-114(a); *see also* Pet. App. 2a. Like nearly all other States with lethal injection procedures, Tennessee originally adopted a three-drug protocol using sodium pentothal, pancuronium bromide, and potassium chloride. *See Workman v. Bredesen*, 486 F.3d 896, 902 (6th Cir. 2007) (noting that 29 other jurisdictions, including the Federal Government, employed the

same protocol), *cert. denied*, 550 U.S. 930 (2007). In 2003, one of the petitioners in this case, Abu-Ali Abdur'Rahman, challenged the constitutionality of that protocol under the Eighth Amendment in state court. The Tennessee Supreme Court rejected the challenge. *See Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 305-09 (Tenn. 2005), *cert. denied*, 547 U.S. 1147 (2006); *see also West v. Schofield*, 380 S.W.3d 105, 116-17 (Tenn. Ct. App. 2012) (rejecting challenge to revised protocol that used same three drugs and added checks for consciousness), *perm. app. denied* (Tenn. 2012), *and cert. denied*, 568 U.S. 1165 (2013). A couple of years later, this Court rejected an Eighth Amendment challenge to Kentucky's lethal injection protocol, which used the same combination of drugs. *Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality opinion).

Although "*Baze* cleared any legal obstacle" to the three-drug protocol that Tennessee originally employed, "a practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences." *Glossip*, 135 S. Ct. at 2733. By 2011, "the sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug protocol," had exited the market entirely. *Id.* Unable to procure sodium thiopental, States, including Tennessee, began replacing that drug with pentobarbital. *Id.*

In 2013, the Tennessee Department of Correction ("TDOC") adopted a new lethal injection protocol that used a single drug: pentobarbital. Pet. App. 3a. Once again, death-sentenced inmates, including many of the petitioners in this case, challenged the protocol in state court under the Eighth Amendment. In 2017, the Tennessee Supreme Court upheld the single-drug protocol using pentobarbital as facially constitutional. *West v. Schofield* (*West II*), 519 S.W.3d 550, 563-67 (Tenn. 2017), *cert. denied sub nom. West v. Parker*, 138 S. Ct. 476 (2017), *and Abdur'Rahman v. Parker*, 138 S. Ct. 647 (2018).

Soon, "pentobarbital also became unavailable" after "[a]nti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions." *Glossip*, 135 S. Ct. at 2733. States were forced to turn to yet another drug: midazolam. *Id.* at 2734. On January 8, 2018, TDOC again amended its lethal injection protocol, this time adopting a midazolam-based three-drug protocol as an alternative to the one-drug pentobarbital protocol. Pet. App. 4a. The three-drug protocol "calls for the administration of 500 milligrams of midazolam (a sedative in the benzodiazepine family of drugs) followed by vecuronium bromide (a paralytic agent) and potassium chloride (a heart-stopping agent)." Pet. App. 4a. On July 5, 2018, TDOC revised the protocol to eliminate the one-drug pentobarbital protocol, leaving the three-drug midazolam-based protocol as the "exclusive method of execution by lethal injection in Tennessee." Pet. App. 5a.

Three years before Tennessee adopted its current midazolam-based protocol, this Court rejected an Eighth Amendment challenge to a materially identical protocol used by Oklahoma. *Glossip*, 135 S. Ct. at 2737-38. In *Glossip*, this Court reiterated what a plurality of the Court had explained in *Baze*: "because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" *Glossip*, 135 S. Ct. at 2732-33 (alterations in original) (quoting *Baze*, 553 U.S. at 47). An inmate challenging a State's method of execution under the Eighth Amendment is therefore required to plead and prove two things: first, that the challenged method presents a "demonstrated risk of severe pain"; and second, "the existence of a known and available alternative method of execution that would entail a significantly less severe risk." *Id.* at 2737. Because the inmates in *Glossip* failed to prove either element, this Court rejected the inmates' Eighth Amendment challenge to Oklahoma's midazolam-based protocol. *Id.* at 2738-45.

B. Tennessee Law Concerning Confidentiality of Execution Participants

Tennessee Code Annotated § 10-7-504(h)(1), which is part of the Tennessee Public Records Act, provides that "those parts of the record identifying an individual or entity as a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection." Tenn. Code Ann. § 10-7-504(h)(1). The provision specifies that the phrase "person or entity" includes, among others, "a person or entity involved in the procurement or provision of chemicals, equipment, supplies and other items for use in carrying out a sentence of death." *Id.*

In *West v. Schofield* (*West I*), 460 S.W.3d 113 (Tenn. 2015), an action challenging the State's lethal injection protocol on its face under the Eighth Amendment, the Tennessee Supreme Court considered whether the State was required to disclose in discovery the identities of certain individuals involved in carrying out that protocol. 460 S.W.3d at 120. The State had urged the court to "adopt a common-law privilege" to protect the identities of execution participants, based largely on the public policy favoring confidentiality reflected in Tenn. Code Ann. § 10-7-504(h)(1). *Id.* at 121. The court found it unnecessary to decide whether a common-law privilege existed because it determined that the requested identities were irrelevant in that case and therefore not subject to discovery. *See id.* at 125.

But the court agreed with the State that the legislature had "declared the public policy of Tennessee to favor the anonymity of those involved in carrying out capital punishment." *Id.* at 124-25. In support of that conclusion, the court recounted the legislative history of Tenn. Code Ann. § 10-7-504(h)(1). The court noted that the legislature had amended the provision in 2013 in response to a Tennessee Court of Appeals decision that had construed it narrowly to protect only direct participants in an execution, and not procurers or suppliers of lethal injection drugs. *Id.* at

122-23 (citing *Bottei v. Ray*, No. M2011-00087-COA-R3-CV, 2011 WL 4342652 (Tenn. Ct. App. Sept. 15, 2011)). The sponsor of that amendment explained that "involvement in carrying out a death sentence . . . in accordance with state law shouldn't subject any person to retaliation by those who may disagree with that law." *Id.* at 121 (internal quotation marks omitted). And he observed that the Tennessee Court of Appeals' decision had made it "difficult for [TDOC] to obtain the materials that are needed [for executions] because those who would provide the materials are afraid that they will be subject to some kind of exposure or liability." *Id.* (internal quotation marks omitted).

Given the State's important policy interest, the Tennessee Supreme Court held that, even if the identities of execution participants are "not privileged and [are] relevant to the subject matter involved in the pending action," a trial court must "balance the specific need for the information against the harm that could result from disclosure of the information." *Id.* at 128. In particular, a trial court must consider the "State's need to protect the privacy of those involved in the execution of condemned inmates and its need to protect those persons from annoyance, embarrassment, and/or oppression." *Id.* at 128. The court noted that, because "the execution of condemned inmates remain[ed] a highly divisive and emotionally charged topic in Tennessee," "[r]evealing the identities of the [p]articipants, even subject to a protective order, create[d] a risk that the [p]articipants would be deterred from performing their lawful duties." *Id.*

C. Procedural Background

Petitioners brought a declaratory judgment action in state court alleging, as relevant here, that Tennessee's midazolam-based protocol is facially unconstitutional under the Eighth Amendment. Pet. App. 4a-5a. In an effort to satisfy *Glossip*'s requirement that an inmate plead and prove a "known and available" alternative method of execution, petitioners alleged that a

single-drug pentobarbital protocol is an available alternative that would significantly lessen the risk of pain. Pet. App. 5a.

During discovery, petitioners requested that the State disclose the identities of persons involved in the procurement of lethal injection drugs and of potential and actual suppliers of the drugs. The State objected to those requests. *See* Pet. App. 86a-87a, 114a-115a,121a-123a. The State argued that Tenn. Code Ann. § 10-7-504(h)(1) evinces a clear policy in favor of protecting the anonymity of procurers and suppliers of lethal injection drugs. The State also argued that disclosure of the identities was prohibited under the balancing test required by the Tennessee Supreme Court's decision in *West I*. Pet. App. 121a-122a.

The trial court granted petitioners some of their requested discovery but allowed the State to protect the identities of those involved in procuring lethal injection drugs and of actual or potential suppliers of such drugs. The trial court found that information regarding the availability of pentobarbital and the State's efforts to obtain it was relevant to petitioners' Eighth Amendment claim, given that they had alleged pentobarbital as a less painful alternative. Pet. App. 108a-110a. Thus, the trial court allowed petitioners to obtain discovery from the named defendants—the Commissioner of TDOC and the Warden of Riverbend Maximum Security Institution—regarding their knowledge of the availability of pentobarbital, the source and basis of that knowledge, and the State's efforts to obtain pentobarbital, while precluding petitioners from discovering the identities of those responsible for procuring the drug or any supplier or potential supplier of the drug. Pet. App. 112a-115a, 131a. The trial court also allowed petitioners to depose the Deputy Commissioner of TDOC, because her "identity in connection with the lethal injection protocol [wa]s not confidential and ha[d] been publicly disseminated such that privacy concerns and interests ha[d] been waived." Pet. App. 86a. But the trial court denied petitioners' requests to

depose a TDOC staff attorney and an assistant warden, because the information that "might be gleaned" from those witnesses did not outweigh their privacy interests. Pet. App. 87a. The trial court made clear that, in crafting its discovery orders, it had factored in the policy of Tenn. Code Ann. § 10-7-504(h)(1) to keep the identities of execution participants confidential, as well as the balancing test required by *West I*. Pet. App. 112a, 116a-117a, 127a.

At trial, petitioners "presented none of their own witnesses to show that their proposed method of execution—pentobarbital—is available to the State of Tennessee." Pet. App. 44a. Of the four expert witnesses petitioners retained, "none were retained to investigate sources of pentobarbital to report to the Court the results of their search, e.g., whether they were rebuffed, whether the sources exist, etc., and none were able to provide any information on this critical element of the trial." Pet. App. 46a. The trial court noted that this approach contrasted with that of the plaintiffs in other method-of-execution challenges. Pet. App. 44a-45a. In one case, for example, inmates had presented their own expert witnesses who had conducted searches and made personal contacts to determine whether pentobarbital was available. Pet. App. 44a-45a (citing *Arthur v. Comm'r, Dep't of Corr.*, 840 F.3d 1268, 1278-80 (11th Cir. 2016), *cert. denied sub nom. Arthur v. Dunn*, 137 S. Ct. 725 (2017)). Petitioners offered "[n]o good reason . . . as to why [they] failed to provide such important proof" in this case. Pet. App. 46a.

Petitioners instead "attempted to prove their case solely by discrediting State officials," a strategy that the trial court found "not persuasive." Pet. App. 46a. The testimony of the TDOC Commissioner and Deputy Commissioner "established that they proceeded reasonably as department heads to delegate the task of investigating supplies of pentobarbital to a member of their staff," and that this staff member provided them information showing that pentobarbital was not available. Pet. App. 47a. The trial court found the officials credible, giving "every appearance

and indication that they have and would continue to discharge their duties of locating supplies of lethal injection drugs in good faith and in accordance with the law." Pet. App. 47a.

Their testimony was corroborated by a PowerPoint presentation that documented, in considerable detail, TDOC's unsuccessful efforts to obtain pentobarbital. Pet. App. 47a-50a. The presentation indicated that "contact was made with close to 100 potential sources." Pet. App. 48a. "None of these worked out," however, because the source either did not have an inventory of pentobarbital, did not have a sufficient quantity of pentobarbital, or was unwilling to supply pentobarbital for use in lethal injection. Pet. App. 48a.

The testimony of the TDOC officials regarding their good-faith efforts to obtain pentobarbital was also corroborated by "common sense." Pet. App. 52a. As the trial court explained, "the State ha[d] every reason to use pentobarbital" if it could be secured. Pet. App. 52a. The Tennessee Supreme Court had recently upheld that protocol after the State spent "three and one-half years . . . defending [it] in *West*." Pet. App. 21a.

"In the face of th[at] weighty evidence," petitioners had urged the trial court to draw negative inferences from a "handwritten, undated note" and a "text message"—inferences that the trial court found were unwarranted "in light of the totality of the information in the PowerPoint and the credibility of the TDOC officials." Pet. App. 50a-51a. The trial court concluded that petitioners had failed to show that pentobarbital is available to the State and therefore had failed to establish, as required by *Glossip*, "that there is an available alternative for carrying out their executions." Pet. App. 54a.

On appeal,[3] petitioners argued that the proof at trial established that pentobarbital was

[3] The Tennessee Supreme Court assumed jurisdiction over the appeal under Tenn. Code Ann. § 16-3-201(d)(3).

available to the State. Petitioners contended that the PowerPoint presentation and other documents established that, at least as of 2017, there were suppliers willing and able to sell small quantities of pentobarbital for use in executions. Brief of Plaintiffs-Appellants at 211, *Abdur'Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018) (No. M2018-01385-SC-RDO-CV) (hereinafter "Brief of Plaintiffs-Appellants").[4] Petitioners theorized that, if the State had purchased those small quantities in 2017, they "would be viable for use, today." *Id.*; *see also id.* at 217 ("Had the State of Tennessee used ordinary transactional effort in April and May of 2017, Defendants would possess sufficient Pentobarbital for multiple executions.").

Petitioners mentioned at various places in their brief that, because the drug procurer was "protected from deposition, testimony, or identification," they had been unable to inquire into details of the drug procurer's search for pentobarbital. *Id.* at 208; *see also id.* at 209 n.74 (noting that, "[a]bsent the 'Drug Procurer's' testimony," details about a certain offer to sell pentobarbital were "unknown"), 212 n.77 (accusing the State of "hiding behind walls of secrecy"), 217 n.81 (referring to the drug procurer's "cloak of secrecy"). Petitioners urged the Tennessee Supreme Court to treat the drug procurer as a "missing witness" and "presume that if the 'Drug Procurer' had been made available to testify, his testimony would have been hurtful to [the State], and would have contradicted" the testimony of the TDOC Commissioner that the drug procurer could not obtain any pentobarbital. *Id.* at 214-15. But petitioners never argued that their inability to obtain discovery from the drug procurer or examine the drug procurer at trial violated the federal Due Process Clause.[5]

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[4] The brief is available at http://www.tncourts.gov/sites/default/files/docs/amended_appellants_brief_-_with_table_of_authorities.pdf.

[5] Petitioners referred to "due process" only in arguing that the drug procurer failed to engage in good-faith efforts to obtain pentobarbital. They contended that a text message sent by the drug

Petitioners' arguments on appeal related to the trial court's discovery rulings were all based on state law. Petitioners argued that the trial court "abused its discretion by imposing extreme restrictions on [their] ability to conduct discovery essential to [their] claims." *Id.* at 308. Petitioners contended that neither Tenn. Code Ann. § 10-7-504(h)(1) nor the Tennessee Supreme Court's earlier decision in *West I* precluded petitioners from discovering the identities of the drug procurer or potential suppliers of lethal injection drugs. *Id.* at 319-20. According to petitioners, the trial court's discovery orders "caused a grave injustice" by "effectively depriving [petitioners] of the ability to obtain evidence to bolster their claims." *Id.* at 321. The "clearest example" of this, petitioners reasoned, was the trial court's refusal to allow petitioners to depose the drug procurer—"the one person responsible for locating pentobarbital for the State"—which allegedly "hampered their ability to prove that pentobarbital is a 'feasible and readily implemented' alternative to the midazolam protocol.'" *Id.* at 321-22. Petitioners argued that the trial court's discovery orders "were an abuse of discretion and cannot stand, or else this State's law will effectively insulate Tennessee's execution methods from state or federal constitutional review." *Id.* at 322. Petitioners asked the Tennessee Supreme Court to "either reverse the discovery orders and remand for further proceedings or hold that [petitioners] need not prove an alternative method of execution where state law (as interpreted by [the State] and the [trial court]) prohibits [petitioners] from conducting fulsome discovery on an essential element of their Eighth Amendment claim." Reply Brief of Plaintiffs-Appellants at 4, *Abdur'Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018) (No. M2018-01385-SC-RDO-CV).

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procurer "demonstrate[d] bad faith" and summarily asserted, in that context, that "[d]ue process of law, and the Law of our Land, require better." Brief of Plaintiffs-Appellants at 219. Petitioners clarified in a footnote, however, that this argument relied on "the bedrock of the Tennessee Constitution for its support." *Id.* at 219 n.83.

In short, petitioners' arguments in this regard were grounded in state law—namely, cases governing the abuse-of-discretion standard for appellate review of discovery decisions. Brief of Plaintiffs-Appellants at 308-09 (discussing Tennessee's abuse-of-discretion standard of review). Petitioners did not argue that the trial court's discovery orders violated the federal Due Process Clause or otherwise indicate that their arguments were based on federal law.

The Tennessee Supreme Court affirmed the trial court's dismissal of petitioners' Eighth Amendment claim, agreeing with the trial court that pentobarbital "is not available for use in executions in Tennessee" and that petitioners had therefore "failed to carry their burden of showing availability of their proposed alternative method of execution." Pet. App. 22a. The Tennessee Supreme Court noted that petitioners "offered no direct proof as to availability of this alternative method of execution." Pet. App. 21a. Petitioners' expert witnesses had "confirmed that they were not retained to identify a source for pentobarbital and that they had no knowledge of where TDOC could obtain it." Pet. App. 21a.

The Tennessee Supreme Court addressed petitioners' argument that "the availability requirement should not apply to them because of discovery disputes and 'state secrecy laws related to executions.'" Pet. App. 12a. But the court declined "to establish new law not recognized in any federal court or in any other state" and found that "the trial court properly balanced the propriety of discovery requests with the confidentiality provisions protecting the identity of those involved in executions." Pet. App. 12a.

Justice Lee dissented. Pet. App. 25a-33a. In her view, "the difficulties of meeting the inconsistent and unworkable *Glossip* requirements and the cloak of secrecy surrounding Tennessee executions; the extraordinary and unnecessary time constraints imposed by the Court due to the impending, and seemingly unalterable, execution dates; and the State's evasiveness about its

execution method and its last-minute changes to the lethal injection protocols combined to deny [petitioners] due process in the form of a fundamentally fair process." Pet. App. 30a.

REASONS FOR DENYING THE PETITION

I. The Question on Which Petitioners Seek Review Was Neither Presented to Nor Decided by the Tennessee Courts.

The petition should be denied for lack of jurisdiction to review the question it presents since that question was neither presented to nor passed on by the Tennessee courts.

"Congress has given this Court the power to review '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (per curiam) (alterations and emphasis in original) (quoting 28 U.S.C. § 1257(a)). This Court has consistently construed that statutory grant of authority as precluding review of a state-court decision "unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision.'" *Id.* (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)); *see also Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.").

The rule that "a federal claim be addressed or properly presented in state court" furthers "an important interest of comity." *Adams*, 520 U.S. at 90. Because it "would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider," the rule affords state courts "the opportunity to determine" the federal-law issue in the first instance. *Id.* (internal quotation marks omitted). The rule also "reflects practical considerations relating to this Court's capacity to decide issues." *Id.* (internal quotation marks omitted). Requiring parties to present their federal issue to the state

court in the first instance "avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state-law grounds" and aids this Court in its "deliberations by promoting the creation of an adequate factual and legal record." *Id.* at 90-91.

When "the highest state court is silent on a federal question," this Court "assume[s] that the issue was not properly presented," and the petitioner "bears the burden of defeating this assumption" by showing "that the state court had 'a fair opportunity to address the federal question that is sought to be presented.'" *Adams*, 520 U.S. at 86-87 (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)). "At the minimum, . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb*, 451 U.S. at 501 (emphasis in original). The petitioner must show that the federal claim was presented "with 'fair precision and in due time.'" *Adams*, 520 U.S. at 87 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)).

The question petitioners ask this Court to review is whether a State "deprive[s] 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." Pet. i. But the Tennessee Supreme Court was not asked to and did not consider whether the limitations the trial court placed on petitioners' discovery violated the federal Due Process Clause. The majority opinion declined to accept petitioners' argument "that the availability requirement should not apply to them because of discovery disputes and 'state secrecy laws related to executions,'" because doing so would require it "to establish new law not recognized in any federal court or in any other state." Pet. App. 12a. And the majority opinion further found, citing the Tennessee

Supreme Court's decision in *West I*, that "the trial court properly balanced the propriety of discovery requests with the confidentiality provisions protecting the identity of those involved in executions." Pet. App. 12 a. At no time, however, did the majority opinion consider or decide whether the discovery limitations placed on petitioners deprived them of due process.

To be sure, Justice Lee's dissent argued that the discovery limitations imposed by the trial court were among "[s]everal factors" that "combined to deny the Petitioners due process in the form of a fundamentally fair process." Pet. App. 25a, 30a. But "discussion appearing in a dissenting opinion" is of no help in demonstrating that "the state court actually considered the federal question." Stephen M. Shapiro et al., *Supreme Court Practice* 198 (10th ed. 2013). Rather, "[t]he *majority opinion* . . . must explicitly or impliedly recognize the presence of a federal question and render a decision thereon." *Id.* (emphasis added). In any event, even Justice Lee's dissent did not decide the question presented, which is whether the trial court's discovery limitations—standing alone—deprived petitioners of due process. She argued only that the discovery limitations were among several factors that combined to deprive petitioners of due process. Nor did she indicate whether she was referring to the due process protections of the federal Constitution or the Tennessee Constitution. *See Bowe v. Scott*, 233 U.S. 658, 664-65 (1914) (reference to "due process of law," with no mention of the U.S. Constitution, was "solely referable to the state Constitution").

The trial court did not pass on the due process issue either. In its orders ruling on the parties' discovery disputes, the trial court considered Tennessee Rule of Civil Procedure 26.02(1), which governs the scope of discovery; potentially applicable privileges; Tennessee's public policy of keeping the identity of execution participants confidential; and the balancing test required by the Tennessee Supreme Court's decision in *West I*. *See* Pet. App. 86a-87a, 95a-117a, 123a-129a.

The trial court never considered or decided whether denying petitioners their requested discovery regarding the identities of the drug procurer or potential suppliers of pentobarbital deprived them of due process.

Because the Tennessee courts did not pass on the question presented, petitioners bear the heavy burden of showing that the federal question was presented to the state court. *Adams*, 520 U.S. at 86. Petitioners cannot make that showing, however, because they never argued, either on appeal or in the trial court, that the trial court's rulings limiting discovery of the identities of the drug procurer and potential drug suppliers deprived them of due process in violation of the federal Constitution. They never made that argument at all, much less "at the time and in the manner required by the state law," *Webb*, 451 U.S. at 501, or "with fair precision and in due time," *Adams*, 520 U.S. at 87.

In Tennessee, "[a]ppellate review is generally limited to the issues that have been presented for review." *Hodge v. Craig*, 382 S.W.3d 325, 334 (Tenn. 2012). An issue "may be deemed waived" when it is omitted from the brief's statement of the issues, even if it is included in the argument section of the brief. *Id.* at 335. An issue may also be deemed waived when it is omitted from the argument section, even if it is included in the statement of the issues. *Id.* Here, the due process issue petitioners ask this Court to review was neither included in the statement of the issues nor argued elsewhere in petitioners' brief.

The statement of the issues in petitioners' opening brief in the Tennessee Supreme Court included the following questions related to their inability to discover the identities of the drug procurer or potential suppliers of pentobarbital:

> 4. Did Defendants waive the pleading requirement of a known, feasible, and readily available alternative by refusing to produce the only source of information regarding Defendants' efforts to obtain Pentobarbital?

> 5. Did the Chancery Court err in denying discovery requests which were designed to discover evidence of the availability of Pentobarbital to the State of Tennessee where it is known that the states of Texas and Georgia continue to use Pentobarbital in executions based on an erroneous interpretation of state secrecy laws related to executions?
>
> 6. Does Tennessee's secrecy statute excuse Plaintiffs from the burden to establish the availability of an alternative lethal injection protocol?

Brief of Plaintiffs-Appellants at 11. None of these issues put either the court or the opposing parties on notice that petitioners were alleging a denial of due process. By contrast, another question included in the statement of issues specifically asked whether "the appellate schedule in this case den[ied] Plaintiffs' [sic] appellate due process." *Id.* at 12. Petitioners plainly knew how to raise a due process argument, and they plainly chose not to do so with respect to the discovery rulings that are the subject of this petition.

Nor did the argument section of petitioners' brief contend that the trial court's discovery rulings violated the federal Due Process Clause. According to petitioners, they asserted in the Tennessee Supreme Court "that [the State's] 'choice to hide the testimony of the one witness who knew what was going on' with respect to the availability of pentobarbital violated fundamental fairness and due process." Pet. 12 (quoting Brief of Plaintiffs-Appellants at 214). Tellingly, the words "due process" are not quoted from petitioners' brief. That is because the words "due process" never appeared in petitioners' brief in connection with their arguments about the trial court's discovery rulings. Petitioners also cite portions of their brief referring to "prejudice" and "injustice." Pet. 12 (quoting Brief of Plaintiffs-Appellants at 317, 321). But petitioners used those terms only in arguing that the trial court's discovery rulings were an abuse of discretion under *state law* because the rulings "employ[ed] reasoning that cause[d] an injustice to the complaining party." Brief of Plaintiffs-Appellants at 309 (quoting *West I*, 460 S.W.3d at 120). Regardless, vague references to "prejudice" and "injustice" were insufficient to properly present a federal due process

claim to the Tennessee courts, when the relevant parts of petitioners' brief "did not cite the [federal Due Process Clause] or even any cases directly construing it, much less any of this Court's cases." *Howell*, 543 U.S. at 443; *see also Beck v. Washington*, 369 U.S. 541, 550-53 (1962).[6]

Petitioners did not sufficiently raise their due process argument in the trial court either. There, petitioners argued only that their requested discovery was relevant to their claims; that Tenn. Code Ann. § 10-7-504(h)(1) prohibited disclosure of the identities of execution participants only in public records requests, not in civil discovery; and that protective measures could be employed to protect the anonymity of execution participants. *See, e.g.*, R., Vol. II at 251-52; R., Vol. IV at 459, 463, 468-69. In one trial-court filing—a reply brief in support of a motion to compel document production and interrogatory responses concerning a wide range of topics—petitioners asserted that "deprivation of the discovery sought by [petitioners] would be a separate and independent due process violation of both the United Sates and Tennessee Constitutions." R., Vol. IV at 469. But that argument did not pertain specifically to discovery regarding the drug procurer and potential drug suppliers. In any event, even if this passing reference were deemed to have raised a due process argument in the trial court, petitioner's failure to raise the argument on appeal precludes this Court from reviewing it. *See, e.g.*, *Hendon v. Georgia*, 295 U.S. 441, 443 (1935) (declining to review federal question that, while presented to the trial court, was "never properly presented to the state supreme court"); Shapiro, et al., *supra*, at 192 (explaining that the question "must also be pursued on appeal to higher state courts . . . in the manner and with the degree of specificity required by the state rules of practice").

[6] If petitioners had actually intended to raise a due process argument, the failure of the majority opinion to address that issue might have prompted a petition for rehearing. *See* Tenn. R. App. P. 39(a) (rehearing may be considered when "the court's opinion overlooks or misapprehends a material fact or proposition of law"). But petitioners did not seek rehearing.

In sum, because the question presented in the petition was neither presented to nor passed on by the Tennessee courts, this Court lacks jurisdiction to review it. The petition must be denied for that reason alone.

II. There Is No Conflict of Authority on the Question Presented.

The petition should also be denied because there is no conflict of authority on the question presented. Petitioners do not cite any case in which, in an action challenging a State's method of execution, a State has been required on due process grounds to disclose to the plaintiffs the identities of the individuals and entities who may participate in carrying out executions. To the contrary, numerous courts have recognized that, "[g]iven the controversial nature of the death penalty," restrictions on discovery may be necessary to protect those who participate, or may participate, in the execution process and to avoid unduly burdening the State. *Arthur*, 840 F.3d at 1305 (trial court did not abuse discretion by refusing to require disclosure of "the names of the drug suppliers who talked to [the State] about pentobarbital"); *see also, e.g.*, *In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 239 (6th Cir. 2016) (protective order preventing disclosure of drug suppliers did not prevent inmates from "prosecuting their claims" but rather appropriately "balance[ed] the need for discovery with strictures to maintain appropriate protection for certain individuals and entities"), *cert. denied sub nom. Fears v. Kasich*, 138 S. Ct. 191 (2017); *In re Mo. Dep't of Corr.*, 839 F.3d 732, 736 (8th Cir. 2016) (granting writ of mandamus to prevent disclosure of anonymous drug supplier because disclosure would unduly burden Missouri by causing loss of pentobarbital supplier), *cert. denied sub nom. Jordan v. Mo. Dep't of Corr.*, 137 S. Ct. 2180 (2017); *Johnson*, 496 S.W.3d at 361 (rejecting argument that disclosure of drug supplier's identity was "required as a matter of due process"), *cert. denied*, 137 S. Ct. 1067 (2017); *Owens v. Hill*, 758 S.E.2d 794, 796 (Ga. 2014) (not unconstitutional for Georgia "to maintain the confidentiality of

the names and other identifying information of the persons and entities involved in executions, including those who manufacture the drug or drugs to be used"), *cert. denied*, 135 S. Ct. 449 (2014). Indeed, this Court recently held that a district court did not abuse its discretion in declining to allow an inmate to "learn the identities of the lethal injection execution team members, to depose them, or to inquire about their qualifications, training, and experience." *Bucklew v. Precythe*, 587 U.S. __, __ (2019) (slip op., at 24 n.2). The trial court's discovery rulings in this case were consistent with these decisions and do not create any conflict, much less one that warrants this Court's review.

Petitioners contend that the trial court's discovery rulings conflict with this Court's due process precedents because those rulings deprived petitioners "of any 'effective opportunity to . . . confront[]' or contest the state officials' assertions," and thereby deprived them "of their right to be heard in a 'meaningful manner' on an essential element of their [Eighth Amendment] claim." Pet. 17 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970)). But there is an important difference between petitioners' Eighth Amendment challenge and the cases on which petitioners rely: here, petitioners bear the burden of proving a "known and available" alternative method of execution to establish their Eighth Amendment claim, *Glossip*, 135 S. Ct. at 2737. Petitioners seek the identities of the drug procurer and drug suppliers *not* so that they can defend against government action, but so that they can bolster their affirmative case against the government. But this Court has made clear that the Constitution does not require the State to enable prisoners to "discover grievances" or to "litigate effectively once in court." *Lewis v. Casey*, 518 U.S. 343, 354 (1996) (emphasis omitted); *see also Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014) ("Neither the Fifth, Fourteenth, or First Amendments afford [an inmate] the broad right 'to know where, how, and by whom the lethal injection drugs will be manufactured'"), *cert.*

denied sub nom. Wellons v. Owens, 573 U.S. 928 (2014).

Petitioners' argument that the trial court's rulings conflict with the longstanding sword-shield rule fails for the same reason. The sword-shield rule prevents the same litigant from using privileged information as a sword while maintaining the privilege as a shield against further discovery; it does not entitle a plaintiff who wishes to use non-privileged information obtained from a defendant in discovery to strip the defendant of a privilege that protects related information.

Petitioners—not the State—sought to use information about the State's efforts to procure pentobarbital as a sword to establish an element of their claim. It was petitioners who called the Commissioner and Deputy Commissioner of TDOC as trial witnesses. *See* R., Vol. XXXIV at 1100; R., Vol. XL at 1554-1555.[7] And it was petitioners who offered the testimony of those witnesses to support their claims. *See* Pet. App. 21a (petitioners "attempted to prove availability of pentobarbital by discrediting the testimony" of TDOC officials). Petitioners' contention that the sword-shield rule required the State to either "give up the ability to offer testimony regarding the supposed unavailability of pentobarbital" or waive the confidentiality of its drug procurer and suppliers is therefore nonsensical. Pet. 21-22.

The sword-shield rule is also inapplicable for another reason. The trial court did not prevent discovery of the State's drug procurer or potential drug suppliers based on the law of privilege; rather, the trial court applied the balancing test required by *West I*, which takes as a given that the requested discovery is relevant and non-privileged but nevertheless requires the trial court to "balance the specific need for the information against the harm that could result from disclosure

[7] The Tennessee Supreme Court's opinion indicates that the State "presented testimony from two experts and three TDOC officials," Pet. App. 6a, but the State in fact called only the two expert witnesses; the State did not call the two TDOC officials or the Warden as witnesses.

of the information." 460 S.W.3d at 128. That balancing test, like Federal Rule of Civil Procedure 26(c),[8] clearly contemplates that there are circumstances in which the discovery of evidence that is concededly relevant and non-privileged must give way to countervailing interests. As explained below, such countervailing interests are clearly present here.

III. The Trial Court Properly Balanced Petitioners' Need for Discovery Against the Harm That Would Result from Disclosure of Execution Participants.

The trial court's discovery rulings in this case did not deprive petitioners of due process. Rather, the trial court appropriately balanced petitioners' need for discovery against the harm that would result if the identities of the State's drug procurer and potential drug suppliers were disclosed. The trial court did not deny petitioners all discovery related to the State's efforts to obtain pentobarbital. Recognizing that *Glossip* requires the plaintiff to plead and prove a "known and available" alternative method of execution that significantly lessens the risk of pain, the trial court allowed petitioners to obtain discovery from the State related to the availability of pentobarbital, including TDOC officials' "knowledge of the availability or unavailability" of pentobarbital and a general description of their "efforts to obtain" the drug. Pet App. 114a. And nothing precluded petitioners from retaining their own experts to "investigate sources of pentobarbital," Pet. App. 46a, as inmates in other method-of-execution challenges have done, *see Arthur*, 840 F.3d at 1268. Indeed, "[n]o good reason was provided to the [trial court] as to why [petitioners] failed to offer" that kind of proof in this case. Pet. App. 46a.

What petitioners could not do is force the State to disclose the identity of its drug procurer, its potential drug suppliers, or other participants in the execution process. Requiring such

[8] Under Federal Rule of Civil Procedure 26(c), a federal court may "issue an order to protect a party or person" from whom discovery is sought "from annoyance, embarrassment, oppression, or undue burden or expense," including by "forbidding the disclosure or discovery," "forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters."

disclosures, even pursuant to a protective order, would unduly burden the State by making it difficult, if not impossible, to carry out the death penalty.

The pressure, threats, and harassment to which suppliers of lethal injection drugs have been subjected are well documented. *See, e.g.*, *Glossip*, 135 S. Ct. at 2733 (explaining that "anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences"); *In re Ohio Execution Protocol Litig.*, 845 F.3d at 237. As a result of these tactics, suppliers whose identities have been disclosed have stopped providing lethal injection drugs to States. In Texas, for example, a compounding pharmacy was subjected to "constant inquiries from the press, . . . hate mail and messages" and eventually demanded that "the Texas Department of Criminal Justice return a supply of compounded pentobarbital sold for use in executions." *In re Lombardi*, 741 F.3d 888, 894 (8th Cir. 2014) (en banc) (internal quotation marks omitted), *cert. denied sub nom. Zink v. Lombardi*, 572 U.S. 1047 (2014). Another supplier was sued and "elected to discontinue providing drugs to the State rather than endure the expense and burdens of litigation." *Zink v. Lombardi*, 783 F.3d 1089, 1105 (8th Cir. 2015), *cert. denied*, 135 S. Ct. 2941 (2015). Not surprisingly, potential suppliers often require "[t]otal confidentiality about [their] identity" as an "essential term" of their agreements with States, *Gray v. McAuliffe*, No. 3:16-cv-982, 2017 WL 102970, at *6 (E.D. Va. Jan. 10, 2017), and make clear that they will stop supplying lethal injection drugs if their identities are disclosed, *see In re Mo. Dep't of Corr.*, 839 F.3d at 736 (Missouri's supplier had confirmed that it would "cease to provide pentobarbital to anyone . . . once its identity is disclosed"); *McGehee v. Tex. Dep't of Criminal Justice*, No. H-18-1546, 2018 WL 3996956, at *9 (S.D. Tex. Aug. 21, 2018) (describing declaration from pharmacy that, because of fear of harassment and retaliation, it would stop supplying drugs to Texas if its identity were disclosed). As Tennessee's experience illustrates, any erosion of

confidentiality protections for suppliers of lethal injection drugs directly harms States by making it more difficult to obtain the drugs needed to carry out executions. *See West I*, 460 S.W.3d at 122 (explaining that, after Tennessee was required to disclose the identity of a supplier, it became "difficult . . . to obtain the materials that are needed because those who would provide [them] are afraid that they will be subject to some kind of exposure or liability").

Petitioners give these concerns short shrift, calling the harassment that suppliers of lethal injection drugs face "consumer-led, market-based feedback" that is "part and parcel of the American economic system." Pet. 24. But "market-based feedback" is no substitute for the democratic process. "Under our Constitution, the question of capital punishment belongs to the people and their representatives . . . to resolve." *Bucklew*, 587 U.S. at __ (slip op., at 29). Given that the constitutionality of capital punishment is "settled," *Glossip*, 135 S. Ct. at 2732, Tennessee and other States that continue to administer the death penalty have a "significant interest in enforcing" death sentences that have been imposed and affirmed on direct and collateral review, *Nelson v. Campbell*, 541 U.S. 637, 650 (2004), and in doing so "in a timely manner," *Baze*, 553 U.S. at 61. *See also Bucklew*, 587 U.S. at __ (slip op., at 29). Requiring States to identify their drug suppliers or other participants in the execution process would unduly burden this sovereign interest. The trial court's discovery rulings appropriately accounted for this burden and do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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