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

REPLY BRIEF FOR THE PETITIONERS

EXECUTION SCHEDULED FOR MAY 16, 2019

KELLEY J. HENRY
AMY D. HARWELL
RICHARD TENNENT
KATHERINE DIX
OFFICE OF FEDERAL PUBLIC DEFENDER, MIDDLE DISTRICT OF TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047

KATHLEEN MORRIS
42 Rutledge Street
Nashville, TN 37210
(615) 242-3200

BRADLEY MACLEAN
1702 Villa Place
Nashville, TN 37212
(615) 943-8716

ROBERT N. HOCHMAN *
KELLY HUGGINS
EMILY A. ROSENBERG
SIDLEY AUSTIN LLP
One S. Dearborn Street
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

COLLIN P. WEDEL
SIDLEY AUSTIN LLP
555 W. Fifth Street
Los Angeles, CA 90013
(213) 896-6000

QAIS GHAFARY
CAITLIN MATHENY
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-8430

Counsel for Petitioners

* Counsel of Record

April 23, 2019

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INTRODUCTION

This Court just a few weeks ago declared that "[t]he proper role of courts is to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1134 (2019). The petition asks this Court to fulfill that promise.

The Supreme Court of Tennessee adopted a rule that violates fundamental fairness and due process to resolve the petitioners' method-of-execution claim. As the petition demonstrated, there is an uncommonly long history and broad consensus in favor of a principle that prohibits the government (and private parties) from using secret evidence to prevail in litigation. Pet. 17-21. That should come as no surprise. Secret evidence is the stuff of totalitarian regimes; the mere say-so of a government official does not establish an assertion as a true fact. Free people have the right to insist on seeing, and the opportunity to test, the evidence upon which the government relies. Yet the Tennessee Supreme Court rejected petitioners' method-of-execution claim based on the (second-hand) say-so of government officials, shielding their assertions from scrutiny behind Tennessee's execution secrecy statute. Because numerous other states have execution secrecy statutes, moreover, this decision threatens to badly distort efforts to ensure that the states live up to the obligations of the Eighth Amendment.

Respondents only lightly defend the ruling on the merits. They suggest that the state interest in secrecy is sufficiently strong to justify maintaining secrecy even as they use the evidence to establish facts necessary to the support judgment. Opp. 23-24. That is wrong, and petitioners welcome the chance to fully demonstrate why in merits briefing. This reply instead

will focus on demonstrating both that petitioners raised the issue below and that the decision provides a strong vehicle for addressing the issue.

ARGUMENT

I. PETITIONERS PRESENTED AND THE TENNESSEE SUPREME COURT DECIDED THE QUESTION PRESENTED.

The question was both pressed and passed on below, the question is one of law for which further factual development would be futile, and there is no bar to review. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (rule that argument must be pressed or passed on below operates "in the disjunctive").

"Where it appears from the opinion of the state court of last resort that a state statute was drawn in question, as repugnant to the Constitution, and that the decision of the court was in favor of its validity, [this Court] ha[s] jurisdiction on appeal." *Charleston Fed. Sav. & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185 (1945). The Court thus "need not inquire how and when the question of the validity of the statute was raised" in the briefing below. *Id.* at 185-86; see Stephen M. Shapiro et al., *Supreme Court Practice* 197 (10th ed. 2013) ("Once it is clear that the highest state court has actually passed on the federal question, . . . [a]n irrebuttable presumption is created that the federal question was timely and properly raised.").

Here, the Tennessee Supreme Court expressly addressed petitioners' claim that the discovery rulings based on the State's secrecy statute were contrary to law. Petitioners' argument that the secrecy statute impaired their Eighth Amendment claim was the *first argument* the Tennessee Supreme Court dealt with, with

express reference to how federal courts would address it:

> First, the Plaintiffs argue that the availability requirement should not apply to them because of discovery disputes and "state secrecy laws related to executions." *See* Tenn. Code Ann. § 10-7-504(h)(1). Acceptance of this argument would require this Court to establish new law not recognized in any federal court or in any other state. We decline to do so.

Pet. App. 12a (internal footnote omitted). That holding, alone, defeats respondents' jurisdictional objections. *Charleston Fed. Sav.*, 324 U.S. at 185-86.

Respondents, relying on a word search, criticize the briefing below for failing to use the phrase "due process" when raising the issue. See Opp. 11-13, 17-19. In truth, "[n]o particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." *Street* v. *New York*, 394 U.S. 576, 584 (1969) (quoting *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928)). "[I]f the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *Id.* (quoting *Zimmerman*, 278 U.S. at 67); see *Eddings* v. *Oklahoma*, 455 U.S. 104, 113 n.9 (1982) ("[J]urisdiction does not depend on citation to book and verse.") (citing *Zimmerman*, 278 U.S. at 67).

Respondents' opposition highlights petitioners' "clear intendment" to present a federal constitutional claim. See Opp. 11-12, 18. Respondents cite petitioners' arguments that the invocation of the drug supplier statute created a "cloak of secrecy" that precluded petitioners from obtaining "discovery essential to [their

Eighth Amendment] claims," Brief of Plaintiffs-Appellants at 217 n.81, 308, *Abdur'Rahman* v. *Parker*, 558 S.W.3d 606 (Tenn. 2018) (No. M2018-01385-SC-RDO-CV) [hereinafter "Brief of Plaintiffs-Appellants"], and that the lower court's discovery orders "caused a grave injustice" that "effectively deprived [petitioners] of the ability to obtain evidence to bolster their claims," *id.* at 321," and "effectively insulate[d] Tennessee's execution methods from state or federal constitutional review," *id.* at 322. Most explicitly, petitioners argued that "[d]ue process of law, and the Law of our Land, require better" than allowing secondhand testimony about the Drug Procurer's "failure to secure Pentobarbital" to "establish unavailability" in the face of petitioner's evidence from "the PowerPoint and the relevant notes." *Id.* at 219.

Those arguments presented the federal issue. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 159 n.5 (1980) (generalized "due process" arguments addressed to "the Florida Constitution and its Federal counterpart" held sufficient for taking claim) (emphasis omitted); *Taylor* v. *Kentucky,* 436 U.S. 478, 482 n.10 (1978) (objection invoking "fundamental principle[s] of judicial fair play" should have "sufficed to alert the trial judge to petitioner's reliance on due process principles") (alteration in original). While respondents contend that these references could be viewed as asserting state law claims, see Opp. 11 n.5, "the Tennessee Constitution has been held to be more protective of individual rights than the test under the United States Constitution," *State* v. *Thacker*, 164 S.W.3d 208, 249 (Tenn. 2005) (citing *State* v. *Stephenson*, 878 S.W.2d 530, 544 (1994) (per curiam), *abrogated by State* v. *Saylor*, 117 S.W.3d 239 (Tenn. 2003)), and thus would subsume a federal challenge. In all events, it is hard to imagine a scenario striking

more at the heart of federal due process than one where essential evidence known only to the State is used to block a litigant from proving his execution will violate the Eighth Amendment. See, *e.g.*, Br. for Conservatives Concerned About the Death Penalty as *Amicus Curiae* Supp. Pet'rs at 2-3, 11-14. When the Tennessee Supreme Court decided that there were no procedural irregularities in how this claim was resolved, it was deciding that issue as a matter of both federal and state constitutional law.

Any doubt on this point is dispelled by Justice Lee's dissenting opinion. While a dissent does not confirm whether the federal question was *decided*, see Opp. 16, it is obvious that the court understood the federal issue to have been *presented*. After recounting the "extraordinary time constraints" and the "cloak of secrecy" that stymied petitioners' litigation, Pet. App. 27a, 30a, Justice Lee concluded that "[p]etitioners were denied due process in the form of a fundamentally fair process," Pet. App. 30a. On this score, respondents ignore that Justice Lee grounded her reasoning explicitly in this Court's federal due process jurisprudence. See *id.* (construing *Boddie* v. *Connecticut*, 401 U.S. 371, 374 (1971), and citing *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). The federal issue was pressed below.[1]

It does not matter whether "the discovery limitations were among several [other] factors that *combined* [in Justice Lee's view] to deprive petitioners of due process." Opp. 16. There is no reason why Justice Lee

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[1] Respondents acknowledge petitioners advanced their due process claim in the trial court, albeit in a manner respondents criticize as insufficient. *See* Opp. 19 (noting petitioners asserted that "deprivation of the discovery sought . . . would be a separate and independent due process violation of both the United Sates [sic] and Tennessee Constitutions." (quoting IV 469)).

would have limited herself to this one procedural irregularity in her dissent. She need not have done so to have written in such a way that it is clear that petitioners presented the issue, which is matters for present purposes.

Moreover, as Justice Lee's opinion highlights, petitioners faced extraordinary challenges in presenting their claims on a "rocket docket." Pet. App. 26a. It was for this reason that petitioners separately argued that "the appellate schedule in this case den[ied] Plaintiffs' appellate due process," Brief of Plaintiffs-Appellants at 13, which the State criticizes as showing that the petitioners "knew how to raise a due process argument," Opp. 18. It would be perverse to penalize petitioners for having raised, under challenging circumstances, *additional* due process claims that resonated with Justice Lee.

Finally, no "practical considerations" counsel against review. *Adams* v. *Robertson*, 520 U.S. 83, 90 (1997) (per curiam) (quoting *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 79 (1988)). The State identifies no need for a more "developed record on appeal." *Bankers Life & Cas. Co.*, 486 U.S. at 79. To the contrary, the State makes clear that, in its view, *no* circumstances would *ever* justify revealing supplier identities, "even pursuant to a protective order," Opp. 23-24, because it would be "impossible[] to carry out the death penalty," *id.* That position is factually unsupportable, Pet. 21, contrary to settled law, *id.* at 22, irreconcilable with protective-order practice, *id.* at 23, and contradicted by the evidence that just 20 out of 100 pharmacies had qualms about supplying execution drugs. X at Ex. 105, p. 1477. But those arguments are better left for the merits. For now, it is clear that no further development of the record is necessary, and this Court can and should review the question.

II. THIS CASE SQUARELY PRESENTS THE IMPORTANT ISSUE OF WHETHER ABANDONING THE SWORD-SHIELD RULE FOR METHOD-OF-EXECUTION CLAIMS VIOLATES THE DUE PROCESS CLAUSE.

1. Respondents try to muddy the prospect of this Court's review by distorting petitioner's claim. Petitioners do not seek to "[r]equir[e] States to identify their drug suppliers," Opp. 25, as part a campaign of "unlimited discovery," *id.* at 3, to "discover grievances," *id.* at 21 (quoting *Lewis* v. *Casey*, 518 U.S. 343, 354 (1996)). Petitioners could not have been clearer: This is "*not* [a] challenge [to] the constitutionality of state secrecy laws in general," Pet. 4, nor does it seek unlimited discovery in search of contrived harms, see *id.* at 21-22 (noting "Tennessee's right" to invoke the statute). Instead, petitioners ask only that the elementary principles of fairness reflected in the sword-shield rule, *e.g.*, *Hunt* v. *Blackburn,* 128 U.S. 464, 470 (1888), be applied consistently to claims implicating needless human suffering in violation of the Constitution, and that this Court recognize that due process forbids the State from relying on secret evidence to defeat a claim alleging "serious[] injur[y]" at the government's hands, *Greene* v. *McElroy*, 360 U.S. 474, 496 (1959).

If any further clarity were needed: Governments can have secrets. This petition poses no threat to the ability of governments that wish to keep execution-related personnel and vendors secret. This case is about one legal consequence of the decision to keep such information secret. The State cannot rely on its secret information to defeat a method-of-execution claim.

Respondents deny the critical role its secret evidence played in the proceedings, noting that petitioners bore the burden of proving an available alternative. See

Opp. 21. True. But petitioners met the burden. Petitioners showed, using the State's Power Point, that there were roughly 10 pharmacies that had pentobarbital on hand and were willing to sell it to the State, Pet. 8, and that at least one of those pharmacies made a concrete offer to the State to sell enough pentobarbital for one or two executions. Pet. 9; XI at Ex. 105, p. 1503.

That would have been enough for a trier of fact to conclude that pentobarbital was available. Respondents prevailed because they presented testimony that, *despite* what the documents suggested, state officials had concluded that pentobarbital was not reasonably available. Respondents highlight testimony that "[n]one of these [pharmacies] worked out" because otherwise-willing suppliers could not provide a "sufficient quantity of pentobarbital." Opp. 10. That evidence came from State officials who, in respondents' words, testified that a "*staff member* [had] provided them information showing that pentobarbital was not available." Opp. 9 (emphasis added); see also Pet. 11; XXXVII 1313-14 (Parker testifying that "any knowledge [he] had [was] based upon conversations . . . with other individuals"). Petitioners were prevented from conducting discovery or cross-examination to probe what that "information" was, why the pharmacy relationships did not "work out," and how much pentobarbital was "sufficient." The State officials' say-so was protected from attack or *any* inspection. That is the issue.

It is true that petitioners called the officials to the stand. See Opp. 22. But who summoned a witness is irrelevant. The substantive testimony is what matters; the government cannot use secret evidence to defeat petitioners' claim. Had the witness not been allowed to testify about what the Drug Procurer purportedly told them about the Power Point, or had petitioners been

allowed to examine the Drug Procurer or to view the unredacted Power Point, the outcome may well have been different.

Respondents also contend that the sword-shield doctrine cannot apply here because the Tennessee secrecy statute is not a "law of privilege." Opp. 22. That is a red herring. As the cases cited in the petition demonstrate, the basis for concealing evidence—whether because of privilege, trade secrets, or otherwise, see Pet. 18-20—does not affect the consequences of doing so: "[W]hen a party . . . uses confidential information against his adversary (the sword), he implicitly waives its use protectively (the shield) under that privilege." *Willy* v. *Admin. Review Bd.*, 423 F.3d 483, 497 (5th Cir. 2005); see also *Hunt,* 128 U.S. at 470-71 ("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 invoke privilege over those communications). Here, the State could have maintained confidentiality by not testifying about what confidential witnesses have said about the supposed unavailability of pentobarbital. But if it relies on such evidence, it has to give up claims of secrecy "to the extent necessary to give [its] opponent a fair opportunity." *Bittaker* v. *Woodford*, 331 F.3d 715, 720 (9th Cir. 2003) (en banc).

Finally, respondents fault petitioners for not having *more* evidence of pentobarbital's availability. Respondents assert petitioners should have introduced expert testimony on availability, citing another case where plaintiffs pursued that approach—and the court found that testimony unpersuasive. See Opp. 23 (citing *Arthur* v. *Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1302-04 (11th Cir. 2016), *abrogated on other grounds by Bucklew*, 139 S. Ct. at 1127-29). But that is a dis-

traction. That petitioners might have tried to overcome respondents' constitutional violation by offering other evidence does not in the least diminish the violation and the need for this Court to correct the error.

2. Unable to avoid that the issue is presented, respondents' fallback is that there is no split of authority. Opp. 20-22. Not so. Tennessee's refusal to apply the sword-shield doctrine to lethal-injection litigation starkly departs from the fairness principle applied by this Court and every lower court for well over a century. Pet. 17-22 & Pet. App. F. Respondents take the absolutist view that supplier identities can *never* be disclosed in litigation. That is at least in tension with this Court's conclusion in *Bucklew* that a prisoner's ability to establish the availability of an alternative "can't be controlled by the State's choice of [what] to authorize in its statutes." 139 S. Ct. at 1128-29; see also *id.* at 1135-36 (Kavanaugh, J., concurring). The state cannot alter a fundamental principle of law like the sword-shield rule and thereby make impregnable its assertions of the unavailability of an alternative method.[2]

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[2] The Eleventh Circuit recently held that, "[i]f a State adopts a particular method of execution . . . it thereby concedes that the method of execution is available to its inmates." *Price* v. *Comm'r, Ala. Dep't of Corr.*, No. 19-11268, 2019 WL 1550234, at *7 (11th Cir. Apr. 10, 2019) (per curiam) (construing *Bucklew*). Tennessee authorized a pentobarbital method until four days before trial. Pet. App. 5a. At a minimum, Tennessee's continued authorization of a pentobarbital method until so shortly before trial raises questions that the sword-shield rule is designed to ensure are answered fairly.

CONCLUSION

The petition should be granted.

Respectfully submitted,

KELLEY J. HENRY
AMY D. HARWELL
RICHARD TENNENT
KATHERINE DIX
OFFICE OF FEDERAL PUBLIC DEFENDER, MIDDLE DISTRICT OF TENNESSEE
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047

KATHLEEN MORRIS
42 Rutledge Street
Nashville, TN 37210
(615) 242-3200

BRADLEY MACLEAN
1702 Villa Place
Nashville, TN 37212
(615) 943-8716

ROBERT N. HOCHMAN *
KELLY HUGGINS
EMILY A. ROSENBERG
SIDLEY AUSTIN LLP
One S. Dearborn Street
Chicago, IL 60603
(312) 853-7000
rhochman@sidley.com

COLLIN P. WEDEL
SIDLEY AUSTIN LLP
555 W. Fifth Street
Los Angeles, CA 90013
(213) 896-6000

QAIS GHAFARY
CAITLIN MATHENY
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-8430

Counsel for Petitioners

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* Counsel of Record