No. 07-5439

In The
Supreme Court of the United States

RALPH BAZE and **THOMAS C. BOWLING**,
Petitioners,

v.

JONATHAN D. REES, *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF OF THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS ("AAJLJ") AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The American Association of Jewish Lawyers and Jurists ("AAJLJ") is a membership organization affiliated with the International Association of Jewish Lawyers and Jurists ("IAJLJ"), which was formed in 1969 in Jerusalem at the first International Congress of Jewish Lawyers and Jurists at the suggestion of Israeli Supreme Court

[1] No party or party's counsel authored this brief in whole or in part, and no person or entity other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief. See Rule 37.6.

Justice Haim H. Cohn, former Justice and United Nations Ambassador Arthur J. Goldberg, and jurist and Nobel Prize Laureate René Cassin. Justice Goldberg was then elected president.

The AAJLJ represents the American Jewish legal community in defending Jewish interests and human rights in the United States and abroad. The AAJLJ also promotes the study of, and respect for, principles of Jewish Law as they have been applied throughout the history of the Jewish people. The AAJLJ has sponsored public lectures in Jewish Law and promoted the publication of scholarly essays in the field of Jewish Law.

The AAJLJ submits this *amicus curiae* brief to advise the Court how questions concerning the mode of execution were resolved in the oldest comprehensive legal system known to man that continues to be studied actively to this day. In December 1999, the predecessor to this *amicus* -- the American Section of the IAJLJ -- joined in an *amicus curiae* brief addressing issues relating to the method used for capital punishment in Florida. The brief was filed in *Bryan v. Moore*, No. 99-6723. After certiorari was granted (528 U.S. 960 (1999)), this Court dismissed the writ as improvidently granted because of a representation by the Attorney General of Florida. *Bryan v. Moore*, 528 U.S. 1133 (2000).

The Jewish legal system -- based on Biblical text, oral tradition, and rabbinic interpretation -- considered and discussed the implementation of the death penalty in substantial detail. At first blush, the means prescribed by Jewish Law for the

execution of an individual who is condemned to death by a duly authorized court seem cruel and insensitive to the pain that accompanies the death of the condemned. But a close examination of the rabbinic interpretation of the Biblical text discloses that approximately 2000 years ago the rabbis of the Talmud agreed that notwithstanding the apparent literal meaning of the Biblical text, execution must be carried out as painlessly as possible. The relevant passages from the Talmud demonstrate that the rabbis sought -- with the scientific knowledge and means available to them in their time -- to formulate the quickest, least painful, and least disfiguring methods of execution that the technology of the day would allow within the framework of Biblical texts.

This *amicus* brief supports the proposition that any method of administering capital punishment that fails the contemporary standards of rapid and painless death is unacceptable. The rabbis of the Talmud ruled that execution by a court must satisfy the Biblical rule, enshrined in *Leviticus* 19:18, "Love your neighbor as yourself." Accordingly, they prohibited methods of capital punishment that did not qualify in their own time as the most humane and painless. These principles should be applied by this Court to evaluate whether execution by lethal injection, as administered in Kentucky, results in an unnecessary risk of pain and suffering. If it does, that means of execution should be barred as "cruel and unusual."

The attitude towards the means of execution in a legal system that is more than 2000 years old and that was known to the Framers of the

Constitution and to the draftsmen of the Eighth Amendment is, we submit, highly relevant to a contemporary evaluation of capital punishment. Whether one utilizes an "originalist" approach in construing the language of the Eighth Amendment or whether one interprets the constitutional text according to "evolving standards of decency" informed by changing American and international standards of morality, the teachings of the system of Jewish Law are instructive in determining whether a particular method of execution is "cruel and unusual."

ARGUMENT

Introduction and Summary of Argument

Capital punishment is a penalty prescribed by Biblical law for the commission of offenses that violate ritual prohibitions (such as deliberate desecration of the Sabbath) as well as laws regarding interpersonal relationships (murder, kidnapping, incest). The Biblical text explicitly specifies two forms of execution: stoning (*Exodus* 17:4, 8:22; *Numbers* 14:10) and burning (*Leviticus* 20:14, 21:9). The oral tradition adds two more means not explicitly enumerated in the Biblical text -- strangulation and decapitation.

Although the Biblical text appears to contemplate frequent imposition of capital punishment, the weight of authority among rabbis of the Mishnaic period (1st-3rd centuries of the Common Era), who first committed to writing what had theretofore been transmitted from generation to

generation as the Oral Law, clearly condemned frequent executions. The Mishna[2] in the tractate *Makkos* (folio 7a) declared:

> A Sanhedrin[3] that executes once in seven years is called a destroyer. Rabbi Eliezar ben Azariah says, "Even once in seventy years." Rabbi Tarfon and Rabbi Akiva say, "Had we been on a Sanhedrin at a time when they still performed executions, no person would ever have been executed." Rabbi Shimon ben Gamliel says, "They too would have increased the number of murderers in Israel, because they would have eliminated the criminals' fear of retribution."

This exchange among rabbis living in the first and second centuries reflects differences over the deterrent value of capital punishment that continue among legal scholars to this day. Some rabbis of the Mishnaic period (such as Rabbis Tarfon and Akiva)

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[2] The "Mishna" is "the collection of mostly halachic Jewish traditions compiled about A.D. 200 and made the basic part of the Talmud." Merriam Websters' Collegiate Dictionary (10th ed. 1993). The Talmud, which was compiled in the Fifth Century, is the authoritative body of Jewish tradition and is comprised of the "Mishna" and the "Gemara."

[3]The Sanhedrin was the "supreme legislative council and highest ecclesiastical and secular tribunal of the Jews, consisting of 71 members and exercising its greatest authority from the Fifth Century B.C. to A.D. 70." Webster's Encyclopedic Unabridged Dictionary of the English Language (1989).

were unwilling to participate in a process that would take human life, while other rabbis (like Rabbi Shimon ben Gamliel) believed that capital punishment had a significant deterrent effect.

The infrequency of the death penalty was attributable to the meticulous application of stringent rules regarding the admissibility and sufficiency of evidence. A court of at least twenty-three judges would have to be satisfied, to a legal certainty, that the capital offense had been committed before the court could impose a death sentence. Since the testimony of two eye-witnesses was required, and the witnesses were subjected to searching and detailed interrogation by the court, there was rarely an instance when the evidence met the prescribed legal standard. See Maimonides, *Mishneh Torah*, Book of Judges, Sanhedrin, chapter XII.[4]

By Talmudic prescription and the rulings of Jewish-Law codifiers including Maimonides, the particular form of execution to be administered under Jewish Law depended upon the nature of the offense. This *amicus* brief does not address the question of whether all capital punishment should today be rejected as "cruel and unusual" punishment. That question is not before the Court in

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[4] Rabbi Moses ben Maimon (also known as "Maimonides") (1135-1204) was a rabbinic authority and leading early codifier of Jewish Law. His 14-volume work, called *Mishneh Torah*, is viewed as an early enduring codification of Jewish Law.

this case. Our brief addresses only two of the Questions Presented that are before the Court in this case. [5]

For reasons stated in this brief, we submit that it was not sufficient under Jewish Law if a method of execution merely avoided "a substantial risk of the wanton infliction of pain." If the method created "an unnecessary risk of pain and suffering" that could be avoided by "available alternatives that pose less risk of pain and suffering," Jewish Law required use of the less painful method.

In prescribing methods for imposition of the death penalty almost two millennia ago, the rabbis of the Talmud were concerned about the same factors that have emerged from this Court's Eighth Amendment jurisprudence. Primary concerns under Talmudic law are (1) the prevention of unnecessary pain and (2) avoidance of mutilation or dismemberment of the body. The four means of execution described in the Talmud were designed to utilize the most effective technology and scientific

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[5] The first two Questions Presented pursuant to this Court's Order of October 3, 2007, are:

1. Does the Eighth Amendment to the United States Constitution prohibit means for carrying out a method of execution that create an unnecessary risk of pain and suffering as opposed to only a substantial risk of the wanton infliction of pain?

2. Do the means for carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?

knowledge available at the time to minimize the pain of the person who was being put to death and to avoid mutilation of his or her body.

I.

THE TALMUDIC STANDARD GOVERNING EXECUTION IS TO TREAT THE CONDEMNED CRIMINAL AS HUMANELY AS ONE WOULD TREAT ONESELF

A casual reader of the Biblical text might assume that the execution described as "stoning" is carried out by hurling stones at the condemned individual until he dies from the force of the objects thrown at him and that "burning" is accomplished by subjecting the condemned to a burning flame after tying the condemned to a stake or casting him or her on a funeral pyre. The oral tradition, however, as explicated by the rabbis of the Talmud, demonstrates that neither of these common misconceptions is accurate

The Mishna in the Talmudic tractate *Sanhedrin* describes execution by "stoning." The condemned defendant was pushed from a platform set high enough above a stone floor that his fall would result in instantaneous death. The Talmud then explains that the height from which the accused was pushed was substantial enough that

death was virtually certain. The Talmud explains (folio 45a): [6]

> It is because Rav Nachman said in the name of Rabbah bar Avuhah: "The verse states: 'You shall love your fellow as yourself,' which implies: If your fellow has been condemned to die, you shall choose for him a favorable death." Thus, since a fall from a higher elevation will kill the condemned more quickly and with less pain, the Mishnah ordained that the precipice be higher than the minimum necessary to cause death.

A later Mishna in *Sanhedrin* (folio 52a) describes the procedure for "burning." Notwithstanding the literal definition of the word, that means of execution did not involve actual resort to fire or flames. In explaining why the condemned was not actually burned, the Talmud repeats the formulation it invoked with regard to "stoning":

> Rav Nachman said in the name of Rabbah bar Avuha: Scripture states: "And you shall love your fellow as yourself." Choose for him a favorable death.

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[6] Translations of Talmudic passages in this brief are taken from the 72-volume edition of "Talmud Bavli: The Gemara," published by Mesorah Publications, Ltd., which explicates the literal text.

Indeed, the Mishna at *Sanhedrin* (folio 52a) concludes with a very revealing passage that condemns any court that would put an accused to death with actual flames:

> Rabbi Elazar ben Rabbi Tzadok said "An incident once occurred with the daughter of a Kohen that committed adultery and they surrounded her with bundles of branches and burned her. Apparently *this* is the proper procedure for burning." They said to him: "That was because the court at that time was not expert."

The Talmud (*Sanhedrin* folio 52b) explains that the incident reported in the Mishna was the work of a court of Sadducees (*i.e.,* those who mistakenly applied the Biblical text without taking account of the oral tradition and rabbinic interpretation). This passage demonstrates once again that notwithstanding the literal text the rabbis' primary concern was that the method of execution not cause unnecessary pain or disfigurement of the body.

With respect to decapitation as well, the Talmud in *Sanhedrin* (folio 52b) rejects one form of such execution that would be painful on the ground that the Scriptural command to "love your fellow as yourself" requires the imposition of a "favorable death." Other Talmudic tractates contain similar rules regarding execution, all based on the same Biblical command found in *Leviticus*. In *Pesachim* (folio 75a), the Talmud discusses the fact that

"burning" was carried out with the ingestion of hot molten lead and not with fire or with the ingestion or immersion in boiling water. In explaining this choice, the Talmud says:

> It is because of a dictum of Rav Nachman. For Rav Nachman said: Scripture states: "And you shall love your fellow as yourself." Choose for him a favorable death.

This Talmudic passage is explained as follows by a modern commentary ("Talmud Bavli: Tractate Pesachim," p. 75a(3), n. 24, Mesorah Publications, Ltd. (1997)):

> The obligation to love one's neighbor as oneself dictates that just as, if given the choice, one would opt for the kindest death for himself, so too one must choose this death for his fellow. Death by means of molten lead poured down the throat is less agonizing than by means of immersion in boiling water.

In Tractate *Kesubos* (folio 37b), the Talmud discusses death by decapitation and similarly concludes that the least painful and quickest method of decapitation must be used because of the Scriptural command to "love your fellow as yourself." The same principle governed the rules of execution by strangulation. Maimonides' Code prescribed that pain was to be minimized by placing a firm cloth within a soft cloth. Maimonides, *Mishneh Torah*, Book of Judges, Sanhedrin, chapter XV, para. 5.

In his authoritative discussion of "Capital Punishment" for the *Encyclopedia Judaica*, the late Israeli Supreme Court Justice Haim H. Cohn, summarized the Talmudic principles as follows (4 *Encyclopedia Judaica* 446 (2d ed. 2007)):

> In no area can the genius of the Talmudic law reformers better be demonstrated than in that of capital punishment. Two general theories were propounded which, though dated from a period too late to have ever stood the test of practical application . . ., reflect old traditions and well-established ways of thinking: namely, first, that "love your neighbor as yourself" (Lev. 19:18) was to be interpreted as applying even to the condemned criminal -- you love him by giving him the most humane ("the most beautiful") death possible (Sanh. 45a, 52a; Pes. 75a; Ket. 37a); secondly, that judicial execution should resemble the taking of life by God: as the body remains externally unchanged when God takes the life, so in judicial executions the body should not be destroyed or mutilated (Sanh. 52a; Sifra 7:9).

Similar conclusions were expressed by Professor Menachem Elon, formerly Deputy President of the Supreme Court of Israel and recognized as the world's foremost modern legal authority on "*Mishpat Ivri*" -- legal principles

derived from traditional Jewish Law.[7] In *Zuckerman v. State of Israel*, 40(iv) P.D. 209, 211 (1986), Justice Elon said:

> [T]he cardinal principle in the Torah "and you shall love your neighbor as yourself" (Lev. 19:18) was also applied by the Sages to convicted criminals. Care must be taken not to disgrace a criminal sentenced to death, and his execution must be carried out in a dignified fashion (*Sanhedrin* 45a). The fundamental rule in Jewish penal theory is that "once punishment has been administered, the offender becomes one of your brethren" [citations omitted]. All this must be taken into account when considering the degree of punishment imposed upon the criminal.

The same governing principles were articulated by Justice Elon in *State of Israel v. Tamir*, 37(iii) P.D. 201 (1983):

> Jewish Law was particularly insistent on the preservation of even a criminal's rights and dignity during the course of punishment. . . . According to Jewish

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[7] Professor Elon's comprehensive treatise *Ha-Mishpat Ha-Ivri* was initially published in Israel in 1973 (before he was appointed to Israel's Supreme Court) and re-published in 1978 and 1988. It is now available in a four-volume English translation. Elon, *Jewish Law: History, Sources, Principles*, translation by Bernard Auerbach & Melvin J. Sykes (Jewish Publication Society 1994).

> law, a death sentence must be carried out with the minimum of suffering and without offense to human dignity. This is based on the Biblical verse, "Love your fellow as yourself," and the rule is, "Choose for him a humane death." From this we declare that even a condemned felon is your "fellow."

The overriding importance in Jewish Law of the Biblical verse in *Leviticus* that governs the permissible method of capital punishment ("love your fellow as yourself") is demonstrated by the observation of Rabbi Akiva that "It is a great principle in the Torah." *Sifra on Leviticus, Kedoshim* 4:12, quoted in Commentary of Rashi. It is Affirmative Obligation 206 in Maimonides *Book of Mitzvot*. See *Sefer Ha-Chinuch*, *Leviticus*, para. 243 ("many commandments in the Torah depend on it").

II.

THE PRINCIPLES OF JEWISH LAW ARE INSTRUCTIVE IN APPLYING THE LANGUAGE OF THE EIGHTH AMENDMENT

We have described the governing principles of Jewish Law because we believe that the standards applied in this venerable legal system inform the meaning of the Eighth Amendment's prohibition against "cruel and unusual punishment." In considering, as a majority of this Court did in *Roper v. Simmons*, 543 U.S. 551, 561 (2005), "evolving standards of decency that mark the progress of a maturing society," this Court enumerated "history, tradition, and precedent" as relevant components in its analysis. The system of Jewish Law is unquestionably part of the history and tradition that should be weighed in arriving at the meaning of the constitutional terms in our contemporary society.

Because the Framers of the Constitution were aware in 1790 of the historic legal systems that had existed prior to their time, the lessons to be learned from them should be instructive also to "originalists" -- *i.e.*, those who apply a "jurisprudence of original intention." See Speech of Attorney General Edwin Meese III before the American Bar Association, reprinted in Originalism: A Quarter-Century of Debate 52 (Regnery Publishing 2007). See also *id.* at 326. By the standard of the plurality opinion in *Stanford v. Kentucky*, 492 U.S. 361, 378 (1989), the lesson to be derived from the Jewish Law texts regarding capital punishment is that a civilized

society had "set its face" against a method of execution that involves an unnecessary risk of pain when, in the view of those administering the system of justice, there is a readily available alternative that poses less risk of pain and suffering.

In advocating for the independence of the judiciary in *Federalist No. 78*, Alexander Hamilton contemplated judges who would not be exercising legislative power or imposing their personal views or contemporary mores onto judicial functions. See, *e.g.*, Shlomo Slonim, "Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy," 23 Constitutional Commentary 7 (2006). But in determining what Hamilton called the "manifest tenor of the constitution," the lessons of history learned from centuries-old applications of the law are surely relevant.

CONCLUSION

For the foregoing reasons, the conclusion reached by the Jewish Law authorities should inform this Court's decision on the First and Second Questions Presented in this case and support the position of the petitioners that Kentucky's system of lethal injection violates the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Respectfully submitted,

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