IN THE SUPREME COURT OF THE STATE OF NEVADA

PAOLA M. ARMENI, JONAH J. HORWITZ, and DEBORAH A. CZUBA, Petitioners, v. THE EIGHTH JUDICIAL DISTRICT COURT of the STATE of NEVADA, IN AND FOR the COUNTY of CLARK; and THE HONORABLE MICHAEL P. VILLANI, Respondents, and TIMOTHY FILSON, Warden, ADAM PAUL LAXALT, Attorney General for the State of Nevada, and THE STATE OF NEVADA, Real Parties in Interest.	)	Supreme Court No.: 73462 District Court No.: 81C053867

AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF NEVADA FOUNDATION AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF *AMICI*

The ACLU is a nationwide nonpartisan organization of nearly one million members dedicated to protecting the fundamental liberties and basic civil rights guaranteed by the state and federal Constitutions, within which the ACLU's Capital Punishment Project focuses on upholding those rights in the context of death-penalty cases. The Capital Punishment Project regularly presents at trainings throughout the nation concerning the standards capital defense attorneys must meet to effectively represent their death-sentenced clients, including what are considered to be the gold standard for capital counsel, published by the American Bar Association. Given the sanctions imposed on Petitioners, capital-defense counsel who are zealously and in good faith representing a death-row client, the ACLU's interests are at stake here.

The American Civil Liberties Union of Nevada (ACLUNV) is an affiliate of the American Civil Liberties Union. The ACLUNV's mission is to protect and defend the civil rights and civil liberties granted to Nevadans by both the Nevada and United States Constitutions. The ACLUNV's work encompasses protecting the constitutional rights of those subject to a sentence of death, which includes ensuring access to effective capital defense attorneys.

The ACLU and the ACLUNV have submitted a motion seeking leave of the court to file this brief per NRAP 29 (a).

DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici has no parent corporations and no publicly held company owns 10% or more of its stock.

The following law firms have appeared and/or are expected to appear in this court:

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I. STATEMENT OF FACTS AND PROCEDURE

Petitioners are attorneys for death-row prisoner Samuel Howard, including attorneys from the Capital Habeas Unit of the Federal Defender Service of Idaho,[1] and pro-bono counsel barred in Nevada. Collectively, they seek a writ of mandamus instructing the district court to vacate the monetary sanction it imposed against them in the course of successor habeas corpus litigation. The sanction was an order requiring Petitioners to pay $250 to the Clark County District Attorney's Office. *See* Pet. for Mandam. at 2. The court cited no disciplinary rule in fashioning this sanction, but imposed it apparently under the theory that the prosecutor's office needlessly spent resources to respond to arguments attacking Howard's death sentence, which the court found to have been made improperly. *See id.* at 24.

As background, the successor habeas litigation involved Howard's arguments that his death sentence, and prior appellate proceedings, violated the Sixth Amendment as interpreted in *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016). *See id.* at 19. As pertinent here, the litigation involved a number of filings, including: 1) a successor habeas petition based on *Hurst*, 2) an amended petition adding an additional *Hurst* argument counsel belatedly identified, and – after the

[1] Counsel from Idaho took on this representation because of a conflict identified by the Capital Habeas Unit of the Nevada Federal Defender, which ordinarily would have done so.

court had ruled the amended successor petition to have been improperly filed without leave – 3) a motion for leave to file the amended petition. *See id.* at 5. Although the district court's rationale was in many respects unclear, *see id.* at 24, it appears to have imposed the sanction because it found that Petitioners had raised additional arguments invoking *Hurst* (in the leave motion and/or in a reply brief) after the court had already ruled that such arguments from the amended petition were not properly before the court. *See id.* at 10.

As Petitioners show in detail, *id.* at 16-17, the district court was wrong to conclude that Petitioners had improperly raised the new arguments concerning *Hurst* because they did so only in the context of a motion specifically asking for leave to file an amended habeas petition. Further, the arguments Petitioners presented on behalf of Mr. Howard in a reply brief responding to the State's opposition to the original successor habeas petition were appropriately confined to the claim in that petition. *See id.* at 19.

With these facts as background, amici join Petitioners in showing that the district court's imposition of sanctions was a gross abuse of discretion.

II. ARGUMENT

A. Sanctioning Petitioners for Zealously Preserving Constitutional Claims of Their Death-Sentenced Client Was Improper.

Appropriately zealous capital defense attorneys argue and preserve all non-frivolous legal claims, particularly federal constitutional claims. Sanctioning them

for doing so not only abuses judicial authority but also sets the dangerous precedent of chilling capital defense attorneys' critical work. Indeed, this Court steers clear of "chilling or unduly temporizing ethical representation by counsel" by applying heightened scrutiny when a trial court monetarily sanctions a capital defense attorney. *Young v. Ninth Jud. Dist. Ct.* 107 Nev. 642, 646 (1991).

Given capital defense counsels' ethical duty to vigorously defend death-sentenced clients, and this Court's recognition of the importance of such advocacy, Petitioners' actions in defense of their client were entirely appropriate. By no means did their actions warrant sanctions. This Court thus should grant Petitioners' writ of mandamus and vacate the sanctions.

1. Petitioners followed applicable guidelines of professional responsibility.

The district court sanctioned Petitioners based on their pursuit of relief for their death-row client Samuel Howard, based on *Hurst v. Florida*. *See Hurst v. Florida*, 136 S. Ct. 616, 619 (2016). Petitioners have described the complex procedural posture in which they argued these *Hurst* Sixth Amendment claims. *See* Pet. for Mandam. at 19. Suffice it to say that Petitioners attempted to follow the district court's directives regarding how the claims could be raised, but the court – either through confusion of the interrelated issues, or undue frustration with a complex process – believed they had not done so. Regardless of this confusion or

frustration, however, Petitioners' diligent pursuit of this issue exemplified the highest standards of capital representation.

The American Bar Association ("ABA") guidelines for capital defense counsel stress the importance of capital counsel's vigorous advocacy, among other reasons, to preserve issues for later review. *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, History of Guideline 10.15.1* (rev. Feb. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 1080 (2003) ("ABA Guidelines"). Guideline 10.8 (A) expressly requires counsel to evaluate legal claims in light of the significance of safeguarding clients' rights against later attacks that a claim has been waived, unexhausted, or defaulted. *See id.* at 1028. Similarly, Guideline 10.15.1 (C) requires competent and professional counsel to litigate *all* arguably meritorious issues. *See id.* at 1079.

The Commentary to Guideline 10.15.1 does not mince words. It states: "When a client will be killed if the case is lost, counsel should not let *any* possible ground for relief go unexplored or unexploited." *Id.* at 1083 (commentary to Guideline 10.15.1) (emphasis added).

The same standard applies to post-conviction counsel. They do a disservice to their death-sentenced prisoners, and risk their lives, by "winnowing issues" in a capital appeal. *See id.* Failing to raise an issue in post-conviction proceedings can

have fatal consequences. Professional and competent counsel following the guidelines must assume that any meritorious issue not contained in the initial application will be "waived, procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications." *Id.* at 1086.

The ABA Guidelines further require counsel to (1) assert legal claims whose basis has only recently become known, and (2) supplement, as needed, prior claims with additional legal information. *See id.* at 1029 (Guideline 10.8). With respect to such new legal claims, counsel must "make every professional appropriate effort to preserve them for subsequent review." *Id.* at 1079. As this Court has stated, "vigorous, diligent advocacy [is] demanded of defense counsel in representing capital defendants[.]" *Young v. Ninth Judicial Dist. Court*, 107 Nev. at 648.

The United States Supreme Court has long recognized ABA guidelines as guides in determining whether counsel's conduct is professional.[2] In *Strickland v. Washington*, the Supreme Court recognized that ABA guidelines and the prevailing norms of practice reflected therein serve as guides in determining whether counsel's conduct is appropriate. *See Strickland v. Washington* 466 U.S. 668, 687 (1984). And in *Wiggins v. Smith*, the Court further acknowledged the ABA guidelines as markers of reasonable, professional competence and barometers for

[2] *Cf. also Rodriguez v. State*, 125 Nev. 1074, 2009 WL 3711919 *3 (Nev. 2009) (unpublished decision) (citing ABA Guideline 11.4.1 (C) (1989)).

gauging the reasonableness of attorney decisions and conduct. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing ABA Guidelines in determining reasonable level of investigation into mitigating evidence by citing to them as "guides for determining what is reasonable").[3]

Petitioners were only living up to the standard of practice for capital defense attorneys reflected in the ABA guidelines, mirrored by competent attorneys everywhere who represent death-sentenced prisoners. Competent attorneys in these circumstances raise all potential claims, particularly constitutional claims. They are on the lookout for new claims based on new precedent.

Hurst claims on behalf of death-row prisoners have been extraordinarily successful in other states. Under any conceivable professional standard of practice, Petitioners were ethically duty-bound to press them. As Petitioners well knew, Florida courts have retroactively applied *Hurst* (in cases that were not yet final at the time of *Ring v. Arizona*, 536 U.S. 584 (2002)) to vacate numerous death sentences and order resentencing. *See, e.g., Mosley v. State*, 209 So.3d 1248, 1281 (Fla. 2016) (granting retroactive relief and noting "it is undeniable that *Hurst v. Florida* changed the calculus of the constitutionality of capital sentencing in this State"); *see, e.g., Hojan v. State*, 212 So.3d 982, 1001 (Fla. 2017) (vacating

[3] *See also Rompilla v. Beard*, 545 U.S. 374, 387 n. 7 (2005) ("Our decision in *Wiggins* made precisely the same point in citing the earlier 1989 ABA Guidelines.").

defendant's death sentence and granting his supplemental claim for relief under *Hurst* after declaring it impossible to conclude that the *Hurst* error was harmless beyond a reasonable doubt).

Similarly, in 2016, the Delaware Supreme Court relied on *Hurst* to invalidate the state's death penalty statute. *See Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (finding that based on *Hurst*, Delaware's death penalty statute violated the Sixth Amendment role of the jury in part because the law did not require the jury to find that aggravating circumstances outweigh the mitigating circumstances). It then found *Rauf* to be fully retroactive as a new watershed rule of criminal procedure, *Powell v. State,* 153 A.3d 69, 70 (Del. 2016), and vacated multiple death sentences. *See, e.g., Phillips v. State* 154 A.3d 1130, 1135 (Del. 2017). Highlighting the gravity of *Hurst* in capital jurisdictions where judges retain a role in sentencing, amicus curiae American Civil Liberties Union Capital Punishment Project served as amici in several of the Delaware and Florida cases pressing for broad and retroactive application of *Hurst*'s jury-sentencing requirement.

This Court has yet to rule on the implications of *Hurst* to Nevada capital sentencing and appeals. Thus, in raising the *Hurst* claim, Petitioners gave the district court an opportunity to adjudicate a claim that has profoundly impacted death penalty litigation in other states but has not yet been addressed here. And

they appropriately gave their client zealous representation that could potentially save his life.

The district court's sanctions were improper because Petitioners were merely conforming to prevailing professional norms by raising these critical claims. This case thus does not resemble the single case where this Court has approved sanctions against a capital defense attorney. *See Young v. Ninth Jud. Dist. Ct.*, 107 Nev. at 642. In *Young v. Ninth Judicial District Court*, the defense counsel moved to strike the State's notice of intent to seek the death penalty, based on the State's allegedly improper political motivations for seeking the death penalty. *See id.* at 644. Counsel failed, however, to put forth sufficient evidence supporting these serious accusations. *See id.* at 648 (finding prosecutor's "tough on crime" campaign rhetoric singularly insufficient to support accusation). This Court affirmed the sanctions because counsel interjected "*groundless* delay in a matter of substantial importance," thereby "demeaning the criminal justice system." *Id.* at 648-49 (emphasis added).

In *Young*, this Court did note, though, that its concern over chilling ethical representation by capital counsel necessarily triggers heightened appellate scrutiny when a trial court imposes monetary sanctions on counsel for a death-sentenced client. *See id.* at 650.

The litigation for which Petitioners were sanctioned could not have been more different. They raised novel constitutional claims, based on recent Supreme Court precedent, and which had been the basis for relief in other states. Petitioners filed a claim that was not only buttressed by precedent but that has also seen significant traction in other states, resulting in multiple vacated sentences for clients on death row. Thus, rather than demeaning the criminal justice system, the attorneys did credit to the system by heeding the rules of their profession, which discourages capital defense counsel from leaving any possible ground for relief unexplored. ABA Guidelines r. 10.15.1, Hofstra L. Rev. at 1083.

Sanctions here are unwarranted. They only serve to punish capital defense lawyers for comporting with ethical guidelines to represent their death-sentenced client. Furthermore, these sanctions set a dangerous precedent of forcing capital defense counsel to choose between adhering to professional guidelines or risking reputational and monetary harm for doing so. Indeed, these sanctions encourage the exact outcome this Court discouraged in *Young*—chilling capital counsels' ethical representation of their death-sentenced clients. And that concern is all the more compelling here where local counsel has taken on Howard's representation on a pro bono basis, answering the call of our profession to represent poor people in dire need of legal services. *Amici* respectfully urge this Court to apply the

heightened scrutiny it embraced in *Young* and to vacate the district court's baseless and chilling sanctions.

2. Petitioners correctly fought to protect their death-row client's rights and life.

Earlier this year, this Court found that the district court abused its discretion in awarding attorney fees against the Petitioners, the Public Employees' Retirement System of Nevada, because the Petitioners' defenses were based upon "novel and arguable . . . issues of law." *Pub. Emps.' Retirement Sys. of Nev. v. Gitter*, 393 P.3d 673 (Nev. 2017). This Court found the Petitioners' defenses were not frivolous but instead rooted in "reasonable interpretations of. . . a novel issue of law." *Id.*

Similar to the Petitioners in *Gitter*, Petitioners here raised a novel issue of law. As this Court has yet to decide if and when *Hurst* could afford relief in Nevada capital proceedings, Petitioners raised novel claims on behalf of their death-sentenced client, and raised claims rooted in reasonable interpretations of Supreme Court precedent. Indeed, one of the reasonable and arguable claims is one that apparently would have succeeded in the Delaware Supreme Court -- that the district court ran afoul of *Hurst* doctrine by failing to instruct the jury that it had to find that aggravation outweighed the mitigation by a reasonable doubt to return a death sentence. *See Rauf*, 145 A.3d at 434 (holding that the jury, under the Sixth

Amendment, must find "that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist . . . unanimously and beyond a reasonable doubt"). And it is a claim that the Delaware court found to be a watershed rule of criminal procedure applying retroactively. *Powell,* 153 A.3d at 70.

As part and parcel of raising this novel and arguable claim that had succeeded in winning relief for death-row prisoners in other states, Petitioners fulfilled their ethical obligations of staying abreast of new controlling precedent that could benefit their client and then raising newly-developed claims. *See* ABA Guideline 10.8(C)(1), Hofstra L. Rev. at 1029; *see also* ABA Guideline 1.1 cmt. at 923.

The United States Supreme Court only decided *Hurst* in January of 2016. *See Hurst v. Florida,* ___ U.S. __, 136 S. Ct. 616 (2016). And in August 2016—less than eight months later—the Delaware Supreme Court struck the state's death penalty statute based on *Hurst* claims. *See Rauf v. State,* 145 A.3d 430 (Del. 2016). In less than a year, *Hurst* had radically changed death penalty litigation. Petitioners did not neglect to raise long established claims. On the contrary, Petitioners acted expeditiously by including a fresh claim that was quickly gaining traction in other states with similar death penalty regimes.

Recognizing that *Hurst* could save their client's life, Petitioners raised a *Hurst* claim in their October 2016 petition for post-conviction relief. Before this petition had been resolved in the district court, however, they recognized an additional error based on *Hurst* (referred to as Claim Two in their petition). Petitioners thus sought to have this additional claim considered, and immediately raised it in an amended petition for post-conviction relief. In taking these steps, Petitioners seized an opportunity to present *Hurst* issues to the court and more importantly, protect their client's life.

Counsel did exactly what competent and professional counsel must. They maintained awareness of new controlling precedent, identified a new decision of great importance in capital cases, researched the issue, and then presented it in a timely manner.[4] In doing so, Petitioners created an opportunity for their death-sentenced client to win relief from his death sentence in the Nevada courts. Seeing the positive outcomes *Hurst* claims had brought to numerous death-row inmates, Petitioners not only raised the claims for state courts to vindicate, but also preserved them for federal habeas review, should it become necessary.

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[4] Nevada courts consider whether a claim is based on new authority that was not available earlier, and whether it is being raised within a reasonable time frame. *See State v. Boston*, 363 P.3d 453, 455 (Nev. 2015). This Court has generally interpreted a reasonable time to be one year. *Rippo v. State*, 368 P.3d 729, 740 (Nev. 2016), *rev'd on other grounds*, 137 S. Ct. 905 (2017). The filing was well within this time frame.

Under the ABA Guidelines, capital defense counsel must recognize the "importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited." *Id.* Because capital defense counsel are operating under rigid default rules, collateral counsel should "assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation." ABA Guidelines r. 10.15.1 cmt. Ultimately, had Petitioners not presented the second *Hurst* claim to the Nevada courts, then the claim would have been procedurally defaulted, regardless of its merit. Petitioners thus had an ethical obligation to exhaust the claim on behalf of Mr. Howard to avoid it being procedurally defaulted in a later stage of litigation.

Indeed, capital defense attorneys shoulder the heightened duty of preserving their clients' claims for federal habeas review. To obtain federal habeas review, capital counsels must "exhaust available state remedies" to allow state courts the opportunity to cure a constitutional violation. *See Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (citing *Rose v. Lundy*, 455 U.S. 509, 518 (1982)); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) (holding that a claim must be fully exhausted at every state court level to be preserved for federal habeas review).

In addition to satisfying the exhaustion requirement, capital defense attorneys must ensure their claims were not procedurally defaulted in state courts.

See Davila 137 S. Ct at 2064. Procedurally defaulted claims are those that the state court denies based on an "adequate and independent state procedural rule." *See id.* The procedural default rule ensures that federal habeas petitioners who fail to satisfy state procedural rules for presenting a federal claim do not deprive state courts of an "opportunity to address those claims in the first instance." *See id.* (citing *Coleman v. Thompson*, 501 U.S. 722,732 (1991)). Ultimately, a collateral capital defense counsel's failure to satisfy *either* the exhaustion or procedural default requirement essentially shuts the door on federal habeas review for their death-sentenced client. *See Coleman v. Thompson*, 501 U.S. 722, 755 (concluding that procedural default in state courts due to attorney error does not excuse the default in federal habeas because there is no right to counsel for post-conviction proceedings).

In short, capital defense attorneys must carefully preserve claims in state courts, following the state court rules, or risk federal courts refusing to grant habeas review for their claim in the future, irrespective of the claim's merit. Indeed, the bar to overcome procedural default and obtain federal habeas review is high. *See Davila*, 137 S. Ct. at 2062. Even if Petitioners had understood the district court at some point to be barring further mention of *Hurst* (though the court's directives were anything but clear), complying with that directive would have come at the steepest cost for their client: he could have forfeited a life-saving

claim. *Cf. Davila*, 137 S. Ct. at 2068 (refusing to find cause for procedural default even when direct-appeal counsel was purportedly constitutionally ineffective). As defense counsel in a capital case, Petitioners absolutely did the right thing. By raising the first *Hurst* claim, and seeking to amend their claim when they realized an additional *Hurst* error in the record, Petitioners sought to raise a viable constitutional claim, and to protect the claim for any needed future review.

B. The Court Should Remove The Sanctions To Avoid Constitutional Concerns.

> *Counsel may "by speech or other conduct . . . resist a ruling of the trial court [to] the point necessary to preserve a claim for appeal." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1071 (1991) (Rehnquist, J., dissenting) (plurality opinion).*

In the district court, Howard himself was protected by his constitutional right of access to the courts. *See* U.S. Const. amend. XIV, § 1. And the speech and conduct of his attorneys were protected by the First Amendment. *See* U.S. Const. amend. I. This Court should reverse the sanctions to avoid the constitutional implications of infringing on these rights, as well as both Howard and his attorneys' rights against retaliation. To force Petitioners to pay sanctions to their opposing counsel's office not only impinges on their constitutional rights, but also creates dangerous incentives for district attorneys to claim that valid constitutional claims have been filed improperly.

***Right of access*:**

To begin, although Howard does not enjoy a Sixth Amendment right to counsel in this post-conviction proceeding, he is a prisoner protected by a constitutional right to access to the courts. *See Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that the "fundamental constitutional right of access to the courts" requires prison authorities to assist inmates in preparing and filing meaningful legal materials). Sanctioning the Petitioners for presenting *Hurst* claims on Howard's behalf implicates this constitutional right.

The Supreme Court has been particularly concerned with protecting prisoners' rights of access in post-conviction proceedings. *Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("This Court has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme."). In *Johnson*, the Supreme Court invalidated a regulation which forbade inmates from assisting one another to prepare habeas corpus applications. *See id.* at 490. The Court reasoned that because habeas corpus's purpose is to "enable those unlawfully incarcerated to obtain their freedom, it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id.* at 485; *see also Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (holding that States must furnish indigent inmates with trial records due to their essentiality to "adequate and effective appellate review"). The right of access thus

is particularly concerned with prisoners' rights to present their claims in a post-conviction context. Upholding the sanction of the district court would thus violate Howard's right "to present his claims fairly in the context of the State's appellate process." *Ross v. Moffitt*, 417 U.S. 600, 601 (1974).

The district court punished Howard's attorneys for advocating on his behalf. In doing so, it denied Howard an adequate opportunity to present his claims fairly during a post-conviction proceeding. As the Court has previously held in *Bounds*, the test is not just access to the courts but *meaningful* access. *See Bounds*, 430 U.S. at 824. Even if Petitioners somehow failed to follow the court rules – which it appears they did not – the potential monetary cost or investment of time the State put into responding to the *Hurst* claim in no way warrants a sanction against counsel. Upholding these unwarranted sanctions would cause a violation of Howard's constitutional right of access to the courts.

First amendment:

Attorneys do not surrender their First Amendment rights once they step into a courtroom. *See Rodgers v. United States Steel Corp.*, 508 F.2d 152,163 (3d Cir.) ("Courts are not exempt from constitutional restraints on violating litigants' free speech."), *cert denied*, 423 U.S. 832 (1975). *See also Committee on Discipline of the U.S. District Court for the Central District of California v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995) (upholding constitutional right of attorney who

critiqued judge as biased in strong and disparaging terms). And yet the court below failed to honor these rights.

In *Gentile v. State Bar of Nevada*, the U.S. Supreme Court reviewed this Court's disciplinary finding against an attorney who had held a press conference concerning the pending criminal case of his client that violated then Rule 177 of the Nevada Supreme Court. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033 (1991). The rule generally barred attorneys from knowingly making public statements causing a substantial likelihood of prejudicing an adjudicative proceeding. *See id.* The attorney meanwhile claimed his speech was protected by the First Amendment. *See id.*

A narrow plurality decision resolved the case, holding the Nevada regulation prohibiting the press conference was void for vagueness. *See id.* at 1049 (Kennedy, J.) (plurality decision); *see id.* at 1082 (O'Connor, J., concurring with Part III of Justice Kennedy's decision). But the salient point here is that all nine justices accepted the attorney's claim of a right of free speech under the First Amendment. The justices divided only on whether the Nevada court rule violated that right. *Compare id.* at 1071-76 (Rehnquist, J., dissenting) (finding it did not, and arguing the First Amendment right of attorneys is circumscribed in the courtroom, and even outside the courtroom as related to pending cases) *with id.* at 1034-35

(Kennedy, J.) ("There is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment.").

Gentile wholly supports Petitioners' position. Even under Justice Rehnquist's limited view of the attorney's First Amendment right, attorneys are permitted, "by speech or other conduct, [to] resist a ruling of the trial court [to] the point necessary to preserve a claim for appeal." *Id.* at 1071 (Rehnquist, J., dissenting). Justice Kennedy noted that "speech critical of the exercise of the State's power lies at the center of the First Amendment." *Id.* at 1034-35 (Kennedy, J., concurring). Petitioners' speech fell well within both descriptions of the right: they argued for their death-sentenced client, against a resisting trial court, to preserve his constitutional right to jury sentencing under *Hurst*. And their speech was advocating against the State's exercise of its power to execute, based on new Supreme Court precedent suggesting the death sentence was obtained through unconstitutional means.

***Retaliation*:**

In response to Howard exercising his right of access to the courts, and his attorneys respectfully engaging in free speech protected under the First Amendment, the district court retaliated with sanctions.

Petitioners and Howard would both easily meet the elements of a retaliation claim. Section 1983 retaliation claims are most often brought by inmates against

corrections systems for violating their First Amendment rights to file prison grievances and access to courts. *See e.g. Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003); *see also Bounds v. Smith*, 430 U.S. 817, 821 (1977). In these cases, claims of retaliation require:

> (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmates exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correction goal.

Rhodes v. Robinson, 408 F.3d 559, 567-68 (9th Cir. 2005) (citing *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000)).

Applying this framework here, both Petitioners and Howard himself easily meet the requirements for a retaliation claim. Although not filing a grievance and complaint against a prison, they are raising a legitimate constitutional claim against Howard's death sentence, which is constitutionally-protected speech and conduct under the First Amendment and right of access to courts. In response, the trial judge—a state actor—took adverse action against Howard's attorneys. *Id.* The sanctions punished both Petitioners, and by extension Howard, for their efforts to protect Howard's capital sentencing rights under *Hurst*. The sanctions of course chilled Petitioners and Howard's speech and actions – any reasonable person would think twice about pursuing newly-arising legal claims if they risked sanctions. Finally, the sanctions did not "reasonably advance" a legitimate goal.

Id. On the contrary, they deterred the State's goal of resolving arguably meritorious claims, interfered with the adversary process, and chilled zealous legal representation of death-sentenced prisoners. Even if the intent behind the sanctions was to encourage counsel to follow filing rules, the sanctions were anything but reasonable in these circumstances where any failings of counsel were not willful and they immediately corrected their mistake by seeking leave to amend their petition.

***

This *amici* brief shows why the conduct of Petitioners was by no means sanctionable. *See* Points A, B, *supra*. The Court should reverse the sanctions on those bases, to avoid the serious constitutional implications of allowing the sanctions to stand.

III. CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to vacate the sanctions against Petitioners.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font, Times New Roman style. I further certify that this Brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 4,697 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that this Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: October 9, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amicus Brief on October 10, 2017. I have also mailed this Amicus Brief by USPS, postage prepaid, for delivery within three calendar days to the following people:

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