No. 19-1361

In The Supreme Court of the United States

RICHARD JORDAN AND RICKY CHASE,

Petitioners,

v.

GEORGIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

Whether the court of appeals correctly held that the district court did not abuse its discretion by quashing a subpoena brought by Mississippi death-row inmates seeking disclosure of documents about Georgia's lethal injection protocol as unduly burdensome, *see* Fed. R. Civ. Pro. 45(d)(3)(A)(iv), when compliance would necessarily reveal the source of the State's execution drug and so likely end Georgia's access.

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The court of appeals opinion on rehearing (Pet. App. 1a–41a) is reported at 947 F.3d 1322. The original panel opinion (Pet. App. 42a–56a) is published at 908 F.3d 1259. The district court's order overruling petitioners' objection and affirming the magistrate judge is unpublished and unavailable by online database but can be found on the district court docket, ECF No. 18. The magistrate judge's order quashing the subpoena (57a–66a) is unpublished but available at 2016 WL 9776069.

JURISDICTION

The opinion on rehearing was issued on January 10, 2020. On March 19, 2020, this Court extended the deadline to petition for a writ of certiorari in all cases to 150 days from the previous deadline. The petition was filed on that new deadline, June 8, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

STATEMENT

1. Richard Jordan and Ricky Chase are death-row inmates in Mississippi.

In January 1976, Jordan kidnapped a loan officer's wife, killed her, and then sought $25,000 for her return. *Jordan v. State*, 266 So. 3d 986 (Miss. 2018). He was convicted of capital murder and sentenced to death. *Id.*

In August 1989, Chase and an accomplice entered the home of an elderly couple. *Chase v. State*, 873 So. 2d 1013, 1015 (Miss. 2004). They bound the wife, ransacked the house, and shot the husband when he returned home to find intruders. *Id.* Chase was convicted of capital murder and sentenced to death.

2. Petitioners are currently challenging Mississippi's execution protocol on Eighth Amendment grounds. *Jordan v. Fisher*, No. 3:15-cv-295 (S.D. Miss. 2015). Mississippi's current protocol involves three injections: first, pentobarbital or midazolam, to sedate and anesthetize; second, vecuronium bromide, to paralyze; and third, potassium chloride, to stop the heart. Pet. App. 3a. Petitioners allege that the initial injection does not adequately anesthetize the inmate, thus causing significant pain during the remaining steps. *Id.* at 3a–4a. Petitioners also challenge the state's use of compounded pentobarbital at all, arguing that the drug is sometimes contaminated or counterfeit and so can itself inflict pain. *Id.*

To prevail on their Eighth Amendment claim, petitioners must show an alternative protocol that

significantly reduces a substantial risk of severe pain. *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015). Petitioners allege that protocols employed by other states present such alternatives. Georgia, for example, uses a single injection of compounded pentobarbital, obtained from an anonymous source. Pet. App. at 4a. Mississippi, however, cannot find a source of pentobarbital. *Id.* at 5a.

3. Petitioners subpoenaed the Georgia Department of Corrections ("GDC"), seeking "documents concerning the feasibility of a one-drug lethal injection protocol using pentobarbital, including specific details about the GDC's source and manner of acquiring pentobarbital." *Id.* "Responding to the demands would require disclosure of the identity of people and entities that manufacture or supply drugs used in Georgia executions." *Id.* at 2a n.1. GDC moved to quash the subpoena and protect the anonymity of the individuals involved in its lethal injection protocol (including its supplier of pentobarbital), which Georgia law guarantees. *Id.* at 6a. The magistrate judge granted the motion to quash. *Id.* at 59a–66a. The district court overruled petitioners' objection to the magistrate's order and affirmed. *Jordan v. Fisher*, No. 16-cv-2582, ECF No. 18 (N.D.Ga. Jan. 17, 2017).

The court of appeals affirmed the district court's order. *Id.* at 42a–56a. First, the court held that the district court properly reviewed the magistrate's order for clear error. Second, the court agreed that the Lethal

Injection Secrecy Act, O.C.G.A. § 42-5-36(d)(2),[1] barred disclosure of the information sought. *Id.* Petitioners moved for rehearing, arguing that the court of appeals had created a new federal evidentiary privilege by relying solely on state law.

The court of appeals granted the motion for rehearing. On rehearing, the court again affirmed the district court's order, *id.* at 1a–41a, holding that the court did not abuse its discretion because compliance with the subpoena would impose an "undue burden" on Georgia. *Id.* at 24a, 29a–41a (citing Fed. R. Civ. Proc. 45(d)(3)(A)(iv)). To begin with, the relevance of the information sought was "highly questionable": Georgia's source of pentobarbital will supply the drug only if its involvement remains anonymous, and so disclosure would end access to the drug for Georgia and do nothing to help Mississippi acquire the drug. *Id.* at 11a–20a. Petitioners also seek an injunction against the use of compounded pentobarbital in Mississippi, meaning they could hardly offer Georgia's supplier as an alternative that would substantially reduce the risk of severe pain. *Id.* at 21a–23a.

The "problematic" relevance of the information sought was more than counterbalanced by the burdens

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[1] That section reads: "The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure . . . under judicial process." *Id.*

disclosure would impose on Georgia. *Id.* at 24a. The State has a "strong interest in enforcing its . . . death penalty laws," *id.* at 36a, and if Georgia identifies its source, "the supplier will either immediately stop providing the drug to Georgia or anyone else, or the supplier will eventually be hounded by anti-death penalty activists until it is forced to cease production of this substance," *id.* at 40a. Because disclosure would likely prevent Georgia from enforcing its criminal laws while providing no benefit in petitioners' suit against Mississippi, the court of appeals affirmed the quashing of the subpoena. This petition followed.

REASONS FOR DENYING THE PETITION

In this suit, petitioners seek information about how Georgia chose and administers its execution protocol, which would require disclosure of the identity of Georgia's supplier of compounded pentobarbital. The court below found that disclosure would end Georgia's supply of the drug. That likely consequence led the court of appeals, like every court of appeals to consider this kind of subpoena, to conclude that the subpoena would impose an undue burden on Georgia. The petition does not attack that ground for affirmance (instead, it focuses on the putative relevance of the information sought). There is no reason to review the court of appeals' well-reasoned opinion, much less the hypothetical question presented.

First, this case is a poor vehicle for addressing the question presented because the court of appeals did

not decide the relevance question petitioners have raised, or even hold that the information sought was irrelevant to the *Glossip* analysis. *Second*, the petition does not frame an issue on which the courts of appeals are divided. The circuits that have addressed the question agree that forcing a state to disclose its sole supplier of lethal injection drugs imposes an undue burden. Petitioners instead allege a circuit split over *Glossip*'s "known and available alternative" standard, but no such split exists. And in any event, that standard is not the focus of this discovery dispute. *Third*, the court of appeals' actual holding—that disclosure would unduly burden Georgia—is correct.

I. This case is a poor vehicle for addressing the question presented.

According to petitioners, this case concerns whether evidence about how other departments of correction obtain their lethal injection drugs is "relevant to showing the method is feasible and available under *Glossip*." Pet. i; *see also* Pet. 13–14 ("The issue here is whether evidence concerning another department of corrections' ability to acquire and successfully administer the alternative method of execution satisfies 'the relevancy requirement of the federal discovery rules.'" (quoting Pet. App. 11a)).

But the court of appeals did not hold that the information petitioners seek is irrelevant, much less affirm on that basis. Although the court questioned the relevance of the information petitioners seek, *see* Pet.

App. 13a (finding it "very questionable" whether the information sought would aid petitioners in proving their claim), it ultimately affirmed the quashing of the subpoena on the ground that producing the information would unduly burden the State. *See id.* at 29a ("[W]e conclude that Plaintiffs' subpoena was required to be quashed because it subjected the GDC to an 'undue burden.' "). That ground for affirmance was rooted in the court's reasoning that, if Georgia's supplier is "unmasked, the supplier will either immediately stop providing the drug to Georgia or anyone else," or be "hounded . . . until it is forced to cease production." *Id.* at 40a. This is why the requested information is not particularly relevant to petitioners' claims, since it would not "bring Mississippi any closer to obtaining the compounded pentobarbital." *Id.* But it is also clear that disclosure "would greatly jeopardize Georgia's ability to implement its criminal laws." *Id.* at 37a. And it was that weighty consequence, not merely the relevance of the information, that ultimately led the court to affirm.

This mismatch between the question presented and the decision below counsels against certiorari because answering the question presented will not affect the outcome of this case. Indeed, the court below said as much, explaining that "*even if the information sought in the GDC subpoena is relevant* to the claims asserted in the underlying Mississippi litigation, the subpoena must still be quashed" because it would impose an undue burden on the State. *Id.* at 24a (emphasis added). The court's basis for that conclusion is not

even disputed at this stage: petitioners do not challenge the court of appeals' findings that public disclosure of Georgia's supplier would end the State's supply of pentobarbital and prevent Mississippi from obtaining it from that source. Simply, the answer to the question presented will not change the court of appeals' decision.

II. The decision below does not implicate a circuit split.

A. The courts of appeals agree that requiring disclosure of a state's supplier of lethal injection drugs unduly burdens the state.

The court's undue burden holding—the sole ground for affirmance—does not implicate a circuit split. In fact, two courts of appeals have reviewed subpoenas brought by these very petitioners seeking similar information from other states. Each time, the court of appeals concluded that the subpoenas were properly quashed because they would impose an undue burden.

In *Virginia Department of Corrections v. Jordan*, petitioners sought disclosure of the state's supplier of execution drugs (and refused to accept redacted documents). 921 F.3d 180, 185 (4th Cir. 2019). The court of appeals held that "Jordan and Chase had little, if any, demonstrated need for the additional documents requested; that they failed to explain why the same or similar information could not be had from better, alternative sources; and that the subpoena imposed

cognizable burdens on VDOC and its drug supplier." *Id.* at 192.

The Eighth Circuit quashed a similar subpoena brought by petitioners—seeking disclosure of Missouri's supplier of pentobarbital—when the supplier revealed it would cease supplying the drug to anyone if disclosure of its identity was required. *In re Missouri Dep't of Corr.*, 839 F.3d 732, 736–37 (8th Cir. 2016). This Court denied certiorari in both cases. *Virginia Dep't of Corr.*, 140 S. Ct. 672 (2019); *Missouri Dep't of Corr.*, 137 S. Ct. 2180 (2017).

Put simply, the circuits are aligned on the only question the decision below reached. All courts of appeals to review petitioners' subpoenas for information about other states' suppliers of execution drugs have rejected them as unduly burdensome.

B. Petitioners' alleged circuit split is neither real nor implicated here.

Unable even to allege a circuit split on the actual ground for decision, petitioners claim instead that the circuits are divided on what counts as an "available" alternative under *Glossip*. Pet. 19. Not so, and even if they were, any theoretical difference among the circuits on that issue would not matter here.

1. Petitioners contend that the Eleventh Circuit "requires a litigant to prove that the executing state 'actually has access to the alternative.'" Pet. 20 (quoting *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268,

1300 (11th Cir. 2016)). They contrast that standard with the Sixth Circuit's statement that, for an alternative method to be known and available, the drugs must be obtainable with "ordinary transactional effort." Pet. 19 (quoting *In re Ohio Execution Protocol*, 860 F.3d 881, 891 (6th Cir. 2017)). But petitioners never explain why they think these phrases reflect different analyses, and a review of case law confirms they do not.

In *Glossip*, this Court confirmed that, to prevail in an Eighth Amendment challenge to an execution protocol, the inmate must show a "known and available alternative[ ]"—one "that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" 135 S. Ct. at 2737 (quoting *Baze v. Rees*, 553 U.S. 35, 52, 61 (2008)); *accord Bucklew v. Precythe*, 139 S. Ct. 1112, 1129 (2019) (explaining that the inmate must give a "readily implemented alternative," not "a proposal for more research"). *Glossip* involved whether pentobarbital was an available alternative to midazolam for Oklahoma's execution protocol. The Court held that it was not: "the record shows that Oklahoma has been unable to procure those drugs despite a good-faith effort to do so." 135 S. Ct. at 2738. And the Court reached that holding even though some states, including "neighboring Texas and Missouri," used pentobarbital at the time. *Id.* at 2796 (Sotomayor, J., dissenting).

All courts of appeals to address the question have adopted that same basic understanding: to show a drug is "available," inmates must show that the state could actually acquire the drug, and not merely that

other states have managed to find a source. In *Brooks v. Warden*, the Eleventh Circuit held that a drug was unavailable to Alabama even though other states had used the drug in executions over the past two years. 810 F.3d 812, 820 (11th Cir. 2016). Likewise, in *Arthur v. Commissioner, Alabama Department of Corrections*, the Eleventh Circuit explained that *Glossip* requires the inmate to show that "the State actually has access to the alternative," and that evidence that other states have been able to access the drug is not enough. 840 F.3d at 1300.

Other courts of appeals have adopted the Eleventh Circuit's reasoning. The Sixth Circuit has held that pentobarbital is unavailable to Ohio, even though "Texas, Missouri, Georgia, Virginia, Alabama, Arizona, and Florida" had obtained sources of the drug, because Ohio could not obtain it "with ordinary transactional effort." *See In re Ohio Execution Protocol*, 860 F.3d 881, 891 (6th Cir. 2017) (en banc). And the en banc Sixth Circuit relied on the Eleventh Circuit's availability analysis in *Arthur*, confirming that the two circuits are of one mind. 860 F.3d at 891 (citing 840 F.3d at 1296). Similarly, the Eighth Circuit has "concur[red] with the Eleventh Circuit that the State must have access to the alternative and be able to carry out the alternative method relatively easily and reasonably quickly." *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017) (citing *Arthur*, 840 F.3d at 1300). There are thus no discernable differences in how the circuits have conducted the "availability" analysis. They reached the same outcome in every case petitioners cite.

Because these rulings follow naturally from this Court's decision in *Glossip*, it is no surprise that this Court has oft denied petitions in recent years alleging that the circuits are split on the meaning of "available." *See Price v. Dunn*, 139 S. Ct. 1533 (2019) (No. 18-1249); *Boyd v. Dunn*, 138 S. Ct. 1286 (2018) (No. 17–962); *Arthur v. Dunn*, 137 S. Ct. 725 (2017) (No. 16–602); *McGehee v. Hutchinson*, 137 S. Ct. 1275 (2017) (No. 16–8770); *Otte v. Morgan*, 137 S. Ct. 2238 (2017) (No. 17A78).

Despite this uniformity, petitioners represent that there is an "acknowledged" circuit split. Pet. 19. This argument is misleading, to put it mildly. In support, they cite the panel opinion in *McGehee*, 854 F.3d at 493 (adopting the Eleventh Circuit's reasoning instead of the Sixth Circuit's test), and the statements dissenting from denial of certiorari in that same case, 137 S. Ct. 1275, 1276 (Sotomayor, J., dissenting); *id.* at 1277 (Breyer, J., dissenting). But each of those opinions point to the Sixth Circuit's opinion of April 25, 2017, as establishing one side of the split. *See*, *e.g.*, 137 S. Ct. at 1276 (Sotomayor, J., dissenting) (citing *In re Ohio Execution Protocol*, 855 F.3d 702, 2017 WL 1457946, *5–*9, and n. 1 (6th Cir. Apr. 25, 2017)). That decision, however, was vacated and reversed by the en banc court. *See In re Ohio Execution Protocol*, 860 F.3d 881 (6th Cir. 2017). Far from rejecting the Eleventh Circuit's test, the en banc Sixth Circuit relied on the Eleventh Circuit's decision in *Arthur* in holding that pentobarbital was unavailable to Ohio. *Id.* at 891. The Eleventh and Sixth Circuits thus agree that a drug can

be unavailable to a state even if other states have found a source for that drug. *Id.* In short, the petitioners' "acknowledged split" disappeared three years ago.

2. Even if the courts of appeals were struggling to define what makes an alternative "available," this case would not help clarify that issue. The court's undue-burden-based affirmance of the district court has nothing to do with the meaning of "available." Rather, the court focused on the "predictable consequence[]" of disclosure of the requested information: "the loss of th[e] source of supply" for Georgia (and Mississippi, too), which would seriously impair Georgia's "sovereign power to enforce the criminal law." Pet. App. 36a–37a (quoting *In re Blodgett*, 502 U.S. 236, 239 (1992)). Petitioners do not explain why the court of appeals' reasoning or conclusion would change if the Eleventh Circuit had a different standard for deciding whether an alternative is "available" under *Glossip*, and no such explanation is apparent. The court was concerned with the consequences for Georgia, not the putative availability of the protocol for Mississippi. *See*, *e.g.*, Pet. App. 40a. Whatever it means for a drug to be "available" to a state, disclosure of the information petitioners seek here would still have the same consequences, and so the court of appeals would reach the same conclusion.

In any event, if this Court were inclined to address the *Glossip* standard again at some point, it should wait for a petition from a decision directly applying that standard, not a tangential discovery dispute. Orders quashing a subpoena are reviewed deferentially—for "an error of law or one that reflects a clear error of

judgment." Pet. App. 6a–7a (quoting *In re Hubbard*, 803 F.3d 1298, 1307 (11th Cir. 2015)). So, unlike in an appeal from a denial of a *Glossip* challenge, petitioners could obtain a different outcome only by showing that the district court abused its discretion. The procedural posture of this petition thus precludes review of the *Glossip* analysis.

III. The decision below is correct.

The court of appeals correctly held that the subpoena "must be quashed pursuant to [Federal Rule of Civil Procedure] 45(d)(3)(A)(iv), which makes mandatory the quashing of any subpoena that would impose" an undue burden on the target. Pet. App. 29a. The undue-burden analysis requires a court to "balance the interests served by demanding compliance with the subpoena against the interests furthered by quashing it." *Id.* at 29a–30a (quoting 9A Wright & Miller, Federal Practice and Procedure § 2463.1 (3d ed. 2019)).

The court found that those interests required that the subpoena be quashed:

> (1) . . . Georgia has a strong interest in enforcing its criminal laws, including its death penalty laws;
>
> (2) . . . disclosure of the information requested in Plaintiffs' subpoena would clearly burden that interest;
>
> (3) . . . the relevance of the information to Plaintiffs' Mississippi case is marginal to nonexistent; and

> (4) . . . Georgia's interests clearly outweigh Plaintiffs' interests in disclosure.

Pet. App. 36a.

Those conclusions are correct. Georgia's sovereign interest in enforcing the sentences imposed by its courts is undeniable. *In re Blodgett*, 502 U.S. at 239 (citing *McCleskey v. Zant*, 499 U.S. 467, 491 (1991)). And history teaches that disclosure of Georgia's source of pentobarbital will inevitably end the state's supply. Pet. App. 30a–36a, 40a. In fact, this Court has documented the efforts by opponents of the death penalty to eliminate all sources of lethal-injection drugs. *See Glossip*, 135 S. Ct. at 2733–34; *see also* Pet. App. 14a–20a. That is why Georgia passed the Lethal Injection Secrecy Act, *see Owens v. Hill*, 295 Ga. 302, 317 (2014), and why the Eleventh Circuit has repeatedly confirmed Georgia's interest in maintaining that secrecy, *see*, *e.g.*, *Gissendaner v. Comm'r, Ga. Dep't of Corr.*, 803 F.3d 565, 569 (11th Cir. 2015). Given Georgia's significant interests in protecting the confidentiality of its source of pentobarbital, it is no surprise that other courts of appeals to consider subpoenas of this kind have decided that disclosure would unduly burden the state. *See* Pet. App. 32a–36a; *see also*, *e.g.*, *Virginia Dep't of Corr.*, 921 F.3d at 192; *In re Missouri Dep't of Corr.*, 839 F.3d at 736; *In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 239 (6th Cir. 2016).

In short, "Georgia has been able to secure a source of pentobarbital for use in executions despite its relative scarcity" *because* it has kept its supplier secret.

Pet. App. 30a. The subpoena poses a direct threat to Georgia's ability to enforce its criminal sentences.

Petitioners' interests in obtaining the information they requested, on the other hand, are minimal. Once Georgia's supplier of pentobarbital is revealed, "the supplier will either immediately stop providing the drug to Georgia or anyone else, or the supplier will eventually be hounded by anti-death penalty activists until it is forced to cease production of this substance." *Id.* at 40a. The petition characterizes this part of the court of appeals opinion as denying the relevance of an alternative source of pentobarbital to the suit in Mississippi. But the court of appeals did not doubt that evidence of a true source of pentobarbital for Mississippi would be at least marginally relevant to petitioners' 42 U.S.C. § 1983 suit. Instead, the court explained why Mississippi would be unable to obtain the drug from Georgia's supplier even if the subpoena were enforced. *See* Pet. App. 14a–20a (explaining why enforcement of the subpoena will lead to no access to the drug for either state). Petitioners elide this distinction. *See*, *e.g.*, Pet. 14 ("Evidence that another state has been able to acquire and carryout an execution method is plainly relevant to showing that the method is 'known and available.' "). The problem with the subpoena is that, rather than identify an alternative source of lethal injection drugs for Mississippi, it will *end* access to the drug from this supplier. The subpoena is self-defeating.

The information sought is of questionable help to petitioners for a second reason: In the Mississippi suit,

Jordan and Chase actually challenge the constitutionality of compounded pentobarbital, too. *See Jordan v. Fisher*, No. 3:15-cv-295, ECF 50, Am. Compl at ¶6 (S.D. Miss. 2015) ("[T]his civil action challenges the use of compounded drugs (including but not limited to compounded pentobarbital)."); *id.* at ¶14 ("Plaintiffs also seek a preliminary injunction against the use of midazolam and compounded pentobarbital in their executions."). So petitioners have already revealed that they do not view compounded pentobarbital as a constitutional alternative to Mississippi's current protocol.[2]

Petitioners argue that they only seek information showing that Georgia has been able to "obtain and successfully carryout single-drug pentobarbital executions," not the identity of the State's source. Pet. 17–18. But Georgia's use of compounded pentobarbital for executions is public information. Petitioners' subpoena can only add to that publicly available data if it results in "disclosure of the identity of people and entities that manufacture or supply drugs used in Georgia executions." Pet. App. 2a–3a n.1.

Petitioners also argue, in summary fashion, that a privilege log or protective order could protect the

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[2] Petitioners ask this Court to ignore these allegations, but never explain these direct challenges to the use of compounded pentobarbital in their complaint. They do suggest now that compounded pentobarbital might be constitutional if used in a single-drug protocol, rather than in a three-drug cocktail. Pet. 16 n.10. Whatever the merits of this uncorroborated distinction, it is certainly not a sufficient basis to overrule the court of appeals, especially on abuse-of-discretion review.

supplier's anonymity. It was no abuse of discretion for the court below to reject this argument. *See* Pet. App. 10a n.3 (explaining that no privilege log was necessary because the information sought was either publicly available, of limited relevance, or protected by the Lethal Injection Secrecy Act). Any disclosure, even if limited to death-row inmates and their lawyers, would have a chilling effect on the supplier. *Virginia Dep't of Corr. v. Jordan*, 921 F.3d at 193. And the risk of public disclosure (inadvertent or otherwise) is unjustifiably high, even with a protective order. *Id.* ("Jordan and Chase's lawyers, advocates trying to prevent their clients' executions, might find it challenging to keep that information confidential while adhering to their duty of zealous representation.").

Thus, the court of appeals did not err in holding that the subpoenaed information would unduly burden Georgia. The impact on Georgia's ability to enforce its criminal laws, which include capital punishment, would be swift and severe. The court of appeals correctly held that the district court did not abuse its discretion in quashing the subpoena.

CONCLUSION

For the reasons set out above, this Court should deny the petition.

Respectfully submitted.

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