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
U.S. Court of Appeals for the Eleventh Circuit

## REPLY IN SUPPORT OF CERTIORARI

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Respondent does not contest that it never asserted *any* of the bases for the panel's second opinion. After the magistrate judge found that petitioners' discovery "goes to the heart of what [they] must prove," both parties accepted it as true. Pet. App. 61a. Respondent did not object to or defend the magistrate judge's decision on the basis of relevance or undue burden, and did not raise either issue on appeal. Pet. 4, 8.

Respondent also does not contest that it *never even hinted* at the panel's posited causal chain of events, in which its supplier's identity would be disclosed, and the supplier would then stop selling pentobarbital to respondent or anyone else. And respondent does not contest that no evidence in the record supports that assumed market outcome. Pet. 13, 15-16. For all we know, respondent's supplier would happily or has previously tried to sell its drugs to Mississippi under the same condition of anonymity. The panel, and now respondent, tell us just to assume that is not the case.

That's not how federal civil discovery works in any other context. *See Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (observing that the laws governing federal discovery and privilege are premised on the "more than three centuries" old and "fundamental maxim that the public . . . has a right to every man's evidence" (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

Now, adopting the second panel opinion's *sua sponte* theory that the evidence is irrelevant and too burdensome, respondent makes three arguments against certiorari. None makes much sense.

1. The petition asks this Court to review the Eleventh Circuit's conclusion that, in evaluating whether single-drug pentobarbital is "known and available" to Mississippi, *Glossip v. Gross*, 576 U.S. 863, 878 (2015), it is irrelevant as a matter of law how respondent has obtained and administered that same drug in its executions. Pet. i, 11-13. Respondent's first argument is that this would be "a poor vehicle" to correct that understanding of the *Glossip*/*Baze* standard because the panel "ultimately affirmed the quashing of the subpoena on the ground that producing the information would unduly burden the State." BIO 6, 7. This is a palpably weak argument.

No one disputes that the panel's revised opinion concluded that the discovery sought would be an undue burden on respondent. But respondent's attempt to shift the focus to the undue burden analysis is superficial, at best, because that analysis was explicitly and necessarily grounded in the panel's determination of the information's relevance. The panel itself said so repeatedly. It explained that, "to determine whether the subpoena subjects the subpoena recipient to an undue burden" it was essential to consider the relevance of the subpoena: "one must identify both that burden as well as the interests served by demanding compliance with the subpoena." Pet. App. 39a. In the panel's words, "the relevance of the requested information to the underlying litigation, or the lack thereof, is important." Pet. App. 39a.[1]

[1] In claiming that the undue burden analysis is untethered from the question presented, respondent conveniently omits this language.

The panel's conclusion that the relevance of information sought was "highly questionable" and "problematic," Pet. App. 11a, 24a, was thus essential to the Eleventh Circuit's opinion by its own terms. That remains evident throughout the court's analysis. Its conclusion that "Georgia's interests clearly outweigh Plaintiffs' interests" explicitly relied on its assessment that "the relevance of the information . . . is marginal to non-existent." Pet. App. 36a. If that were not clear enough, the court refers the reader to its relevance section, "discussed at great length above," with a *supra* citation. Pet. App. 37a. And the court then summarizes the same causal chain of events underlying its relevance conclusion, in which "the supplier capitulates and ceases supplying the drug." *Id.* In weighing the interests, the court again reasons: "[m]ore importantly, and as explained earlier, the relevance of the subpoenaed information . . . is marginal to non-existent," with a *supra* citation to its entire discussion of relevance. *See* Pet. App. 39a.[2]

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[2] At the risk of stating the obvious, courts routinely treat the conclusion that information is marginally relevant as a basis to find subpoenas or discovery unduly burdensome. *See, e.g.*, *Whole Woman's Health v. Smith*, 896 F.3d 362, 375 (5th Cir. 2018), *as revised* (July 17, 2018) ("The small or non-existent incremental 'need' for and 'relevance' of this discovery alone impose a burden on [non-party], if it must produce documents unnecessary to the litigation."), *cert. denied sub nom. Whole Woman's Health v. Texas Catholic Conference of Bishops*, 139 S. Ct. 1170 (2019); *Compaq Computer Corp. v. Packard Bell Elecs., Inc.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995) ("Obviously, if the sought-after documents are not relevant nor calculated to lead to the discovery of admissible evidence, then *any burden whatsoever* imposed upon [the non-party] would be by definition 'undue'."); *Sotelo v. Old Republic Life Ins.*, No. C-05-02238 RS, 2006 WL 2632563, at *2 (N.D. Cal. Sept. 13, 2006); *New York State Energy Research &*

The conclusion that production of the information sought would be an undue burden does not create a "mismatch," BIO 7; it begs whether the panel's irrelevance analysis is correct.

2. The petition explains that the decision below pushes the Eleventh Circuit to an even further extreme in the conflict over what it means for an execution method to be a "known and available alternative." *Glossip*, 576 U.S. at 878. The en banc Sixth Circuit holds that this inquiry asks whether the method could be obtained by "ordinary transactional effort." Pet. 19 (quoting *Fears v. Morgan*, 860 F. 3d 881, 891 (6th Cir. 2017) (en banc)). On the other hand, the Eighth and Eleventh Circuits require a plaintiff to show that the executing state "actually has access to the alternative," meaning "there is *now* a source for pentobarbital *that would sell it to [that particular department of corrections]* for use in executions." Pet. 20 (quoting *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1300 (11th Cir. 2016), *abrogated on other grounds by Bucklew v. Precythe*, 139 S. Ct. 1112, 1127-29 (2019)).

The BIO's surface-level response is telling. It takes issue with whether the split is "acknowledged" because after members of this Court and another judge acknowledged the Sixth Circuit was on "one side of the split," the Sixth Circuit heard the case en banc. BIO 12. Respondent does not contest that the *en banc* court went on to adopt the "ordinary transactional effort" test—*not* the standard used by the Eighth and Eleventh Circuits. It claims, however, that the Sixth Cir-

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*Dev. Auth. v. Nuclear Fuel Servs., Inc.*, 97 F.R.D. 709, 712 (W.D.N.Y. 1983).

cuit "relied on the Eleventh Circuit's availability analysis in *Arthur*, confirming that the two circuits are of one mind." BIO at 11 (discussing *Fears*, 860 F.3d at 891). What respondent does not mention is that the Sixth Circuit cited *Arthur* only once, to rebut a factual point. *See Fears*, 860 F.3d at 891 (citing *Arthur* to rebut the significance of an expert's "testimony about an affidavit he filed in a prior Alabama case"). Despite that, the Sixth Circuit went on to hold that "for the one-drug protocol to be 'available' and readily implemented,' Ohio need not already have the drugs on hand," and it is enough that Ohio "should be able to obtain the drugs with ordinary transactional effort." *Id.* at 891.

The Sixth Circuit has continued to invoke this "ordinary transactional effort" test in subsequent cases. *See, e.g.*, *Sutton v. Parker*, 800 F. App'x 397, 401 (6th Cir. 2020); *In re Ohio Execution Protocol Litig.*, 946 F.3d 287, 291 (6th Cir. 2019). And, contrary to respondent's position, commentators have continued to acknowledge the conflict. *See* Ryan M. Dunn, *Dealing in Death: Challenging State Execution Procedures After Baze, Glossip and Bucklew*, 15 Seton Hall Cir. Rev. 80, 98 (2019) (urging that "the Supreme Court should adopt the Sixth Circuit's 'ordinary transactional effort' standard, rather than the nearly impossible burden established by the Eighth and Eleventh Circuits").

3. In defense of the merits, respondent merely echoes the reasoning of the second panel opinion. BIO 14-18. Those arguments can and should be evaluated at the merits stage; however, three important observations are warranted now:

First, despite insisting that the decision below provides no occasion to review the court of appeal's relevance analysis, when it comes time for respondent to address the merits, it identifies "the relevance of the information" as the sole interest of petitioner identified and weighed in the burden analysis. BIO 14. Respondent goes on to summarize the panel's relevance analysis, including its conjectural causal chain under which "[t]he 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." BIO 16 (emphasis in original).

Second, respondent does not contest that the Eleventh Circuit's decision charted a new extreme for the bounds of procedural fairness which would be hard to imagine in any other context. Respondent does not contest that it never advanced these arguments on appeal, and does not contest that there is no evidence in the record to support the court of appeals' predicted market outcome. One would think that if respondent had any reason to believe its supplier would stop selling to it, it would have floated that possibility itself.

No one disputes that petitioner's burden under *Glossip* is a demanding one. But it is quite another thing to abandon the rules that would apply to any other litigant, resolving the matter on grounds that had long been abandoned, without any opportunity to address those issues.

Third, respondent does not offer *any* limiting principle for its position. To the contrary, its analysis—premised on general considerations of a state's "sovereign interest in enforcing the sentences imposed by its courts" and a presumed hypothetical in which the supplier has to be identified (which is not at all clear) and

then refuses to sell to anyone—would ostensibly preclude any civil discovery into another state's execution protocol. This would render impossible *Bucklew*'s invitation that "a prisoner may point to a well-established protocol in another State as a potentially viable option." 139 S. Ct. at 1128.

Any department of corrections facing a *Glossip* claim could thus prevail on the mere assertion that it has "no idea" how to secure or carry out methods of execution widely used in other states (as Mississippi did here), and the plaintiff would have no way to rebut it. On that reading, "known and available" is not a legal standard at all. Moreover, that view effectively cedes to states control over whether any particular method is constitutional—a proposition this Court unanimously rejected. *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) (recognizing that "all nine Justices today agree" that states do not define the universe of permissible methods and therefore there is "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative").

* * *

Courts and parties litigating claims under the *Glossip*/*Baze* standard need to know what availability means in order to meaningfully, efficiently and fairly adjudicate them. Respondent does not dispute the profound importance of the constitutional interests at stake for condemned prisoners. Pet. 21. Consistent with the Court's repeated advice, petitioners present this issue to the Court not in the context of "last-minute stays" of their executions, but in a concrete litigation dispute before any execution date has been set. Pet. 22 (collecting cases).

## CONCLUSION

For the reasons here and in the petition, certiorari should be granted.

Respectfully submitted,

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