CAPITAL CASE – NO EXECUTION DATE SET
No. _____

In The Supreme Court Of The United States

RICHARD JORDAN and RICKY CHASE,
Petitioners,

v.

VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Death-sentenced Petitioners Richard Jordan and Ricky Chase filed a Section 1983 lawsuit against officers of the Mississippi Department of Corrections (MDOC) challenging the use of midazolam in a three-drug protocol and the three-drug protocol itself. To meet the burden of *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015), Petitioners proposed the alternative method of a single lethal dose of pentobarbital, which would eliminate the risks of the second and third drugs in MDOC's protocol. MDOC disputes that it can obtain pentobarbital for use in executions.

To disprove MDOC's assertions, Petitioners sought discovery from Respondent Virginia Department of Corrections (VDOC) for documents and testimony on transactions for pentobarbital between VDOC and the Texas corrections department, and data on five prior Virginia executions. Respondent produced some documents and otherwise successfully moved the district court to quash. The Fourth Circuit affirmed.

This ruling presents the following questions for review by this Court:

1. Whether the burden of proof demanded by *Glossip* in method-of-execution challenges requires commensurately broad discovery rights to provide plaintiffs an adequate opportunity to meet *Glossip*'s requirements.

2. Whether condemned prisoners bringing method-of-execution challenges under *Glossip* must be allowed a reasonable opportunity to secure discovery from corrections departments outside their state to meet the requirement to prove a "known, available alternative" to the method they challenge.

LIST OF PROCEEDINGS

Jordan, et al. v. Hall, et al., No. 3:15-cv-00295-HTW-LAA (S.D. Miss.)

Missouri Dep't of Corr. v. Jordan et al., 2:16-mc-09005-SRB, rev'd, *In re: Missouri Dep't of Corr.*, No. 16-3072 (8th Cir.), mandate issued Dec. 6, 2016), cert. denied, *Jordan et al. v. Missouri Dep't of Corr.*, No. 16-8158 (May 22, 2017).

Georgia Dep't of Corr. v. Jordan et al., 1:16-cv-02582-RWS-JCF, aff'd, *Jordan v. Comm'r, Miss. Dep't of Corr.*, No. 17-12948 (11th Cir.), opinion issued Nov. 19, 2018, pet. for reh'g pending in 11th Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Jordan and Chase respectfully petition this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Fourth Circuit affirming the district court's order to quash a notice of deposition and subpoena duces tecum issued by the United States District Court for the Southern District of Mississippi, Northern Division.

OPINIONS BELOW

The decision of the Court of Appeals, which affirmed the order to quash, reported as *Va. Dep't of Corr. v. Jordan*, 921 F.3d 180 (4th Cir. 2019), is attached as Appendix A. The opinion of the United States District Court for the Eastern District of Virginia in *Va. Dep't of Corr. v. Jordan*, Civil Action No. 3:17mc02 (Nov. 3, 2017), is attached as Appendix B.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit affirmed the order to quash on April 11, 2019. Petitioners sought panel rehearing and rehearing en banc. The United States Court of Appeals for the Fourth Circuit denied rehearing on May 21, 2019. This order is attached as Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eighth Amendment to the United States Constitution provides, in pertinent part, "Excessive

bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law; . . . ."

Title 42, Section 1983, of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in [a] . . . suit in equity, or other proper proceeding for redress.

Federal Rule of Civil Procedure 26(b)(1) provides, in pertinent part:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties'

> resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

STATEMENT OF THE CASE

Petitioners Jordan and Chase are Mississippi prisoners under sentence of death. They have sued officials from the Mississippi Department of Corrections (MDOC) for violations and threatened violations of their rights to due process and to be free from cruel and unusual punishment under the First, Eighth, and Fourteenth Amendments to the United States Constitution.[1] This petition for writ of certiorari only concerns Petitioners' efforts to secure third-party discovery from the Virginia Department of Corrections (VDOC) in support of their Eighth Amendment claims. No execution dates have been set for Petitioners or the three Intervenor-Plaintiffs in the underlying case.

Petitioners specifically challenge MDOC's three-drug execution protocol under the Eighth Amendment Standard of *Glossip v. Gross*, 135 S. Ct. 2726 (2015). *Glossip* requires Petitioners to prove both that MDOC's method raises a "substantial risk of serious pain" and that there is "a known and available alternative method of execution that entails a lesser risk of pain." *Id.* at 2731.

Petitioners requested issuance of a Fed. R. Civ. P. 30(b)(6) deposition notice and subpoena duces

[1] *Jordan v. Fisher*, 3:15-cv-295-HTW-LRA (S.D. Miss.).

tecum to VDOC.[2] The topics in the deposition notice include:

Topics 1-3	VDOC's efforts to secure pentobarbital.
Topic 9	VDOC's execution procedures, including the steps and safeguards to mitigate the risk of serious harm.
Topics 10-11	VDOC's process for selecting midazolam for use in lethal injection executions, and any study of the use of a one-drug protocol.
Topic 14	The actual process of lethal injection executions in Virginia from 2010 to the present, including the chronology of the administration of lethal injection drugs and any method of monitoring consciousness during the execution.[3]

The subpoena duces tecum seeks documents related to these deposition topics.[4]

VDOC produced some documents in response to the subpoena—notably transcripts of testimony from other proceedings[5]—while withholding others[6] and refusing to produce any witness for deposition.[7] VDOC made no distinct argument in the district court to support this refusal. Further, VDOC's privilege log

[2] 4th Cir. JA 136.
[3] 4th Cir. JA 140–46.
[4] 4th Cir. JA 151–52.
[5] 4th Cir. JA 154.
[6] 4th Cir. JA 153.
[7] 4th Cir. JA 57.

disclosed memoranda documenting its efforts to secure drugs for use in lethal injections[8] as well as execution logs, an autopsy report, and heart monitoring tapes from past executions.[9] None of these documents were produced.

In opposition to the motion to quash, Petitioners relied on *Glossip*:

> Given the *Glossip* requirement that [Petitioners] plead and prove both the risks involved in the use of midazolam and the existence of a known and available alternative method of execution, it can hardly be disputed that the availability of alternative drugs and the feasibility of an alternate execution protocol are relevant subjects of inquiry in Jordan and Chase's civil rights lawsuit.[10]

Petitioners specified issues on which they need discovery. The first is whether pentobarbital, the alternative pled by Appellants in Mississippi under *Glossip*, is "known and available." In this context, Appellants sought discovery on VDOC's 2015 transaction with Texas for pentobarbital[11] to prove the availability of that drug for executions.[12]

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[8] 4th Cir. JA 411. With respect to these documents, VDOC asserted "executive privilege" and "deliberative process privilege" in the privilege log but not in the motion to quash.
[9] 4th Cir. JA 412.
[10] 4th Cir. JA 228.
[11] 4th Cir. JA 225, 266–72.
[12] 4th Cir. JA 228–32.

Similarly, Petitioners sought discovery regarding the May 2012 and June 2013 internal memoranda withheld by VDOC. Their titles—"Solutions to the Continuing Problem of Obtaining Necessary Drugs for Executions" and "Continuing Efforts to Ensure the Department's Ability to Carry Out Court Ordered Executions"[13]—indicate that they include information on Virginia's evaluation of its then-current pentobarbital protocol and the availability of various execution drugs.

The second issue is whether a three-drug protocol in which either pentobarbital or midazolam is followed by a paralytic and potassium chloride presents a substantial risk of severe pain under *Glossip*. In this connection, VDOC withheld documents related to the five lethal injection executions conducted since 2010:[14]

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[13] 4th Cir. JA 411.

[14] These were the executions of Walker and Lewis in 2010, Jackson in 2011, Prieto in 2015, and Gray in 2017. The first three of these used a three-drug protocol with pentobarbital; the fourth used a three-drug protocol with compounded pentobarbital; the last used a three-drug protocol with midazolam. *See* Death Penalty Information Center, Execution List (2010, 2011, 2015, 2017) https://deathpenaltyinfo.org/execution-list-2010, https://deathpenaltyinfo.org/execution-list2011, https://deathpenaltyinfo.org/execution-list-2015, and https://deathpenaltyinfo.org/execution-list-2017 (last viewed 5/9/19).

- execution logs showing the time between the administration of each drug in the series for Virginia's five previous lethal injection executions,[15]
- the autopsy from the 2011 Jackson execution,[16] and
- heart monitor tapes from the five previous lethal injection executions.[17]

Petitioners sought these documents to show the risks of the three-drug protocol, asserting that "the best proof available of both prongs of [the *Glossip*] test is held by those agencies which have studied, or actually implemented, execution by lethal injection—particularly those which have used midazolam."[18]

Responding to VDOC's confidentiality concerns, Appellants offered "for a protective order to be issued to protect VDOC's stated interests while allowing them access to the discovery they require to meet the requirements of *Glossip*."[19] At no point did Appellants challenge the redaction of the names of execution team members from the discovery given to them. Appellants do not seek the identity of VDOC personnel involved in executions.

The district court granted VDOC's motion to quash on a finding of undue burden, refusing to issue

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[15] 4th Cir. JA 412 (Item 8).
[16] 4th Cir. JA 412 (Item 9).
[17] 4th Cir. JA 412 (Item 10).
[18] 4th Cir. JA 241.
[19] 4th Cir. JA 242.

a protective order to minimize any such burden.[20] Petitioners appealed. After full briefing and argument,[21] the Fourth Circuit panel requested and received supplemental briefing on the potential application of state sovereign immunity to enforcement of a federal subpoena.[22]

The Fourth Circuit affirmed the district court's order quashing the subpoena and deposition notice. The court determined that it did not need to reach the state sovereign immunity issue.[23] On the merits of the appeal, the Fourth Circuit found the district court did not abuse its discretion in granting the motion to quash.[24]

While recognizing in particular that Petitioners sought the discovery to undercut Mississippi's defense that it could no longer acquire pentobarbital and to show that VDOC's use of midazolam demonstrated risks applicable to Mississippi's protocol, the Fourth Circuit held that the district court reasonably found it "unlikely that VDOC would have any useful information under" these theories.[25]

The Court of Appeals weighed this assessment of need for the information against two potential

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[20] 4th Cir. JA 45–47.
[21] Dkt. Nos. 20, 26, 32, 42.
[22] Dkt. No. 43, 44, 47, 51.
[23] App. A at 9–11.
[24] *Id.* at 11–20.
[25] *Id.* at 15–18. The Fourth Circuit also opined that VDOC was not the only or best source of the sought information. *Id.*

burdens: the subpoena's request for information dating back to 2010 and the concern that the subpoena and/or deposition would reveal VDOC's execution drug supplier.[26]

The Fourth Circuit concluded:

> In sum, the district court did not abuse its discretion in finding 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—both nonparties to the litigation. And those considerations, taken together, supported the district court's finding that the burdens of further compliance with the subpoena outweighed its benefits.[27]

The Fourth Circuit completed its analysis by holding that a protective order would not address VDOC's concerns because "extremely potent confidential information may be of such a nature that it would be humanly impossible to control its inadvertent disclosure."[28] In this connection, the Fourth Circuit opined that "Jordan and Chase's

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[26] *Id.* at 19.
[27] *Id.* at 20.
[28] *Id.* at 21.

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."[29] Finally, the court dismissed Appellants' argument that prior transcripts would not be admissible at their Section 1983 trial in Mississippi as speculative.[30]

In response to the Fourth Circuit panel opinion, Petitioners filed a petition for rehearing and rehearing en banc, contending that the panel's opinions did not adequately consider this Court's opinion in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), which predated the panel's opinion by three days.[31] The Court of Appeals denied the petition.[32]

REASONS FOR GRANTING THE WRIT

A. Introduction: Method-of-Execution Challengers Require a Means to Secure Discovery on the Second Prong of *Glossip*.

In both civil and criminal cases, this Court endorses "the fundamental maxim that the public has a right to every man's evidence;" thus, "we start with the primary assumption that there is a general duty to give what testimony one is capable of giving . . . ." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)

[29] *Id.*
[30] *Id.* at 22–23.
[31] *See* App. A at 1.
[32] App. C at 1–2.

(quoting 8 J. Wigmore, EVIDENCE §2192, p. 64 (3d ed. 1940))).

In this case, the Virginia Department of Corrections resists discovery by two Mississippi death-sentenced prisoners who seek to prove that lethal injection by means of a single overwhelming dose of the barbiturate pentobarbital is a "known and available alternative" to Mississippi's three-drug protocol, which commences with the administration of midazolam. Such proof is part of the showing required in Petitioners' Eighth Amendment challenge, pursuant to 42 U.S.C. § 1983, to the Mississippi protocol. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (explaining that prisoners challenging their jurisdictions' methods of execution under the Eighth Amendment "must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason"); *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015) (same).

Significantly, this Court's opinion in *Bucklew* clarified that method-of-execution challengers like Petitioners may meet their burden on the availability of alternative methods with proof of the procedures of other jurisdictions (such as other state corrections departments). *See* 139 S. Ct. at 1128.

What *Bucklew* did not make clear, however, was the right that method-of-execution challengers have to third-party discovery in order to discharge that burden. Specifically, this Court's opinion in *Bucklew*

strongly suggested, without definitively declaring, that the significant burden mandated by *Glossip* comes packaged with a mandate for correspondingly liberal discovery. Thus, granting certiorari in this case will give this Court the opportunity to address this loose end by bringing the standard for discovery in *Glossip* cases in line with longstanding Court precedent, namely *Herbert v. Lando*, 441 U.S. 153 (1979), thereby putting an end to the ambiguity surrounding condemned prisoners' discovery rights post-*Bucklew*.

1. Under Supreme Court Precedent, Petitioners Require a Means of Discovery Commensurate to Their Burden of Proof Under *Glossip*.

Petitioners' position is similar to that of the petitioner in *Herbert v. Lando*, 441 U.S. 153 (1979). Herbert was a public figure who brought a defamation action against CBS, the Atlantic Monthly, and individual journalists and publishers for allegedly depicting him as a liar covering up his deficient performance as a commanding officer in Vietnam. Recognizing that he was required to prove actual malice under the standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Herbert deposed publisher Lando and sought an order to compel answers to questions regarding editorial decisions and communications to which Lando objected as violative of the First Amendment. The district court ruled that Herbert's questions were of central importance to the issue of malice, and denied Lando's motion to quash. *Herbert*, 441 U.S. at 157–58. The Court of Appeals reversed the district court and entered a protective order barring the discovery. *Id*. at 158.

This Court reversed. Central to the Court's holding was its recognition that constitutional law could not require the heavy burden of proof in libel cases in *New York Times v. Sullivan* without providing a means for a defamation plaintiff to secure evidence, through discovery, to meet that burden:

> In the first place, it is plain enough that the suggested privilege for the editorial process would constitute a substantial interference with the ability of a defamation plaintiff to establish the ingredients of malice as required by *New York Times*. . . . To erect an impenetrable barrier to the plaintiff's use of such evidence on his side of the case is a matter of some substance . . . .

Herbert, 441 U.S. at 170. Similarly, this Court pointed out that neither *New York Times* nor its progeny:

> suggest[ed] any First Amendment restriction on the sources from which the plaintiff could obtain the necessary evidence to prove the critical elements of his cause of action. On the contrary, [those cases] made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant.

Herbert, 441 U.S. at 160.

This Court's observations in *Herbert* apply with equal force here. Like Herbert's burden of proof under the *New York Times* standard, method-of-execution challengers like Petitioners face a significant burden of proof under *Bucklew* and *Glossip* that—if they are denied the opportunity to secure relevant evidence through discovery—will "erect an impenetrable barrier" preventing even the most meritorious method-of-execution challenges from their deserved victories.

Thus, if institutions like VDOC are allowed to refuse to provide method-of-execution challengers crucially relevant information regarding their own executions and drug acquisitions—information that, as with the states of mind of libel defendants under *New York Times* and its progeny, *Bucklew* has "made . . . essential to proving" the availability of alternative methods of execution—then the opportunity provided by *Glossip* and *Bucklew* to meaningfully challenge methods of execution by offering available alternatives will be functionally abrogated. *See Bucklew*, 139 S. Ct. at 1128; *Herbert*, 441 U.S. at 160. If method-of-execution challengers are not provided, through discovery, information necessary to meet their burden under *Glossip* and *Bucklew*, then no such challengers will ever be successful.

Therefore, just as *Herbert* was needed to define the discovery rights and obligations in libel cases governed by the constitutional standard in *New York Times*, a grant of review in this case will provide guidance to the lower courts regarding the operation of the discovery process in method-of-execution cases governed by *Glossip*.

2. The Discovery Rights and Obligations Under *Glossip* Have Yet to be Fully Defined.

Guidance from this Court is especially needed in this area post-*Bucklew*. While *Bucklew* retained *Glossip*'*s* holding that the Eighth Amendment demands method-of-execution challengers to prove feasible alternative methods of execution, *See Bucklew*, 139 S. Ct. at 1126 (citing *Glossip*, 135 S. Ct. at 2731), this Court explained in *Bucklew* that "the burden [challengers] must shoulder . . . can be overstated" and posited that there should be "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." 139 S. Ct. at 1128–29. Nonetheless, this Court stated that challengers' proposals "must be sufficiently detailed to permit a finding that the State could carry it out relatively easily and quickly," providing evidence on essential questions like how and in what concentrations execution drugs should be administered. *See* id. at 1129. (internal quotation marks omitted).

So, while Petitioners' burden "can be overstated," this Court appears to contemplate a fairly specific amount of factual detail for them to succeed. Indeed, the principal dissent in *Bucklew* characterized the majority's demands here as "amount[ing] to an insurmountable hurdle for prisoners." Id. at 1143 (Breyer, J., dissenting). Petitioners are inclined to agree, but with one important caveat: the hurdle is insurmountable provided that method-of-execution challengers are denied access to the information that would allow them to clear the hurdle—information

such as that which VDOC has so far denied to Petitioners.

But without a full-fledged holding on the issue this Court's agreement with Petitioners is not binding on lower courts, and thus the discovery rights and obligations demanded by the *Glossip* standard are unclear. As Justice Sotomayor recently pointed out, for instance, the interplay between state secrecy laws and method-of-execution challengers' burden to offer alternative execution methods—to wit, whether the former can prevent disclosure of information that would be helpful or even crucial to the latter—remains undefined despite the significant tension between the two. *See Abdur'rahman v. Parker*, 139 S. Ct. 1533, 1533 (2019) (Sotomayor, J., dissenting from denial of certiorari).[33] At least one court, in fact, has expressly noted that this Court said nothing in *Bucklew* about method-of-execution challengers' right to discovery

[33] As the Tennessee Supreme Court put the point when deciding that case below: "Plaintiffs argue that the [*Glossip*] availability requirement should not apply to them because of discovery disputes and 'state secrecy laws related to executions.' Acceptance of this argument would require this Court to establish new law not recognized in any federal court or in any other state." *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 617 (Tenn. 2018) (internal citations omitted). Notably, this tension between *Glossip*'s demands and state secrecy laws has plagued Petitioners in other cases stemming from their underlying litigation. *See, e.g.*, 4th Cir. JA 439 ("The Eleventh Circuit has, on at least five occasions, prevented a capital offender from obtaining information protected under [Georgia's Lethal Injection Secrecy Act, OC.G.A. § 42-5-36]. It was not clearly erroneous or contrary to the law to quash [Petitioners'] subpoena in its entirety . . . ."); *see also In re Mo. Dep't of Corr.*, 839 F.3d 732, 736 (8th Cir. 2016) (per curiam).

from state agencies, citing both the lack of an explicit holding on a discovery issue and no discovery issues being presented to the Court in that case. *See In Re Ohio Execution Protocol Litig.*, No. 2:11-cv-1016, 2019 WL 2191869, at *3 (S.D. Ohio May 21, 2019).

And the lower courts have continued to impose the *Glossip* standard in a manner just as—if not more—demanding as this Court did in *Bucklew*. For one, the Eleventh Circuit Court of Appeals recently held that a post-*Bucklew* method-of-execution challenger failed to meet his burden to prove that his proposed alternative execution method (nitrogen hypoxia) would significantly reduce the risk of substantial pain caused by Alabama's three-drug protocol because his evidence—a preliminary draft of a university report on nitrogen hypoxia as a means of capital punishment labeled with "Do Not Cite" and an expert declaration about nitrogen hypoxia—were insufficient. *Price v. Comm'r, Dep't of Corr.*, 920 F.3d 1317, 1330 (11th Cir. 2019).

Key to the court's reasoning was that neither piece of evidence directly compared the effectiveness of and the respective amounts of pain likely to result from nitrogen hypoxia and Alabama's three-drug protocol. *See* id. Relatedly, the Supreme Court of Florida denied a post-*Bucklew* method-of-execution challenge, holding that the lower court correctly found that the employment by other states of execution protocols using pentobarbital and expert testimony providing that pentobarbital and fentanyl were purchasable by a Florida pharmacist were not sufficient demonstrations that pentobarbital was a feasible and readily

implemented alternative execution method in Florida and that assertions to the contrary were "unsupported speculation." *Long v. State*, 271 So. 3d at 938, 945 (Fla. 2019).

Given the burden that challengers like Petitioners face under *Glossip*, the discovery rights and obligations that accompany that standard should be liberal enough to allow challengers to meet that burden—and this Court's opinion in *Bucklew* contemplates this. *See* 139 S. Ct. at 1128–29. But, because discovery was not the focus of *Bucklew*, there are significant holes remaining in this Court's method-of-execution jurisprudence that threaten to undermine the ability of any method-of-execution challenger from meeting his burden under *Glossip*. Therefore, granting this writ will give this Court the much-needed opportunity to make these ambiguities clear and—as argued above, just as with *Herbert*—ensure that *Glossip* does not impose a burden on prisoners that denials of needed discovery preclude them from meeting.

B. The Fourth Circuit Court of Appeals Failed to Adequately Consider *Bucklew*.

This Court's decision in *Bucklew* predated both the Fourth Circuit Court of Appeals's original panel opinion and its subsequent denial of Petitioners petition for rehearing and rehearing en banc, yet the Fourth Circuit both times failed to appreciate *Bucklew*'s significance to Petitioners' right to discovery under *Glossip*. In its initial panel opinion, the court acknowledged *Bucklew*, but it failed to recognize that

this Court significantly increased the weight that should be afforded to Petitioners' need for information from VDOC.[34] The court's order denying a rehearing did not reference *Bucklew* at all.[35]

Admittedly, much of *Bucklew* saw this Court reaffirming the rule from *Glossip*—itself taken from the Chief Justice's plurality opinion in *Baze v. Rees*—that "[t]he Eighth Amendment does not come into play unless the risk of pain associated with the State's method [of execution] is 'substantial when compared to a known and available alternative.'" *Bucklew*, 139 S. Ct. at 1125 (quoting *Glossip*, 135 S. Ct. at 2738 (quoting *Glossip*, 139 S. Ct. at 2738) (citing *Baze v. Rees*, 553 U.S. 35, 61 (2008)).

But this Court made far clearer in *Bucklew*, as compared to *Baze* or *Glossip*, the answer to the exact question that was before the Fourth Circuit and is now before this Court: that a method-of-execution challenger can meet the second prong of the *Glossip* test by comparing the practices of jurisdictions outside the one being challenged. To that end, this Court

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[34] Specifically, the Fourth Circuit panel cited this Court's *Bucklew* opinion exactly twice, once as authority for the proposition that, as method-of-execution challengers, Petitioners are required to show "a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason," and once in support of the proposition that Petitioners' proposed alternative(s) must be clearly and considerably different from Mississippi's three-drug protocol. *See* App. A at [4, 18] (internal quotation marks omitted).

[35] *See* App. C at [1–2].

plainly stated in *Bucklew*: "Finally, the burden Mr. Bucklew must shoulder under the *Glossip* test can be overstated . . . a prisoner may point to a well-established protocol in another State as a potentially viable option." 139 S. Ct. at 1128.[36]

Thus, *Bucklew* requires that Petitioners' need for discovery from VDOC be given substantially more weight than the Fourth Circuit afforded it below.[37] Several specific examples make the point clear.

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[36] In his concurring opinion, Justice Kavanaugh emphasized that this was a crucial component of *Bucklew*'s significance, writing separately specifically "to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law" and to point out that every Justice on this Court agreed with that proposition across the various *Bucklew* opinions. 139 S. Ct. at 1136 (Kavanaugh, J., concurring).

[37] Notably, Bucklew himself enjoyed "extensive discovery" in his attempt to meet his burden under *Glossip*, having been made privy to much of the "defendants' knowledge regarding execution by lethal gas." *Bucklew*, 139 S. Ct. at 1121; *Bucklew v. Precythe*, 883 F.3d 1087, 1094 (8th Cir. 2018). And Bucklew was granted this extensive discovery despite his "refus[al] to identify *any* alternative method of execution" throughout much of the litigation before finally proposing a method (execution through nitrogen hypoxia) never before used by any state, at which point he was allowed "to explore the viability of that alternative." *See Bucklew*, 139 S. Ct. at 1121, 1129 (internal quotation marks omitted).

1. The Texas Transaction Proves the Availability of Pentobarbital Through Interstate Transfers.

Petitioners sought discovery from VDOC to meet their burden of showing the availability of pentobarbital in proving an alternative method of execution to Mississippi's three-drug protocol. In 2013, VDOC provided pentobarbital to Texas's department of corrections. In 2015, VDOC secured pentobarbital from Texas for use in the Prieto execution on October 1, 2015.[38] This transfer of pentobarbital from Virginia to Texas was four months after the Mississippi Department of Corrections Commissioner testified by declaration that he could not secure pentobarbital.[39] During the same time, in fact, Mississippi claims to have attempted—and failed—to secure pentobarbital from other states' corrections departments, including Texas'.[40]

In response to Petitioners' subpoena, VDOC produced a transcript of prior testimony by Arnold Robinson, its Chief of Corrections Operations, regarding VDOC's efforts to obtain lethal injection drugs. This included limited testimony as to the arrangement with Texas to obtain pentobarbital at a time Mississippi claimed the drug was unavailable from any source. Notably, the production of the transcript demonstrates that VDOC does not consider

[38] 4th Cir. JA at 266–72.
[39] 4th Cir. JA at 315.
[40] *See* MDOC's Second Supplemental Answers to Interrogatories in *Jordan v. Hall*, Case 3:15-cv00295-HTW-LRA (S.D. Miss.), Docket No. 167-1 at 7 (November 7, 2017)] at 7.

the disclosure of information about this transaction to impose an undue burden.

The Fourth Circuit inadequately considered Petitioners' need for deposition testimony for use at trial, concluding that their need was "speculative."[41] For one, the admissibility of Robinson's testimony at trial in the Mississippi district court is, at a minimum, "problematical" given that counsel for MDOC were not present at the prior Virginia hearings. *See Dartez v. Fireboard Corp*, 765 F.2d 456, 461–62 (5th Cir. 1985).[42] Further, the transcript of Robinson's testimony on the Texas transaction is brief and non-specific.[43] Thus, Petitioners propose to examine either Robinson or any other witness produced by VDOC pursuant to Fed. R. Civ. P. 30(b)(6) on VDOC's attempts to secure pentobarbital, focusing specifically on demonstrating the availability of the drug and on the terms necessary to secure it.[44] Indeed, Petitioners pled the Texas transaction in the First Amended Complaint for this exact purpose.[45]

Especially following this Court's decision in *Bucklew*, the Fourth Circuit should have afforded great weight to Petitioners' need for deposition

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[41] App. A at [23].

[42] The admissibility of Robinson's testimony turns on whether the VDOC is MDOC's predecessor in interest under Fed. R. Evid. 804(b)(1)(B).

[43] 4th Cir. JA at 266–72.

[44] Robinson testified that another VDOC employee, Carolos Hernandez, actually travelled to Texas to retrieve the pentobarbital. Mr. Hernandez is another 30(b)(6) witness on Topics 1-3 of the deposition notice. 4th Cir. JA at 270.

[45] First Amended Complaint ¶ 190, 4th Cir. JA at 112.

testimony from Robinson (or a suitable alternative witness). Petitioners are entitled to evidence about the circumstances, terms, and conditions of the Texas transaction so that they can compare it with Mississippi's efforts to secure pentobarbital. Such evidence could prove that MDOC could, with "good faith" or "ordinary transactional effort", implement Petitioners' *Glossip* alternative. *See Bucklew*, 139 S. Ct. at 1125 (citing *Glossip*, 125 S. Ct. at 2737–38 (discussing "good faith" effort to secure alternative drugs)); *see also Abdur'Rahman v. Parker*, 558 S.W.3d 606, 623 (Tenn. 2018) (discussing "ordinary transactional effort" to secure alternative drugs); *In re Ohio Execution Protocol*, 860 F.3d 881, 891 (6th Cir. 2017) (same), *cert. denied sub nom. Otte v. Morgan*, 127 S. Ct. 2238 (2017). Demonstration of a practice in which states provide execution drugs to each other fits comfortably within *Bucklew*'s holding on *Glossip*'s alternative-methods prong.[46]

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[46] According to the Death Penalty Information Center, in the time period from the execution of Prieto in October 2015 until as recently as April 24, 2019, Texas has carried out 33 executions using pentobarbital. Death Penalty Information Center, Execution List (2015-19), https://deathpenaltyinfo.org/execution-list-2015; https://deathpenaltyinfo.org/execution-list-2016; https://deathpenaltyinfo.org/execution-list-2017; https://deathpenaltyinfo.org/executionlist-2018; https://deathpenaltyinfo.org/execution-list-2018 (last viewed 5/9/19). Obviously, Texas continues to have access to the drug, and could make it available to MDOC with similar effort, and under similar terms and conditions, of the VDOC's 2015 transaction.

Deposition testimony on interstate transfers of execution drugs between Virginia and Texas would impose no undue burden on VDOC. The concerns VDOC raised about identification of execution drug suppliers—that future shipments would be jeopardized—do not arise with respect to these transactions.[47] Petitioners desire only to learn the substance of the transactions (*i.e.*, the terms and conditions of the transfers and how the transfers came about), not the identity of the states' suppliers. Deposition testimony on these interstate transactions, then, will not reveal VDOC's current execution drug supplier.[48] Indeed, the only additional information at risk of being discovered through this proposed deposition testimony is the fact that both states are institutionally committed to capital punishment. But, of course, that information is already publicly known.

The two VDOC memoranda exploring execution drug supply[49] are similarly relevant to *Glossip*'s alternative-method prong: their titles make clear that the memoranda discuss VDOC's prior pentobarbital protocol and the availability of drugs to carry out executions.

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[47] *See* App. A at [19].

[48] The Fourth Circuit stated "information about the episode in which Texas officials provided pentobarbital can be sought from them." App. A at [17]. But Texas would have the same (albeit reversed) argument as Virginia. Given the lack of any written documentation of the transaction, *see* 4th Cir. JA at 271–72, Petitioners may validly seek testimony from both parties.

[49] 4th Cir. JA at 411.

2. *Bucklew* Requires Reexamination of Appellants' Need for Scientific Evidence Regarding Virginia Executions.

Evidence regarding the medical and scientific facts of Virginia's use of manufactured pentobarbital in three executions, compounded pentobarbital in a fourth, and midazolam in a fifth is necessary to Petitioners' burden to demonstrate the differing risks of severe harm from the use of these three different initial drugs in a three-drug protocol. Citing the district court, the Fourth Circuit discarded Petitioners need for this evidence due to "Virginia's long history of using a three-drug protocol successfully."[50]

Petitioners are entitled to this data to establish the difference between the use of manufactured pentobarbital, compounded pentobarbital, and midazolam under the three-drug protocol. Mississippi only has experience with the first of these methods; the latter two are proposed by MDOC but have yet to be used by that State. The paralytic agent in a three-drug protocol inhibits all of a prisoner's muscular-skeletal movements during the execution regardless of the prisoner's pain,[51] so external perception alone cannot demonstrate that a three-drug protocol (beginning with either manufactured pentobarbital,

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[50] App. A at [16]. In particular, the court opined that evidence regarding issues with the 2017 execution was insignificant given this "well-documented history of successfully using the three-drug protocol." App. A at [7]. But 2017 was the first time the VDOC used midazolam as its first drug. *See* App. B at [23].

[51] *See Baze v. Rees*, 553 U.S. 35, 44 (2008) (plurality).

compounded pentobarbital, or midazolam) does not inflict serious pain. The autopsy report, execution logs showing the time of drug administration, and heart monitor strips withheld by VDOC provide the data needed to evaluate the three-drug protocol's true effectiveness.

The relevance of such scientific data is far from unprecedented in method-of-execution challenges. For an example from this year: the expert for method-of-execution-challengers in *In re Ohio Protocol Litig.* reviewed twenty-eight autopsies to provide data on the potential harm caused by midazolam in a three-drug protocol, and the court used this evidence to conclude that "midazolam at the 500 mg dose used by Ohio as an initiatory drug is certain or very likely to cause pulmonary edema" and that the challengers had thereby met their burden under *Glossip*'s first prong. No. 11-1016, 2019, WL 244488 at *16–17, *63 (S.D. Ohio Jan. 14, 2019).

VDOC's medical and scientific data regarding Virginia's executions is therefore highly relevant to Petitioners regardless of that fact that Virginia does not use the single-drug protocol that Petitioners allege to be a known and available alternative to Mississippi's three-drug protocol. That is, rather than being relevant for the purposes of establishing a known and available alternative method of execution, VDOC's data—insofar as it can serve as evidence of the efficacy (or lack thereof) of the different drugs VDOC has used and continues to use to initiate its three-drug protocol—is applicable to Petitioners'

claim that Mississippi's current protocol presents a substantial risk of serious harm.

3. The Fourth Circuit's Refusal to Consider a Protective Order Must be Revisited After *Bucklew*.

It follows from this Court's opinion in *Bucklew* that courts must balance the interests of condemned prisoners and corrections officials from other states in a manner that allows the prisoner to "point to a well-established protocol in another State as a potentially viable option" to the prisoners' States' methods of execution. *See* 139 S. Ct. at 1128. Yet, both the District Court for the Eastern District of Virginia and the Fourth Circuit declined Petitioners' offer of a protective order for matters that VDOC held confidential. The Fourth Circuit specifically relied primarily on *In re Deutsche Bank Trust Co. Americas*, in which the court reevaluated a district court's grant of a protective order allowing trial counsel access to confidential documents in a patent infringement case despite the fact that the same attorney represented the same client in patent prosecutions. 605 F.3d 1373, 1376–77 (Fed. Cir. 2010). The court stated that "whether a trial lawyer should be denied access to information under a protective order because of his additional role in patent prosecution, or alternatively be barred from representing clients in certain matters before the U.S. Patent and Trademark Office ("PTO"), is an issue unique to patent law." *Id.* at 1377.[52]

[52] The uniqueness stems from the fact that, in addition to litigating infringement issues, patent attorneys may be involved

Given the uniqueness of this issue and this Court's *Bucklew* opinion, the discussion in *Deutsche Bank* has no application to the case at bar. Contrary to the Fourth Circuit's view, there is no need for Petitioners to "compartmentalize and selectively suppress information" about any of VDOC's confidential information because Petitioners' counsel have no overlapping professional duties to their clients comparable to those of a lawyer who prosecutes patents before the PTO.[53] Thus, *Bucklew*'s requirement that the balance of interests should favor prisoners being able to use the execution protocols of other states in support of method-of-execution challenges should control the discovery dispute in this case.

Therefore, even if this Court determines that VDOC's confidential interests could be jeopardized to some extent by Petitioners' requested discovery, the proper remedy is to order the district court to fashion an appropriate protective order. *See, e.g.*, *Deitchman*

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in "advice and participation in any or all of the client's decisions (pricing, product design, etc.) made in light of similar or corresponding information about a competitor." *Id.* at 1378 (citing *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1467–68 (Fed. Cir. 1984)). The duties of counsel in patent prosecution may also include "obtaining disclosure materials for new inventions and inventions under development, investigating prior art relating to those inventions, making strategic decisions on the type and scope of patent protection that might be available or worth pursuing for such inventions, writing, reviewing, or approving new applications or continuations-in-part of applications to cover those inventions, or strategically amending or surrendering claim scope during prosecution." *Deutsche Bank*, 605 F.3d at 1380.

[53] *See* App. A at [21] (citing *FTC v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980)).

v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 655 (7th Cir. 1984) (explaining that "[t]he issue of confidentiality" is "not an insurmountable one" but rather "a familiar problem in discovery cases and measures to preserve it are easily contrived" and remanding case to district court "to fashion as inventive an order as the necessities of this unique case dictate").

CONCLUSION

The Fourth Circuit's analysis disregards the language in *Bucklew* suggesting that discovery in method-of-execution challenges should be liberally allowed, and that the practices of other States are relevant to the plaintiff's burden to show a known, available alternative to his State's execution protocol. Further, the Court of Appeals, like other courts, have generally restricted discovery in method-of-execution cases in a manner that forecloses the prisoner-plaintiff's practical ability to rely on these out-of-state practices. Where, as here, Petitioners are amenable to a protective order, these restrictions are unjustified and unfair. Because there are no execution dates set for Petitioners or the other plaintiffs in the underlying litigation, this case is an appropriate vehicle for the instruction of the lower Federal courts with respect to the proper scope of discovery in *Glossip* method-of-execution challenges under *Glossip* and *Bucklew*.

For these reasons, Petitioners request that the Court grant certiorari, reverse the Court of Appeals, and remand this case to the Fourth Circuit for further proceedings.

Respectfully submitted,

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