APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7594

VIRGINIA DEPARTMENT OF CORRECTIONS,
Petitioner – Appellee,

v.

RICHARD JORDAN; RICKY CHASE,
Respondents – Appellants.

STATE OF NEBRASKA; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSOURI; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF WYOMING,
Amici Supporting Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. M. Hannah Lauck, District Judge. (3:17-mc-00002-MHL)

Argued: November 1, 2018 Decided: April 11, 2019

Before AGEE, KEENAN, and RICHARDSON, Circuit Judges.

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Agee and Judge Keenan concurred.

ARGUED: James W. Craig, THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, New Orleans, Louisiana, for Appellants. Margaret Hoehl O'Shea, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee. **ON BRIEF:** Emily M. Washington, THE RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, New Orleans, Louisiana; Christina Bonanni, William C. Miller, PILLSBURY WINTHROP SHAW PITTMAN LLP, Washington, D.C.; David M. Shapiro, Roderick & Solange MacArthur Justice Center, NORTHWESTERN PRITZKER SCHOOL OF LAW, Chicago, Illinois, for Appellants. Mark R. Herring, Attorney General, Victoria N. Pearson, Deputy Attorney General, Toby J. Heytens, Solicitor General, Matthew R. McGuire, Principal Deputy Solicitor General, Michelle S. Kallen, Deputy Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee. Douglas J. Peterson, Attorney General, James D. Smith, Solicitor General, David A. Lopez, Deputy Solicitor General, Ryan S. Post, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEBRASKA, Lincoln, Nebraska; Steve Marshall,

Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ALABAMA, Montgomery, Alabama; Leslie Rutledge, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ARKANSAS, Little Rock, Arkansas; Mark Brnovich, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF ARIZONA, Phoenix, Arizona; Pamela Jo Bondi, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF FLORIDA, Tallahassee, Florida; Christopher M. Carr, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF GEORGIA, Atlanta, Georgia; Lawrence G. Wasden, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF IDAHO, Boise, Idaho; Curtis T. Hill, Jr., Attorney General, OFFICE OF THE ATTORNEY GENERAL OF INDIANA, Indianapolis, Indiana; Derek Schmidt, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF KANSAS, Topeka, Kansas; Jeff Landry, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF LOUISIANA, Baton Rouge, Louisiana; Joshua D. Hawley, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MISSOURI, Jefferson City, Missouri; Adam Paul Laxalt, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF NEVADA, Carson City, Nevada; Mike Hunter, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF OKLAHOMA, Oklahoma City, Oklahoma; Alan Wilson, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina; Marty J. Jackley, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH DAKOTA, Pierre, South Dakota; Ken Paxton, Attorney General, OFFICE

OF THE ATTORNEY GENERAL OF TEXAS, Austin, Texas; Sean D. Reyes, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF UTAH, Salt Lake City, Utah; Peter K. Michael, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WYOMING, Cheyenne, Wyoming, for Amici Curiae.

RICHARDSON, Circuit Judge:

Richard Jordan and Ricky Chase, both Mississippi death-row inmates, have filed a federal lawsuit challenging that state's lethal-injection procedures under the Eighth Amendment. As part of discovery in that lawsuit, they served a subpoena on the Virginia Department of Corrections ("VDOC") that sought documents and testimony about Virginia's execution practices. VDOC provided some documents to Jordan and Chase and then moved to quash the subpoena in district court. The district court granted VDOC's motion, finding that requiring VDOC to provide any further response to the subpoena would impose an undue burden. VDOC urges us to affirm on the merits or, if it would not prevail on the merits, because the subpoena infringes Virginia's state sovereign immunity.

As we explain below, we need not reach state sovereign immunity given VDOC's conditional assertion of that defense. Instead, we affirm on the merits. The district court reasonably found that Jordan and Chase did not have a need for further discovery from VDOC, a nonparty, that outweighed the burdens the discovery would impose. The district court

thus did not abuse its discretion in quashing the subpoena.

I.

This appeal is ancillary to a civil action pending in the Southern District of Mississippi. Jordan and Chase, the plaintiffs in that action, challenge Mississippi's method of execution, which they claim will cause them unnecessary physical pain. Mississippi executes prisoners by lethal injection using a three-drug protocol that begins with the administration of an anesthetic. At the start of the plaintiffs' litigation, that anesthetic was the drug pentobarbital; after the identity of Mississippi's pentobarbital supplier was disclosed, the state had to replace pentobarbital with another drug, midazolam. Mississippi's loss of its pentobarbital supplier was just one instance of a well-known phenomenon in which drug suppliers, once exposed to pressure from activists opposed to the death penalty, refuse to supply drugs to state corrections departments. *See generally Glossip v. Gross*, 135 S. Ct. 2726, 2733–34 (2015) (discussing this trend).

Jordan and Chase have mounted several attacks on Mississippi's execution practices. They argue that Mississippi should use a one-drug protocol that consists of a large dose of a single anesthetic, not a three-drug protocol that uses an anesthetic followed by other drugs. They also claim that midazolam should not be used as the anesthetic in the three-drug protocol, because it is inadequate to prevent pain during execution. Jordan and Chase further challenge

Mississippi's use of drugs prepared by compounding pharmacies that, in their view, lack meaningful regulatory oversight. To prevail in their attacks, Jordan and Chase 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." *Bucklew v. Precythe*, No. 17-8151, slip op. at 13 (U.S. Apr. 1, 2019) (citing *Glossip*, 135 S. Ct. at 2737–38; *Baze v. Rees*, 553 U.S. 35, 52 (2008) (plurality opinion)).

Jordan and Chase have tried to meet this burden, in part, by comparing Mississippi's practices to those of other states using lethal injection. Virginia is one such state. Like Mississippi, Virginia carries out executions using a three-drug protocol that includes compounded midazolam. Like Mississippi, it previously used pentobarbital in place of midazolam. And like Mississippi, Virginia is eager to keep the identity of its drug supplier secret, lest pressure from death-penalty opponents cause the supplier to stop providing the state with drugs for use in executions.

During discovery, Jordan and Chase served a third-party subpoena on VDOC. The subpoena sought both documents and testimony. The document requests covered various topics relating to Virginia's executions, including how Virginia has obtained its execution drugs. The testimony was sought under Federal Rule of Civil Procedure 30(b)(6), which authorizes parties to take testimony from entities like corporations and government agencies. A Rule 30(b)(6) subpoena must

identify the subject matter of the testimony sought; the topics listed in Jordan and Chase's Rule 30(b)(6) request overlapped substantially with their document requests.

In response to the subpoena, VDOC provided Jordan and Chase with a number of documents, many of which originated in prior litigation about Virginia's execution practices. The documents included labels and certificates of analysis for Virginia's execution drugs, a redacted copy of Virginia's agreement with the compounding pharmacy that serves as Virginia's drug supplier, a redacted copy of VDOC's execution manual, and transcripts from evidentiary hearings in the prior litigation. The transcripts included a discussion of an episode in 2015 in which a VDOC official drove to Texas to obtain pentobarbital from Texas officials for use in a Virginia execution. VDOC informed Jordan and Chase's counsel that it was willing to provide an additional affidavit to "fill in any of the gaps," but that it otherwise objected to the subpoena and would move to quash if the parties could not agree on how to narrow the scope of the subpoena. J.A. 161.

No agreement was reached, and VDOC moved to quash. VDOC argued that the subpoena sought privileged material; unduly burdened Virginia, its drug supplier, and the members of its execution team;[1]

[1] Some documents that Jordan and Chase sought would have revealed the identities of the people who carry out Virginia's executions. On appeal, Jordan and Chase claim that they are no

and violated Virginia's state sovereign immunity. VDOC described the subpoena as an overbroad "fishing expedition" into its execution practices, which had limited (if any) relevance to Jordan and Chase's Mississippi lawsuit. J.A. 69–70. What is more, VDOC argued, the outstanding requests in the subpoena would reveal the identity of Virginia's supplier of execution drugs. As VDOC pointed out, that information is normally kept confidential: Virginia state law recognizes a qualified privilege for the identity of execution-drug suppliers. Va. Code § 53.1-234. Disclosing this information would not only infringe on the drug supplier's own interest in confidentiality, VDOC argued, but also restrict Virginia's ability to carry out lawful executions by chilling suppliers from providing execution drugs.

In response, Jordan and Chase argued that the information they sought was relevant and that disclosure would not impose a burden on VDOC. In their view, they needed discovery from VDOC to show the required "feasible and readily implemented" alternative. Information about Virginia's execution drugs would be relevant (1) to evaluate Mississippi's claim that using pentobarbital is not a "feasible" alternative because Mississippi cannot acquire pentobarbital, and (2) to show the feasibility of the one-drug protocol. Jordan and Chase also suggested that Virginia might have evidence that the use of midazolam in the three-drug protocol poses an excessively high risk of suffering. In support of this

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longer seeking that information.

claim, they pointed to a 2017 execution that Virginia officials carried out using midazolam, during which an unusual 30-minute delay occurred. J.A. 225–26. Jordan and Chase opposed Virginia's argument that there was a cognizable confidentiality interest in the identity of its drug supplier. And even if there was, they argued, a confidentiality order could protect it.

In a 42-page opinion, the district court granted VDOC's motion to quash because the requests imposed an undue burden, without reaching the parties' arguments on privilege and state sovereign immunity. The court found that VDOC's prompt responses had provided much of the requested information. Additional information was unlikely to be relevant to the key issue: whether there is a safer, feasible alternative to Mississippi's execution method. Virginia's method was not really an "alternative" at all. Like Mississippi, Virginia uses a three-drug protocol that includes compounded midazolam. Nor could Virginia's experience be used to disprove Mississippi's claim that it could not obtain pentobarbital: VDOC produced documents showing that it, too, could not obtain pentobarbital. The district court also rejected Jordan and Chase's suggestion that Virginia's execution practices were flawed. Jordan and Chase's only evidence was the 30-minute delay during the 2017 execution, which was not compelling proof given Virginia's well-documented history of successfully using the three-drug protocol. The court also noted that Jordan and Chase had failed to explain what relevant information they could receive from Mississippi officials, casting more doubt on their need

for additional discovery from VDOC.

The district court also found that further disclosure would burden Virginia's ability to obtain lethal-injection drugs. Many of the documents Jordan and Chase sought would reveal the identity of Virginia's midazolam supplier, either directly or by giving clues that could lead someone to uncover it. Documents provided by VDOC show the sensitivity of this information. In hearing transcripts from the prior litigation, VDOC officials described how hard it was to find a supplier of execution drugs. Only after Virginia passed its confidentiality statute was VDOC able to find a compounding pharmacy willing to supply it with midazolam, and even then only with an agreement promising to protect the supplier's confidentiality. In addition, the district court noted the pressure that death-penalty opponents place on drug suppliers. So the district court found that disclosing the identity of the drug supplier would inhibit Virginia's ability to carry out lawful executions. And the district court found that a confidentiality order would not adequately alleviate this burden. The court also found the subpoena overbroad for seeking information dating back to 2010, far longer than reasonably necessary.

Based on all these considerations, the district court found that the subpoena imposed an undue burden and granted VDOC's motion to quash.

Jordan and Chase timely appeal. Because the court below denied nonparty discovery in an ancillary proceeding where the underlying action is pending in

another circuit, we have appellate jurisdiction under the collateral-order doctrine. *Nicholas v. Wyndham Int'l, Inc.*, 373 F.3d 537, 541 (4th Cir. 2004).

II.

At the outset, we must determine the proper order of decision: do we start with VDOC's state sovereign immunity argument or the merits? We conclude that we should start with the merits.

Courts must generally decide jurisdictional issues first. That is certainly true of subject matter jurisdiction: courts must always assure themselves of subject matter jurisdiction before reaching the merits, even if the parties have not raised it. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006). It is also true of personal jurisdiction: even though personal jurisdiction may be waived, if it is timely raised, it too takes priority over the merits. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007). The Supreme Court has cautioned against exceptions that allow courts, for reasons of expedience, to sidestep jurisdictional issues. Most notably, in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Court overturned the practice of exercising "hypothetical jurisdiction" to reach the merits first when the merits question was easy and the jurisdictional question was hard. *Id.* at 93–94.

State sovereign immunity should also, at least in principle, have priority over merits issues. It too is a jurisdictional doctrine, although a singular one that

is somewhat of a hybrid between subject matter and personal jurisdiction. *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 394 (1998) (Kennedy, J., concurring); Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1609–11 (2002). Like other constitutional limitations on our subject matter jurisdiction, "the fundamental principle of sovereign immunity limits the grant of judicial authority," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984), and is not forfeited by inattention at the trial level, meaning it can be raised for the first time on appeal, *Edelman v. Jordan*, 415 U.S. 651, 677–78 (1974). Yet state sovereign immunity is unlike subject matter jurisdiction, and like personal jurisdiction, in that it can be affirmatively waived, *see Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 618 (2002), and need not be raised by the court on its own motion, *see Patsy v. Board of Regents*, 457 U.S. 496, 515–16 n.19 (1982).

The Supreme Court has therefore recognized that sovereign immunity must generally be decided first, but with an exception: courts may instead begin by asking if a statutory cause of action can, under the statute itself, ever be asserted against a state. *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000). There are two reasons for this exception. First, a statute that does not permit suits against a state does not implicate the Eleventh Amendment, and so the statutory question is "logically antecedent" to the constitutional one. *Id.* Second, the exception is limited to the threshold,

categorical question of whether a cause of action exists against a state; it does not permit adjudication of whether the particular facts alleged describe a violation of the statute. For that reason, the exception "does not, as a practical matter, permit the court to pronounce upon any issue, or upon the rights of any person, beyond the issues and persons that would be reached under the Eleventh Amendment inquiry anyway." *Id.*

Our precedents have identified another exception for cases when a state asserts its sovereign immunity only conditionally. If the state does not "insist" on its sovereign immunity defense, but uses it only as a backstop to prevent a defeat on the merits, we may affirm on the merits alone. *Strawser v. Atkins*, 290 F.3d 720, 729–30 (4th Cir. 2002) (alternative holding). We have grounded this exception in part in the principle of constitutional avoidance, which counsels against reaching state sovereign immunity where it is unnecessary. *Id.* at 730. To be sure, one might question whether this exception is in keeping with the spirit of the Supreme Court's opinions in *Steel Co.* and *Vermont Agency*. But we are bound by our precedents, which have concluded that it is. *See Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 479–83 (4th Cir. 2005); *Strawser*, 290 F.3d at 729–30; *see also McClendon v. Georgia Dep't of Cmty. Health*, 261 F.3d 1252, 1258–59 (11th Cir. 2001) (adopting same exception for "conditional" assertions of immunity).

The exception applies to VDOC's conditional

assertion of state sovereign immunity here. At oral argument, VDOC first insisted that we reach state sovereign immunity. Because this Circuit has not addressed whether a subpoena issued against a nonparty state agency—not merely a state official—runs afoul of that state's sovereign immunity, we ordered supplemental briefing. VDOC then backpedaled in its supplemental brief, withdrawing its prior insistence and stating that it would be content with a victory on the merits. VDOC's final answer controls, and so the exception applies.

As we explain below, the merits favor VDOC. So we bypass state sovereign immunity.

III.

We now turn to the merits of the motion to quash. District courts enjoy "considerable discretion in overseeing discovery," and we will disturb a district court's discovery rulings only if we find an abuse of that discretion. *Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 172, 178 (4th Cir. 2014). In applying the abuse-of-discretion standard, we review the district court's factual conclusions for clear error and its legal conclusions de novo. *In re Grand Jury Subpoena*, 870 F.3d 312, 316 (4th Cir. 2017). Here, the district court quashed the subpoena after determining it imposed an undue burden. Finding no abuse of discretion, we affirm.

A.

All civil discovery, whether sought from parties or nonparties, is limited in scope by Rule 26(b)(1) in two fundamental ways. First, the matter sought must be "relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Relevance is not, on its own, a high bar. There may be a mountain of documents and emails that are relevant in some way to the parties' dispute, even though much of it is uninteresting or cumulative. Rule 26 therefore imposes another requirement: discovery must also be "proportional to the needs of the case." *Id.* Proportionality requires courts to consider, among other things, "whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* This relieves parties from the burden of taking unreasonable steps to ferret out every relevant document.

When discovery is sought from nonparties, however, its scope must be limited even more. Nonparties are "strangers" to the litigation, and since they have "no dog in [the] fight," they have "a different set of expectations" from the parties themselves. *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998). Bystanders should not be drawn into the parties' dispute without some good reason, even if they have information that falls within the scope of party discovery. For example, a party's email provider might well possess emails that would be discoverable from the party herself. But unless the email provider can offer important information that cannot be obtained from the party directly, there would be no cause for a subpoena against the provider.

A more demanding variant of the proportionality analysis therefore applies when determining whether, under Rule 45, a subpoena issued against a nonparty "subjects a person to undue burden" and must be quashed or modified. Fed. R. Civ. P. 45(d)(3)(A)(iv). As under Rule 26, the ultimate question is whether the benefits of discovery to the requesting party outweigh the burdens on the recipient. *In re Modern Plastics Corp.*, 890 F.3d 244, 251 (6th Cir. 2018); *Citizens Union of N.Y.C. v. Att'y Gen. of N.Y.*, 269 F. Supp. 3d 124, 138 (S.D.N.Y. 2017). But courts must give the recipient's nonparty status "special weight," leading to an even more "demanding and sensitive" inquiry than the one governing discovery generally. *In re Public Offering PLE Antitrust Litig.*, 427 F.3d 49, 53 (1st Cir. 2005).

Without exhaustively listing the considerations that go into this analysis, we note a few that are important here. On the benefit side of the ledger, courts should consider not just the relevance of information sought, but the requesting party's need for it. *See Wiwa v. Royal Dutch Petrol. Co.*, 392 F.3d 812, 818 (5th Cir. 2004). The information sought must likely (not just theoretically) have marginal benefit in litigating important issues. (We mean "marginal" in the economic sense that the information must offer some value over and above what the requesting party already has, not in the sense that a mere *de minimis* benefit will suffice.) Courts should also consider what information is available to the requesting party from other sources. *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE &

PROCEDURE § 2463.1, at 501–06 (3d ed.2008).To that end, the requesting party should be able to explain why it cannot obtain the same information, or comparable information that would also satisfy its needs, from one of the parties to the litigation—or, in appropriate cases, from other third parties that would be more logical targets for the subpoena.[2]

On the burden side, district courts should of course consider the dollars-and-cents costs associated with a large and demanding document production. But there are other cognizable burdens as well. For example, a subpoena may impose a burden by invading privacy or confidentiality interests. *See Modern Plastics*, 890 F.3d at251–52; *In re Missouri Dep't of Corr.*, 839 F.3d 732, 736–37(8th Cir. 2016); *Fappiano v. City of New York*, 640 F. App'x 115, 121 (2d Cir. 2016).[3] Courts may consider the interests of the recipient of the subpoena, as well as others who might be affected. The text of Rule 45 makes that clear, encompassing burdens on any "person," not just the recipient of the subpoena. Fed. R. Civ. P.

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[2] We do not mean to imply that, on a motion to quash, the requesting party bears the burdens of proof and of persuasion. The moving party bears those burdens. *See Wiwa*, 392 F.3d at 818. But they are not terribly difficult burdens to meet if the requesting party cannot articulate its need for the information and address obvious alternative sources.

[3] The text of Rule 26 confirms that "burden" means more than the financial costs of compliance: it speaks of the "burden or expense" of discovery, Fed. R. Civ. P.26(b)(1), which implies that these terms are not coextensive.

45(d)(3)(A)(iv). For example, if a subpoena seeks information from a business about its customers, it may implicate the business's interest in protecting competitively sensitive information, as well as the customers' interest in protecting their privacy, *see Modern Plastics*, 890 F.3d at 251–52. Another type of burden arises when a subpoena is overbroad—that is, when it seeks information beyond what the requesting party reasonably requires. *See Wiwa*, 392 F.3d at 818. A nonparty should not have to do the work of tailoring a subpoena to what the requesting party needs; the requesting party should have done that before serving it.[4]

B.

These factors appropriately led the district court to conclude that any further production by VDOC would impose an undue burden. In framing its analysis, the district court properly considered the fact that VDOC had produced responsive documents. That production addressed, at least to some degree, most of the document requests and deposition topics. We see no error in that finding. Thus, the issue was whether

[4] Mere overbreadth, of course, usually warrants modifying a subpoena to narrow its scope, not quashing it. *See, e.g.*, *Wiwa*, 392 F.3d at 820–21. In a case like this one, where the recipient has already provided a substantial response, "quashing" the subpoena effectively narrows it by limiting it to what has already been produced. A subpoena may be so sweepingly overbroad, however, that it should be quashed in its entirety. *See, e.g.*, *In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606, 612 (E.D. Va. 2008).

providing the documents and testimony that remained outstanding—assuming they satisfied Rule 26's threshold relevance requirement—would create an undue burden.

We begin with the asserted need for the information. Jordan and Chase advanced three theories below for how the documents might bolster their case. First, they claimed that information about actual or potential drug suppliers might undercut Mississippi's defense that it could no longer acquire pentobarbital. Second, they argued, VDOC might have internal documents discussing the feasibility of a one-drug protocol. Third, because Virginia's execution protocol supposedly has flaws (as revealed by alleged missteps during a 2017 execution), VDOC's documents might show that Mississippi's similar three-drug protocol poses a substantial risk of serious harm. On appeal they add a fourth, alternative theory: if Virginia's execution practices are in fact sound, they can be held up against Mississippi's practices to show that the latter are flawed.

The district court rejected all of these theories, finding it unlikely that VDOC would have useful information under any of them. We find its conclusions reasonable. First, VDOC had already provided documents showing that it, like Mississippi, could not obtain pentobarbital and had been unable to do so for several years. Additional documents confirming this fact would be of little value. Second, VDOC was an unlikely source of helpful information about a single-drug protocol, because VDOC did not use that protocol

and never had. Third, the district court reasonably rejected Jordan and Chase's factual claim that Virginia's execution practices were flawed, citing Virginia's long history of using a three-drug protocol successfully. The district court also anticipated Jordan and Chase's alternative argument that VDOC might have helpful evidence about procedural safeguards that Mississippi lacked. The court noted that VDOC had produced its execution manual and testimony describing drug storage and testing; Jordan and Chase failed to explain what other information they needed.

Even if VDOC might have additional, helpful evidence on any of these fronts, Jordan and Chase have never explained why VDOC is an appropriate source given the alternatives. As the district court noted, Jordan and Chase "have been particularly opaque as to why the VDOC, a nonparty to the underlying action, is a better source of information than the Mississippi DOC." J.A. 26. Even on appeal, they have provided little insight into what information Mississippi has provided or why it is inadequate.

There are also obvious third-party alternatives. Evidence showing the feasibility and safety of a single-drug protocol could be sought more readily from states that actually use single-drug protocols. Similarly, information about the episode in which Texas officials provided pentobarbital could be sought from them. Jordan and Chase's failure to address these issues is a mystery, given that they have served subpoenas seeking similar discovery from other state governments.

Jordan and Chase try to bolster their arguments by analogizing to products-liability cases in which plaintiffs have taken third-party discovery from the defendants' competitors about products with safer alternative designs. That information was arguably relevant because, in at least some jurisdictions, a plaintiff bringing a design-defect claim must show that a reasonable alternative exists. *See* Restatement (Third) of Torts: Products Liability § 2 (Am. Law Inst. 1988). But this analogy presupposes that Virginia's execution practices represent a relevant, safer "alternative." In fact, Virginia and Mississippi use similar three-drug execution protocols, and Jordan and Chase have provided nothing, apart from conjecture, to suggest that Virginia's practices are different or safer. Even if Virginia's execution practices were marginally better than Mississippi's, that alone would not make Virginia a relevant point of comparison. Jordan and Chase must prove there is a feasible alternative procedure that "*significantly* reduce[s] a *substantial* risk of *severe* pain," a standard not satisfied "merely by showing a slightly or marginally safer alternative." *Baze v. Rees*, 553 U.S. 35, 51–52 (2008) (plurality opinion) (emphases added); *see also Bucklew v. Precythe*, No. 17-8151, slip op. at 23 (U.S. Apr. 1, 2019) (holding that "the difference must be clear and considerable").

The analogy to the products-liability context—like many of Jordan and Chase's arguments—also operates at an excessively high level of generality. It is not tethered close enough to the facts to show why *these plaintiffs* in *this case* should

get additional discovery *from VDOC*. When framed at such a high level of abstraction, the argument proves too much. It would, if accepted, entitle every plaintiff in every death-penalty challenge to extensive discovery from *every* state that conducts executions. Such freewheeling nonparty discovery would improperly turn district courts into "boards of inquiry charged with determining 'best practices' for executions," *Baze*, 553 U.S. at 51 (plurality opinion), which they are not.

On the other side of the ledger, the district court properly considered two burdens that these requests would impose. First, the district court found the subpoena overbroad for seeking information dating back to 2010. The court concluded that the documents provided already offered "a full picture of how the VDOC currently carries out an execution," J.A. 44–45, and that the older information would not "advance [Jordan and Chase's] underlying Eighth Amendment claim," J.A. 45. By failing to tailor their subpoena to their needs, Jordan and Chase imposed a burden on VDOC, which had to do the tailoring itself. We find no error in the district court's conclusion on this point, which Jordan and Chase hardly challenge on appeal.

Second, the district court reasonably found that both VDOC and its drug supplier would be burdened by the disclosure of the supplier's identity, which most of the outstanding requests sought to uncover. This would harm the supplier's own confidentiality interest, one recognized by Virginia law. It would also impede Virginia's ability to carry out executions by chilling Virginia's current drug supplier, as well as potential

future suppliers, from providing drugs for executions. Here, the district court's findings properly rested on Virginia's history of difficulties in finding a drug supplier, as well as the fact that death-penalty opponents have pressured drug suppliers in an effort to halt executions. In recognizing that both states and execution-drug suppliers have a legitimate interest in keeping suppliers' identities confidential, we follow several of our sister circuits. *See In re Missouri Dep't of Corr.*, 839 F.3d at 736–37 (reversing, on writ of mandamus, district court's decision to allow discovery of execution-drug supplier); *Arthur v. Commissioner, Alabama Dep't of Corr.*, 840 F.3d 1268, 1304–05 (11th Cir. 2016) (upholding district court's decision to require disclosure of general facts about drug suppliers, but not their names); *In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 237–38 (6th Cir. 2016) (upholding district court grant of protective order denying plaintiff discovery of drug suppliers' identities); *In re Lombardi*, 741 F.3d 888, 894–96 (8th Cir. 2014) (reversing, on writ of mandamus, district court decision to allow discovery of identities of drug supplier, testing lab, and prescribing physician).

Jordan and Chase respond, in part, by arguing that the cost of compliance would be low because the documents they seek are not so voluminous. But as we have already explained, the expense of collecting, reviewing, and producing documents is not the only burden cognizable under Rule 45. The overbreadth and confidentiality concerns identified by the district court also represent cognizable burdens under Rule 45.

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.

C.

Jordan and Chase alternatively argue that, assuming the district court properly found an undue burden grounded in the need to protect the drug supplier's identity, it erred by quashing the subpoena outright. They claim the district court instead should have permitted the requested discovery subject to an order requiring the parties to keep the materials confidential. And disclosure subject to a confidentiality order, if feasible, is generally preferable to an outright denial of discovery. Yet the district court considered the issue and concluded that such an order would not have adequately protected the confidentiality interests at stake. We find no abuse of discretion in that decision.

As courts have recognized, sometimes "even the most rigorous efforts of the recipient of [sensitive] information to preserve confidentiality in compliance with the provisions of such a protective order may not

prevent inadvertent compromise." *In re Deutsche Bank Tr. Co. Americas*, 605 F.3d 1373, 1378 (Fed. Cir. 2010). "[I]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so." *Id.* (alteration in original) (quoting *FTC v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980)). In particular, "'extremely potent' confidential information" may be "of such a nature that it would be 'humanly impossible' to control its inadvertent disclosure." *Id.* (quoting *U.S. Steel Co. v. United States*, 730 F.2d 1465, 1467 (Fed. Cir. 1984)).

The information in question—the identity of Virginia's supplier of execution drugs—is certainly potent. The provision of execution drugs has become a flash point in the ongoing debate over the death penalty, which has long been a contentious issue. 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. Broad disclosure could easily result from the very act of litigating their case, perhaps from counsel's investigation of the supplier, or perhaps from the introduction of evidence about the supplier at trial. *See In re Missouri Dep't of Corr.*, 839 F.3d at 737. There is also good reason to think that a confidentiality order would not serve its intended purpose. The goal of the order would be to avoid a chilling effect on Virginia's drug supplier and other, potential suppliers. Yet a drug supplier would probably take little comfort in knowing that disclosure was limited to death-row

inmates and their lawyers.

Based on these considerations, the district court reasonably concluded that a confidentiality order would not be up to the task of protecting the interests of Virginia and its drug supplier. The district court therefore did not abuse its discretion in quashing the subpoena outright.

D.

Jordan and Chase make one final argument. They claim that, even if the district court properly quashed their document requests, it should have permitted them to take deposition testimony under Rule 30(b)(6). The same undue-burden standard "applies to both document and testimonial subpoenas." *Watts v. SEC*, 482 F.3d 501, 508 (D.C. Cir. 2007). Thus, the question is whether Jordan and Chase's need for a Rule 30(b)(6) deposition outweighs the burden and expense of having one, given the documents VDOC already provided.

There are two possible arguments in support of the Rule 30(b)(6) deposition. The first is that a deposition would provide additional useful information beyond what the documents themselves provide. Yet Jordan and Chase have simply failed to explain what that information might be. That failure is particularly glaring given the unique characteristics of Rule 30(b)(6) depositions. Rule 30(b)(6) deponents testify on behalf of entities, not themselves, and often do so based on careful advance preparation, not personal

knowledge. *See, e.g.*, *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1146–47 (10th Cir. 2007); *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006). If VDOC's document production has already provided the substantive information Jordan and Chase are entitled to, then a Rule 30(b)(6) deponent would likely just repeat that same information in some testimonial form.

The second argument is that a Rule 30(b)(6) deposition is necessary to obtain evidence in a form admissible at trial. Here, Jordan and Chase point to the transcripts that VDOC provided. These transcripts capture the testimony of three state employees in prior litigation about Virginia's execution practices. Jordan and Chase complain that the transcripts may not be admissible in the Mississippi litigation. We find this speculative argument uncompelling. Jordan and Chase do not represent that they intend to use this testimony at trial, or that the defendants would object to its admissibility.

Moreover, Jordan and Chase did not argue in the proceedings below that they needed live testimony to obtain important information or admissible evidence. So the district court did not abuse its discretion by analyzing the document requests and deposition topics together.

IV.

Nonparties faced with civil discovery requests deserve special solicitude. They should not be drawn

into the parties' dispute unless the need to include them outweighs the burdens of doing so, considering their nonparty status. This undue-burden analysis must be conducted based on the concrete facts and issues in the litigation, not on vague generalities or speculation. This district court reasonably determined that Jordan and Chase's request for more discovery from VDOC was unsupported by a genuine need that outweighed the burdens involved. Because the district court did not abuse its discretion, the order is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

IN RE: VIRGINIA DEPARTMENT
OF CORRECTIONS
Petitioner,

v. Civil Action No. 3:17mc02

RICHARD JORDAN and
RICKY CHASE, *et al.*
Respondents.

MEMORANDUM OPINION

This matter comes before the Court on the Motion to Quash the third-party Notice of Deposition and Subpoena issued in *Jordan* v. *Fisher*, (S.D. Miss.).[1] Neither party requested a hearing on the matter. For the reasons that follow, the Motion to Quash will be GRANTED to the extent it seeks information beyond that already disclosed.

I. Pertinent Procedural Background

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

Mississippi sentenced Richard Jordan and Ricky Chase to death. Mississippi proposes to execute Jordan and Chase by the serial intravenous injection of three drugs: midazolam, vecuronium bromide, and potassium chloride. Jordan and Chase ("Plaintiffs") filed a civil rights action under 42 U.S.C. § 1983[2] asserting that execution under the above protocol violates the Eighth Amendment.[3] "To prove this protocol violates the Eighth Amendment, Jordan and Chase must show (1) that the Mississippi protocol raises a substantial risk of serious harm and (2) that there is a known, available alternative to the Mississippi protocol which reduces this risk. *Glossip v. Gross,* 135 S. Ct. 2726, 2738 (2015)." (Resp. Opp'n 1, ECF No. 12.)

The underlying challenge to Mississippi's method of execution continues the impassioned debate

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[2] That statute provides, in pertinent part:

> Every person who, under color of any statute ... 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 an action at law ....

42 U.S.C. § 1983.

[3] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

regarding where the contours of the Eighth Amendment's prohibition of cruel and unusual punishment lie when a state ultimately implements a death sentence. This opinion must address, in detail, the method by which a death sentence may be imposed.[4] Here, Jordan and Chase dispute the three-drug lethal injection protocol Mississippi uses. The inmates seek discovery from the Virginia Department of Corrections ("VDOC") which they contend relates to their constitutional challenge to Mississippi's method-of-execution protocol.

A. Two Courts Have Quashed Subpoenas from Plaintiffs When Plaintiffs Sought Materials from Single-Drug Protocol States

Prior to this motion, Plaintiffs sought information from two other states in addition to

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[4] Many challenges to the death penalty involve distasteful analyses: either an objective discussion of the vile crimes that often undergird an imposition of a death sentence, or analysis in explicit detail-past or potential-of the execution method imposed. "Certainly some jurists have questioned the constitutionality of the death penalty ... [y]et the law remains valid," *In re Ohio Execution Protocol Litigation,* 845 F.3d 231, 240 (6th Cir. 2016), *cert denied, sub nom. Fears v. Kasich,* No. 17-5010, 2017 WL 2854622 (U.S. Oct. 2, 2017), and courts must recognize "society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine,* 475 U.S. 412,426 (1986); *see Brooks v. Warden,* 810 F.3d 812,825 (11th Cir.) (noting that the state, a victim, and the victim's family "have an important interest in the timely enforcement" of a lawful sentence), *cert denied,* 136 S. Ct. 979 (2016).

Mississippi itself.[5] Both of those third-party subpoenas have been quashed entirely. First, Jordan and Chase served upon the Missouri Department of Corrections ("MDOC") "a third-party subpoena for documents and a Federal Rule of Civil Procedure ... 30(b)(6) deposition notice seeking information regarding MDOC's use of pentobarbital in lethal injections, including the identity of MDOC's supplier of pentobarbital." *In re Mo. Dep't of Corr.,* 839 F.3d 732, 734 (8th Cir. 2016), *cert. denied, sub nom. Jordan v. Mo. Dep't of Corr.,* 137 S. Ct. 2180 (2017). The United States Court of Appeals for the Eighth Circuit ultimately granted MDOC' s writ of mandamus prohibiting the discovery "on the grounds of relevancy and undue burden." *Id* at 737.

In Missouri, the district court had found that information as to the use of pentobarbital as a single drug might be relevant to the Plaintiffs' quest to establish a feasible and readily implemented alternative. But the Eighth Circuit ultimately ruled the request to be irrelevant and unduly burdensome. Based on a record expanded beyond that of the district court, the Eighth Circuit concluded that the release of the drug supplier's identity would result in the supplier "refusing to make pentobarbital available to anyone," *id.* at 736, meaning that discovery of the supplier's name would result in its identity becoming irrelevant to *all* method of execution claims because the company would no longer supply to Missouri,

[5] The Plaintiffs fail to identify what, if any, information they have obtained in discovery from the state of Mississippi in the underlying civil rights action.

Mississippi, or any state. And, the court concluded, Missouri would consequently suffer an undue burden on its interest in "exercising its sovereign power to enforce criminal law." *Id* (quoting *In re Blodgett,* 502 U.S. 236, 239 (1992)).

Second, Plaintiffs served upon the Georgia Department of Corrections ("GDOC") a third-party subpoena seeking a deposition and documents related to executions in Georgia. *Ga. Dep't Corr.* v. *Jordan,* 1:16--cv--02582-RWS-JCF, at 1 (N.D. Ga. Oct. 20, 2016) (ECF No. 12-9).[6] The GDOC uses a single drug, pentobarbital, to carry out its executions. *Id.* at 2. Plaintiffs sought "to secure discovery from GDOC concerning (a) whether pentobarbital is available, (b) the factors which went into GDOC's decision to switch from a three-drug protocol to a single-drug protocol, and (c) whether a single-drug protocol is a feasible alternative method of execution." *Id.* The GDOC asserted, *inter alia,* that the information sought was protected by Georgia's Lethal Injection Secrecy Statute and moved to quash the third-party subpoena.[7] *Id.* at 4.

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[6] The Court employs this abbreviation in the quotations that refer to the GDOC.

[7] That statute provides, in pertinent part:

> 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

The district court granted the GDOC's motion to quash the subpoena. *Id.* at 8. While finding that this single-drug protocol might be relevant to the Plaintiffs' need to establish the existence of a feasible and available alternative to Mississippi's three-drug protocol, *id.* at 3, the district court observed that "the Eleventh Circuit has uniformly given Georgia's Lethal Injection Secrecy Act an expansive reading, essentially viewing it as creating a total ban on the production of information concerning Georgia's choices in connection with its lethal injection protocol," *id.* at 6. The Court then concluded, "where Georgia's own death row prisoners have been flatly denied access to information covered by Georgia's Lethal Injection Secrecy Act, it similarly bars Jordan and Chase's efforts to secure the same type of information via subpoena for use in their Mississippi case." *Id.* at 7.

B. Virginia Provided Information within a Week of Receiving Plaintiffs' Subpoena, Despite the Fact that Information about Virginia's Three-Drug Protocol Likely Lacks Relevance to Plaintiffs' Attempt to Establish a Feasible and Available Alternative to Mississippi's Three-Drug Protocol

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utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret. O.C.G.A. § 42-5-36(d)(2).

After seeking information from Missouri and Georgia, Plaintiffs served the VDOC with a third-party subpoena for documents and a deposition notice seeking information regarding, *inter alia,* VDOC's current lethal injection drug supplies, testing results, and efforts to obtain lethal injection drugs. (ECF No. 2-2.) Virginia, like Mississippi, utilizes a three-drug protocol beginning with midazolam. The VDOC quickly and voluntarily supplied Plaintiffs with a host of information responsive to the subpoena. (ECF No. 2-3.) The VDOC, however, refused to supply Plaintiffs with, *inter alia,* information that might lead to the disclosure of the supplier of the chemicals the VDOC utilizes in carrying out an execution or to the disclosure of the identities of the members of the VDOC execution team. VDOC argues that these aspects of the subpoena should be quashed because they require compliance

> with discovery requests that are overbroad, not narrowly tailored to the subject of that dispute, require the production of irrelevant information, and would disclose identities that are privileged as a matter of state and federal constitutional law. Compliance with the discovery requests would pose an undue burden on VDOC, Virginia's lethal injection drug suppliers, and members of the execution team.

(Mem. Supp. Mot. Quash 18, ECF No. 2.)

Plaintiffs assert that the VDOC's arguments lack merit. Plaintiffs, however, fail to direct the Court to any decision from any federal court of appeals[8] where the court found that disclosure of the identities of the execution team or the supplier of the lethal injection materials pursuant to a discovery request to be appropriate. Conversely, the circuit courts that have addressed the issue have concluded that disclosure of that information pursuant to a discovery request would impose an undue burden upon a state seeking to carry out lawfully imposed executions in the future. *See In re Ohio Execution Protocol Litig.,* 845 F.3d at 239 (citation omitted) ("[B]ut for the protective order, Defendants will suffer an undue burden and prejudice in effectuating Ohio's execution protocol and practices."); *In re Mo. Dep't of Corr.,* 839 F.3d at 736-

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[8] Plaintiffs assert that "[t]wo other district courts have held that similar discovery requests were relevant to the pleadings" in Plaintiffs' underlying case, and point to decisions in the Western District of Missouri and the Northern District of Georgia. (Resp. Opp'n Mot. Quash 13.) First, the findings of relevance in those cases do not constitute even persuasive authority here because they rest on the premise that the single-drug protocol in Missouri and Georgia would be relevant to Plaintiffs establishing a readily, available feasible alternative to Mississippi's current three-drug protocol. Virginia's three-drug protocol does not hold the same relevance.

Perhaps more importantly, Plaintiffs point to these decisions while acknowledging -- only by footnote -- that, eventually, both subpoenas were quashed. As they must, Plaintiffs admit that "[t]he Eighth Circuit reversed the [Missouri] district court['s]" denial of the motion to quash, and the Northern District of Georgia granted the motion to quash. *(Id* nn.24, 25.)

38 (granting petition for rehearing, and granting petition for writ of mandamus because disclosure of the supplier's identity placed an undue burden on the state by preventing it from acquiring the drug for executions, and the inmates offered no assurances that active investigation of the supplier would not lead to further disclosure of identities); *Jones v. Comm'r, Ga. Dep't of Corr.,* 811 F.3d 1288, 1292-93 (11th Cir.) (citation omitted) (internal quotation marks omitted) (concluding death row inmate has no constitutional right to "know where, how, and by whom lethal injection drugs will be manufactured," and no "due process right-of-access claim" to this information exists), *cert. denied,* 136 S. Ct. 998 (2016).[9] For the reasons stated more fully below, the Court finds that requiring the VDOC to file a further response to the subpoena would pose an undue burden. Accordingly, the Motion to Quash will be granted to the extent it seeks information not already disclosed.[10]

II. Relevant Legal Principles Regarding

[9] In the context of denying a stay of execution, a court in this district recently rejected a Virginia inmate's assertion that he had a "procedural due process right to discover information about Virginia's lethal injection drugs." *Gray v. McAuliffe,* No. 3:16CV982-HEH, 2017 WL 102970, at *20 (E.D. Va. Jan. 10, 2017) (citing *Jones,* 811 F.3d at 1292-93; *Phillips v. De Wine,* 841 F.3d 405,420 (6th Cir. 2016); *Zink v. Lombardi,* 783 F.3d 1089, 1109 (8th Cir.), *cert. denied,* 135 S. Ct. 2941 (2015); *Trottie v. Livingston,* 766 F.3d 450,452 (5th Cir. 2014)).

[10] Because the Court grants the Motion to Quash on the grounds of undue burden, no need exists to address the VDOC's other arguments for quashing the subpoena.

the Motion to Quash

A. Federal Rules of Civil Procedure 26 and 45

The Federal Rules of Civil Procedure govern the scope of discovery. "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 .... " Fed. R. Civ. P. 26(b)(1).[11] Pursuant to Federal Rule of Civil Procedure 45, parties may use subpoenas to command parties or non-parties to "produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control." Fed. R. Civ. P. 45(a)(1)(A)(iii).

Rule 45(d)(1) emphasizes that "[a] party or attorney responsible for issuing ... a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Fed. R. Civ. P. 45(d)(1). A court *"must* quash or modify a

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[11] Federal Rule of Civil Procedure 26(c) provides, in pertinent part:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending . . . . The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ....

Fed. R. Civ. P. 26(c)(1).

subpoena that fails to allow a reasonable time to comply; ... requires disclosure of privileged or other protected matter, if no exception or waiver applies; or subjects a person to *undue burden."* Fed. R. Civ. P. 45(d)(3)(A) (emphases added). "[T]he burden for showing that a subpoena must be quashed under Rule 45([d])(3) is at all times on the movant." *Ohio Valley Envtl. Coal., Inc. v. U.S. Army Corps of Eng'rs,* No. 1 :11MC35, 2012 WL 112325, at *2 (N.D.W. Va. Jan. 12, 2012); *see Sheet Metal Workers Int'l Ass'n* v. *Sweeney,* 29 F.3d 120, 125 (4th Cir. 1994).

"A party may seek to quash or modify a subpoena on grounds of irrelevance or overbreadth, even though irrelevance and overbreadth are not explicitly listed as grounds to quash in Rule 26(c)(1) or Rule 45([d])(1), because either irrelevance or overbreadth necessarily establishes undue burden." *In re Subpoenas for Documents Issued to ThompsonMcMullan, P.C.*, No. 3:16-MC-1, 2016 WL 1071016, at *5 (E.D. Va. 17, 2016). This principle flows from the interaction of Rule 26(c)(1) and Rule 45(d)(1) with Rule 26(b)(1). *Id* "[T]he scope of discovery allowed under a subpoena is the same as the scope of discovery allowed under Rule 26." *Singletary* v. *Sterling,* 289 F.R.D. 237, 240-41 (E.D. Va. 2012) (citing *Cook* v. *Howard,* 484 F. App'x 805,812 (4th Cir. 2012); *Barrington* v. *Mortage IT, Inc.,* No. 07-61304-CIV 2007 WL 4370647, at *3 (S.D. Fla. Dec. 10, 2007)). "Despite the additional proportionality consideration required under the amendment to Rule 26, ... 'the [2015 amendment] does not place on the party seeking discovery the burden of addressing all proportionality

considerations.'" *Brown* v. *Mountainview Cutters, LLC,* No. 7:15cv204, 2016 WL 3045349, at *3 (W.D. Va. May 27, 2016) (alteration in original) (quoting Fed. R. Civ. P. 26 advisory committee's note to 2015 amendment).

Rule 26(b) limits the scope of discovery to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case," Fed. R. Civ. P. 26(b)(1), and Rule 45(d)(1) requires that a party seeking discovery through the use of a subpoena "must take reasonable steps to avoid imposing undue burden or expense on a person subjected to the subpoena." Fed. R. Civ. P. 45(d)(1). Thus,

> any subpoena that seeks evidence that is neither relevant ... or that is so overbroad that compliance with its demands will necessarily require production of irrelevant evidence, seeks evidence outside the scope of Rule 26(b)(1). Such a subpoena creates an undue burden because it necessarily imposes greater hardship than is necessary to obtain proper discovery.

In re Subpoenas for Documents Issued to ThompsonMcMullan, P.C., 2016 WL 1071016, at *5. In order to avoid imposing an undue burden, third-party subpoenas, like the one before the Court, "must be narrowly crafted to relevant subject matter in the underlying litigation." *Id.* at *6 n.6 (citing *Theofel v. Farey-Jones,* 359 F.3d 1066, 1071-72 (9th Cir. 2004); *In*

re Subpoena Duces Teucm to AOL, LLC, 550 F. Supp. 2d 606, 612 (E.D. Va. 2008)).

Therefore, in assessing whether a subpoena imposes an undue burden

> [c]ourts should balance the need for discovery against the burden imposed on the person ordered to produce documents. Non-party status is one of the factors the court uses in weighing the burden of imposing discovery. An undue burden is identified by looking at factors such as relevance, the need for the documents, the breadth of the document request, the time period covered by such request, the particularity with which the documents are described, and the burden imposed.

Wyoming v. US. Dep't of Agric., 208 F.R.D. 449, 452-53 (D.D.C. 2002) (citations omitted).

Critically, as discussed more fully below, disclosures pursuant to a subpoena that impede a state's ability to carry out executions constitute an undue burden. *See Ohio Execution Protocol Litigation,* 845 F.3d 231, 238-39 (6th Cir. 2016); *In re Mo. Dep't Corr.,* 839 F.3d 732, 737 (8th Cir. 2016).

B. Eighth Amendment Principles in Method of Execution Claims

In the most recent method-of-execution challenge the Supreme Court of the United States has evaluated, a majority of the Court upheld the denial of a preliminary injunction as to whether Oklahoma's three-drug protocol using midazolam violated the Eighth Amendment. *Glossip v. Gross,* 135 S. Ct. 2726, 2736-46 (2015). In *Glossip,* the Supreme Court reiterated an earlier finding that "because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" *Id* at 2732-33 (quoting *Baze v. Rees,* 553 U.S. 35, 47 (2008)). While the dissent in *Glossip* challenged this "flawed syllogism,"[12] *id* at 2795, the Court majority plainly

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[12] In *Glossip,* the dissent commented that, if only a barbarous method of execution remained, it "would not become less [barbarous] because it is the only method available to the state." 135 S. Ct. 2726, 2795 (Sotomayor, J., dissenting). Thus, the dissent suggests this syllogism could ring false if a state has available only barbarous methods of execution. A majority of the Supreme Court has been unwilling to adopt the dissent's reasoning.

But the observation speaks to the *sub rosa* dispute underlying many method-of-execution claims. Success in identifying the source of lethal injection has, in addition to allowing testing for unnecessary infliction of pain, resulted in pressure on pharmacies or laboratories to cease supplying the drug used in lethal injection. *Glossip,* 135 S. Ct. at 2733 (discussing sodium thiopental and pentobarbital); *see Zink v. Lombardi,* 783 F.3d 1089, 1106 (8th Cir.) (citing allegation in complaint saying that confidentiality improperly prevented plaintiffs from "censuring or boycotting" suppliers of drugs or their agents), *cert denied,* 135 S. Ct. 2941 (2015). When those censuring efforts have succeeded, states have established a new

confirmed its earlier observations in *Baze* that because "[s]ome risk of pain is inherent in any method of execution," the Eighth Amendment "does not require the avoidance of all risk of pain" in carrying out executions, *Baze,* 553 U.S. at 47. More specifically, the Court in *Baze* defined the contours of the Eighth Amendment by stating that "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, [it] does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Id.* at 50. "[P]risoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is *'sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers.'" *Glossip,* 135 S. Ct. at 2737 (quoting *Baze,* 553 U.S. at 50). "[T]he condemned prisoner [must] establish[] that the State's lethal injection protocol creates a demonstrated risk of severe pain." *Id.* (quoting *Baze,* 553 U.S. at 61).

Despite the *Glossip* dissent's contention that no second requirement need be established, this Court must apply what the majority in *Glossip* unmistakably articulated as a second necessary showing an inmate must make: the inmate must also show that "the risk is substantial when compared to the known and available alternatives." *Id* (quoting *Baze,* 553 U.S. at

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drug protocol based on substituted, and still available, drugs. The question then becomes whether the new drug or drug protocol passes constitutional muster, and how deeply a challenge against it may delve.

61).[13] This second prong requires the condemned inmate to suggest an alternative method of execution that is "known and available" as well as "feasible, readily implemented, and in fact significantly [likely to] reduce a substantial risk of severe pain." *Id* (quoting *Baze,* 553 U.S. at 61, 52). The burden rests with the plaintiff to "plead and prove" both prongs of the test. *Id.* at 2739; *see Brooks v. Warden, Comm'r Ala. Dep't of Corr.,* 810 F.3d 812,819 (11th Cir. 2016) (citation omitted), *cert. denied,* 136 S. Ct. 979 (2016).

To undertake a proper analysis under *Glossip,* this Court must evaluate whether Plaintiffs, who challenge Mississippi's three-drug protocol, are entitled to discover information beyond that already provided by the VDOC as to its own three-drug protocol. In order to conclude that Plaintiffs should receive further information, the Court must find that any additional information would be relevant to the Mississippi Amended Complaint, and that production would not unduly burden the VDOC, a third-party entity. Thus, the Court must provide some background regarding the use of lethal injection in Virginia, Plaintiffs' claims in Mississippi, and how the two interrelate. Only with that backdrop can the Court assess whether the motion to quash should be granted.

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[13] The dissent in *Glossip* argued, "[n]owhere did the plurality [in *Baze]* suggest that all challenges to a State's method of execution would require this sort of comparative-risk analysis." 135 S. Ct. at 2794. The dissent's attempt to constrain the finding in *Baze* to its factual and legal posture did not prevail.

III. Factual and Procedural Principles Regarding the Motion to Quash

A. Lethal Injection in Virginia

"As an alternative to execution by electric chair, Virginia adopted lethal injection on January 1, 1995." *Gray v. McAuliffe,* No. 3:16CV982-HEH, 2017 WL 102970, at *6 (E.D. Va. Jan. 10, 2017). Since then, Virginia has efficaciously "executed [over] 80 inmates by lethal injection." *Id.* Like Mississippi, "Virginia employs a three-drug protocol to perform an execution by lethal injection." *Id.* The first drug in Virginia's protocol "renders the condemned inmate unconscious." *Id.*

Earlier this year, Ricky Javon Gray challenged, via preliminary injunction, the VDOC's proposal to carry out his execution by the proposed use of compounded midazolam to render him insensate. *Id.* at *1. "Gray argue[d] that the VDOC' s planned use of compounded drugs, including compounded midazolam, carrie[d] a demonstrated risk of inflicting severe pain upon him." *Id.* at *4 (citation omitted). The *Gray* Court conducted an evidentiary hearing at which "A. David Robinson, the Chief of Corrections Operations for the VDOC, recounted the difficulty encountered by the VDOC in acquiring lethal injection drugs. He also explained the methodology the VDOC has employed for monitoring and controlling the potency of the compounded drugs at issue." *Id.* at *6 (citation

omitted).[14]

Ultimately, the *Gray* Court concluded that Gray "fail[ed] to make any showing, much less a clear showing, that midazolam poses 'an objectively intolerable risk of harm.'" *Id.* at *12 (quoting *Glossip,* 135 S. Ct. at 2737). The Court further concluded that the evidence "establishe[d] that the administration of 500 mg of midazolam can render a prisoner unconscious and insensate to pain during the remainder of the three-drug protocol. The evidence [also] demonstrate[d] that even 500 mg of midazolam used alone will result in a 'certainty of death.' (Prelim. Inj. Hr'g Tr. 54.)" *Id.* at *13.

The Court further found that Gray had put forth no persuasive "evidence that compounded drugs subject [Gray] to 'a substantial risk of serious harm.'" *Id.* at *15 (quoting *Glossip,* 135 S. Ct. at 2737). In this regard, the Court noted,

> [T]he evidence before the Court reflects that the VDOC selected a licensed pharmacy and a licensed pharmacist to make the compounded drugs. Moreover, the compounded midazolam and potassium chloride have been tested by [a chemist at the Virginia Department of Consolidated Laboratory Services,

[14] This Court has reviewed the entirety of the transcript of the evidentiary hearing, which the VDOC also has supplied to Plaintiffs.

> General Services Division ("VDCL")]. The testing confirms that each bottle contains the substance and concentration that each label reflects and that the substance meets the concentration level of comparable manufactured drugs. The presence of contaminants in the compounded drugs would have been revealed in the VDCL's test results. Compounded drugs are utilized routinely, even in clinical settings, and are just as efficacious as their manufactured counterparts. Gray fails to point to any instance where a state has unsuccessfully used compounded midazolam or compounded potassium chloride in the execution context.

Id. at *14. The *Gray* Court concluded that Gray fell "far short of demonstrating entitlement to a preliminary injunction," denied the motion for a preliminary injunction, and allowed Gray's execution to proceed. *Id.* at *5, *22.

In their Response in Opposition to the Motion to Quash, Plaintiffs suggest that, in the end, Gray's execution was not "without incident." (Resp. Opp'n 2, ECF No. 12.) Plaintiffs quote a newspaper account of Gray's execution that stated, in pertinent part:

> [Gray] was placed on the gurney, and a half-dozen members of the execution team strapped down his limbs

> and torso. At 8:54, a curtain was drawn blocking the view of the witnesses so IV lines could be placed and other procedures conducted.
>
> By 9:14, the curtain was still closed and the Virginia public safety secretary, Brian J. Moran, apparently prompted by questions from one of Gray's lawyers, consulted with a corrections official in the witness room. The curtain was not opened again until 9:27. Gray's lawyer, Elizabeth Peiffer, with the Virginia Capital Representation Resource Center, said following the execution that "I do have great concern ... it was a very unusual amount of time."

(Id.)[15] However, this same newspaper report revealed that, during the 33-minute interval between 8:54 and 9:27, no lethal injection drugs were administered. The delay flowed from difficulty citing intravenous lines or conducting other preliminary procedures, but the remainder of the newspaper article, which Plaintiffs' themselves cite, did not report any untoward "incident" that occurred during the actual injection of

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[15] Plaintiffs' Response in Opposition to the Motion to Quash cites F. Green and A. Rockett, *Executed: Ricky Gray put to death for murders of Harvey Girls,* Richmond Times-Dispatch (Jan. 18, 2017) http://www.richmond.com/news/local/crime/executed-ricky-gray-put-to-death-for-murders-of-harvey/article 5deH312-1142-5cad-88a3-cdela0e068c7.html (last viewed July 8, 2017)).

the lethal chemicals:[16]

> When the curtain was reopened, Gray declined to make a statement and at 9:28, the first of the three chemicals was introduced. Gray lifted his head up, looked around, moved his toes and legs. At 9:29, his eyes were closed. He appeared to take a number of deep breaths and he appeared to make snoring or groaning sounds.[17]

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[16] F. Green and A. Rockett, *Executed: Ricky Gray put to death for murders of Harvey Girls,* Richmond Times-Dispatch (Jan. 18, 2017) http://www.richmond.com/news/local/crime/executed-ricky-gray-put-to-death-for-murders-of-harvey/ article 5delf312-1142-5cad-88a3-cdela0e068c7.html (last viewed June 1, 2017)).

[17] During the evidentiary hearing in *Gray,* Dr. Daniel E. Buffington testified that in addition to rendering an individual insensate, midazolam causes respiratory depression. *Gray v. McAuliffe,* 3:16CV982-HEH, ECF No. 30 (E.D. Va. 2016) ("Gray Transcript"), at 62-63. Gray's deep breaths appear to be consistent with respiratory depression. Dr. Buffington testified:

> [I]f you're going to say that [midazolam] is having one effect, you would expect it to have all the effects. So if you've got a serious profound respiratory depression, you've also got serious sedation and significant anesthetic effects all simultaneous. So, I would not expect the respiratory depression effect to be something the person would be cognizant of.

Id at 63 (spelling corrected).

> At 9:32, an officer checked to make sure Gray was unconscious. At 9:33, all his body movements appeared to have stopped. At 9:41, the physician came out from behind the curtain and used a stethoscope to listen to his chest. He was pronounced dead at 9:42.

Plaintiffs' own source recounts that within five minutes of injecting the first chemical, all of Gray's bodily movements had stopped. And within fourteen minutes Gray was pronounced dead. Plaintiffs fail to plausibly suggest that Virginia's execution utilizing midazolam as the first drug in a three-drug protocol was fraught with the sort of problems admittedly experienced by other states. *Cf. The Estate of Lockett by & through Lockett v. Fallin,* 841 F.3d 1098, 1105-06 (10th Cir. 2016), *cert. denied sub nom. Lockett v. Fallin,* 137 S. Ct. 2298 (2017) (citation omitted) (describing an execution that lasted 43 minutes and where the inmate said, "something's wrong," "buck[ed] and writhe[d]," and "clench[ed] his teeth and grimac[ed] in pain").

B. Plaintiffs' Amended Complaint as It Pertains to the VDOC

1. Mississippi's Three-Drug Protocol Is Similar to that Used by Virginia

The Mississippi Department of Corrections ("Mississippi DOC") intends to execute Plaintiffs using

a three-drug protocol similar to that which Virginia employs. In their September 28, 2015 Amended Complaint filed in the Southern District of Mississippi, Plaintiffs contend that:

> there is a substantial risk that the first drug injected in a three-drug series will not be administered correctly, will not be sufficiently potent, pure, and rapid in onset, and is not chemically capable of rendering the prisoner unconscious and insensate so he does not feel the painful effects of the second and third drugs, [therefore] the execution will cause severe, torturous pain for the prisoner, in violation of the Eighth and Fourteenth Amendments.

(Am. Compl. ¶ 55, ECF 2-1.) Plaintiffs assert that no need exists to use the second and third drugs and that "[e]xecutions may be carried out through the use of a single-drug anesthetic-only injection, a protocol now used in most executions nationwide and which has proven effective in executing over one hundred (100) prisoners to date." (*Id.* ¶ 66.)

Plaintiffs do not challenge the "entirety of the lethal injection protocol promulgated by [the Mississippi DOC]." *(Id.* ¶ 6.) Instead, Plaintiffs insist they challenge only:

> the use of compounded drugs (including but not limited to compounded

> pentobarbital) and midazolam in lethal injection executions conducted by [the Mississippi DOC]. Further this civil action specifically challenges the use of a three-drug lethal injection procedure. Lastly, this civil action challenges [the Mississippi DOC's] intent to have the raw ingredients for pentobarbital compounded into an injectable solution on the grounds of the ... [p]enitentiary . . . where there is no pharmacy suitable for compounding sterile drugs.

(Id.) Plaintiffs contend:

> there is a high risk that either: (a) the Defendants intend to use a degraded form of compounded pentobarbital for the execution[s] of the Plaintiffs; (b) the Defendants have obtained only the raw ingredients for pentobarbital and intend to compound the pentobarbital at the Mississippi State Penitentiary [where no licensed pharmacy exists]; or (c) the Defendants have devised some other unknown and heretofore untested method of making pentobarbital.

(Id. ¶ 155.)

Furthermore, in July of 2015, the Mississippi DOC's execution protocol changed to permit the "use of midazolam in executions by [the Mississippi DOC]

where a sufficient quantity of pentobarbital is unavailable. Defendants have stated that [the Mississippi DOC] is unable to obtain pentobarbital in any form. However, other state departments of corrections continue to obtain and utilize compounded pentobarbital in lethal injection executions." *(Id.* ¶¶ 185-87 (paragraph numbers omitted).) Unable to obtain pentobarbital, the Mississippi DOC has "purchased midazolam to be used as the first drug in the three-drug series." *(Id.* ¶ 203.) Plaintiffs insist midazolam "cannot be relied upon to render a person anesthetized and insensate to pain." *(Id.* ¶ 201.)[18]

Plaintiffs also argue that the "Mississippi protocol does not provide for any procedural safeguards which have been added to the revised lethal injection protocols of other jurisdictions in an effort to reduce the ... harm that can result from failures in the administration of lethal injection drugs." *(Id.* ¶ 210.)

Plaintiffs contend there exists "a feasible

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[18] The Court notes that Torrey Twane McNabb, who was "scheduled to be executed by the State of Alabama on October 19, 2017, by a three-drug lethal injection protocol, with midazolam as the first drug administered," sought a stay challenging this method of execution. *Grayson v. Dunn,* No. 2:12-CV-0316-WKW, 2017 WL 4638594, at *1 (M.D. Ala. Oct. 16, 2017), *vacated sub nom. Dunn v. McNabb,* No. 17 A440, 2017 WL 4698311 (U.S. Oct. 19, 2017). On October 16, 2017, the United States District Court for the Middle District of Alabama granted McNabb's motion to stay his execution. *Id.* at *5. On October 19, 2017, the Supreme Court vacated the stay. *McNabb,* 2017 WL 4698311, at*1.

alternative which could substantially reduce the risk of severe pain and serious harm presented by the continuous intravenous administration of compounded pentobarbital in combination with a chemical paralytic agent and potassium chloride." *(Id.* ¶ 1223.) That alternative requires "[t]he use of an FDA-approved, ultra short-acting barbiturate in a single-drug protocol .... " *(Id.* ¶ 1224.) Alternatively, if a noncompounded, FDA approved barbiturate such as pentobarbital is "not legally available, and only in that event," the use of a compounded barbiturate "used in a single-drug anesthetic-only protocol (without a paralytic agent or potassium chloride), is a feasible and available alternative which would significantly reduce the substantial risk of severe pain presented by Mississippi's current procedure." *(Id.* ¶ 226.)

2. VDOC Properly Challenges Whether the Subpoena Seeks Information that Could Support or be Relevant to any Claim About an Alternative Method of Execution that Likely Could Significantly Reduce a Substantial Risk of Severe Pain

At base, much of the information Plaintiffs seek from the VDOC appears to be irrelevant to the claims they raise in Mississippi. Such a finding would render any further production unduly burdensome. *In re Subpoenas for Documents Issued to ThompsonMcMullan, P.C.*, No. 3:16--MC-1, 2016 WL 1071016, at *5 (E.D. Va. Mar. 17, 2016). First, because Virginia's current lethal injection protocol is similar to

Mississippi's contemplated protocol criticized by Plaintiffs, it becomes hard to fathom how additional information from the VDOC would *support* Plaintiffs' claim that Mississippi is ignoring a "known and available alternative[]" method of execution that is "significantly [likely to] reduce a substantial risk of severe pain," *Glossip,* 135 S. Ct. at 2737 (quoting *Baze,* 553 U.S. at 61),[19] or how any additional response could be "relevant to [that] claim," Fed. R. Civ. P. 26(b)(1). Both states contemplate using midazolam as the first drug.[20] Indeed, the VDOCs production to date likely includes much of the relevant responsive information Plaintiffs are due under the rules.

Second, to the extent Plaintiffs seek information about an alternative method, the VDOC readily

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[19] Plaintiffs contend that the "Mississippi protocol does not provide for any procedural safeguards which have been added to the revised lethal injection protocols of other jurisdictions in an effort to reduce the ... harm that can result from failures in the administration of lethal injection drugs." (Am. Compl. ¶ 210.) The Court describes in detail, *see infra* Parts IV.A-IV.D, that the VDOC already has provided Plaintiffs with a significant amount of information relevant to this allegation, including the VDOC Execution Manual and extensive testimony regarding how the lethal injection drugs are stored and tested.

[20] Plaintiffs' attempt to ascertain the GDOC's *pentobarbital* supplier was relevant to Plaintiffs' claim that pentobarbital is a better alternative than midazolam, and is readily available to the Mississippi DOC for use in their executions. *Ga. Dep't Corr. v. Jordan,* 1: 16-cv-02582- RWS-JCF, at 3 (N.D. Ga. Oct. 20, 2016) (ECF No. 12-9). The same cannot be said of Plaintiffs' attempt to ascertain the VDOC's *midazolam* supplier for executions.

provided Plaintiffs with transcripts from evidentiary hearings in which Arnold David Robinson, the Chief of Corrections Operations for the VDOC, testified that the VDOC has been unable to obtain pentobarbital in recent years. *Prieto v. Clarke,* 3:15CV587-HEH, ECF No. 27 (E.D. Va. 2015) and *Gray v. McAuliffe,* 3:16CV982-HEH, ECF No. 30 (E.D. Va. 2016). Those transcripts include extensive testimony from Robinson regarding the VDOC's efforts to obtain pentobarbital, midazolam and other lethal injection drugs. (Prieto Tr. 64-78; Gray Tr. 91-96, 98-99, 104-05.)

Third, because VDOC has efficaciously utilized a three-drug protocol employing compounded midazolam as the initial drug, the VDOC would not appear to be a source of relevant information to support Plaintiffs' claim that Mississippi's similar proposed method of execution "presents a risk that is *sure or very likely* to cause serious illness and needless suffering, and give rise to sufficiently *imminent* dangers." *Glossip,* 135 S. Ct. at 2737 (internal quotation marks omitted) (quoting *Baze,* 553 U.S. at 50).

These three observations, the significant information the VDOC already has provided to Plaintiffs, and the Plaintiffs' own failure to reveal what information they have obtained in discovery from the Mississippi DOC in the underlying litigation, all cut against Plaintiffs' need for the additional discovery sought from the VDOC. *See Wyoming v. U.S. Dep't of Agric.,* 208 F.R.D. 449,452 (D.D.C. 2002) (citations omitted) (explaining that in assessing undue burden,

courts consider non-party status and "the need for discovery against the burden imposed on the person ordered to produce documents"). Plaintiffs have been particularly opaque as to why the VDOC, a non-party to the underlying action, is a better source of information than the Mississippi DOC. These circumstances taken together tend to undercut any claim by Plaintiffs that they need the additional discovery sought. Instead, the record indicates that requiring the VDOC to provide additional material would pose an undue burden. The Court will not draw such a conclusion definitively, however, without considering the subpoena and any response to it in detail. That evaluation follows.

IV. Plaintiffs' Notice of Deposition, Subpoena Duces Tecum, and the VDOC's Response

Plaintiffs' Notice of Deposition of a Nonparty Organization (Notice Dep. 2-8, ECF 2-2) requires the VDOC to designate one or more persons to testify as to a variety of topics, the specifics of which are described below. *See infra* Parts IV.A-IV.D. Plaintiffs also request that the following documents, from 2010 to the present,[21] be produced:

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[21] For document requests 1-5, 6, and 8-13 and many of their deposition topics, Plaintiffs demanded information dating back to 2010. As explained below, the VDOC readily supplied pertinent information when it was available and would not pose an undue burden. *See infra* Parts IV.A-IV.B. However, as explained more fully below, *see infra* Part IV.C, requiring the VDOC to supply materials beyond the time period covered by the current response would pose an undue burden.

1) All documents related to attempts to secure or purchase pentobarbital for use in executions in Virginia;

2) All documents related to attempts of any kind to secure or purchase midazolam for use in executions in Virginia;

3) All drug labels and package inserts for any drug purchased or obtained by the VDOC for use in lethal injection executions;

4) The VDOC'S Lethal Injection Protocols and Lethal Injection Procedures in force;

5) All documents related to the process by which the VDOC decided to use a three-drug series including the use of midazolam as the method of lethal injection executions in Virginia;

6) All documents related to the VDOC's potential use of any drug compounded from API for use in lethal injection executions;

7) All documents related to the process by which the VDOC determined that midazolam would be used in lethal injection executions in Virginia;

8) All documents related to and/or evincing any training attended by the VDOC' s officers, employees, agents, or attorneys related to the conduct of executions by lethal injection;

9) All documents related to the supply or inventory of drugs purchased, procured, held or stored, by the VDOC for use in lethal injection executions, including all logs or inventory lists maintained by the VDOC with respect to such drugs;

10) All chronological logs or other documents which disclose the timing of the administration of lethal injection drugs in all executions in Virginia;

11) All documents which describe or evince the actual process of each of the lethal injection executions in Virginia;

12) All studies which constitute, describe or evince any evaluations or other examinations into any problems encountered in any lethal injection executions in Virginia; and,

13) All communications between the VDOC or any employee of, or attorney for, the VDOC, with any employee of, or attorney for, the corrections department or attorney general's office of any other jurisdiction, including but not limited to Mississippi or Texas, related to the selection, purchase, or exchange of drugs for purposes of lethal injection executions.

(Id Ex. A, at 2-4.)

Within six days of being served with the subpoena duces tecum, the VDOC sent thirteen documents to Plaintiffs that were responsive to all but two of Plaintiffs' thirteen document production topics,

and all but seven of Plaintiffs' sixteen deposition notice topics. As described in Parts IV.A through IV.D, the VDOC provided information responsive to the Plaintiffs' requests when doing so would not jeopardize its ability to carry out executions.[22] Nevertheless, the majority of the topics for the deposition and the documents requested by Plaintiffs seek information that could reveal the supplier of Virginia's lethal injection chemicals or the individuals involved in carrying out Virginia's executions. *(See, e.g.,* Notice of Dep., Topics 1-8, 9(c), 12; *Id.* Ex. A, Documents to be Produced 1-2, 5-8.) For the reasons articulated below, the Court concludes that it would pose an undue burden on the VDOC to provide these additional materials.

A. Materials Responsive to Notice of Deposition Topics 1 through 5 and

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[22] Specifically, the VDOC provided Plaintiffs with: the "Laboratory Report, Pentobarbital *(Prieto v. Clarke,* ECF No. 12-1)"; "Affidavit of D. Ricks *(Arthur v. Dunn);* roughly 300 pages of testimony from the Prieto Transcript and the Gray Transcript; "Certificate of Analysis, January 2017"; "Label, Potassium Chloride *(Gray v. McAuliffe,* ECF 21-08)"; "Label, Midazolam *(Gray v. McAuliffe,* ECF No. 21-07)"; "Certificate of Analysis, items submitted December 2016 *(Gray v. McAuliffe,* ECF 21-06)"; "Certificate of Analysis, items submitted October 2016 *(Gray v. McAuliffe,* ECF 21-05)"; "Label, Potassium Chloride *(Gray v. McAullife,* ECF 21-04)"; "Label, Midazolam *(Gray v. McAullife,* ECF 21-03)"; "Memorandum of Understanding with Compounding Pharmacy (redacted) *(Gray v. McAuliffe,* ECF 21-02)"; and "VDOC Operating Procedure 406, Execution Manual (redacted) *Gray v. McAuliffe,* ECF 21- 01). " (Mem. Supp. Mot. Quash Ex. 3, at 2, ECF No. 2-3.)

Document Requests 1 through 2

In the first five topics in the Notice of Deposition and the first two classes of documents requested to be produced, Plaintiffs request information pertaining to the VDOC's efforts to obtain lethal injection drugs, including pentobarbital and midazolam from 2010 until the present. (Notice Dep. Topics 1-5.) In response, the VDOC provided Plaintiffs with, *inter alia,* the transcripts of the evidentiary hearings from *Prieto v. Clarke,* 3:15CV587-HEH, ECF No. 27 (E.D. Va. 2015) and *Gray v. McAuliffe,* 3:16CV982-HEH, ECF No. 30 (E.D. Va. 2016). In those transcripts, Arnold David Robinson, the Chief of Corrections Operations for the VDOC, provided extensive testimony regarding the VDOC's efforts to obtain sodium thiopental, pentobarbital, midazolam and other lethal injection drugs. (Prieto Tr. 64-78; Gray Tr. 91-96, 98-99, 104-05.) Robinson testified that the VDOC initially used sodium thiopental and switched to pentobarbital when it could no longer obtain sodium thiopental. (Gray Tr. 91.) The VDOC then switched to midazolam when it could not obtain pentobarbital. (Gray Tr. 91). Robinson's testimony covered the VDOC's efforts to obtain lethal injection drugs from 2010 until the present. *(See* Am. Compl. ¶ 278; Prieto Tr. 65.) Furthermore, with respect to Plaintiffs' attempt to gain information to support their assertion that the Mississippi DOC should use pentobarbital in their executions, the evidence reflects that the VDOC is not a viable source for that information. Specifically the VDOC has provided a transcript of sworn testimony making plain that it "does not have pentobarbital,"

and, as evidenced through the documents disclosed, has not "for several years." (Reply 1; Prieto Tr. 64-78; Gray Tr. 91-96.)

B. Materials Responsive to Notice of Deposition Topics 6 and 7

In Notice of Deposition Topics 6 and 7, Plaintiffs seek, *inter alia:*

> **Topic No. 6:** The process, if any, by which sodium pentobarbital [Active Pharmaceutical Ingredient ("API")] has been compounded into injectable pentobarbital for use in lethal injection executions by the Department between 2010 and the present. This topic includes, but is not limited to:
>
> (a) The individual, corporation, or other entity with which the Department is, or has in the past, compounded sodium pentobarbital API into injectable pentobarbital for use in lethal injection executions.[23]
>
> (b) Any contracts or other agreements between the Department and any officer, agent, employee or representative of the compounding

[23] This "individual, corporation or other entity" shall be referred to below as "the compounding pharmacy."

pharmacy.
...

Topic No. 7: The process, if any, by which API has been compounded into any drug other than pentobarbital (including, but not limited to, midazolam) for use in lethal injection executions by the Department between 2010 and the present. This topic includes, but is not limited to:

(a) The individual, corporation, or other entity with which the Department is, or has in the past, compounded API into any drug other than pentobarbital (including, but not limited to, midazolam) for use in lethal injection executions.[24]

(b) Any contracts or other agreements between the Department and any officer, agent, employee or representative of the compounding pharmacy.

(c) Any communications, whether oral or written, whether on paper or electronically or digitally transmitted, between the Department and any officer, agent, employee or representative of the

[24] This "individual, corporation or other entity" shall be referred to below as "the compounding pharmacy."

compounding pharmacy.

(Notice Dep. 5, 6.) The VDOC declined to provide Plaintiffs with information directly responsive to the above requests because doing so could reveal the identity of the pharmacy that was providing it with lethal injection drugs. However, under each of these topics, Plaintiffs also pursued information about procedures for testing compounded pentobarbital or compounded midazolam, *(id.* at 5-6, Topics 6(d), 7(d)).

The VDOC only used compounded midazolam in Mr. Gray's execution in 2017. The VDOC only used compounded pentobarbital, provided by Texas, in Mr. Prieto's execution in 2015. Thus, no evidence about the testing of compounded substances exists prior to 2015. With respect to the compounded pentobarbital, Robinson's testimony reflected that the VDOC did not independently test the compounded pentobarbital, but that Texas tested the drug and the VDOC obtained from Texas "a certificate that verified the validity of the drug." (Prieto Tr. 69, 73.)

With respect to the testing of compounded midazolam, the VDOC provided the testimony of Dr. Frank Fuller, III, the pharmacist for the VDOC, and Shane Wyatt, the lead scientist for Virginia's Division of Consolidated Laboratory Services. (Gray Tr. 129-47; 156-69.) Mr. Wyatt testified extensively about the exacting testing performed on the drugs for the Gray execution to assure their purity and potency. (Gray Tr. 159-69.) Dr. Fuller confirmed that the results of the testing reflected that the concentrations of the drugs

were "consistent with what you would see in their commercially available counterparts." (Gray Tr. 136.)

C. Materials Responsive to Notice of Deposition Topics 8 thorough 10 and Document Requests 3, 4, 5, 6, 7, 10 and 11

In Notice of Deposition Topics 8, 9, and 10, Plaintiffs seek information about:

> **Topic No. 8:** The storage of lethal injection drugs by the Department from 2010 to the present. This includes, but is not limited to:
>
> (a) All policies, written procedures, or other protocols governing the storage of the drugs which are intended for use in lethal injection executions.
>
> (b) The actual practice of the Department with respect to the storage of the drugs which are intended by the Department to be used in lethal injection executions.
>
> (c) The name, address, electronic mail address, and business telephone number of all persons, whether individual or corporate or other entity, responsible for the storage of the drugs which are intended by the Department to

be used in lethal injection executions.

Topic No. 9: The procedures used by the Department from 2010 to the present to execute a convicted offender by means of lethal injection. This topic includes, but is not limited to:

(a) The documents which set forth the identity, dosage, and order of the drugs used in the lethal injection execution.

(b) The documents which set forth the logistical steps taken by the department and its officers, agents, employees and/or attorneys in the days leading up to an execution.

(c) The documents which record the events during the process of a lethal injection execution, including but not limited to execution logs, autopsies, and other materials.

(d) The actual practice of the Department in the execution of convicted offenders by means of lethal injection.

Topic No. 10: The process, if any, by which the Department determined that midazolam (either purchased in injectable form or API purchased for

> compounding into injectable form) would be used in lethal injection executions in Virginia.

(Notice of Dep. 6-7.) The VDOC provided a significant amount of information pertinent to the above topics. In response to Topics 8(a) and 8(b), the VDOC provided Plaintiffs with, *inter alia,* Robinson's testimony as to how Virginia obtained and stored the drugs utilized in Prieto' s execution. (Prieto Tr. 67-74.) Additionally, the VDOC provided Dr. Fuller's extensive testimony regarding how the VDOC stored the lethal injection chemicals for Gray's execution. (Gray Tr. 129-43.) This testimony covers the last two years and provides a clear picture of the VDOC's current practices, but it did not address the period between 2010 and 2014 as identified in the deposition notice. Nevertheless, given the amount of information produced and the VDOC's third-party status, information for the 2010 to 2014 period appears irrelevant and unduly burdensome. *See In re Subpoenas for Documents Issued to ThompsonMcMullan, P.C.*, No. 3:16-MC-1, 2016 WL 1071016, at *6 n.6 (E.D. Va. Mar. 17, 2016) (citations omitted) (emphasizing that in order to avoid imposing an undue burden, third-party subpoenas "must be narrowly crafted to relevant subject matter in the underlying litigation"). Moreover, Plaintiffs fail to suggest how information about the VDOC's storage of sodium thiopental and noncompounded pentobarbital during the 2010 to 2014 period would advance their claim.

In response to Topic 8(c), however, the VDOC

did not identify the corporate entity or individual responsible for storage of lethal injection drugs. As discussed below, this Court finds that disclosure of this information poses an undue burden. With respect to Topic 9 and Document Requests 3, 4, 10, and 11, the VDOC provided Plaintiffs with the VDOC Execution Manual, the laboratory report for the pentobarbital used in Prieto's execution, (ECF No. 2-3, at 2), the labels of drugs and certificates of analysis of the drugs utilized in the Gray execution *(id.),* and testimony regarding the events that occur before and during an execution. (Prieto Tr. 73-74; Gray Tr. 88-90.)[25] The

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[25] Plaintiffs request "[a]ll drug labels and package inserts for any drug purchased or obtained by the Department, from 2010 to the present, for use in lethal injection executions." (Notice of Dep. Ex. A, at 15 (as paginated by CM/ECF).) The VDOC provided labels of the drugs used in the most recent execution of Ricky Gray, which involved compounded midazolam. Labels and inserts for drugs the VDOC used before then, which by all accounts the VDOC cannot obtain, *see Gray,* 2017 WL 102970, at *7, are not relevant to Plaintiffs' claim. Plaintiffs' demand for such material poses "an undue burden because it necessarily imposes greater hardship than is necessary to obtain proper discovery." *In re Subpoenas for Documents Issued to ThompsonMcMullan, P.C.*, 2016 WL 1071016, at *5.

The Court also notes that the VDOC did not list *(see* ECF No. 2-3, at 2) any document responsive to Document Request 6: "All documents related to the Department's potential use of any drug (including, but not limited to, pentobarbital or midazolam) compounded from API for use in lethal injection executions from 2010 to the present .... " (Notice Dep. Ex. A 2.) Although not entirely clear, the record suggests that the lack of documents flows from the fact that the VDOC has no documents responsive to this request. Plaintiffs contend that the Mississippi DOC

Execution Manual is eighteen (18) single-spaced pages long and bears an effective date of June 30, 2016. (ECF No. 21-1, at 1.) Attached to the Execution Manual are an additional twenty-six (26) pages of forms and checklists, with revision dates from October 1, 2010 *(see Gray v. McAuliffe,* 3:16cv982-HEH, ECF No. 21-1, at 30) to February 14, 2014 *(see* ECF No. 19, at 1). These documents provide further details regarding the VDOC's execution procedures from 2010 until 2016. Requiring the VDOC to provide additional information about past procedures for executions would pose an undue burden given the amount of information already provided and the marginal possible relevance to Plaintiffs' claims. This conclusion applies with equal force to requiring the VDOC to respond further to Notice of Deposition Topics 12 through 16 and Document Requests 8 and 9 discussed below.

Additionally, in response to Document Requests 5 and 7 and Topic 10, the VDOC provided Plaintiffs with Robinson's testimony recounting why the VDOC incorporated midazolam into its lethal injection protocol. (Gray Tr. 91-99, 104-05.)

D. Notice of Deposition Topics 11 through 16 and Document Requests 8 and 9

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intends "to have the raw ingredients [i.e., API] for pentobarbital compounded into an injectable solution" on the prison grounds. (Am. Compl. ¶ 6.) But the VDOC does not follow such a practice. Rather, the record reflects that the lethal injection drugs are delivered to the VDOC already compounded into an injectable solution. (Gray Tr. 131-34.)

In Notice of Deposition Topics 11 through 16, Plaintiffs seek:

> **Topic No. 11:** The process, if any, by which the Department rejected the use of a single-drug protocol for lethal injection executions in Virginia.
>
> **Topic No. 12:** The training mandated by the Department from 2010 to the present for officers, employees, agents or attorneys with respect to the conduct of executions by lethal injection. This topic includes, but is not limited to:
>
> (a) The professional and/or educational certifications required for employees within the Department to participate in any specific role in lethal injection executions.
>
> (b) The documents provided to the Department's officers, employees, agents or attorneys during or as a result of any such training.
>
> (c) The syllabi, training description, or schedule of any such training.
>
> **Topic No. 13:** From 2010 to the present, the supply or inventory of drugs purchased, procured, held or stored, by

the Department for use in lethal injection executions, including the documents, logs or inventory lists maintained by the Department with respect to such drugs.

Topic No. 14: The actual process of lethal injection executions in Virginia, including the chronology of the administration of lethal injection drugs and the use of any method for monitoring the consciousness of the condemned prisoner, in all executions from January 1, 2010 to the present.

Topic No. 15: Any studies, evaluations or other examinations into any problems encountered in any lethal injection executions in Virginia from January 1, 2010 to the present.

Topic No. 16: Any communication between the Department and any officer, agent, employee, or attorney: for the Mississippi Department of Corrections or the Mississippi Attorney General's Office regarding lethal injection executions. This topic includes, but is not limited to:

(a) The contents of any telephone or in-person conversation between any officer agent or employee of the Department with any officer, agent or attorney of or for the Mississippi

> Department of Corrections or the Mississippi Attorney General's Office.
>
> (b) The contents of any written communication, whether invoice, letter, electronic mail, text message or other form of written communication between any officer agent or employee of the Department with any officer, agent or attorney of or for the Mississippi Department of Corrections or the Mississippi Attorney General's Office.
>
> (c) The current location of any documents evincing any communication between any officer agent or employee of the Department with any officer, agent or attorney of or for the Mississippi Department of Corrections or the Mississippi Attorney General's Office.

(Not. Deposition 7-8.)

Although the VDOC did not identify any materials responsive to Topic 11, the record contains nothing to suggest that the VDOC ever contemplated utilizing a single-drug execution protocol.[26] For more than a decade Virginia has employed a three-drug protocol in its executions. *See Reid v. Johnson,* 333 F. Supp. 2d 543, 546-47 (E.D. Va. 2004). Moreover,

[26] The VDOC did not indicate that it was withholding documents pertinent to this request on grounds of privilege.

according to Plaintiffs' Amended Complaint, the states that currently employ a single-drug protocol utilize pentobarbital. (Am. Compl. 1278.) But the VDOC has not been able to obtain pentobarbital for roughly the last two years.[27] (Gray Tr. 91.)

Nevertheless, the VDOC turned over substantial material relative to the remaining topics. With respect to Topic 12 and Document Request 8, the VDOC provided Plaintiffs with the description of training for the execution team outlined in the VDOC Execution Manual and Robinson's testimony describing the execution team training. (Gray Tr. 88-90.) Many of the materials previously described were responsive to Topics 13 and 14 and Document Request 9, including the labels for drugs utilized in recent executions and the transcripts of the Gray and Prieto evidentiary hearings. (ECF No. 2-3, at 2.)

The VDOC gave Plaintiffs information relevant to Document Request 13, in which Plaintiffs sought all documents pertaining to communications from the VDOC to any employee of the corrections department or attorney general's office of any other jurisdiction related to the selection, purchase, or exchange of drugs for lethal injection executions. Specifically, the VDOC supplied Plaintiffs with Robinson's testimony

[27] Robinson testified that the VDOC authorized the use of midazolam in 2014 because it could not locate a commercial supplier of pentobarbital. (Gray Tr. 91-92.) The VDOC was able to obtain pentobarbital for Mr. Prieto's 2015 execution only because Texas agreed to provide the VDOC with compounded pentobarbital. (Gray Tr. 92.)

regarding his communications with Texas, Florida, and Alabama officials about lethal injection drugs. (Prieto Tr. 66-73, 75-78; Gray Tr. 92, 98, 104-05.) Finally, with respect to Topic 15 and Document Request 12, requesting any studies related to any problems encountered in lethal injection executions in Virginia from 2010 to the present, the VDOC offered Plaintiffs Robinson's testimony stating that he had witnessed thirteen executions, (Gray Tr. 88), that the VDOC had not "ever had an issue with IV line placement in our executions by lethal injections,"[28] (Gray Tr. 90), and that there were no problems in executing Prieto with compounded pentobarbital, (Gray Tr. 93).

The VDOC did not provide any materials responsive to Topic 16 regarding communications between VDOC officials and officials with the Mississippi DOC. The record does not establish whether that omission is attributable to the fact that no relevant communications exist, to the probability that such communications may unveil the VDOC's supplier of the lethal injections chemicals, or to something else. Under any scenario, however, the Mississippi DOC remains a party to underlying litigation, meaning that Plaintiffs should obtain such information, if discoverable, directly from the

[28] As discussed above, Mr. Gray's execution was slightly delayed while VDOC cited the IV lines. Ultimately, however, before the administration of the lethal chemical, the VDOC officials were able to place the lines so that the execution went forward without incident.

Mississippi DOC rather than VDOC in its third-party status.

V. Analysis

Federal Rule of Civil Procedure 45(d)(3)(A)(iv) "prohibits the discovery of information 'where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information.'" *In re Mo. Dep't of Corr.,* 839 F.3d 732, 736 (8th Cir. 2016) (quoting *Miscellaneous Docket Matter No. 1* v. *Miscellaneous Docket Matter No. 2,* 197 F.3d 922,925 (8th Cir. 1999)), *cert. denied sub nom. Jordan v. Mo. Dep't of Corr.,* 137 S. Ct. 2180 (2017). The majority of the unanswered Topics for Deposition and the undisclosed documents requested by Plaintiffs seek information that would reveal the supplier of Virginia's lethal injection chemicals or the individuals involved in carrying out Virginia's executions. *(See, e.g.,* Notice of Dep., Topics 1-8, 9(c), 12; *Id.* Ex. A, Documents to be Produced 1-2, 5-8.) In those instances where it would not jeopardize its ability to carry out executions, the VDOC generally provided information responsive to the Plaintiffs' requests. Clearly, complying with the remaining aspects of the subpoena would pose an undue burden on the VDOC.

The Eighth Circuit made that exact finding as to these Plaintiffs when they served upon the MDOC a third-party subpoena similar to that served on the VDOC. There, Plaintiffs served "a third-party

subpoena for documents and a Federal Rule of Civil Procedure .... 30(b)(6) deposition notice seeking information regarding MDOC's use of pentobarbital in lethal injections, including the identity of MDOC's supplier of pentobarbital." *In re Mo. Dep't of Corr.,* 839 F.3d at 734. MDOC filed a motion to quash and argued that Plaintiffs' subpoena presented an undue burden under Rule 45(d)(3)(A)(iv). *Id.* MDOC relied upon the affidavit of MDOC Director George Lombardi, who asserted that "MDOC's pentobarbital suppliers 'require the assurance of confidentiality,' [and] producing the information sought by the inmates would result in the state no longer being able to obtain the drug for use in executions." *Id.* The district court concluded that Lombardi's affidavit was "'insufficient to establish that Missouri's supplier will no longer supply pentobarbital to Missouri if identified to Respondents' because Lombardi's statement was 'a bare, hearsay assertion unsupported by record evidence.'" *Id.*

Ultimately, the United States Court of Appeals for the Eighth Circuit granted a writ of mandamus and prohibited the discovery when the MDOC's anonymous pentobarbital supplier, designated as "M7," submitted a declaration wherein it stated that if its identity is disclosed, it will not supply lethal chemicals to anyone.[29] *Id.* at 735. The Eighth Circuit concluded:

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[29] This reasoning echoes that of *Glossip:* in the absence of confidentiality, anti-death penalty activists target labs or suppliers to cease the distribution of legal drugs for a controversial, but still legal, use. The resulting scarcity of drugs

> A state has an interest in "exercising its sovereign power to enforce the criminal law." *In re Blodgett,* 502 U.S. 236, 239, 112 S. Ct. 674, 116 L.Ed.2d 669 (1992). As M7's declaration demonstrates, disclosure of M7' s identity will certainly harm this interest by preventing MDOC from acquiring pentobarbital for executions from M7. Without M7, Lombardi states that MDOC "would not be able to obtain the lethal chemicals necessary to carry out its lawful executions."

Id. at 736.

More recently, relying on Ohio's secrecy statute, the United States Court of Appeals for the Sixth Circuit upheld a protective order that prevented inmate plaintiffs from obtaining the identity of the supplier of the drugs to be used in their executions. *In re Ohio Execution Protocol Litig.,* 845 F.3d 231, 233 (6th Cir. 2016), *cert denied, sub nom. Fears v. Kasich,* No. 17-5010, 2017 WL 2854622 (U.S. Oct. 2, 2017). "After hearing testimony and admitting evidence, the district court found that the disclosures would cause an undue burden on and prejudice Defendants by

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could impinge on what the Supreme Court has identified as a state's "legitimate interest in carrying out a sentence of death in a timely manner." *Baze v. Rees,* 553 U.S. 35, 61 (2001) (citations omitted); *see also Nelson v. Campbell,* 541 U.S. 63 7, 644 (2004) (calling it a "significant interest").

subjecting them to the risk of harm, violence, and harassment and by making it difficult for them to obtain lethal-injection drugs." *Id* at 237. The district court observed that, given the legality of execution by lethal injection,

> [a] court should then regard discovery that overly burdens or outright prevents a state from obtaining the drugs, materials, or assistance needed to execute by lethal injection as suspect and consequently drill down into the parties' arguments on each side of the issues. The specific, albeit limited, evidence before this Court and Ohio's secrecy statute together present good cause for issuance of the requested protective order.

In re: Ohio Execution Protocol Litig., No. 2:11-CV-1016, 2015 WL 6446093, at *9 (S.D. Ohio Oct. 26, 2015), *ajf'd sub nom. In re Ohio Execution Protocol Litig.,* 845 F.3d 231 (6th Cir. 2016). Both these cases provide persuasive authority for this Court's decision to quash the remainder of Plaintiffs subpoena to the VDOC. The Court's rationale follows.

A. Disclosure of Information Pertaining to the VDOC's Supplier of Lethal Injection Drugs and the Members of the Execution Team Poses an Undue Burden

The Circuit Courts concur that requiring

disclosure of suppliers of lethal injection chemicals and team members imposes an undue burden on states. *In re Mo. Dep't of Corr.,* 839 F.3d at 736; *In re Ohio Execution Protocol Litig.,* 845 F.3d at 239-40; *see Jones v. Comm'r, Ga. Dep't of Corr.,* 811 F.3d 1288, 1292-93 (11th Cir.), *cert. denied,* 136 S. Ct. 998 (2016). Upon review of the record, and considering Virginia's third-party status in receiving these discovery requests, this Court agrees that disclosure of additional information regarding suppliers or execution team members would be unduly burdensome. *Wyoming v. US. Dep't of Agric.,* 208 F.R.D. 449, 452-53 (D.D.C. 2002) (citations omitted).

The issues heard during the *Gray* motion for preliminary injunction overlap substantially with those raised, on a third-party basis, by Plaintiffs here. Within a week of receiving their discovery requests, the VDOC provided Plaintiffs with a copy of the *Gray* Transcript and other evidence from the *Gray* and *Prieto* evidentiary hearings.[30] The historical record and Robinson's testimony from the *Gray* hearing provide strong evidence that the VDOC's duty to implement the sentences of Virginia's condemned inmates would be frustrated if the identity of the supplier of Virginia's lethal injection drugs is revealed.

Robinson testified that prior to Prieto's execution, the VDOC was experiencing difficulties obtaining lethal injection drugs. (Gray Tr. 92.) Robinson indicated that commercial suppliers of lethal

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[30] *See supra* n.22.

injection drugs were unwilling to provide the drugs to the VDOC. (Gray Tr. 91-92.) Robinson testified that if Texas had not supplied the VDOC with the necessary drugs, the VDOC would not have had drugs to use in Prieto's execution. (Gray Tr. 92.)

After Prieto's execution, the VDOC again attempted to purchase lethal injections drugs, but was unsuccessful. (Gray Tr. 92.) In the wake of these unsuccessful efforts, Virginia passed a new secrecy

statute[31] to complement its other secrecy statute.[32]

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[31] The pertinent portions of the new statute provide:

> The identities of any pharmacy or outsourcing facility that enters into a contract with the Department for the compounding of drugs necessary to carry out an execution by lethal injection, any officer or employee of such pharmacy or outsourcing facility, and any person or entity used by such pharmacy or outsourcing facility to obtain equipment or substances to facilitate the compounding of such drugs and any information reasonably calculated to lead to the identities of such persons or entities, including their names, residential and office addresses, residential and office telephone numbers, social security numbers, and tax identification numbers, shall be confidential, shall be exempt from the Freedom of Information Act (§ 2.2-3700 et seq.), and shall not be subject to discovery or introduction as evidence in any civil proceeding unless good cause is shown.

Va. Code Ann.§ 53.1-234 (West 2017) (Effective July 1, 2016).

[32] Effective July 1, 2007, Virginia's other secrecy statute provides in pertinent part:

> The identities of persons designated by the Director to conduct an execution, and any information reasonably calculated to lead to the identities of such persons, including, but not limited to, their names, residential or office addresses, residential or office telephone numbers, and social security numbers, shall be confidential, shall be exempt from the Freedom of Information Act (§ 2.2-3700 et seq.), and shall not be subject to discovery or introduction as evidence

Robinson explained that, "[a]fter the enactment of law, we went out and talked with numerous pharmacies throughout the Commonwealth of Virginia. Somewhere in the neighborhood of 20 to 25." (Gray Tr. 93.) Eventually, the VDOC found a compounding pharmacy willing to provide the drugs. (Gray Tr. 93.) "The VDOC was required to enter into a Memorandum of Understanding with a compounding pharmacy before the pharmacy agreed to provide the VDOC with the necessary drugs. (ECF No. 21-2.) Total confidentiality about the pharmacy's identity was an essential term of that agreement. (Prelim. Inj. Hr'g Tr. 95.)" *Gray v. McAuliffe,* No. 3:16CV982-HEH, 2017 WL 102970, at *7 (E.D. Va. Jan. 10, 2017).[33] Robinson explained that his "[e]xperience has shown that if the pharmacy or pharmacist was to be revealed, ... they

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> in any civil proceeding unless good cause is shown.

Va. Code Ann.§ 53.1-233 (West 2017) (Effective July 1, 2007).

[33] The *Gray* Court also noted:

> In light of the pressure waged by death penalty opponents, it has become increasingly difficult to obtain the drugs Virginia traditionally used to render a prisoner unconscious during the initial stage of the execution process .... Because death penalty opponents have made it difficult to obtain FDA-approved drugs customarily used in executions, Virginia has recently resorted to obtaining drugs from compounding pharmacies instead of traditional suppliers.

Gray, 2017 WL 102970, at *7.

would not provide the drugs that were necessary just because of potential outside pressure to that organization." (Gray Tr. 95.)

Robinson's testimony confirms that Virginia's ability to secure the drugs necessary to carry out lethal injections would be jeopardized, if not totally frustrated, should the supplier of those drugs be disclosed. Thus, the VDOC contends here that "Virginia's ability to obtain lethal injection drugs and conduct executions would be greatly damaged, if not completely eliminated," if the identities of its supplier of lethal injection drugs and the members of the execution team were revealed. (VDOC's Reply 6, ECF No. 13.) This contention is borne out by the historical record and the experience of other states currently attempting to obtain lethal injection drugs. *Glossip v. Gross,* 135 S. Ct. 2726, 2733 (2015) (detailing how anti-death penalty advocates pressured pharmaceutical companies to stop supplying sodium thiopental and pentobarbital for use in executions).

Virginia, like Ohio, passed a statute to keep secret the identity of the pharmacy that supplies the drugs to be utilized in the lethal injection process. Va. Code § 53.1-234; *see In re Ohio Execution Protocol Litig.,* 845 F.3d at 237 (observing that the Ohio secrecy statute was enacted out of concern for "the burden on and prejudice to the state that disclosure presents" (quoting *In re: Ohio Execution Protocol Litig.,* 2015 WL 6446093, at *7)). This Court, like the Sixth Circuit, views the statute as an evidentiary "add-on" to the reasons counseling against disclosure: "the same

concerns that apparently led to the creation of the statute [exist]: the burden on and prejudice to the state that disclosure presents." *In re Ohio Execution Protocol Litig.,* 845 F.3d at 237 (internal quotation marks omitted) (citation omitted). Thus, without deciding whether the state statute creates any privilege in federal court, and even in the absence of a specific threat against an Ohio-connected pharmacy, the district court recognized that disclosure would pose "a tangible burden on Defendants and would be unduly prejudicial." *In re: Ohio Execution Protocol Litig.,* 2015 WL 6446093, at *2.

In addition to noting the statute's existence, the VDOC, like the Ohio Defendants, try to demonstrate danger posed by disclosure of the pharmacy by citing a threatening email sent to an apothecary that supplied execution drugs to the state of Missouri, which states in pertinent part:

> Still, were I you I'd at least want to beef up my security now that you've been put in the spotlight as a likely supplier and failed to issue a flat denial. As the folks at the federal building can tell you, it only takes one fanatic with a truckload of fertilizer to make a real dent in business as usual.

(Mem. Supp. Mot. Quash Ex. 5, at 14.) The Ohio district court opined that, "[i]f the question is whether a reasonable pharmacy owner or compounder would feel burdened by receiving such an email, the answer

is likely if not certainly yes. And by burdened this Court means likely scared to the point of electing not to help Ohio" in assisting in executions. *In re: Ohio Execution Protocol Litig.,* 2015 WL 6446093, at *3.

When assessing whether a subpoena imposes an undue burden courts balance "the need for discovery against the burden imposed on the person ordered to produce documents." *Wyoming,* 208 F.R.D. at 452 (citation omitted). The remaining outstanding discovery largely deals with information that would disclose the identity of the VDOC's execution team and the supplier of its lethal injection drugs. On this record, the Court must find that disclosure of the team and suppliers would be unduly burdensome because it would impede the VDOC's significant interest in carrying out lawfully imposed sentences. Similar to the MDOC in the Eighth Circuit, the VDOC has produced evidence that total confidentiality is essential to maintain the supply of lethal injection drugs. As in the Sixth Circuit, the Court evaluates a request from a state whose legislature has enacted a statute to protect such information from disclosure. Unlike either circuit, the Court faces a record in which the VDOC has disclosed considerable information while, largely, excepting out only information about team members and suppliers. In light of the foregoing, the Court finds that requiring the VDOC to further respond to the Notice of Deposition and Subpoena Duces Tecum imposes an undue burden upon the VDOC. Disclosure of this information would place a real and significant burden on the VDOC. Conversely, Plaintiffs have shown little, if any, need for the information.

B. Disclosure of Additional Information Would Be Unduly Burdensome for Other Reasons

Other factors this Court should assess when evaluating the burden on VDOC also weigh in favor of quashing additional disclosure. *See Wyoming,* 208 F.R.D. at 452-53 (citation omitted). First, the VDOC's non-party status is one of the factors the Court considers in assessing the burden of imposing further discovery from the VDOC. *Id.* at 452 (citation omitted). VDOC has provided documents beyond that required of Missouri or Georgia, and nothing on this record clearly establishes the current state of what Mississippi has or has not provided. The law does not require further disclosure from the VDOC as a third-party respondent.

Second, it does not appear that Plaintiffs seek relevant information beyond that provided already by Virginia. A requirement to provide additional, irrelevant information would be unduly burdensome. *In re Subpoenas for Documents Issued to ThompsonMcMullan, P. C.*, 2016 WL 1071016, at *5; *see also Wyoming,* 208 F.R.D. at 453. Unlike the suppliers of pentobarbital to Georgia and Mississippi, which Plaintiffs tout as a superior drug for lethal injection purposes, the VDOC's anonymous compounding pharmacy supplies the VDOC with midazolam, which according to Plaintiffs, is an inferior drug for use in lethal injections. Thus, disclosure of this information would not be relevant to demonstrating an alternative method of execution that

is "known and available" as well as "feasible, readily implemented, and in fact significantly [likely to] reduce a substantial risk of severe pain." *Glossip,* 135 S. Ct. at 2737 (quoting *Baze v. Rees,* 553 U.S. 35, 52 (2008)). To the extent that pentobarbital and compounding issues are relevant to Plaintiffs' claim, they deserve nothing more than the significant information that already has been supplied. That information reflects, among other things: that the VDOC switched to compounded midazolam because it could not obtain pentobarbital; how the VDOC tests and stores its compounded midazolam; and, the detailed procedures the VDOC employs for ensuring that an execution by lethal injection goes smoothly.

Third, Plaintiffs' requests for additional materials are overbroad and unduly burdensome to the extent that they seek information dating back to 2010.[34] *Wyoming,* 208 F.R.D. at 453 (citation omitted).

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[34] Plaintiffs were obliged to "narrowly craft[]" the subpoena "to relevant subject matter in the underlying litigation" in order to avoid imposing an undue burden on a third-party like the VDOC. *In re Subpoenas for Documents Issued to ThompsonMcMullan, P.C.*, No. 3: 16-MC-1, 2016 WL 1071016, at *6 n.6 (E.D. Va. 17, 2016) (citing *Theofel v. Farey-Jones,* 359 F.3d 1066, 1071-72 (9th Cir. 2004); *In re Subpoena Duces Teucm to AOL, LLC,* 550 F. Supp. 2d 606, 612 (E.D. Va. 2008)). Nevertheless, Plaintiffs disregarded this obligation and demanded that the VDOC produce *all* documents dating back to 2010. This hardly constitutes an effort to narrowly craft the subpoena and, in this respect, makes the subpoena overly broad and unduly burdensome. *U.S. Dep't of Agric.,* 208 F.R.D. at 453 (citation omitted) (observing that courts consider the time period covered by the document request in assessing undue burden).

The VDOC has supplied Plaintiffs with almost all the information it supplied to Prieto and Gray, the two most recent challengers to the Virginia lethal injection procedures.[35] This material provides a full picture of how the VDOC currently carries out an execution. Plaintiffs fail to suggest how material related to the VDOC's storage of pentobarbital or labels from pentobarbital and other drugs the VDOC can no longer obtain would advance their underlying Eighth Amendment claim. The time frame and the overbreadth of any additional information requested by Plaintiffs demonstrate that any further production by VDOC would be unduly burdensome. *Id* (citation omitted).

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[35] It may be that Plaintiffs' attempt to ascertain the VDOC's supplier of lethal injection drugs is a roundabout effort to discover the supplier of the lethal injection drugs for the Mississippi DOC. Such information is marginally relevant to their claim. Nevertheless, when Ricky Gray, a Virginia inmate, in a direct challenge to his imminent execution sought to obtain the identity of the pharmacy supplying lethal injection drugs to the VDOC, the *Gray* Court concluded Mr. Gray had no right to such information. *Gray v. McAuliffe,* No. 3:16CV982-HEH, 2017 WL 102970, at *20 (E.D. Va. Jan. 10, 2017) (citing *Jones,* 811 F.3d at 1292-93; *Phillips v. De Wine,* 841 F.3d 405,420 (6th Cir. 2016); *Zink v. Lombardi,* 783 F.3d 1089, 1109 (8th Cir.), *cert. denied,* 135 S. Ct. 2941 (2015); *Trottie v. Livingston,* 766 F.3d 450,452 (5th Cir. 2014)). Plaintiffs certainly have less need for the identity of the VDOC's supplier of lethal injection drugs than did Mr. Gray. If Plaintiffs wish to discover the Mississippi DOC's supplier of lethal injection drugs, they should do so through the normal discovery procedures in the underlying litigation. For all the reasons previously stated, requiring the VDOC to disclose the supplier of its lethal injection drugs is unduly burdensome and far outweighs Plaintiffs need for that information.

C. Quashing the Subpoena Is the Appropriate Remedy

Plaintiffs suggest that the Court need not quash the subpoena, but could enter

> a protective order [that] would allow Jordan and Chase access to the documents and testimony requested, but would require them to file any privileged information under seal in the underlying case. Similarly, no party to the underlying case in Mississippi would have a right of access to the privileged materials without being willing to be bound by the terms of the protective order.

(Resp. 20.) In nearly identical contexts, other courts have observed that such protective orders are not adequate to protect a state's interest in shielding the identities of individuals and entities that assist the state in carrying out executions. *See In re Ohio Execution Protocol Litig.,* 845 F.3d at 238-39 (observing that "the district court did not err in rejecting Plaintiffs' request to designate certain information subject to the protective order as 'attorney's eyes only'"); *In re Mo. Dep't of Corr.,* 839 F.3d at 737. Indeed, just as they do here, these same Plaintiffs argued that Missouri's interest in limiting the disclosure of its supplier of lethal injection drugs could be adequately accommodated by including "a provision requiring third parties to agree to be bound

by the terms of a protective order as a condition precedent to receiving documents produced under such an order." *In re Mo. Dep't of Corr.,* 839 F.3d at 737. The Eighth Circuit flatly rejected that argument: *Id.*

> [I]n *In re Lombardi,* [741 F.3d 888 (8th Cir. 2014)], we granted a writ [of mandamus] to prevent disclosure of the lethal chemical supplier's identity instead of requiring a protective order. 741 F.3d at 897 ....
>
> ...[E]ven assuming that the district court can issue such an order directed at [third parties], the inmates fail to distinguish this case from *In re Lombardi.* There, we granted a writ based on Lombardi's assertion that "it is likely that active investigation of the physician, pharmacy, and laboratory will lead to further disclosure of the identities." 741 F.3d at 894. The inmates do not offer any assurances that they will be able to investigate the supplier any more subtly than the inmates in *In re Lombardi.*

Id.

In Virginia, after much effort, the VDOC located a pharmacy that agreed to provide the chemicals necessary to carry out its executions. *Gray,* 2017 WL 102970, at *7. "Total confidentiality about the

pharmacy's identity was an essential term of that agreement." *Id.* Revelation of the pharmacy's identity to Plaintiffs, even if Plaintiffs revealed the pharmacy's identity to no one else, would jeopardize that agreement and frustrate the VDOC's lawful duty to carry out the sentences of execution imposed by the Virginia courts.

VI. The VDOC's Invocation of Privilege

The VDOC also filed a privilege log with respect to 12 categories of documents that it asserted were protected by, *inter alia,* Virginia Code §§ 53.1-233 and 53.1-234 ("the Virginia Secrecy Statutes"), executive privilege, attorney-client communication, and an individual's right to privacy in their health care records. (Reply Ex. 10, ECF No. 12-10.) Plaintiffs contest the VDOC's assertion of privilege under the Virginia Secrecy Statutes. (Reply 15-19.) The VDOC invoked the Secrecy Statute as a privilege with respect to documents that revealed the identities of the execution team or the lethal drug supplier. (Reply Ex. 10, at 2-4.) This Court, like the Sixth Circuit, need not address that issue. Disclosure of these documents would pose an undue burden on the VDOC, and the need behind Virginia's secrecy statute merely serves as additional evidence that a concern of harm exists. The Court does not rest its undue burden finding on privilege.

Plaintiffs note that the privilege log "raises claims of privilege based on other state statutory sources." (Reply 13 n.26.) Plaintiffs assert that

"[b]ecause VDOC did not brief the applicability of these other claims of privilege, they are waived in connections with the VDOC's Motion to Quash." *(Id.)* Plaintiffs, however, fail to provide any legal authority for this proposition or otherwise contest the VDOC's invocation of privilege. Moreover, review of the privilege log indicates that the VDOC identified privileged documents with sufficient particularity to allow Plaintiffs to launch an individualized, rather than this sweeping, challenge to the information withheld.[36] Because the Court does not rely on privilege in quashing the subpoena, and because Plaintiffs do not challenge the VDOC's detailed and substantive description of which documents are subject to privilege, the Court need not and will not consider the issue of privilege further.

VII. Conclusion

After receiving Plaintiffs' subpoena, the VDOC promptly provided Plaintiffs with a plethora of information responsive to Plaintiffs' requests. Although Plaintiffs contend their need for additional information is substantial, they fail to reveal what information they have received during discovery from the defendants in the underlying civil rights litigation

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[36] For example, in one entry in the Privilege Log, the VDOC invoked "Attorney-client communication" with respect to an "August 2013 letter authored by the Director of the Virginia Department of Corrections, directed to an attorney at the Office of Attorney General, discussing previously-provided legal advice on executions by lethal injection. Marked as confidential communication. 2 pages." (Reply Ex. 10, at 2.)

to provide context for this contention. In contrast, it is plain that ordering the VDOC, a non-party to underlying litigation, to provide the additional documents sought would pose a substantial and undue burden. *See Ohio Execution Protocol Litigation,* 845 F.3d 231, 238-39 (6th Cir. 2016); *In re Mo. Dep't Corr.,* 839 F.3d 732, 737 (8th Cir. 2016).

Federal Rule of Civil Procedure 45(c)(1) emphasizes that "[a] party or attorney responsible for issuing ... a subpoena must take reasonable steps to avoid imposing undue burden ... on a person subject to the subpoena." Fed. R. Civ. P. 45(c)(1). Plaintiffs have failed to honor this obligation, and requiring further compliance with the subpoena would present an undue burden for the VDOC. Given the amount of information timely tendered, and especially considering the VDOC's non-party status, the Court will not require the VDOC to tender further information in response to these discovery requests.

For the reasons discussed above, the Motion to Quash (ECF No. 1) any information in addition to that already tendered by the VDOC will be GRANTED.

An appropriate Order will accompany this Memorandum Opinion.

Date: 11/3/17
Richmond, Virginia

/s/
M. Hannah Lauck
United States District Judge

APPENDIX C

FILED: May 21, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-7594
(3:17-mc-00002-MHL)

VIRGINIA DEPARTMENT OF CORRECTIONS
Petitioner - Appellee

v.

RICHARD JORDAN; RICKY CHASE
Respondents - Appellants

STATE OF NEBRASKA; STATE OF ALABAMA; STATE OF ARKANSAS; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF IDAHO; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MISSOURI; STATE OF NEVADA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF WYOMING
Amici Supporting Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Keenan, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk