No. 19-235

In the Supreme Court of the United States

RICHARD JORDAN ET AL., PETITIONERS

v.

VIRGINIA DEPARTMENT OF CORRECTIONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTION PRESENTED

In a separate lawsuit, petitioners challenge Mississippi's method of execution under the First, Eighth, and Fourteenth Amendments. In conjunction with that litigation, petitioners served the Virginia Department of Corrections (VDOC) with third-party discovery. After voluntarily producing hundreds of pages of responsive documents, VDOC moved to quash the remainder of the subpoena on the grounds that it was barred by sovereign immunity and that compliance would be unduly burdensome.

The district court granted VDOC's motion, finding that the burdens attendant to additional discovery outweighed the benefits. The court of appeals unanimously held that this analysis did not constitute an abuse of discretion and affirmed. The question presented is:

Whether the court of appeals erred in affirming the district court's decision to grant respondent's motion to quash the remainder of petitioners' third-party subpoena.

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INTRODUCTION

Petitioners seek review of a factbound, third-party discovery dispute that directly implicates an unresolved sovereign immunity issue. As part of an Eighth Amendment challenge to Mississippi's lethal-injection protocol, petitioners sought discovery from an arm of the Commonwealth of Virginia about Virginia's protocol. After voluntarily producing hundreds of pages of material, respondent moved to quash the remainder of petitioners' subpoena on the grounds that it was overbroad and barred by sovereign immunity.

The district court found that the potential benefits of further discovery did not outweigh the burdens, and granted respondent's motion to quash. Applying an abuse of discretion standard, the court of appeals unanimously affirmed and denied rehearing without recorded dissent.

The lower court's unanimous rejection of petitioners' factbound claims was correct, and petitioners do not even allege (much less show) that that rejection creates or implicates a conflict with any other court of appeals or state court of last resort. Petitioners' suggestion that this Court's method-of-execution precedents cast doubt on well-established third-party discovery principles is both incorrect and was never raised until the petition for rehearing. Finally, petitioners could not obtain the relief they seek without prevailing on a matter that was expressly flagged but never addressed by the courts below: whether sovereign immunity shields States from judicial

enforcement of a third-party subpoena. The petition for a writ of certiorari should be denied.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–28a) is reported at 921 F.3d 180. The opinion of the district court (Pet. App. 29a–93a) is not published in the Federal Supplement but is available at 2017 WL 5075252.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2019. A petition for rehearing was denied on May 21, 2019 (Pet. App. 94a). The petition for a writ of certiorari was filed on August 18, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This appeal arises from a district court's decision to quash the remainder of petitioners' third-party subpoena.

1. Under the Federal Rules of Civil Procedure, discovery reaches materials "relevant to any party's claim or defense" and "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). To access those materials, litigants may invoke the subpoena power against non-parties, but only so long as the resulting subpoena does not "subject[] a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). When deciding whether a subpoena creates an "undue burden," *id.*, "the ultimate question is whether the benefits of discovery to the requesting

party outweigh the burdens on the recipient" of the subpoena, Pet. App. 16a; see also Fed. R. Civ. P. 26(b)(1) (requiring, as part of proportionality analysis, consideration of "whether the burden or expense of the proposed discovery outweighs its likely benefit").[1] If the burdens outweigh the benefits, relief to the subpoena's recipient is mandatory: courts "*must* quash or modify" the subpoena. Fed. R. Civ. P. 45(d)(3)(A) (emphasis added).

2. Petitioners are two Mississippi death-row inmates who have filed a federal lawsuit in the Southern District of Mississippi challenging Mississippi's three-drug lethal-injection protocol under the First, Eighth, and Fourteenth Amendments. Pet. App. 4a.

Only petitioners' Eighth Amendment challenge is relevant here. To succeed on such a claim, petitioners must establish "a substantial risk of serious harm" under the challenged method and "identify an alternative [method] that is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain." *Glossip* v. *Gross*, 135 S. Ct. 2726, 2737 (2015) (quotation marks and citation omitted); see also *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1126–29 (2019) (holding that both facial and as-applied challengers must identify an alternative method of execution).

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[1] Rule 26's proportionality requirement was relocated to subsection (b)(1) in 2015 to underscore that "[t]he parties and the court have a *collective* responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes." Fed. R. Civ. P. 26 advisory committee notes to 2015 amendment (emphasis added).

Petitioners assert that Mississippi's current execution method creates a "substantial risk that the first drug injected in the three-drug series" will fail to "render[ ] the prisoner unconscious and insensate so [that] he does not feel the painful effects of the second and third drugs." Pet. App. 51a (quoting petitioners' amended complaint). The alternative method petitioners identify is "a single-drug protocol." *Id.* at 53a–54a.

3. Although Virginia does not use a single-drug protocol, petitioners served the Virginia Department of Corrections (VDOC) with third-party discovery requests.[2] These requests included a Rule 30(b)(6) notice of deposition and corresponding Rule 45 subpoena, and sought information regarding "VDOC's current lethal injection drug supplies, testing results, and efforts to obtain lethal injection drugs," including documents and information "dating back to 2010." Pet. App. 35a, 57a–59a.

In response, VDOC "quickly and voluntarily supplied [petitioners] with a host of information responsive to the subpoena." Pet. App. 35a. Among the hundreds of pages of documents VDOC turned over were "labels and certificates of analysis for Virginia's execution drugs, a redacted copy of Virginia's

[2] Petitioners also sought discovery from two States that do employ a single-drug protocol: Missouri and Georgia. See Pet. App. 32a–33a. Both States moved to quash petitioners' subpoenas, and "[b]oth of those third-party subpoenas [were] quashed entirely." *Id.* at 32a; see also *In re Mo. Dep't of Corr.*, 839 F.3d 732, 734 (8th Cir. 2016), cert. denied sub nom. *Jordan v. Missouri Dep't of Corr.*, 137 S. Ct. 2180 (2017); *Jordan* v. *Commissioner, Miss. Dep't of Corr.*, 908 F.3d 1259, 1261 (11th Cir. 2018).

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" involving Virginia's execution practices. *Id.* at 7a; see also *id*. at 60a n.22. VDOC then offered to "provide an additional affidavit to 'fill in any gaps,' " but clarified 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." *Id.* at 7a (citation omitted).

The parties could not reach agreement, and VDOC moved to quash, arguing that the subpoena sought privileged material, that compliance would be unduly burdensome, and that the subpoena was barred by sovereign immunity. Pet. App. 7a–8a.

4. The district court granted the motion to quash. Pet. App. 29a–93a. The court did not resolve VDOC's arguments about privilege or sovereign immunity. See *id.* at 37a n.10, 90a–91a. Instead, after weighing the benefits of additional discovery against the burdens attendant to that discovery, the district court's 42-page opinion concluded that requiring VDOC to provide additional information would impose "an undue burden" on respondent. *Id.* at 60a.

The district court first examined the potential benefits of further discovery—and found each rationale lacking. To the extent petitioners sought information regarding Virginia's existing lethal-injection protocol, the district court reasoned that "VDOC's production to date likely includes much of the relevant responsive information [petitioners] are due under the rules."

Pet. App. 55a. With respect to the availability of pentobarbital (a drug that Mississippi and Virginia both previously used as part of a three-drug protocol and that petitioners proposed using as part of a single-drug protocol), the district court noted VDOC had already provided transcripts explaining that "VDOC has been unable to obtain pentobarbital in recent years." *Id.* at 56a. And as to whether Mississippi's existing method of execution was sure or likely to cause needless suffering, the district court observed that "VDOC would not appear to be a source of relevant information" in light of the fact that VDOC had not experienced the difficulties petitioners suggest Mississippi's protocol will generate. *Id.*

The district court then turned to the burdens attendant to additional discovery. Emphasizing that "VDOC has disclosed considerable information while, largely, excepting out only information about [execution] team members and suppliers," the district court concluded that "requiring the VDOC to further respond to the Notice of Deposition and Subpoena Duces Tecum [would] impose[] an undue burden upon the VDOC." Pet. App. 85a. In reaching this conclusion, the district court highlighted VDOC's nonparty status, the general lack of relevance of any additional materials, and the overbreadth of the discovery requests. See *id.* at 86a–87a. For that reason, the district court concluded that petitioners had "failed to honor th[eir] obligation" to "'take reasonable steps to avoid imposing [an] undue burden'" on respondent and thus declined

to "requir[e] further compliance" with petitioners' subpoena. *Id.* at 93a (quoting Fed. R. Civ. P. 45(c)(1)).

5. The Fourth Circuit unanimously affirmed. Pet. App. 1a–28a. Like the district court, the court of appeals "bypass[ed] state sovereign immunity," relying on circuit precedent permitting a court to rule for a State on the merits in situations where the State does not "insist" that the immunity issue be resolved first. *Id.* at 12a–13a, 14a. Instead, the court of appeals concluded that the district court "did not abuse its discretion in quashing the subpoena" because it "reasonably found that [petitioners] did not have a need for further discovery from VDOC, a nonparty, that outweighed the burdens the discovery would impose." *Id.* at 4a–5a.

Like the district court, the Fourth Circuit saw little benefit in additional discovery. First, because "VDOC had already provided documents showing that it, like Mississippi, could not obtain pentobarbital and had been unable to do so for several years," the court reasoned that "[a]dditional documents confirming this fact would be of little value." Pet. App. 19a. Second, the court observed that "VDOC was an unlikely source of helpful information about a single-drug protocol, because VDOC did not use that protocol and never had." *Id.* at 19a–20a. Third, considering "Virginia's long history of using a three-drug protocol successfully," the court held that the district court "reasonably rejected" petitioners' "factual claim that Virginia's execution practices were flawed." *Id.* at 20a. And fourth, with respect to petitioners' claim (newly raised on appeal) "that VDOC might have helpful evidence about procedural

safeguards that Mississippi lacked," the court pointed out "that VDOC had produced its execution manual and testimony describing drug storage and testing," and that petitioners had "failed to explain what other information they needed." *Id.*

The Fourth Circuit likewise agreed with the district court's finding that additional discovery would impose substantial burdens. As an initial matter, the court of appeals explained, the subpoena was overbroad: "By failing to tailor their subpoena to their needs, [petitioners] imposed a burden on VDOC, which had to do the tailoring itself." Pet. App. 22a. Moreover, "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." *Id.*; see also *id.* at 23a ("recognizing that both states and execution-drug suppliers have a legitimate interest in keeping suppliers' identities confidential," and collecting cases from other circuits to that effect).

The court also concluded that the district court had not abused its discretion by finding that petitioners "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." Pet. App. 24a.

6. Petitioners sought rehearing, which the court of appeals denied without recorded dissent. See Pet. 10 & n.32.

ARGUMENT

Petitioners contend (Pet. 10–29) that this Court should grant review of the lower courts' unanimous resolution of this third-party discovery dispute. Further review is unwarranted. Petitioners fail to assert—much less establish—a split in lower-court authority. The decisions below are intensely factbound and reflect an appropriate and careful consideration of the competing interests. Petitioners' suggestion that this Court's decisions in *Glossip* v. *Gross*, 135 S. Ct. 2726 (2015), and *Bucklew* v. *Precythe*, 139 S. Ct. 1112 (2019), have or should prompt changes to well-established law governing third-party discovery is both untimely and incorrect. Finally, petitioners could not obtain the requested discovery without also prevailing on an issue that neither lower court ever addressed: whether sovereign immunity shields an arm of the State from judicial enforcement of a third-party subpoena in a case where neither the State nor any of its agents is a party. The petition for a writ of certiorari should thus be denied.

1. Petitioners do not even assert that the unanimous decisions of the courts below "conflict with the decision[s] of" any other federal or state court "on the same important matter." S. Ct. R. 10(a). Nor could they. As the district court noted, petitioners previously sought third-party discovery from two other States and both of those subpoenas were quashed as well. See Pet. App. 31a–34a. Indeed, the Eighth Circuit granted

mandamus relief when a district court denied a Missouri state agency's motion to quash, holding that petitioners' desired discovery "has no relevance to the inmates' Eighth Amendment claim" and would "result in an undue burden." See *In re Mo. Dep't of Corr.*, 839 F.3d 732, 736 (8th Cir. 2016) (per curiam), cert. denied sub nom. *Jordan* v. *Missouri Dep't of Corr.*, 137 S. Ct. 2180 (2017); accord *Jordan* v. *Commissioner, Miss. Dep't of Corr.*, 908 F.3d 1259, 1261 (11th Cir. 2018) (affirming district court decision granting Georgia's motion to quash petitioners' third-party subpoena). That is the opposite of a split warranting this Court's review.

2. The decisions below are both correct and intensely factbound. The district court reasonably found that the *additional* discovery sought by petitioners was not justified under the Federal Rules of Civil Procedure, and the court of appeals appropriately found that that decision did not constitute an abuse of discretion. Petitioners' various arguments about why the courts below "inadequately considered" certain factors (Pet. 22) or struck the balance in the wrong place in other respects (see Pet. 25–29) are precisely the sort of pleas for case-specific error correction that do not warrant this Court's review. See S. Ct. R. 10.[3]

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[3] As petitioners obliquely acknowledge (see Pet. 12), this Court's decision in *Herbert* v. *Lando*, 441 U.S. 153 (1979), involved discovery from one of the parties to the existing case rather than the sort of third-party discovery at issue here. At any rate, petitioner does not assert that the Fourth Circuit's decision conflicts with *Herbert*; instead, they claim the Court should extend a portion of *Herbert*'s analysis to cover this far-different situation.

3. Beyond their plea for factbound error correction, petitioners pitch this case as "the opportunity to address [a] loose end" purportedly created by this Court's decisions in *Glossip* and *Bucklew*, specifically "the right that method-of-execution challengers have to third-party discovery in order to discharge" their burden under those decisions. Pet. 11–12. According to petitioners, "*Bucklew* strongly suggested, without definitively declaring, that the significant burden mandated by *Glossip* comes packaged with a mandate for correspondingly liberal discovery." *Id.* There are two problems with that argument: it comes too late and it is wrong.

a. Neither the district court nor the court of appeals considered whether this Court's decisions in *Glossip, Bucklew*, or both entitle petitioners to uniquely lenient third-party discovery. The explanation is straightforward: petitioners made no such argument until their petition for rehearing before the Fourth Circuit.

To be sure, *Bucklew* came out just three days before the court of appeals' decision. But, as petitioners acknowledge, "much of *Bucklew* saw this Court reaffirming the rule from *Glossip*," which was "itself taken from the Chief Justice's plurality opinion" in *Baze* v. *Rees*, 553 U.S. 35 (2008). See Pet. 19; accord *Bucklew*, 139 S. Ct. at 1129 (characterizing holding as "(re)confirm[ing] . . . the *Baze-Glossip* test"). To the extent the *Baze-Glossip* test has anything to say about third-party discovery, that test has been established since at least 2015, when this Court decided *Glossip*. This

Court should not be the first to entertain petitioners' late-arriving argument.[4]

b. At any rate, neither *Glossip* nor *Bucklew* even addressed (much less altered) the operation of well-established discovery principles. To the contrary, both decisions addressed the *substantive* obligations faced by those, like petitioners, who challenge a State's method of execution under the Eighth Amendment. *Glossip* held that "a known and available alternative method of execution that entails a lesser risk of pain [is] a requirement of all Eighth Amendment method-of-execution claims," 135 S. Ct. at 2731, and *Bucklew* "(re)confirmed that anyone bringing a method of execution claim alleging the infliction of unconstitutionally cruel pain must meet the *Baze-Glossip* test." 139 S. Ct. at 1129. Neither *Glossip* nor *Bucklew* said anything about creating "broad discovery rights to provide plaintiffs an adequate opportunity to meet *Glossip*'s requirements." Pet. i.

Petitioners point repeatedly to statements from this Court in *Bucklew*—and from Justice Kavanaugh's concurrence—that the *Baze-Glossip* test is not prohibitively difficult. See Pet. 15, 18–20 & n.36. But the Court's assurance "that there should be 'little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative,' " Pet. 15 (quoting *Bucklew*, 139 S. Ct. at 1128–29) says nothing

[4] To the extent that petitioners argue that *Bucklew* marks a meaningful shift in this Court's application of the *Baze-Glossip* test, see Pet. 19–20, that issue would benefit from further percolation.

about expanding well-established principles of third-party discovery specifically to help litigants achieve that end. At any rate, those principles *already* require that courts take into account "the needs of the case" in resolving discovery disputes like this one. Fed. R. Civ. P. 26(b)(1).

4. Even if both lower courts erred in applying normal discovery principles in this case, petitioners would still not have been able to obtain the requested materials because sovereign immunity shields an arm of a State (like VDOC) from third-party subpoenas in cases where neither the State nor any of its agents is a party. "While state sovereign immunity serves the important function of shielding state treasuries," the immunity is not limited to situations where a private party is seeking monetary relief from a State. *Federal Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 765 (2002). Rather, "[t]he very object and purpose of the [E]leventh [A]mendment were to prevent the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Ex Parte Ayers*, 123 U.S. 443, 505 (1887). For that reason, various lower courts (including the court below) have held that judicial proceedings seeking to enforce discovery obligations "fall within the protection of sovereign immunity." *Boron Oil Co.* v. *Downie*, 873 F.2d 67, 71 (4th Cir. 1989); see also *Bonnet* v. *Harvest (US) Holdings, Inc.*, 741 F.3d 1155, 1160 (10th Cir. 2014) (explaining that "a subpoena *duces tecum* served directly on [a Native American] Tribe . . . is a 'suit'

against the Tribe," sufficient to "trigger[ ]" principles of "sovereign immunity").

As the court of appeals noted, VDOC has been careful during each stage of this litigation not to waive its sovereign immunity defense. See Pet. App. 8a, 13a–14a. Thus, although neither court below addressed the sovereign immunity issue, see *id.* at 9a, 14a, 37a, petitioners would be unable to obtain any of their requested discovery unless that issue were also resolved in their favor. The existence of that independent justification supporting the lower court's judgment also counsels against this Court's review.[5]

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[5] There is also the closely related question about whether States and state agencies are "persons" within the meaning of Federal Rule of Civil Procedure 45. Although "the word 'person' in Rule 45 is not limited merely to 'natural persons' but includes juristic persons like corporations and governments as well," *Rosenruist-Gestao E Servicos LDA* v. *Virgin Enter., Ltd.*, 511 F.3d 437, 445 (4th Cir. 2007), this Court does not appear to have squarely considered whether that term includes States or state agencies. Cf. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989) (holding that neither States nor state officials acting in their official capacities are "persons" under 42 U.S.C. § 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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