No. 19-235

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD JORDAN and RICKY CHASE,
Petitioners,

v.

VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

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

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Introduction

Mississippi death-sentenced prisoners Richard Jordan and Ricky Chase (Petitioners) seek a writ of certiorari from this Court to review the Fourth Circuit's affirmance of an order quashing discovery requests to the Virginia Department of Corrections (VDOC) for information relevant to Petitioners' § 1983 method-of-execution challenge. The requested discovery includes deposition testimony from VDOC on its 2015 transaction with Texas for pentobarbital.[1] In the same timeframe, Mississippi's Commissioner of Corrections testified by declaration[2] that the drug could not be obtained for use in the one-drug protocol pled by Petitioners as their "known, available alternative." Disproving the Mississippi Commissioner's testimony would assist Petitioners in establishing that MDOC could, with a "good faith" effort, obtain pentobarbital and implement Petitioner's one-drug alternative protocol. *Bucklew v. Precythe*, 139 S.Ct. 1112, 1125 (2019).

The discovery Petitioners sought from VDOC also includes documents related to VDOC's use of compounded pentobarbital and midazolam in a three-drug protocol.[3] Such evidence would assist Petitioners in demonstrating the risks of the similar protocol

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[1] VDOC did not even move to quash the subpoena to the extent it requested deposition testimony. This misled the Fourth Circuit into finding that Petitioners did not address the need for such testimony in the district court. App. A. at 27a.

[2] 4th Circuit JA at 315.

[3] *Id*. at 412.

adopted (but as yet not used) by Mississippi.[4] *See, e.g., In re Ohio Execution Protocol Litig.*, No. 11-1016, 2019 WL 244488 at *16-17, *63 (S.D. Ohio Jan. 14, 2019), *aff'd*, 937 F.3d 759 (6th Cir. 2019).[5]

The Fourth Circuit affirmed the district court's order quashing Petitioner's requested discovery, discounting Petitioners' need for the discovery and finding cognizable burdens on both VDOC and its execution drug suppliers that outweighed that need.[6]

In this Court, VDOC's opposition makes several points which can be easily discarded by this Court. This Reply Brief will discuss three of these points; the remainder were anticipated and addressed in the Petition.

A. Petitioners' arguments were presented to the courts below.

First, VDOC asserts that Petitioners did not argue in the lower courts that their burden to demonstrate an alternative execution protocol required discovery on the use of that alternative by other jurisdictions.[7] This is false. From the outset of this case, Petitioners have focused on the "known, available" alternative requirement of *Baze v. Rees*, 553 U.S. 35 (2008) (plurality) and *Glossip v. Gross*,

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[4] Mississippi's lethal injection executions have been conducted with a three-drug protocol using either sodium thiopental or manufactured pentobarbital as the first drug.

[5] The magistrate judge in the Ohio case admitted expert testimony which relied, in part, on autopsies from executions in other jurisdictions, but ultimately ruled for the Defendants in the case. The Sixth Circuit affirmed the denial of relief.

[6] App. A at 20a.

[7] VDOC Brief (Fourth Circuit) at 11.

135 S.Ct. 2726 (2015). In the First Amended Complaint, Petitioners pled that the availability of pentobarbital for a one-drug protocol was established, in part, by the Texas-to-Virginia transaction that is the subject of the subpoena to VDOC.[8]

In opposition to the motion to quash filed by VDOC in the Virginia district court, Petitioners asserted:

> Given the *Glossip* requirement that Plaintiffs plead and prove both the risks involved in the use of midazolam and the existence of a known and available alternative method of execution, it can hardly be disputed that the availability of alternative drugs and the feasibility of an alternate execution protocol are relevant subjects of inquiry in Jordan and Chase's civil rights lawsuit.[9]

Further, at a later point in the opposition, Petitioners cited *Herbert v. Lando*, 441 U.S. 153 (1979) to establish the necessity of discovery from out-of-state corrections departments to meet their burden under *Glossip*:

> *Glossip* requires Jordan and Chase to prove both the risks associated with the use of midazolam in a three-drug lethal injection protocol and the availability of alternatives which would mitigate

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

[9] Response to Motion to Quash (filed in the district court), 4th Cir. JA 228.

> those risks. By definition, the best proof available of both prongs of this test is held by those agencies which have studied, or actually implemented, execution by lethal injection – particularly those which have used midazolam. As the Supreme Court in *Herbert* allowed defamation plaintiffs an opportunity to secure discovery to meet the daunting standard of *New York Times v. Sullivan*, [376 U.S. 254 (1964),] this Court must give Jordan and Chase the opportunity to make their case under *Glossip*.[10]

Similarly, in the Fourth Circuit, Petitioners argued at length that the discovery from VDOC is necessary to show both the availability of pentobarbital and the risks posed by a three-drug protocol beginning with either compounded pentobarbital or midazolam.[11] Petitioner's Reply Brief made this particularly clear:

> The fact is that pentobarbital has been "available" to VDOC by means of a state-to-state transfer that bypasses the commercial market. Jordan and Chase seek documents and testimony

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[10] *Id*. at 241-42.

[11] Brief of Appellant (Fourth Circuit), at 24-29. The title of this section of the Appellant's brief is "The corrections departments in executing states other than Mississippi are an essential source for facts which provide a basis for the comparative risk analysis required by *Glossip*."

> about these transfers to determine whether Mississippi could use a similar approach to securing pentobarbital for use in a single-drug protocol. Such information is directly relevant to Jordan and Chase's burden under *Glossip*, and would establish one of the allegations of their First Amended Complaint.[12]

Petitioners do not present a "new" argument to this Court that has not been previously asserted in the courts below. Rather, Petitioners have consistently argued that if a method-of-execution plaintiff is required to establish a "known, available alternative" to the practice in use in plaintiff's jurisdiction, then third-party discovery must be allowed from other jurisdictions that employ capital punishment.

B. The requirements established by *Glossip* and *Bucklew* for a method-of-execution claim must be considered in the analysis of the discovery allowed to support those claims.

Second, VDOC argues that "neither *Glossip* nor *Bucklew* even addressed (much less altered) the operation of well-settled discovery principles." VDOC Opposition at 12. VDOC is correct, but it is making Petitioners' point. As VDOC further acknowledges, "both decisions addressed the *substantive* obligations

[12] Appellant's Reply Brief (Fourth Circuit) at 6.

faced by those, like petitioners, who challenge a State's method of execution under the Eighth Amendment." *Id*. (emphasis in original).

The first question presented to this Court is "whether the burden of proof demanded by *Glossip* in method-of-execution challenges requires commensurately broad discovery rights to provide plaintiffs an adequate opportunity to meet *Glossip*'s requirements." The issue is not whether any proposition in *Baze*, *Glossip*, or *Bucklew* provides a specialized standard for discovery in method-of-execution challenges, but rather, what is the proper scope of discovery for plaintiffs to have a fair opportunity to meet their burden under those cases.

Put another way, this case is to *Glossip* as *Herbert v. Lando* was to *New York Times v. Sullivan*.[13] As method-of-execution plaintiffs absorb this Court's teachings in *Bucklew*, and in particular, its focus on the execution protocols of other states in the review of the "known, available alternative" requirement,[14] the resolution of the discovery issue presented to the Court here is important to the prompt adjudication of those cases in the lower courts.

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[13] VDOC misses the point by observing that the discovery in *Herbert v. Lando* was not directed at a third party. VDOC Opposition at 10 n.3. The *New York Times v. Sullivan* standard did not require review of "alternatives" and therefore did not require information about how other journalists might or might not approach the same subject. The opposite is true here.

[14] *Bucklew*, 139 S.Ct. at 1128; *see also id*. at 1136 (Kavanaugh, J., concurring).

C. VDOC's sovereign immunity argument is not grounds to deny review.

Finally, VDOC asserts that the sovereign immunity issue presented to the Fourth Circuit should dissuade this Court from granting certiorari review. VDOC Opposition at 13-14. But none of the Courts of Appeals has yet held that a state agency is immune from third-party discovery in a Federal civil rights case. The only such court to have squarely confronted the issue decided it against VDOC's position, holding that "[t]here is simply no authority for the position that the Eleventh Amendment shields government entities from discovery in federal court." *In re Missouri Dep't of Natural Resources*, 105 F.3d 434, 436 (8th Cir. 1997). Indeed, neither VDOC nor any other Virginia agency has prevailed on this argument in the district courts of its own state. VDOC's sovereign immunity argument is no reason to deny review in this case.

CONCLUSION

This Court should grant review of this case to adjudicate the rights of method-of-execution plaintiffs to third-party discovery from out-of-state corrections departments.

Respectfully Submitted,

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