No. 19-___

IN THE
Supreme Court of the United States

RICHARD JORDAN AND RICKY CHASE,

Petitioners,

v.

GEORGIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Whether evidence of how other departments of corrections have obtained and successfully administered an alternative execution method is relevant to showing the method is feasible and available under *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

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Richard Jordan and Ricky Chase petition for a writ of certiorari to review the Eleventh Circuit's judgment in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion on rehearing (Pet. App. 1a-41a) is published at 947 F.3d 1322. The panel's original opinion (Pet. App. 42a-56a) is published at 908 F.3d 1259. The district court's order (Pet. App. 57a-58a) is unpublished, but is available at 2016 WL 9776069. The magistrate judge's order (Pet. App. 59a-66a) is unpublished.

JURISDICTION

The Eleventh Circuit entered its judgment on January 10, 2020. On March 19, 2020 this Court extended the time to file any petition for certiorari to 150 days, making this petition due on June 8, 2020. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

INTRODUCTION

To prove that a State's planned execution method violates the Eighth Amendment, a litigant must show, among other things, that "the State had some other feasible and readily available method to carry out its lawful sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019); *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015); *Baze v. Rees*, 553 U.S. 35, 52 (2008) (plurality opinion). This Court has been clear that a litigant must do more than offer a "bare-bones proposal" or an alternative method that has "'never been used to carry out an execution' and had 'no track record of successful use.'" *Bucklew*, 139 S. Ct. at 1129-30. Instead, the litigant must proffer evidence "sufficiently detailed" to "present[] the State with a readily implemented alternative method." *Id.* at 1129.

The Court has, at the same time, assured that this burden "can be overstated." *Id.* at 1128; *see also id.* at 1136 (Kavanaugh, J., concurring). In particular, the Court's comparative inquiry "can't be controlled by the State's choice of which methods to authorize." *Id.* at 1128. And, properly applied, there should be "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* at 1128-29; *id.* at 1136 (Kavanaugh, J., concurring).

The Eleventh Circuit's new extreme in this case puts that assurance to the test, and raises a question as to whether condemned litigants seeking to satisfy the Court's demanding (but not limitless) *Glossip* test will be afforded ordinary application of the civil rules. Here, petitioners are not asking Mississippi to execute them using some method that has "'never been used" or has "no track record" of use. *Id.* at 1130. They contend Mississippi could readily execute them using a

single drug, pentobarbital, which is routinely used by other states and has, indeed, been the favored method in a substantial majority of executions across this country today. Given petitioners' claim—and Mississippi's repeated assertions that it could not feasibly acquire pentobarbital—petitioners sought precisely what this Court's test requires: Concrete evidence that other states, including Georgia, have had no difficulty obtaining and administering the drug, including for the nearly 100 single-drug pentobarbital executions conducted in just the last few years.

The magistrate judge found this evidence "goes to the heart of what [petitioners] must prove to successfully prosecute their cases" under the *Glossip/Baze* test. Pet. App. 61a. And respondent, for its part, never disputed that relevance finding, declining to object to it and never contesting relevance on appeal. Yet, after premising its original opinion on an obvious error of civil procedure, the Eleventh Circuit issued a new opinion adopting an unpresented and radical understanding of the *Glossip*/*Baze* test: That concrete evidence of other states' ability to secure and successfully administer pentobarbital for executions would *not even be relevant to* whether that execution method is "feasible and readily available" in Mississippi. In fact, according to the Eleventh Circuit, other states' acquisition and use of pentobarbital is so irrelevant to this Court's standard that the magistrate judge *abused its discretion* by concluding otherwise; so irrelevant that it did not matter respondent never objected to relevance or challenged it on appeal; and so irrelevant that petitioners should not even be given an opportunity to address the conceded issue.

This does not resemble ordinary or fair process. No one doubts that *Glossip* and *Baze* set a very demanding legal standard. But this Court did not purport to deprive condemned litigants of fair application of the procedural rules available to any other litigant. The Eleventh Circuit's relevance holding brings it to an even further extreme in an already acknowledged circuit split. *See McGehee v. Hutchinson*, 137 S. Ct. 1275, 1276 (2017) (Sotomayor, J., dissenting from denial of stay and certiorari) (observing that the Sixth, Eighth, and Eleventh Circuits "are divided as to [the] meaning" of what it means to "offer alternative methods"); *McGehee v. Hutchinson*, 854 F.3d 488, 500 (8th Cir. 2017) (Kelly, J., dissenting) (same). The *Glossip*/*Baze* test governs execution-method litigation across the country, and courts ought to know how it applies. Petitioners present the opportunity to resolve this question in the context of a concrete and practical litigation dispute, and they do so before any execution date has been set, not in the context of "last-minute stays." *Bucklew*, 139 S. Ct. at 1134 & n.5 (discussing *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Dunn v. Ray*, 139 S. Ct. 661, 661 (2019)); *see, e.g.*, *McGehee*, 137 S. Ct. at 1276.

The Court should grant certiorari.

STATEMENT OF THE CASE

1. This petition arises out of ongoing federal litigation over the constitutionality of Mississippi's lethal injection protocol, pending in the U.S. District Court for the Southern District of Mississippi. *See Jordan, et al. v. Fisher, et al.*, 3:15-cv-295-HTW-LRA (S.D. Miss.). Petitioners allege that Mississippi's execution protocol—which uses a three-drug series of pentobar-

bital or midazolam, vecuronium bromide or rocuronium bromide, and potassium chloride—violates this Court's demanding standard in *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

In *Glossip*, this Court held that individuals challenging their jurisdiction's method of execution under the Eighth Amendment have the "burden of establishing that any risk of harm [is] substantial when compared to a known and available alternative method of execution." 135 S. Ct. at 2738. Petitioners argue that Mississippi's protocol poses a substantial risk relative to methods of lethal injection used in other states, including Georgia, which have abandoned the three-drug series and now use a single drug, pentobarbital, to execute prisoners. N.D. Ga. ECF No. 9-2 at ¶¶ 187-90, 224-227, 247-249.[1]

Mississippi moved to dismiss Plaintiffs' complaint under *Glossip*, asserting that Jordan and Chase had not pled a "known and available alternative" to the Mississippi protocol.[2] The district court denied the motion and the parties proceeded to discovery on the merits. Mississippi has since continued to dispute the feasibility and availability of pentobarbital. In its An-

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[1] Citations to "N.D. Ga. ECF No. __" are to the district court docket below concerning respondent's motion to quash the Southern District of Mississippi subpoena. *Jordan, et al. v. Fisher, et al.*, No. 1:16-cv-2582 (N.D. Ga.).

Citations to "S.D. Miss. ECF No. __" are to the proceeding in the Southern District of Mississippi for which the subpoena was issued, *Jordan, et al. v. Fisher, et al.*, 3:15-cv-295-HTW-LRA (S.D. Miss.).

[2] S.D. Miss. ECF Nos. 24 & 25.

swer, Mississippi specifically denied that pentobarbital is available.[3] It then continued to repeat that assertion: "[a]t the end of the day, . . . pentobarbital is not available" and Mississippi has "no idea where [other states] are getting it from."[4] Mississippi also propounded interrogatories and other discovery requiring Jordan and Chase to produce evidence of the "feasible and available alternatives" alleged in the Complaint and Amended Complaint.[5]

2. The Georgia Department of Corrections ("GDC") recently abandoned a protocol that was similar to Mississippi's and has, for recent executions, moved to a single-drug protocol involving pentobarbital.[6]

To satisfy their burden under *Glossip* and rebut Mississippi's repeated assertions that pentobarbital is not available, petitioners subpoenaed GDC for testimony and documents related to its acquisition of pentobarbital, its decision to abandon a three-drug series in favor of pentobarbital as a single drug, and the com-

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[3] N.D. Ga. ECF No. 9-7 ¶ 186.

[4] N.D. Ga. ECF No. 9-6 at 8-9.

[5] N.D. Ga. ECF No. 9-8 at 7.

[6] *See* Execution List 2017, Death Penalty Information Center, https://deathpenaltyinfo.org/execution-list-2017; Execution List 2016, Death Penalty Information Center, https://deathpenaltyinfo.org/execution-list-2016; Execution List 2015, Death Penalty Information Center, https://deathpenaltyinfo.org/execution-list-2015.

munications GDC has had with other states—including Mississippi—about securing pentobarbital.[7] Petitioners made clear that, to the extent any of this information is sensitive or confidential, they would be prepared to enter into a protective order allowing it to be produced under seal.[8]

3. GDC moved to quash the subpoena in its entirety, and the motion was referred to a magistrate judge.

The magistrate judge found the subpoenaed information clearly relevant to Petitioners' claims and thus properly within the scope of federal discovery, explaining that the requested information "goes to the heart of what [Petitioners] must prove to successfully prosecute their cases." Pet. App. 61a. The magistrate judge quashed the subpoena in its entirety, however, on the basis that the testimony sought was privileged under the Georgia Lethal Injection Secrecy Act (the "state Secrecy Act"). *Id.* at 62a.

4. GDC did not object to the magistrate judge's finding that the information sought in the subpoena is relevant to petitioners' claims under *Glossip*. Petitioners objected to the magistrate judge's application of the state Secrecy Act, explaining that the issue of privilege in federal civil discovery is governed by federal law, not state law. N.D. ECF No. 16-1 at 8-18.

The district court affirmed in a two-page opinion. The court concluded that the magistrate judge's ruling

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[7] N.D. Ga. ECF No. 1-1 at 5-7 (Subpoena Requests 1, 4, 5, 6, 8); *id.* at 9-13 (Notice of Deposition Topics 1, 2, 6, 7, 9).

[8] N.D. Ga. ECF No. 9 at 27.

concerned a pre-trial discovery issue, and was therefore entitled to deference unless "clearly erroneous or is contrary to the law." Pet. App. 58a. It concluded that "[i]t was not clearly erroneous or contrary to the law to quash the subpoena in its entirety" because "[t]he Eleventh Circuit has, on at least five occasions, prevented a capital offender from obtaining information protected under the Act." *Id.*

5. Petitioners appealed to the Eleventh Circuit. In their briefing, petitioners explained that "GDC did not object to the magistrate judge's finding that the information sought in the subpoena is relevant" and had "thus waived the right to challenge it on appeal." Appellants' Br. 7, 12. GDC did not attempt to argue otherwise, never contesting the relevance of the information sought in the subpoena on appeal. *See generally* Appellee's Br.; Reply Br. 24.

Petitioners' opening and reply briefs explained that "privileges in a federal action are governed by federal law." Appellants' Br. at 10-11, 21-26; Reply Br. 13-19. Thus, while the state Secrecy Act may be constitutional and may have been a valid basis for GDC to decline public-record requests and state-court discovery, even perfectly valid state confidentiality laws do not give rise to a privilege in federal discovery. *Id.* Petitioners cited caselaw from this Court explaining that the recognition of new federal privileges is disfavored and extraordinary. *Id.* (discussing, *e.g.*, *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996); *Trammel v. United States*, 445 U.S. 40, 50 (1980); and *United States v. Nixon*, 418 U.S. 683, 710 (1974)). Petitioners also reiterated that to the extent their requests implicated any sensitive or confidential information, it would be "appropriately handled through entry of a protective

order, which courts routinely use to ensure confidentiality in cases that involve sensitive information." Appellants' Br. 10-11, 26; Reply Br. 19.

The panel affirmed in a published opinion. Like the district court, it concluded that the magistrate judge's findings were subject to review for abuse of discretion. Pet. App. 47a. The panel acknowledged the magistrate judge had "rejected the GDC's relevancy argument" and quashed discovery based solely on the state Secrecy Act. Pet. App. 46a.

The panel reasoned that the subpoena could be quashed in its entirety because the Eleventh Circuit had "upheld the constitutionality" of the state Secrecy Act against direct attack on multiple occasions. Pet. App. 53a. According to the panel, the fact that the state Secrecy Act was a "legitimate and constitutional" enactment meant it gave rise to a federal privilege that justified quashing the subpoena in its entirety. Pet. App. 55a. Despite holding petitioners' appeal under consideration for over a year without allowing oral argument, the panel never addressed *any* of this Court's caselaw that restricts privileges in federal civil discovery to those recognized under federal law.

6. Petitioners filed a timely petition for rehearing. They reiterated that application of the state Secrecy Act to federal discovery was an obvious error: "It is a basic principle of federal civil litigation that privileges are governed by federal—not state—law." Rehearing Petition 1. Thus, as this Court has held on numerous occasions, "even perfectly valid state confidentiality laws do not give rise to privilege in federal court." *Id.* Petitioners pointed out that the panel's opinion conflicted with three centuries of this Court's caselaw

without addressing any of it. *Id.* at 1-2, 8-10. Petitioners requested "the opportunity to satisfy [this Court's] demanding standard in *Glossip* according to the same rules of civil litigation that would apply to any other federal litigant." *Id.* at 10-11.

7. On January 10, 2020, thirteen months after Petitioners moved for rehearing, the panel vacated its original opinion and issued a new one in its place.

The panel again concluded that the magistrate judge's findings were to be reviewed for abuse of discretion, requiring "a clear error of judgment" or application of "an incorrect legal standard." Pet. App. 6a-7a. However, the panel abandoned its prior reasoning regarding the Secrecy Act's creation of a federal privilege.[9] The panel now concluded, for the first time and without it being raised or briefed, that petitioners' discovery was precluded under the federal rules because it "seeks irrelevant information." Pet. App. 12a.

The panel acknowledged that petitioners' *Glossip* claim requires them to prove that pentobarbital is a "known and available alternative to Mississippi's three-drug protocol." Pet. App. 4a. It also acknowledged that Mississippi has repeatedly "dispute[d] Plaintiffs' claim that pentobarbital is available to them, asserting at various times in the underlying § 1983 action that they are unable to acquire pentobarbital." Pet. App. 4a-5a. The panel also recognized

[9] The panel relegated the Secrecy Act to a "potential pertinent" ground on which it "do[es] not base [its] affirmance." Pet. App. 24a, 26a-27a.

that the magistrate judge had, in fact, reached the opposite conclusion, finding that the evidence sought by petitioners "is relevant." Pet. App. 13a.

The panel nonetheless decided it could reverse that aspect of the magistrate judge's ruling. The panel's irrelevance holding was premised on the following causal chain of events: First, the panel took for granted that responding to petitioners' subpoena requires GDC's supplier to be "unmasked." *Id.*; *see also* Pet. App. 14a (assuming that a response would necessarily require "the supplier's identity be revealed in this litigation"). Second, the panel assumed that "once its identity is revealed, the pharmacy will simply cease to supply the drug to any state." Pet. App. 20a. Third, because the supplier will cease operations, "Mississippi will be no closer to finding a willing supplier of pentobarbital." *Id.*

Based on this posited chain of events, the panel concluded discovery would not be relevant to showing that pentobarbital could be "readily implemented" in Mississippi. Pet. App. 20a (quoting *Bucklew*, 139 S. Ct. at 1129). This conclusion followed from prior circuit precedent "hold[ing] that the fact that other states in the past have procured" a drug "does not make it available" to another state within the meaning of *Glossip*. Pet. App. 14a-15a (quoting *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1302 (11th Cir. 2016)).

The panel also found, for the first time, that enforcing the subpoena would unduly burden respondent. Pet. App. 40a-41a. The panel explained that the "relevance of the requested information to the underlying litigation, or the lack thereof, is important." Pet. App. 39a. It also again posited that disclosure of supplier

identity "would likely result in the loss of that source of supply" and thus "greatly jeopardize Georgia's ability to implement its criminal laws." Pet. App. 37a. Given Georgia's "significant interest in keeping information about the source of their lethal injection drugs secret" and the panel's relevance analysis that the requested information "is unlikely to bring Mississippi any closer to obtaining the compounded pentobarbital," the panel found that the burden to Georgia outweighed any interests served by disclosure. Pet. App. 31a, 40a.

The panel did not address the fact that respondent had never advanced the causal chain of events that it assumed in its opinion, or that petitioners had never been given any opportunity to brief the issue. The panel also never explained its premise that any response to petitioners' discovery necessarily required unmasking the supplier's identity, and never addressed the petitioners' argument that courts routinely use tools such as protective orders or redaction to protect even incredibly sensitive business or government information.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Is Wrong.

All parties and the courts below accept that this Court's Eighth Amendment standard requires a litigant challenging his execution method to proffer a "known and available alternative method of execution that entails a lesser risk of pain." *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015) (citing *Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality opinion)). The issue here is whether evidence concerning another department of

corrections' ability to acquire and successfully administer the alternative method of execution satisfies "the relevancy requirement of the federal discovery rules" with regard to the *Glossip* test, or if its relevance is so "very questionable" that it falls beyond the broad definition of relevance for civil discovery and renders any such inquiry burdensome as a matter of law. Pet. App. 11a, 13a.

Evidence that another state has been able to acquire and carryout an execution method is plainly relevant to showing that the method is "known and available"—indeed, as the magistrate judge found and respondent never objected to or appealed, this "goes to the heart of what [petitioners] must prove to successfully prosecute their cases" under this Court's test. Pet. App. 61a. This Court's analysis makes that clear. In *Bucklew*, this Court revisited both *Baze* and *Glossip* and, applying their test, held that an Eighth Amendment claim requires more than a "bare-bones proposal" or an alternative method that has "'never been used to carry out an execution' and had 'no track record of successful use.'" *Bucklew*, 139 S. Ct. at 1129-30. The Court explained that *Glossip*'s comparative test "isn't something that can be accomplished by examining the State's proposed method in a vacuum." *Id.* at 1126. Rather, it requires "'compar[ing]' that method with a viable alternative" that "'provides the needed metric' to measure whether the State is lawfully carrying out an execution or inflicting 'gratuitous' pain." *Id*. That requires a litigant to produce "sufficiently detailed" evidence which "present[s] the State with a readily implemented alternative method." *Id*. at 1129. This includes evidence concern-

ing "how [the alternative method] should be administered"; "in what concentration"; "how quickly and for how long it should be introduced"; and "how the State might ensure the safety of the execution team." *Id.*

The Eleventh Circuit concluded that another department of corrections' ability to secure and successfully administer pentobarbital for executions is irrelevant as a matter of law to whether such executions are known and available to Mississippi. Relying on prior Eleventh Circuit precedent "hold[ing] that the fact that other states in the past have procured" an execution method, the panel concluded that other states' acquisition of a drug "does not make it available" to the executing state within the meaning of *Glossip*. Pet. App. 14a-15a (quoting *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1302 (11th Cir. 2016)). The panel then posited a causal chain of events in which respondent's supplier would necessarily have to be disclosed in the discovery process and, upon being identified, would stop selling pentobarbital to any state for executions. Pet. App. 19a-20a.

The panel's assumed chain of events was not based on any evidence in the record, or even anything that respondent itself had ever suggested in its brief. Conjecture into a conceivable chain of events that could possibly render evidence irrelevant is not the ordinary operation of the civil rules. As this Court has recognized, relevance for the purpose of federal civil discovery calls on courts to do just the opposite: to determine whether evidence is "relevant to the subject matter in the pending action," relevance is to be "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could

bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

In addition, the Eleventh Circuit's premises—that any response to petitioners' discovery would entail disclosing respondents' supplier and that petitioners must identify such a supplier who will agree to sell to Mississippi—is wrong. The *Glossip* standard does not require that petitioners facilitate a sale contract between Mississippi and a drug supplier. It requires petitioners to prove that there is a "known and available alternative." 135 S. Ct. at 2738. Evidence that other departments of corrections have been able to secure and administer that alternative method with reasonable transactional efforts—whoever the particular supplier—obviously bears on whether Mississippi could do the same with reasonable efforts. Indeed, *Glossip* itself spoke in terms of whether the state made a "good-faith effort" to procure the drugs. *Id.*[10]

The Eleventh Circuit's strained conception of relevance, layered atop its strict interpretation of *Glossip*, completely betrays this Court's statement that a liti-

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[10] The Eleventh Circuit also concluded that petitioners' discovery "bears only marginal relevance," claiming that petitioners' "also challenge the constitutionality of the use of" compounded pentobarbital as a single drug. Pet. App. 14a, 20a. This, too, was never advanced by respondents and was arrived at without providing petitioners any opportunity to brief the issue. And no party or court here or in the Mississippi proceedings has ever construed petitioners' claim in the manner adopted by the Eleventh Circuit. Petitioners' claim is *not* premised on challenging the constitutionality of compounded pentobarbital as a single drug, but rather offers it as an available alternative to Mississippi's three-drug protocol. N.D. Ga. Dkt. ECF No. 9-2 at ¶¶ 227, 249.

gant's burden to identify a known and available alternative "can be overstated." *Bucklew*, 139 S. Ct. at 1128; *see also id.* at 1136 (Kavanaugh, J., concurring) (writing separately to "simply emphasize" the same). The Eleventh Circuit would at the same time (1) require a litigant to identify a specific supplier who is ready to sell drugs to the executing department of corrections; and (2) deny the litigant any discovery into suppliers on the conjecture that no supplier will sell the drugs and any discovery is therefore irrelevant. *Glossip*'s availability element would thus become impossible to satisfy—a burden which *cannot* "be overstated." *Bucklew*, 139 S. Ct. at 1128.

If that were the standard, all it would take for any department of corrections to prevail on a *Glossip* claim is a mere assertion that it has "no idea" how to secure or carry out an alternative method of execution, as Mississippi did here, and the plaintiff would have no way to rebut it. States would thus have the final say over whether any particular method is constitutional—a proposition that this Court has unanimously rejected. *Id.* at 1136 (Kavanaugh, J., concurring) (recognizing that "all nine Justices today agree" that states do not define the universe of permissible methods and therefore there is "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative").

The Eleventh Circuit's assumption that petitioners' discovery necessarily entails identification of respondent's supplier is unfounded. Petitioners are not here to unmask respondent's source. They seek only the information necessary to show that respondent has, with reasonable effort, been able to obtain and

successfully carryout single-drug pentobarbital executions. Petitioners' discovery requests thus seek testimony and documents related to GDC's acquisition of pentobarbital and its communications with other states, including Mississippi—information that could be provided without identifying any particular supplier. *See* Appellants' Br. 11, 19-20, 27-29 (repeatedly explaining that "the Southern District of Mississippi subpoena seeks documents and testimony beyond such identifying information"); Reply Br. 19-20. Indeed, in the Mississippi proceedings, the court suggested, and petitioners agreed, to allow department of corrections personnel to testify anonymously, with voice altering software precisely because this is *not* about identification.[11]

Even assuming a situation arose in which it were somehow necessary to reveal the supplier's identity, the Eleventh Circuit never explained why this information—like highly sensitive trade secrets, source code, and personal information in other suits—could not be adequately protected through ordinary discovery mechanisms, such as a protective order. Indeed, the Eleventh Circuit has said just that in other contexts. *See Adkins v. Christie*, 488 F.3d 1324, 1329 (11th Cir. 2007) (recognizing that although the information sought could not be withheld based on any privilege, it could be protected "through other established means such as protective orders, confidentiality agreements, and when appropriate, by disclosure only after an in-camera review").

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[11] *See* S.D. Miss. ECF Nos. 197 at 3, 200 at 4-5, 205 at 2-3.

II. The Meaning of "Known And Available" Is The Subject Of An Acknowledged Circuit Split.

The conclusion that other department of corrections' conduct is not even relevant to the "known and available" element brings the Eleventh Circuit to a new extreme in an acknowledged split. As members of this Court have recognized, even prior to this case, circuits were "divided as to [the] meaning" of this Court's "requirement that inmates offer alternative methods" of execution. *McGehee v. Hutchinson*, 137 S. Ct. 1275, 1276 (2017) (Sotomayor, J., dissenting from denial of stay and certiorari); *id.* at 1277 (Breyer, J., dissenting from denial of stay and certiorari); *see also McGehee v. Hutchinson*, 854 F.3d 488, 500 (8th Cir. 2017) (Kelly, J., dissenting) (explaining that the en banc Eighth Circuit has adopted "the Eleventh Circuit's more demanding standard" for availability, rather than "the Sixth Circuit's definition").

In the Sixth Circuit, a litigant challenging a department of correction's planned method of execution can prove that an alternative method is "known and available" by showing the proposed drugs are obtainable through "ordinary transactional effort." *Fears v. Morgan*, 860 F. 3d 881, 891 (6th Cir. 2017) (en banc); *In re Ohio Execution Protocol Litigation*, 946 F.3d 287, 291 (2019). In *Fears*, the *en banc* court held Ohio had satisfied its "ordinary transactional effort" test where it had "contacted the departments of correction in Texas, Missouri, Georgia, Virginia, Alabama, Arizona, and Florida to ask whether they would be willing to share their supplies" and had even applied for its own "import license from the Drug Enforcement Admin-

istration." 860 F. 3d at 890-91. Under the Sixth Circuit's standard, a litigant need not show that the drugs are "on hand," *id*. at 891, but does need to show that reasonable efforts could yield the drug "for executions as opposed to" other purposes, *In re Ohio Execution Protocol Litigation*, 946 F.3d at 291 (finding drugs unavailable through "ordinary transactional effort" where alternative had "never been used in an execution" by any state, was not authorized for that purpose, and had only been used for assisted suicides).

As set forth above, the Eleventh Circuit holds that "known and available" requires a litigant to prove that the executing state "actually has access to the alternative." *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1300 (11th Cir. 2016), *abrogated on other grounds by Bucklew*, 139 S. Ct. at 1127-29. It has specifically held "that the fact that other states in the past have procured a compounded drug and pharmacies in [the executing state] have the skills to compound the drug does not make it available to the [executing department of corrections] for use in lethal injections." *Id*. at 1302. Instead, the plaintiff must show "there is *now* a source for pentobarbital *that would sell it to [that particular department of corrections]* for use in executions." *Id*. (emphasis in original).

The Eighth Circuit has adopted the same standard. In *McGehee*, the district court had rejected the Eleventh Circuit's standard because it "places an 'impossible burden' on the prisoners" and adopted the Sixth Circuit's test for availability. 854 F.3d at 493; *see also McGehee v. Hutchinson*, No. 4:17-CV-00179 KGB, 2017 WL 1399554, at *39 (E.D. Ark. Apr. 15, 2017) ("After reviewing these decisions from the Sixth

and Eleventh Circuits, the Court finds that the approach taken by the Sixth Circuit provides a better test for 'availability' under *Glossip*."). The Eighth Circuit held that irrespective of the district court's conclusion that it imposed an "impossible burden," the Eleventh Circuit's standard "is necessary to conform to the Eighth Amendment." *McGehee*, 854 F.3d at 493; *see also id.* ("concur[rring] with the Eleventh Circuit" test in *Arthur*).

In the decision below, the Eleventh Circuit took its interpretation of *Glossip* to a new extreme in which the litigant who must identify a specific supplier that stands ready to contract with the executing state is told that any discovery into that topic is irrelevant and burdensome as a matter of law.

III. The Court Should Grant This Case.

Courts and parties litigating claims under *Glossip* need to know what availability means in order to meaningfully and fairly adjudicate them. The circuits in acknowledged conflict account for one half of all death row inmates at risk of execution, and together comprise 40% of states with active lethal injection regimes.

The decision below is problematic in a way that all members of this Court have sought to avoid. The Eleventh Circuit's earlier interpretations of "known and available" may have set "an almost impossible" standard, *McGehee v. Hutchinson*, No. 4:17-CV-00179 KGB, 2017 WL 1399554, at *39 (E.D. Ark. Apr. 15, 2017), but deeming the evidence needed to meet that standard irrelevant and burdensome as a matter of law makes the Court's Eighth Amendment standard actually impossible. The result is that any department of

corrections can stick its head in the sand—asserting that it has "no idea" how to obtain methods used in other states—and the condemned litigant will have no way of rebutting that assertion. In *Bucklew*, "all nine Justices" agreed that states should not have the authority to dictate what the Constitution requires. 139 S. Ct. at 1136.

The information that petitioners sought to obtain through ordinary application of civil discovery rules cannot be obtained any other way. For instance, state confidentiality statutes, like Georgia's Secrecy Act, preempt any inquiry through public-record requests or state court litigation. Federal civil discovery has always existed as a guarantee against absolute darkness—it has "[f]or more than three centuries" been premised on the "the fundamental maxim that the public . . . has a right to every man's evidence." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

The Court has repeatedly urged condemned litigants to raise such issues before they are compelled to do so in "last-minute stays" of execution. *Bucklew*, 139 S. Ct. at 1134 (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006)); *see also id.* n.5 (discussing *Dunn v. Ray*, 139 S. Ct. 661 (2019)). And it has previously declined to clarify the meaning of availability within that context. *See McGehee*, 137 S. Ct. at 1276 (Sotomayor, J. dissenting from denial of stay and certiorari); *Zagorski v. Parker*, 139 S. Ct. 11, 13-14 (2018) (Sotomayor, J., dissenting from denial of stay and certiorari). Petitioners bring this issue to the Court before any execution date has been set.

CONCLUSION

The petition for a writ of certiorari should be granted.

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