No. 19-1770

In the United States Court of Appeals for the Eighth Circuit

JASON MCGEHEE, et al.,

Plaintiffs-Appellees,

v.

NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES,

Defendant-Appellant.

On Appeal from the United States District Court for Nebraska,
the Honorable Laurie Smith Camp

Brief of *Amici Curiae* States of Missouri, Alabama, Arkansas, Georgia, Idaho, Indiana, Louisiana, Oklahoma, South Carolina, Texas, and Utah Supporting Nebraska Department of Correctional Services and Reversal

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Amici Curiae's Interest

Amici curiae are the States of Missouri, Alabama, Arkansas, Georgia, Idaho, Indiana, Louisiana, Oklahoma, South Carolina, Texas and Utah. *Amici* file this amicus brief pursuant to Fed. R. App. P. 29(a)(2).

Amici curiae have a strong interest in defending the principles of federalism and the comity between co-equal sovereigns. These principles are threatened when out-of-state litigants issue non-party subpoenas to sovereign States seeking protected information about capital-punishment protocols as yet another front in the "guerilla war against the death penalty." Transcript of Oral Argument at 14:20-25, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955). Unlike other non-party subpoenas, the subpoenas issued in this and similar cases seek information critical to the States' ability to administer their own criminal-justice systems, such as the source of a non-party States' lethal chemicals. Such requests infringe on the non-party State's "sovereign power to enforce the criminal law," which is "an interest [the Supreme Court] found of great weight," and which is fundamental to the autonomy of a sovereign State. *In re Blodgett*, 502 U.S. 236, 239 (1992).

Summary of Argument

After the United States Supreme Court decided *Hill v. McDonough*, 547 U.S. 573 (2006), inmates convicted of capital murder across the country brought lawsuits under 28 U.S.C. § 1983 challenging methods of execution. The Supreme Court's decision *Glossip v. Gross*, 135 S. Ct. 2726 (2015), led to an explosion of non-party subpoenas directed at States. These subpoenas—for documents, for depositions, or for both—inquire into some of the most privileged information possessed by States: the identity of execution team members and the source of lethal chemicals used in executions. States have expended considerable resources litigating these non-party subpoenas, and federal courts across the country have expended considerable resources adjudicating these issues.

These subpoenas have weakend the comity inherent in our system of federalism. Despite the strong protections of the Eleventh Amendment and traditional notions of state sovereign immunity, States have repeatedly been forced into federal courts by private, out-of-state litigants with intrusive information requests that undermine core sovereign interests. Such non-party subpoenas—like the one issued

against Nebraska in this case—are and ought to be barred by sovereign immunity.

Argument

I. States have recently been the targets of a spate of non-party subpoenas by inmates convicted of capital murder.

In recent years, inmates convicted of capital murder have brought "a wave" of lawsuits seeking to prohibit states from carrying out lawful executions. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1119 (2019). In conjunction with that effort, anti-death-penalty advocates have pressured individuals and groups to stop supplying lethal chemicals to states for use in lawful executions. *Id.* at 1120. One critical tool in this effort is the growing use of non-party subpoenas directed at States to compel the production of records and information concerning the non-party State's acquisition of execution chemicals. This material must remain confidential in order to maintain the stability of States' lethal injection drug supplies and, consequently, their ability to carry out executions. Non-party discovery for such records has become a persistent problem faced by many States with capital punishment protocols, including several of the undersigned *amici* States.

Condemned murderers have argued that their use of non-party subpoenas is justified by *Glossip* and *Baze*. Those cases require that a condemned murderer plead an alternative method of execution that is available, feasible, and readily implemented, and that is sure or very likely to significantly reduce a substantial risk of severe pain. *Glossip*, 135 S. Ct. at 2737. A plaintiff cannot satisfy this element "merely by showing a slightly or marginally safer alternative." *Id.* at 2737 (quoting *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion)); *see also Bucklew*, 139 S. Ct. at 1121.

In the wake of the Supreme Court's 2015 reaffirmation of the *Baze-Glossip* standard, a torrent of federal non-party subpoenas has issued from method-of-execution plaintiffs to non-party States, seeking to compel the production of confidential lethal-chemical acquisition and supplier records. One such example occurred five months after *Glossip,* when Alabama plaintiffs issued a non-party subpoena to the Missouri Department of Corrections. That non-party subpoena demanded a deposition about the Department's "procurement of pentobarbital or sodium thiopental for use in lethal injection" and "executions under [the Missouri Department of Correction's] current lethal injection protocol

involving pentobarbital, including the efficacy of such protocol." *Thomas D. Arthur v. Jefferson Dunn, et al.,* 2:11-CV-00438 (M.D. Ala.) (Subpoena issued Nov. 4, 2015).

Non-party subpoenas were also issued in 2016. For example, plaintiffs in a case in the District Court of Arizona issued a non-party subpoena to the Missouri Department of Corrections seeking "all communications since January 1, 2010, between you and any supplier regarding any execution chemicals or drugs." *First Amendment Coalition of Arizona, Inc. et al, v. Charles L. Ryan, et al.,* 2:14-CV-01447-NVM-JFM (Subpoena issued June 20, 2016).

A method-of-execution challenge to Ohio's lethal injection protocol has likewise generated discovery demands to out-of-state corrections officials. *See In re Ohio Execution Protocol*, No. 2:16-mc-3770 (M.D. Ala. Jan. 25, 2017) (order quashing subpoena to Alabama officials seeking records from that State concerning its execution protocol and related records). Arkansas officials have received similar subpoenas from the Ohio plaintiffs. *See In re Ohio Execution Protocol*, No. 2:11-cv-1016, ECF Doc. 1813-25, 1813-26, and 1813-27 (S.D. Ohio June 28, 2018) (Subpoena issued May 2, 2017).

Mississippi-based litigation has spawned collateral litigation concerning non-party discovery served on other States. *See Jordan v. Comm'r, Mississippi Dep't of Corr.*, 908 F.3d 1259 (11th Cir. 2018) (affirming district court's quashing of subpoena to Georgia where information sought was protected by the Georgia Lethal Injection Secrecy Act, which the Eleventh Circuit had previously characterized as both constitutional and "necessary to protect Georgia's [source of lethal injection drugs] for use in executions"); *In re Mo. Dep't of Corr.*, 839 F.3d 732 (8th Cir. 2016) (quashing subpoena on relevancy and undue burden grounds; declining to reach sovereign immunity assertion), *cert. denied sub nom. Jordan v. Mo. Dep't of Corr.*, 137 S. Ct. 2180 (2017).

And this appeal arises from a sprawling case in Arkansas, where a group of death row inmates brought a method-of-execution challenge to that State's midazolam-based lethal injection protocol. *McGehee v. Hutchinson*, No. 4:17-cv-179 (E.D. Ark.); *see also McGehee v. Hutchinson*, 854 F.3d 488 (8th Cir. 2017) (per curium) (summary of case while on interlocutory appeal from district court's order staying executions), *cert. denied*, 137 S. Ct. 1275 (2017). In that single case, the plaintiffs served notice that they intended to subpoena at least *eight* States—Florida,

Georgia, Missouri, Nebraska, Nevada, South Dakota, Texas, and Utah—in order to compel those States to produce confidential information such as those States' methods of execution, execution protocols, current chemical supply, chemical expiration dates, lethal chemical suppliers, package inserts and labels, independent testing laboratory results, and extensive lethal injection data regarding IV insertion, execution chamber set-up, syringes, disposition of leftover drugs, autopsy reports, and execution notes and internal reports. At least four of those subpoenas resulted in separate, full-scale litigation in the targeted States' federal courts. *See McGehee v. Mo. Dep't of Corr.*, No. 2:18-mc-4138, ECF Doc. # 14 (W.D. Mo. Jan. 1, 2019) (granting in part motion to compel after modification of subpoena); *McGehee v. Tex. Dep't of Criminal Justice*, 2018 WL 3996956 (S.D. Tex. Aug. 21, 2018) (quashing subpoena on relevance grounds); *McGehee v. Fla. Dep't of Corr.*, No. 4:18-mc-00004 (N.D. Fla. Mar. 25, 2019) (Order dismissing case as moot because trial was scheduled to occur before plaintiff could seek appellate review).

These cases have consumed significant State resources. Likewise, federal courts across the country have been required to expend resources in adjudicating these cases. For instance, the United States District

Court for the Western District of Missouri has heard three such cases, and this Court has now heard at least two cases challenging the propriety of these non-party subpoenas. And in this case, the appellate litigation in the collateral lawsuit continues, even though discovery in the underlying case has closed and the trial has been conducted. *McGehee et al., v. Hutchinson et al.,* 4:17-CV-00179-KGB (E.D. Ark.) (Discovery closed March 20, 2019; trial concluded May 2, 2019).

These examples demonstrate the burgeoning problem of non-party subpoenas to sovereign States in anti-death-penalty litigation. Before, there was a "flood of lethal injection lawsuits . . . that 'severely constrained states' ability to carry out executions.'" *Bucklew,* 139 S. Ct. at 1119 (citing Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301, 1304 (2007)). Now, each time *any* State is sued, many other States with the death penalty may be forced to defend against non-party subpoenas.

II. A non-party subpoena to a State that implicates critical sovereign interests is a "suit" barred by the Eleventh Amendment and state sovereign immunity bar.

The impact of these non-party subpoenas is real, and it affects states across the nation. Fortunately, the Founders' original

constitutional design protects States from these non-party subpoenas because they are federal "suits" by citizens of a foreign state.

The States enjoy sovereign immunity from two separate, but related, sources: the Eleventh Amendment and the sovereign immunity retained by the States when they joined the union. *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1277, 1495–96 (2019) ("the 'sovereign immunity of the States . . . neither derives from, nor is limited by, the terms of the Eleventh Amendment.") (citing *Alden v. Maine*, 527 U.S. 706, 713 (1999)).

The Eleventh Amendment,[1] which was adopted to correct the "blunder" of *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793), prevents Article III courts from exercising jurisdiction over lawsuits by private, out-of-state citizens against sovereign States. By its plain text, the Eleventh Amendment provides that the "Judicial power of the United States" does not extend to "any suit" against a State "by Citizens of another State."

[1] The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

Likewise, traditional State sovereign immunity bars such suits. As the Supreme Court reaffirmed just last month, *Chisholm* was wrongly decided, and State sovereign immunity was always inherent in our constitutional design. *Hyatt*, 139 S. Ct. at 1496; *see also Federal Maritime Comm'n v. S.C. State Ports Authority*, 535 U.S. 743, 753 (2002) ("the *Chisholm* decision was erroneous"); *Alden*, 527 U.S. at 721 (stating that *Chisholm* "seems unsupportable"). Put another way: "the Constitution . . . preserve[d] the States' traditional immunity from private suits." *Alden*, 527 U.S. at 724.

The United States Supreme Court has observed that subpoenas are subject to "those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution." *U.S. v. Morton Salt Co.* 338 U.S. 632, 642 (1950). This raises the question whether a non-party subpoena issued by a federal court is a "suit." This Court has already answered that question in the affirmative: "[A] federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity." *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1105 (8th Cir. 2012).

Other courts have reached the same conclusion. For instance, the Tenth Circuit has directly held that "a subpoena duces tecum is a form of judicial process," and "judicial process" is a type of "suit" under Article III. *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1160 (10th Cir. 2014). For the same reasons, a state court may not enforce a non-party subpoena to a federal agency because such subpoenas are barred by the federal government's sovereign immunity. *See, e.g., Huston Business Journal, Inc. v. Office of Comptroller of Currency, U.S. Dept. of Treasury*, 86 F.3d 1208, 1212 (D.C. Cir. 1996); *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989) (same).

In *Alltel*, this Court determined that a subpoena qualified as an Article III "suit" because, "[e]ven though the government is not a party to the underlying action, the nature of the subpoena proceeding against a federal employee to compel him to testify about information obtained in his official capacity is inherently that of an action against the United States because such a proceeding 'interfere[s] with the public administration' and compels the federal agency to act in a manner different from that in which the agency would ordinarily choose to

exercise its public function." *Alltel*, 675 F.3d at 1103 (quoting *Boron Oil*, 873 F.2d at 70–71 (quoting *Dugan v. Rank*, 372 U.S. 609, 620 (1963))).

These authorities compel the conclusion that a private litigant's non-party subpoena to a State—where the subpoena represents an effort to coerce a State to act differently than it ordinarily would pursuant to its law or policy—is outright barred by the Eleventh Amendment and traditional State sovereign immunity.

To be sure, a previous Eighth Circuit opinion states 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 Res.*, 105 F.3d 434, 436 (8th Cir. 1997) ("*Missouri DNR*"). But that sentence is dictum, and it comes at the end of two paragraphs that suggested that the Eleventh Amendment *would* bar a subpoena that "infringes [on a State's] autonomy or threatens its treasury." *Id.* Non-party subpoenas that seek confidential information about States' lethal-injection protocols, suppliers, and execution teams unquestionably infringe on state autonomy, and on the States' critical interest in administering their own criminal-justice systems.

Moreover, to the extent there is any tension between the dictum in *Missouri DNR* and the holding of *Alltel*, the latter is more persuasive. *Alltel* dealt with whether tribal immunity bars enforcement of non-party subpoenas served on a tribal government. 675 F.3d at 1102. This Court concluded that it does. Non-party subpoenas, this Court explained, "command a government unit to appear in federal court and obey whatever judicial discovery commands may be forthcoming." *Id.* at 1104–05. "The potential for severe interference with government functions is apparent." *Id.*

Alltel recognized the significance of its reasoning—which dealt with a tribal immunity issue—for State sovereign immunity. 675 F.3d at 1104. *Alltel* noted that it was not deciding the question of State sovereign immunity from non-party subpoenas in federal litigation, stating that the Court was "unwilling to predict how the Supreme Court would decide a case in which *disruptive* non-party subpoenas that would clearly be barred in a State's own courts are served on a state agency in private federal court civil litigation." *Id.* at 1104–05 (emphasis added). "Based upon the reasoning in cases such as *Boron Oil,*" this Court stated, "the [Supreme] Court might well conclude that the Eleventh Amendment

applies, or it might apply a broader form of state sovereign immunity as a matter of comity, which would likewise apply to claims of tribal immunity." *Id.* at 1105.

Non-party subpoenas for confidential information about State's lethal-injections suppliers and protocols are just the sort of "disruptive" subpoenas that *Alltel* noted were likely barred by sovereign immunity, *id.* at 1104; and they also plainly "infringe[]" on a State's "autonomy" within the meaning of *Missouri DNR*, 105 F.3d at 436. For both reasons, this Court should conclude that they are barred by sovereign immunity. In the alternative, if the Court concludes that *Missouri DNR* and *Alltel* are in conflict, it should consider granting en banc consideration of this important question and clarifying that *Alltel* governs claims of state sovereign immunity against non-party subpoenas that impinge upon core sovereign interests.

Following *Alltel*, this Court cited *Alltel* for the principle that "any State official or entity the plaintiffs subpoena for discovery may raise a claim of sovereign immunity." *Webb v. City of Maplewood*, 889 F.3d 483, 488 (8th Cir. 2018). That is consistent with one of the purposes behind sovereign immunity: protection "against the indignity of suit and the

burdens of litigation." *Fant v. City of Ferguson*, 913 F.3d 757, 758 (8th Cir. 2019) (citing *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141 (1993)).

In the specific context of non-party subpoenas for lethal injection supplier information, this Court has left open the question whether sovereign immunity bars such subpoenas. In a Missouri case, this Court, at first, declined to accept Missouri's immunity assertion where the record was inadequate to show that disclosing Missouri's pentobarbital supplier information would be sufficiently "disruptive to the state's autonomy" to trigger the Eleventh Amendment. *In re Mo. Dep't of Corr.* ["*MDOC I*"], 661 F. App'x 453, 456-57 (8th Cir. 2016) (unpublished), *reh'g granted and opinion vacated* (Sept. 13, 2016). Missouri submitted evidence to support its claim of sovereign immunity in *MDOC II*, including presenting testimony from the supplier itself. *In re Missouri Department of Corrections*, 839 F.3d 732, 735 (8th Cir. 2016) ("*MDOC II*"). Based on that record, this Court observed that Missouri's argument that "the subpoena violates Missouri's sovereign immunity" "represents an independently sufficient ground for holding that MDOC is entitled to"

a writ of mandamus to reverse the district court's disclosure order. *Id.* But ultimately, this Court decided the case on alternative grounds. *Id.*

Nebraska, like several of the *amici* States that have defended against similar subpoenas, has conclusively shown that its autonomy would be invaded and disrupted by forced compliance with the subpoena. Missouri has also been forced into several rounds of litigation, and has made similar showings. *See, e.g. MDOC II*, 839 F.3d at 732; *In re Lombardi*, 741 F.3d 888, 895 (8th Cir. 2014) (en banc); *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) (en banc); *Flynt v. Lombardi*, 885 F.3d 508 (8th Cir. 2018).

Missouri, like Nebraska and several of the *amici* States, has had considerable difficulty finding suppliers of lethal chemicals because of pressure, threats, and litigation from anti-death-penalty advocates. Because of this, those willing to supply lethal chemicals to Missouri require confidentiality. This Court has recognized that "any actions leading to the disclosure of members of the execution team would compromise the State's ability to carry out its lawful sentences." *Flynt*, 885 F.3d at 513.

The States that have seen fit to implement capital punishment for their most heinous offenders possess a legitimate interest in carrying out a sentence of death in a timely and constitutional manner. *Bucklew*, 139 S. Ct. at 1133; *see also In re Blodgett*, 502 U.S. 236, 239 (1992). Crime victims, likewise, have that same important interest. *Id*. Forced compliance with subpoenas like the one at issue would run directly contrary to that legitimate interest. It would serve as yet another impairment of a State's ability to effectively search for appropriate means of carrying out executions by lethal injections. It would signal to possible future suppliers that a State cannot invoke the legal means at its disposal to keep their identities secret in order to secure a stable supply of lethal chemicals, thereby interfering with a core sovereign interest.

Subpoenas like this one not only violate the States' Eleventh Amendment immunity, but also interfere with the States' ability to enforce the death penalty, an interest already under siege by death penalty opponents' ongoing "guerilla war against the death penalty." Transcript of Oral Argument at 14:20-25, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955) (Alito, J.). Nebraksa's ability to exercise "its sovereign power to enforce the criminal law" is "an interest [the Supreme

Court] found of great weight," and is at the very heart of Nebraska's autonomy as a sovereign state. *In re Blodgett*, 502 U.S. 236, 239 (1992). The subpoena threatens this sovereign power; therefore, the subpoena threatens Nebraska's autonomy. Sovereign immunity bars this suit.

Conclusion

The Court should hold that the non-party subpoena is barred by Nebraska's Eleventh Amendment immunity and sovereign immunity.

Dated: July 19, 2019

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Certificate of Compliance

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/s/ Gregory M. Goodwin