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 Missouri, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Ohio, Oklahoma, South Carolina, South Dakota, and Texas Supporting Nebraska Department of Correctional Services and Rehearing En Banc

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Table of Contents

Table of Contents 2
Table of Authories 3
Amici Curiae's Interest 3
Argument 3
I. Inmates Have Repeatedly Used Non-Party Subpoenas To Undermine States' Eleventh Amendment and Sovereign Immunity. 3
II. A Non-Party Subpoena to a State Is a "Suit" Barred by Both the Eleventh Amendment and State Sovereign Immunity. 7
III. Rehearing En Banc Is Necessary to Restore Comity Between Co-Equal Sovereigns. 12
CONCLUSION 15
Certificate of Service and Compliance 17

Table of Authories

Cases

Alden v. Maine,
527 U.S. 706 (1999) 10

Alltel Commc'ns, LLC v. DeJordy,
675 F.3d 1100 (8th Cir. 2012) 7, 9

Bonnet v. Harvest (U.S.) Holdings, Inc.,
741 F.3d 1155 (10th Cir. 2014) 8, 9, 11

Boron Oil Co. v. Downie,
873 F.2d 67 (4th Cir. 1989) 8

Bucklew v. Precythe,
139 S. Ct. 1112 (2019) 3, 7, 12

Chisholm v. Georgia,
2 Dall. 419, 1 L.Ed. 440 (1793) 9

Flynt v. Lombardi, 885 F.3d 508 (8th Cir. 2018) 13

Franchise Tax Board of California v. Hyatt,
139 S. Ct. 1277 (2019) 9, 10, 14

Glossip v. Gross,
135 S. Ct. 2726 (2015) 13

Huston Business Journal, Inc. v. Office of Comptroller of Currency, U.S. Dept. of Treasury,
86 F.3d 1208 (D.C. Cir. 1996) 8, 9, 11

In re Blodgett,
502 U.S. 236 (1992) 12

In re Missouri Department of Natural Resources,
105 F.3d 434 (8th Cir. 1997) 7, 10, 11

In re Mo. Dep't of Corr.,
839 F.3d 732 (8th Cir. 2016) 6

Jordan v. Comm'r, Mississippi Dep't of Corr.,
908 F.3d 1259 (11th Cir. 2018) 6

McGehee v. Fla. Dep't of Corr.,
No. 4:18-mc-00004 (N.D. Fla. Mar. 25, 2019) 6

McGehee v. Hutchinson,
854 F.3d 488 (8th Cir. 2017) 5

McGehee v. Nebraska Dep't of Corr. Servs.,
2020 WL 4517553 (8th Cir. 2020) 7, 9

McGehee v. Tex. Dep't of Criminal Justice,
2018 WL 3996956 (S.D. Tex. Aug. 21, 2018) 6

U.S. v. Morton Salt Co.,
338 U.S. 632 (1950) 8

Younger v. Harris,
401 U.S. 37 (1971) 14

Rules

Fed. R. App. Pro. 29(a)(2) 3

Other Authorities

Note, A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections, 120 Harv. L. Rev. 1301, 1304 (2007) 7

Amici Curiae's Interest

Amici curiae are the States of Missouri, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Ohio, Oklahoma, South Carolina, South Dakota, and Texas. *Amici* file this amicus brief under Fed. R. App. P. 29(b)(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 and force them to defend in federal court without their consent.

Argument

I. Inmates Have Repeatedly Used Non-Party Subpoenas To Undermine States' Eleventh Amendment and Sovereign Immunity.

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 States' 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.

In the wake of the Supreme Court's decision in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), 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. For example, five months after *Glossip,* Alabama plaintiffs issued a non-party subpoena to the Missouri Department of Corrections. *Thomas D. Arthur v. Jefferson Dunn, et al.,* 2:11-CV-00438 (M.D. Ala.) (Subpoena issued Nov. 4, 2015). In 2016, 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). In 2017, still more non-party subpoenas issued against other

States. *See, e.g., 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); *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).

Non-party subpoenas continue to be issued against States. For instance, Nebraska was one of eight States—Florida, Georgia, Missouri, Nevada, South Dakota, Texas, and Utah—that the Arkansas inmates in this case noticed their intent to serve with non-party subpoenas. The inmates sought 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. *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). At least four States were forced to appear and defend in federal courts across the country. *See*, *e.g.*, *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). Inmates from other States have employed similar tactics.

These cases have consumed considerable state resources, and they have also had an impact on this Court and other federal courts. For instance, Mississippi-based litigation has spawned collateral litigation concerning non-party discovery served on other states. *See*, *e.g.*, *Jordan v. Comm'r, Mississippi Dep't of Corr.*, 908 F.3d 1259 (11th Cir. 2018); *In re Mo. Dep't of Corr.*, 839 F.3d 732 (8th Cir. 2016), *cert. denied sub nom. Jordan v. Mo. Dep't of Corr.*, 137 S. Ct. 2180 (2017).

These examples demonstrate the burgeoning problem of non-party subpoenas to sovereign states in anti-death-penalty litigation. Prior to this wave of non-party subpoenas, there was already 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 death-penalty States may be forced into litigation in federal court to defend against non-party subpoenas.

II. A Non-Party Subpoena to a State Is a "Suit" Barred by Both the Eleventh Amendment and State Sovereign Immunity.

The panel's opinion found that Nebraska's position was foreclosed by circuit precedent. *McGehee v. Nebraska Dep't of Corr. Servs.,* 2020 WL 4517553 (8th Cir. 2020). The panel found that *In re Missouri Department of Natural Resources*, 105 F.3d 434 (8th Cir. 1997), constrained it and required it to affirm the district court. *Id.* But *In re Missouri DNR* is not consistent with both preexisting and more recent cases recognizing that immunity bars such third-party subpoenas in related contexts, and its holding warrants en banc consideration.

In the related contexts of federal-government immunity and tribal immunity, there is no doubt that a non-party subpoena is a "suit" under Article III. *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1105 (8th Cir. 2012) (holding that "a federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity"); *Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1160 (10th Cir. 2014) (holding that "a subpoena duces tecum served directly on the Tribe, regardless of whether it is a party to the underlying legal action, is a 'suit' against the Tribe, triggering tribal sovereign immunity"); *Huston Business Journal, Inc. v. Office of Comptroller of Currency, U.S. Dept. of Treasury*, 86 F.3d 1208, 1211 (D.C. Cir. 1996) (holding that "[w]hen a litigant seeks to obtain documents from a non-party federal governmental agency … [i]n state court," then "the federal government is shielded by sovereign immunity"); *Boron Oil Co. v. Downie*, 873 F.2d 67, 71 (4th Cir. 1989) (holding that a "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" that "falls within the protection of sovereign immunity").

Because they are "suits," third-party subpoenas and proceedings to enforce them are subject to "those limitations inherent in the body that issues them because of the provisions of the Judiciary Article of the Constitution." *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950).

By the same principles, the States enjoy sovereign immunity from non-party subpoenas on the same footing as tribal immunity and federal-government immunity. The concurring opinion in this case expressed "doubts whether, under basic sovereign-immunity principles, a state may be haled into federal court solely for the purpose of answering a third party subpoena." *McGehee v. Nebraska Dep't of Corr. Servs.,* 2020 WL 4517553, at *2 (8th Cir. 2020) (Stras, J., concurring). These concerns are well-placed, in that neither a tribe nor the federal government is subject to the same treatment. *Alltel Commc'ns,* 675 F.3d at 1105, *Bonnet*, 741 F.3d at 1160; *Huston Business Journal, Inc.*, 86 F.3d at 1212. There is no basis in the text of the Constitution for providing States with lesser immunity than that afforded to tribal governments or the federal government.

On the contrary, the Eleventh Amendment was adopted to correct the "blunder" of *Chisholm v. Georgia*, 2 Dall. 419, 1 L.Ed. 440 (1793), and

it expressly prevents Article III courts from exercising jurisdiction over lawsuits by private, out-of-state citizens against sovereign states. *Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1277, 1495–96 (2019). The several States also enjoy the sovereign immunity they retained when they joined the union. *Id.* ("[T]he '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)).

In addition, traditional state sovereign immunity provides a separate bar to such suits. The Supreme Court recently reaffirmed that state sovereign immunity was always inherent in our constitutional design. *Hyatt*, 139 S. Ct. at 1496. Put another way, "the Constitution . . . preserve[d] the States' traditional immunity from private suits." *Alden*, 527 U.S. at 724.

A non-party subpoena for records is a private suit. Suits against non-consenting states are barred by both the Eleventh Amendment and traditional state sovereign immunity. Under these principles, the subpoena for records against Nebraska is invalid.

Against this straightforward application of traditional federalism principles, *In re Missouri DNR* offered only a brief analysis, based on two

general statements. First, it observed that "governmental units are subject to the same discovery rules as other persons and entities" in the federal courts. *In re Missouri DNR*, 105 F.3d at 436. While true in most cases, that statement puts the cart before the horse. States enjoy Eleventh Amendment immunity from "suits," and discovery rules follow, not precede, a suit. Second, *In re Missouri DNR* stated, without further analysis or support, that "[t]here is simply no authority for the position that the Eleventh Amendment shields government entities from discovery in federal court." *Id*. But as discussed in Nebraska's petition and above, that was incorrect at the time, and it is certainly no longer true now. *See Alltel Commc'ns,* 675 F.3d at 1105, *Bonnet*, 741 F.3d at 1160; *Huston Business Journal, Inc.*, 86 F.3d at 1212.

In short, *In re Missouri DNR* is ripe for reconsideration. It offered only a brief analysis of the immunity question, which was evidently not the focus of the parties' briefing in the case. And its reasoning conflicts with more recent decisions from both this Court and the Tenth Circuit on tribal immunity, as well as previous decisions from the D.C. Circuit and the Fourth Circuit on federal-government immunity. The conflicting

decisions, moreover, come to the proper conclusion that is consistent with the Constitution, comity, and federalism.

III. Rehearing En Banc Is Necessary to Restore Comity Between Co-Equal Sovereigns.

The impact of these non-party subpoenas is substantial, and it affects death-penalty states across the nation. The Founders' original constitutional design protects states from these non-party subpoenas because they are federal "suits" by citizens of a foreign state. The regime created by *In re Missouri DNR* undermines the Founders' design by effectively abrogating state sovereign immunity. En banc consideration is necessary to restore the comity owed to co-equal sovereigns.

Our constitutional system has, in large measure, reserved the police power to the states. Some states have, in turn, seen fit to implement capital punishment for their most heinous offenders. In doing so, those states have a legitimate and compelling 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. *Bucklew*, 139 S. Ct. at 1133.

Forced compliance with these subpoenas would run 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. The very pendency of such enforcement actions threatens the States' sovereign interests in carrying out their lawful sentences of death on heinous murderers. Even the threat of such subpoenas signals to potential future suppliers of lethal chemicals—who frequently insist on anonymity to avoid harassment and economic retaliation—that their identities might not be secure if they are subject to subpoenas in courts across the land. This threat interferes with the states' ability to secure a stable supply of lethal chemicals, thereby undermining a core sovereign interest.

These concerns are concrete. Missouri, like Nebraska and several other 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 v. Lombardi*, 885 F.3d 508, 513 (8th Cir. 2018). Subpoenas for records, like the one issued against Nebraska, interfere with this already formidable task. For years, States have been subject to 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.). These non-party subpoenas are merely the newest front in this war.

The war's collateral damage is the weakening of state sovereignty. By requiring States to appear and defend against non-party subpoenas, federal courts have reduced the states' immunity—which is "[a]n integral component of the States' sovereignty." *Hyatt*, 139 S. Ct. at 1493. This, in turn, injures traditional notions of comity, which serves federalism by fostering "a proper respect for state functions" by recognizing "that the entire country is made up of a Union of separate state governments." *Younger v. Harris*, 401 U.S. 37, 44 (1971).

The Court should grant en banc consideration in this case to reconsider *In re Missouri DNR* and restore the proper understanding of the States' Eleventh Amendment and traditional sovereign immunity from suit in federal courts.

CONCLUSION

Nebraska's petition for en banc consideration should be granted.

Dated: August 27, 2020

Respectfully Submitted,

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Certificate of Service and Compliance

I hereby certify that a true and correct copy of the foregoing was electronically filed by using the CM/ECF system. Counsel for petitioner will receive a copy of the foregoing document through the CM/ECF system this 27th day of August, 2020.

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it is prepared in a proportionally spaced typeface in Microsoft Word using 14-point Century Schoolbook typeface and with the type-volume limitation of Rule 29(a)(5) because it contains 2,317 words.

/s/ Gregory M. Goodwin