No. 21-439

IN THE
Supreme Court of the United States

MICHAEL NANCE,
Petitioner,
v.
COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, AND WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,
Respondents.

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

REPLY BRIEF

ANNA M. ARCENEAUX
CORY H. ISAACSON
GEORGIA RESOURCE CENTER
104 Marietta Street NW
Ste. 260
Atlanta, GA 30303

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

MATTHEW S. HELLMAN
Counsel of Record
KEVIN J. KENNEDY*
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

LAURIE WEBB DANIEL
MATTHEW D. FRIEDLANDER
HOLLAND & KNIGHT LLP
1180 West Peachtree Street
Suite 1800
Atlanta, GA 30309

**Not admitted in the District of Columbia; practicing under direct supervision of members of the D.C. Bar*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

REPLY BRIEF OF PETITIONER

All nine Justices agreed in *Bucklew* that an inmate may plead a non-statutory alternative in challenging the existing method of execution adopted by his State. Were it otherwise, the Court explained, the "comparative assessment" the Eighth Amendment requires would impermissibly "be controlled by the State's choice of which methods to authorize." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1128 (2019).

The decision below vitiates that holding. It transmutes a ruling intended to ensure that an inmate would have a fair opportunity to challenge an unconstitutional protocol into a functional bar against such claims. *Bucklew*, 139 S. Ct. at 1136 ("underscor[ing]" and "emphasiz[ing]" that allowing inmates to point to non-statutory alternatives ensures that there is "little likelihood" an inmate will be unable to identify such an alternative (Kavanaugh, J., concurring)).

Respondents do not dispute that the panel decision makes it all but impossible for a litigant to plead the non-statutory alternatives this Court preserved in *Bucklew*. Nor do they dispute that the decision means that some prisoners will not have any avenue for judicial review before they are executed using methods that pose an unconstitutionally serious risk of severe pain. Instead, Respondents argue that the issue does not warrant review and that the decision merely correctly carries out this Court's suggestion that claims like Nance's "might" sound in habeas. *Hill v. McDonough*, 547 U.S. 573, 582 (2006). But a decision that closes the courthouse doors to claims of serious constitutional violations decidedly

warrants this Court's review, particularly because Nance's claim would not have been barred elsewhere. And on the merits, challenges to execution procedures fall squarely on the § 1983 side of the habeas/§ 1983 line that this Court has consistently drawn for decades. If this Court meant to break with that precedent and foreclose those claims in the manner adopted by the Eleventh Circuit, it should be the Court to say so, not the Eleventh Circuit. And it should resolve the question in this case, which presents an excellent vehicle in a non-emergency posture that will allow for full briefing and oral argument.

1. This case presents a clean circuit split—between the Sixth and Eleventh Circuits—in an area of law—method-of-execution claims—where this Court regularly intervenes even absent such a split. Review is warranted.

Despite Respondents' assertions to the contrary, the Sixth Circuit and Eleventh Circuit are squarely divided. In the Sixth Circuit, a claim asserting that all methods of execution authorized under a State's statute are unconstitutional must be brought via § 1983, not habeas. *In re Campbell*, 874 F.3d 454, 465-66 (6th Cir. 2017). In the Eleventh Circuit, the opposite is true—that same claim must proceed through habeas, not § 1983.

In opposition, Respondents principally argue that this Court's recent decision in *Bucklew* casts doubt on the Sixth Circuit's earlier holding. That contention is unpersuasive. To be sure, in *Bucklew* this Court acknowledged that if the relief sought through § 1983 would "'foreclose the State from implementing the [inmate's] sentence under present law,' then

'recharacterizing a complaint as an action for habeas corpus might be proper.'" 139 S. Ct. at 1128 (quoting *Hill*, 547 U.S. at 582-83 (bracket in original)). But, as the citation itself indicates, *Bucklew* simply reiterated a possibility previously articulated by this Court in *Hill*, a case decided before *Campbell*. And in reaching its decision in *Campbell*, the Sixth Circuit considered, but rejected, the habeas route discussed in *Hill*, finding it inconsistent with the fundamental divide between habeas and § 1983. *Campbell*, 874 F.3d at 465-66. The Sixth Circuit has thus already rejected the interpretation the Eleventh Circuit gave to the language quoted in *Bucklew*.

Moreover, the Sixth Circuit has revisited the issue post-*Bucklew* and reiterated that the *Hill* passage quoted in that opinion does not change its analysis. *In re Smith*, 806 F. App'x 462, 464 (6th Cir. 2020) (noting that the issue was not "implicated by the question presented in *Bucklew*, its holding, or its primary legal reasoning"). Respondents contend that *Smith* should be ignored because it is an unpublished determination, but there is little reason to think that the Sixth Circuit, after having repeatedly rejected the Eleventh Circuit's interpretation of the 15-year old language from *Hill*, would change course now.

In any case, this Court has repeatedly granted cases concerning lethal injection even where no split was alleged in light of the importance of the questions they presented. In both *Bucklew* and *Glossip v. Gross*, 576 U.S. 863 (2015), for example, this Court granted review to resolve lethal injection issues despite an acknowledged lack of a split. *See* Brief in Opposition at

38, *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (No. 17-8151), 2018 WL 1757762; Brief in Opposition at 7-8, *Glossip v. Gross*, 576 U.S. 863 (2015) (No. 14-7955), 2015 WL 1743949. This case presents a question of at least equal importance, particularly because the decision below creates the very legal regime that this Court abjured in *Bucklew*; namely one where there is "little likelihood" (and indeed no likelihood) a prisoner could plead a feasible alternative method of execution. And it does so in a jurisdiction in which a full 22% of the nation's death row inmates are housed. *See Death Row*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/death-row/overview (last visited Dec. 1, 2021). Review is merited to protect the fundamental interests of those prisoners seeking to vindicate their Eighth Amendment rights—particularly in a State, like Georgia, that authorizes only a single method of execution and thus leaves no option but to name an alternative not authorized by statute.

2. Respondents' merits arguments are similarly unpersuasive: like the Eleventh Circuit, Respondents misunderstand the fundamental divide between § 1983 and habeas. Nance's claim, which does not challenge the validity of his death sentence, sounds in § 1983.

As Justice Scalia explained in his seminal opinion for the Court, habeas provides the exclusive vehicle where a prisoner "challenges the fact or duration of his confinement and seeks immediate or speedier release." *Heck v. Humphrey*, 512 U.S. 477, 481 (1994). A habeas petition seeks that release through "*invalidation* (in whole or in part) of *the judgment* authorizing the prisoner's confinement." *Magwood v. Patterson*, 561

U.S. 320, 332 (2010) (quotation marks omitted) (emphasis in original). Thus the "typical relief granted" following a successful petition is a "conditional order of release," which entitles the petitioner to release pending the State's effort to replace the invalid judgment with a valid one through retrial or resentencing. *Herrera v. Collins*, 506 U.S. 390, 403 (1993).

Section 1983, on the other hand, provides a vehicle for altering the conditions through which a valid judgment is carried out. *Nelson v. Campbell*, 541 U.S. 637, 643-45 (2004). Put differently, a § 1983 claim identifies unlawfulness in the *implementation* of a judgment, rather than in the judgment *itself*. As a result, a successful § 1983 claim does not alter the terms of a judgment (the fact or duration of confinement), but rather merely directs the State to accomplish those terms through alternative, lawful means.

Because Nance's claim goes only to the method through which his death sentence will be carried out, it sounds in § 1983, not habeas. The stakes of Nance's claim make that clear. If Nance were to succeed, he would not achieve speedier release and his death sentence would remain valid and in place. The State would not be required to pursue a new judgment to authorize his continued confinement and eventual execution. As such, it is simply incorrect to contend, as Respondents repeatedly do, that Nance's suit would "necessarily" invalidate his death sentence. BIO 12. Instead, Nance's successful claim would merely enjoin the State from carrying out his death sentence through one particular method: lethal injection.

To be sure, before carrying out Nance's death sentence, the State would need to authorize an additional method of execution. But the very nature of § 1983 relief is that it requires a State to halt its unlawful practices, which, in turn, often necessitates that the State develop and adopt new ones. *See, e.g.*, *Johnson v. California*, 543 U.S. 499 (2005) (considering a § 1983 racial discrimination claim requiring the integration of California's prison system). Because § 1983 suits routinely aim to enjoin the enforcement of state law, a State's substitution of new practices frequently requires legislative involvement. And this familiar dynamic applies equally in the prison context. Consider, for example, an Eighth Amendment challenge alleging that a State failed to provide adequate prison health services. That kind of core § 1983 claim would not be transformed into a request for habeas relief simply because the State contended that it could not provide those services absent an additional statutory appropriation.

Respondents concede that, under the Eleventh Circuit's approach, there will be "line drawing problems." BIO 13. That is an understatement. Respondents claim that challenges to methods of execution sound in habeas only if the claim prohibits the execution as a matter of "logical necessity" under "state law." BIO 14. But that rule is hardly self-defining. Is "state law" exclusively a matter of state *statute*? Respondents pointedly do not disclaim that a challenge requiring a sufficiently substantial change to state *regulations* might also sound in habeas. It is hard to blame them for the lack of clarity: because the Eleventh Circuit's approach is unmoored from existing jurisprudence, there are no clear answers to these

questions. Consequently, Eighth Amendment challenges will consistently be subject to satellite jurisidictional litigation at the outset about whether the proposed alternative requires the relevant sort of legal change to bring the claim within habeas' domain. Thus, in addition to being irreconcilable with the clear line the Court has drawn between habeas and § 1983, the Eleventh Circuit's approach needlessly complicates Eighth Amendment litigation and further subjects Eighth Amendment rights to the peculiarities of state practice.

Respondents ultimately fall back on this Court's dicta that habeas "might be proper" for claims that would block an execution absent a change to "present law." *Hill*, 547 U.S. at 582-83. But that dicta does not dictate a result in this case. If the Court meant that language to mean that claims like Nance's are barred—notwithstanding that they clearly sound in § 1983 under this Court's jurisprudence, and notwithstanding this Court's unanimous determination in *Bucklew* that inmates should be able to plead non-statutory alternatives—then this Court should say so. Only this Court can authoritatively construe its opinion, and it should do so by granting review in this case.

3. Respondents' discussion of the second question presented misses the mark. In reaching its decision, the panel majority made two distinct, but related, legal holdings. First, the panel held that Nance's claim must proceed through habeas. Second, the panel found that Nance's petition was his second challenging the judgment at issue and was thus properly characterized as second-or-successive under the Antiterrorism and

Effective Death Penalty Act of 1996 (AEDPA). That second holding—presented for review by the second question—is both consequential and incorrect.

Respondents begin by baldly mischaracterizing the second question as a "factbound issue." BIO 17. It is a legal one, and one of great importance. The panel found that Nance's method-of-execution challenge—and those like his—must be treated as a "second or successive" petition under AEDPA § 2244. That holding constitutes binding circuit precedent on an important issue of statutory interpretation. As we have explained, essentially every person on death row will have already filed one habeas petition by the time any method-of-execution challenge would become ripe. And because method-of-executon challenges almost never present claims of actual innocence or invocations of a new retroactive rule, such Eighth Amendment challenges will seldom be cognizable. The Eleventh Circuit's holding on this point is the epitome of a categorical legal ruling, not a factbound one.

It is also an erroneous one. In *Panetti v. Quarterman*, this Court recognized that AEDPA's use of "[t]he phrase 'second or successive' is not self-defining," such that not all second-in-time claims are statutorily second-or-successive ones. 551 U.S. 930, 943 (2007). Nance's claim fits within that carveout. Just as with *Ford* claims, if a second-or-successive bar were applied in this context, it would create judicial inefficiency by requiring prisoners to plead method-of-execution claims before they ripen. *Id.* at 946. And when prisoners inevitably trip over that "empty formality," the bar would unfairly foreclose meritorious, timely filed

claims. *Id.* AEDPA was not enacted to achieve those purposes. *See id.* at 945-47.

To avoid that conclusion, Respondents echo the Eleventh Circuit's inadequate analysis. Respondents, like the Eleventh Circuit, wrongly assert that *Panetti*'s exception "is tailored to the context of *Ford* claims." BIO 19 (quoting Pet. App. 23a-24a). To the contrary, this Court recently reiterated that *Panetti*'s framework is generally applicable: to determine whether a given type of claim "qualifies as second or successive," courts must look both to "historical habeas doctrine and practice" and to "AEDPA's own purposes." *Banister v. Davis*, 140 S. Ct. 1698, 1705-06 (2020). Other circuits have properly found that the category recognized in *Panetti* is not a class of one. *See, e.g.*, *Leal Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009); *In re Bowling*, No. 06-5937, 2007 WL 4943732, at *3 (6th Cir. Sept. 12, 2007); *United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011).

Respondents' passing attempt to rebut the relevant equivalence between *Ford* claims and those raised here is similarly unavailing. Again, Respondents simply quote the Eleventh Circuit's brief analysis. BIO 19. According to the Eleventh Circuit, unlike a prisoner with a *Ford* claim, a prisoner whose method-of-execution claim ripens after the first habeas petition "may rely on section 1983 to minimize the risk of pain during his execution—with the caveat that he seeks relief designed to accommodate his state's authorized methods of execution." Pet. App 24a. But the caveat swallows the whole: where, as here, a prisoner's as-applied claim runs against a State's sole authorized method of execution, the Eleventh Circuit's rule

provides no alternative to habeas and thus no viable way to raise the claim at all. The prisoner is, as Respondents put it, "stuck between a rock and a hard place." BIO 19.

Should the Court agree with the Eleventh Circuit's finding that habeas provides the proper vehicle for these claims, it should also take up and reverse the Eleventh Circuit's second holding, which effectively closes the courthouse doors to valid lethal-injection claims.

4. Finally, Respondents' vehicle arguments are meritless. Respondents contend that the district court correctly dismissed Nance's § 1983 claim as time-barred, and that Nance therefore would not be entitled to relief even if he prevailed in this Court. BIO 15-16. But the Eleventh Circuit pointedly did not find that Nance's § 1983 claim was properly dismissed as untimely. Indeed, the panel majority made no attempt to rebut Judge Martin's conclusion that Nance has "alleged sufficient facts to survive Defendants' timeliness challenge." Pet. App. 40a & n.4.

As Judge Martin explained, Nance "alleged that he learned about the condition of his veins—and the impact they would have on his execution—in May 2019 at the earliest," which would make his January 2020 complaint timely. Pet. App. 39a & n.4. Judge Martin rejected Respondents' factual contention that Nance had not adequately established that his claim was timely. As Judge Martin explained, such arguments were the proper province of discovery, not a basis for dismissal on a motion to dismiss. Pet. App. 40a & n.4. In any event, the timeliness of Nance's § 1983 claim can and should be addressed in the first instance by the Eleventh Circuit on remand, and the presence of that subsidiary question

poses no barrier to this Court's review.[1] *See Nelson*, 541 U.S. at 651 (remanding for further proceedings in lethal injection case); *Hill*, 547 U.S. at 585 (same).

So too with Respondents' contention that Nance's claim would fail on the merits. BIO 16. Again, the panel majority did not reach that question, let alone rebut Judge Martin's analysis that Nance had stated a claim. Pet. App. 41a-46a. To the extent Respondents are contending that they would prevail *after* discovery, that assertion is obviously premature and only demonstrates why review is warranted. Respondents will be free to defend their method on remand. Nance asks only that this Court address the threshold legal ruling that prevents him from ever being able to challenge that method in the first place.

The reality is that this case is an excellent vehicle. It squarely tees up the questions presented, and, equally important, it does so in a case where the petitioner does not have an execution date. The Court would thus have the benefit of full merits briefing and oral argument

---

[1] That review on remand can also encompass, and should reject, Respondents' assertion—briefed for the first time in this Court—that Nance's 2014 habeas petition shows that he was aware of the basis of his claim at that time. As with Respondents' other attempts to go beyond the "face of the complaint," the habeas petition is irrelevant at the pleadings stage, Pet. App. 40a & n.4. Moreover, Nance has never denied he was aware he was an intravenous drug user; his allegation is that it was only in 2019 that he learned his veins were so severely compromised that execution by lethal injection necessarily will violate the Eighth Amendment as applied to him. *Id.* Proceedings on remand can also address the timeliness of Nance's gabapentin claim, Pet. 10, which was not discussed by any member of the panel.

rather than having to take action on the emergency docket. The Court should resolve the questions presented in this petition rather than wait to see them recur in a case where they are presented in an emergency posture.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

ANNA M. ARCENEAUX
CORY H. ISAACSON
GEORGIA RESOURCE CENTER
104 Marietta Street NW
Ste. 260
Atlanta, GA 30303

DAVID A. STRAUSS
SARAH M. KONSKY
JENNER & BLOCK SUPREME COURT AND APPELLATE CLINIC AT THE UNIVERSITY OF CHICAGO LAW SCHOOL
1111 E. 60th Street
Chicago, IL 60637

MATTHEW S. HELLMAN
Counsel of Record
KEVIN J. KENNEDY*
JENNER & BLOCK LLP
1099 New York Avenue NW
Washington, DC 20001
(202) 639-6000
mhellman@jenner.com

LAURIE WEBB DANIEL
MATTHEW D. FRIEDLANDER
HOLLAND & KNIGHT LLP
1180 West Peachtree Street
Suite 1800
Atlanta, GA 30309

**Not admitted in the District of Columbia; practicing under direct supervision of members of the D.C. Bar*