No. 21-439

IN THE
Supreme Court of the United States

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

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

BRIEF FOR PETITIONER

ANNA M. ARCENEAUX
CORY H. ISAACSON
GEORGIA RESOURCE CENTER
104 Marietta Street NW
Suite 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
URJA MITTAL
KEVIN J. KENNEDY*
DEANNA E. KROKOS
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*

CAPITAL CASE
QUESTIONS PRESENTED

In *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), "all nine Justices" agreed that a person challenging a State's method of execution could allege an alternative "not … authorized under current state law" and that there was therefore "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* at 1136 (Kavanaugh, J., concurring).

In the proceedings below, Petitioner filed a § 1983 suit bringing an as-applied challenge to Georgia's sole statutorily authorized method of execution, lethal injection. Petitioner alleged the use of a firing squad as an alternative method. A divided panel held that Petitioner's challenge could not be heard. The panel ruled that Petitioner must bring his challenge in habeas rather than via § 1983 because he had alleged an alternative method not currently authorized under Georgia law. It further held that Petitioner's claim would be an impermissible successive petition notwithstanding that the claim would not have been ripe at the time of Petitioner's first petition.

The questions presented are:

1. Whether an inmate's as-applied method-of-execution challenge must be raised in a habeas petition instead of through a § 1983 action if the inmate pleads an alternative method of execution not currently authorized by state law.

2. Whether, if such a challenge must be raised in habeas, it constitutes a successive petition where the challenge would not have been ripe at the time of the inmate's first habeas petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the Northern District of Georgia is not published but is reproduced at Pet. App. 47a–67a. The judgment of the Northern District of Georgia is not published but is reproduced at Pet. App. 68a–69a. The Eleventh Circuit's opinion is reported at 981 F.3d 1201 and reproduced at Pet. App. 1a–46a. The Eleventh Circuit's divided order denying rehearing is reported at 994 F.3d 1335 and reproduced at Pet. App. 70a–84a.

JURISDICTION

The judgment of the court of appeals was entered December 2, 2020, and a timely petition for *en banc* review was denied on April 20, 2021. Petitioner filed a timely petition on September 17, 2021, which was granted on January 14, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Title 28, Section 2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in

> custody in violation of the Constitution or laws or treaties of the United States.

Title 28, Section 2244(b)(3)(A) of the United States Code provides:

> Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Title 42, Section 1983 of the United States Code provides, in relevant part:

> Every person who, under color of any statute … of any state … subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

INTRODUCTION

In a series of decisions spanning nearly two decades, the Court has set out the pleading requirements for challenging a State's method of execution under the Eighth Amendment. Those decisions hold that a prisoner must identify in his complaint an alternative feasible and readily available method of execution that the prisoner concedes is lawful. In the Court's most recent opinion to address this issue, "all nine Justices" agreed that the proffered alternative method need not currently be authorized by state law. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1136 (2019) (Kavanaugh, J., concurring). As the Court explained, "the Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes." *Id.* at 1128. The Court stressed that allowing prisoners to plead non-statutory alternatives would ensure that there would be "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* at 1128–29.

The decision below violates those holdings, upends well-settled doctrines, and needlessly opens the door to confusion and delay in prisoner litigation cases. Petitioner Michael Nance has been sentenced to death by the State of Georgia. Nance brought a § 1983 claim challenging Georgia's sole authorized method of execution—lethal injection—as unconstitutional as applied to him. Because Georgia authorizes only one method of execution, Nance necessarily had to plead a non-statutory alternative. Nance alleged the firing squad as his alternative—a method that this Court has

held is constitutional and one that is currently authorized in four other states, where it was most recently used to carry out an execution in 2010.

Although Georgia opposed Nance's claims solely on the merits, a divided court of appeals *sua sponte* held that Nance's claim was jurisdictionally barred. According to the panel majority, because Nance's proffered alternative was not currently authorized by state law, his challenge to lethal injection was a claim that his death sentence *itself* was unconstitutional, and thus sounded in habeas rather than § 1983. And because Nance, like almost all death-row prisoners, had filed a first federal habeas petition after his conviction became final, the panel majority held that he was barred by the limits on second or successive petitions from seeking relief. The panel acknowledged that its decision would bar meritorious Eighth Amendment claims from being considered but held that was a necessary consequence of the habeas rules where a prisoner pleaded a non-statutory alternative.

The Eleventh Circuit's decision rests on a basic category error. As this Court has repeatedly explained, a claim sounds in habeas when it necessarily implies the invalidity of the prisoner's conviction or sentence. Nance's claim not only does not necessarily imply the invalidity of his death sentence, it affirmatively concedes that sentence's validity. If Nance gets all the relief he seeks, he will still be executed. His claim thus is not a habeas claim.

Instead, as this Court has repeatedly held, a method-of-execution claim is the equivalent of a conditions-of-confinement claim. Just as a conditions-of-confinement

claim challenges the method by which a state implements a sentence of imprisonment, Nance's claim challenges the method by which a State implements a sentence of death. Neither claim "necessarily" (or even potentially) implies the invalidity of the sentence, and thus both sound in § 1983.

The Eleventh Circuit contended that proposing a non-statutory alternative effectively challenged the death sentence itself because a State would need to pass legislation to implement the constitutional method. That asks the wrong question: the test is whether the claim necessarily implies the invalidity of the sentence, not what steps the State would need to take to comply with the Constitution. No one would think, for example, that a § 1983 claim challenging the adequacy of medical care in a prison would be transformed into a habeas claim if the State needed to make further legislative appropriations to provide a constitutional level of care. Section 1983 is equally applicable—and habeas equally inapplicable—regardless of whether the proposed alternative method for carrying out the sentence is adopted via legislation, regulation, or policy change.

In addition to transgressing the Court's teachings on the difference between § 1983 and habeas, the Eleventh Circuit's rule vitiates *Bucklew* itself. *Bucklew* holds that a prisoner should—and indeed must—have the ability to plead a non-statutory alternative. Yet under the Eleventh Circuit's rule, prisoners who plead such alternatives will almost invariably have the courthouse doors closed to them in habeas—no matter how unconstitutional the State's method is, and no matter how feasible their alternative is. Far from ensuring the

Eighth Amendment reigns as the supreme law of the land as *Bucklew* requires, the Eleventh Circuit's rule confines the constitutional inquiry to whichever methods of execution a State has chosen to legislate.

The panel majority defended that outcome by pointing to dicta in *Bucklew* suggesting that claims alleging non-statutory alternatives could perhaps sound in habeas. But *Bucklew* did not redraw the line between habeas and § 1983, and the panel majority badly misinterpreted that decision by treating it as creating a functional bar to the very kind of claim that the opinion stressed should not be difficult to bring. When this Court's precedents are applied, the answer to the question posed by *Bucklew* is clear: Claims that allege a non-statutory alternative for carrying out a death sentence do not necessarily imply the invalidity of that sentence, and therefore sound in § 1983.

In the face of this Court's settled jurisprudence, the Eleventh Circuit's decision offers an unwelcome invitation for confusion and delay. Under the panel's rule, method-of-execution cases will now routinely begin with a jurisdictional dispute about whether the proposed alternative method could be implemented under current law. The answer—which may not even be determined until after evidence is presented—could mean that prior proceedings were wasted on the adjudication of the wrong claim in the wrong court. More fundamentally, the rule below allows a State to insulate its practices from § 1983 review simply by codifying them via legislation. The very same unconstitutional method of execution could be subject to a § 1983 challenge in one State, but immune under the habeas rules from

challenge in another solely because it was codified in the latter State. Nor would that arbitrariness necessarily be limited to method-of-execution claims. If prisoner suits that require legislative change sound in habeas, a State could just as easily use legislation to force a litigant to bring a habeas petition to challenge prison policies governing, say, medical services or the exercise of First Amendment rights.

All of this can and should be avoided simply by recognizing that claims like Nance's do not necessarily imply the invalidity of his death sentence. But if this Court were to find that Nance's claim sounds in habeas, it should hold that it is not second or successive. Nance's claim is no different from a competency-to-be-executed claim that was not ripe at the time of his first habeas petition. And just as with those competency claims, claims like Nance's implicate an interest in ensuring that unconstitutional executions do not take place. Such claims are not second or successive under this Court's precedent.

For all these reasons, Nance respectfully asks this Court to reverse and remand the judgment below.

STATEMENT

A. Precedential Background

Over a series of decisions, this Court has addressed both a litigant's obligation to plead and prove an alternative method of execution as part of a method-of-execution challenge, as well as the related question of what procedural vehicle must be used for such challenges.

The Court first opined on these issues in *Nelson v. Campbell*, 541 U.S. 637 (2004). In *Nelson*, the prisoner had filed a civil rights action under § 1983, "alleging that the use of a 'cut-down' procedure to access his veins would violate the Eighth Amendment." *Id.* at 639. The Court rejected the State's argument that petitioner's challenge to a "part of the execution procedure" presented a "challenge to the fact of his execution" that sounds in habeas. *Id.* at 645. Emphasizing that "we see no reason on the face of the complaint to treat petitioner's claim differently solely because he has been condemned to die," *id.* at 645, the Court held that the relevant inquiry "focus[ed]" on "whether petitioner's challenge to the cut-down procedure would *necessarily* prevent Alabama from carrying out its execution." *Id.* at 647 (emphasis in original). Because the petitioner had conceded that his execution could take place using alternatives to the cut-down procedure, the Court held that the claim sounded in § 1983. *Id.*

The Court next addressed these issues in *Hill v. McDonough*, in which a litigant alleged that Florida's three-drug lethal injection protocol violated the Eighth Amendment. 547 U.S. 573 (2006). Hill did not propose an alternative method of execution, and the lower courts construed his claim as sounding in habeas. This Court reversed, and held that Hill's claim sounded in § 1983 and could proceed under "traditional [section 1983] pleading requirements." *Id.* at 582.

The Court held that a challenge to execution procedures is properly brought under § 1983 unless the "relief sought would foreclose execution," in which case, "recharacterizing a complaint as an action for habeas

corpus might be proper." *Id.* at 582. Rejecting the State's argument that challenges to execution procedures implicating "practical" impediments to carrying out a sentence "should be brought in habeas," the Court explained the "criterion" for distinguishing § 1983 and habeas turns on "whether a grant of relief to the inmate would necessarily bar the execution." *Id.* at 583. Although Hill had not affirmatively proposed an alternative method, Hill had conceded that "other methods of lethal injection the Department could choose to use would be constitutional." *Id.* at 580 (quotation marks omitted). Accordingly, the Court found that the relief "Hill seeks would not necessarily foreclose the State from implementing the lethal injection sentence under present law" and held that the claim sounded in § 1983. *Id.* at 583.

Next, in *Baze v. Rees*, 553 U.S. 35, 52 (2008), a plurality of the Court clarified that a litigant must plead a "feasible, readily implemented" alternative as part of a method-of-execution claim. In *Glossip v. Gross*, 576 U.S. 863 (2015), the Court held that the plurality opinion in *Baze* controlled and that "the Eighth Amendment requires a prisoner to plead and prove a known and available alternative" method of execution that "presents less risk" of pain than the State's planned method, 576 U.S. at 879-80. The Court further noted that *Hill* "held that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." *Id.* at 879 (citing *Hill*, 547 U.S. at 579–80).

In *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), this Court resolved two open questions relating to the

obligation to plead an alternative method: whether a litigant was obligated to plead an alternative method in bringing an as-applied (rather than facial) challenge to the existing method, and whether a litigant could plead an alternative method that was not currently authorized by state law. This Court answered both questions affirmatively—the second unanimously.

Bucklew squarely held that a prisoner "is not limited to choosing among those [methods] presently authorized by a particular State's law." 139 S. Ct. at 1128; *see also id.* at 1136 (Kavanaugh, J., concurring) (recognizing that "all nine Justices" agreed on this point). This Court explained that this conclusion flowed from the Eighth Amendment itself: "the Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes." *Id.* at 1128.

The Court emphasized the burden to plead an alternative method may often "be overstated" and held specifically that prisoners "may point to a well-established protocol in another State as a potentially viable option." *Id.* In that same passage, the Court noted in dicta that existing state law might "be relevant to determining the proper procedural vehicle for the inmate's claim," repeating the dictum from *Hill* that such a claim "might" sound in habeas if it "'foreclosed the State from implementing the [inmate's] sentence under present law.'" *Id.* (quoting *Hill*, 547 U.S. at 582–83 (bracket in original)). However, this Court did not decide that question, or disrupt its settled holding that method-of-execution cases "must be brought under

§ 1983," *Glossip*, 576 U.S. at 879, unless they would "necessarily impl[y] the invalidity of the prisoner's sentence," *Hill*, 547 U.S. at 580.

Justice Kavanaugh, who provided the fifth vote for the majority opinion, also wrote separately to "underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law." 139 S. Ct. at 1136 (Kavanaugh, J., concurring). As he explained, "an inmate who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain." *Id.*

B. The Firing Squad As An Alternative Method Of Execution

This Court has never held that a particular alternative method of execution is feasible and readily implemented. Several Justices, however, have indicated that the firing squad is likely to be such an alternative. The plurality opinion in *Baze* noted the Court had previously held that the firing squad was constitutional under the Eighth Amendment, and that the firing squad had a long history of being used successfully to carry out executions in the military. 553 U.S. at 48 (citing *Wilkerson v. Utah*, 99 U.S. 130, 134 (1879)). Justice Thomas, joined by Justice Scalia, likewise emphasized that the firing squad was "well established in military practice." *Id.* at 102 (Thomas, J., concurring in the judgment) (citation omitted). In *Bucklew*, the State of Missouri suggested that the firing squad might be feasible and readily implemented, though it was not authorized under Missouri state law. *See Bucklew*, 139

S. Ct. at 1136 (Kavanaugh, J., concurring) (quoting Tr. of Oral Arg. 63–64).

Other Justices have described the firing squad as a comparatively painless method of execution that "causes an immediate and certain death, with close to zero risk of a botched execution." *Bucklew*, 139 S. Ct. at 1136 (Kavanaugh, J., concurring) (citing *Arthur v. Dunn*, 137 S. Ct. 725 (2017) (Sotomayor, J., dissenting from denial of certiorari)); *see also Glossip*, 576 U.S. at 880 (majority opinion) (agreeing with the dissent that "there is some reason to think" that execution by firing squad "is relatively quick and painless"). The firing squad is currently authorized as a method of execution in four states: Oklahoma, South Carolina, Mississippi, and Utah. *See States and Capital Punishment*, National Conference of State Legislatures (Aug. 11, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx. The firing squad was used most recently to carry out an execution in Utah in 2010. *See* Kirk Johnson, *Double Murderer Executed by Firing Squad in Utah*, N.Y. Times (June 18, 2010), https://www.nytimes.com/2010/06/19/us/19death.html.

C. Procedural History

1. *Earlier Proceedings.* In 1997, a jury convicted Nance of murder and other crimes and sentenced him to death. Pet. App. 88a. At the time, Georgia's sole method of execution was electrocution. *Dawson v. State*, 554 S.E.2d 137, 139 (Ga. 2001). The Georgia Supreme Court reversed his death sentence on appeal and remanded for a new resentencing trial. Pet. App. 88a. The resentencing trial resulted in a new death sentence. Nance appealed, and the Georgia Supreme Court

affirmed in 2005. Pet. App. 88a. By that time, lethal injection was the sole method of execution in Georgia. *See Dawson*, 554 S.E.2d at 144.

Nance initiated collateral relief proceedings in state court. The trial court granted Nance's petition and held that Nance's counsel was ineffective in presenting mitigating evidence at the resentencing trial. Pet. App. 88a. The Georgia Supreme Court reversed and reinstated his death sentence in 2013. Pet. App. 88a.

Nance subsequently filed a habeas petition under 28 U.S.C. § 2254 in federal court. The district court denied the petition but certified two of Nance's claims for appeal: (1) that Nance received ineffective assistance of counsel at the resentencing trial, and (2) that the trial court erroneously required him to wear a stun belt at the resentencing trial. Pet. App. 88a–89a. The Eleventh Circuit affirmed the denial of the petition in April 2019. Pet. App. 89a. Nance sought review in this Court, which denied certiorari on March 23, 2020. *Nance v. Warden, Georgia Diagnostic Prison*, 922 F.3d 1298 (2019), *cert. denied*, 140 S. Ct. 2520 (2020).

2. *Nance's Method-of-Execution Challenge.* Nance brought this challenge after learning that his medical conditions created a high likelihood he would experience a torturously painful execution. In 2016, Nance was prescribed gabapentin to treat chronic back pain. In April 2019, Nance's physician increased his thrice-daily gabapentin dose from 800 milligrams to 900 milligrams. Pet. App. 96a. Around May 2019, a prison medical technician who was attempting to draw blood from Nance informed him that his veins were so compromised that the execution team would be unable to obtain the

intravenous access ("IV") necessary to execute Nance by lethal injection. Pet. App. 93a. The technician said that the execution team would have to "cut his neck" to administer the injection. Pet. App. 93a. In October 2019, an anesthesiologist confirmed that Nance's veins were severely compromised. Pet. App. 93a–94a, 96a–97a.

If Respondents attempt to execute Nance by lethal injection, Nance will likely endure a prolonged and painful attempt to gain intravenous access. Pet. App. 94a. Then, even if the execution team is able to locate a vein, Nance's veins will not support an IV, and there is a substantial risk that his veins will lose their structural integrity and "blow," causing the injected pentobarbital to extravasate (leak) into the surrounding tissue. Pet. App. 94a–95a. This would cause intensely painful burning and a prolonged and only partially anesthetized execution that Nance would experience as death by suffocation. Pet. App. 94a; *see also Glossip*, 576 U.S. at 872 (describing execution attempt where, after numerous unsuccessful attempts to obtain IV access, IV leaked fluid into Glossip's tissue, resulting in a botched execution). At the same time, Nance's years of gabapentin use will interfere with the sedative effect of pentobarbital, further increasing the risk that he will be partially sensate to the agony associated with respiratory and organ failure. Pet. App. 96a–97a.

The alternatives to conventional intravenous access—central venous cannulation and a cut-down—also present an unacceptable risk of a torturous and botched execution because they are complicated medical procedures that require specific training, tools, and equipment not possessed by the execution team, and the

risks generated by Nance's medical conditions and Georgia's protocol would still exist. Pet. App. 95a–96a; *see also Nelson*, 541 U.S. at 641–42 (describing cut-down procedure).

In January 2020, soon after learning Georgia's lethal injection protocol poses a substantial risk to him of inflicting serious pain, Nance filed a § 1983 action against Respondents in the Northern District of Georgia. The complaint alleged that, due to Nance's compromised veins and prolonged and increased gabapentin use, there was a substantial risk that an execution pursuant to Georgia's lethal injection protocol would violate his rights under the Eighth and Fourteenth Amendments. Pet. App. 86a.

As required under *Glossip* and *Bucklew*, Nance pled the use of a "feasible, readily implemented" alternative to lethal injection—the firing squad—that would "significantly reduce[] [the] substantial risk of severe pain" presented by lethal injection. *Glossip*, 576 U.S. at 877 (quotation marks omitted); *see* Pet. App. 101a–102a. Nance asked the district court to grant declaratory and injunctive relief prohibiting Respondents from executing him "by lethal injection." Pet. App. 103a–104a.

Respondents moved to dismiss, arguing that Nance's claims were time-barred, that they failed to state a plausible claim, and that Nance had failed to exhaust available administrative remedies. Pet. App. 48a. Respondents did not contend that Nance's claim sounded in habeas rather than § 1983. The district court granted Respondents' motion finding that Nance's

complaint was untimely and failed to state a claim. Pet. App. 67a.

3. *Appellate Proceedings.* Nance timely appealed. Two weeks before oral argument, the panel *sua sponte* directed the parties to address (1) whether Nance's § 1983 claim constituted an attack on his death sentence, only cognizable in habeas; and (2) if Nance's claim had to be reconstrued in habeas, whether it was a second or successive petition. Order, *Nance v. Comm'r, Ga. Dep't of Corr.*, No. 20-11393 (11th Cir. Sept. 30, 2020); *see* Pet. App. 4a, 81a.

On December 2, 2020, a divided panel held that the claim sounded in habeas and was barred as a second or successive petition. Pet. App. 2a. The panel majority noted this Court's dictum in *Bucklew* that "perhaps" a claim alleging an alternative not authorized under present law might sound in habeas. Pet. App. 11a. The panel majority acknowledged that "to be sure" Nance had affirmatively alleged that he could be constitutionally executed via the firing squad. Pet. App. 2a. But it held that his claim nevertheless "necessarily implied" the invalidity of his sentence as a "logical necessity" because "lethal injection is the *only* method of execution authorized under Georgia law." Pet. App. 17–18a.

After holding that Nance's claim had to be reconstrued as a request for habeas relief, the panel majority found it was barred as a second or successive petition. Pet. App. 25a. The panel explained that Nance had already filed a habeas petition in 2013. Pet. App. 20a. *See* Pet. App. 88a. Because Nance had not sought permission to file a second or successive petition, the

panel held that the district court lacked subject matter jurisdiction. Pet. App. 20a. The panel majority further stated that even if Nance had sought permission to file, the panel would have rejected the request because Nance did not meet the requirements for second and successive petitions; *i.e.*, he did not rely on a new rule of constitutional law made retroactive nor newly discovered evidence of his innocence. Pet. App. 19a–20a. The panel then rejected Nance's argument that because he filed his petition as soon as it was ripe, it was not second or successive under this Court's decisions in *Panetti v. Quarterman*, 551 U.S. 930 (2007) and *Ford v. Wainwright*, 477 U.S. 399 (1986). Pet. App. 20a–22a. The panel did not address the correctness of the district court's opinion regarding whether Nance had stated a claim under § 1983 or whether his claims were time-barred.

Judge Martin, dissenting, stated that the majority opinion "introduces chaos into this area of law." Pet. App. 46a. Judge Martin explained that Nance's claim was analogous to a conditions-of-confinement claim: Nance "simply is not seeking to 'invalid[ate] a particular death sentence'"; he is seeking to challenge only the "method of execution." Pet. App. 33a. Judge Martin cautioned that [t]he majority's contrary rule, will "sow confusion" by leaving prisoners uncertain about the proper procedure for bringing a method-of-execution claim. Pet. App. 35a. She further found Nance had stated a timely claim under § 1983 regarding the substantial risk of harm from the protocol and the viability of a firing squad as a feasible and readily implemented alternative. Pet. App. 44a–46a.

Nance filed a petition for rehearing *en banc* on December 23, 2020, which was denied. A majority of judges in active service voted against rehearing. Pet. App. 70a–71a. Judge Pryor, joined by Judge Newsom and Judge Lagoa, wrote a statement respecting the denial. Pet. App. 72a. Judge Pryor reiterated that the panel's decision was "consistent with Supreme Court precedent," including dicta in *Bucklew*. Pet. App. 74a. Judge Pryor rejected the notion that the panel's opinion "close[d] the federal court to prisoners" because they could still bring "more traditional challenges to execution protocol under section 1983." Pet. App. 76a.

In dissent, Judge Wilson, joined by Judge Martin and Judge Jordan, explained that the panel's decision was "irreconcilable with Supreme Court precedent" and would leave prisoners "without a remedy in federal court." Pet. App. 78a. And this was the result even though "Nance did everything he was supposed to: he made a colorable claim, alleged sufficient facts, and proposed a viable remedy in accordance with *Bucklew* … Nance is not seeking to avoid his execution. He accepts his fate … Nance asks only that the method by which the State will take his life falls in line with his Eighth Amendment right to be free of cruel and unusual punishment." Pet. App. 83a–84a.

SUMMARY OF ARGUMENT

I. A long line of authority from this Court makes clear that method-of-execution claims, including claims alleging non-statutory alternatives, sound in § 1983, not habeas.

A. The test that distinguishes habeas from § 1983 is whether the claim "necessarily impl[ies] the invalidity"

of the conviction or the sentence. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994). Claims that necessarily imply the invalidity of the sentence sound in habeas. Claims that merely challenge how the State carries out that sentence sound in § 1983. As Justice Scalia put it, habeas is not available for a state prisoner seeking "relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody." *Wilkinson v. Dotson*, 544 U.S. 74, 86 (2005) (Scalia, J., concurring). Even a claim that *could* result in a reduced sentence—such as a claim that a prisoner is entitled to a new parole hearing—sounds in § 1983 because the new hearing would not *necessarily* lead to a shorter sentence or earlier release. *Id.*

B. "[A] method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." *Glossip v. Gross*, 576 U.S. 863, 879 (2015). Such claims do the opposite of attacking the sentence. Instead of implying invalidity, Nance's claim requires him to *prove* that there is a feasible alternative method of carrying out his sentence lawfully. If Nance gets all the relief he seeks, the State will still be able to execute him.

The Eleventh Circuit nevertheless contended that Nance's claim necessarily implied the invalidity of his sentence because the alternative he proposed would require legislative change to implement. But that is a non-sequitur. The test for whether a claim sounds in habeas is not the means by which the State remedies the constitutional violation, but whether the claim necessarily implies the invalidity of the sentence. Section 1983 claims are routinely used to enjoin

enforcement of unconstitutional state laws. And it would be wrong to say that a classic conditions-of-confinement claim—*e.g.*, alleging inadequate security at a prison—would become a habeas claim if the State could show that it was unable to provide a constitutionally adequate level of security without passing further legislative appropriations.

This Court's dictum in *Bucklew* does not change this calculus, as the Eleventh Circuit contended. While *Bucklew* noted that state law "might" be relevant when determining the proper procedural vehicle for claims alleging non-statutory alternatives, *Bucklew* did no more than identify an issue that this Court has previously left unresolved. And under this Court's case law the answer is clear. This Court has consistently held that method-of-execution claims sound in § 1983. And that conclusion is compelled even more strongly in light of the current requirement that such claims must affirmatively identify and prove that there is a feasible, readily available alternative means of lawfully carrying out the sentence.

C. The Eleventh Circuit's rule is also irreconcilable with *Bucklew* itself. In *Bucklew*, the Court held that prisoners had to be able to plead non-statutory alternatives because "the Eighth Amendment is the supreme law of the land, and the comparative assessment it requires can't be controlled by the State's choice of which methods to authorize in its statutes." 139 S. Ct. at 1128. And the Court emphasized that allowing litigants to plead non-statutory alternatives would help ensure that the burden of identifying such an alternative was not too great. *Id.*

Yet under the rule below, claims alleging non-statutory alternatives will almost never be heard. Instead, they will be barred because most death-row prisoners will have long before filed a first habeas petition, and thus be prevented by limits on second or successive petitions from bringing a method-of-execution claim when it becomes ripe. In the many States that authorize only a single method of execution, the result will be that no matter how unconstitutional a State's method, and no matter how feasible the prisoner's alternative, the claim will never be heard on the merits. That is the opposite of what *Bucklew* contemplates and requires.

D. The rule below also threatens to inflict confusion, delay, and arbitrariness on prisoner litigation claims. Most obviously, many method-of-execution claims will now begin with a threshold dispute about whether the proffered alternative is allowed under state law. That will frequently be difficult to discern given state statutes that, for example, permit the use of specified drugs and "similar" ones to carry out execution. Whether a proposed alternative drug is "similar" or not will determine what kind of claim must be brought and the court in which it belongs. Those issues might not be resolved until after the pleadings stage, which risks delay and wasted judicial resources.

Other problems abound as well. The Eleventh Circuit's rule—which refers only to "state law"—is not necessarily limited to claims identifying alternatives not currently authorized by state *statutory* law. The rule may also apply to claims requesting alternatives inconsistent with state *regulatory* law. Claimants

seeking to bring such claims will likely face time-consuming threshold litigation. And perhaps most fundamentally, whether an unconstitutional method of execution can be meaningfully challenged will turn on the happenstance of whether the method is codified or not in a given State. That kind of arbitrariness is incompatible with the requirements of the Eighth Amendment.

Nor are these problems necessarily limited to method-of-execution claims. States will be incentivized to insulate their prison practices from meaningful challenge by codifying them. A litigant who seeks to challenge prison policies that pose an unconstitutional danger to him or that unconstitutionally infringe his First Amendment right would have to bring that challenge in habeas—and likely be barred from doing so—if the State had incorporated those challenged practices into legislation.

For all these reasons, we respectfully ask the Court to reverse and remand the judgment so that Nance's § 1983 claim can be reviewed on the merits.

II. To the extent the Court nevertheless finds that Nance's claim sounds in habeas, it should hold that it is not a second or successive petition. As this Court has held, the term "second or successive" is not self-defining. *Panetti*, 551 U.S. at 943–44. Instead, the Court asks whether a subsequent habeas petition amounts to an abuse of the writ and whether allowing the petition to proceed is consistent with the goals of ADEPA. *Banister v. Davis*, 140 S. Ct. 1698, 1705 (2020). Like competency-to-be-executed claims under *Ford v. Wainwright*, method-of-execution claims like Nance's

are not second or successive. Nance's claim is not an abuse of the writ, since there was no deliberate abandonment or neglect of the claim. Indeed, the appellate court did not dispute that it was unripe at the time of his first habeas petition. And as with *Ford* claims, AEDPA's interests are served by *not* barring review of a previously unripe claim that an execution will be carried out in violation of the Constitution.

ARGUMENT

I. METHOD-OF-EXECUTION CLAIMS SOUND IN SECTION 1983, NOT HABEAS, UNDER LONGSTANDING DOCTRINES OF THIS COURT.

Nance's claim sounds in § 1983, not habeas. That conclusion follows directly from the longstanding line this Court has drawn between those two kinds of claims. That conclusion also follows from this Court's recent decision in *Bucklew*—and the Eleventh Circuit's rule eviscerates the Eighth Amendment protections that this Court took care to preserve in that case. The decision below will sow confusion and delay for prisoners seeking to bring, and courts endeavoring to resolve, method-of-execution claims.

A. This Court Has Articulated A Clear Divide Between Section 1983 And Habeas.

This Court has drawn a clear divide between claims properly raised through § 1983 and those that must proceed through the federal habeas statute. While both statutes "provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials," the similarities end there: the schemes "differ

in their scope and operation." *Heck v. Humphrey*, 512 U.S. 477, 480 (1994). As Justice Scalia explained in that seminal opinion, habeas is the narrower of the two in scope, and the more specific in operation: it is the proper vehicle only for claims that "*necessarily imply the invalidity* of [the defendant's] conviction or sentence." *Id.* at 487 (emphasis added). Section 1983, on the other hand, is broader—it covers "constitutional claims" that challenge any feature of "the *conditions* of a prisoner's confinement." *Nelson*, 541 U.S. at 643 (emphasis added).

Habeas's limited domain has been clear since the Founding, when it was understood that the writ of habeas corpus "simply provided a means of contesting the lawfulness of restraint and securing release." *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020). Over the last three decades, this Court's decisions interpreting the federal habeas statute have maintained that narrow scope in the statutory context. "Th[ose] cases, taken together, indicate that" a claim sounds exclusively in habeas only if "success in [the] action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005).

Conversely, claims that identify unlawfulness in the implementation of a prisoner's sentence—rather than in the fact or duration of that sentence—sound in § 1983. *See id.* at 83 ("*Heck* uses the word 'sentence' to refer not to prison procedures, but to substantive determinations as to the length of confinement." (quoting *Muhammad v. Close*, 540 U.S. 749, 751 n.1 (2004) (per curiam))). A state prisoner seeking "relief that neither terminates custody, accelerates the future date of release from

custody, nor reduces the level of custody" may not bring his suit through habeas. *Wilkinson*, 544 U.S. at 86 (Scalia, J., concurring). He must do so instead via § 1983. *Id.* at 87 (Scalia, J., concurring); *see also id.* at 82 (majority opinion).

In each decision drawing the line between § 1983 and habeas, this Court has underscored that the defining feature of a habeas suit is the "necessary" relationship between the claim and the "invalidity of [the] conviction or sentence." *Heck*, 512 U.S. at 487. In *Wolff v. McDonnell*, for example, state prisoners challenged disciplinary proceedings on Due Process grounds, contending that they were improperly deprived good-time credits. 418 U.S. 539, 553 (1974). They sought two kinds of relief—restoration of good-time credits and a declaratory judgment that the disciplinary proceedings were unconstitutional. *Id.* at 554–55. The former directly attacked the length of their sentences, so it could only proceed in habeas. *Id.* (citing *Preiser*, 411 U.S. at 500). But the latter was permissible under § 1983 because "the prisoners attacked only the 'wrong procedures, not … the wrong result.'" *Wilkinson*, 544 U.S. at 80 (quoting *Heck*, 512 U.S. at 483).

Similarly, in *Wilkinson*, the plaintiffs challenged state procedures for denying parole eligibility and parole suitability. 544 U.S. at 82. This Court found no necessary relationship between success on those claims and "immediate or speedier release into the community." *Id.* "[A]t most" a favorable judgment would have "sp[ed] *consideration* of a new parole application" or provided "a new eligibility review" at which state officials could at "their discretion, decline to

shorten" the prison sentence. *Id.* As such, the claims sounded in § 1983. A favorable judgment would have increased the probability of release, but in neither case was release guaranteed—rather, release remained *contingent* on subsequent state action.

Thus, to fall within habeas's domain, it is not enough that a successful claim would provide the *possibility* of a change in the fact or duration of confinement; habeas requires a strict cause and effect. If that strict condition is not met—if "the prisoner's claim would not 'necessarily spell speedier release'"—then the "suit may be brought under § 1983." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (citation omitted).

B. Method-Of-Execution Challenges—Including Those That Allege Non-Statutory Alternatives—Fall Plainly On The Section 1983 Side Of That Divide.

This Court has recognized as a general matter that "a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." *Glossip*, 576 U.S. at 879. Like a conditions-of-confinement claim, which challenges the State's chosen method of carrying out a prisoner's concededly valid term of imprisonment, a method-of-execution claim simply challenges the method by which a State has chosen to implement a concededly valid death sentence. If successful, neither claim would spell immediate or speedier release; thus both claims sound in § 1983.

Nance's claim does not potentially, let alone necessarily, imply the invalidity of his sentence. On the contrary, the claim affirmatively *concedes* the validity of

that sentence by proposing an alternative means of carrying it out, *i.e.*, the firing squad. If Nance were to gain all the relief he seeks, the State can still execute him. Indeed, the success of Nance's claim *turns on* whether he can prove that his sentence can be carried out through a feasible, readily available alternative method of execution. Nance's successful claim would merely enjoin the State from carrying out his death sentence through one particular method: lethal injection. In that sense, although his claim goes to the most significant punishment the State may administer, it is no different in kind from any other conditions-of-confinement claim. A litigant who obtains the relief he seeks in a conditions-of-confinement claim—*e.g.*, constitutionally adequate medical care—will not affect the duration of his sentence. So too with Nance's method-of-execution claim: if he prevails, he will be executed in a constitutional manner, but his sentence of death will remain the same.

That kind of claim is straightforwardly different from a claim that the death penalty itself is unconstitutional, or that it would always be unconstitutional to execute Nance in particular. Unlike a method-of-execution challenge, a claim that the death penalty itself is unlawful necessarily implies the invalidity of the inmate's death sentence. *Heck*, 512 U.S. at 487. Or put another way, if Nance's claim were successful, he would not be resentenced—he would be executed using a different method. *Cf. Muhammad v. Close*, 540 U.S. 749, 751, n.1 (2004) (per curiam) ("[T]he incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction.").

The court of appeals nonetheless concluded that a "judgment in Nance's favor *would* imply the invalidity of his death sentence … because lethal injection is the *only* method of execution authorized under Georgia law." Pet. App. 17a–18a (emphases in original). According to the panel, because Georgia would need to undertake a "change in law" to carry out Nance's sentence in the event that Nance prevailed on his claim, Nance's claim sounded in habeas. And the panel majority further contended that conclusion followed from this Court's statement in *Bucklew* that "existing state law might be relevant to determining the proper procedural vehicle for the inmate's claim," 139 S. Ct. at 1128. Neither half of the Eleventh Circuit's reasoning withstands scrutiny.

First, the question for determining whether a claim sounds in § 1983 is not the extent to which the relief the prisoner seeks will require the State to change its practices, but whether the relief necessarily implies the invalidity of the conviction or sentence. The fact that the State might have to undertake a "change in law"—whether statutory, regulatory, or otherwise—to comply with the Constitution does not transmute a challenge about the *means* by which the State implements a sentence into a challenge about the *validity* of that sentence. *Wilkinson*, 544 U.S. at 83 ("*Heck* uses the word 'sentence' to refer not to prison procedures, but to substantive determinations as to the length of confinement.").

Indeed, as this Court has recognized, § 1983 is "intended to enforce the provisions of the Fourteenth Amendment 'against State action, … whether that

action be executive, *legislative*, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 240 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879) (emphasis added) (ellipsis in original)). In keeping with that aim, § 1983 claims frequently result in injunctions barring enforcement of an unconstitutional state statute. *See, e.g.*, *Harris v. Quinn*, 573 U.S. 616 (2014).

It therefore simply misunderstands the nature of a § 1983 suit to say that it does not reach unconstitutional actions because they are taken pursuant to a statute. No one would say, for instance, that a prisoner challenging the adequacy of prison medical services would need to bring that claim in habeas if the State could provide a constitutionally sufficient level of care only bypassing new appropriations legislation. Such a suit sounds in § 1983 because it challenges the implementation of the sentence, not its validity. And for that matter, legislation modifying methods of execution is hardly uncommon. Since 2015, five States have altered their authorized methods of execution. *See Capital Punishment Enactment Database*, National Conference of State Legislatures, https://www.ncsl.org/research/civil-and-criminal-justice/capital-punishment-enactment-database.aspx (last visited Feb. 25, 2022).

Faced with Nance's concession that his sentence is valid, the panel nonetheless contended that because Georgia would have to change its law to allow execution by firing squad, Nance's suit could result in his execution not being carried out. But contingencies about what may or may not result from the prisoner's challenge are

the tell-tale sign that the claim does *not* sound in habeas.[1] This is a far easier case than *Wilkinson*. As discussed above, the Court there held that a challenge to parole procedures that "may or may not result in release" sound in § 1983. *Wilkinson*, 544 U.S. at 86–87 (Scalia, J., concurring). In *Wilkinson*, the prisoner was seeking relief that at least could have resulted in the shortening of his sentence had the State complied with the procedures the prisoner claimed were required. Here, if Georgia adopts the method that Nance has proposed, Nance's sentence will not be changed. That is a § 1983 claim.

Second, the panel majority's reading finds no support in *Bucklew*'s dictum that "existing state law might be relevant to determining the proper procedural vehicle." 139 S. Ct. at 1128. *Bucklew* merely identified and preserved an issue that the Court had reserved in earlier decisions. *See Hill*, 547 U.S. at 576; *Nelson*, 541 U.S. at 645–46. Those decisions, both of which *held* that the method-of-execution claims at issue were proper in § 1983, hypothesized that it "might" make a difference if the prisoner sought relief that would not allow the

---

[1] Moreover, the contingency of whether a State would implement a constitutionally compliant protocol is a feature of *all* method-of-execution challenges, regardless of whether the proposed alternative is non-statutory. If, for example, a litigant prevailed on a method-of-execution challenge and proposed an alternative method that could be implemented through regulatory change, a State could still choose not to promulgate the required regulations. The Eleventh Circuit's purported justification for treating non-statutory alternatives differently is simply arbitrary.

execution to proceed under state law. *Hill*, 547 U.S. at 582.

But *Hill* addressed a scenario that is no longer permitted today: a litigant who challenges a State's method of execution in § 1983 without proposing an alternative. At the time of *Hill*, litigants were not required to plead a feasible alternative, and the prisoner in that case had not done so. *Id.* at 580, 582. As such, although *Hill* did not need to decide the question, the Court reasoned that a claimant who contends that the State's only authorized method of execution is unconstitutional, and fails to identify any viable alternative, may be understood to be making a claim that "would foreclose execution." *Id.* at 582.

Since *Glossip*, however, litigants have been required to plead a "feasible, readily available alternative" as part of their § 1983 challenge. And it is no accident that in that same decision, the Court explained that *Hill* held that "a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence." *Glossip*, 576 U.S. at 879. Where a litigant like Nance pleads such an alternative, he is not contending that his sentence is invalid or incapable of being carried out. Moreover, to *prevail* on that claim, the prisoner must establish that his alternative actually is feasible and readily available, and further that the State does not "possess[] a legitimate reason for declining to adopt [it]." *Bucklew*, 139 S. Ct. at 1128. *Hill* did not consider, let alone adopt, a rule that a prisoner who pleads and proves such a viable alternative is nonetheless necessarily implying the invalidity of his sentence.

To be sure, in *Bucklew*, this Court once again noted the possibility articulated in *Hill*. But that reference simply allowed the Court to preserve the issue for a case that more squarely presented it. This is that case. Here, the Court can recognize that a constitutional challenge to a method of execution pleading a feasible and readily available non-statutory alternative sounds in § 1983. That conclusion follows from *Glossip*, as well as from *Bucklew* itself. When a prisoner identifies a feasible and readily implemented non-statutory alternative, a successful claim would not "foreclose execution"—rather, it does the opposite.

C. The Eleventh Circuit's Rule Vitiates *Bucklew* Itself.

The Eleventh Circuit's interpretation does not just rough roughshod over the line between habeas and § 1983, it vitiates *Bucklew* itself. *Bucklew* held that litigants needed to be able to plead non-statutory methods of execution in order to ensure that the Eighth Amendment's requirements are not cabined by the particular methods of execution the State has authorized. *Bucklew*, 139 S. Ct. at 1128. And the Court emphasized that allowing non-statutory alternatives would ensure the burden of pleading an alternative would not be too great. *Id.*

Yet, under the Eleventh Circuit's rule in this case, inmates who allege non-statutory alternatives will nearly always be unable to pursue those claims, no matter how meritorious, because they will be barred by habeas restrictions. Those restrictions are heightened for any habeas petition, and they are practically an

absolute bar in the case of a second or successive petition.

Consider Nance's case. Nance had no choice but to identify a non-statutory alternative given that Georgia's sole authorized method of execution—lethal injection—would cause him substantial and avoidable pain regardless of the particular protocol used. Nance's non-statutory alternative, the firing squad, was identified by this Court as a potential alternative and is employed in other States. Yet under the Eleventh Circuit's rule, Nance's claim will never be heard on the merits because it is barred as a second or successive habeas petition. Instead of there being a low burden for identifying an alternative method of execution, 139 S. Ct. at 1128, the Eleventh Circuit imposes an insuperable one. And instead of being the "law of the land," *id.*, the Eighth Amendment is merely the law of what a state legislature chooses to authorize.

For prisoners facing execution by an unconstitutional method, Nance's predicament is typical, not unique. Of the 27 States that have the death penalty, 17 of them presently authorize only one method of execution: lethal injection. *See Authorized Methods by State*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state (last visited Feb. 25, 2022). And nearly every death row prisoner will, like Nance, have already used their first habeas petition to challenge alleged substantive or procedural errors in their trials. A method-of-execution claim will almost never be ripe at the time of that first habeas petition, which typically is filed years before any execution date is on the horizon.

For its part, the Eleventh Circuit did not dispute that Nance's as-applied method-of-execution claim was unripe at the time of his first petition—it determined that the second or successive bar applied regardless. *See* Pet. App. 25a. And, as other courts have recognized, changes in execution protocols or methods, as well as physical changes in the inmate himself, would generally make any such claim premature. *See, e.g.*, Order at 100–01, *Sealey v. Chatman*, No. 1:14-cv-00285 (N.D. Ga. Nov. 9, 2017), ECF No. 66 (denying a method-of-execution claim in a habeas petition as both unripe and not the proper subject for a habeas claim); Order at 16, *Wilson v. Humphrey*, No. 5:10-cv-489 (M.D. Ga. July 12, 2011), ECF No. 28 (same).

Yet once that first habeas petition is filed, if the Court were to adopt the Eleventh Circuit's rule, any subsequent challenge to a State's sole authorized method will be subject to—and almost certainly fail—the limits on second or successive habeas applications set out in § 2244. Under that provision, petitioners must show either that a new rule of constitutional law has been made retroactive, or that new evidence has emerged proving that they are actually innocent. *See* 28 U.S.C. § 2244(b)(2). But a method-of-execution claim will seldom—if ever—raise that sort of challenge (in large part precisely because it is not a habeas claim that necessarily implies the invalidity of the sentence, let alone the conviction). And, as a result, a prisoner seeking an alternative not formally authorized by state law will seldom—if ever—have the opportunity to present his claim on the merits.

Even in the rare instance in which a prisoner is able to raise a ripe habeas claim in his first petition, the claim will in many cases be barred by the requirements that apply to all habeas petitions. This includes, for instance, the requirement that the prisoner establish not just a violation of the Eighth Amendment, but one that is clearly established under Supreme Court precedent. None of that is consistent with a regime in which litigants face "little likelihood" that they will be unable to identify an alternative method of execution as part of their constitutional claim. *Bucklew*, 139 S. Ct. at 1128–29.

D. Holding That Certain Method-Of-Execution Claims Must Proceed through Habeas Will Sow Doctrinal Confusion.

In addition to—and as a consequence of—being wrong on the law, the rule below will generate confusion, delay, and arbitrariness both in the context of method-of-execution claims, and potentially for prisoner § 1983 claims in general.

To begin, under the Eleventh Circuit's rule, method-of-execution challenges would frequently be subject to preliminary disputes about whether the proposed alternative is a "non-statutory" alternative. States often legislate open-ended terms in their method-of-execution statutes. For example, some States legislate that an execution shall use a specified drug "*or other equally or more effective substance*." Colo. Rev. Stat. Ann. § 18-1.3-1202 (emphasis added); *see also* Miss. Code Ann. § 99-19-51(1) (method of lethal injection defined to include "potassium chloride, or *other similarly effective substance*" (emphasis added)); Md. Code Ann., Corr.

Servs., § 3–905 (repealed in 2013) ("The manner of inflicting the punishment of death shall be the continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or *other similar drug* in combination with a chemical paralytic agent." (emphasis added)).

Statutes like these will generate needless and confusing jurisdictional litigation under the Eleventh Circuit's rule. When an inmate alleges an alternative drug to the one specified by statute, the first question will inevitably be whether the alleged alternative is a "similar" drug, in which case the claim can proceed in § 1983, or whether the alternative is not "similar," in which case the claim sounds in habeas. Each proposed alternative will have to be litigated; and if courts reach different interpretations of similarly worded statutes, that will further subject Eighth Amendment rights to state-level variation.

That statutory interpretation question will be accompanied by the concomitant questions of whether the claim belongs in the appellate courts as a second or successive petition, and whether there must first be exhaustion in the state courts. Nor would it be clear who should make that determination, or how and when it should be made. If a prisoner files a § 1983 claim proposing an alternative drug, would the district court be obligated to accept an allegation of similarity as true on a motion to dismiss, but then potentially dismiss the action as an unexhausted habeas claim (and/or as an improper second or successive petition) if evidence ultimately showed it was dissimilar? As Judge Martin put it below, "[a] prisoner can no longer be certain about

the proper procedure for bringing a method-of-execution claim." Pet. App. 35a.

Ambiguous state statutes are only the beginning of the problem—the rule below is not necessarily limited to claims that would require a *statutory* change. Rather, the Eleventh Circuit referred only to claims requiring a change in "state law," a category that is hardly self-defining. The category could just as well include claims requiring a *regulatory* change. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, 955 F.3d 106, 132–33 (D.C. Cir.) (concluding that the Federal Death Penalty Act's reference to "law of the State" includes both "statutes" and "formal regulations" (Rao, J., concurring)), *cert. denied* 141 S. Ct. 180 (2020). That possibility is left open by this Court's cases. *Hill* teaches that a change in department of corrections protocol is not a change in "state law," but only where the department had not "issued rules" establishing any particular protocol, and where the department was "exempt from [the State's] Administrative Procedure Act. *Hill*, 547 U.S. at 577; *see also Nelson*, 541 U.S. at 646 (finding it significant that no party identified "duly-promulgated regulations" barring the proposed alternative procedure).

That leaves much undetermined. What if a State's department of corrections issues a rule establishing a particular lethal injection procedure? What if a particular State *requires* that the department of corrections implement the statutorily prescribed method by way of regulation following notice-and-comment rulemaking? Under the Eleventh Circuit's rule, it remains unclear whether a claim identifying a

method inconsistent with those regulations would sound in habeas. With that question undecided, jurisdictional confusion will follow, both for prisoners bringing § 1983 actions that identify alternatives requiring a change in regulations or a change in statute, as well as for courts.

Perhaps even worse is the arbitrariness the rule below creates. Two States could use an equally unconstitutional drug, and prisoners in each State could propose the same equally feasible and readily available alternative drug, but the Eighth Amendment claim would likely never be heard in the State that legislated (or perhaps formally regulated) the use of the unconstitutional drug, while the claim could go forward in the State that used the drug pursuant to a more informal protocol. Constitutional claims, let alone claims of cruel and unusual punishment, should not turn on whether the unconstitutional practice is contained in the state legislative code, state regulatory code, or state policy handbook.

Nor should constitutional doctrine be structured to allow States to close the courthouse doors to meritorious claims by taking advantage of those arbitrary lines. If codifying (or formally regulating) prison procedures insulates them from constitutional challenge, then States will do that with clear consequences for method-of-execution claims. Under the rule below, States will have reason to authorize—by statute or formal regulation—only a single method of execution, and to include in that authorization specific requirements that the State seeks to insulate from challenge.

Indeed, the Eleventh Circuit's novel rule may also upend prisoner litigation more generally. Consider a

prisoner who brings a claim alleging that his prison is overcrowded and that, as a result, the medical care is constitutionally inadequate. That claim sounds in § 1983, even if potential remedies would necessitate legislative intervention. *Cf. Brown v. Plata*, 563 U.S. 493, 528 (2011). But a State could conceivably enact a statute or issue a regulation specifying the prison population assigned to each correctional facility. And, under the Eleventh Circuit's rule, a challenge to that statute or regulation would seemingly have to proceed through habeas. Or take a case currently pending at the Court, *Ramirez v. Collier*. No. 21-5592 (U.S. argued Nov. 9, 2021). The prisoner in that case brought a § 1983 suit alleging that Texas's refusal to allow pastoral touch at his execution would violate his Free Exercise rights. If Texas codified its policies governing religious counselors in the execution chamber, then such a claim would seemingly have to be brought in habeas (and barred as second or successive) because it would seek a "change in law," notwithstanding the fact that Ramirez's claim in no way implies the validity of his death sentence. A State could easily immunize its policies bearing on prisoners' exercise of their First Amendment and other constitutional rights simply by legislating them.

The panel's rule is therefore both doctrinally invalid and functionally inadministrable. The Court can and should avoid its inescapable consequences by reversing and holding that method-of-execution challenges sound in § 1983.

II. IF THE COURT CONCLUDES THAT NANCE'S CLAIM SOUNDS IN HABEAS, IT SHOULD HOLD THAT IT IS NOT SECOND OR SUCCESSIVE.

This Court should hold that Nance's claim sounds in § 1983 for all the reasons given above. But if the Court concludes that Nance's claim sounds in habeas, it should reverse the court of appeals' holding that Nance's claim was jurisdictionally barred as "second or successive" under 28 U.S.C. § 2244(b). Method-of-execution claims that were unripe at the time of a prisoner's first habeas petition are not "second or successive" under this Court's decisions in *Banister* and *Panetti*.

1. If Nance's method-of-execution challenge sounds in habeas, then it is not a "second or successive" petition under this Court's precedents. The Eleventh Circuit held that Nance's claim was jurisdictionally barred as "second or successive" because Nance had previously filed a habeas petition, and the petition was not subject to either of the two exceptions under which "second or successive" habeas petitions may proceed (namely, that the petition relies upon a change in the relevant constitutional rules made retroactive by a decision of this Court or alleges facts that establish the petitioner's innocence and could not have been discovered previously, 28 U.S.C. § 2244(b)(2)(A)–(B)). Pet. App. 19a–25a. The panel's ruling was wrong.

Nance's petition is not "second or successive" simply because he had previously filed a habeas petition. As this Court has explained, "[t]he phrase 'second or successive' is not self-defining" and it has repeatedly "declined to interpret 'second or successive' as referring

to *all* § 2254 applications filed second or successively in time, even when the later filing addresses a state-court judgment already challenged in a prior § 2254 application." *Panetti*, 551 U.S. at 943–44. Instead, "[i]n addressing what qualifies as second or successive," this Court "look[s] for guidance in two main places." *Banister*, 140 S. Ct. at 1705.

First, the Court "ask[s] whether a type of later-in-time filing would have 'constituted an abuse of the writ, as that concept is explained in our [pre-AEDPA] cases.'" *Id.* at 1706 (quoting *Panetti*, 551 U.S. at 947). "If so, it is successive; if not, likely not." *Id.* Second, the Court "consider[s] 'the implications for habeas practice' of allowing a type of filing, to assess whether Congress would have viewed it as successive." *Id.* In this assessment, the Court "consider[s] AEDPA's own purposes," *id.*, of "'further[ing] comity, finality, and federalism,'" *Panetti*, 551 U.S. at 945 (quotation marks omitted).

In *Panetti*, this Court applied this framework to hold that a petitioner's challenge to his execution on the basis of his incompetency (a *Ford* claim) was not barred as "second or successive." 551 U.S. at 947. The Court first explained that there was "no argument that petitioner's actions constituted an abuse of the writ," under pre-AEDPA case law, which "confirmed that claims of incompetency to be executed remain unripe at early stages of the proceedings." *Id.* The Court next found that barring the incompetency claim as "second or successive" would undermine AEDPA's purposes. *Id.* at 946. As the Court explained, "[a]n empty formality requiring prisoners to file unripe *Ford* claims neither

respects the limited legal resources available to the States nor encourages the exhaustion of state remedies." *Id.* The Court emphasized that the "practical effects" of a decision to foreclose a category of claims must be considered when interpreting AEDPA," "particularly … when petitioners 'run the risk' under the proposed interpretation of 'forever losing their opportunity for any federal review of their unexhausted claims.'" *Id.* at 945–46 (quoting *Rhines v. Weber*, 544 U.S. 269, 275 (2005)).

Accordingly, the Court refused to adopt "an interpretation of [AEDPA] that would 'produce troublesome results,' 'create procedural anomalies,' and 'close [the Court's] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress's intent,'" *Id.* at 946 (quoting *Castro v. United States*, 540 U.S. 375, 381 (2003)). Such an interpretation, the Court explained, would be inconsistent with AEDPA and the "legal backdrop" against which Congress enacted the statute. *Banister*, 140 S. Ct. at 1707; *see also id.* ("[T]he statute did not redefine what qualifies as a successive petition.").

Thus, *Panetti* concluded that Congress "did not intend" to foreclose a "*Ford*-based incompetency claim [that] was filed as soon as that claim is ripe." 551 U.S. at 945. If the claim was unripe at the time of the prior petition, the execution is imminent, and the filing of the current petition does not reflect an "abuse of the writ" under established case law, then it is not "second or successive." *Panetti* did *not* hold that *only Ford* claims may be brought as "second or successive" petitions, as the panel below ruled. Instead, *Panetti* simply applied

the settled habeas framework for evaluating later-in-time petitions to permit petitions that raise *Ford* claims when the claims were unripe at the time of the prior petitions and the execution date is imminent. In such a context, the claim is not "second or successive." "AEDPA's concern for finality … is not implicated" in the *Panetti* context, because "federal courts would [not] be able to resolve a prisoner's *Ford* claim before execution is imminent." *Id.* at 946. The Court dismissed any concern that its holding would open the floodgates to "last-minute filings that are frivolous and designed to delay executions," by underscoring that such petitions could be "dismissed in the regular course," via, for instance, the "requirement of a threshold preliminary showing."[2] *Id.* at 946–47.

---

[2] Aside from the panel below, lower courts have properly understood that the *Panetti* framework is not limited to *Ford* claims. *See, e.g.*, *United States v. Obeid*, 707 F.3d 898, 902 (7th Cir. 2013) ("A number of our sister circuits have generalized [*Panetti*'s] logic to apply to other types of second-in-time petitions that were not ripe at the time of the initial petition."); *United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) ("*Martinez* and *Panetti* do not apply only to *Ford* claims. Prisoners may file second-in-time petitions based on events that do not occur until a first petition is concluded."); *Johnson v. Wynder*, 408 F. App'x 616, 619 (3d Cir. 2010) ("We see no reason to avoid applying *Panetti* in the context of other types of claims that ripen only after an initial habeas petition has been filed."); *Garcia v. Quarterman*, 573 F.3d 214, 222 (5th Cir. 2009) ("If … the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous petition, the later petition based on that defect may be non-successive."); *In re Bowling*, No. 06-5937, 2007 WL 4943732, at *3 (6th Cir. Sept. 12, 2007) (petition raising *Atkins* claim was non-successive because "the factual basis for this claim did not exist" at the time of the first petition).

2. Under the *Banister*/*Panetti* framework, method-of-execution claims that were unripe at the time of a first habeas petition are not "second or successive."

First, such claims would not have "'constituted an abuse of the writ, as that concept is explained in our [pre-AEDPA] cases.'" *Banister*, 140 S. Ct. at 1706 (quoting *Panetti*, 551 U.S. at 947). Before AEDPA, courts would look to "a petitioner's acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 490 (1991). "[D]eliberate abandonment" or "inexcusable neglect" of a potential claim constituted abuse of the writ. *Id.* at 489; *see also id.* at 491 (explaining that the abuse-of-the-writ doctrine protected the "finality" of judgments).

A method-of-execution claim that was unripe at the time of the first habeas petition was neither deliberately abandoned nor inexcusably neglected. Such a claim would have been permitted as non-successive under the pre-AEDPA abuse-of-the-writ doctrine. By definition, much as in the context of *Ford* claims, whether a method of execution is constitutional is a claim that cannot be resolved "before execution is imminent." *Panetti*, 551 U.S. at 946–47.

Panetti declined to require prisoners to bring unripe *Ford* claims in their initial habeas petitions in large part because "[a]ll prisoners are at risk of deteriorations in their mental state" and requiring prisoners to preserve their claims by filing them when they are unripe would "add to the burden imposed on courts, applicants, and the States, with no clear advantage to any." *Id.* at 943. The same is true here: Requiring prisoners to bring

unripe method-of-execution claims at the time of their first habeas petition would serve little purpose and indeed would be "counterintuitive." *Id.*

Second, allowing method-of-execution claims is consistent with Congress's aims in enacting AEDPA. As with *Ford* claims, barring petitions like Nance's would have grave and devastating "implications for habeas practice," which Congress did not intend in enacting AEDPA. *Banister*, 140 S. Ct. at 1706. Under the panel's rule, prisoners like Nance would "'run the risk' … of 'forever losing their opportunity for any federal review,'" 551 U.S. at 945–46 (citation omitted)—no matter how cruel and unusual a State's authorized method of execution might be and through no fault of the prisoners' own. The prisoners, after all, have no say in the methods of execution the State authorizes and cannot control when their execution-related claims will ripen. And a State could singlehandedly foreclose challenges by prisoners like Nance by codifying the key features of the execution protocol in state law.

In short, barring method-of-execution claims that were unripe at the time of the initial habeas petition as successive would "'produce troublesome results,' 'create procedural anomalies,' and 'close [the Court's] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress'[s] intent.'" *Panetti*, 551 U.S. at 946. This Court has not interpreted and should not interpret AEDPA to compel such results in the absence of any clear indication that Congress "intend[ed]" them. *Id.* at 945.

3. The panel contended that a different result is required under *Magwood v. Patterson*, 561 U.S. 320

(2010). But *Magwood* answered an altogether different question from the one presented here. In *Magwood*, the Court held that the "second or successive" bar applies "only to a 'second or successive' application challenging the same state-court *judgment*"; therefore, the prisoner's "first application challenging [a] *new* judgment cannot be 'second or successive'" under the statute. 561 U.S. at 331 (second emphasis added). In so holding, the Court rejected the State's argument that a prisoner is foreclosed from filing a later-in-time habeas petition challenging a new and separate judgment because he "is entitled to one, but only one, full and fair opportunity to wage a collateral attack.'" *Id.* (quotation marks omitted).

None of this has any bearing on Nance. Nance is not arguing that his petition should be permitted as a challenge to a new state-court judgment; nor is Nance arguing that he be permitted just "one … full and fair opportunity to wage a collateral attack" as the State did in *Magwood*. Pet. App. 23a. Nance takes the straightforward position that *if* his claim sounds in habeas (which Nance contends would be error), it is non-successive under the *Banister*/*Panetti* framework, which *Magwood* did not disturb. As the controlling concurrence in *Magwood* explained, "the Court's decision … and our decision in *Panetti* fit comfortably together." 561 U.S. at 343 (Breyer, J., concurring). "[I]f [a prisoner] were challenging an undisturbed state-court judgment for the second time, abuse-of-the-writ principles would apply, including *Panetti*'s holding that an 'application' containing a 'claim' that 'the petitioner had no fair opportunity to raise' in his first habeas petition is not a 'second or successive' application." *Id.*

4. If this Court decides that Nance's claim must proceed in habeas, it should hold that Nance's claim is not second or successive. The district court did not reach this question because it (correctly) treated Nance's claim as a § 1983 claim. And the Eleventh Circuit did not reach this question because it erroneously read *Panetti* as stipulating that *only Ford* claims do not count as "second or successive" if they are unripe at the time of the earlier habeas petition.

But the record before the Court makes clear that Nance's claim is not second or successive. First, Nance's current petition reflects neither "deliberate abandonment" nor "inexcusable neglect," but rather the fact that his claim was unripe at the time of his first habeas petition in 2013, a point that the Eleventh Circuit accepted. Pet. App. 21a–23a ("Nance's reliance on *Panetti* assumes … that the accrual of a new challenge entitles him to a new opportunity to file a petition."). As explained above, such challenges are routinely dismissed as unripe in first habeas petitions (in addition to being dismissed as an improper use of the writ). *See supra* at 34. Any claim about the method of execution being unconstitutionally torturous as a result of his specific combination of medical conditions would have been premature, particularly given that Nance's claim rests in part on the deterioration of his veins and the effects of prolonged and increased gabapentin use, which did not arise and were not identified until long after he filed his first habeas petition. *See supra* at 13–14.

Second, as explained above, barring method-of-execution claims like Nance's would run counter to AEDPA's statutory design and purposes. For these

reasons, it is clear that analyzed under the correct legal framework, Nance's method-of-execution claim is non-successive.

CONCLUSION

The Court should reverse and remand the judgment below.

Respectfully submitted,

ANNA M. ARCENEAUX
CORY H. ISAACSON
GEORGIA RESOURCE CENTER
104 Marietta Street NW
Suite 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
URJA MITTAL
KEVIN J. KENNEDY*
DEANNA E. KROKOS
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*