No. 21-439

IN THE

Supreme Court of the United States

MICHAEL NANCE,

Petitioner,

v.

TIMOTHY C. WARD, COMMISSIONER, GEORGIA DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Page

Statutes and Other Authorities

Cited Authorities

INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae[2] are legal scholars and academics who have dedicated their careers to the study, teaching and practice of United States constitutional law, including the death penalty and methods of execution. Many *amici* have written scholarly articles on these topics.

Many amici listed below earlier wrote to this Court in 2018 by submitting a brief in *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019), to apprise the Court of information regarding the availability of alternative methods of execution to be considered in clarifying the applicable Eighth Amendment standard for method-of-execution challenges. Amici agreed with the Court's clear statement in that case that prisoners challenging an unconstitutional method of execution are not limited to proposing alternative methods already authorized by state law. They are particularly concerned today that the decision below violates this Court's own guidance by foreclosing prisoners' previously protected ability to allege well-established and available alternative methods of execution that are not yet authorized under a given state's law.

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1. *Amici* affirm that no counsel for a party authored this brief in whole or in part, and no party other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties consent to the filing of this brief.

2. The views expressed by *amici curiae* are their own and not those of the institutions where they teach. The list of institutions to which *amici curiae* belong is provided for identification purposes only.

The below amici respectfully submit this brief urging the Court to rule in favor of Petitioner.

- Eric Berger, Earl Dunlap Distinguished Professor of Law, University of Nebraska College of Law
- William W. Berry III, Montague Professor of Law, University of Mississippi School of Law
- Christopher L. Blakesley, Emeritus Professor of Law, William S. Boyd School of Law
- Marc D. Falkoff, Professor of Law, Northern Illinois University College of Law
- Brian Gallini, Dean & Professor of Law, Willamette University College of Law
- Catherine M. Grosso, Professor of Law, Michigan State University College of Law
- Janet C. Hoeffel, Catherine D. Pierson Professor of Law, Tulane Law School
- Daniel LaChance, Winship Distinguished Research Professor in History (2020-23) and Associate Professor, Department of History, Emory University
- Corinna Barrett Lain, S. D. Roberts & Sandra Moore Professor of Law, University of Richmond School of Law
- Joseph Margulies, Professor of the Practice of Law and Government, Cornell Law School

- Colin Miller, Professor of Law & Thomas H. Pope Professorship in Trial Advocacy, University of South Carolina School of Law

- Austin D. Sarat, William Nelson Cromwell Professor of Jurisprudence and Political Science; Chair of Political Science, Amherst College

- Kenneth Williams, Professor of Law, South Texas College of Law Houston

SUMMARY OF ARGUMENT

In order to challenge a state's proposed method of execution as cruel and unusual under the Eighth Amendment, a prisoner must also allege a known and available alternative method. *See Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35, 50 (2008). This court made clear in *Bucklew v. Precythe* that "[a]n inmate seeking to identify an alternative method of execution is *not* limited to choosing among those presently authorized by a particular State's law." 139 S. Ct. 112, 1128 (2019) (emphasis added). When Petitioner raised an as-applied challenge to Georgia's method of execution and alleged a non-statutory alternative that would spare him unconstitutional pain, the Eleventh Circuit held that the claim must be brought in habeas and dismissed the challenge altogether as a second or successive habeas petition. With this procedural maneuver, the decision below effectively overturns this Court's recent pronouncement in *Bucklew* by leaving prisoners with no cognizable vehicle to allege non-statutory alternative methods of execution. To reaffirm the right explicitly recognized in *Bucklew*, the decision below must be reversed.

The writ of habeas corpus has long been understood as providing "a means of contesting the lawfulness of restraint and securing release," *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020), while 42 U.S.C. § 1983 claims concern conditions of confinement and sentencing, *Nelson v. Campbell*, 541 U.S. 637, 643–45 (2004). Method-of-execution challenges are properly brought under § 1983 rather than through habeas petitions because they do not challenge the validity of the prisoner's sentence or conviction, and success on such a claim leaves the prisoner on death row and eligible for execution as he was before. The burden to plead an alternative method when raising method-of-execution challenges was placed on prisoners in the first place "because [given] it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" *Glossip*, 576 U.S. at 869 (quoting *Baze*, 553 U.S. at 47). Alleging an alternative method serves to prevent method-of-execution challenges from *de facto* invalidating the sentence altogether, making them claims most appropriately raised under § 1983.

Judicial economy further counsels in favor of allowing prisoners to raise method-of-execution challenges as straight-forward § 1983 claims, regardless of whether the alternative method alleged is statutorily authorized. Federal habeas petitions are required to be filed within one year of the conviction being final, which is typically several years before an execution is scheduled. Method-of-execution challenges are often unripe at that time because both the state's execution method and/or the prisoner's physical condition can change in the intervening years, giving rise to new as-applied claims. In recognition of this fact, the Eleventh Circuit regularly dismisses method-of-execution challenges in habeas petitions, explicitly

mentioning the likelihood that the method in use at the time of the petition is unlikely to be the one actually used. *See, e.g.*, *Butts v. Chatman*, No. 5:13-cv-194, 2014 WL 185339, *4 (M.D. Ga. Jan. 15, 2014); *Tollette v. Warden*, No. 4:14-cv-110, 2014 WL 5430029, *9 (M.D. Ga. Oct. 22, 2014). Allowing prisoners to raise such challenges with a straightforward § 1983 claim allows states to adopt new execution methods when needed, while allowing prisoners with as-applied challenges to vindicate their Eighth Amendment rights.

The decision below relegates any method-of-execution challenge raising a non-statutory alternative method to a habeas petition and then dismisses such a petition on the grounds that it is second or successive. This leaves prisoners with no cognizable vehicle to allege non-statutory alternative methods. Under such a rule, any state could shield a new method of execution from meaningful review by simply failing to authorize an alternative. Prisoners in any of the seventeen states that authorize only one method of execution will be especially affected, as the decision below leaves them with no avenue to allege any alternative method of execution, even when the state's only authorized method would cause them unconstitutional pain and an alternative is feasible and easily implemented. This will lead to a balkanized Eighth Amendment jurisprudence, with prisoners of different states afforded different opportunities to defend their constitutional rights. Such a situation is contrary to this Court's supreme authority and is reflective of the exact situation that existed pre-*Bucklew*, which this Court sought to correct with its clear pronouncement in that case. To re-affirm *Bucklew*'s explicit recognition that prisoners are not limited to alleging statutorily-authorized alternative methods of execution, the decision below should be reversed.

ARGUMENT

I. A prisoner's method-of-execution challenge is properly raised under 42 U.S.C. § 1983 regardless of whether the alternative method alleged is authorized under state law.

This Court has held that in order to challenge a state's proposed method of execution as cruel and unusual under the Eighth Amendment, a prisoner must also allege a known and available alternative method. *See Glossip v. Gross*, 576 U.S. 863 (2015); *Baze v. Rees*, 553 U.S. 35, 50 (2008). In *Bucklew v. Precythe*, this Court provided further, clear guidance by holding that "[a]n inmate seeking to identify an alternative method of execution is *not* limited to choosing among those presently authorized by a particular State's law." 139 S. Ct. 1112, 1128 (2019) (emphasis added). The Eleventh Circuit's ruling below now seeks to relegate any challenge raising a non-statutory alternative method to a habeas petition and to foreclose relief by dismissing such a petition as successive, effectively eradicating the right that this Court explicitly announced in *Bucklew*.

Under this Court's jurisprudence, method-of-execution claims are not properly brought in habeas because they do not challenge the validity of the death sentence—even if a state's only authorized method is invalidated as applied to a particular prisoner, that prisoner will remain on death row and immediately eligible for execution when a new method is adopted. The requirement to plead an alternative method was itself created to ensure that challenges to a method of execution do not render the death penalty *de facto* unconstitutional,

see Glossip, 576 U.S. at 869, making it clear that such claims do not challenge the validity of the sentence itself and are thus properly brought under § 1983 rather than through a habeas petition.

Additionally, the Eleventh Circuit's decision runs contrary to the principles of judicial economy. A federal habeas petition must be filed within a year of the conviction becoming final, which is often a decade or longer before an execution is scheduled. The methods authorized by a state at the time of the habeas petition may well be changed before the execution occurs, meaning such claims would go from being unripe to moot. As-applied challenges in particular cannot be expected to be raised in a prisoner's habeas petition because the prisoner's unique circumstances or medical condition that render the state's method unconstitutionally painful might develop or worsen years after the habeas petition is filed. Method-of-execution claims are thus more appropriately brought under 42 U.S.C. § 1983 when the claim accrues, rather than years earlier when a federal habeas petition is filed. This well-established practice ensures that questions around a method's constitutionality are adjudicated only when they are ripe and ensures efficient use of judicial resources.

A. This Court clearly established in *Bucklew v. Precythe* that a prisoner can allege an alternative method of execution that is not authorized by state law.

To prove that a method of execution is cruel and unusual in violation of the Eighth Amendment, a prisoner must demonstrate that the state's proposed method

presents an "objectively intolerable risk of harm." *Baze*, 553 U.S. at 50. This Court set forth a two-prong test for meeting this Eighth Amendment standard in *Glossip v. Gross*. A petitioner must plead and prove: (1) that the state's execution method poses a substantial risk of severe pain; and (2) that there is a "known and available" alternative method of execution that is "feasible, [and] readily implemented" that "significantly reduce[s] a substantial risk of severe pain." *Glossip*, 576 U.S. at 877–82.

Glossip, however, "provided little guidance as to when an alternative method of execution is 'available,'" *McGehee v. Hutchinson*, 854 F.3d 488, 500 (8th Cir. 2017) (Kelly, J., dissenting), resulting in lower courts addressing the "known and available" requirement inconsistently and incorrectly. Many courts interpreted all non-statutory alternative methods to be unavailable for that reason alone. *See, e.g.*, *Kelley v. Johnson*, 496 S.W.3d 346, 359–60 (Ark. 2016) ("Execution by firing squad is not identified in the statute as an approved means of carrying out a sentence of death . . . [therefore] it cannot be said that the use of a firing squad is a readily implemented and available option to the present method of execution."); *Bible v. Davis*, No. 4:18-CV-1893, 2018 WL 3068804, at *9 (S.D. Tex. June 21, 2018) (holding that firing squad and nitrogen hypoxia were not feasible or readily implemented alternative methods because "Texas law and protocol allow for the State to use only one method of execution: lethal injection."), *aff'd*, 739 F. App'x. 766 (5th Cir. 2018).

The recent decision in *Bucklew v. Precythe* further clarified and built upon the *Baze-Glossip* pleading standard while rejecting such overly strict interpretations

of the burden to allege an alternative method. 139 S. Ct. at 1112. The Court reiterated that to establish whether a "State's chosen method of execution cruelly superadds pain to the death sentence, a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason." *Id.* at 1125 (citing *Baze*, 553 U.S. at 52 and *Glossip*, 576 U. S. at 877). The Court further explained that:

> [T]he burden [a prisoner] must shoulder under the *Baze-Glossip* test can be overstated. An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law. . . So, for example, a prisoner may point to a well-established protocol in another State as a potentially viable option.

Bucklew, 139 S. Ct. at 1128.

Justice Kavanaugh, who joined the decision, wrote separately "to underscore the Court's additional holding that the alternative method of execution need not be authorized under current state law—a legal issue that had been uncertain before today's decision. Importantly, all nine Justices today agree on that point." *Id.* at 1136 (Kavanaugh, J., concurring) (internal citations omitted).

In light of this holding, the Court saw "little likelihood that an inmate facing a serious risk of pain will be unable to identify an available alternative." *Id.* at 1128–29. Yet under the Eleventh Circuit's ruling, such an outcome would

be virtually certain in any of the 17 states that, along with the federal government, authorize only one method of execution. *See* Death Penalty Information Center, *Authorized Methods by State*, https://deathpenaltyinfo.org/executions/methods-of-execution/authorized-methods-by-state. The decision below requires any prisoner alleging an alternative method of execution that is not yet authorized by the sentencing state to raise his claim in a habeas petition, and then dismisses such a petition as being second or successive and failing to meet the strict jurisdictional requirements of 28 U.S.C. § 2244(b)(2). Given that method-of-execution claims are unlikely to be ripe when a prisoner's first habeas petition is due to be filed, such claims would virtually always have to be raised sometime after the initial habeas petition is filed and are therefore effectively barred under the Eleventh Circuit's ruling below. Thus, by eliminating § 1983 as a vehicle for such challenges and holding that a habeas petition raising such a claim is successive, the ruling below eviscerates a method for vindicating a fundamental constitutional right that this Court clearly and unequivocally preserved in *Bucklew*. The Eleventh Circuit's decision relegates death-sentenced prisoners to the uncertainty of the pre-*Bucklew* era, destroying *Bucklew*'s clear mandate that prisoners may allege methods of execution that are not presently permitted under state law. The resulting patchwork approach, in which a prisoner's Eighth Amendment rights are prescribed and limited by the relevant state's law, is incompatible with the fundamental principle emphasizing a "necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution." *Martin v. Hunter's Lessee*, 14 U.S. 304, 347–348 (1816) (emphasis in original).

B. This Court's jurisprudence supports a ruling that 42 U.S.C. § 1983 is the proper procedural vehicle for such challenges.

In *Bucklew*, this Court emphasized that "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." *Bucklew*, 139 S. Ct. at 1128. Because a method-of-execution challenge does not challenge the validity of the underlying sentence—whether or not the alleged alternative method is authorized by state statute—this Court's jurisprudence supports a conclusion that such challenges must be brought under § 1983.

The writ of habeas corpus has long been understood as providing "a means of contesting the lawfulness of restraint and securing release," *Dep't of Homeland Sec. v. Thuraissigiam*, 140 S. Ct. 1959, 1969 (2020), while § 1983 claims concern conditions of confinement and sentencing, *Nelson v. Campbell*, 541 U.S. 637, 643–45 (2004). A habeas claim is one that implies invalidity of the conviction or sentence altogether, while a claim that "would not necessarily spell speedier release, however . . . may be brought under § 1983." *Skinner v. Switzer*, 562 U.S. 521, 525 (2011) (internal quotation omitted). This Court has repeatedly held that an action under § 1983 will not lie where a state prisoner challenges "the fact or duration of his confinement" and seeks either "immediate release from prison" or shortening of the term of confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 482, 489 (1973); *see also Wolff v. McDonnell*, 418 U.S. 539, 554 (1974); *Heck v. Humphrey*, 512 U.S. 477, 481 (1994); *Edwards v. Balisok*, 520 U.S. 641, 648 (1997).

In practice, this has consistently been understood to mean that challenges to the method and protocol by which a prisoner is to be executed are properly brought under § 1983, as they impact not the sentence itself, but how it is carried out. To hold otherwise is a misunderstanding of black letter law. As Justice Scalia wrote,

> It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a 'quantum change in the level of custody,' . . . It is quite another to say that the habeas statute authorizes federal courts to order 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) (citation omitted).

The Eleventh Circuit's reasoning in drawing the opposite conclusion—that invalidating Georgia's only authorized execution method as applied to Petitioner would necessarily imply the invalidity of his sentence—is inaccurate. Were lethal injection to be held unconstitutional as applied to Petitioner, he would remain on death row in Georgia and still be eligible for execution. To carry out his sentence, the people of Georgia and their representatives could authorize one of many other available execution methods, like the firing squad that petitioner alleged. South Carolina amended its laws to allow the firing squad and electric chair just last year, *see* Emily Bohatch, *SC House passes bill bringing back electric chair, introducing firing squad*, STATE (May 6, 2021), https://www.thestate.com/news/politics-government/article251151894.html,

while Alabama, Oklahoma and Mississippi chose to authorize execution by nitrogen hypoxia in 2018, *see* Kim Chandler, *Alabama says it has built method for nitrogen gas execution*, AP NEWS (Aug. 7, 2021), https://apnews.com/article/alabama-executions-57c6d76d5a0f6b4a8ecb2324b7a68004. Nothing would prevent Georgia from taking a similar step to authorize another method that does not violate Petitioner's constitutional rights. Such an approach has been endorsed by the Sixth Circuit, which held that an Ohio prisoner's challenge to lethal injection (the state's only authorized method of execution) was required to be raised as a § 1983 claim because if he were successful, Ohio would still be permitted to execute the petitioner. The Sixth Circuit held that success on Petitioner's claim:

> would not impair the validity of Campbell's death sentence at all. The fact that Ohio *currently* permits execution only by lethal injection does not change that fact. The Ohio legislature could, tomorrow, enact a statute reinstating the firing squad as an alternative method of execution. . . . The State of Ohio could still execute Campbell—it would simply need to find a method that comports with the Eighth Amendment."

In re Campbell, 874 F.3d 454, 465–66 (6th Cir. 2017) (emphasis in original).

This Court acknowledged in *Bucklew* that "existing state law might be relevant to determining the proper procedural vehicle for the inmate's claim," and that "if the relief sought in a 42 U.S.C. §1983 action 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,'" *Bucklew*, 139 S. Ct. 1112 at 1128 (quoting *Hill v. McDonough*, 547 U.S. 573, 582–583 (2006)), but ultimately did not resolve the question. This Court's logic in placing the burden to raise an alternative method of execution upon prisoners itself supports a holding now that such claims are best brought under § 1983. The Court reasoned in *Glossip* that "because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" 576 U.S. at 869 (quoting *Baze*, 553 U.S. at 47). *Glossip* placed this pleading burden on prisoners explicitly to prevent method-of-execution challenges from *de facto* rendering the death penalty unconstitutional. The need to allege an alternative method prevents the challenge from invalidating the sentence altogether, making it more appropriately brought as a § 1983 claim rather than a habeas petition.

By seeking to challenge the method of execution to be used against him while affirmatively pleading an alternative method that would be less painful, Petitioner does not challenge the validity of his sentence; if successful, he would still remain under a sentence of death. His claim is similar to that of petitioners in *Wolff v. McDonnell*, who sought to challenge disciplinary procedures by which state prison officials denied good-time credits. 418 U.S. at 539. This Court ruled that § 1983 was the proper vehicle for the petitioners to obtain both a declaration that the disciplinary procedures were invalid and an injunction against their future enforcement. *Id.* at 79–80. In obtaining this relief, petitioners challenged the "wrong procedures, not . . . the wrong result (i.e., [the denial of] good-time credits)." *Heck*, 512 U.S. at 483

(discussing *Wolff*). Conversely, they could not have their invalidated credits restored under § 1983 because that would necessarily shorten their terms of confinement, making it a habeas claim. *Wolff*, 418 U.S. at 554. Similarly, Petitioner's claim in the instant case seeks to challenge "wrong procedures"—an unconstitutionally painful method of execution—without making any claim that his execution itself would be a "wrong result." This Court used the same logic when deciding that Ohio prisoners could use § 1983 to challenge the state's procedures for denying parole eligibility or suitability. While success in their claims would entitle the prisoners to a new parole eligibility review or application, which might in turn shorten their sentences, it would not "*necessarily* spell speedier release" and therefore the claims did not go to "the core of habeas corpus." *Wilkinson*, 544 U.S. at 82 (emphasis added) (internal citations omitted). Similarly, while Petitioner's success in the instant case might temporarily impact the timing of his execution while Georgia adopts a new, constitutional method to be used against him, it does not necessarily prevent his sentence from being carried out as ordered.

C. Alleging a non-statutory alternative method of execution through 42 U.S.C. § 1983 is a well-established practice that allows for the timely administration of justice.

The need for rigorous procedural protections and the highest standard of reliability in capital cases is clear and well recognized by this Court. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment . . . . Because of that qualitative difference,

there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."). Because method-of-execution challenges are rarely, if ever, ripe at the time of a petitioner's first habeas deadline, the Eleventh Circuit's decision below will require courts to pass judgment on questions that are not yet ripe for judicial review because they rely "upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (citations omitted).

Congress has established a strict statute of limitations that requires a federal habeas petition to be filed within one year from the time that the conviction becomes final. 28 U.S.C. § 2244(d)(1)(A). As this Court has noted, however, there is often significant additional delay before an execution is actually scheduled. *See, e.g.*, *Bucklew*, 139 S. Ct. at 1134. In 2019, the average length of time between sentencing and execution for prisoners on death row in the United States was 264 months, or 22 years. Statista, *Average time between sentencing and execution for inmates on death row in the United States from 1990 to 2019*, https://www.statista.com/statistics/199026/average-time-between-sentencing-and-execution-of-inmates-on-death-row-in-the-us/. It is therefore likely that the method of execution authorized and used by a state at the time a prisoner files and litigates his habeas petition will change before his execution date is set years later. While this Court has recognized a need to prevent such delays, *see, e.g.*, *Bucklew*, 139 S. Ct. at 1134, the solution cannot be to adjudicate claims before they are ripe.

States are changing their execution methods and protocols with increasing frequency. This is a particular concern for lethal injection executions, because prisoners cannot determine if the lethal injection will cause them unconstitutional pain without knowing the exact drugs, dosages and procedures to be used. It has become common practice for states to adopt lethal injection protocols for each specific execution, based on the materials available at that time. For example, Joseph Wood was executed in Arizona on July 23, 2014 under a protocol confirmed by the state a month earlier on June 25. *See, e.g.*, *Wood v. Ryan*, 759 F.3d 1076, 1078 (9th Cir. 2014), *vacated*, 573 U.S. 976 (2014), and Mark Berman, *Arizona Execution Lasts Nearly Two Hours; Lawyer Says Joseph Wood Was 'Gasping and Struggling to Breathe*,' Washington Post (Jul. 23, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/. Billy Ray Irick was executed on August 9, 2018 under a new protocol announced by Tennessee on January 8 of the same year. *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 611 (Tenn. 2018). While a prisoner might know at the time of filing his habeas petition that he is likely to be executed by lethal injection, he cannot adequately assess the constitutionality of that without knowing the precise protocol to be used. Neither can he determine what alternative drugs, if any, are available for use instead. Moreover, his own medical condition may change in a way that renders a previously-constitutional method in his case unconstitutionally painful in the present. Therefore, it is impossible for prisoners to adequately challenge the lethal injection years before they are to be executed, and very possible that only non-statutory alternative methods that do not require restricted drugs may be available. In recognition of these trends, District Courts in the

Eleventh Circuit regularly dismiss method-of-execution challenges in habeas petitions for being unripe. *See Butts*, 2014 WL 185339 at *4 ("Georgia's lethal injection protocol and procedures change frequently . . . Even if this Court allowed discovery and held an evidentiary hearing now, the evidence developed would likely be irrelevant by the time [petitioner's] execution is scheduled . . . [petitioner's] lethal injection claim is premature and should be brought in a 42 U.S.C. § 1983 action."); *Tollette*, 2014 WL 5430029 at *9 ("Any discovery regarding Georgia's current lethal injection procedures is likely to have no relevance when, and if, [petitioner's] execution is scheduled. As the Georgia Supreme Court noted, Georgia has recently found it necessary to make repeated alterations to its lethal injection procedures. It is likely that the procedures will change again before [petitioner's] execution is scheduled.") (citations omitted); *Sealey v. Chatman*, No. 1:14-cv-00285, 2017 WL 11477455, *38 (N.D. Ga. Nov. 9, 2017) ("It is quite possible that Georgia's protocols will change between now and the time that Petitioner's execution date is set, rendering moot any ruling by this Court."), *aff'd sub nom. Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338 (11th Cir. 2020).

Under the well-settled practice, states have the flexibility to adopt a new method of execution, or a change in protocol, and if indicated, prisoners can challenge its constitutionality by filing a straightforward § 1983 claim. Under the Eleventh Circuit's logic, however, a prisoner is required to raise any indicated challenges to the method of execution in use at the time of his habeas petition, despite the likelihood that a different method will be used when he is actually executed. In practice, the Eleventh Circuit would require prisoners to anticipate an unconstitutional

manner of execution (even one resulting from a medical condition that may thereafter develop or worsen) and prophylactically raise that challenge too early in the process, wasting valuable time and judicial resources in reviewing a method that will very likely not be used on the day of the execution. Raising such claims under § 1983 instead allows courts to review a state's method of execution in the context of an actual "case or controversy," with due concern for prisoners' Eighth Amendment rights.

II. Requiring prisoners who cannot allege a statutorily-authorized alternative to proceed in habeas will effectively prevent constitutional review of states' execution protocols.

Method-of-execution challenges, and particularly as-applied challenges, are often not ripe when a first federal habeas petition is required to be filed—within one year of the conviction being final and typically a decade or longer before a warrant of execution is actually issued—and they are not adequate grounds to file a successive petition under the decision below. Thus requiring petitioners without a statutory alternative method to plead to proceed in habeas would circumvent any meaningful opportunity to challenge the state's method. Such a rule is particularly problematic in the many states that authorize only one method of execution, where any petitioner raising an as-applied challenge would by definition be required to plead a non-statutory alternative. This is contrary to this Court's recent pronouncement in *Bucklew*. Prior to *Bucklew*, some state and lower courts took an overly restrictive view of *Glossip* and summarily dismissed method-of-execution challenges which alleged any alternative method that was not already authorized under state law, effectively allowing state law to set the parameters for prisoners'

Eighth Amendment challenges. This Court responded to that problem by providing clear guidance that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." *Bucklew*, 139 S. Ct. at 1128. This Court should now reaffirm that decision by holding that non-statutory alternative methods are properly raised in method-of-execution challenges under 42 U.S.C. § 1983.

A. If non-statutory alternative methods cannot be raised under 42 U.S.C. § 1983, any state can insulate an unconstitutional execution method from review by failing to authorize an alternative.

The Eleventh Circuit's decision below would require any prisoner raising a method-of-execution challenge and alleging an alternative method that is not authorized by state law to bring his claim in a habeas petition. Given the timeline of capital litigation, it is very common for such claims to ripen long after a prisoner files his first habeas petition, arising due to changes to the method of execution, the prisoner's physical condition, or both. Any successive petition on these grounds would fail for lack of jurisdiction under the decision below, as the Eleventh Circuit held that the bar on successive petitions applies. Thus, by eliminating § 1983 as an avenue for these challenges, the Eleventh Circuit would allow any state to circumvent any and all challenges to its execution method, including by simply authorizing only one method. This would effectively overturn *Bucklew* by leaving death-sentenced petitioners with no cognizable avenues to allege non-statutory alternatives, despite this Court's recent proclamation that they have the right to do so.

If a state can shield a potentially cruel and unusual punishment from review by not authorizing any constitutional alternatives, then that state effectively has a veto power over capital prisoners' Eighth Amendment rights. Any state would be able to authorize impermissibly cruel and unusual execution methods, like being drawn and quartered, and could prevent the federal courts from conducting a meaningful review by simply failing to authorize any constitutional alternatives. More likely, a state might authorize an otherwise constitutional method of execution that causes a particular prisoner severe pain and suffering, in violation of the Eighth Amendment, due to his unique circumstances. And were such a Petitioner to raise medical circumstances that make a state's only execution method cruel and unusual as applied to him, as in the instant case, a method of execution "known" and recognized could be denied to him simply because it was not listed in the particular state statute, even if it would alleviate unconstitutional suffering. This cannot be the law.

A rule that allows each state to determine its "available" methods of execution, no matter the constitutionality of such methods, potentially permits a state to avoid all review of those methods. Such a landscape will balkanize Eighth Amendment jurisprudence, leading to arbitrary and inconsistent results. Without question, "state laws respecting crimes, punishments, and criminal procedure are . . . subject to the overriding provisions of the United States Constitution." *Payne v. Tennessee*, 501 U.S. 808, 824 (1991). Yet, the Eleventh Circuit's decision does bring this principle into question, by allowing state statutes to determine which prisoners are given an effective vehicle to secure their Eighth Amendment rights and challenge the unconstitutional method of execution to be used to

kill them. This cannot be what this Court intended when it held so clearly that "[a]n inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law." *Bucklew*, 139 S. Ct. at 1128.

B. Relegating all method-of-execution challenges alleging a non-statutory alternative method to successive habeas petitions would procedurally overrule the right recently announced in *Bucklew v. Precythe*.

If the right announced in *Bucklew* is to have meaning, such claims must be allowed under § 1983, when a prisoner's as-applied challenge actually ripens. Allowing the decision below to stand would procedurally circumvent *Bucklew*'s holding, meaning new execution methods can be easily shielded from constitutional scrutiny.

In the years before *Bucklew*, many lower courts adopted an overly restrictive interpretation of the requirement to plead an "available alternative," allowing petitioners to allege only methods already prescribed in a state statute and for which the necessary elements were in that state's "medicine cabinet" at that moment in time. The Eleventh Circuit held that allowing a petitioner to amend his complaint to allege an alternative method not authorized under Alabama state law would have been futile, in part because petitioner was "not entitled to veto the Alabama legislature's constitutional choice as to how Alabama inmates will be executed" and because "Alabama is under no obligation to deviate from its widely accepted, presumptively constitutional methods in favor of [the petitioner's] retrogressive alternative." *Arthur v. Commissioner, Ala. Dept. of Corrections*, 840 F.3d 1268,

1318 (11th Cir. 2016), *abrogated in part by Bucklew*, 139 S. Ct. 1112. Similarly, the Supreme Court of Arkansas rejected the firing squad—one of the nation's oldest and most easily performed forms of execution—as an alternative to lethal injection, determining that because "[e]xecution by firing squad is not identified in the statute as an approved means of carrying out a sentence of death . . . it cannot be said that the use of a firing squad is a readily implemented and available option to the present method of execution." *Kelley*, 496 S.W.3d at 359–60 (Ark. 2016). *See also Arthur v. Dunn*, 195 F. Supp.3d 1257, 1260 n.5 (M.D. Ala. 2016) ("A firing squad is not a legal method of execution in Alabama."); *Boyd v. Myers*, No. 2:14-CV-1017-WKW, 2015 WL 5852948, at *4 (M.D. Ala. Oct. 7, 2015) (holding that Boyd failed to meet his burden of pleading a feasible and readily available alternative because he "identifie[d] a firing squad and hanging as two feasible and readily available alternatives . . . [b]ut those two methods are not permitted by statute in Alabama"), *aff'd sub nom. Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853 (11th Cir. 2017). Other courts recognized that available methods can be non-statutory, with the Eighth Circuit holding that "[w]e do not say that an alternative method must be authorized by statute or ready to use immediately" but that rather "the State must have access to the alternative and be able to carry out the alternative method relatively easily and reasonably quickly." *McGehee*, 854 at 493.

These inconsistent interpretations of *Glossip*'s requirements gave rise to perverse and illogical results. Firing squad, for example, was held as not "known and available" in Arkansas, *Kelley*, 496 S.W.3d at 359–60, Alabama, *Arthur*, 195 F. Supp. 3d at 1264–69, and Texas,

Bible, 2018 WL 3068804 at *9, despite being a method of execution that is simple to implement, is older than the United States, and was used in Utah as recently as 2010. *See* Death Penalty Information Centre, *State and Federal Info, Utah*, http://www.deathpenaltyinfo.org/state-and-federal-info/state-by-state/utah. While prisoners in states like Arkansas and Alabama could at least pursue their challenges by alleging other, statutory alternatives, such rulings left prisoners in one-method states like Texas and Georgia with no feasible option to pursue a method-of-execution challenge.

This Court sought to end this inconsistent practice in *Bucklew* by clearly establishing that prisoners seeking to challenge the method of execution to be used against them are not limited to alleging alternative methods authorized under the relevant state's law. Lower courts began to assess alleged alternative methods per *Bucklew*'s guidance that they must be something that the "State could carry [] out relatively easily and reasonably quickly," *Bucklew* at 1129, rather than focusing solely on the question of statutory authorization. *See, e.g.*, *Glossip v. Chandler*, No. CIV-14-0665-F, 2021 WL 3561229, *12 (W.D. Okla. Aug. 11, 2021) (allowing a Petitioner in Oklahoma to proceed past summary judgment with a method-of-execution challenge alleging a firing squad as an alternative method because it was sufficiently detailed to "permit a finding that the State could carry it out 'relatively easily and reasonably quickly.'") (quoting *Bucklew*); *In re Fed. Bureau of Prisons' Execution Protocol Cases,* 471 F. Supp. 3d 209, 221-22 (D.D.C. 2020) (holding that because a firing squad "is feasible, readily implemented, and would significantly reduce the risk of severe pain, it satisfies the *Baze-Glossip* requirements for proposed alternatives."),

v*acated on other grounds sub nom. Barr v. Lee*, 140 S. Ct. 2590 (2020). Yet the Eleventh Circuit's decision below would procedurally circumvent this Court's recent holding by relegating all such challenges to habeas petitions that it then considers jurisdictionally barred as second or successive. This would essentially be a return to the pre-*Bucklew* era, when state and lower courts often rejected non-statutory alternative methods as not being available. If the Court's recent holding is to have meaning, prisoners must be allowed to allege non-statutory alternatives through timely litigation under § 1983 when their claims actually ripen, typically long after a first federal habeas petition has been filed. Procedurally limiting prisoners to raising only statutory alternative methods at this stage would circumscribe Eighth Amendment rights by state law, contrary to this Court's supreme authority.

CONCLUSION

This Court should reverse and remand the judgment below.

Respectfully submitted,

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