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.

(CAPITAL CASE)

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a state capital inmate's as-applied Eighth Amendment challenge to the method of his execution must be raised as a petition for a writ of habeas corpus pursuant to 28 U.S.C. 2254, instead of through an action under 42 U.S.C. 1983, when the inmate proffers an alternative method of execution that is not currently authorized by state law.

2. Whether and in what circumstances such a claim, if required to proceed as a habeas petition, may be jurisdictionally barred as an invalid "second or successive" petition under 28 U.S.C. 2244.

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INTEREST OF THE UNITED STATES

This case concerns the procedural mechanism for a state capital inmate to raise an as-applied challenge to the method of carrying out the execution. Federal law authorizes capital punishment for certain criminal offenses and provides that the method for implementing federal death sentences is the method authorized "by the law of the State in which the sentence is imposed" or, if that State "does not provide for implementation of a sentence of death," another State designated by the court. 18 U.S.C. 3596(a). Although 42 U.S.C. 1983 does not provide a mechanism for claims against the federal government, a determination that the challenge at issue

in this case must proceed in habeas may suggest that a similar challenge by a federal capital inmate must likewise proceed in habeas rather than under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See 5 U.S.C. 704. Accordingly, the decision in this case could alter the procedure by which federal capital inmates bring method-of-execution claims. See, *e.g.*, *In re Federal Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 126, 131-135 (D.C. Cir. 2020) (per curiam) (addressing method-of-execution claims by federal inmates brought under the APA). The United States thus has a substantial interest in the resolution of this case.

STATEMENT

Following a jury trial in Georgia state court, petitioner was convicted of malice murder and related offenses. 526 S.E.2d 560, 563. Pursuant to the jury's recommendation, the court imposed a capital sentence, along with term-of-years sentences. *Id.* at 563 & n.1. After exhausting his state-court appeals and state collateral review rights, and after the denial of a petition for a writ of habeas corpus from a federal court, petitioner brought an action under 42 U.S.C. 1983 challenging the method of his execution. Pet. App. 3a. The district court dismissed his claim on procedural and substantive grounds. *Id.* at 4a. The court of appeals construed the claim as a second habeas petition, vacated the district court's decision, and remanded with instructions to dismiss for lack of jurisdiction. *Id.* at 4a-5a. This Court granted a writ of certiorari.

1. In 1993, petitioner stole a car and drove it to a bank in Georgia. 526 S.E.2d at 563. He entered the bank carrying a .22 caliber revolver and wearing a ski mask, demanded that the tellers put money into two pillowcases he had brought with him, and threatened to

kill the tellers if they included dye packets with the money. *Ibid.* Despite the threats, the tellers slipped in two dye packets, which released red dye and tear gas when petitioner returned to the stolen car. *Ibid.*

Petitioner abandoned the money and the car and ran to a nearby parking lot where an innocent bystander, Gabor Balogh, was backing his car out of a parking space. 526 S.E.2d at 563. Petitioner opened the driver's side door and fatally shot Balogh when he resisted the attempted carjacking. *Id.* at 563-564. Petitioner then pointed the gun at another innocent bystander and demanded his car keys; when that bystander fled, petitioner fired at him but missed. *Id.* at 564. Petitioner ran to a nearby gas station, where he engaged in a one-hour standoff with police before ultimately surrendering. *Ibid.*

A Georgia grand jury indicted petitioner for malice murder, felony murder, aggravated assault, theft by taking, criminal attempt to commit armed robbery, and possession of a firearm during the commission of a felony. See 526 S.E.2d at 563 n.1. The State filed a notice of intent to seek the death penalty. *Ibid.* The jury found petitioner guilty on all counts and recommended a capital sentence for the malice murder count. *Ibid.* The court vacated the conviction on the felony-murder count, which merged with the malice-murder conviction for sentencing purposes; imposed a capital sentence for the conviction on the malice-murder count; and imposed term-of-years sentences for the convictions on the non-murder counts. *Ibid.*

Petitioner exhausted direct appeals and state collateral proceedings. 744 S.E.2d 706, 709; 571 U.S. 1177. In 2013, petitioner filed a petition for a writ of habeas corpus in federal district court pursuant to 28 U.S.C. 2254.

See 922 F.3d 1298, 1300. The district court denied relief, and the court of appeals affirmed. See *ibid.*; *id.* at 1307. This Court denied a petition for a writ of certiorari. 140 S. Ct. 2520. The State has not yet scheduled petitioner's execution. See Br. in Opp. 8.

2. In January 2020, petitioner filed a complaint under 42 U.S.C. 1983 against respondents, the Commissioner of the Georgia Department of Corrections and the warden of the Georgia Diagnostic and Classification Prison, claiming that the planned method for his execution was unconstitutional as-applied. See Pet. App. 85a-105a. He sought a declaration that respondents' "plans to execute [petitioner] by lethal injection" violate his constitutional rights, and sought an order "enjoin[ing] [respondents] from proceeding with the execution of [petitioner] by a lethal injection," as well as providing any further relief the court finds "just and proper." *Id.* at 103a-104a.

Lethal injection is the sole method of execution authorized by Georgia law. Ga. Code Ann. § 17-10-38(a) (2020); see Pet. App. 2a. Petitioner alleged that several circumstances arising after his criminal judgment became final would create an unacceptable risk of pain and suffering if that method were applied to him: that he had begun taking the prescription medication gabapentin for back pain; that a prison medical technician informed him that sustained intravenous access necessary for lethal injection would require a surgical "cutdown" procedure on his neck; and that an anesthesiologist had informed him that his veins lack sufficient structural integrity for a fully anesthetized lethal injection. Pet. App. 93a; see *id.* at 93a-98a. Petitioner's complaint identified a firing squad as an alternative

execution procedure that could be constitutionally carried out. *Id.* at 101a-103a.

The district court dismissed the suit, deeming it untimely and, in the alternative, meritless. Pet. App. 47a-67a.

3. A divided panel of the court of appeals vacated and remanded with instructions to dismiss for lack of jurisdiction. Pet. App. 1a-25a; see *id.* at 26a-46a (Martin, J. dissenting).

Although the parties had not disputed that Section 1983 was the appropriate procedural vehicle for petitioner's claim, the court of appeals noted its "obligat[ion] to address subject-matter jurisdiction *sua sponte*" and directed the parties to address at oral argument whether petitioner's complaint "should be reconstrued as a habeas petition and, if so, whether it was second or successive." Pet. App. 4a. A majority of the panel subsequently concluded that the complaint should in fact be recharacterized as a habeas petition; that, as such, it was an unauthorized second or successive habeas petition; and that it was accordingly jurisdictionally barred. *Id.* at 19a-25a; see *Burton* v. *Stewart*, 549 U.S. 147, 157 (2007) (per curiam) (holding that limits on second or successive collateral attacks are jurisdictional).

The panel majority acknowledged that this Court had held that Section 1983 was the proper vehicle for the as-applied method-of-execution claims in *Nelson* v. *Campbell*, 541 U.S. 637 (2004), and *Hill* v. *McDonough*, 547 U.S. 573 (2006). Pet. App. 2a. But the panel majority noted that the Court had reserved decision on the precise circumstance of an as-applied method-of-execution claim in which the inmate's proposed alternative method of execution is not currently authorized by

state law. *Ibid.* The panel majority took the view that such a claim must proceed in habeas, on the theory that, "as a matter of logical necessity," such a claim implies the invalidity of the capital sentence. *Id.* at 17a-18a; see *id.* at 2a. The panel majority recognized that "a judgment in [petitioner's] favor implies the invalidity of his sentence as a matter of logical necessity only if [the court] take[s] Georgia law as fixed." *Id.* at 18a. But it reasoned that it "must accept as fixed a state law providing a facially constitutional method of execution," deeming it "not [the] place" of a federal court "to entertain complaints under section 1983 that ask [it] to force a State to fundamentally overhaul its system of capital punishment." *Id.* at 18a-19a.

The panel majority then reasoned that petitioner's claim in this case was a jurisdictionally barred "second or successive" habeas petition. Pet. App. 19a-25a. It observed that petitioner had "already brought a habeas petition contesting his death sentence" and concluded that he could not avoid the jurisdictional limits on second or successive habeas petitions simply by asserting that his current claim had not been ripe at that time. *Id.* at 20a. The panel majority explained that "a prisoner whose physical health deteriorates following his first habeas petition" has the ability to seek relief through a claim under Section 1983—but, in its view, only if the Section 1983 claim "seek[s] relief designed to accommodate his state's authorized methods of execution." *Id.* at 24a.

Judge Martin dissented. Pet. App. 26a-46a. Applying this Court's precedents, she reasoned that petitioner's method-of-execution claim may proceed under Section 1983 because, although the relief he seeks would require the State "to execute him by a different

method," his Section 1983 action "does not challenge or dispute that the State can go forward with his execution." *Id.* at 29a, 33a; see *id.* at 26a-46a. Judge Martin warned that the majority's contrary conclusion will "invite new litigation," and "sow confusion," because a "prisoner can no longer be certain about the proper procedure for bringing a method-of-execution claim." *Id.* at 35a. And because she also disagreed with the district court's grounds for finding the claim untimely and meritless, she explained that she would have reversed the district court's decision. *Id.* at 27a; see *id.* at 39a-46a.

4. The court of appeals denied a petition for rehearing en banc. Pet. App. 70a-71a. Chief Judge Pryor, joined by Judge Newsom and Judge Lagoa, issued a statement respecting the denial, noting that even under the panel majority's approach, an inmate like petitioner could file a Section 1983 action "insist[ing] that Georgia modify its venous-access protocol or choice of injection drug." *Id.* at 76a; see *id.* at 72a-76a. Judge Wilson, joined by Judge Jordan and Judge Martin, dissented. *Id.* at 77a-84a. The dissenters explained that the panel decision was "irreconcilable with Supreme Court precedent" and observed that it "leave[s] prisoners like [petitioner] without a remedy in federal court—no matter how cruel and unusual the State's authorized method of execution might be." *Id.* at 78a, 83a.

SUMMARY OF ARGUMENT

A state inmate may raise a method-of-execution claim under 42 U.S.C. 1983, rather than exclusively in habeas, regardless of whether state law currently authorizes the alternative method of execution that the inmate identifies as a permissible alternative.

Section 1983 broadly authorizes an action by any person challenging the deprivation of a federal

constitutional right. This Court has made clear that a state capital inmate's constitutional challenge to the method of his execution is excepted from Section 1983, and must instead be brought in a habeas petition, only if "a grant of relief to the inmate would necessarily bar the execution." *Hill* v. *McDonough*, 547 U.S. 573, 583 (2006). A claim like petitioner's would not.

The Court has generally recognized that Section 1983 encompasses method-of-execution claims in which an inmate accepts that another constitutional and readily available alternative exists for carrying out his execution. See *Hill*, 547 U.S. 573; *Nelson* v. *Campbell*, 541 U.S. 637 (2004). And while the Court has thus far reserved the precise question presented here, see *Nelson*, 541 U.S. at 645, nothing justifies differential treatment of method-of-execution claims based on whether state law currently authorizes the identified alternative. Just as a prisoner could not rely on such a state-law limitation as the basis for a habeas claim, the State may not rely on it to divert a federal constitutional claim into habeas.

To the contrary, Section 1983 exists, in large part, to override portions of state law that conflict with an individual's federal constitutional rights. And the contours of present state law would not matter in a traditional conditions-of-confinement suit: a prisoner's challenge to inadequate medical care, for example, is equally cognizable under Section 1983 when supplying adequate care would require a statutory amendment to increase the State's prison appropriations. Even if it is more cumbersome for the State to amend or vary from a state statute than from a less formal agency protocol, this Court has specifically rejected a functional test for determining whether a federal constitutional claim may be

brought under Section 1983. Moreover, in the particular context of execution methodology, legislatures can and do alter the requirements of state law in response to updated judicial guidance and other new circumstances.

A dual-track approach for method-of-execution claims, in which some may proceed under Section 1983 while others are diverted into habeas, would add unnecessary complexity to capital cases, which are often litigated on compressed schedules. The proper classification of a claim would turn on state-law distinctions that may be difficult for a federal court to discern and may be impossible to assess at the pleading stage. Moreover, those classifications could change if, for example, an inmate revises his proposed alternative, the course of discovery and other proceedings sheds new light on an alternative, or a State amends its law during the litigation. As a result, claims could bounce back and forth between different venues; multiple claims by the same inmate could be split; and the treatment of similar federal constitutional claims could differ based solely on the otherwise-irrelevant specificity of the execution-procedure law of the relevant States.

The court of appeals' rationale does not support such an impractical result. Its decision rested on the legal fiction that the court must take state law as fixed in determining the propriety of Section 1983 relief. But Section 1983 in fact works in precisely the opposite way: It is not subservient to a State's legislative choices, but instead exists to vindicate the supremacy of the federal Constitution and laws. Nor was the court of appeals correct in construing the relief petitioner seeks as an injunction requiring the State either to amend its law or to vacate petitioner's capital sentence. Even if

petitioner were to obtain all the relief he seeks, his capital sentence would remain valid. The State would simply be enjoined from implementing that sentence unless and until the State takes a step that is both optional and fully within its control.

Because Section 1983 provides a proper procedural mechanism to vindicate petitioner's asserted constitutional rights, the Court can and should reverse the decision below without addressing the second question presented. That question, which concerns only the circumstances in which the bar on second or successive habeas petitions applies to state capital inmates in a specific circumstance, does not directly implicate federal interests, because the corresponding bar on second or successive collateral attacks by federal prisoners would not apply to the type of claim at issue here. Should the Court nevertheless address the second question presented, it should cabin any consideration of second-or-successive bars to the unique state-specific context of this case, an issue on which the federal government takes no position.

ARGUMENT

I. A METHOD-OF-EXECUTION CLAIM IDENTIFYING AN ALTERNATIVE NOT AUTHORIZED BY EXISTING STATE LAW MAY BE BROUGHT UNDER 42 U.S.C. 1983

A. A Method-Of-Execution Claim That Accepts The Validity Of A Prisoner's Death Sentence Can Proceed Under Section 1983 Rather Than In Habeas

For state inmates, "[f]ederal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under * * * 42 U.S.C. § 1983." *Muhammad* v. *Close*, 540 U.S. 749, 750 (2004) (per curiam). This

Court's precedents make clear that the habeas avenue is the proper channel for claims that a sentence is invalid, while the Section 1983 avenue is available for claims that challenge only the way in which a sentence, including a sentence of death, is implemented.

1. By its terms, Section 1983 provides a broad remedy for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. 1983. Accordingly, "constitutional claims that * * * challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, * * * may be brought pursuant to § 1983." *Nelson* v. *Campbell*, 541 U.S. 637, 643 (2004). And this Court has repeatedly entertained, and granted relief on, such claims. See, *e.g.*, *Taylor* v. *Riojas*, 141 S. Ct. 52 (2020) (per curiam); *Hope* v. *Pelzer*, 536 U.S. 730 (2002).

State inmates' Section 1983 claims may be precluded, however, when they fall within the scope of the federal habeas statute, which provides the mechanism for claims that an inmate is "in custody in violation of the Constitution" or other federal law. 28 U.S.C. 2254(a); see *Wilkinson* v. *Dotson*, 544 U.S. 74, 78-79 (2005). In particular, this Court has held that "[d]espite its literal applicability," Section 1983 "must yield to the more specific federal habeas statute, with its attendant procedural and exhaustion requirements," if an inmate's claim "seeks injunctive relief challenging the fact of his conviction or the duration of his sentence," such that the claim lies within the "'core'" of habeas corpus. *Nelson*, 541 U.S. at 643 (citation omitted).

That is plainly the case when the relief sought by a prisoner is either "immediate release from prison" or the "shortening" of his term of confinement. *Preiser* v.

Rodriguez, 411 U.S. 475, 482 (1973); see *Dotson*, 544 U.S. at 79. In addition, a claim must be brought in habeas rather than under Section 1983 when an order granting relief on that claim would "necessarily demonstrate[] the invalidity of [a] conviction" or sentence that has not already been invalidated. *Heck* v. *Humphrey*, 512 U.S. 477, 481-482 (1994); see *id.* at 487; *Dotson*, 544 U.S. at 82. The Court has long adhered to "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Heck*, 512 U.S. at 486.

Recognizing the exclusivity of the habeas statutes in that context accords with the "concerns for finality and consistency" that have more generally led the Court to "decline[] to expand opportunities for collateral attack." *Heck*, 512 U.S. at 485; *id.* at 485-486 (citing cases). The Court has, however, made clear that habeas remedies displace Section 1983 only "*if* success in [the prisoner's] action would necessarily demonstrate the invalidity of confinement or its duration." *Dotson*, 544 U.S. at 82.

2. In *Nelson* v. *Campbell*, *supra*, and *Hill* v. *McDonough*, 547 U.S. 573 (2006), this Court evaluated whether those habeas-preclusion principles applied to particular method-of-execution claims. First, in *Nelson*, this Court held that Section 1983 was the proper procedural vehicle for a prisoner who challenged the use of a "cut-down" procedure that the State planned to use to access his veins. 541 U.S. at 639. Relying on prior Section 1983 decisions, the Court explained that the "focus[]" of the procedural inquiry was "whether [the prisoner's] challenge to the cut-down procedure would *necessarily* prevent [the State] from carrying out its execution." *Id.* at 647 (citing *Heck*, 512 U.S. at 487 n.7). The Court observed that such a focus "both protects

against the use of § 1983 to circumvent any limits imposed by the habeas statute and minimizes the extent to which the fact of a prisoner's imminent execution will require differential treatment of his otherwise cognizable § 1983 claims." *Ibid.*

Subsequently, in *Hill*, the Court followed the same approach in holding that Section 1983 was the proper procedural vehicle for a prisoner's challenge to a State's three-drug protocol for lethal injection. 547 U.S. at 576, 578. The Court reaffirmed that the "criterion" for determining the propriety of a Section 1983 action challenging the method of execution was "whether a grant of relief to the inmate would necessarily bar the execution." *Id.* at 583. And the Court emphasized the consistency of that criterion with the general treatment of Section 1983 claims "that implicate habeas relief." *Ibid.*

In both *Nelson* and *Hill*, the Court relied on the apparent availability of an alternative method of execution in holding that the prisoner's claim could proceed under Section 1983. See *Nelson*, 541 U.S. at 646 (observing that the prisoner had "alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled"); see also *Hill*, 547 U.S. at 580-581 (observing that the prisoner's claim "appears to leave the State free to use an alternative lethal injection procedure"). The Court has subsequently made clear that, because the Eighth Amendment is violated only when the risk of pain associated with the State's chosen execution method is "substantial when compared to a known and available alternative method of execution," an inmate must identify such an alternative as a "substantive element[] of an Eighth Amendment method-of-execution claim." *Glossip* v. *Gross*, 576 U.S. 863, 878, 880 (2015); see *Bucklew* v. *Precythe*, 139

S. Ct. 1112, 1126 (2019); *Baze* v. *Rees*, 553 U.S. 35, 61 (2008) (plurality opinion).

The Court's treatment of method-of-execution claims that challenge only one method of carrying out the sentence, where an alternative is known and available, differentiates such claims from those that would wholly foreclose the State from implementing the sentence. A claim that an inmate is mentally incompetent to be executed under *Ford* v. *Wainwright*, 477 U.S. 399 (1986), for example, has been channeled into habeas because it would impose a complete constitutional bar on carrying out the death sentence in any manner, unless and until the inmate regains competence. See *Dunn* v. *Madison*, 138 S. Ct. 9, 11 (2017) (per curiam) (considering *Ford* claim raised in habeas petition); *Panetti* v. *Quarterman*, 551 U.S. 930, 948-962 (2007) (same); see, *e.g.*, 19-cv-3570 D. Ct. Doc. 1, at 57, *Purkey* v. *Barr* (D.D.C. Nov. 26, 2019) (seeking "an injunction preventing [prisoner's] execution during any period of incompetency").

A method-of-execution claim that identifies a known and available alternative, in contrast, allows the court addressing the claim to craft injunctive relief with assurance that the State will be able to carry out the death sentence in a concededly constitutional way. Such injunctive relief does not nullify the death sentence or otherwise imply anything about the result of the state criminal proceedings. The relief instead relates solely to an issue of implementation of the sentence. The State retains the power to enforce its criminal judgment so long as it complies with the injunction's terms, either by adopting the identified alternative method of execution or any other method that is constitutional.

3. The foregoing principles establish that petitioner's claim is cognizable under Section 1983. Petitioner does not seek the invalidation of his death sentence or release from custody. See *Preiser*, 411 U.S. at 479. Nor does petitioner's suit "necessarily * * * imply the invalidity of the * * * sentence." *Hill*, 547 U.S. at 583 (citation and internal quotation marks omitted). Rather than challenging the validity of the judgment that sentences him to death, petitioner explicitly alleges "an alternative method of execution that is feasible and readily implemented." Pet. App. 101a. Accordingly, while the relief petitioner seeks would prevent the State from executing him in a specific manner—namely, "by lethal injection," *id.* at 103a—it would not "necessarily bar the execution." *Hill*, 547 U.S. at 583. Petitioner therefore may seek that relief under Section 1983.

B. The Current Limits Of State Law Do Not Constrain The Alternative Methods Of Execution That May Be Identified In A Section 1983 Action

This Court has expressly recognized that 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." *Bucklew*, 139 S. Ct. at 1128. And while the Court has reserved the question of whether that aspect of an identified alternative should alter the procedural vehicle for an inmate's method-of-execution claim, see, *e.g.*, *ibid.*; *Nelson*, 541 U.S. at 645, a straightforward application of Section 1983 and habeas principles demonstrates that the contours of current state law should not define the boundaries of a constitutional claim under Section 1983. A State cannot, in effect, unilaterally divert a subset of method-of-execution claims into habeas. Splitting method-of-

execution claims in that way would also confuse and complicate capital postconviction litigation.

1. One of the "main aims" of Section 1983, when it is available, is to "override certain kinds of state laws." *Monroe* v. *Pape*, 365 U.S. 167, 173 (1961); see *Zinermon* v. *Burch*, 494 U.S. 113, 124 (1990) (explaining that Section 1983 exists in part to "override * * * unconstitutional state laws") (citation and internal quotation marks omitted). This Court's precedents repeatedly illustrate that the unenforceability of state law as currently written is an expected and ordinary consequence of various Section 1983 actions. See, *e.g.*, *Americans for Prosperity Found.* v. *Bonta*, 141 S. Ct. 2373, 2380, 2389 (2021) (rendering California regulation unenforceable); *Cedar Point Nursery* v. *Hassid*, 141 S. Ct. 2063, 2069, 2080 (2021) (same); *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2460 (2018) (same for portion of Illinois statute); *Arizona Free Enter. Club's Freedom Club PAC* v. *Bennett*, 564 U.S. 721, 728-730, 753 (2011) (same for provision of Arizona statute); see also, *e.g.*, *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985) (holding unconstitutional a police practice specifically authorized by a Tennessee statute).

A need to change state law is often the expected outcome of a Section 1983 action. See, *e.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) (holding California criminal statute unconstitutionally vague "as presently drafted and construed by the state courts"). Perhaps the clearest example is a Section 1983 action raising a First Amendment overbreadth claim, in which a plaintiff concedes that the State has the power to regulate his conduct, but insists that the State must craft a narrower law to do so. See, *e.g.*, *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442,

449 n.6 (2008); see also, *e.g.*, *City of Houston* v. *Hill*, 482 U.S. 451, 467 (1987) (finding municipal ordinance overbroad).

A state prisoner, no less than any other Section 1983 claimant, may likewise seek relief that would preclude the State from achieving a particular result unless and until it amends current state law. An action challenging the conditions of confinement on the ground that the prison has failed to provide adequate sustenance or needed medical care, for example, would appropriately proceed under Section 1983 even if a State would have to increase statutory appropriations to remedy the constitutional violation. See *Estelle* v. *Gamble*, 429 U.S. 97, 104-105 (1976); cf. *Brown* v. *Plata*, 563 U.S. 493, 510-511 (2011) (considering claims brought under Section 1983 that prisoners received inadequate medical care due to prison overcrowding). An action challenging racial segregation in prison would likewise be cognizable under Section 1983 irrespective of whether the policy is unwritten, see *Johnson* v. *California*, 543 U.S. 499 (2005), or explicitly codified, cf. *Garner*, 471 U.S. at 11. Indeed, the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, Tit. I, § 101(a) (Tit. VIII), 110 Stat. 1321, 1321-66, which places limits on the relief that can be awarded in Section 1983 actions brought by prisoners, expressly contemplates that in certain circumstances, a federal court may specifically order "prospective relief" that "requires" a government official "to exceed his or her authority under State * * * law" or that "otherwise violates State * * * law," where such relief is "necessary to correct the violation of a Federal right." 18 U.S.C. 3626(a)(1)(B).

2. That is exactly the type of relief that would be available to a state inmate whose identified alternative

method of execution could be, but currently is not, authorized by state law. And nothing about the habeas remedy suggests that an inmate who identifies such an alternative, like petitioner here, should be treated differently from other Section 1983 plaintiffs. The boundaries of state law would not in themselves provide the basis for a prisoner to seek habeas relief, and a State may not rely on those boundaries to preclude a claim that is validly based on federal law.

Instead, as explained above, the habeas remedy would supersede Section 1983 only if the claim would preclude any method of effectuating the capital sentence. A claim that all death sentences are unconstitutional, or that the State has no way to execute the particular prisoner, would proceed in habeas because it would "necessarily * * * imply the invalidity of the * * * sentence" by depriving the State of the power to effectuate it. *Hill*, 547 U.S. at 583 (citation and internal quotation marks omitted).

Claims like petitioner's, in contrast, would not foreclose implementation of the sentence even if they succeed. Petitioner seeks only an injunction that precludes respondents "from proceeding with the execution * * * by a lethal injection." Pet. App. 103a. And he explicitly identifies "an alternative method of execution" that he alleges "is feasible and readily implemented," namely, a "firing squad." *Id.* at 101a. Accordingly, while the relief petitioner seeks would prevent the State from executing him in one manner as opposed to another, it would not "necessarily bar the execution." *Hill*, 547 U.S. at 583. The logic of *Nelson* and *Hill*—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—thus applies with full force.

As the Court recognized in *Nelson*, a "suit seeking to enjoin a particular means of effectuating a sentence of death does not directly call into question the 'fact' or 'validity' of the sentence itself" because "the State can go forward with the sentence" by "simply altering its method of execution." 541 U.S. at 644. That observation is no less true when the alteration would require a change to state law than when it would not. The State would be free under the federal Constitution to carry out the sentence if it authorized another method of execution. See *Malloy* v. *South Carolina*, 237 U.S. 180, 185 (1915) (rejecting ex post facto challenge to a State's change in the authorized method of execution); accord *Nelson*, 541 U.S. at 644; see also, *e.g.*, *Woo Dak San* v. *State*, 7 P.2d 940, 942 (N.M. 1931) (holding that a state legislative change in the method of execution "convert[ed] unexecuted judgments of death to be executed by hanging into judgments of death to be executed by electrocution"). Indeed, petitioner's identification of a firing squad as an alternative method of execution amounts to an express concession that the State may constitutionally effectuate the sentence that way.

Relief that would require amending (or varying from) a state statute may be more burdensome as a practical matter than relief that would require only the modification of a state agency protocol or rule. See *Nelson*, 541 U.S. at 644 (noting that a "statutory amendment or variance" would "impos[e] significant costs on the State and the administration of its penal system"). But the Court has rejected a "functional[]" test that looks to the incremental burden on the State in determining whether Section 1983 is an appropriate vehicle

for a plaintiff's claim. *Hill*, 547 U.S. at 583 (citation omitted). And even if a functional analysis were appropriate, amending state law is not an unworkable impediment to carrying out the sentence. States regularly amend their statutorily authorized methods of execution, including in response to court decisions and scientific developments about execution methods. See, *e.g.*, *Sims* v. *Kernan*, 241 Cal. Rptr. 3d 300, 308 (Cal. Ct. App. 2018) (detailing such changes); Stuart Banner, *The Death Penalty: An American History* 296-297 (2002); National Conference of State Legislatures, *Capital Punishment Enactment Database*, https://www.ncsl.org/research/civil-and-criminal-justice/capital-punishment-enactment-database.aspx.

Similarly, while the relief that petitioner requests might preclude his execution before state law is amended, the "incidental delay" caused by a successful Section 1983 action "does not cast on [a prisoner's] sentence the kind of negative legal implication that would require him to proceed in a habeas action." *Hill*, 547 U.S. at 583. Neither the possibility that the judgment could lead to a delay in the execution, or even that it could "frustrate the execution as a practical matter" if the State chooses not to authorize a constitutionally acceptable method of execution, *ibid.*, suffices to put petitioner's action at the core of the habeas statute or transform it into an action that necessarily implies the invalidity of the sentence.

3. A dual-track approach to method-of-execution claims would have detrimental and unwarranted consequences on the litigation of capital cases. In light of this Court's holding in *Hill*, method-of-execution challenges proceed under Section 1983 where the alleged alternative is permissible under current state law. 547 U.S. at

580. Differential treatment of claims that would, or could, require amending state law could cause the proper procedural vehicle for such claims to flip back and forth between Section 1983 and habeas if the prisoner modified his request or if the State amended its law during the course of litigation. A dual-track regime would also substantially complicate cases in which a prisoner pleads multiple alternatives, some of which are authorized under state law and some of which are not, and cases in which a State proposes a different alternative in response to a prisoner's claims.

Applying a dual-track approach to a case involving multiple potential alternatives would often lead to impractical claim-splitting. For example, Georgia law specifies that lethal injection must be a "continuous intravenous injection of a substance or substances." Ga. Code Ann. § 17-10-38(a) (2020). Under a dual-track approach, a method-of-execution claim that asks for a non-continuous lethal injection procedure would therefore have to proceed in habeas, while one that asks for a modified continuous procedure would proceed under Section 1983 because it falls within the contours of existing state law. Difficult classification questions and procedural complications could arise at the threshold in many method-of-execution cases, even if the set of cases where a prisoner has a meritorious Eighth Amendment claim and is ultimately entitled to relief is far narrower. See *Bucklew*, 139 S. Ct. at 1129-1130 (describing the merits showing a prisoner must make to succeed on an Eighth Amendment claim).

Such questions would continue to arise as the litigation proceeds, if (for example) the State proposes a different alternative in response to a prisoner's claims, or the court subsequently rejects some of the proposed

alternatives as a legal or factual matter. See, *e.g.*, *In re Federal Bureau of Prisons' Execution Protocol Cases*, 514 F. Supp. 3d 136, 154-155 (D.D.C. 2021) (addressing additional alternative of execution by firing squad raised by inmates mid-litigation), vacated by No. 21-5004, 2021 WL 164918 (D.C. Cir. Jan. 13, 2021). And the possibility of repeated back-and-forth rerouting, present even in a case raising only a single alternative, would be multiplied in a case raising several proposed alternatives. Particularly in light of the often last-minute nature of capital litigation, such potential procedural complexities, which could require federal courts to make very specific determinations about state laws governing execution procedures that the state courts themselves may not have addressed, are unwarranted.

Even beyond those procedural complexities, the dual-track approach would lead to different treatment of substantively similar claims. Some States have codified specific lethal injection protocols in their statutes, see, *e.g.*, Ark. Code Ann. § 5-4-617(c)-(f) (Supp. 2021), and some have not. Similarly, some States authorize additional methods of execution in the event that the methods provided by state law are held unconstitutional by a court (see, *e.g.*, Ala. Code § 15-18-82.1(d) (LexisNexis 2018); Fla. Stat. § 922.105(3) (2021)), and some do not. Depending on the interpretation of those state-law provisions, an identical method-of-execution claim alleging the same alternative method may proceed as a Section 1983 action for prisoners sentenced in those States, while it would need to proceed as a habeas action for a prisoner sentenced in a State like Georgia that has chosen to authorize execution by a single method. See Ga. Code Ann. § 17-10-38(a) (2020). As a result, one inmate might be procedurally barred from bringing that

claim, while the other would not. Such disparate treatment lacks any sound basis in legal, practical, or equitable considerations.

C. The Court Of Appeals' Approach Is Unjustified

The court of appeals accordingly erred in holding that petitioner's method-of-execution claim cannot proceed under Section 1983 because the alternative method of execution he identifies as constitutionally permissible is not authorized by existing state law. Neither the court's decision, nor the State's brief in opposition in this Court, identifies a sound rationale for the court of appeals' approach.

1. The court of appeals took the view that, "because lethal injection is the *only* method of execution authorized under Georgia law," petitioner's complaint would imply the invalidity of his death sentence "as a matter of logical necessity," and must therefore proceed in habeas. Pet. App. 17a-18a. But the court acknowledged that "the State could respond by enacting a law authorizing execution by firing squad," which would allow the State to "constitutionally carry out his death sentence." *Id.* at 18a. As explained above, the availability of such an alternative implementation method demonstrates that injunctive relief would not, in fact, imply the criminal judgment's invalidity.

The court of appeals' contrary conclusion turned on a novel premise that the court itself introduced—namely, that Section 1983 requires that a court "must accept as fixed a state law providing a facially constitutional method of execution," on the theory that it is not the "place" of a federal court "to entertain complaints under section 1983 that ask [the court] to force a State to fundamentally overhaul its system of capital punishment." Pet. App. 18a-19a. The court identified no

authority for that interpretation of Section 1983. To the contrary, as explained above (see pp. 16-17, *supra*), Section 1983 vindicates the supremacy of federal law, allowing claims to challenge actions taken under color of state law that violate the federal Constitution. This Court "ha[s] not hesitated * * * to strike down applications of constitutional statutes which [it] ha[s] found to be unconstitutionally applied." *Allee* v. *Medrano*, 416 U.S. 802, 815 (1974) (citation omitted); cf. *Cameron* v. *EMW Women's Surgical Center, P.S.C.*, No. 20-601 (Mar. 3, 2022), slip op. 8 (describing a State's sovereign power "to enact and enforce any laws that do not conflict with federal law"). And where a State can remedy the infirmity by amending the otherwise-constitutional state law, such a judgment does not preclude the State from effectuating its interests.

The court of appeals accordingly misconstrued the relief sought in petitioner's complaint "as a request for an injunction directing the State to either enact new legislation or vacate his death sentence." Pet. App. 19a. Petitioner does not ask for relief *requiring* the State to take any affirmative steps; he asks only that the State be *prohibited* from carrying out his execution in the allegedly unconstitutional manner. *Id.* at 103a-104a; see 18 U.S.C. 3626(a)(1) (explaining that prospective relief in cases relating to conditions of confinement must be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right"). If a court awards that relief, it would leave to the State the decision whether and how to amend its execution procedure and when to do so.

Similarly, petitioner's claim would not require the State to "vacate [petitioner's] death sentence" if it does

not wish to amend its laws. Pet. App. 19a. Instead, if the court enters the injunction petitioner seeks, petitioner's sentence would remain valid and could, without any further relief from a federal court, be carried out by any constitutional method other than lethal injection that the State may in the future authorize. An injunction prohibiting the State from implementing the execution in the manner currently authorized accords with the traditional remedies available under Section 1983, which may likewise require changes in state law. And such an injunction is not different in kind from remedies that may be required under *Nelson* and *Hill*, which could also affect existing state procedures that can be modified only through a process that requires significant coordination and agreement among various state actors. See, *e.g.*, Resp. Rule 32.3 Material at 14a, *Ramirez* v. *Collier*, No. 21-5592 (Oct. 19, 2021) (describing coordination among various state agencies necessary to change Texas execution protocols).

2. Neither the court of appeals nor the State's brief in opposition in this Court has asserted that allowing the subset of method-of-execution claims at issue here to proceed under Section 1983 would create practical problems that would warrant a special rule diverting them to habeas. See Pet. App. 6a-19a; Br. in Opp. 11-15. Given this Court's instruction in *Hill* that "[f]iling an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course," 547 U.S. at 583-584, a State need not be unduly concerned that maintaining such claims under Section 1983 will result in unwarranted emergency relief. See also *Bucklew*, 139 S. Ct. at 1133. And courts have ample tools—such as the procedural and substantive limits imposed by the Prison Litigation Reform Act,

see 18 U.S.C. 3626—to streamline Section 1983 actions and protect the interest of States in "the timely enforcement of a sentence." *Bucklew*, 139 S. Ct. at 1133 (quoting *Hill*, 547 U.S. at 584); see *Nelson*, 541 U.S. at 650; Br. in Opp. 15-16 (asserting that petitioner's claim is time-barred and meritless under Section 1983).

The established history of litigating claims like petitioner's under Section 1983 illustrates as much. Although Georgia now supports channeling suits like petitioner's into habeas, the State did not challenge the propriety of Section 1983 as the vehicle for petitioner's action in district court. And in response to the court of appeals' order raising the issue *sua sponte*, Georgia acknowledged that, "candidly * * * [it] had grown accustomed to dealing with these in § 1983." Pet. App. 28a (Martin, J. dissenting) (brackets and citation omitted). Federal courts likewise have extensive experience addressing method-of-execution challenges under Section 1983, without any significant evidence of practical difficulties. See, *e.g.*, *McGehee* v. *Hutchinson*, 854 F.3d 488, 490-494 (8th Cir.) (per curiam) (Section 1983 suit by nine inmates who identified several alternatives, at least some of which were not authorized by State law), cert. denied, 137 S. Ct. 1275 (2017).

This Court has itself repeatedly considered method-of-execution challenges brought under Section 1983 in cases where a prisoner requested an alternative method of execution not authorized by state law. See, *e.g.*, *McGehee* v. *Hutchinson*, 137 S. Ct. 1275 (2017); *Arthur* v. *Dunn*, 137 S. Ct. 14 (2016). And the Court has addressed Section 1983 method-of-execution claims in which the inmate failed to identify a known and available alternative. See, *e.g.*, *Glossip*, 576 U.S. at 867, 876. Particularly now that the Court has clarified that such

an alternative is an element of the claim, *id.* at 880, and thereby ensured a concrete context for consideration of the merits and the tailoring of any relief, *ibid.*, the Court should reverse the decision below and allow the settled practice of considering such claims under Section 1983 to continue.

II. BECAUSE PETITIONER'S CLAIM MAY BE BROUGHT UNDER SECTION 1983, THE COURT NEED NOT REACH THE SECOND QUESTION PRESENTED

This case also presents the additional question whether, if a method-of-execution claim that pleads an alternative method of execution not currently authorized by state law 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." Pet. i. But because petitioner's claim, and others like it, are properly brought under Section 1983, the Court need not address that question.

The government takes no position on the correct resolution of that question, both because the correct result on the first question presented would obviate the need to reach it and because resolution of the second question would not apply to the federal government. The only express statutory second-or-successive bar for prisoners in federal custody is for motions under 28 U.S.C. 2255 that attack the validity of a defendant's sentence. See 28 U.S.C. 2255(h). If claims like petitioner's must be brought in habeas, however, federal prisoners would not raise the claims in a Section 2255 motion, because the claims do not challenge the underlying criminal judgment. See 28 U.S.C. 2255(a); see also 28 U.S.C. 2255(b) (requiring a court to "vacate and set the judgment aside and * * * discharge the prisoner or resentence him or grant a new trial or correct the sentence

as may appear appropriate"). And a habeas petition under 28 U.S.C. 2241 for prisoners in federal custody, unlike a motion under Section 2255, is not subject to a statutory second-or-successive bar as such, but instead draws its limitations from other sources, including traditional abuse-of-the-writ principles. See 28 U.S.C. 2241; *McCleskey* v. *Zant*, 499 U.S. 467, 470 (1991).

Those limitations would not be at issue here even if the Court were to reach the second question presented. For that reason—and because second-or-successive bars, like Section 2255's, can be implicated in contexts that are distinct from method-of-execution claims—the Court should cabin any consideration of the scope of such a bar to the unique context of such claims by state inmates.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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